U.S. Citizenship and Immigration Services

Non-Precedent Decision of the Administrative Appeals Office

In Re: 18347258

Date: DEC. 22, 2021

Appeal of Texas Service Center Decision

Form I-140, Immigrant Petition for an Alien Worker

The Petitioner, a "personal enrichment" business, seeks to employ the Beneficiary as an Alpha Chi consultant. It requests classification of the Beneficiary as an "other" worker under the third preference immigrant category. Immigration and Nationality Act (the Act) section 203(b)(3)(A)(iii), 8 U.S.C. § 1153(B)(3)(A)(iii). This employment-based "EB-3" immigrant classification allows a U.S. employer to sponsor for lawful permanent residence a foreign national who is capable of performing unskilled labor that requires less than two years of training or experience and is not of a temporary or seasonal nature.

The Director of the Texas Service Center denied the petition on the ground that the Petitioner did not establish its ability to pay the proffered wage.

On appeal the Petitioner submits a brief and additional documentation and asserts that the evidence of record establishes its ability to pay the proffered wage.

The AAO reviews the questions in this matter *do novo*. *Matter of Christo's Inc.*, 26 I&N Dec. 537, 537 n.2 (AAO 2015). The Applicant bears the burden of proof to establish eligibility for the requested benefit by a preponderance of the evidence. Section 291 of the Act, 8 U.S.C. § 1361; *Matter of Chawathe*, 25 I&N Dec. 369, 375 (AAO 2010).

Upon *de novo* review, we will withdraw the Director's decision. However, the evidence of record does not establish that the Beneficiary qualifies for the proffered position under the terms of the labor certification. Accordingly, we will remand this case to the Director for further consideration of this issue, and any other issue the Director may deem relevant.

I. LAW

Employment-based immigration generally follows a three-step process. First, an employer obtains an approved labor certification (ETA Form 9089) from the U.S. Department of Labor (DOL). *See* section 212(a)(5) of the Act, 8 U.S.C. § 1182(a)(5). By approving the labor certification, the DOL certifies that there are insufficient U.S. workers who are able, willing, qualified, and available for the offered position and that employing a foreign national in the position will not adversely affect the wages and

working conditions of domestic workers similarly employed. *See* section 212(a)(5)(A)(i)(I)-(II) of the Act. Second, the employer files an immigrant visa petition with U.S. Citizenship and Immigration Services (USCIS). *See* section 204 of the Act, 8 U.S.C. § 1154. Third, if USCIS approves the petition, the foreign national 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. ANALYSIS

A. Petitioner's Ability to Pay the Proffered Wage

To be eligible for the classification it requests for the beneficiary, a petitioner must establish that it has the ability to pay the proffered wage stated in the labor certification. As provided in the regulation at 8 C.F.R. § 204.5(g)(2):

> The petitioner must demonstrate this ability at the time the priority date is established and continuing until the beneficiary obtains lawful permanent residence. Evidence of this ability shall be either in the form of copies of annual reports, federal tax returns, or audited financial statements. In a case where the prospective United States employer employs 100 or more workers, the director may accept a statement from a financial officer of the organization which establishes the prospective employer's ability to pay the proffered wage. In appropriate cases, additional evidence, such as profit/loss statements, bank account records, or personnel records, may be submitted by the petitioner or requested by [USCIS].

As indicated in the above regulation, the Petitioner must establish its continuing ability to pay the proffered wage from the priority date[1] of the petition onward. In this case the proffered wage is $23,629 per year and the priority date is May 22, 2019.

In determining a petitioner's ability to pay the proffered wage, USCIS first examines whether the beneficiary was employed and paid by the petitioner during the period following the priority date. A petitioner's submission of documentary evidence that it employed the beneficiary at a salary equal to or greater than the proffered wage for the time period in question, when accompanied by a form of evidence required in the regulation at 8 C.F.R. § 204.5(g)(2), may be considered proof of the petitioner's ability to pay the proffered wage. In this case the record indicates that the Petitioner has never employed the Beneficiary, and therefore cannot establish its ability to pay the proffered wage from the priority date onward based on wages paid to the Beneficiary.

If a petitioner does not establish that it has paid the beneficiary an amount equal to or above the proffered wage from the priority date onward, USCIS will examine the net income and net current assets figures recorded on the petitioner's federal income tax return(s), annual report(s), or audited financial statements(s). If either of these figures, net income or net current assets, equals or exceeds the proffered wage or the difference between the proffered wage and the amount paid to the beneficiary

[1] The "priority date" of an employment-based immigrant petition is the date the underlying labor certification application is filed with the DOL. *See* 8 C.F.R. § 204.5(d).

in a given year, the petitioner would ordinarily be considered able to pay the proffered wage during that year.

On appeal the Petitioner submits a copy of its 2019 federal income tax return, Form 1120S, U.S. Income Tax Return for an S Corporation, which had not yet been filed with the Internal Revenue Service at the time the Petitioner responded in May 2020 to the Director's request for evidence (RFE). As recorded on the 2019 tax return, the Petitioner had net income of $285,614[2] and net current assets of $368,048.[3] Thus, the Petitioner's net income and net current assets both greatly exceeded the proffered wage of $23,629 in 2019.

Based on the evidence of record, therefore, we conclude that the Petitioner has established its ability to pay the proffered wage from the priority date of May 22, 2019, onward.

B. Beneficiary's Qualifications for the Job

A petition for unskilled "other worker" classification must be accompanied by evidence that the beneficiary meets any educational, training, experience, or other requirements of the labor certification. 8 C.F.R. § 204.5(l)(3)(ii)(D). All requirements must be met by the petition's priority date. *Matter of Wing's Tea House,* 16 I&N Dec. 158, 159 (Acting Reg'l Comm'r 1977).

The labor certification in this case does not require any education or experience to qualify for the job of Alpha Chi consultant, but does require 12 months of training. As provided in the regulation at 8 C.F.R. § 204.5(l)(3)(ii)(A):

> Any requirements of training or experience for skilled workers, professionals, or other workers must be supported by letters from trainers or employers giving the name, address, and title of the trainer or employer, and a description of the training received or the experience of the alien.

The labor certification claims that the Beneficiary met the training requirement for the proffered position in a one-year training program for Alpha Chi Principles at [redacted] a personal enrichment instruction business in [redacted] Germany, from December 1, 2002, to December 1, 2003. As evidence of this training the Petitioner submitted a letter dated May 2, 2019, in [redacted] Germany, signed by [redacted] Trainer, on the letterhead of [redacted], which states that the Beneficiary "successfully passed the 12 month training period . . . for Alpha Chi Consultants from December 2002 to December 2003" and that she "demonstrated in a practical examination that she is able and qualified to work independently as an Alpha Chi Consultant following Alpha Chi Principles."

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[2] If an S corporation, like the Petitioner, has income exclusively from a trade or business, USCIS considers its net income (or loss) to be the figure for "Ordinary business income (loss)" on page 1, line 21, of the Form 1120S. However, if there are relevant entries for additional income, credits, deductions or other adjustments from sources other than a trade or business, they are reported on Schedule K of the Form 1120S, and the corporation's net income or loss will be found in line 18 of Schedule K ("Income/loss reconciliation").

[3] For a corporation net current assets (or liabilities) are the difference between its current assets, entered on Schedule L, lines 1-6, of the Form 1120S, and its current liabilities, entered on Schedule L, lines 16-18.

This letter does not meet the substantive requirements of 8 C.F.R. § 204.5(l)(3)(ii)(A), however, because it does not give the address of the trainer and does not adequately describe the training allegedly received. The [redacted] letterhead is not accompanied by an address or any other identifying information about that organization, and the trainer likewise provided no personal address or other identifying information about herself. On the basis of the letter, therefore, USCIS would have no way of contacting the trainer or anyone else at [redacted] to verify that the Beneficiary completed the training as claimed. Furthermore, the letter from the trainer does not describe what Alpha Chi Principles are or otherwise illuminate the nature and content of the training the Beneficiary allegedly received.

Based on the current evidence of record we conclude that the Petitioner has not established that the Beneficiary gained the requisite 12 months of training, as required by the labor certification, to qualify for the proffered position of Alpha Chi consultant. Since this issue was not previously addressed by the Director, we will remand this case for further consideration. The Director may issue a request for additional evidence of the Beneficiary's alleged training, and any other evidence that may be deemed relevant. After the Petitioner's response is received, or the response period expires, the Director shall issue a new decision.

ORDER: The Director's decision is withdrawn. The matter is remanded for further proceedings consistent with the foregoing analysis and for the entry of a new decision.