U.S. Citizenship and Immigration Services

Non-Precedent Decision of the Administrative Appeals Office

In Re: 06821383

DATE: DEC. 23, 2019

Appeal of Texas Service Center Decision

Form I-140, Immigrant Petition for a Professional

The Petitioner, a securities business, seeks to employ the Beneficiary as a Mexican securities analyst. It requests professional classification for the Beneficiary under the third preference immigrant category. Immigration and Nationality Act (the Act) section 203(b)(3)(A)(ii), 8 U.S.C. § 1153(b)(3)(A)(ii). This employment-based "EB-3" immigrant classification allows a U.S. employer to sponsor a professional with a baccalaureate degree for lawful permanent resident status.

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 asserts that the Director did not properly consider the documentation provided and claims that the evidence in the record establishes its ability to pay the proffered wage.

Upon *de novo* review, we will withdraw the Director's decision and remand the case for further consideration and the issuance of a new decision.

I. LAW

Employment-based immigration generally follows a three-step process. First, an employer obtains an approved labor certification from the U.S. Department of Labor (DOL). *See* section 212(a)(5)(A)(i) of the Act, 8 U.S.C. § 1182(a)(5)(A)(i). 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.

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].

II. ANALYSIS

A. Petitioner's Ability to Pay the Proffered Wage

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. The priority date in this case is May 15, 2018, and the proffered wage for the job of Mexican securities analyst is $110,000 per year. The Director found that the record did not demonstrate the Petitioner's ability to pay the proffered wage in 2017 or 2018 based on tax return documents for 2017 and pay statements to the Beneficiary in 2018 which covered only part of the year. As the priority date occurred in 2018, however, that is the first year for which the Petitioner must demonstrate its ability to pay the proffered wage. When the record was before the Director regulatory required evidence of the Petitioner's ability to pay in 2018, as specified in 8 C.F.R. § 204.5(g)(2), was not yet available. Therefore we will remand this matter to the Director to request regulatory required evidence of the Petitioner's ability to pay the proffered wage in 2018 for the entity listed on the Form ETA 9089 and the Form I-140, FEIN (Federal Employer Identification Number) [redacted].

The Petitioner may also submit additional materials in support of the factors discussed in *Matter of Sonegawa*, 12 I&N Dec. 612, 614-15 (Reg'l Comm'r 1967), which permits USCIS to consider the totality of the circumstances affecting a petitioner's ability to pay the proffered wage.

B. Labor Certification Requirements

A beneficiary must meet all of the education, training, experience, and other requirements of the labor certification as of the petition's priority date. *See Matter of Wing's Tea House*, 16 I&N Dec. 158, 159 (Acting Reg'l Comm'r 1977). In reviewing the labor certification requirements in this case, we note that in section H, box 14, the labor certification specifies that "Series 4 and 7 licenses" are required. While the Petitioner asserts that the Beneficiary has these licenses, there is no documentation thereof in the record. Accordingly, the Director may wish to obtain such evidence on remand.

[1]The "priority date" of a petition is the date the underlying labor certification is filed with the DOL. *See* 8 C.F.R. § 204.5(d). The Petitioner must establish that all eligibility requirements for the petition have been satisfied as of the priority date.

III. CONCLUSION

For the reasons discussed above, we will remand this case to the Director for further consideration of the Petitioner's ability to pay the proffered wage from the priority date onward and the Beneficiary's fulfillment of the license requirements in the labor certification.

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