U.S. Citizenship and Immigration Services

Non-Precedent Decision of the Administrative Appeals Office

In Re: 1383889

Date: MAY 3, 2021

Appeal of Texas Service Center Decision

Form I-140, Immigrant Petition for Other Worker

The Petitioner seeks to employ the Beneficiary as a poultry meat cutter. It requests classification of the Beneficiary as an unskilled worker under the third preference immigrant classification. Immigration and Nationality Act (the Act) section 203(b)(3)(A)(iii), 8 U.S.C. § 1153(b)(3)(A)(iii). This employment-based immigrant classification allows a U.S. employer to sponsor a foreign national for lawful permanent resident status to work in a position that requires less than two years of training or experience.

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 withdraw the Director's decision and remand the matter to the Director for the 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) of the Act, 8 U.S.C. § 1182(a)(5). 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 id*. 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 December 6, 2016. *See* 8 C.F.R. § 204.5(d).

II. ANALYSIS

The regulation at 8 C.F.R. § 204.5(g)(2) states, in part:

> *Ability of prospective employer to pay wage.* Any petition filed by or for an employment-based immigrant which requires an offer of employment must be accompanied by evidence that the prospective United States employer has the ability to pay the proffered wage. The petitioner must demonstrate this ability at the time the priority date is established and continuing until the beneficiary obtains lawful permanent residence. Evidence of this ability shall be either in the form of copies of annual reports, federal tax returns, or audited financial statements.

In this case, the proffered wage is $9.60 per hour ($19,968.00 per year based on a 40-hour work week).

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] Further, where a petitioner has filed Form I-140 petitions for multiple beneficiaries, it must demonstrate that its job offer to each beneficiary is realistic, and that it has the ability to pay the proffered wage to each beneficiary. *See* 8 C.F.R. § 204.5(g)(2); *see also Patel v. Johnson*, 2 F. Supp. 3d 108, 124 (D. Mass. 2014) (upholding our denial of a petition where a petitioner did not demonstrate its ability to pay multiple beneficiaries).

The Petitioner in this case has filed multiple Form I-140 petitions for other beneficiaries. Thus, the Petitioner must establish its ability to pay this Beneficiary as well as the beneficiaries of the other Form I-140 petitions that were pending or approved as of, or filed after, the priority date of the current petition.[3] We do not consider the other beneficiaries for any year that the Petitioner has paid the Beneficiary a salary equal to or greater than the proffered wage.

The Petitioner must document the receipt numbers, names of beneficiaries, priority dates, and proffered wages of these other petitions, and indicate the status of each petition and the date of any status change (i.e., pending, approved, withdrawn, revoked, denied, on appeal or motion, beneficiary obtained lawful permanent residence). To offset the total wage burden, the Petitioner may submit documentation showing that it paid wages to other beneficiaries. To demonstrate that it has the ability

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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*, 108 F. Supp. 3d 936, 942-946 (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] The Petitioner's ability to pay the proffered wage of one of the other I-140 beneficiaries is not considered:

- After the other beneficiary obtains lawful permanent residence;
- If an I-140 petition filed on behalf of the other beneficiary has been withdrawn, revoked, or denied without a pending appeal or motion; or
- Before the priority date of the I-140 petition filed on behalf of the other beneficiary.

to pay the Beneficiary and the other beneficiaries, the Petitioner must, for each year at issue (a) calculate any shortfall between the proffered wages and any actual wages paid to the primary Beneficiary and its other beneficiaries, (b) add these amounts together to calculate the total wage deficiency, and (c) demonstrate that its net income or net current assets exceed the total wage deficiency.[4] Without this information, we cannot determine the Petitioner's ability to pay the combined proffered wages of all of its applicable beneficiaries.

The Director issued a request for evidence (RFE) to the Petitioner on August 1, 2017, requesting, in part: "A list of the receipt numbers for all petitions filed by the petitioner for each year as of the priority date, and continuing until the date of this notice, the proffered wage of each beneficiary (including the total amount of the proffered wage), and each beneficiary's priority date." In response to the RFE, the Petitioner provided a list of beneficiaries of Forms I-140 that it had filed between December 6, 2016, and August 1, 2017. The Director denied the petition because the Petitioner failed to provide evidence relating to beneficiaries of Forms I-140 that it had filed prior to December 6, 2016. The Director noted that a complete list of beneficiaries "that have not obtained permanent residency, or whose petitions have been denied, revoked, or withdrawn" is material and must be included in the Petitioner's ability to pay for each subsequent year. The Director cited the regulation at 8 C.F.R. § 103.2(b)(14) and stated that the failure to submit requested evidence that precludes a material line of inquiry shall be grounds for denying the petition.

On appeal, the Petitioner asserts that the RFE was unclear as to the information it was expected to submit, as the RFE requested information regarding "all petitions filed by the petitioner for each year as of the priority date." The Petitioner states that "it was reasonable to surmise that the request for the pending I-140 list would start with the priority date of December 6, 2016." We agree that the RFE was unclear. We will therefore withdraw the Director's decision and remand the matter to the Director. On remand, the Director should request evidence of the Petitioner's ability to pay this Beneficiary as well as the beneficiaries of the other Form I-140 petitions that were pending or approved as of, or filed after, the priority date of the current petition.[5] The Director should allow the Petitioner a reasonable time to respond. The Petitioner may also submit additional materials in support of the factors discussed in *Matter of Sonegawa*, 12 I&N Dec. 612, 614-15 (Reg'l Comm'r 1967), which permits USCIS to consider the totality of the circumstances affecting a petitioner's ability to pay the proffered wage.[6] The Director may also consider on remand the letter from the Petitioner's chief financial officer[7] and other documents submitted on appeal.

Finally, the Petitioner submitted its audited financial statement for the year ending October 29, 2016. However, the priority date is December 6, 2016. Without annual reports, federal tax returns, or audited financial statements from the priority date onward, we cannot affirmatively find that the Petitioner has

[4] It is the Petitioner's burden to establish eligibility for the immigration benefit sought. Section 291 of the Act, 8 U.S.C. § 1361; *Matter of Skirball Cultural Ctr.*, 25 I&N Dec. 799, 806 (AAO 2012).

[5] On appeal, the Petitioner submits a list of the Form I-140 petitions that it has filed from January 1, 2016, to August 1, 2017. However, it is not clear that the period between January 1, 2016, and August 1, 2017, covers all relevant petitions.

[6] In determining the Petitioner's ability to pay the proffered wage, we may examine such factors as: the number of years the Petitioner has conducted business; its number of employees; the growth of its business; its incurrence of uncharacteristic losses or expenses; its reputation in its industry; the Beneficiary's replacement of a current employee or outsourced service; or other factors affecting the Petitioner's ability to pay. *See id.*

[7] The regulation at 8 C.F.R. § 204.5(g)(2) provides that if a petitioner employs 100 or more workers, we may accept a statement from a financial officer of the petitioner which establishes its ability to pay the proffered wage.

the continuing ability to pay from the priority date. On remand, the Director should request the Petitioner's annual reports, federal tax returns, or audited financial statements from the priority date onward.

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