U.S. Citizenship and Immigration Services

Non-Precedent Decision of the Administrative Appeals Office

In Re: 04698537

Date: SEPT. 30, 2021

Appeal of Texas Service Center Decision

Form I-140, Immigrant Petition for Other Worker

The Petitioner seeks to employ the Beneficiary as a poultry trimmer. 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 revoked the approval of the petition, concluding that the Petitioner did not establish that (1) it made a *bona fide* job offer to the Beneficiary; and (2) the job requirements stated on the labor certification represent the Petitioner's actual minimum requirements. 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. LAW

A. 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

[1] The priority date of a petition is the date the DOL accepted the labor certification for processing, which in this case is October 22, 2015. *See* 8 C.F.R. § 204.5(d).

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.

B. Revocation of a Petition's Approval

After granting a petition, USCIS may revoke the petition's approval "at any time" for "good and sufficient cause." Section 205 of the Act, 8 U.S.C. § 1155. If supported by the record and substantial evidence, a director's realization that a petition was erroneously approved may justify revocation. *Matter of Ho*, 19 I&N Dec. 582, 590 (BIA 1988). By regulation this revocation authority is delegated to any USCIS officer who is authorized to approve an immigrant visa petition "when the necessity for the revocation comes to the attention of [USCIS]." 8 C.F.R. § 205.2(a).

II. ANALYSIS

On appeal, upon review of the entire record, we conclude that the Petitioner has established by a preponderance of the evidence that it made a *bona fide* job offer to the Beneficiary and that the job requirements stated on the labor certification represent the Petitioner's actual minimum requirements. Thus, the Director erred in revoking the approval of the petition, and we will withdraw his decision.

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 2015.[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 for the priority date in 2015.[3] Instead, it contains two letters from the Petitioner's chief financial officer (CFO) stating that the Petitioner has the ability to pay the proffered wage. The CFO's letters detail the Petitioner's total number of employees, gross revenue, and net income for 2015 and 2017, respectively. 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

[2] The annual proffered wage is $18,366.

[3] The Petitioner submitted the combined audited financial statements of [redacted] for the fiscal years ending June 3, 2017, and June 4, 2016. The combined audited financial statements contain a separate balance sheet and income statement for the Petitioner for the year ending June 3, 2017. However, the record does not contain a separate balance sheet and income statement for the Petitioner for the period that includes the priority date of October 22, 2015. The regulation at 8 C.F.R. § 204.5(g)(2) requires a petitioner, and not a combined group, to establish its ability to pay the proffered wage with its annual reports, federal tax returns, or audited financial statements. Because a corporation is a separate and distinct legal entity from its shareholders, the assets of its shareholders or of other enterprises cannot be considered in determining the Petitioner's ability to pay the proffered wage. *See Matter of Aphrodite Invs., Ltd.*, 17 I&N Dec. 530 (Comm'r 1980). The record does not contain regulatory-prescribed evidence of the Petitioner's ability to pay for the period that includes the priority date.

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.[4] 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.[5]

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 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] The record contains a list of 388 petitions filed by the Petitioner between October 22, 2015, and October 3, 2018.[7] It includes receipt numbers, priority dates, and proffered wages of these other petitions and indicates the status of each petition. However, it does not include the names of the beneficiaries and the dates of any status changes.

Based upon review of the entire record, 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 2015. 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.[8]

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[4] 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.

[5] We note that the record contains the Beneficiary's paystubs from portions of 2017 and 2018, but the paystubs do not contain any identifying information regarding the Beneficiary's employer.

[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] USCIS records show that the Petitioner filed several additional petitions between October 4, 2018, and the date of the Director's revocation decision on November 28, 2018.

[8] 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.

III. CONCLUSION

In conclusion, we withdraw the Director's decision, 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.

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