U.S. Citizenship and Immigration Services

Non-Precedent Decision of the Administrative Appeals Office

In Re: 2000657

Date: DEC. 2, 2021

Appeal of Texas Service Center Decision

Form I-140, Immigrant Petition for Other Worker

The Petitioner, a manufacturer of frozen foods, seeks to employ the Beneficiary as a production helper. The company requests her classification under the third-preference, immigrant category as an "other worker." Immigration and Nationality Act (the Act) section 203(b)(3)(A)(iii), 8 U.S.C. § 1153(b)(3)(A)(iii).

The Director of the Texas Service Center denied the petition. The Director concluded that the Petitioner didn't establish its required ability to pay the combined proffered wages of this and other petitions.

The Petitioner bears the burden of establishing eligibility for the requested benefit by a preponderance of evidence. *See* section 291 of the Act, 8 U.S.C. § 1361 (discussing the burden of proof); *see also Matter of Chawathe*, 25 I&N Dec. 369, 375 (AAO 2010) (discussing the standard of proof). Upon *de novo* review, we will dismiss the appeal.

I. EMPLOYMENT-BASED IMMIGRATION

Immigration as an "other," or "unskilled," worker generally follows a three-step process. First, a prospective employer must apply to the U.S. Department of Labor (DOL) for certification that: (1) there are insufficient U.S. workers able, willing, qualified, and available for an offered position; and (2) the employment of a noncitizen in the position won't harm wages and working conditions of U.S. workers with similar jobs. *See* section 212(a)(5) of the Act, 8 U.S.C. § 1182(a)(5).

Second, an employer must submit an approved labor certification with an immigrant visa petition to U.S. Citizenship and Immigration Services (USCIS). *See* section 204 of the Act, 8 U.S.C. § 1154. Among other things, USCIS determines whether a noncitizen beneficiary meets the requirements of a DOL-certified position and a requested immigrant visa category. 8 C.F.R. § 204.5(l).

Finally, if USCIS approves a petition, a noncitizen beneficiary may apply for an immigrant visa abroad or, if eligible, "adjustment of status" in the United States. *See* section 245 of the Act, 8 U.S.C. § 1255.

II. ABILITY TO PAY THE PROFFERED WAGE

A petitioner must demonstrate its continuing ability to pay the proffered wage of an offered position, from a petition's priority date until a beneficiary obtains lawful permanent residence. 8 C.F.R. § 204.5(g)(2). Evidence of ability to pay must generally include copies of annual reports, federal tax returns, or audited financial statements. *Id.*

The accompanying labor certification states the proffered wage of the offered position of production helper as $8.28 an hour, or - based on a 40-hour, work week - $17,222.40 a year. The petition's priority date is June 14, 2017, the date DOL accepted the labor certification application for processing. *See* 8 C.F.R. § 204.5(d) (explaining how to determine a petition's priority date).

In response to the Director's request for additional evidence, the Petitioner submitted copies of financial statements for 2015 through April 30, 2018. Contrary to the Director's request and 8 C.F.R. § 204.5(g)(2), however, the financial statements for 2017 and 2018 don't indicate that they were "audited."[1] The record therefore lacks required evidence of the Petitioner's ability to pay the proffered wage from the petition's priority date onward.

The petition included a letter from the Petitioner's chief financial officer (CFO). The letter states the company's employment of more than 200 workers and asserts its ability to pay the proffered wage.

A statement from a financial officer "may" establish a petitioner's ability to pay if the business, like the Petitioner here, employs at least 100 workers. 8 C.F.R. § 204.5(g)(2). But the Director didn't abuse his discretion by finding the CFO's letter insufficient. Because USCIS records indicate the company's filing of multiple Form I-140 petitions, the Director properly required the company to submit additional evidence of its ability to pay the proffered wage.

As previously indicated, a petitioner must demonstrate its ability to pay the proffered wage of each petition it files until a beneficiary obtains lawful permanent residence. 8 C.F.R. § 204.5(g)(2). The Petitioner here must therefore demonstrate its ability to pay the combined proffered wages of this and its other petitions that were pending or approved as of this petition's priority date of June 14, 2017 or filed thereafter. *See Patel v. Johnson*, 2 F. Supp. 3d 108, 124 (D. Mass. 2014) (affirming our revocation of a petition's approval where, as of the filing's grant, a petitioner didn't demonstrate its ability to pay the combined proffered wages of multiple petitions).[2]

The record lacks the proffered wages and priority dates of the Petitioner's other petitions. Thus, USCIS can't calculate the total proffered wages that the company must demonstrate its ability to pay. The record therefore doesn't establish the Petitioner's ability to pay the proffered wages of all applicable petitions.

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[1] The financial statements for 2018 also don't cover a long enough period to reliably demonstrate the Petitioner's ability to pay that year.

[2] The Petitioner needn't demonstrate its ability to pay proffered wages of petitions that it withdrew or, unless pending on appeal or motion, that USCIS rejected, denied, or revoked. The Petitioner also needn't demonstrate its ability to pay proffered wages after corresponding beneficiaries obtained lawful permanent residence, or before petitions' corresponding priority dates.

On appeal, the Petitioner argues that USCIS erred by not considering other factors affecting its ability to pay the proffered wage. *See Matter of Sonegawa*, 12 I&N Dec. 612, 614-15 (Reg'l Comm'r 1967). The Petitioner contends, for example, that its beneficiaries will replace some of its current, temporary employees in the offered position, saving the company substantial money.

But, where USCIS rejects a letter from a petitioner's financial officer as insufficient, the petitioner must submit other regulatory required evidence to establish its ability to pay. *See* 8 C.F.R. § 204.5(g)(2) (stating that "[e]vidence of this ability [to pay] *shall be* either in the form of copies of annual reports, federal tax returns, or audited financial statements") (emphasis added). In the absence of USCIS's acceptance of a statement from a financial officer or other regulatory required evidence, *Sonegawa* factors don't establish a petitioner's ability to pay.

The record lacks required evidence of the Petitioner's ability to pay the combined proffered wages from the petition's priority date onward. Thus, the Petitioner hasn't demonstrated its ability to pay the proffered wage. We will therefore affirm the petition's denial.

III. DRUG TEST AND BACKGROUND SCREENING

Although unaddressed by the Director, the record also doesn't establish the Beneficiary's satisfaction of the drug test and background screening requirements of the offered position. A petitioner must establish a beneficiary's possession of all DOL-certified job requirements by a petition's priority date. *Matter of Wing's Tea House*, 16 I&N Dec. 158, 160 (Acting Reg'l Comm'r 1977).

The labor certification states that, besides a U.S. high school diploma or a foreign educational equivalent, the offered position requires a "[d]rug test and background screening." *See, e.g., Matter of Honeywell Int'l, Inc.*, 2016-PER-00434, 2018 WL 3232449 *2 (BALCA June 27, 2018) (holding that a pre-employment drug test and background check listed on a labor certification application constitute job requirements) (citation omitted).[3] As previously indicated, the petition's priority date is June 14, 2017.

The Petitioner's RFE response included a letter from its human resources manager. The letter states that, before the company offered the Beneficiary the position, she "passed an initial drug screen and background check." The company letter, however, doesn't constitute independent evidence of the Beneficiary's satisfaction of the job requirements. A petitioner may submit a letter containing biased information, but the partiality will affect the weight accorded the evidence. *Matter of D-R-*, 25 I&N Dec. 445, 461 (BIA 2011) (citations omitted). Thus, in any future filings in this matter, the Petitioner must submit objective evidence of the Beneficiary's successful completion of the drug test and background screening requirements by the petition's priority date of June 14, 2017.

[3] Decisions of DOL's Board of Alien Labor Certification Appeals (BALCA) don't bind USCIS in cases involving the same issues. *See* 8 C.F.R. § 103.10(b) (requiring USCIS employees to follow precedent decisions of the U.S. Attorney General and Board of Immigration Appeals). USCIS, however, may find BALCA decisions persuasive. *See Martin v. Occupational Safety & Health Review Comm'n*, 499 U.S. 144, 157-58 (1991) (holding that administrative agencies should defer to reasonable, regulatory interpretations of sister agencies that Congress authorized to enforce the rules at issue).

IV. CONCLUSION

The Petitioner hasn't demonstrated its ability to pay the combined proffered wages of this and other petitions from this petition's priority date onward. We will therefore affirm the petition's denial.

ORDER: The appeal is dismissed.