U.S. Citizenship and Immigration Services

Non-Precedent Decision of the Administrative Appeals Office

In Re: 6018282

Date: FEB. 6, 2020

Appeal of Texas Service Center Decision

Form I-140, Immigrant Petition for Skilled Worker

The Petitioner seeks to employ the Beneficiary as a cook specializing in Korean cuisine. The company requests his classification under the third-preference, immigrant category as a skilled worker. *See* Immigration and Nationality Act (the Act) section 203(b)(3)(A)(i), 8 U.S.C. § 1153(b)(3)(A)(i).

The Director of the Texas Service Center denied the petition. The Director concluded that the Petitioner did not demonstrate the Beneficiary's possession of the minimum employment experience required for the offered position or the requested classification.

The Petitioner bears the burden of establishing eligibility for the requested benefit. *See* section 291 of the Act, 8 U.S.C. § 1361. Upon *de novo* review, we will dismiss the appeal.

I. EMPLOYMENT-BASED IMMIGRATION

Immigration as a skilled worker generally follows a three-step process. To permanently fill a position in the United States with a foreign worker, a prospective employer must first obtain 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). DOL approval signifies that insufficient U.S. workers are able, willing, qualified, and available for an offered position. *Id.* Labor certification also indicates that employment of a foreign national would not harm wages and working conditions of U.S. workers with similar jobs. *Id.*

If DOL approves a position, an employer must next submit the certified labor application 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 beneficiary meets the requirements of a DOL-certified position and a requested visa classification. If USCIS grants a petition, a foreign national may finally 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. THE REQUIRED EXPERIENCE

To qualify as a skilled worker, a foreign national must have at least two years of training or employment experience. Section 203(b)(3)(A)(i) of the Act. A petitioner must also establish a beneficiary's possession of all DOL-certified job requirements of an offered position by a petition's priority date. *Matter of Wing's Tea House*, 16 I&N Dec. 158, 160 (Acting Reg'l Comm'r 1977).[1] In evaluating a beneficiary's qualifications, USCIS must examine the job-offer portion of an accompanying labor certification to determine a position's minimum requirements. USCIS may neither ignore a certification term, nor impose additional requirements. *See, e.g., Madany v. Smith*, 696 F.2d 1008, 1015 (D.C. Cir. 1983) (holding that "DOL bears the authority for setting the *content* of the labor certification") (emphasis in original).

Here, the accompanying labor certification states the minimum requirements of the offered position of Korean specialty cook as two years of experience in the job offered. The certification states that the position requires neither education, nor training. Also, part H.14 of the certification, "Specific skills or other requirements," states that the job requires "Two years' experience as a cook at a Korean restaurant. Must have experience preparing Korean dishes including Soontofu, Kalbi, Bulgogi and Bibimbap."

The Beneficiary attested on the labor certification that, by the petition's priority date, he gained about 26 months of full-time experience in the offered position. He stated that he worked as a Korean specialty cook at a restaurant in South Korea from April 2002 to June 2004. To support his claimed qualifying experience, the Petitioner submitted a letter from the Beneficiary's purported former employer. Pursuant to 8 C.F.R. § 204.5(l)(3)(ii)(A), the letter includes the name, address, and title of the employer, and describes the Beneficiary's claimed experience.

In a written notice of intent to deny (NOID) the petition, however, the Director questioned the Beneficiary's claimed experience. The NOID notes that, on an application for a U.S. visitor's visa in November 2004, the Beneficiary indicated that a wholesaler - not the restaurant – then employed him in South Korea. The Beneficiary also conceded that he did not list any prior experience on the application. The Director found that the Beneficiary's employment history on the nonimmigrant visa application cast doubt on his claimed experience. *See Matter of Ho*, 19 I&N Dec. 582, 591 (BIA 1988) (requiring a petitioner to resolve inconsistencies of record with independent, object evidence pointing to where the truth lies).

In a sworn statement in response to the NOID, the Beneficiary reiterated that the South Korean restaurant employed him as a cook from April 2002 to June 2004. He stated that he earned the U.S. equivalent of about $400 a week. He said he received payments in cash, which he described as "customary practice for small businesses in Korea." The Beneficiary stated that he applied for the U.S. visitor's visa about five months after his employment at the restaurant ended. At that time, he said the wholesaler then employed him.[2] The Beneficiary said that he did not realize the visa

[1] This petition's priority date is October 7, 2016, the date DOL accepted the accompanying labor certification application for processing. *See* 8 C.F.R. § 204.5(d) (explaining how to determine a petition's priority date).

[2] The Beneficiary's application for adjustment of status included a Form G-325A, Biographic Information, omitting his claimed employment with the wholesaler. Rather, he listed his claimed position of cook with the South Korean

application form required him to list his prior work history and that he did not intentionally omit his prior employment from the form. The Petitioner's NOID response also included a copy of the Beneficiary's "certificate of qualification" as a Korean cook, another letter from his claimed former employer, and letters from two of his purported co-workers at the restaurant.

As the Director found, the Petitioner's evidence does not demonstrate the Beneficiary's claimed qualifying experience. The record lacks evidence that the restaurant employed the Beneficiary's purported co-workers during his tenure there. Evidence of their employment does not accompany their letters. The restaurant's letters also do not state its employment of the purported co-workers. Their statements therefore have little evidentiary value.

The Beneficiary stated that he did not consider his claimed prior employment to be relevant to his visa application. As the website of the U.S. consulate in Seoul indicates, however, visitor visa applicants must demonstrate strong economic and social ties to South Korea - such as the existence of family members, property, or employment – to show that they would likely return to the country after visiting the United States. *See* U.S. Embassy & Consulate in South Korea, "Nonimmigrant Visa FAQs [Frequently Asked Questions]," https://www.ustraveldocs.com/kr/kr-gen-faq.asp#qlistb1b2 (last visited Jan. 27, 2020). Thus, if the Beneficiary truly worked at the restaurant, he would have likely disclosed his prior employment on the application to demonstrate a lengthy employment history in South Korea and increase his chances of obtaining a visitor's visa.

On appeal, the Petitioner asserts that additional documentation of the Beneficiary's prior employment does not exist because South Korea does not tax workers' incomes and the restaurant paid the Beneficiary in cash. The record, however, lacks independent evidence that the Beneficiary did not have to pay income taxes in South Korea. Also, the Petitioner has not demonstrated the restaurant's lack of contemporaneous business records, such as employee schedules or reports of hours employees worked, that would evidence the Beneficiary's claimed employment. *See Matter of Ho*, 19 I&N Dec. at 591 (requiring "independent objective evidence" to resolve inconsistencies of record).

The Petitioner also asserts that the Director should have credited the Beneficiary's Korean cook certificate as evidence of his qualifications for the offered position. The Petitioner argues that the certificate, which is dated in 2015 but states its first issuance in 2003, required the Beneficiary's completion of hundreds of hours of training. The company asserts that he would not have spent time and energy to obtain the document if he did not work in the restaurant business. The offered position and the requested visa classification, however, require at least two years of employment experience. The labor certification also does not allow substitution of training for experience in the job offered. Thus, the certificate may indicate the Beneficiary's possession of cooking skills, but it does not establish his possession of the requisite employment experience.

For the foregoing reasons, the record on appeal does not demonstrate the Beneficiary's possession of the minimum experience required for the job offered or the requested visa classification. We will therefore affirm the petition's denial.

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restaurant as his last occupation abroad.

III. ABILITY TO PAY THE PROFFERED WAGE

Although unaddressed by the Director, the record also does not establish the Petitioner's ability to pay the proffered wage of the offered position. A petitioner must demonstrate its continuing ability to pay a proffered wage, from a petition's priority date until a beneficiary obtains lawful permanent residence. 8 C.F.R. § 204.5(g)(2). If a petitioner employs less than 100 people, as in this case, evidence of ability to pay must include copies of annual reports, federal tax returns, or audited financial statements. *Id.*

In determining ability to pay, USCIS examines whether a petitioner paid a beneficiary the full proffered wage each year from a petition's priority date. If a petitioner did not annually pay a beneficiary the full proffered wage, USCIS considers whether it generated annual amounts of net income or net current assets sufficient to pay any differences between the proffered wage and wages paid. If net income and net current assets are insufficient, USCIS may consider other factors affecting a petitioner's ability to pay a proffered wage. *See Matter of Sonegawa,* 12 I&N Dec. 612, 614-15 (Reg'l Comm'r 1967).[3]

Here, the labor certification states the proffered wage of the offered position of Korean specialty cook as $32,552 a year. As previously noted, the petition's priority date is October 7, 2016.

The Petitioner did not submit any evidence of payments it made to the Beneficiary. Thus, based solely on wages paid, the record does not establish the Petitioner's ability to pay the proffered wage.

In response to the Director's written request for additional evidence (RFE), the Petitioner submitted copies of its federal income tax returns for fiscal years 2016-17 and 2017-18.[4] The tax return for 2016-17 reflects net income of $10,599 and a negative amount of net current assets. Neither amount equals or exceeds the annual proffered wage of $32,552. Thus, based on examinations of wages paid, net income, and net current assets, the record does not establish the Petitioner's ability to pay the proffered wage in 2016, the year of the petition's priority date.

In its RFE response, the Petitioner argued that it need only demonstrate its ability to pay the portion of the 2016 proffered wage that accrued after the petition's priority date of October 7. The Petitioner contended that its net income amount of $10,599 exceeded the prorated proffered wage of $8,138. USCIS policy, however, does not permit petitioners to prorate proffered wages in the years of priority dates. The Agency may consider a short period between a priority date and the end of a calendar year in its totality-of-the-circumstances analysis under *Sonegawa*. But a petitioner must generally demonstrate its ability to pay the full proffered wage of an offered position in the year of a petition's priority date. The record does not establish the Petitioner's ability to pay the full proffered wage in 2016.

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[3] Federal courts have upheld USCIS' method of determining a petitioner's ability to pay a proffered wage. *See, e.g., River St. Donuts, LLC v. Napolitano*, 558 F.3d 111, 118 (1st Cir. 2009); *Rahman v. Chertoff*, 641 F. Supp. 2d 349, 351-52 (D. Del. 2009).

[4] The Petitioner's tax returns indicate that the company's fiscal years run from June 1 through May 31.

The Petitioner's federal income tax return for 2017-18 reflects a negative amount of net current assets, but net income of $44,728. The net income amount exceeds the annual proffered wage of $32,552. Thus, the record appears to demonstrate the Petitioner's ability to pay the Beneficiary's individual proffered wage in 2017.

USCIS records, however, indicate the Petitioner's filing of a Form I-140 petition for another beneficiary.[5] 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 any other petition that was pending or approved as of this petition's priority date of October 7, 2016, 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, the petitioner did not demonstrate its ability to pay the combined proffered wages of multiple petitions).[6]

The record lacks the proffered wage or priority date of the Petitioner's other Form I-140 petition. We are therefore unable to determine the exact proffered wage amount that the Petitioner must demonstrate its ability to pay in 2017. The record therefore does not establish the Petitioner's ability to pay the proffered wage that year.

In any future filings in this matter, the Petitioner must provide the proffered wage and priority date of its other petition. The Petitioner may also provide additional evidence of its ability to pay the proffered wages in 2016 and 2017, including proof of wage payments it made to the beneficiaries in those years or documentation supporting the factors stated in *Sonegawa*. *See Matter of Sonegawa*, 12 I&N Dec. at 614-15. In addition, the Petitioner must submit copies of annual reports, federal tax returns, or audited financial statements covering the remainder of 2018 and, if available, 2019.

IV. CONCLUSION

The record on appeal does not establish the Beneficiary's possession of the minimum experience required for the offered position or the requested classification. We will therefore affirm the petition's denial.

ORDER: The appeal is dismissed.

[5] USCIS records identify the other petition by the receipt number [redacted]

[6] The Petitioner need not demonstrate its ability to pay proffered wages of petitions that it withdrew, or that USCIS rejected, denied, or revoked. The Petitioner also need not demonstrate its ability to pay proffered wages before the priority dates of their corresponding petitions, or after the dates their corresponding beneficiaries obtained lawful permanent residence.