U.S. Citizenship and Immigration Services

Non-Precedent Decision of the Administrative Appeals Office

MATTER OF S-C- INC.

DATE: JULY 30, 2019

APPEAL OF NEBRASKA SERVICE CENTER DECISION

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

The Petitioner, a provider of software and services for the oil and gas industry, seeks to employ the Beneficiary as a geomechanics and stimulation specialist. It requests his classification under the third-preference immigrant category as a professional. Immigration and Nationality Act (the Act) section 203(b)(3)(A)(ii), 8 U.S.C. § 1153(b)(3)(A)(ii). This employment-based, "EB-3" category allows a U.S. business to sponsor a foreign national for lawful permanent resident status to work in a job requiring at least a bachelor's degree.

The Director of the Nebraska Service Center denied the petition. The Director concluded that the Petitioner did not demonstrate its required ability to pay the position's proffered wage.

On appeal, the Petitioner submits additional evidence. It argues that the record demonstrates its ability to pay the proffered wage based primarily on expected financial support from its parent company.

Upon *de novo* review, we will withdraw the Director's decision and remand the matter for entry of a new decision consistent with the following analysis.

I. EMPLOYMENT-BASED IMMIGRATION

Immigration as a professional 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, and 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 the 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.

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). Evidence of ability to pay must generally include copies of annual reports, federal tax returns, or audited financial statements. *Id.*

Here, the accompanying labor certification states the proffered wage of the offered position of geomechanics and stimulation specialist as $135,658 a year. The petition's priority date is February 26, 2018, the date DOL accepted the labor certification application for processing. *See* 8 C.F.R. § 204.5(d) (explaining how to determine a petition's priority date).

As evidence of its ability to pay the proffered wage, the Petitioner initially submitted a letter from its chief financial officer (CFO). A statement from a financial officer may demonstrate ability to pay if a petitioner employs at least 100 people. 8 C.F.R. § 204.5(g)(2). The letter from the Petitioner's CFO, however, indicates that the company employs only 70 people. The Director therefore properly issued a written request for additional evidence (RFE).

As of the RFE's issuance in October 2018, required evidence of the Petitioner's ability to pay the proffered wage in 2018, the year of the petition's priority date, was not yet available. The Petitioner therefore submitted a copy of a 2017 federal income tax return, which the Director used in determining the company's ability to pay. Following the pendency of this appeal, however, the Petitioner should be able to provide a requisite annual report, federal tax return, or audited financial statement for 2018. We will therefore remand the matter.

Also, the 2017 tax return submitted by the Petitioner bears the name of its parent company and contains consolidated financial information of the parent, the Petitioner, and another subsidiary. Other entities or individuals, however, generally cannot demonstrate a petitioner's ability to pay a proffered wage. A petition must include "evidence that *the prospective United States employer* has the ability to pay the proffered wage." 8 C.F.R. § 204.5(g)(2) (emphasis added). This petition and its accompanying labor certification identify the Petitioner as the Beneficiary's prospective U.S. employer. Thus, unless the Petitioner submits its own federal tax return for 2018, or the tax return of the Petitioner's parent distinguishes the Petitioner's finances from those of the parent and the other subsidiary, the Petitioner may need to submit required evidence in a form other than a tax return. *See Sitar Rest. v. Ashcroft*, No. 02-30197-MAP, 2003 WL 22203713, *2 (D. Mass. Sept. 18, 2003) (holding "that nothing in the governing regulation, 8 C.F.R. § 204.5, permits the [immigration service] to consider the financial resources of individuals or entities who have no legal obligation to pay the wage").

In addition, USCIS records indicate the Petitioner's filing of immigrant petitions for other beneficiaries. A petitioner must demonstrate its ability to pay the proffered wage of each petition it files until a beneficiary obtains lawful permanent residence. 8 C.F.R. § 204.5(g)(2). The Petitioner here must therefore demonstrate its ability to pay the combined proffered wages of this petition and any others that were pending or approved as of this petition's priority date of February 26, 2018, or filed thereafter. *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 wage of multiple petitions).[1]

USCIS records indicate the Petitioner's filing of at least five immigrant petitions for other beneficiaries that were pending or approved as of February 26, 2018.[2] Thus, on remand, the Director should ask the Petitioner to provide the proffered wages and priority dates of its other petitions. The Petitioner may also submit additional evidence of its ability to pay the combined proffered wages, such as proof of payments to applicable beneficiaries in 2018 and materials supporting the factors stated in *Matter of Sonegawa*, 12 I&N Dec. 612 (Reg'l Comm'r 1967). In addition, as previously indicated, the Petitioner must submit required evidence of its ability to pay in 2018.

III. THE REQUIRED EXPERIENCE

Although unaddressed by the Director, the record also does not establish the Beneficiary's possession of the experience required for the offered position. A petitioner must establish that a Beneficiary meets all DOL-certified job requirements of an offered position by a petition's priority date. *Matter of Wing's Tea House*, 16 I&N Dec. 158, 160 (Acting Reg'l Comm'r 1977). In evaluating a beneficiary's qualifications, USCIS must examine the job-offer portion of an accompanying labor certification. USCIS may neither ignore a certification term, nor impose additional requirements. *See, e.g., Madany v. Smith*, 696 F.2d 1008, 1015 (D.C. Cir. 1983) (holding that "DOL bears the authority for setting the *content* of the labor certification") (emphasis in original).

Here, the labor certification states the minimum requirements of the offered position of geomechanics and stimulation specialist as a bachelor's degree in petroleum engineering, electrical engineering, or mechanical engineering, plus two years of experience. Part H.14 of the labor certification, "Specific skills and other requirements," specifies that the required experience must include at least: two years of "field experience as a hydraulic fracturing engineer"; two years' experience with "fracture modeling and stress profiling using Fracpro PT or similar programs"; two years' experience using "Python, with fracture mechanics and fracture Theory, fracturing fluid systems and necessary laboratory testing requirements" and one year's experience "using CMG, Petrel or similar programs."

The Beneficiary's educational qualifications are not at issue. On the labor certification, he attested that, by the petition's priority date and before joining the Petitioner in the offered position, he gained more than two years of full-time qualifying experience. He stated that a U.S. oilfield services company employed him as a field engineer from March 2012 to November 2014.

---

[1] The Petitioner need not demonstrate its ability to pay proffered wages of petitions that it withdrew or, unless pending on appeal, that USCIS denied, revoked, or rejected. The Petitioner also need not demonstrate its ability to pay proffered wages before the priority dates of corresponding petitions, or after corresponding beneficiaries obtained lawful permanent residence.

[2] USCIS records identify the other petitions by the following receipt numbers: [redacted], [redacted], [redacted], [redacted] and [redacted].

Pursuant to 8 C.F.R. § 204.5(l)(3)(ii)(A), the Petitioner submitted a letter from the Beneficiary's former employer in support of the Beneficiary's claimed, qualifying experience. Consistent with the information on the labor certification, the letter states that the company employed the Beneficiary full-time as a field engineer from March 2012 to November 2014 and describes his duties and skills. Contrary to Part H. 14 of the labor certification, however, the letter does not state that the Beneficiary gained two years of experience with Python, or, for at least one year, used CMG, Petrel or other similar programs. In a letter accompanying the petition, the Petitioner's human resources manager asserted that the Beneficiary meets all of the offered position's requirements. The Petitioner, however, has not demonstrated that its human resources manager has personal knowledge of the Beneficiary's experience from March 2012 to November 2014. The record therefore does not establish the Beneficiary's possession of the minimum experience required for the offered position by the petition's priority date.

The Director did not notify the Petitioner of this evidentiary deficiency. Therefore, on remand, the Director should ask the Petitioner for additional evidence that, by February 26, 2018, the Beneficiary met the specific experience requirements stated in part H.14 of the labor certification. The Director should also provide the Petitioner with a reasonable opportunity to respond to this and the other issues raised on remand. Upon receipt of a timely response, the Director should review the entire record and enter a new decision.

IV. CONCLUSION

The record lacks required evidence of the Petitioner's ability to pay the proffered wage in 2018, the year of the petition's priority date. The record also lacks proffered wages and priority dates of immigrant petitions the company filed for other beneficiaries that were pending or approved as of this petition's priority date. In addition, the Petitioner has not demonstrated the Beneficiary's possession, by the petition's priority date, of the minimum experience required for the offered position.

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

Cite as *Matter of S-C- Inc.*, ID# 5107916 (AAO July 30, 2019)