U.S. Citizenship and Immigration Services

Non-Precedent Decision of the Administrative Appeals Office

In Re: 32413287

Date: MAR. 12, 2024

Appeal of Nebraska Service Center Decision

Form I-140, Immigrant Petition for Alien Workers (Other Worker)

The Petitioner operates a restaurant and seeks to employ the Beneficiary as a chef specializing in Italian cuisine. The company seeks his classification under the employment-based, third-preference (EB-3) immigrant visa category as a "skilled worker." Immigration and Nationality Act (the Act) section 203(b)(3)(A)(i), 8 U.S.C. § 1153(b)(3)(A)(i). U.S. businesses may sponsor noncitizens in this category to permanently work in jobs requiring at least two years of training or experience. *Id.*

The Director of the Nebraska Service Center denied the petition, concluding that the Petitioner did not demonstrate its required ability to pay the offered job's proffered wage. While the company's appeal was pending before us, the Director approved a second petition by the Petitioner for the Beneficiary in the same job, relying on the same labor certification, and for the same requested immigrant visa category. Finding that the second petition's approval deprived the pending appeal of practical significance, we dismissed the appeal as moot. *See In Re: 06267218* (AAO Dec. 30, 2019). After review, we reopened this matter on our own motion. *See* 8 C.F.R. § 103.5(a)(5).

The Petitioner bears the burden of demonstrating eligibility for the requested benefit by a preponderance of the evidence. *Matter of Chawathe*, 25 I&N Dec. 369, 375-76 (AAO 2010). Exercising de novo appellate review, *see Matter of Christo's, Inc.*, 26 I&N Dec. 537, 537 n.2 (AAO 2015), we conclude that the Petitioner should have more recent evidence of its continuing ability to pay the proffered wage, which was unavailable at the time of filing. We will therefore withdraw the Director's decision and remand the matter for entry of a new decision consistent with the following analysis.

I. LAW

Immigration as a skilled worker generally follows a three-step process. First, a prospective employer must obtain certification from the U.S. Department of Labor (DOL) that: there are insufficient U.S. workers able, willing, qualified, and available for an offered job; and a noncitizen's permanent employment in the job would not harm wages and working conditions of U.S. workers with similar jobs. Section 212(a)(5)(A)(i) of the Act, 8 U.S.C. § 1182(a)(5)(A)(i).

Second, an employer must submit an approved labor certification with an immigrant visa petition to U.S. Citizenship and Immigration Services (USCIS). Section 204(a)(1)(F) of the Act, 8 U.S.C. § 1154(a)(1)(F). Among other things, USCIS determines whether a noncitizen beneficiary meets the requirements of a DOL-certified position and a requested immigrant visa category. 8 C.F.R. § 204.5(l)(3)(ii)(D), (4).

Finally, if USCIS approves a petition, a beneficiary may apply for an immigrant visa abroad or, if eligible, adjustment of status in the United States. *See* section 245(a) of the Act.

II. ANALYSIS

A. Ability to Pay the Proffered Wage

A petitioner must demonstrate its continuing ability to pay an offered job's proffered wage, from a petition's priority date until a beneficiary obtains permanent residence. 8 C.F.R. § 204.5(g)(2). Initial evidence of ability to pay must generally include copies of an annual report, federal tax return, or audited financial statements for each available year, from the year of the priority date onward. *Id.; see generally* 6 *USCIS Policy Manual* E.(4)(A), www.uscis.gov/policy-manual.

When determining ability to pay, USCIS examines whether a petitioner paid a beneficiary the full proffered wage, beginning with the year of a petition's priority date. *See generally* 6 *USCIS Policy Manual* E.(4)(C)(1). If a petitioner did not pay a beneficiary the full proffered wage or did not pay a beneficiary at all during the relevant period, USCIS considers whether the business generated annual amounts of net income or net current assets sufficient to pay any differences between the proffered wage and the wages paid. *See generally* 6 *USCIS Policy Manual* E.(4)(C)(2). If net income and net current assets are insufficient, the Agency may consider other factors potentially 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).[1]

The Petitioner's labor certification states the proffered wage of the offered position of chef, Italian cuisine as $48,901 a year. The petition's priority date is July 21, 2017, 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).

The Petitioner did not claim or submit evidence that it has employed the Beneficiary. Thus, based solely on wages paid, the company has not demonstrated its ability to pay the proffered wage.

The record contains a copy of the Petitioner's federal income tax return for 2017, the year of the petition's priority date. The 2017 tax return reflects net income of $999,234 and net current assets of

[1] Federal courts have upheld USCIS' method of determining a petitioner's ability to pay a proffered wage. *See, e.g., River St. Donuts, Inc. v. Napolitano*, 558 F.3d 111, 118 (1st Cir. 2009); *Just Bagels Mfg., Inc. v. Mayorkas*, 900 F. Supp. 2d 363, 373-76 (S.D.N.Y. 2012).

-$168,885.[2] The net income amount exceeds the annual proffered wage of $48,901. Thus, based on net income, the company has demonstrated its ability to pay the proffered wage in 2017.

At the time of the appeal's filing in August 2018, initial required evidence of the Petitioner's ability to pay in 2018 was not yet available. Thus, the record lacks evidence of the company's ability to pay the proffered wage beyond 2017.

As previously indicated, a petitioner must demonstrate its ability to pay a proffered wage "at time the priority date is established *and continuing until the beneficiary obtains lawful permanent residence.*" 8 C.F.R. § 204.5(g)(2) (emphasis added). Because the Petitioner must establish its *continuing* ability to pay and initial required evidence of its ability to pay beyond 2017 should now be available, we will remand the matter.

On remand, the Director should ask the Petitioner to submit copies of its annual reports, federal tax returns, or audited financial statements for 2018 and for additional years it determines relevant. The company may also submit additional evidence of its ability to pay during the period, including proof of its employment of the Beneficiary or materials supporting factors stated in *Sonegawa*.

B. Intent to Employ Full-Time in the Offered Job

Although unaddressed by the Director, the Petitioner also has not demonstrated its intent to employ the Beneficiary full-time in the offered job.

A business may file an immigrant visa petition if it is "desiring and intending to employ [a noncitizen] within the United States." Section 204(a)(1)(F) of the Act. A petitioner must generally intend to employ a beneficiary under the terms and conditions of an accompanying labor certification. *See Matter of Izdebska*, 12 I&N Dec. 53, 54 (Reg'l Comm'r 1966) (affirming a petition's denial where, contrary to the terms of accompanying labor certification, the petitioner did not intend to employ the beneficiary as a domestic worker on a full-time, live-in basis).

In the petition and on the accompanying labor certification, the Petitioner stated its intent to permanently employ the Beneficiary full-time as a chef specializing in Italian cuisine. The job's duties involve preparing, seasoning, and cooking Italian specialty meals.

The Petitioner's website, however, contains menus - both for its restaurant and catering services – that do not primarily include Italian meals. The menus also omit "Pasta Bolognese, Sea Scallop Risotto, [and] Wood Oven Roasted Branzino," as specifically mentioned in the job's duties on the labor certification.[3] The record therefore does not establish the company's intent to employ the Beneficiary full-time in the offered job.

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[2] The Petitioner, a limited liability company (LLC), filed its 2017 federal income tax return on IRS Form 1065, U.S. Return of Partnership Income. Schedule K of Form 1065 lists all members' shares of the LLC's income, credits, deductions, etc. U.S. Internal Revenue Serv. (IRS), "Instructions for Form 1065," 31, www.irs.gov/pub/irs-pdf/i1065.pdf. USCIS therefore considers "Analysis of Net Income" on the Petitioner's 2017 Schedule K to most accurately reflect the company's net income amount that year.

[3] In relevant part, the labor certification describes the job's duties as "participat[ing] in the preparation, seasoning, and

On remand, the Director should ask the Petitioner to submit additional evidence of its purported intent to employ the Beneficiary in the offered job. The company must explain why its menus do not reflect its claimed need for a full-time chef specializing in Italian cuisine. *See Matter of Ho*, 19 I&N Dec. 582, 591 (BIA 1988) (requiring a petitioner to resolve inconsistencies with independent, objective evidence pointing to where the truth lies).

C. The Required Experience

The record also does not establish the Beneficiary's qualifying experience for the offered job.

A petitioner must demonstrate a beneficiary's possession of all DOL-certified requirements of an offered job by a petition's priority date. *Matter of Wing's Tea House*, 16 I&N Dec. 158, 160 (Acting Reg'l Comm'r 1977). When assessing a beneficiary's qualifications, USCIS must examine the job-offer portion of an accompanying labor certification to determine the job's minimum requirements. The Agency may neither ignore a certification term nor impose an unstated requirement. *See, e.g., Madany v. Smith*, 696 F.2d 1008, 1015 (D.C. Cir. 1983) (holding that "DOL bears the authority of setting the *content* of the labor certification") (emphasis in original).

The Petitioner's labor certification states the minimum requirements of the offered job of chef, Italian cuisine as two years of experience "in the job offered." The labor certification states that the Petitioner will not accept experience in an alternate occupation. Also, the certification indicates that the job requires neither training nor experience.

On a labor certification application, experience "in the job offered" means "experience performing the key duties of the job opportunity, specifically those listed in Question H.11 [of the application]." *Matter of Symbioun Techs., Inc.*, 2010-PER-01422, *4 (BALCA Oct. 24, 2011) (citations omitted). In Question H.11 of the Petitioner's application, the company listed the following duties of the offered job:

> Direct, coordinate activities of cooks and participate in the preparation, seasoning, and cooking of Italian specialty meals, such as Pasta Bolognese, Sea Scallop Risotto, Wood Oven Roasted Branzino, salads, soups, fish, meats, vegetables, desserts, or other foods. Plan and price menu items. Estimate amounts and costs of required supplies. Order supplies. Keep records and accounts.

On the application, the Beneficiary attested that, by the petition's July 21, 2017 priority date, he gained more than eight years of full-time qualifying experience. He stated that he worked as a chef, Italian cuisine for a restaurant in Italy from February 2000 to October 2008.

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cooking of Italian specialty meals, such as Pasta Bolognese, Sea Scallop Risotto, Wood Oven Roasted Branzino, salads, soups, fish, meats, vegetables, desserts, or other foods." Where, as here, a list of two or more specific descriptors are followed by more general descriptors, the otherwise wide meaning of the general descriptors must be restricted to the same class of the specific words that precede them. *See, e.g., Matter of A-C-M-*, 27 I&N Dec. 303, 311 (BIA 2018) (discussing the doctrine of ejusdem generis). Thus, as specified at the beginning of the job duties' list, we consider the offered job to involve Italian specialty meals.

Consistent with 8 C.F.R. § 204.5(l)(3)(ii)(A) and in response to the Director's request for additional evidence, the Petitioner submitted a letter from the Beneficiary's former employer. The letter describes the Beneficiary's experience as follows:

> [The Beneficiary] directed and coordinated activities of cooks and participated in the preparation, seasoning, and cooking of Italian specialty meals, soups, meats, pasta, fish, vegetables and desserts and other foods. He prepared menu and priced menu items. The employee estimated amounts and costs of required supplies, ordered supplies and he checked all purchased supplies for quality. [The Beneficiary] also kept records and accounts.

The letter from the Beneficiary's former employer indicates the Beneficiary's performance of almost all the offered job's duties listed in Question H.11 of the labor certification. But, contrary to the duties on the application, the letter does not state the Beneficiary's participation in the preparation, seasoning, and cooking of "Pasta Bolognese, Sea Scallop Risotto, [or] Wood Oven Roasted Branzino" as the certification specifically requires. Thus, the Petitioner has not demonstrated the Beneficiary's qualifying experience "in the job offered."

On remand, the Director should inform the Petitioner of this evidentiary defect and request additional evidence that, by the petition's priority date, the Beneficiary gained at least two years of full-time experience performing the job duties stated on the labor certification.

If supported by the record, the Director may notify the Petitioner of any other potential denial grounds. The Director, however, must afford the company a reasonable opportunity to respond to all issues raised on remand. Upon receipt of a timely response, the Director should review the entire record and enter a new decision.

III. CONCLUSION

The record lacks updated evidence of the Petitioner's continuing ability to pay the offered job's proffered wage. The company also has not demonstrated its intent to employ the Beneficiary in the offered job or his qualifying experience for the job.

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