U.S. Citizenship and Immigration Services

Non-Precedent Decision of the Administrative Appeals Office

In Re: 04632288

Date: SEPT. 8, 2021

Appeal of Texas Service Center Decision

Form I-140, Immigrant Petition for Other Worker

The Petitioner, an operator of franchise restaurants, seeks to employ the Beneficiary as a pizza cook. 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 the Petitioner's intention to employ the Beneficiary on a permanent, full-time basis.

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) with the certified labor certification. *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 9, 2016. *See* 8 C.F.R. § 204.5(d).

II. THE PERMANENT, FULL-TIME NATURE OF THE OFFERED POSITION

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 its accompanying labor certification, a petitioner did not intend to employ a beneficiary as a domestic worker on a full-time, live-in basis). For labor certification purposes, the term "employment" means "[p]ermanent, full-time work." 20 C.F.R. § 656.3. Here, the Petitioner attested on the labor certification to its intention to permanently employ the Beneficiary as a full-time pizza cook.

In his decision, the Director determined that the Petitioner had not established that the Beneficiary will be employed by the Petitioner as a full-time, permanent employee. Specifically, the Director questioned the full-time nature of the position. In a prior request for additional evidence (RFE), the Director asked the Petitioner to submit, in part, records showing the full- or part-time status of its employees. The Director noted in his decision that the Petitioner's RFE response did not include all requested evidence and that USCIS may deny a petition if an omission in a petitioner's reply "precludes a material line of inquiry." *See* 8 C.F.R. § 103.2(b)(14). However, the full- or part-time status of its other employees is not material to the nature of the offered position. Company officials affirmed that many of its fast food restaurants are understaffed, and that they regularly experience significant turnover. The Petitioner's reliance on a majority of part-time workers does not preclude it from also offering full-time employment. The Petitioner has therefore overcome the Director's concerns regarding the full-time nature of the offered employment.

However, we cannot affirmatively find that the Petitioner intends to employ the Beneficiary because the Petitioner's franchise tax status has ended in the State of Texas. The Texas Comptroller of Public Accounts database lists the Petitioner's corporate status as "franchise tax ended." Tex. Comptroller of Pub. Accounts, https://mycpa.cpa.state.tx.us/coa/coaSearchBtn (last visited Aug. 25, 2021). This indicates that the "entity has ceased to exist in its state or country of formation or has ceased doing business in Texas." Tex. Comptroller of Pub. Accounts, https://mycpa.cpa.state.tx.us/coa/FranchiseStatusHelp.jsp (last visited Aug. 25, 2021). This information calls into question the Petitioner's intent to employ the Beneficiary at the Texas location specified on the labor certification.[2] We will therefore remand the matter to the Director to determine the Petitioner's status and its intent to employ the Beneficiary, as well as to determine the Petitioner's continuing ability to pay as set forth below.

III. ABILITY TO PAY THE PROFFERED WAGE

In this case, the proffered wage is $16,994.00 per year. The Petitioner must demonstrate its continuing ability to pay the proffered wage from the priority date in 2016 until the Beneficiary obtains lawful permanent residence. 8 C.F.R. § 204.5(g)(2). The regulation requires that "[e]vidence of this ability shall be either in the form of copies of annual reports, federal tax returns, or audited financial statements." *Id.* The regulation further 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. *Id.*

[2] The labor certification indicates that the Beneficiary will work in [redacted] Texas.

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.[3] 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 record contains the combined audited financial statements for the Petitioner and its affiliates for 2016. The audited financial statements separately state the Petitioner's net income and net current assets for 2016 and appear to establish the Petitioner's ability to pay based on its net income in 2016. However, the record does not contain the Petitioner's annual reports, federal tax returns, or audited financial statements for 2017 onward. Given the termination of the Petitioner's franchise tax status in Texas, the Director should request this information on remand to confirm its continuing ability to pay.[4] We note that the record contains a letter dated September 2, 2017, from the Petitioner's chief financial officer (CFO) stating that the Petitioner has the ability to pay the proffered wage. The CFO asserts that the Petitioner employs 1,666 employees and that it had net income of $6,675,983 in 2016. However, given the Petitioner's terminated franchise tax status and its multiple Form I-140 filings further detailed below, we decline to exercise our discretion to accept the letter from the Petitioner's CFO.

The Petitioner in this case has filed multiple Form I-140 petitions for other beneficiaries. Therefore, it 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.[5] 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

---

[3] 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).

[4] If the Petitioner intends to claim that it has a successor-in-interest, it must (a) fully describe and document the transaction transferring ownership of all, or a relevant part, of the predecessor's business to the successor; (b) demonstrate that the job opportunity remains the same as certified by the DOL; and (c) establish eligibility for the requested benefit in all respects, including the ability to pay of the predecessor and the successor. *See Matter of Dial Auto Repair Shop, Inc.*, 19 I&N Dec. 481, 482-83 (Comm'r 1986).

[5] 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.

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 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.[6] Without this information, we cannot determine the Petitioner's ability to pay the combined proffered wages of all of its applicable beneficiaries.

The record contains information submitted by the Petitioner in response to the Director's RFE regarding nearly 300 beneficiaries of other petitions filed by the Petitioner in 2016 and 2017. On remand, the Director should request additional, updated 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. 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.[7]

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

[6] 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).

[7] 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.*