U.S. Citizenship and Immigration Services

Non-Precedent Decision of the Administrative Appeals Office

In Re: 15840600

Date: MAY 7, 2021

Appeal of Texas Service Center Decision

Form I-140, Immigrant Petition for Professional

The Petitioner seeks to employ the Beneficiary as a tennis coach. It requests her classification under the third-preference, immigrant category for members of the professions. *See* Immigration and Nationality Act (the Act) section 203(b)(3)(A)(ii), 8 U.S.C. § 1153(b)(3)(A)(ii).

The Director of the Texas Service Center denied the petition. Crediting the Beneficiary's claimed part-time employment experience at half the value of full-time experience, the Director concluded that the Petitioner did not demonstrate the Beneficiary's possession of the minimum experience required for the offered position.

The Petitioner appeals the decision and bears the burden of establishing eligibility for the requested benefit by a preponderance of evidence. *See* section 291 of the Act, 8 U.S.C. § 1361 (discussing the burden of proof); *see also Matter of Chawathe*, 25 I&N Dec. 369, 375 (AAO 2010) (discussing the standard of proof).[1] Upon *de novo* review, we will withdraw the Director's decision and remand the matter for the entry of a new decision consistent with the following analysis.

I. EMPLOYMENT-BASED IMMIGRATION

Immigration as a professional generally follows a three-step process. First, a prospective employer must file an application with the U.S. Department of Labor (DOL) requesting certification that: (1) there are insufficient U.S. workers able, willing, qualified, and available for the offered position; and (2) the employment of a noncitizen will not harm wages and working conditions of U.S. workers with similar jobs. *See* section 212(a)(5) of the Act, 8 U.S.C. § 1182(a)(5).

Second, the employer must submit an approved labor certification with an immigrant visa petition to U.S. Citizenship and Immigration Services (USCIS). *See* section 204 of the Act, 8 U.S.C. § 1154. Among other things, USCIS determines whether a beneficiary meets the requirements of the certified position and the requested immigrant visa category.

[1] Shortly after filing the appeal, the Petitioner submitted a motion to reconsider, which the Director dismissed. This appeal does not challenge the motion decision.

Finally, if USCIS approves the petition, a designated noncitizen beneficiary 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.

II. THE REQUIRED EXPERIENCE

A petitioner must demonstrate a beneficiary's possession of all DOL-certified job requirements of an offered position by a petition's priority date. *Matter of Wing's Tea House*, 16 I&N Dec. 158, 160 (Acting Reg'l Comm'r 1977). This petition's priority date is July 28, 2017, the date DOL accepted the accompanying labor certification application for processing. *See* 8 C.F.R. § 204.5(d) (explaining how to determine a petition's priority date).

When assessing a beneficiary's qualifications for an offered position, USCIS must examine the job-offer portion of an accompanying labor certification to determine the position's minimum job requirements. USCIS may neither ignore a certification term nor impose additional requirements. *See, e.g., Madany v. Smith*, 696 F.2d 1008, 1015 (D.C. Cir. 1983) (holding that "DOL bears the authority for setting the *content* of the labor certification") (emphasis in original).

The accompanying labor certification states the minimum requirements of the offered position of tennis coach as a U.S. bachelor's degree in sports management and one year of experience "in the job offered."

The labor certification states that, from 2011 to 2017, the Beneficiary worked part-time at various tennis clubs and academies in the United States and in her home country of Romania.[2] To support claimed qualifying experience, a petitioner must provide letters from a beneficiary's former employers. 8 C.F.R. § 204.5(l)(3)(ii)(A). The letters must include the employers' names, addresses, and titles, and descriptions of the beneficiary's experience. *Id.*

The Petitioner submitted letters from two of the Beneficiary's purported former employers in Romania. Consistent with the information on the labor certification, a letter from a tennis club states its employment of the Beneficiary for 30 hours a week as a tennis professional for about seven months, from December 2016 to July 2017. Another tennis club wrote that it employed her for 30 hours a week as head tennis pro for about three months a year, from May to August, in 2010, 2011, 2012, and 2013. The Petitioner did not submit letters from any of the Beneficiary's other claimed former employers.

A. Converting Part-Time Employment Experience to Full-Time Experience

The Director found the two submitted letters insufficient to demonstrate the Beneficiary's possession of the requisite one year of full-time, qualifying experience. The Director found that full-time experience must reflect work of at least 35 hours a week. DOL Field Memorandum No. 48-94, Barbara Ann Farmer, Admin'r for Reg'l Mgmt., *Policy Guidance on Alien Labor Certification Issues*, 2 (May 16, 1994). Also, citing a decision of DOL's Board of Alien Labor Certification Appeals (BALCA),

[2] The Beneficiary also attested on the labor certification that, on her college tennis team from 2011 to 2014, she played and assisted the coach.

the Director found that a noncitizen's part-time experience equates to half the amount of full-time experience.[3] *Matter of Cable Television Labs., Inc.*, 2012-PER-00449 slip op. at *2 (BALCA Oct. 23, 2014). Thus, crediting only half of the Beneficiary's days of part-time employment stated in the letters, the Director concluded that the Beneficiary worked the equivalent of about 284, full-time days, less than one year or 365 days.

On appeal, the Petitioner agrees that the offered position requires at least one year of full-time experience. But the company argues that we should reject the Director's valuation of the Beneficiary's part-time experience because the Director did not follow any applicable law, regulation, or policy. The Petitioner also calls the Director's method "illogical," as it values part-time employment at 50% of full-time work whether a beneficiary's weekly hours totaled 34 or just one.

The Petitioner agrees that full-time employment must reflect at least 35 hours of work a week.[4] In valuing the Beneficiary's part-time experience, however, the company focuses not only on the length of her employment but also on the number of hours she worked. Multiplying 35 hours a week times 52 weeks a year, the Petitioner reasons that one year of full-time employment requires at least 1,820 hours of work. The company argues that the letters from the Beneficiary's two former employers document her employment for 30 hours a week over 81 total weeks. Thus, the Petitioner contends that the Beneficiary worked 2,430 hours, more than the required 1,820 hours for one year of full-time employment.

We agree with the Petitioner's methodology. The company reasonably relies not only on the length of a noncitizen's employment but also on the number of hours he or she worked. As the Petitioner argues, its method more fairly values the part-time experience of noncitizens who worked disparate numbers of hours.

We note, however, that the letter from the tennis club that employed the Beneficiary in multiple years states part-time employment that she omitted from the labor certification. The letter states that, in addition to her employment in 2011, 2012, and 2013, the Beneficiary worked part-time from May to August in 2010. The omission of the Beneficiary's purported 2010 employment from the labor certification application casts doubt on the experience. A petitioner must resolve inconsistencies of record with independent, objective evidence pointing to where the truth lies. *Matter of Ho*, 19 I&N Dec. 582, 591 (BIA 1988). Also, claimed experience is less reliable when a beneficiary omits it from a labor certification. *Matter of Leung*, 16 I&N Dec. 12, 14-15 (BIA 1976), *disapp'd of on other grounds by Matter of Lam*, 16 I&N Dec. 432, 434 (BIA 1978). Nevertheless, the submitted letters

[3] BALCA decisions do not bind USCIS. Rather, USCIS need only follow decisions of the Attorney General and Board of Immigration Appeals (BIA) in proceedings involving the same issue or issues. 8 C.F.R. § 103.10(b). Nevertheless, USCIS generally defers to DOL's reasonable interpretation of labor certification rules, as Congress authorized DOL to administer the labor certification process. *See Martin v. Occupational Safety & Health Review Comm'n*, 499 U.S. 144, 150-59 (1991) (holding that an administrative agency should defer to the reasonable regulatory interpretations of another agency authorized by Congress to enforce the rules at issue).

[4] The Petitioner cites the DOL regulation at 20 C.F.R. § 655.5, which defines the term "full-time" as "35 or more hours of work per week." That regulation, however, does not apply to the labor certification process for *permanent* employment of *immigrants* in the United States. Rather, the rule applies only to the labor certification process "for the *temporary* employment of *nonimmigrant* foreign workers in the H-2B nonimmigrant classification." 20 C.F.R. § 655.1(b) (emphasis added). The Director's citation to the 1994 DOL memo is therefore more relevant to this matter.

otherwise document the Beneficiary's possession of 69 weeks of experience at 30 hours a week, showing that her part-time employment equates to more than one year of full-time work.

When evaluating a noncitizen's part-time experience in labor certification proceedings, the DOL has also considered the number of hours worked. Adjudicating a labor certification application for a graphic designer, DOL's Certifying Officer calculated the equivalency of the noncitizen's part-time experience by multiplying her length of employment (29.5 months) by 0.625, or 25/40, representing her employment for 25 hours of a typical 40-hour, work week. *Matter of 1 Grand Express*, 2014-PER-00783, slip op. at *4 (BALCA Jan. 16, 2018).

Cable Television Laboratories, the BALCA case cited by the Director, does not necessarily conflict with the valuation method in *1 Grand Express*. In *Cable Television Laboratories*, the BALCA panel found the noncitizen's 16 months of part-time work equivalent to eight months of full-time employment. *Matter of Cable Television Labs., Inc.*, *supra*, slip op. at *2. The decision, however, does not disclose how many hours the noncitizen's part-time employment entailed. *Id.* During the 16-month period, the noncitizen may have worked 20 hours of a typical 40-hour work week, and the panel may have multiplied the noncitizen's length of employment by 0.5. Thus, when valuing the noncitizen's part-time employment, the panel in *Cable Television Laboratories* may have also considered his number of hours.

For the foregoing reasons, we conclude that the Director erred in valuing the Beneficiary's part-time experience by disregarding the number of weekly hours she worked. Nevertheless, for the following reasons, the Petitioner has not demonstrated the Beneficiary's possession of sufficient qualifying experience in the offered position.

B. The Nature of the Experience

The labor certification states that the offered position requires at least one year of experience "in the job offered." On a labor certification application, the term "in the job offered" means experience performing the key duties of the offered position listed on the application. *See, e.g., Matter of Symbioun Techs., Inc.*, 2010-PER-01422, slip op. at *4 (BALCA Oct. 24, 2011) (citations omitted). The labor certification describes the job duties of the offered position of tennis coach as: coaching a player on stroke production, match strategy, mental and fitness training, motivational techniques, and match play advice, applying knowledge of national and international rules and regulations; arranging tournament and travel schedules; accompanying the player to tournaments in accordance with budget and competition difficulty; and advising parents on the player's technical, mental, and physical development.[5]

The letter from the Beneficiary's most recent former employer states that she "competed as a Tennis Professional from December 12th 2016 to July 28th 2017, where she competed playing professional tennis, and coaching players of all levels (approximately 30 hours weekly)." The letter does not document that the Beneficiary's "coaching" duties included performance of the primary job duties of

[5] The job duties on the labor certification also indicate the offered position's need for: "US PTR or PTA" certification; and "collegiate and professional level playing experience." Based on a copy of the Beneficiary's certificate, "PTR" stands for the Professional Tennis Registry. "PTA" appears to refer to the U.S. Professional Tennis Association. The Petitioner submitted sufficient evidence to demonstrate the Beneficiary's satisfaction of these additional requirements.

the offered position. Also, the letter does not detail how much time she spent "coaching," as opposed to "playing," tennis during the seven-month period. The letter is unclear whether she spent 30 hours a week coaching, or 30 hours a week coaching *and* playing professional tennis. The letter therefore does not demonstrate that she gained sufficient, qualifying experience "in the job offered." With insufficient evidence of the Beneficiary's claimed qualifying experience from December 2016 to July 2017, the letter from her other former employer does not document her possession of the minimum experience required for the offered position.

The Director did not notify the Petitioner of the evidentiary deficiency regarding the nature of the Beneficiary's part-time experience from December 2016 to July 2017. *See* 8 C.F.R. § 103.2(b)(16)(i) (requiring USCIS to notify a petitioner of material, derogatory information of which it may not be aware and to afford it an opportunity to respond). We will therefore remand the matter. On remand, the Director should inform the Petitioner of the deficiency and advise the company of its need to submit additional evidence of the Beneficiary's claimed, qualifying experience.

III. THE BONA FIDES OF THE JOB OFFER

Although unaddressed by the Director, the record also does not establish the *bona fides* of the job offer. A business may file a Form I-140 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 intend to employ a beneficiary under the terms and conditions of an accompanying labor certification. *See Matter of Izdebska*, 12 I&N Dec. 54, 55 (Reg'l Comm'r 1966) (affirming a petition's denial where, contrary to the terms of an accompanying labor certification, the petitioner did not intend to employ the beneficiary as a domestic worker on a full-time, live-in basis).

On the petition and accompanying labor certification, the Petitioner attested to its intention to employ the Beneficiary in the permanent, full-time position of tennis coach. The Petitioner stated that it would employ her at the company's current, principal place of business in [redacted] Florida. As previously indicated, the position's job duties include coaching a tennis player on stroke production, match strategy, mental and fitness training, motivational techniques, and match play advice, applying knowledge of national and international rules and regulations. These duties indicate the position's likely need for access to a tennis court.

The record, however, does not establish that the Petitioner's place of business includes a tennis court. Online, government records identify the property as containing a "warehouse" in an industrial area. [redacted] (Fla.) Clerk of Court, "Property Records," https://www[redacted]org/records/property-records (last visited May 4, 2021). The government records, as well as online satellite photographs, do not indicate a tennis court on the site.

Also, on the Form I-140, the Petitioner described itself as a "Wholesaler/Distributor/Athlete Sponsor." But the company submitted a copy of its federal income tax return for 2016 stating that the firm provides "sales & installation" of "floor tiles." *See Matter of Ho*, 19 I&N Dec. at 591 (requiring a petitioner to resolve inconsistencies of record). The record neither explains why a floor-tiling company would intend to employ a tennis coach, nor establishes that the company's place of business likely includes a tennis court.

Further, online government records indicate that, in 2008, the Petitioner sold the property on which it does business to a sports management company. [redacted] (Fla.) Clerk of Court, *supra*. USCIS records identify the son of the married couple who owns the Petitioner as a principal of the sports management company. Also, on the labor certification application, the Beneficiary attested that she previously worked an internship at the sports management company, serving as a "Tennis Instructor/Coach/Trainer." Thus, the record suggests the Beneficiary's employment in the offered position by the sports management company, rather than by the Petitioner.

For the foregoing reasons, the record does not establish the Petitioner's intention to employ the Beneficiary in the offered position. *See* section 204(b) of the Act (authorizing USCIS to "determine that the facts stated in the petition are true"). On remand, the Director should ask the Petitioner to explain the inconsistencies in the job offer and submit additional evidence of the company's intention to employ the Beneficiary in the offered position.

IV. ABILITY TO PAY THE PROFFERED WAGE

The evidence of record also does not establish the Petitioner's ability to pay the proffered wage of the offered position. A petitioner must demonstrate its continuing ability to pay the proffered wage from a petition's priority date until the beneficiary obtains lawful permanent residence. 8 C.F.R. § 204.5(g)(2). Evidence of ability to pay must generally include copies of annual reports, federal tax returns, or audited financial statements. *Id.*

In determining ability to pay, USCIS examines 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 a beneficiary the full proffered wage or did not pay a beneficiary at all, USCIS considers whether the business' net income or net current assets is sufficient to pay any difference between the proffered wage and the actual wages paid to the beneficiary. If net income and net current assets are insufficient, USCIS may consider other factors affecting a petitioner's ability to pay the proffered wage. *See Matter of Sonegawa,* 12 I&N Dec. 612, 614-15 (Reg'l Comm'r 1967).[6]

The labor certification states the proffered wage of the offered position as $20.22 an hour, or $36,800.40 a year based on a 35-hour work week. As previously indicated, the petition's priority date is July 28, 2017.

The Petitioner does not claim to have employed the Beneficiary and did not submit any evidence that it paid her wages. Thus, based solely on wages paid, the record does not establish the Petitioner's ability to pay the proffered wage.

As previously indicated, the Petitioner submitted a copy of its federal income tax return for 2016. The record, however, lacks evidence of the company's ability to pay in 2017, the year of the petition's priority date, or thereafter. The Petitioner therefore has not established its continuing ability to pay the proffered wage from the petition's priority date onward.

[6] Federal courts have upheld USCIS's 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); *Z-Noorani, Inc. v. Richardson*, 950 F. Supp. 2d 1330, 1345-46 (N.D. Ga. 2013).

Also, USCIS records indicate the Petitioner's filing of a Form I-140 petition for another beneficiary. A petitioner must demonstrate its ability to pay the proffered wage of each petition it files until a beneficiary obtains lawful permanent residence. 8 C.F.R. § 204.5(g)(2). The Petitioner here must therefore demonstrate its ability to pay the combined proffered wages of this petition and any other petitions it filed that were pending or approved as of this petition's priority date or filed thereafter. *See Patel v. Johnson*, 2 F. Supp. 3d 108, 124 (D. Mass. 2014) (affirming our revocation of a petition's approval where, at the time of the filing's grant, the petitioner did not demonstrate its ability to pay the combined proffered wages of multiple petitions).[7]

USCIS records indicate that, as of this petition's priority date of July 28, 2017, the Petitioner's other petition was pending and that its beneficiary ultimately obtained lawful permanent residence in 2018.[8] The Petitioner must therefore demonstrate its ability to pay the combined proffered wages of this and its other petition in 2017 and 2018.

On remand, the Director should request copies of: the Petitioner's annual reports, federal tax returns, or audited financial statements for 2017, 2018, 2019, and 2020; the proffered wage of its other petition; and proof of any wages it paid the beneficiaries in relevant years. The Petitioner may also submit additional evidence of its ability to pay, including materials supporting the factors stated in *Sonegawa*.

If supported by the record, the Director may notify the Petitioner of any other potential grounds of denial. The Director 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.

V. CONCLUSION

The Director erred in valuing the Beneficiary's part-time experience at only half the amount of full-time employment. But the Petitioner has not demonstrated the Beneficiary's possession of the requisite experience in the job offered, the *bona fides* of the job offer, or the company's continuing ability to pay the proffered wage.

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

[7] A petitioner need not demonstrate its ability to pay the proffered wages of petitions that it withdrew or that USCIS rejected, denied, or revoked (unless appeals remain pending). A petitioner also need not demonstrate its ability to pay the proffered wages of petitions before their corresponding priority dates or after their corresponding beneficiaries obtained lawful permanent residence.

[8] USCIS records identify the other petition by the receipt number [redacted]