U.S. Citizenship and Immigration Services

Non-Precedent Decision of the Administrative Appeals Office

In Re: 8400395

Date: JAN. 31, 2020

Appeal of California Service Center Decision

Form I-140, Immigrant Petition for Skilled Worker

The Petitioner, a mosque, sought to employ the Beneficiary as a religious washman under the third-preference, immigrant classification for skilled workers.[1] *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 California Service Center denied the petition. The Director concluded that the Petitioner did not demonstrate its required ability to pay the proffered wage of the offered position.

The Petitioner bears the burden of establishing eligibility for the requested benefit. 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.* DOL approval also signifies that 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 labor certification 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.

[1] The record indicates that the offered position involves performing ritual cleansings of male decedents while reciting Muslim funeral prayers from memory.

II. ABILITY TO PAY THE PROFFERED WAGE

A petitioner must demonstrate its continuing ability to pay the proffered wage of an offered position, from a petition's priority date until a beneficiary obtains lawful permanent residence. 8 C.F.R. § 204.5(g)(2). For petitioners with less than 100 employees, 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 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).[2]

Here, the labor certification states the proffered wage of the offered position of religious washman as $504.80 a week, or $26,249.60 a year. The petition's priority date is January 2, 1998, the date an office within DOL's employment service system accepted the labor certification application for processing. *See* 8 C.F.R. § 204.5(g)(2) (explaining how to determine petition priority dates).

The Petitioner, a nonprofit, submitted copies of its state informational tax returns from July 1997 through June 2001 and financial statements for the same period and from July 2004 through June 2005. Contrary to 8 C.F.R. § 204.5(g)(2), however, the state tax documents do not constitute "federal tax returns" and the financial materials indicate that they are not "audited financial statements." Therefore, the record lacks required evidence of the Petitioner's ability to pay the proffered wage from the petition's priority date until the Director issued his decision in 2006.

On appeal, the Petitioner argues that, as a nonprofit, it need not file federal income tax returns.[3] The Petitioner also contends that the cost of submitting audited financial statements would unduly burden it. As the Director found, however, the regulation mandates that evidence of ability to pay "shall be either in the form of copies of annual reports, federal tax returns, or audited financial statements." 8 C.F.R. § 204.5(g)(2). The regulation does not include an exception for nonprofit organizations. Because the Petitioner's evidence does not comply with the applicable regulation, the record does not establish the mosque's ability to pay the proffered wage.

Even if we could excuse the Petitioner's omission of required forms of evidence, which we cannot, its remaining proof would not establish its ability to pay. The record indicates that the Beneficiary volunteered with the Petitioner in the offered position beginning in 1994. But the Petitioner did not submit evidence that it paid him. Based on wages paid, the record therefore would not establish the

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[2] 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); *Estrada-Hernandez v. Holder*, 108 F Supp 3d 936, 942-43 (S.D. Cal. 2015).

[3] According to the U.S. Internal Revenue Service (IRS), although tax-exempt organizations need not pay federal income taxes, they may have to file annual federal informational returns. IRS, "Charities and Nonprofits," Annual Filings and Forms, https://www.irs.gov/charities-non-profits/annual-filing-and-forms (last visited Dec. 11, 2019).

Petitioner's ability to pay. The record also would lack evidence of the Petitioner's ability to pay from July 2001 through June 2004, and after July 2005. In addition, the Petitioner's state informational tax returns would not demonstrate its generation of sufficient excess revenues or net current assets to pay the proffered wage from July 1999 through June 2000. Absent regulatory required evidence, the factors stated in *Sonegawa* would not demonstrate the Petitioner's ability to pay. We therefore need not engage in a *Sonegawa* analysis.

The Petitioner's appeal includes copies of its monthly bank statements from 2000 through 2006. The regulation at 8 C.F.R. § 204.5(g)(2) allows "bank account records" as evidence of ability to pay "[i]n appropriate cases." But the regulation does not authorize the substitution of such "additional evidence" for a required form of proof. The bank statements therefore do not establish the Petitioner's ability to pay.

For the foregoing reasons, the record on appeal does not establish the Petitioner's ability to pay the proffered wage from the petition's priority date until the Director's decision. In any future filings in this matter, the Petitioner must submit copies of annual reports, federal tax returns, or audited financial statements from the priority date onward in accordance with the regulation and also since the 2006 decision in support of its continuing ability to pay the proffered wage. The Petitioner may also submit additional evidence, such as proof of any payments to the Beneficiary from the petition's priority date onward or materials supporting *Sonegawa* factors.

III. INTENTION TO EMPLOY IN THE OFFERED POSITION

Although unaddressed by the Director, the record also does not establish the Petitioner's intention to employ the Beneficiary in the offered position. An organization may file a petition if it is "desiring and intending to employ [a foreign national] within the United States." Section 204(a)(1)(F) of the Act. A petitioner must intend to employ a beneficiary pursuant to the terms of an accompanying labor certification. *See Matter of Izdebska*, 12 I&N Dec. 54, 55 (Reg'l Comm'r 1966) (affirming a petition's denial where, contrary to the accompanying labor certification, the petitioner did not intend to employ the beneficiary as a live-in, domestic worker on a full-time basis).

A petitioner must establish eligibility for a requested benefit as of a petition's filing and continuing throughout its adjudication. 8 C.F.R. § 103.2(b)(1). Upon receipt of an appeal from a petition denial, a USCIS officer, if deciding not to reopen or reconsider the decision, "shall promptly forward the appeal and the related record of proceeding" to our office. 8 C.F.R. § 103.3(a)(2)(iv).

Here, we did not receive the appeal until a number of years after its filing. After the filing, while in removal proceedings under section 240 of the Act, 8 U.S.C. § 1229a, the Beneficiary submitted a written motion to the Immigration Judge (IJ). The motion requested permission to voluntarily depart the United States at the Beneficiary's own expense before completion of the removal proceedings. *See* section 240B(a)(1) of the Act, 8 U.S.C. § 1229c(a)(1). The motion stated that the Beneficiary "has several family matters pending outside the United States and wishes to abandon his petition in order to attend to these matters." The motion further stated the "Respondent has an appeal pending on his I-140 employment based immigrant petition."

The record does not explain what the Beneficiary meant by "abandoning" this petition. If he purported to withdraw the petition, he lacked authority to do so. Only "[a]n applicant or petitioner may withdraw a benefit request." 8 C.F.R. § 103.2(b)(6).

If, by "abandoning" this petition, the Beneficiary meant that he no longer accepted the Petitioner's offer of employment, the record does not explain whether he permanently rejected the offer or rejected it only until resolving family matters outside the United States. Department of Homeland Security records show that the Beneficiary effectively removed himself from the United States in 2008 by leaving the country after expiration of the period of voluntary departure granted by the IJ. *See* section 240B(a)(1) of the Act, 8 U.S.C. § 1229c(a)(1) (explaining voluntary departure). The Beneficiary, however, is eligible to apply for readmission to the United States once he remains outside the country 10 years. *See* section 212(a)(9)(A)(ii)(II) of the Act, 8 U.S.C. § 1182(a)(9)(A)(ii)(II). Thus, as this appeal might retain practical significance, we decline to dismiss it as moot. *See Matter of Luis-Rodriguez*, 22 I&N Dec. 747, 753 (BIA 1999) (holding that, as a matter of prudence, an administrative tribunal may dismiss an appeal lacking practical significance as moot) (citations omitted).

Because of the significant delay in our receipt of this appeal, however, without any inquiry from the Petitioner, the record does not demonstrate the Petitioner's continuing intention to employ the Beneficiary in the offered position. Thus, in any future filings in this matter, the Petitioner must submit additional evidence that it still intends to employ the Beneficiary in the offered position.

IV. INTENTION TO EMPLOY ON A FULL-TIME BASIS

The record also does not establish the Petitioner's intention to employ the Beneficiary on a full-time basis. For labor certification purposes, employment means "[p]ermanent, full-time work." 20 C.F.R. § 656.3 (2004) (defining the term "employment").[4] Full-time work generally means at least 35 hours a week. DOL Field Memorandum No. 48-94, "Policy Guidance on Alien Labor Certification Issues" (May 16, 1994).

Here, the labor certification states the Petitioner's intention to permanently employ the Beneficiary full-time in the offered position of religious washman. In response to a written request for additional evidence from the Director, however, the Petitioner indicated that the offered position might not entail full-time employment. The Petitioner stated that the Beneficiary "is not called upon to perform these duties on any scheduled basis, but rather on an *ad hoc* basis as deaths occur in the primarily [redacted] Iranian Muslim community." Also, in a letter to DOL during the labor certification proceedings, the Beneficiary stated that, as an unpaid volunteer in the offered position, he "devoted some 25 to 30 hours per week to this work." Thus, the record does not demonstrate that the offered position would constitute full-time employment. Any future filings in this matter by the Petitioner must include additional evidence establishing that the Beneficiary would work at least 35 hours a week in the offered position.

[4] Current DOL regulations apply to labor certification applications filed on or after March 28, 2005. Final Rule for Applications for Permanent Labor Certification in the United States, 69 Fed. Reg. 77325, 77325 (Dec. 27, 2004). The Petitioner filed its labor certification application before March 28, 2005. We therefore cite to prior DOL regulations as they existed in 2004.

V. CONCLUSION

The record on appeal does not establish the Petitioner's ability to pay the proffered wage of the offered position from the petition's priority date until the Director's decision. We will therefore affirm the petition's denial.

ORDER: The appeal is dismissed.