U.S. Citizenship and Immigration Services

Non-Precedent Decision of the Administrative Appeals Office

In Re: 30115968

Date: FEB. 20, 2024

Appeal of Texas Service Center Decision

Form I-140, Immigrant Petition for Alien Workers (Skilled Worker)

The Petitioner, a gas station and convenience store business, seeks to employ the Beneficiary as a bookkeeper. It requests classification of the Beneficiary under the third-preference, immigrant classification for skilled workers. Immigration and Nationality Act (the Act) section 203(b)(3)(A)(i), 8 U.S.C. § 1153(b)(3)(A)(i). This employment-based category allows a U.S. business to sponsor a foreign national for lawful permanent resident status based on a job offer requiring at least two years of training or experience.

The Texas Service Center Acting Director denied the petition, concluding that the Petitioner did not establish that the Beneficiary possessed the minimum experience required for the offered position. The matter is before us on appeal. 8 C.F.R. § 103.3.

The Petitioner bears the burden of proof to demonstrate eligibility by a preponderance of the evidence. *Matter of Chawathe*, 25 I&N Dec. 369, 375-76 (AAO 2010). We review the questions in this matter de novo. *Matter of Christo's, Inc.*, 26 I&N Dec. 537, 537 n.2 (AAO 2015). Upon de novo review, we will withdraw the Director's decision and remand the matter for entry of a new decision consistent with the following analysis.

I. LAW

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) of the Act, 8 U.S.C. § 1182(a)(5). DOL approval signifies that insufficient U.S. workers are able, willing, qualified, and available for a position. *Id.* Labor certification also indicates that the employment of a foreign national will 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 considers whether a beneficiary meets the requirements of a certified position and a requested immigrant visa classification. If USCIS approves the 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. ANALYSIS

A petitioner must establish a beneficiary's possession of all the education, training, and experience specified on an accompanying labor certification by a petition's priority date.[1] 8 C.F.R. §§ 103.2(b)(l), (12); *see also Matter of Wing's Tea House,* 16 I&N Dec. 158, 159 (Acting Reg'l Comm'r 1977); *Matter of Katigbak,* 14 I&N Dec. 45, 49 (Reg'l Comm'r 1971). The priority date in this case is April 24, 2020.

The underlying labor certification states that the 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 on the labor certification. The position's minimum requirements are 24 months of experience in the offered position of bookkeeper, or in the alternative, 24 months of experience in accounting. The labor certification further states that the offered position requires "proficiency in typing and machines, and strong ability to work independently and create consistent bookkeeping policies."

Upon review of the entire record, including employment verification letters, a statement from the Beneficiary, payroll and income tax records, and government issued employment certifications, we conclude that the Petitioner has established that the Beneficiary met the minimum experience requirement for the offered position. However, we cannot conclude that the Petitioner has established eligibility for the benefit sought, as further detailed below. Upon de novo review, we will withdraw the Acting Director's decision and remand the matter for entry of a new decision consistent with the following analysis.

To be eligible for the classification, a petitioner must establish that it has the continuing ability to pay the proffered wage stated on the labor certification. The regulation at 8 C.F.R. § 204.5(g)(2) requires that "[e]vidence of this ability shall be either in the form of copies of annual reports, federal tax returns, or audited financial statements." While the record includes copies of the Petitioner's federal tax returns for 2019 through 2021, the record does not contain regulatory-required evidence of the Petitioner's continuing ability to pay the proffered wage of $48,000 per year in each year from the April 24, 2020 priority date. Without this regulatory-required evidence, we cannot affirmatively find that the Petitioner has the continuing ability to pay the proffered wage from the priority date.

Therefore, we will remand the matter to the Director to request additional evidence, if deemed appropriate, and analyze the record and determine whether the Petitioner has established its ability to pay the proffered wage to this Beneficiary, and the beneficiaries of its other petitions, from the priority date onward. On remand, the Director should request such regulatory-required evidence and allow the Petitioner reasonable time to respond.

II. CONCLUSION

The Acting Director's decision is withdrawn. However, the record does not demonstrate affirmatively that the Petitioner is eligible for the benefit sought, including whether the Petitioner can establish that it has the continuing ability to pay the proffered wage to the Beneficiary as required by 8 C.F.R.

[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).

§ 204.5(g)(2). Therefore, we will remand this case to the Director for further consideration of the Petitioner's eligibility for the requested benefit. The Petitioner bears the burden of proof to demonstrate eligibility by a preponderance of the evidence. *Matter of Chawathe*, 25 I&N Dec. 369, 375-76 (AAO 2010).

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