U.S. Citizenship and Immigration Services

Non-Precedent Decision of the Administrative Appeals Office

In Re: 06842528

Date: SEPT. 29, 2021

Appeal of Texas Service Center Decision

Form I-140, Immigrant Petition for Other Worker

The Petitioner, a farm, seeks to employ the Beneficiary as a production worker. 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. He determined that certain fees paid by the Beneficiary to a third party consultant violate the provisions of 20 C.F.R. § 656.12, which prohibits the labor certification being sold, bartered, or purchased by individuals or entities. The matter is now before us on appeal.

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, upon approval of the petition, a foreign national may apply for an immigrant visa abroad, or if eligible, adjust status in the United States to lawful permanent resident. *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 January 6, 2017. *See* 8 C.F.R. § 204.5(d).

II. ANALYSIS

On appeal, upon review of the entire record, we conclude that the Petitioner has established by a preponderance of the evidence that the labor certification was not the subject of improper commerce or payment. Thus, the Director erred in denying the petition and entering a finding of willful misrepresentation of material fact against the Petitioner. We will therefore withdraw the Director's decision and finding of willful misrepresentation of material fact against the Petitioner. We will also withdraw the Director's invalidation of the labor certification and reinstate it.

Although the Director's decision is withdrawn, we cannot affirmatively conclude that the Petitioner has established eligibility for the benefit sought. The Petitioner must establish its continuing ability to pay from the priority date in 2017.[2] The regulation at 8 C.F.R. § 204.5(g)(2) 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." 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.*

The record does not contain the Petitioner's annual reports, federal tax returns, or audited financial statements from the priority date in 2017 onward. Instead, it contains a letter dated September 20, 2018, from the Petitioner's CFO stating that the Petitioner has the ability to pay the proffered wage. The Petitioner's CFO asserts that the Petitioner employs 569 employees and that it had gross revenue of over $50 million in 2016. However, given the Petitioner's history of filing petitions detailed below, on remand, the Director should request additional evidence of the Petitioner's continuing ability to pay.

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). USCIS records show that the Petitioner has filed hundreds of 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

[2] The annual proffered wage is $18,034.

[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.

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

We cannot affirmatively find that the Petitioner has the continuing ability to pay the combined proffered wages of all of its applicable beneficiaries from the priority date in 2017. On remand, the Director should request additional evidence of the Petitioner's ability to pay and allow the Petitioner 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.[5]

III. CONCLUSION

In conclusion, we withdraw the Director's decision on the issue of improper commerce and payment, and we remand the matter to the Director to determine whether the Petitioner has the continuing ability to pay the combined proffered wages of all of its applicable beneficiaries. Additionally, we withdraw the Director's finding of willful misrepresentation of material fact against the Petitioner involving the labor certification application, and we withdraw the Director's invalidation of the labor certification and reinstate it.

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

FURTHER ORDER: The ETA Form 9089, case number [redacted], is reinstated.

[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] 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 Matter of Sonegawa*, 12 I&N Dec. at 614-15.