U.S. Citizenship and Immigration Services

Non-Precedent Decision of the Administrative Appeals Office

In Re: 4240878

Date: SEP. 30, 2021

Appeal of Texas Service Center Decision

Form I-140G, Immigrant Petition for Other Worker

The Petitioner, a manufacturer of [redacted] seeks to employ the Beneficiary as a production helper. The company requests her 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. The Director concluded that the Petitioner didn't demonstrate the Beneficiary's qualifications for the offered position or the company's required ability to pay the combined proffered wages of this and other petitions.

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. 369, 375 (AAO 2010) (discussing the standard of proof). Upon *de novo* review, we find that the Petitioner has demonstrated the Beneficiary's qualifications for the offered position, but not the company's ability to pay the combined proffered wages. We will therefore dismiss the appeal.

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).

Finally, if USCIS approves a petition, a 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. REQUIREMENTS OF 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).[1] 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 unlisted 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 production helper as a U.S. high school diploma, or a foreign educational equivalent. The labor certification states that the position requires neither training nor experience. But part H.14 of the certification, "Special skills or other requirements," states: "Drug test and background screening." Such pre-employment conditions on a labor certification constitute job requirements. *See, e.g., Matter of Aetna Life Ins. Co.*, 2012-PER-03011, slip op. **4-5 (BALCA Dec. 14, 2016) (citations omitted).[2]

The Petitioner demonstrated the Beneficiary's possession of the foreign educational equivalent of a U.S. high school diploma. But the Director found the record devoid of evidence of the Beneficiary's successful completion of a drug test and background screening by the petition's priority date.

As the Petitioner argues, however, the record contains proof that the Beneficiary meets the requirements listed in part H.14. The Petitioner's initial submission included separate results of a drug test and background screening, both dated the month before the petition's priority date. The results show no illegal drugs in the Beneficiary's system and no criminal record in her home country of China. A preponderance of evidence therefore demonstrates that, by the petition's priority date, the Beneficiary met the requirements of part H.14 of the labor certification.

The Petitioner demonstrated the Beneficiary's qualifications for the offered position. We will therefore withdraw the Director's contrary finding.

III. ABILITY TO PAY THE PROFFERED WAGE

A petitioner must also 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 annual reports, federal tax returns, or audited financial statements. *Id.* If a petitioner employs at least 100 workers,

[1] This petition's priority date is June 14, 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).

[2] Decisions of DOL's Board of Alien Labor Certification Appeals (BALCA) don't bind USCIS. *See* 8 C.F.R. § 103.10(b) (requiring USCIS employees to follow only precedent decisions of the Board of Immigration Appeals and the Attorney General in proceedings involving similar issues). But USCIS may find BALCA decisions to be persuasive or otherwise defer to them. *See Martin v. Occupational Safety & Health Review Comm'n*, 499 U.S. 144 (1991) (requiring administrative agencies to defer to reasonable regulatory interpretations of sister agencies charged with issuing and enforcing the corresponding rules).

however, "the director may accept a statement from a financial officer of the organization which establishes the prospective employer's ability to pay the proffered wage." *Id.*

The labor certification states the proffered wage of the offered position of production helper as $8.28 an hour, or - based on a 40-hour, work week - $17,222.40 a year. As previously noted, the petition's priority date is June 14, 2017.

The Petitioner submitted copies of financial statements for 2015 through April 2018. The Director evaluated the Petitioner's ability to pay in 2017, the year of the petition's priority date, using the company's financial statements for that year. The statements for 2017, however, do not indicate that they were audited. The Petitioner's financial statements therefore do not establish its compliance with 8 C.F.R. § 204.5(g)(2), which requires "audited financial statements."

The Petitioner also documented its employment of more than 100 people and submitted a letter from its chief financial officer (CFO) asserting its ability to pay the proffered wage. The Director, however, properly rejected the CFO's letter as insufficient, citing the company's filing of multiple Form I-140 petitions. As the Director noted and the Petitioner concedes, at the time of the Director's decision in October 2018, the company had filed more than 40 Form I-140 petitions for other beneficiaries.[3] 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). This Petitioner 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 of June 14, 2017, 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 grant, a petitioner didn't demonstrate its ability to pay the combined proffered wages of multiple petitions). The CFO's letter asserts the company's ability "to pay the annual wages of all the Production Helpers we are sponsoring." But the Petitioner's obligation to demonstrate its ability to pay combined proffered wages of multiple Form I-140 petitions merits additional scrutiny and supports the Director's discretionary rejection of the letter. Therefore, 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 from the petition's priority date onward.

In response to the Director's NOID, the Petitioner argued that the former Immigration and Naturalization Service (INS) intended 8 C.F.R. § 204.5(g)(2) to allow a letter from a large employer to serve as "*de facto* proof" of its ability to pay. The Petitioner noted that INS agreed to consider statements from financial officers of large employers after commenters objected to the agency's proposed rule to accept only copies of annual reports or U.S tax returns as evidence of ability to pay. Final Rule for Employment-Based Petitions, 56 Fed. Reg. 60897, 60898 (Nov. 29, 1991). The plain language of the final regulation, however, doesn't require USCIS to accept a letter from a financial officer as conclusive proof of a petitioner's ability to pay. Rather, 8 C.F.R. § 204.5(g)(2) states that a director "may accept" such a statement. This Petitioner must demonstrate its ability to pay combined proffered wages of multiple petitions. For this reason, the Director reasonably rejected the CFO's letter as proof of the company's ability to meet all its payroll obligations. The Director therefore didn't

[3] In response to the Director's notice of intent to deny (NOID), the Petitioner identified 41 petitions for other beneficiaries that it filed in 2018. Since the NOID response, USCIS records indicate the company's submission of additional Form I-140 petitions for other beneficiaries. In any future filings in this matter, the Petitioner must provide the proffered wages and priority dates of its additional petitions.

abuse his discretion by finding the CFO's letter insufficient to demonstrate the Petitioner's ability to pay.

On appeal, the Petitioner notes that USCIS' ability-to-pay determination must generally consider other factors, such as: the number of years a 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; and a beneficiary's replacement of a current worker. *See Matter of Sonegawa*, 12 I&N Dec. 612, 614-15 (Reg'l Comm'r 1967). The Petitioner, however, didn't submit regulatory required evidence of its ability to pay from the petition's priority date, nor did it assert the material's unavailability. Thus, even if a totality of circumstances favors the Petitioner, its unexplained omission of required evidence bars it from demonstrating its ability to pay the proffered wage. We therefore needn't consider other factors affecting the Petitioner's ability to pay.

IV. CONCLUSION

Contrary to the Director's decision, the record establishes the Beneficiary's qualifications for the offered position. The Petitioner, however, hasn't demonstrated its required ability to pay the position's proffered wage. We will therefore affirm the petition's denial.

ORDER: The appeal is dismissed.