U.S. Citizenship and Immigration Services

Non-Precedent Decision of the Administrative Appeals Office

MATTER OF E-C-TSG LLC

DATE: FEB. 13, 2019

APPEAL OF NEBRASKA SERVICE CENTER DECISION

PETITION: FORM I-140, IMMIGRANT PETITION FOR ALIEN WORKER

The Petitioner, a construction company, seeks to employ the Beneficiary as an electrician. It requests classification of the Beneficiary as a skilled worker under the third preference immigrant classification. Immigration and Nationality Act (the Act) section 203(b)(3)(A)(i), 8 U.S.C. § 1153(b)(3)(A)(i). This employment-based immigrant classification allows a U.S. employer to sponsor a foreign national for lawful permanent resident status to work in a position that requires at least two years of training or experience.

The Director of the Nebraska Service Center denied the petition, concluding that the Petitioner has not established that the Beneficiary is qualified for the offered job. On appeal, the Petitioner asserts that the Director ignored evidence submitted to the record regarding the Beneficiary's prior work experience, and that the Beneficiary is qualified for the offered job.

Upon *de novo* review, we will withdraw the Director's decision and remand the matter for entry of a new decision.

I. THE EMPLOYMENT-BASED IMMIGRATION PROCESS

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).[1] *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 applies 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.

[1] The priority date of a petition is the date the DOL accepted the labor certification for processing, which in this case is June 18, 2014. *See* 8 C.F.R. § 204.5(d).

II. BENEFICIARY'S QUALIFICATIONS

A beneficiary must meet all of the requirements of the offered position set forth on the labor certification by the priority date of the petition. 8 C.F.R. § 103.2(b)(l), (12); *Matter of Wing's Tea House*, 16 I&N Dec. 158, 159 (Acting Reg'l Comm'r 1977). In this case, the labor certification requires two years of experience in the job offered of electrician. Experience in an alternate occupation is not acceptable.

The labor certification states that the Beneficiary has the following experience:

- As an electrician with the Petitioner from June 1, 2012, to June 17, 2014; and
- As an electrician with , Georgia, from February 3, 2010, to May 31, 2012.

Evidence relating to qualifying experience must be in the form of a letter from a current or former employer and must include the name, address, and title of the writer, and a specific description of the duties performed by the beneficiary. *See* 8 C.F.R. § 204.5(l)(3). With the petition, the Petitioner submitted a letter dated October 15, 2013, from manager of stating that the Beneficiary was employed as an electrician from February 3, 2010, to May 31, 2012.

In a notice of intent to deny (NOID), the Acting Director of the Nebraska Service Center informed the Petitioner that the owners of were contacted to verify the Beneficiary's employment. The owners stated that the Beneficiary assisted his father, who was an electrician for but that the Beneficiary was not an employee of and that he did not carry an electrician's license. Based on this information, the Acting Director informed the Petitioner that the information on the labor certification regarding the Beneficiary's prior experience appears to have been misrepresented. She also noted that electricians in Georgia must have a license, and that a search of the State of Georgia licensing board's website does not indicate that the Beneficiary ever held an electrician's license in Georgia. Thus, the Acting Director stated that the Beneficiary is not qualified for the position because he does have two years of experience in the offered job. The Acting Director stated that she planned to deny the petition, and gave the Petitioner thirty days to submit evidence in support of the petition.

In response to the NOID, the Petitioner submitted a new letter dated May 23, 2018, from manager of which states that the Beneficiary was employed full-time from February 3, 2010, to May 31, 2012, "to assist in the electrician components of our installation projects as needed." states that the Beneficiary was paid in cash and that because he was under the supervision of a licensed electrician, he was not required to have an electrician's license. The Petitioner also provided a letter from which states that the author is a licensed electrician in the Georgia and that the author supervised the electrical work of the Beneficiary from February 2010 to May 2012.[2] states that under Georgia law, the

[2] The Petitioner also submitted confirmation of electrical contractor's license in Georgia.

Beneficiary was not required to have an electrician's license, and that the Beneficiary was working to obtain the four years of experience performing electrical work that is required to obtain an electrician's license in Georgia. Finally, the Petitioner provided a copy of Ga. Comp. R. & Regs. R. 121-2-.01, which states that applicants for a Georgia electrical contractor license "must document a minimum of 4 years experience in the electrical field... [s]uch experience must be Primary Experience." "Primary Experience" involves "installation of electrical systems." *Id.*

In his decision denying the petition, the Director described the new letter from but he did not detail why the letter and other evidence submitted by the Petitioner in response to the NOID failed to overcome the issues presented in the NOID. Instead, he simply stated "[i]t appears that there has been an attempt to hide and misrepresent the beneficiary [*sic*] qualifying experience." It is not clear from the decision that the Director properly considered the evidence submitted by the Petitioner in response to the NOID. Therefore, we will withdraw the Director's decision, and we will remand this matter for further proceedings.

III. ABILITY TO PAY THE PROFFERED WAGE

The Director should determine on remand whether the Petitioner has the continuing ability to pay the proffered wage. The proffered wage is $79,435 per year. The petitioner must demonstrate its continuing ability to pay the proffered wage from the priority date until the Beneficiary obtains lawful permanent residence. 8 C.F.R. § 204.5(g)(2).

In determining a petitioner's ability to pay, we examine whether it paid a beneficiary the full proffered wage each year from a petition's priority date. We also examine whether it had sufficient annual amounts of net income or net current assets to pay the proffered wage. If a petitioner's net income or net current assets are insufficient, we may also consider other evidence of its ability to pay the proffered wage.[3]

Although the labor certification states that the Petitioner employed the Beneficiary from 2012 onward, the record does not contain the Beneficiary's IRS Forms W-2, Wage and Tax Statements, or Forms 1099-MISC, Miscellaneous Income, showing that the Petitioner paid the Beneficiary in any relevant year.[4]

The record does not contain regulatory-prescribed evidence of the Petitioner's ability to pay the proffered wage in 2014. *See* 8 C.F.R. § 204.5(g)(2) (requiring submission of a petitioner's annual reports, federal tax returns, or audited financial statements from the priority date onward). Further,

[3] Federal courts have upheld our 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); *Tongatapu Woodcraft Haw., Ltd. v. Feldman*, 736 F.2d 1305, 1309 (9th Cir. 1984); *Estrada-Hernandez v. Holder*, -- F. Supp. 3d --, 2015 WL 3634497, *5 (S.D. Cal. 2015); *Rizvi v. Dep't of Homeland Sec.*, 37 F. Supp. 3d 870, 883-84 (S.D. Tex. 2014), *aff'd*, 627 F. App'x 292, 294-295 (5th Cir. 2015).

[4] The Petitioner's 2015 federal tax return shows that it paid a total of $8,000 in salaries and wages that year. While it also lists $466,150 for "contracted service" that year, it is not clear if that entry incudes payments to the Beneficiary.

the record is missing information regarding another beneficiary of a Form I-140 filed by the Petitioner.

Where a petitioner has filed Form I-140 petitions for multiple beneficiaries, it must demonstrate that its job offer to each beneficiary is realistic, and that it has the ability to pay the proffered wage to each beneficiary. *See* 8 C.F.R. § 204.5(g)(2); *see also Patel v. Johnson*, 2 F. Supp. 3d 108, 124 (D. Mass. 2014) (upholding our denial of a petition where a petitioner did not demonstrate its ability to pay multiple beneficiaries). USCIS records show that the Petitioner filed another Form I-140 petition for the father of the current Beneficiary. Thus, the Petitioner must establish its ability to pay this Beneficiary as well as the beneficiary of its other Form I-140 petition that was pending or filed after the priority date of the current petition.[5]

The Petitioner must document the receipt number, name of the beneficiary, priority date, and proffered wage of the other petition, and indicate the status of the petition and the date of any status change (i.e., pending, approved, withdrawn, revoked, denied, on appeal or motion, beneficiary obtained lawful permanent residence). To offset the total wage burden, the Petitioner may submit documentation showing that it paid wages to other beneficiary. To demonstrate that it has the ability to pay the Beneficiary and the other beneficiary, the Petitioner must, for each year at issue (a) calculate any shortfall between the proffered wages and any actual wages paid to the primary Beneficiary and its other beneficiary, (b) add these amounts together to calculate the total wage deficiency, and (c) demonstrate that its net income or net current assets exceed the total wage deficiency.[6] Without this information, we cannot determine the Petitioner's ability to pay the combined proffered wages of all of its applicable beneficiaries.

IV. CONCLUSION

The decision of the Director will be withdrawn. The matter is remanded to the Director for consideration of whether the Beneficiary has the required experience for the offered position, and whether the Petitioner has the continuing ability to pay the proffered wage. The Director may request any additional evidence considered pertinent. Similarly, the Petitioner may provide additional evidence within a reasonable period of time to be determined by the Director. Upon receipt of all the evidence, the Director will review the entire record and enter a new decision.

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[5] The Petitioner's ability to pay the proffered wage of one of the other I-140 beneficiaries is not considered:

- After the other beneficiary obtains lawful permanent residence;
- If an I-140 petition filed on behalf of the other beneficiary has been withdrawn, revoked, or denied without a pending appeal or motion; or
- Before the priority date of the I-140 petition filed on behalf of the other beneficiary.

[6] It is the Petitioner's burden to establish eligibility for the immigration benefit sought. Section 291 of the Act, 8 U.S.C. § 1361; *Matter of Skirball Cultural Ctr.*, 25 I&N Dec. 799, 806 (AAO 2012).

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

Cite as *Matter of E-C-TSG LLC*, ID# 2607483 (AAO Feb. 13, 2019)