U.S. Citizenship and Immigration Services

Non-Precedent Decision of the Administrative Appeals Office

In Re: 12009103

Date: OCT. 19, 2020

Appeal of Nebraska Service Center Decision

Form I-140, Immigrant Petition for Skilled Worker

The Petitioner seeks to employ the Beneficiary as a software applications developer under the third-preference, immigrant classification for skilled workers. See Immigration and Nationality Act (the Act) section 203(b)(3)(A)(i), 8 U.S.C. § 1153(b)(3)(A)(i).

The Director of the Nebraska Service Center denied the petition. The Director concluded that the Petitioner did not demonstrate its required ability to pay the proffered wage.

The Petitioner bears the burden of establishing 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 for entry of a new decision consistent with the following analysis.

I. EMPLOYMENT-BASED IMMIGRATION

Immigration as a skilled worker generally follows a three-step process. To permanently fill a position in the United States with a foreign worker, a prospective employer must first obtain certification from the U.S. Department of Labor (DOL). See section 212(a)(5) of the Act, 8 U.S.C. § 1182(a)(5). DOL approval signifies that insufficient U.S. workers are able, willing, qualified, and available for an offered position. Id. Labor certification also indicates that employment of a foreign national will not harm wages and working conditions of U.S. workers with similar jobs. Id.

If DOL approves a position, an employer must next submit the certified labor application with an immigrant visa petition to USCIS. See section 204 of the Act, 8 U.S.C. § 1154. Among other things, USCIS determines whether a beneficiary meets the requirements of a DOL-certified position and a requested visa classification. If USCIS grants a petition, a foreign national may finally 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. ABILITY TO PAY THE PROFFERED WAGE

A petitioner must demonstrate its continuing ability to pay the proffered wage of an offered position, from a petition's priority date until a beneficiary obtains lawful permanent residence. 8 C.F.R.

§ 204.5(g)(2). Evidence of ability to pay must generally include copies of a petitioner's annual reports, federal tax returns, or audited financial statements. Id.

Here, the accompanying labor certification states the proffered wage of the offered position of software applications developer as $150,000 to $160,000 a year. The petition's priority date is July 26, 2019, 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).

At the time of the petition's filing, regulatory required evidence of the Petitioner's ability to pay the proffered wage in 2019, the year of the petition's priority date, was not yet available. The Petitioner submitted financial statements for the first three quarters of 2019. Contrary to 8 C.F.R. § 204.5(g)(2), however, these statements do not indicate that they are audited. The financial statements therefore do not establish the Petitioner's ability to pay the proffered wage.

Regulatory required evidence of the Petitioner's ability to pay the proffered wage should now be available. We will therefore remand the matter. On remand, the Director should ask the Petitioner to provide copies of annual reports, federal tax returns, or audited financial statements for 2019 and, if available, 2020. The Petitioner may also submit additional evidence of its ability to pay, including proof of any payments it made to the Beneficiary in 2019 or 2020, and materials supporting the factors stated in Matter of Sonegawa, 12 I&N Dec. 612, 614-15 (Reg'l Comm'r 1967).

We note that the Petitioner is a sole proprietorship. Thus, to demonstrate its ability to pay the proffered wage, the Petitioner must submit evidence of the personal finances of its owner. See Matter of United Inv. Grp., 19 I&N Dec. 248, 250 (Comm'r 1984) (noting that a sole proprietorship and its owner are the same legal entity). In determining ability to pay, USCIS must consider the adjusted gross income, assets, and personal liabilities of the Petitioner's owner. The Petitioner must demonstrate that its owner can cover his existing business expenses and pay the Beneficiary's proffered wage from the owner's adjusted gross income or other available funds. The Petitioner must also show that its owner can support himself and his dependents. See Ubeda v. Palmer, 539 F. Supp. 647 (N.D. Ill. 1982), aff'd, 703 F.2d 571 (7th Cir. 1983).

The accountant of the Petitioner's owner stated that the owner does not have any student loan, school, daycare, gardener, or nanny expenses. The accountant also asserted that other personal expenses of the owner - including housing, food, insurance, transportation, clothing, utilities, and credit cards - are "insignificant" when compared to his taxable income. The Petitioner, however, must estimate and disclose all its owner's living expenses. See Ubeda, 539 F. Supp. at 650 (considering a sole proprietor's ability to pay a proffered wage while supporting his spouse and five children, one of whom was severely disabled). The Director therefore should ask the Petitioner to detail the personal expenses of its owner.

In addition, USCIS records indicate the Petitioner's filings of Form I-140 petitions for other beneficiaries. 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 and its other petitions 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, as of the filing's grant, a petitioner did not demonstrate its ability to pay the combined proffered wages of multiple petitions).[1]

USCIS records indicate the Petitioner's filing of at least nine Form I-140 petitions for other beneficiaries that were pending or approved as of July 26, 2019, or filed thereafter.[2] The record lacks proffered wages and priority dates of these additional petitions. Thus, USCIS cannot determine the Petitioner's ability to pay the combined proffered wages of all applicable petitions. The record therefore does not demonstrate the Petitioner's ability to pay the proffered wage.

On remand, the Director should ask the Petitioner to provide proffered wages and priority dates of its other petitions. The Petitioner may also submit additional evidence of its ability to pay the combined proffered wages, such as proof of any payments it made to applicable beneficiaries in 2019 or 2020 and materials supporting the factors stated in Sonegawa.

III. THE REQUIRED EXPERIENCE

Although unaddressed by the Director, the Petitioner also did not demonstrate the Beneficiary's qualifying experience for the offered position. A petitioner must establish 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). In evaluating a beneficiary's qualifications, USCIS must examine the job-offer portion of an accompanying labor certification to determine a position's minimum 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).

Here, the labor certification states the primary requirements of the offered position of software applications developer as a U.S. bachelor's degree, or a foreign equivalent degree, in information technology (IT), computer science, or computer information systems, plus four years' experience in the job offered or six years as a test consultant, team lead, or application development specialist.[3] The labor certification also states the Petitioner's acceptance of an alternate combination of education and experience: no education and six years of experience.

On the labor certification, the Beneficiary attested that, by the petition's priority date, a Filipino university awarded him a bachelor's degree in IT, and claims he obtained more than six years of qualifying experience. The Beneficiary stated that an IT consulting firm employed him in various

[1] The Petitioner need not demonstrate its ability to pay proffered wages of petitions that it withdrew or that USCIS rejected, denied, or revoked. The Petitioner also need not demonstrate its ability to pay proffered wages before the priority dates of their corresponding petitions or after their corresponding beneficiaries obtain lawful permanent residence.

[2] USCIS records identify the other Form I-140 petitions by the following receipt numbers: [redacted]; and [redacted]. The Form I-140 states the Petitioner's employment of 92 people.

[3] Part H.14 of the labor certification states the position's requirement of a baccalaureate and only four years' experience in one of the alternate occupations.

positions in the Philippines and the United States from September 2012 until he began working for the Petitioner in June 2019.[4]

To support qualifying experience, a petitioner must provide a letter from a beneficiary's former employer. 8 C.F.R. § 204.5(l)(3)(ii)(A). A letter must contain a former employer's name, title, and address, and describe a beneficiary's experience. Id.

The Petitioner submitted a letter from the Beneficiary's former employer. The April 2019 letter states the IT firm's full-time employment of the Beneficiary since April 2010. The letter also states that, at the time of its issuance, the Beneficiary served as an associate manager.

The letter states a different start date of employment than listed on the labor certification. Unlike the information on the labor certification, the letter also does not indicate the Beneficiary's employment in various positions. The discrepancies cast doubts on the Beneficiary's claimed, former employment and do not establish his qualifying experience in the job offered or in one of the listed, alternate positions. See Matter of Ho, 19 I&N Dec. 582, 591 (BIA 1988) (requiring a petitioner to resolve inconsistencies of record with independent, objective evidence pointing to where the truth lies). Also, contrary to 8 C.F.R. § 204.5(l)(3)(ii)(A), the letter does not describe the Beneficiary's experience or account for any varying job duties in different positions. The record therefore does not establish the Beneficiary's qualifying experience for the offered position.

On remand, the Director should ask the Petitioner to explain the inconsistencies in the Beneficiary's claimed, employment history and to provide independent, objective evidence of his purported qualifying experience. The Director may also inform the Petitioner of any other potential denial grounds supported by the record.

The Director should afford the Petitioner a reasonable opportunity to respond to all issues raised on remand. Upon receipt of a timely response, the Director should consider the entire record and enter a new decision.

IV. CONCLUSION

The record lacks required evidence of the Petitioner's ability to pay the proffered wage from the year of the petition's priority date. The Petitioner also did not demonstrate the Beneficiary's qualifying experience for the offered position.

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

[4] An employer cannot rely on experience that a foreign national gained with it unless he or she gained the experience in a substantially different position than the offered one, or the employer can demonstrate the impracticality of training a U.S. worker for the offered position. 20 C.F.R. § 656.17(i)(3). The Petitioner here does not claim that the Beneficiary gained qualifying experience with it.