U.S. Citizenship and Immigration Services

Non-Precedent Decision of the Administrative Appeals Office

MATTER OF H-Y-H-

DATE: JUL. 6, 2018

APPEAL OF TEXAS SERVICE CENTER DECISION

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

The Petitioner, a full service marina, seeks to employ the Beneficiary as a cleaner of vehicles and equipment. It requests classification of 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 evidence of record did not establish the Petitioner's continuing ability to pay the proffered wage from the priority date onward. The Petitioner filed motions to reopen and reconsider, which the Director denied.

On appeal, the Petitioner submits additional documentation and asserts that the evidence of record establishes its ability to pay the proffered wage. We issued a notice of intent to deny (NOID) advising that it did not appear the Beneficiary had the educational credential required by the labor certification and that the Petitioner must submit a type of documentary evidence required by regulation to establish its ability to pay the proffered wage. The Petitioner has responded to the NOID with additional materials.

Upon *de novo* review, we will dismiss the appeal on the grounds that the Petitioner has not submitted the requisite type of evidence to establish its ability to pay the proffered wage and the Beneficiary does meet the minimum educational requirement of the labor certification.

I. LAW

Employment-based immigration generally follows a three-step process. First, an employer obtains an approved labor certification (ETA Form 9089, Application for Permanent Employment 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). By approving the labor certification, 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 U.S. 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.

II. ANALYSIS

At issue in this case is whether the Petitioner has established its continuing ability to pay the proffered wage from the priority date[1] onward, and whether the Beneficiary meets the minimum educational requirement of the labor certification.

A. Petitioner's Ability to Pay the Proffered Wage

The regulation at 8 C.F.R. § 204.5(g)(2) provides that a petitioner must establish its ability to pay the proffered wage from the priority date until the beneficiary obtains lawful permanent residence. The evidentiary requirements for a petitioner to establish its ability to pay the proffered wage are stated, in pertinent part, as follows:

> Evidence of this ability shall be either in the form of copies of annual reports, federal tax returns, or audited financial statements. . . . . 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].

Id. Thus, the regulation clearly indicates that for each year a petitioner must establish its ability to pay the proffered wage, at least one type of required evidence – an annual report, or a federal tax return, or an audited financial statement – must be submitted.

The Petitioner states that it has employed the Beneficiary since April 2009 and has submitted copies of the Forms W-2, Wage and Tax Statements, it issued to the Beneficiary for the years 2013-2017. They show that the Beneficiary's gross pay has exceeded the proffered wage each of these years. The Petitioner asserts that this documentation establishes its continuing ability to pay the proffered wage from the priority date of January 13, 2014, up to the present.

As stated by the Director in his request for evidence (RFE), however, the Petitioner must submit one of the three types of evidence required by 8 C.F.R. § 204.5(g)(2) for each year since the priority date. The Petitioner did not submit any type of required evidence in response to the RFE, and the Director denied the petition accordingly, finding that the Petitioner had not established its ability to pay the proffered wage. On appeal the Petitioner contends that the Forms W-2 establish its ability to pay the proffered wage because they show the wages paid to the Beneficiary have consistently exceeded the proffered wage since the priority date. We advised the Petitioner once again in our

[1] The "priority date" of the petition is the date the underlying labor certification is filed with the DOL. *See* 8 C.F.R. § 204.5(d). In this case the priority date is January 13, 2014.

notice of intent to deny (NOID), however, that notwithstanding the Forms W-2 in the record the Petitioner was required by regulation to submit either an annual report, or a federal tax return, or an audited financial statement for each year since the priority date. The Petitioner did not submit any such documents in its response to the NOID. Instead, the Petitioner submitted two sets of income statements and balance sheets, one for the month of January 2015 and the other for the month of January 2017. The income statements and balance sheets bear no evidence of having been audited, and neither covered more than one month. Thus, they do not meet the regulatory requirement of audited financial statements for 2015 or 2017.

In view of the Petitioner's failure to submit at least one type of documentation required by the regulation at 8 C.F.R. § 204.5(g)(2) – either an annual report, or a federal tax return, or an audited financial statement – for each year since the priority date of January 13, 2014, despite repeated requests to do so by the Director and by this office, we conclude that the Petitioner has not established its continuing ability to pay the proffered wage from the priority date onward.

B. Beneficiary's Educational Qualifications under the Terms of the Labor Certification

A beneficiary must meet all of the education, training, experience, and other requirements of the labor certification as of the petition's priority date. *See Matter of Wing's Tea House*, 16 I&N Dec. 158, 159 (Acting Reg'l Comm'r 1977).

In this case, the labor certification specifies in section H (boxes 4 and 9) that the minimum educational requirement for the job offered is a high school diploma or a foreign educational equivalent. As evidence of the Beneficiary's education the record includes a copy of a certificate issued by Mexico, on 1993 (along with an English translation), certifying that the Beneficiary had completed secondary education (*educacion secundaria*). The record indicates that the Beneficiary was 15 years old at that time. As described by the , created by the in Mexico is awarded after three years of lower secondary education and is comparable to less than a complete high school education. credential advice states that the holder of a may be placed in 10th grade in the United States.

In our NOID we informed the Petitioner of this credential advice from and stated that it did not appear the Beneficiary's education in Mexico was equivalent to a high school education in the United States. In response to the NOID the Petitioner submitted an educational evaluation from

stating its opinion that the Beneficiary's Mexican education is equivalent to the completion of grade nine at an accredited U.S. high school. Thus, the evaluation from concurs with the credential advice of that the Beneficiary's education at *Telescundaria* is not equivalent to the completion of high school in the United States. Accordingly, the Petitioner has not established that the Beneficiary has the minimum education required by the terms of labor certification.

III. CONCLUSION

We will dismiss the appeal because the Petitioner has not established its continuing ability to pay the proffered wage from the priority date onward and because the Beneficiary does not meet the minimum educational requirement of the labor certification.

ORDER: The appeal is dismissed.

Cite as *Matter of H-Y-H-*, ID# 1289116 (AAO Jul. 6, 2018)