U.S. Citizenship and Immigration Services

Non-Precedent Decision of the Administrative Appeals Office

In Re: 29426701

Date: MAR. 29, 2024

Appeal of Nebraska Service Center Decision

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

The Petitioner, a skilled nursing facility, seeks to permanently employ the Beneficiary as a registered nurse. It requests his classification as a skilled worker under the third preference immigrant classification. *See* Immigration and Nationality Act (the Act) section 203(b)(3)(A)(i), 8 U.S.C. § 1153(b)(3)(A)(i). This category allows prospective U.S. employers to sponsor noncitizens for lawful permanent residence to work in positions requiring at least two years of training or experience.

The Director of the Nebraska Service Center denied the petition, which also sought the position's designation as a professional nurse under Schedule A. The Director concluded the Petitioner did not comply with U.S. Department of Labor (DOL) regulations requiring that a notice of filing be posted at the proposed worksite for at least 10 consecutive business days and that such notice be provided between 30 and 180 days before filing a Schedule A application. The matter is now before us on appeal. 8 C.F.R. § 103.3.

The Petitioner bears the burden of proof to demonstrate eligibility by a preponderance of the evidence. *Matter of Chawathe*, 25 I&N Dec. 369, 375-76 (AAO 2010). We review the questions in this matter de novo. *Matter of Christo's, Inc.*, 26 I&N Dec. 537, 537 n.2 (AAO 2015). 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. LAW

Immigration as a skilled worker typically follows a three-step process. First, to permanently fill a position in the United States with a noncitizen worker, a prospective employer usually must seek DOL certification. *See* section 212(a)(5)(A)(i) of the Act, 8 U.S.C. § 1182(a)(5)(A)(i). If DOL approves a position, an employer next submits the labor certification with an immigrant visa petition to U.S. Citizenship and Immigration Services (USCIS). Section 204 of the Act, 8 U.S.C. § 1154. If USCIS grants a petition, the noncitizen worker may finally apply abroad for an immigrant visa or, if eligible, for adjustment of status in the United States. *See* section 245 of the Act, 8 U.S.C. § 1255.

A Schedule A occupation is an occupation codified at 20 C.F.R. § 656.5(a) for which DOL has determined that there are not sufficient U.S. workers who are able, willing, qualified and available and

that the wages and working conditions of similarly employed U.S. workers will not be adversely affected by the employment of foreign nationals in such occupations. The current list of Schedule A occupations includes professional nurses and physical therapists. *Id.* Petitions for Schedule A occupations do not require a petitioner to test the labor market and obtain a certified labor certification from the DOL prior to filing the petition with USCIS. Instead, the petition is filed directly with USCIS with a duplicate uncertified labor certification, and USCIS makes a determination on both the petition and the accompanying labor certification. *See* 8 C.F.R. § 204.5(a)(2); *see also* 20 C.F.R. § 656.15.

II. NOTICE OF FILING REQUIREMENTS

The sole issue addressed with the Director is whether the Petitioner properly notified its employees of its application for Schedule A designation in compliance with DOL requirements. Specifically, a Schedule A application must include evidence that notice of filing the labor certification application was provided to the bargaining representative, or to the petitioner's employees as prescribed in 20 C.F.R. § 656.10(d). *See* 20 C.F.R. 656.15(b)(2). In adjudicating an immigrant petition involving a Schedule A occupation, USCIS applies DOL's regulations to the application for permanent labor certification to determine whether the employer has met DOL requirements, including all posting requirements for the notice of filing.

When an employer offers a non-unionized position to a noncitizen, it must document that it posted notice of the application's filing to employees at the proposed worksite for at least 10 consecutive business days. 20 C.F.R. § 656.10(d)(l)(ii).[1] The notice must: indicate that the posting stems from the filing of a certification application for the offered position; state that anyone may send documentary evidence about the application to the DOL certifying officer; list the address of the appropriate officer; and be posted between 30 and 180 days before the application's filing. 20 C.F.R. § 656.10(d)(3). A notice of filing in a Schedule A case must also describe the job and rate of pay. 20 C.F.R. § 656.10(d)(6).

The record includes an attestation from the Petitioner's administrator stating that the notice of filing was posted in two locations at the intended worksite from November 21, 2022, until January 5, 2023. Therefore, the record shows that the notice was posted for 45 consecutive business days, as the Petitioner established that it is open for business on weekends and holidays. The Petitioner filed the Form I-140 on January 9, 2023.

After issuing a request for evidence and considering the Petitioner's response, the Director denied the petition, concluding that Petitioner did not comply with the notice of filing requirement at 20 C.F.R. § 656.10(d)(3)(iv), which states that the notice of filing must "be provided between 30 and 180 days before filing the application." The Director determined that "since the last day of the posting was January 5, 2023, proper notice was not provided between 30 and 180 days prior to filing the application."

On appeal, the Petitioner asserts that it complied with 20 C.F.R. § 656.10(d)(1)(ii) by posting the notice of filing for "at least 10 consecutive business days" beginning on November 21, 2022. Further,

[1] If an offered position is unionized, the employer must notify the bargaining representative of its employees who work in the same occupational classification and area of intended employment. 20 C.F.R. § 656.10(d)(1)(i).

it maintains that this 10-day period occurred between 30 and 180 days before filing the application, as required by 20 C.F.R. § 656.10(d)(3)(iv). Specifically, the Petitioner emphasizes that the required 10-day posting period was complete on December 1, 2022, more than 30 days prior to filing, and therefore allowed sufficient time for interested persons to submit documentary evidence bearing on the application to the DOL.

Upon review, we conclude that the Petitioner complied with all requirements for the notice of filing at 20 C.F.R. § 656.10(d). The regulations require a 10 business-day posting period, with the last day of that period occurring at least 30 days prior to the filing of the application. Therefore, the 30 days should be counted beginning from the last day of this 10-day period, regardless of whether the employer removes the notice from the worksite after 10 consecutive business days or leaves it posted for a longer period. Accordingly, we will withdraw the Director's decision.

III. ABILITY TO PAY

Although the Petitioner has overcome the sole grounds for denial the record as presently constituted contains insufficient evidence of its ability to pay the Beneficiary's 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 lawful 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. If a petitioner employs 100 or more workers, a statement from a financial officer of the organization may serve to establish ability to pay the proffered wage. *Id.*

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*, *supra*, at 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. *Id.* 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).[2]

The petition's priority date is January 9, 2023, the date the Petitioner filed the Form I-140 and Schedule A application with USCIS. *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 Petitioner provided copies of its audited financial statements for the years ending December 31, 2020 and 2021. This evidence cannot establish the Petitioner's ability to pay the proffered wage as of the priority date.

[2] 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).

Because the initial required evidence of the Petitioner's ability to pay as of the petition's priority date 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 2023. The company may also submit additional evidence of its ability to pay, including proof of its employment of the Beneficiary since the priority date or materials supporting factors stated in *Sonegawa*. If the Petitioner has filed Form I-140 on behalf of other beneficiaries, the Director should determine whether this case necessitates analysis of the Petitioner's ability to pay multiple beneficiaries and may request additional supporting evidence. *See generally* 6 *USCIS Policy Manual*, *supra*, at 4.D(2).

III. CONCLUSION

Although the Petitioner has demonstrated its compliance with the notice of filing requirements applicable to Schedule A applications, the record lacks required initial evidence of the Petitioner's ability to pay the proffered wage. Accordingly, we will remand the matter to the Director for further review and entry of a new decision.

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