U.S. Citizenship and Immigration Services

Non-Precedent Decision of the Administrative Appeals Office

In Re: 13161861

DATE: JAN. 25, 2021

Appeal of Nebraska Service Center Decision

Form I-140, Immigrant Petition for an Alien Worker

The Petitioner, a dairy cattle and milk production business, seeks to employ the Beneficiary as a milker. It requests classification for the Beneficiary as an "other worker" under the third preference immigrant category. Immigration and Nationality Act (the Act) section 203(b)(3)(A)(iii), 8 U.S.C. § 1153(b)(3)(A)(iii). This employment-based "EB-3" immigrant classification allows a U.S. employer to sponsor for lawful permanent resident status a foreign national who is capable of performing unskilled labor that requires less than two years of training or experience and is not of a temporary or seasonal nature.

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's decision was erroneous, that it did not properly evaluate the evidence submitted, and that the documentation of record establishes the Petitioner's ability to pay the proffered wage.[1]

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) of the Act, 8 U.S.C. § 1182(a)(5). 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

[1] The Form I-290B, Notice of Appeal or Motion, along with an appeal brief were filed on March 13, 2020, by the Petitioner's former counsel, [redacted] However, the appeal was not accompanied by a new, properly executed Form G-28, Notice of Entry of Appearance as Attorney or Accredited Representative, as required by the regulation at 8 C.F.R. § 292.4(a). Therefore, on September 2, 2020, we sent a Notice of Self-Representation to the Petitioner, stating that: "This Notice is to inform you that we consider the . . . petitioner to be self-represented for the above-referenced appeal."

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

As indicated in the above regulation, the Petitioner must establish its continuing ability to pay the proffered wage from the priority date[2] of the petition onward. In this case the proffered wage is $8.56 per hour (or $17,805 per year based on a work year of 2,080 hours) and the priority date is March 7, 2019.

In determining a petitioner's ability to pay the proffered wage, USCIS first examines whether the beneficiary was employed and paid by the petitioner during the period following the priority date. A petitioner's submission of documentary evidence that it employed the beneficiary at a salary equal to or greater than the proffered wage for the time period in question, when accompanied by a form of evidence required in the regulation at 8 C.F.R. § 204.5(g)(2), may be considered proof of the petitioner's ability to pay the proffered wage.

In this case there is no evidence that the Petitioner has ever employed the Beneficiary. Therefore, the Petitioner has not established its ability to pay the proffered wage from the priority date of March 7, 2019, onward based on wages paid to the Beneficiary.

If a petitioner does not establish that it has paid the beneficiary an amount equal to or above the proffered wage from the priority date onward, USCIS will examine the net income and net current assets figures recorded on the petitioner's federal income tax return(s), annual report(s), or audited financial statements(s). If either of these figures, net income or net current assets, equals or exceeds

[2] The "priority date" of an employment-based immigrant petition is the date the underlying labor certification application is filed with the DOL. *See* 8 C.F.R. § 204.5(d).

the proffered wage or the difference between the proffered wage and the amount paid to the beneficiary in a given year, the petitioner would ordinarily be considered able to pay the proffered wage during that year.

With its initial evidence the Petitioner submitted a copy of its federal income tax return (Form 1065, U.S. Return of Partnership Income) for 2018, which was apparently still the Petitioner's most recently filed return at the time of the Director's decision in February 2020 and the Petitioner's subsequent appeal. As the priority date of the petition is in 2019, however, that is the first year for which the Petitioner must demonstrate its ability to pay the proffered wage. Without a copy of the Petitioner's 2019 federal tax return (or an annual report or audited financial statement for 2019), we are unable to determine the Petitioner's ability to pay the proffered wage based on its net income or net current assets from the priority date of March 7, 2019, onward.

Therefore, we will remand this case for the Director to request the submission of regulatory required evidence from the Petitioner, as specified in 8 C.F.R. § 204.5(g)(2), for the year 2019 and, if available, for 2020, along with any other evidence the Director may deem necessary to determine the Petitioner's eligibility for the requested immigration benefit. Per *Matter of Sonegawa*, 12 I&N Dec. 612 (Reg'l Comm'r 1967), the Director may also consider the totality of the Petitioner's circumstances in determining its ability to pay the proffered wage.[3]

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 of March 7, 2019, onward.

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

[3] We note that a letter from the Petitioner's certified public accountant, dated January 17, 2020, indicates the Petitioner may wish to hire five foreign workers. The Petitioner must establish that its job offer is realistic not only for the instant Beneficiary, but also for the beneficiaries of its other petitions. Thus, the Petitioner must establish its ability to pay the proffered wages of the instant Beneficiary and the beneficiaries of every other pending or approved I-140 petition from this petition's priority date of March 7, 2019 (or any subsequent priority dates of the other petitions), until the other beneficiaries obtained lawful permanent resident status. *See Patel v. Johnson*, 2 F. Supp. 3d 108, 124 (D. Mass. 2014). USCIS records confirm that one other Form I-140 petition filed by the Petitioner (receipt number [redacted]) has been approved.