U.S. Citizenship and Immigration Services

**Non-Precedent Decision of the Administrative Appeals Office**

In Re: 11244093

Date: JAN. 14, 2021

Appeal of Texas Service Center Decision

Form I-140, Immigrant Petition for Other Worker

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

The Director of the Texas Service Center denied the petition, concluding that the Petitioner did not establish that the Beneficiary met the minimum requirements for the offered position. The Director dismissed a subsequent motion to reopen.

In these proceedings, it is the Petitioner's burden to establish eligibility for the requested benefit. Section 291 of the Act, 8 U.S.C. § 1361. Upon *de novo* review, we will withdraw the decision of the Director. The matter is remanded for the entry of a new decision consistent with the foregoing analysis.

## I. EMPLOYMENT-BASED IMMIGRATION

Employment-based immigration 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) 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. THE BENEFICIARY'S QUALIFICATIONS

The Petitioner is a dental office in Florida with four employees. The petition is accompanied by a labor certification with a priority date of May 21, 2019.[1] The job duties of the offered position of dental assistant are as follows:

> Under direction of dentist suction patient's saliva, blood and/or mucus during procedure, prepare patients for x-rays, organize instruments, communicate with dentist and patient, make impressions of teeth, operate autoclave to sterilize instruments and otherwise prepare patient for dental work. Takes direction and works under immediate supervision of dentist.

Part H of the labor certification states that the offered position requires a high school or foreign equivalent education, and "one month of any of the following kinds of training: Dental Assistant, Dentist, Medical Doctor, Nursing, or any allied health profession training involving concepts of anatomy, infection control and medical terminology."

Part J of the labor certification states that the Beneficiary possesses a high school education and one month of training with the Petitioner.[2] In support of this training the Petitioner provided a Dental Assistant Training Verification letter, stating that the Beneficiary completed the dental assistant practical training course from April 11 to May 11, 2019, and describing the content of the training course as follows:

- Front office basic procedures;
- Greeting patients, managing the movement of patients to and from treatment areas;
- Prepare patients and the work area for treatments and procedures;
- Personal Protective Equivalent (PPE);
- How to sterilize dental instruments;
- Demonstration of Basic Instruments, equipment and general dental materials;
- How to hand instruments to dentists during procedures;
- Demonstrate how to dry patients' mouths using suction hoses;
- How to instruct patients in proper oral hygiene (student will be taught to provide oral hygiene instructions to a patient);
- How to take digital x-rays;
- Schedule patient appointments;
- Disposal of contaminated waste and perforating-cutting material;
- Assist in updating and maintaining client dental records.

[1] The priority date is the date the DOL accepted the labor certification for processing. *See* 8 C.F.R. § 204.5(d).

[2] In determining whether an employer fully considered all able and qualified U.S. workers, the DOL looks to whether the U.S. worker can acquire the required skills for the position during a reasonable period of on-the-job training. "Rejecting U.S. workers for lacking skills necessary to perform the duties involved in the occupation, where the U.S. workers are capable of acquiring the skills during a reasonable period of on-the-job training is not a lawful job-related reason for rejection of the U.S. workers." 20 C.F.R. § 656.17(g)(2).

Section J of the accompanying labor certification also states that the Petitioner did not pay for any of the Beneficiary's education or training necessary to satisfy any of the job requirements for the offered position, and that the Petitioner did not current employ the Beneficiary.[3]

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. 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 Director first issued a request for evidence (RFE) to the Petitioner, noting that the record did not establish that the Beneficiary met the education requirement for the offered position of completion of high school or foreign equivalent, or that the Petitioner had established its continuing ability to pay the proffered wage to the Beneficiary or to the beneficiaries of its other petitions. In response to the RFE, the Petitioner submitted an evaluation of the Beneficiary's high school diploma and transcripts, as well as additional evidence of its ability to pay the proffered wage.

The Director then issued a notice of intent to deny (NOID) the petition, informing the Petitioner that the record was insufficient to establish the Beneficiary's qualifications for the offered position as of the priority date because the training verification does not indicate that the training complies with state training and licensing requirements for dental assistants, or whether the trainer is licensed to train in accordance with state law.

In response to the NOID, the Petitioner explained that Florida State law sets forth the tasks delegable to dental assistants and mandates training requirements for these delegable tasks. The Petitioner provided a copy of Chapter 64B5-16 of the Florida Administrative Code, "Remediable Tasks Delegable to Dental Hygienists and Dental Assistants," and noted that, while certain tasks do require formal training, the tasks listed in the job duties of the offered position are listed in the Code as tasks delegable to dental assistants which require "training in these procedures in pre-licensure education or on-the-job training." The Code further states that on-the-job training is training performed "by a licensed dentist who assumes full responsibility for assuring that the dental hygienist or dental assistant has completed hands-on training in order that he/she is competent to perform the tasks." The Petitioner also provided the professional dental license verification for the dentist who signed the Dental Assistant Training Verification letter and who is listed on the accompanying labor certification as the Beneficiary's training supervisor.

The Director denied the petition. Repeating the same language used in the NOID, the Director concluded that the Petitioner did not establish that the Beneficiary was qualified for the offered position. Although the Director acknowledged receipt of the Petitioner's response to the NOID, the Director does not address the response or explain why the submitted evidence is not sufficient to establish the Beneficiary's qualifications.

[3] Pursuant to 20 C.F.R. § 656.17(i)(4), "In evaluating whether the alien beneficiary satisfies the employer's actual minimum requirements, DOL will not consider any education or training obtained by the alien beneficiary at the employer's expense unless the employer offers similar training to domestic worker applicants."

On appeal, the Petitioner asserts that the Director erred in his conclusion, that the Beneficiary was qualified for the position as of the priority date, and that the training was in accordance with state law.

Upon review, we find that the Director did not provide sufficient detail in the decision to advise the Petitioner of the reasons for denial. The regulation at 8 C.F.R. § 103.3(a)(1)(i) states that when denying a petition, the Director shall explain in writing the specific reasons for denial. Therefore, we will remand the matter for further consideration of whether the Beneficiary meets the minimum requirements for the offered position as set forth on the labor certification.

As noted above, the offered position of dental assistant requires one month of training involving "concepts of anatomy, infection control and medical terminology." The Dental Assistant Training Verification letter in the record does not identify any training given to the Beneficiary in anatomy or medical terminology. The record does not include other evidence to demonstrate that the Beneficiary possessed this required training as of the priority date. On remand, the Director may wish to request evidence related to this issue.

Additionally, the Florida Administrative Code, Chapter 64B5-16.005 lists the tasks delegable to dental assistants. Sections 1 and 2 of the Chapter identify tasks that may be performed by a dental assistant who has received formal training, and Sections 3, 4 and 5 identify tasks that require only on-the-job training. We note that the task of "making impressions" falls only in Sections 1 and 2 of the Chapter. As one of the job duties of the offered position listed on the labor certification is "making impressions of teeth," the Petitioner must address whether the Beneficiary is required to or has completed formal training in order to be considered qualified to perform this job duty.[4]

On remand, the Director may wish to issue a new RFE outlining the deficiencies above, requesting additional independent objective evidence in support, and allowing the Petitioner an opportunity to respond.

## III. ABILITY TO PAY

Although also not discussed by the Director in the decision, the record does not contain regulatory-required evidence of the Petitioner's ability to pay the proffered wage of $14.04 per hour from the priority date on May 21, 2019, and continuing until the beneficiary obtains lawful permanent residence. 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."

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[4] Chapter 64B5-16.002(1) states:

> Formal training which is required for the performance of certain remediable tasks consists of a dental hygienist's or dental assistant's successful completion of an expanded duty course or program which meets one of the following requirements:
>
> (a) The course or program is administered or was developed as part of the regular curriculum at a school of dentistry, dental hygiene or dental assisting accredited by the American Dental Association's Commission on Dental Accreditation, its successor agency or any other nationally recognized accrediting agency; or
>
> (b) The course or program has been approved by the Board for the purpose of providing expanded-duties training for dental hygienists and dental assistants.

The record does not contain regulatory-prescribed evidence of the Petitioner's ability to pay for 2019. 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.

We note that where a petitioner has filed 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 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, a petitioner did not demonstrate its ability to pay the combined proffered wages of multiple petitions). USCIS records show that the Petitioner has filed Form I-140 petitions for 22 other beneficiaries.[5] Thus, the Petitioner must establish its ability to pay this Beneficiary as well as the beneficiaries of the other Form I-140 petitions that were pending or approved as of, or filed after, the priority date of the current petition.

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.

## IV. CONCLUSION

Considering the above discussed deficiencies, we are withdrawing the Director's decision. However, the record does not demonstrate affirmatively that the Petitioner is eligible for the benefit sought, including whether the Petitioner has the ability to pay the proffered wage to the Beneficiary as required by 8 C.F.R. § 204.5(g)(2), and whether the Beneficiary meets the experience requirements as stated on the labor certification. Therefore, we will remand this case to the Director for further consideration of the Beneficiary's qualifications for the offered position and of the Petitioner's ability to pay the proffered wage from the priority date onward.

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

[5] The Petitioner states on the petition and the accompanying labor certification that it has four employees.