U.S. Citizenship and Immigration Services

Non-Precedent Decision of the Administrative Appeals Office

In Re: 8654274

Date: MAR. 20, 2020

Appeal of Texas Service Center Decision

Form I-140, Immigrant Petition for Professional

The Petitioner seeks to employ the Beneficiary as an international marketing associate. It requests classification of the Beneficiary as a professional under the third preference immigrant classification. Immigration and Nationality Act (the Act), section 203(b)(3)(A)(ii), 8 U.S.C. § 1153(b)(3)(A)(ii). This employment-based immigrant classification allows a U.S. employer to sponsor a professional with a baccalaureate degree for lawful permanent resident status.

The Director of the Texas Service Center denied the petition, concluding that the record did not establish that the Petitioner had the continuing ability to pay the proffered wage.

In these proceedings, it is the Petitioner's burden to establish eligibility for the requested benefit. Section 291 of the Act, 8 U.S.C. § 1361. Upon *de novo* review, we will remand the matter to the Director for further consideration and entry of a new decision.

I. THE EMPLOYMENT-BASED IMMIGRATION PROCESS

Employment-based immigration generally follows a three-step process. First, an employer obtains an approved labor certification from the U.S. Department of Labor (DOL).[1] *See* section 212(a)(5)(A)(i) of the Act, 8 U.S.C. § 1182(a)(5)(A)(i). By approving the labor certification, the 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 domestic 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 applies 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.

[1] The priority date of a petition is the date the DOL accepted the labor certification for processing, which in this case is October 4, 2017. *See* 8 C.F.R. § 204.5(d).

II. ABILITY TO PAY THE PROFFERED WAGE

The Director determined that the Petitioner did not establish its continuing ability to pay the proffered wage. The proffered wage is $174,000 per year.

The regulation at 8 C.F.R. § 204.5(g)(2) requires a petitioner to establish its continuing ability to pay the proffered wage from the priority date until the beneficiary obtains lawful permanent residence. In determining a petitioner's ability to pay, we first examine whether it paid a beneficiary the full proffered wage each year from a petition's priority date. If a petitioner did not pay a beneficiary the full proffered wage, we next examine whether it had sufficient annual amounts of net income or net current assets to pay the difference between the proffered wage and the wages paid, if any. If a petitioner's net income or net current assets are insufficient, we may also consider other evidence of its ability to pay the proffered wage.[2]

The record indicates that the Petitioner is a professional limited liability company (LLC) taxed as an S corporation. The record does not demonstrate that the Petitioner has paid the Beneficiary any wages from the priority date onward. The Petitioner's federal tax return states net income[3] of $228,561. Therefore, for the year 2017, the Petitioner had sufficient net income to pay the proffered wage.[4] We will therefore withdraw the Director's decision. However, for the reasons discussed below, we will remand the matter to the Director.

III. BENEFICIARY'S QUALIFICATIONS

A beneficiary must meet all of the requirements of the offered position set forth on the labor certification by the priority date of the petition. 8 C.F.R. § 103.2(b)(1), (12); *Matter of Wing's Tea House*, 16 I&N Dec. 158, 159 (Acting Reg'l Comm'r 1977).

Section H of the labor certification states that the offered position of international marketing associate requires a bachelor's degree in marketing/management and 60 months of experience in the job offered. Experience in an alternate occupation is not acceptable. Further, part H.14. of the labor certification requires the following special skills: ability to adapt to a wide variety of environments and cultures; strong understanding of sales and marketing in the global environment; strong leadership skills, communication skills, and analytical skills; fluent in Urdu and English; and must be able to travel overseas.

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[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); *Tongatapu Woodcraft Haw., Ltd. v. Feldman*, 736 F.2d 1305, 1309 (9th Cir. 1984); *Estrada-Hernandez v. Holder*, -- F. Supp. 3d --, 2015 WL 3634497, *5 (S.D. Cal. 2015); *Rizvi v. Dep't of Homeland Sec.*, 37 F. Supp. 3d 870, 883-84 (S.D. Tex. 2014), *aff'd*, 627 Fed. App'x 292, 294-295 (5th Cir. 2015).

[3] Where an LLC taxed as an S corporation's income is exclusively from a trade or business, USCIS considers net income to be the figure for ordinary income, shown on line 21 of page 1 of a petitioner's IRS Form 1120S, U.S. Income Tax Return for an S Corporation. However, where an S corporation has income, credits, deductions, or other adjustments from sources other than a trade or business, net income is found on line 18 of Schedule K to Form 1120S. *See* Internal Revenue Serv., Instructions to Form 1120S, 22, at https://www.irs.gov/pub/irs-pdf/i1120s.pdf (last visited Mar. 16, 2020). In this case, the Petitioner's net income is found on line 21 of page 1 of its Form 1120S. The Director erred in his determination of the Petitioner's net income in 2017.

[4] In any future proceedings, the Petitioner must establish its continuing ability to pay the proffered wage from the priority date onward.

The labor certification states that the Beneficiary worked part-time (25 hours per week) as visiting faculty at an educational institution in Pakistan from January 1, 2015, to October 4, 2017; as the full-time (40 hours per week) director of marketing at the [redacted] in Pakistan from September 1, 2011, to January 4, 2016; and as the full-time (40 hours per week) director of operations at "[redacted]" in Pakistan from September 1, 2011, to October 4, 2017. Thus, the labor certification indicates that the Beneficiary worked a total of 80 hours per week from September 1, 2011, to December 31, 2014; a total of 105 hours per week from January 1, 2015, to January 4, 2016; and a total of 65 hours per week from January 5, 2016, to October 4, 2017. The Petitioner must resolve incongruities in the record with independent, objective evidence pointing to where the truth lies. *Matter of Ho*, 19 I&N Dec. 582, 591-92 (BIA 1988). Doubt cast on any aspect of the Petitioner's proof may undermine the reliability and sufficiency of the remaining evidence offered in support of the visa petition. *Id.*

Evidence relating to qualifying experience must be in the form of a letter from a current or former employer and must include the name, address, and title of the writer, and a specific description of the duties performed by the beneficiary. *See* 8 C.F.R. § 204.5(l)(3). The Petitioner's initial submission did not contain any regulatory-required evidence of the Beneficiary's experience. In a request for evidence (RFE), the Director asked the Petitioner to submit evidence of the Beneficiary's experience and to explain the Beneficiary's three overlapping positions. In response, the Petitioner submitted a letter dated February 12, 2016, from the Director of Human Resources at the [redacted] stating that the Beneficiary worked as Director of Marketing and Public Relations from September 20, 2011, to January 16, 2016.[5] It did not indicate whether he worked full- or part-time. Even if the Petitioner established that the Beneficiary worked full-time for [redacted] from September 20, 2011, to January 16, 2016, he gained approximately four years and four months of qualifying experience there, which is less than the five years of required qualifying experience for the offered job.

The Petitioner also submitted a statement dated November 11, 2018, from the Beneficiary stating that he was the sole owner of [redacted] an event management and advertising agency, since February 2004.[6] He asserted that he ran the company "in the evening time while [he] was working for Different Five Star Hotels" but did not list his job duties as required by 8 C.F.R. § 204.5(l)(3) or indicate whether he worked full-or part-time. The statement does not confirm that he gained any experience in the job offered. Therefore, this employment is not qualifying experience for the offered job.

Further, in response to the RFE, the Petitioner submitted a letter dated November 14, 2018, from the Pakistan [redacted] stating the Beneficiary had worked as faculty and conducted classes since January 2015. It does not indicate whether he worked full-or part-time, and it does not indicate that he worked in the job offered. Therefore, this employment is not qualifying experience for the offered job.

[5] These dates do not match the dates listed on the labor certification.

[6] It also submitted a registration certificate and tax returns for [redacted] These documents do not confirm the Beneficiary's job duties or work schedule.

In response to the RFE, the Petitioner asserted that the Beneficiary worked the jobs simultaneously, including working nights and weekends. However, it did not provide any independent, objective evidence to support this claim. *See Matter of Ho*, 19 I&N Dec. at 591-92. None of the evidence submitted relating to the Beneficiary's experience confirms his work schedule.[7] The Petitioner has not resolved the incongruities in the record regarding the Beneficiary's purported simultaneous employment.

For the reasons discussed above, we cannot affirmatively find that the Beneficiary possessed the minimum five years of experience in the offered job required by the labor certification as of the priority date. We further note that the record contains no evidence that the Beneficiary is fluent in English and is able to "travel overseas"[8] as required by part H.14. of the labor certification. On remand, the Director should request additional evidence of the Beneficiary's qualifications and allow the Petitioner reasonable time to respond.

IV. THE PETITIONER'S STATUS

Beyond the Director's decision, we note that the petitioning entity is not in good standing with the State of Texas. The Texas Office of the Comptroller's online database lists the Petitioner's status as "forfeited." Texas Comptroller of Public Accounts, https://mycpa.cpa.state.tx.us/coa/search.do (last visited Mar. 16, 2020). Further, the Petitioner is a law firm whose sole attorney/member was disbarred in July 2019 in the State of Texas. State Bar of Texas, https://www.texasbar.com/AM/Template.cfm?Section=Find_A_Lawyer&template=/Customsource/MemberDirectory/MemberDirectoryDetail.cfm&ContactID=[redacted] (last visited Mar. 16, 2020). This information indicates that the Petitioner is not authorized to do business in Texas and calls into question the Petitioner's intent to do business in the future. On remand, the Director should request additional evidence of the Petitioner's status and intent to do business, and allow the Petitioner reasonable time to respond.

V. CONCLUSION

The Petitioner has established its ability to pay the proffered wage in 2017, the year of the priority date. We will therefore withdraw the Director's decision on this issue. However, the Director's decision did not clarify whether the Beneficiary possessed the experience and special skills required by the labor certification as of the priority date. The Petitioner's status and intent to do business are also not clear. Thus, we will remand the matter to the Director for further consideration.

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

[7] The Petitioner must support its assertions with relevant, probative, and credible evidence. *See Matter of Chawathe*, 25 I&N Dec. 369, 376 (AAO 2010).

[8] The Beneficiary is from Pakistan. A visa would be required for him to enter nearly every country in the world, with no assurance of the visa being granted.