U.S. Citizenship and Immigration Services

Non-Precedent Decision of the Administrative Appeals Office

MATTER OF S- CORP.

DATE: JUNE 30, 2017

APPEAL OF TEXAS SERVICE CENTER DECISION

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

The Petitioner, a provider of information technology services, seeks to employ the Beneficiary as a software engineer. It requests his classification as a member of the professions holding an advanced degree under the second preference, immigrant category. *See* Immigration and Nationality Act (the Act) section 203(b)(2)(A), 8 U.S.C. § 1153(b)(2)(A). This employment-based, "EB-2" category allows U.S. businesses to sponsor foreign nationals for lawful permanent resident status if they have master's degrees, or bachelor's degrees followed by five years of experience.

The Director of the Texas Service Center denied the petition, concluding that the record did not establish the Petitioner's required ability to pay the proffered wage. The Director found that the Petitioner could not pay the combined proffered wages of this and its other petitions that remained pending or approved in 2015.

On appeal, the Petitioner submits evidence that it withdrew two approved petitions and asserts its ability to pay the combined proffered wages of this and the remaining petitions.

Upon *de novo* review, we will withdraw the Director's decision and remand the matter for further consideration consistent with the following opinion.

I. LAW

Employment-based immigration generally follows a three-step process. First, an employer files a labor certification application with 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). The DOL must certify that the United States lacks able, willing, qualified, and available workers for an offered position, and that employment of a foreign national will not hurt the wages and working conditions of U.S. workers with similar jobs. *Id.* If the DOL approves the labor certification application, the employer then files an immigrant visa petition with U.S. Citizenship and Immigration Services (USCIS). *See* section 204 of the Act, 8 U.S.C. § 1154. Finally, if USCIS approves a 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.

A petitioner must demonstrate its continuing ability to pay a proffered wage, from a petition's priority date until a beneficiary obtains lawful permanent residence.[1] 8 C.F.R. § 204.5(g)(2). Evidence of ability to pay must include copies of annual reports, federal income tax returns, or audited financial statements. *Id.*

II. ANALYSIS

A. The Petitioner's Ability to Pay the Proffered Wage

In this case, the labor certification states the proffered wage of the offered position of software engineer as $95,077 a year. The petition's priority date is January 13, 2015. As of the appeal's filing, required evidence of the Petitioner's ability to pay the proffered wage in 2016 was not yet available. We will therefore consider the Petitioner's ability to pay only in 2015, the year of the petition's priority date.

In determining ability to pay, we first examine 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, we next examine whether it generated annual amounts of net income or net current assets sufficient to pay the difference between a proffered wage and any wages paid. If net income and net current assets are insufficient, we may consider other factors affecting a petitioner's ability to pay. *See Matter of Sonegawa,* 12 I&N Dec. 612, 614-15 (Reg'l Comm'r 1967).[2]

The Petitioner submitted a copy of an IRS Form W-2, Wage and Tax Statement, indicating that it paid the Beneficiary wages of $104,205.30 in 2015. This amount exceeds the annual proffered wage of $95,077. Therefore, contrary to the Director's decision, the record establishes the Petitioner's ability to pay the proffered wage in 2015.

The Director required the Petitioner to demonstrate its ability to pay the combined proffered wages of this and its other petitions that remained pending or approved in 2015, after this petition's priority date of January 13. As previously indicated, petitioners must demonstrate their abilities to pay from the priority dates of each petition they file until the beneficiaries became lawful permanent residents. 8 C.F.R. § 204.5(g)(2). Thus, petitioners sometimes must demonstrate their abilities to pay combined proffered wages of multiple petitions that remain pending or approved beyond a priority date. *See Patel v. Johnson*, 2 F. Supp. 3d 108, 124 (D. Mass. 2014) (affirming our revocation of a petition where, as of its approval, a petitioner did not demonstrate its ability to pay multiple beneficiaries). However, if a petitioner paid a beneficiary in a given year at least the proffered wage, we do not require it to demonstrate its ability to pay combined proffered wages of other petitions in

[1] In this case, the petition's priority date is the date the DOL received the accompanying labor certification application for processing. *See* 8 C.F.R. § 204.5(d).

[2] Federal courts have upheld our 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); *Rivzi v. Dep't of Homeland Sec.*, 37 F. Supp. 3d 870, 883-84 (S.D. Tex. 2014), *aff'd*, 627 Fed. App'x 292 (5th Cir. 2015).

that same year. Thus, having paid the Beneficiary here more than the proffered wage in 2015, the Petitioner need not establish its ability to pay multiple beneficiaries that same year.

As of 2015, the record establishes the Petitioner's continuing ability to pay the proffered wage from the petition's priority date onward. We will therefore withdraw the Director's decision.

B. The Beneficiary's Possession of a Master's Degree in a Required Field of Study

Although the Petitioner demonstrated its ability to pay the proffered wage in 2015, the petition is not approvable. The record does not establish the Beneficiary's possession of a master's degree in a field of study required for the offered position.

A petitioner must establish a beneficiary's possession of all the job requirements specified on a labor certification by a petition's priority date. *See, e.g., Matter of Wing's Tea House,* 16 I&N Dec. 158, 160 (Acting Reg'l Comm'r 1977). In evaluating a beneficiary's qualifications, we must examine the job offer portion of a labor certification to determine the minimum requirements of an offered position. We may neither ignore a term of a labor certification, nor impose additional requirements. *See, e.g., Madany* v. *Smith,* 696 F.2d 1008, 1012-13 (D.C. Cir. 1983).

Here, the labor certification states the minimum requirements of the offered position of software engineer as a U.S. master's degree, or a foreign equivalent degree, in computer science, engineering, "math[ematics]," or business administration. The labor certification does not state the Petitioner's acceptance of other related fields of study.

A copy of the Beneficiary's Indian diploma indicates his receipt of a master's degree in "computer applications." The Petitioner submitted an independent evaluation of the Beneficiary's three-year, foreign degree, stating its equivalence to a U.S. master's degree in computer science. But the evaluation does not compare the Beneficiary's graduate coursework in India to curricula of U.S. master's programs in computer science. The evaluation therefore does not sufficiently explain why the foreign degree's field of computer applications equates to the required field of computer science, rather than to other related fields like computer information systems (CIS) or management information systems (MIS). *See Matter of Caron Int'l, Inc.*, 19 I&N Dec. 791, 795 (Comm'r 1988) (allowing us to reject or discount an education evaluation that "is in any way questionable").

Because the record does not establish the Beneficiary's possession of a master's degree in a required field of study, we will remand this matter to the Director for further consideration. On remand, the Director should notify the Petitioner of this defect and afford it a reasonable opportunity to respond.

Considering the amount of time the case spent on appeal, the Director may also request required evidence of the Petitioner's ability to pay the proffered wage in 2016. The Director should also allow the Petitioner to submit other evidence of its ability to pay that year, including materials bearing on the factors stated in *Sonegawa.* Upon receipt of any timely response from the Petitioner, the Director should review the entire record and enter a new decision.

III. CONCLUSION

Contrary to the Director's decision, the Petitioner demonstrated its ability to pay the proffered wage in 2015. The record, however, does not establish the Beneficiary's possession of a master's degree in a field of study required for the offered position.

ORDER: The decision of the Director is withdrawn. The matter is remanded for further proceedings consistent with the foregoing opinion and for the entry of a new decision.

Cite as *Matter of S- Corp.*, ID# 454665 (AAO June 30, 2017)