U.S. Citizenship and Immigration Services

Non-Precedent Decision of the Administrative Appeals Office

MATTER OF D-Y-H-O-

DATE: JULY 20, 2017

MOTION ON ADMINISTRATIVE APPEALS OFFICE DECISION

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

The Petitioner, an educational institution, seeks to employ the Beneficiary as a first grade elementary school teacher. It requests classification of the Beneficiary as a member of the professions holding an advanced degree under the second preference immigrant classification. *See* Immigration and Nationality Act (the Act), section 203(b)(2), 8 U.S.C. § 1153(b)(2). This employment-based immigrant classification allows a U.S. employer to sponsor a professional with an advanced degree for lawful permanent resident status.

The Director of the Texas Service Center denied the petition. The Petitioner filed a motion to reopen and motion to reconsider, which the Director also denied. The Petitioner then filed a second motion to reopen. The Director ultimately affirmed his denial of the petition, finding that the record did not establish the Petitioner's ability to pay the proffered wage from the priority date onward. On appeal, we affirmed the Director's finding that the Petitioner had not established its continuing ability to pay the proffered wage. We also concluded that the Petitioner had not established that the Beneficiary possessed the minimum education and experience required by the job offer.

On motion to reopen, the Petitioner asserts that it has the ability to pay in the totality of its circumstances. The Petitioner further asserts that it had submitted sufficient documentation to establish that the Beneficiary possessed the education and experience required by the job offer.

Upon review, we will deny the motion to reopen.

I. MOTION REQUIREMENTS

A motion to reopen is based on documentary evidence of *new facts*, while a motion to reconsider is based on *the assertion of an incorrect application of law or policy*. The requirements of a motion to reopen are located at 8 C.F.R. § 103.5(a)(2). We may grant a motion that satisfies these requirements and demonstrates eligibility for the requested immigration benefit.

II. ANALYSIS

Although the Petitioner did submit new evidence on motion, it did not, for the reasons discussed below, establish that it has the ability to pay the proffered wage or that the Beneficiary has the education and experience required by the labor certification.

A. Ability to Pay

Our prior appellate decision found that the Petitioner has not demonstrated its ability to pay the Beneficiary the proffered wage from the priority date of February 1, 2013, onward. Specifically, we found that the Petitioner did not establish its ability to pay the proffered wage in 2014 or 2015. The regulation at 8 C.F.R. § 204.5(g)(2) states that any petition filed by or for an employment-based immigrant which requires an offer of employment must be accompanied by evidence that the prospective United States employer has the ability to pay the proffered wage. The petitioner must demonstrate this ability at the time the priority date is established and continuing until the beneficiary obtains lawful permanent residence.

On motion, the Petitioner states that the current state of its finances is the result of a past embezzlement by its managers. The Petitioner submits documentation regarding the embezzlement and a June 30, 2015, audited financial statement (covering July 1, 2014, through June 30, 2015). Counsel asserts that the audited statement demonstrates the Petitioner's financial growth since the embezzlement. The statement shows that the Petitioner had -$1,478,648 in net current assets for that time period and the page that would show the Petitioner's net revenues (page 11) is missing from the submitted copy of the financial statement. Counsel states on motion that the Petitioner had net revenues of -$266,768 in the fiscal year ending June 30, 2015. Neither these net current assets nor the claimed net revenues would establish the Petitioner's ability to pay the proffered wage of $51,380 in either 2014 or 2015.

Counsel cites *Matter of Sonegawa,* 12 I&N Dec. 612 (Reg'l Comm'r 1967), and states that the Petitioner, like the petitioner in *Sonegawa*, experienced "unusual circumstances no longer affecting the organization." Counsel attributed the Petitioner's negative net revenues to the fact that "[b]etween 2011 and 2012 some members of [the Petitioner's] management embezzled an estimated $500,000." Counsel states that since "discovering the embezzlement and purging the responsible parties, [the Petitioner's] net income has significantly increased. . . . and will continue to do so." However, Counsel referred to the audited financial statements as showing net income of -$584,406 in 2013, -$142,629 in 2014, and -$266,768 in 2015. These fluctuating net incomes (which refer to "Revenue Over (Under) Expenditures" on the audited financial statements) do not support Counsel's generalization that the Petitioner's net incomes have increased since the embezzlement in 2011 and 2012 and that they "will continue to do so."

Furthermore, Counsel's statements about the Petitioner's improving financial position seem to contradict the evidence in the record. Counsel states that the embezzlement occurred between 2011 and 2012, and refers to the Petitioner's financial statements from 2013, 2014, and 2015 as evidence

of the Petitioner's financial recovery from that embezzlement. However, the Petitioner submits a photocopy of a newspaper article in the [redacted] 2016, [redacted] that discusses calls for an investigation into a suspected embezzlement.[1] The Petitioner also submits a printout of a February 15, 2017, email from the Beneficiary containing what claims to be an excerpt from a [redacted] 2016, [redacted] newspaper article regarding allegations of financial abuse at the school. Finally, while Counsel states that the Petitioner has "adopted and implemented changes" and concludes that the Petitioner "is in little danger of ceasing operations," the auditor's notes from 2015 cite "deficiencies in internal control that we consider to be material weaknesses and significant deficiencies." The Petitioner must resolve these inconsistencies with independent, objective evidence pointing to where the truth lies. *Matter of Ho*, 19 I&N Dec. 582, 591-92 (BIA 1988). Thus, assessing the totality of the circumstances in this individual case, it is concluded that the Petitioner has not established that it had the continuing ability to pay the proffered wage from the priority date onward.

On motion, counsel also states that prior to the Director's denial, the Beneficiary "ported" to a new employer as allowed by the terms of the American Competitiveness in the Twenty-First Century Act of 2000 (AC21). Counsel asserts that because the Beneficiary ported, the Petitioner was not required to establish its ability to pay the proffered wage beyond the first 180 days that the petition and the associated Form I-485, Application to Register Permanent Residence or Adjust Status were pending. However, the Petitioner presents no evidence to corroborate counsel's assertion that the Beneficiary had ported to a new employer, or to establish when that porting had taken place. We note that the Petitioner previously submitted IRS Forms W-2 showing wages it paid to the Beneficiary in 2014 and 2015 and submitted a letter dated February 5, 2016, confirming the Petitioner's continued employment of the Beneficiary.[2] Therefore, despite Counsel's claim to the contrary, the record does not contain evidence that the Beneficiary ported to a new employer under AC21. Absent evidence that the Beneficiary ported, the Petitioner must show its continuing ability to pay the proffered wage under 8 C.F.R § 204.5(g)(2).

B. Beneficiary's Education

Counsel also asserts on motion that the Petitioner has submitted sufficient evidence to establish that the Beneficiary possessed the education required by the labor certification. However, assertions of counsel do not constitute evidence. *Matter of Obaigbena*, 19 I&N Dec. 533, 534 n.2 (BIA 1988) (citing *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980)). Counsel's statements on motion are not supported by additional evidence and are not sufficient to overcome our appellate finding that the Beneficiary's degree in family life is not in the field of elementary education, which is required by the labor certification.

The petitioner must establish that the beneficiary satisfied all of the educational, training, experience and any other requirements of the offered position by the priority date. 8 C.F.R. § 103.2(b)(l), (12).

[1] http:// [redacted] (last visited June 15, 2017).
[2] The wages paid to the Beneficiary in 2014 and 2015 were below the proffered wage.

See Matter of Wing's Tea House, 16 I&N Dec. 158, 159 (Acting Reg'l Comm'r 1977); *see also Matter of Katigbak,* 14 I&N Dec. 45, 49 (Reg'l Comm'r 1971).

In evaluating the beneficiary's qualifications, USCIS must examine "the language of the labor certification job requirements" in order to determine what qualifications the position requires. *Madany v. Smith*, 696 F.2d 1008, 1015 (D.C. Cir. 1983). USCIS's interpretation of the job's requirements, as stated on the labor certification must involve "reading and applying *the plain language* of the [labor certification]" even if the employer may have intended different requirements than those stated on the form. *Rosedale Linden Park Company v. Smith*, 595 F. Supp. 829, 834 (D.D.C. 1984)(emphasis added).

Here, the labor certification unequivocally requires a degree in elementary education, without allowing for related fields of study. Although the Petitioner has claimed that it intended to accept degrees in other fields of study, the evidence is not sufficient to establish that the Petitioner expressed such intent to the U.S. Department of Labor (DOL) or to U.S. workers during the labor certification process. Moreover, as noted in our appellate decision, the Petitioner has declined to submit the results of its recruitment efforts to show that it considered candidates with education in fields other than elementary education. On motion, Counsel asserts that the Petitioner need not have this information unless they are audited by the DOL; however, DOL regulations at 20 CFR 656.10(f) require retention of all supporting recruitment documentation for five years from the date of filing the application for labor certification. The current labor certification was filed on February 1, 2013.

Moreover, even if we were to find that the labor certification allows candidates to qualify with a degree in a related or equivalent field, as we fully discussed in our prior decision, the credentials evaluations submitted contain conflicting conclusions. The initial evaluation submitted with the petition concludes that the Beneficiary's degree was equivalent to a U.S. bachelor's degree in family and child studies, while a later evaluation asserts that it was equivalent to a U.S. bachelor's degree in elementary education. The Petitioner must resolve this discrepancy with independent, objective evidence pointing to where the truth lies. *Matter of Ho*, 19 I&N Dec. at 591-92. Though we discussed this issue in our prior decision, the Petitioner has not submitted evidence to resolve the discrepancy.

C. Beneficiary's Experience

Counsel also asserts on motion that the Petitioner had submitted sufficient evidence to establish that the Beneficiary possessed the experience required by the labor certification. However, Counsel's statements are not sufficient to overcome our appellate finding.

As noted, the Petitioner must establish that the Beneficiary satisfied all of the educational, training, experience and any other requirements of the offered position by the priority date. 8 C.F.R. §103.2(b)(l), (12). *See Matter of Wing's Tea House*, 16 I&N at 158; *see also Matter of Katigbak,* 14 I&N Dec. at 49. We must examine the language of the labor certification in order to determine what is required for a candidate to be found qualified for the position. In this case, in addition to the

bachelor's degree in elementary education discussed above, the labor certification also requires candidates to possess 60 months of experience in the offered job of "elementary school teacher 1st grade." Counsel asserts that the Beneficiary's experience teaching in the Philippines prior to August 2007 should be considered because it included work teaching kindergarten, which is in the field of elementary education. Counsel notes that the Petitioner's recruitment advertisements allowed candidates to qualify for the job with experience in the field of elementary education, which is broader than the experience in the offered job of "Elementary School Teacher 1st Grade" specifically required by the Petitioner on the labor certification.

Contrary to counsel's assertions, however, the employment affidavits from the Beneficiary's employers in the Philippines specifically state that the Beneficiary was employed as a "preschool teacher" and not as an elementary school teacher. Moreover, on her own resume, the Beneficiary refers to her work with these preschools as "preschool teaching . . . Toddler's Exploration Teacher . . . planning for the toddler's level . . . Toddler Teacher . . . toddler's class (2-year-olds) . . . Facilitated the pre-nursery Level (3 year old) children," and the Beneficiary makes no references to teaching kindergarten or other elementary classes. Therefore, even if we were to accept Counsel's assertion that the Petitioner sought to allow candidates to qualify for the offered job with experience teaching elementary school generally, not only teaching first grade as specified on the labor certification, the Beneficiary would still not satisfy the requirements of the job offer because the Petitioner has not established that the Beneficiary has the required experience in the job offered or in the broader field of elementary education.

III. CONCLUSION

The Petitioner has not established its ability to pay the proffered wage from the priority date onward. The Petitioner has also not established that the Beneficiary possesses the education or work experience required by the labor certification. Accordingly, the Petitioner has not established the Beneficiary's eligibility for the immigration benefit sought.

ORDER: The motion to reopen is denied.

Cite as *Matter of D-Y-H-O-*, ID# 505864 (AAO July 20, 2017)