U.S. Citizenship and Immigration Services

Non-Precedent Decision of the Administrative Appeals Office

In Re: 1518667

Date: SEP. 28, 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 food service worker. The company requests his classification under the third-preference, immigrant category for "other workers." Immigration and Nationality Act (the Act) section 203(b)(3)(A)(iii), 8 U.S.C. § 1153(b)(3)(A)(iii).

The Director of the Texas Service Center denied the petition and dismissed the Petitioner's following motion to reconsider.[1] The Director concluded that the company didn't demonstrate its required intent to employ the Beneficiary on a full-time basis.

The Petitioner 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. 169, 175 (AAO 2010) (discussing the standard of proof). 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 an "other," or unskilled, worker generally follows a three-step process. First, a prospective employer must apply to the U.S. Department of Labor (DOL) for certification that: (1) there are insufficient U.S. workers able, willing, qualified, and available for an offered position; and (2) the employment of a noncitizen in the position won't 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, an 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 noncitizen beneficiary meets the requirements of a certified position and a requested immigrant visa category. 8 C.F.R. § 204.5(l).

[1] The record indicates that USCIS mailed the petition's denial to an affiliate of the Petitioner. The Petitioner, however, hasn't alleged that the error prejudiced it.

Finally, if USCIS approves a petition, a designated noncitizen 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 MOTION TO RECONSIDER

A motion to reconsider must establish that the challenged decision misapplied law or policy based on the record at the time of the decision. 8 C.F.R. § 103.5(a)(3). In contrast, a motion to reopen must state new facts, supported by documentary evidence. 8 C.F.R. § 103.5(a)(2).

The Petitioner filed a Form I-290B, Notice of Appeal or Motion, designating the submission as a "motion to reconsider." Consistent with criteria for such motions, the filing omitted accompanying evidence. Nevertheless, the Director's decision concludes: "The evidence submitted with the motion to reopen does not establish that the requirements for filing a motion to reopen have been met."

As the Petitioner argues on appeal, the record indicates the Director's mistreatment of the company's motion to reconsider as a motion to reopen. By applying requirements for a motion to reopen, the Director erroneously denied the Petitioner's motion to reconsider.

This error would justify a remand for reconsideration of the Petitioner's motion. Also, however, the record doesn't support the petition's denial based on the company's lack of intent to employ the Beneficiary on a full-time basis.

III. INTENTION TO EMPLOY ON A FULL-TIME BASIS

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 a petition's denial where, contrary to the terms of the accompanying labor certification, the petitioner didn't 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.

The Petitioner attested on the Form I-140 and labor certification that it intends to permanently employ the Beneficiary in the offered position of food service worker on a full-time basis. Pursuant to the Director's request for additional evidence (RFE), the Petitioner submitted a list of its employees at the restaurant where the Beneficiary would work and copies of the eatery's work schedules for a four-week period from September 2017 to October 2017. The employee list classifies some of the workers as full-time and others as part-time. The work schedules similarly assign some workers to 35 hours a week or more, and others to lesser amounts. *See* Memorandum from Barbara Ann Farmer, Admin'r for Reg'l Mgm't, Div. of Foreign Labor Certification, DOL, *Field Memorandum No. 48-94* 2 (May 16, 1994) (stating that, for most occupations, full-time employment means at least 35 weekly hours of work).

The record lacked evidence that the restaurant's employees worked and received compensation for their scheduled hours. The Director therefore found the Petitioner's materials insufficient to establish its full-time employment of restaurant employees. He also noted that the company didn't explain why the restaurant scheduled some employees, classified as full-time on the list, to work less than 35 hours

each week. In concluding that the Petitioner didn't establish its intent to employ the Beneficiary on a full-time basis, the decision stated: "Based on the evidence submitted, it is unlikely that the petitioner actually employs non-managerial staff as full-time employees."

As the Petitioner argues, however, the Director didn't request evidence that the restaurant's employees worked and received wages for their scheduled hours. Rather, in inquiring about the Petitioner's employment of non-managerial workers, the RFE specifically requested a listing of the restaurant's employees and its four most recent work schedules. Without providing the Petitioner an opportunity to submit additional evidence of the employees' work and wages, the Director shouldn't have rejected evidence that he specifically requested. *See* USCIS Policy Manual, Vol. 1, Part E, Ch. 6, F.3 "Requests for Evidence," https://www.uscis.gov/policy-manual/volume-1-part-e-chapter-6 (last visited Sep. 24, 2021) (stating that "[t]he RFE should ask for all the evidence the officer anticipates needing to determine eligibility").

Also, despite inconsistencies between the restaurant's employee list and work schedules, the documents indicate that, during the four-week period, the restaurant consistently scheduled at least three, non-managerial employees to work on full-time bases. Thus, contrary to the decision's conclusion, the record indicates that the Petitioner employs non-managerial staff on a full-time basis. In addition, the Petitioner submitted letters from: its chief legal officer, stating its intent to permanently employ the Beneficiary on a full-time basis; the restaurant's director of operations, stating that it offers full-time employment to U.S. job applicants; and the Beneficiary, stating his intent to work full-time in the offered position.

Thus, a preponderance of evidence establishes the Petitioner's intent to permanently employ the Beneficiary on a full-time basis. We will therefore withdraw the Director's decision.

IV. ABILITY TO PAY THE PROFFERED WAGE

The appeal overcomes the denial ground. But the record doesn't establish the Petitioner's required ability to pay the proffered wage of the offered position.

A petitioner must demonstrate its continuing ability to pay a proffered wage, 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 annual reports, federal income tax returns, or audited financial statements. *Id.*

The accompanying labor certification states the proffered wage of the offered position of food service worker as $18,554 a year. The petition's priority date is October 7, 2016, the date DOL accepted the labor certification application for processing. 8 C.F.R. § 204.5(d) (explaining how to determine a petition's priority date).

The Petitioner submitted copies of audited financial statements for 2016, the year of the petition's priority date. The Director, however, denied the petition in November 2007 and didn't dismiss the company's motion to reconsider until January 2018. Contrary to 8 C.F.R. § 204.5(g)(2), the record lacks required evidence of the Petitioner's ability to pay the proffered wage in 2017 and the years that have since followed.

Also, USCIS records show that, since before the petition's denial, the Petitioner filed Form I-140 petitions for other beneficiaries. A petitioner must demonstrate its ability to pay the proffered wages of each petition it files until a beneficiary obtains lawful permanent residence. 8 C.F.R. § 204.5(g)(2). This Petitioner must therefore demonstrate its ability to pay the combined proffered wages of this petition and any others that were pending or approved as of this petition's priority date of October 7, 2016 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 didn't demonstrate its ability to pay the combined proffered wages of multiple petitions).[2]

The Director didn't notify the Petitioner of these evidentiary deficiencies. We will therefore remand the matter. On remand, the Director should ask the Petitioner to submit copies of annual reports, federal income tax returns, or audited financial statements for 2017, 2018, 2019, and 2020. The company must also provide the proffered wages and priority dates of its other petitions that were pending or approved as of October 7, 2016 or filed thereafter. The Petitioner may also submit additional evidence of its ability to pay. Additional evidence may include documentation of any wages it paid applicable beneficiaries during relevant years or any materials supporting factors stated in *Matter of Sonegawa*, 12 I&N Dec. 612, 614-15 (Reg'l Comm'r 1967).

If supported by the record, the Director may notify the Petitioner of any additional, potential grounds of denial. The Director, however, must provide 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 record didn't support the Director's denial of the petition or his dismissal of the Petitioner's motion to reconsider. The company, however, didn't demonstrate its continuing ability to pay the proffered wage from the petition's priority date onward.

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

[2] The Petitioner needn't demonstrate its ability to pay proffered wages of petitions that it withdrew or, unless pending on appeal or motion, that USCIS rejected, denied, or revoked. The Petitioner also needn't demonstrate its ability to pay proffered wages before the priority dates of corresponding petitions or after the dates that corresponding beneficiaries obtained lawful permanent residence.