U.S. Citizenship and Immigration Services

Non-Precedent Decision of the Administrative Appeals Office

In Re: 25679639

Date: MAR. 08, 2023

Appeal of Texas Service Center Decision

Form I-140, Immigrant Petition for Alien Worker (Advanced Degree)

The Petitioner, an information technology business, seeks to employ the Beneficiary as a software developer. It requests classification of the Beneficiary as a member of the professions holding an advanced degree under the second preference immigrant classification. Immigration and Nationality Act (the Act) section 203(b)(2), 8 U.S.C. § 1153(b)(2). This employment-based immigrant classification allows a U.S. employer to sponsor a professional with an advanced degree for lawful permanent resident status.

The Director of the Texas Service Center denied the petition, concluding that the proffered position was not a permanent, full-time position and therefore the record did not establish that the Petitioner had a bona fide job opportunity available for the Beneficiary. The matter is now before us on appeal. 8 C.F.R. § 103.3.

The Petitioner bears the burden of proof to demonstrate eligibility by a preponderance of the evidence. Matter of Chawathe, 25 I&N Dec. 369, 375-76 (AAO 2010). We review the questions in this matter de novo. *Matter of Christo's*, Inc., 26 I&N Dec. 537, 537 n.2 (AAO 2015). 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. LAW

Immigration as an advanced degree professional usually follows a three-step process. First, the prospective employer must obtain a labor certification approval from the U.S. Department of Labor (DOL) to establish that there are not sufficient U.S. workers who are available for the offered position. Section 212(a)(5) of the Act, 8 U.S.C. § 1182(a)(5). Second, the employer must submit the approved labor certification with an immigrant visa petition to U.S. Citizenship and Immigration Services (USCIS). Section 204 of the Act, 8 U.S.C. § 1154. The immigrant visa petition must establish that the foreign worker qualifies for the offered position, that the foreign worker and the offered position are eligible for the requested immigrant classification, and that the employer has the ability to pay the proffered wage. See 8 C.F.R. § 204.5. These requirements must be satisfied by the priority date of the immigrant visa petition. See 8 C.F.R. § 204.5(g)(2), *Matter of Wing's Tea House*, 16 I&N Dec. 158, 159 (Act. Reg'l Comm'r 1977). For petitions that require a labor certification, the priority date

is the date on which the DOL accepted the labor certification application for processing. See 8 C.F.R. § 204.5(d). Finally, if USCIS approves the immigrant visa petition, the foreign worker may apply for an immigrant visa abroad or, if eligible, for adjustment of status in the United States. Section 245 of the Act, 8 U.S.C. § 1255.

II. ANALYSIS

A. Job Offer

The Petitioner filed its Form I-140 petition on January 28, 2022, retaining a priority date of April 2, 2021. On the Form I-140, under "Part 6. Basic Information About the Proposed Employment," the Petitioner checked the "no" box in response to question 6, "[i]s this a permanent position?"[1] The Director issued a request for evidence (RFE), which notified the Petitioner that its response to question 6 in Part 6 of the Form I-140 contradicted the conditions of employment certified on the DOL Form ETA 9089 (labor certification). The Director therefore requested the Petitioner to "clarify the terms of the labor certification and demonstrate [its] intent regarding the nature of the proffered position." In response, the Petitioner notified the Director that its "no" response to question 6 in Part 6 had been an error and provided the Director with a new Form I-140 that included a "yes" response to question 6 in Part 6. The Petitioner also provided evidence of its job announcement postings to support its assertion that the "no" response in the initially filed petition had been an error. Specifically, the Petitioner included a printout of the announcement it placed on [redacted], the website of a State Workforce Agency (SWA) for North Carolina,[2] which stated that the job's duration is "Over 150 days" and the job time type is "Full Time (30 hours or More)." The Director reviewed this evidence and concluded that:

> Based on the SWA postings, the offered position will not be permanent and full-time in nature. Employment as it relates to the process of permanently employing aliens in the United States to mean in part permanent, full-time work by an employee for an employer other than oneself. See 20 C.F.R. Section 656.3. Here, the petitioner indicated the duration of the offered position as "Over 150 days." A job offer with a limited term of employment may not be a permanent, bona fide job opportunity. See Matter of Albert Einstein Medical Center, 2009-PER-00379 at *41 (BALCA 2011). In addition, the petitioner posted the number of work hours as "30 hours or more." According to the Department of Labor, full-time means at least 35 hours or more per week. See Memo, Farmer, Admin. for Reg'l. Mngm't., Div. of Foreign Labor Certification, DOL Field Memo No. 48-94 (May 16, 1994).

On appeal, the Petitioner explains that when posting an announcement on [redacted], certain questions mandate answers in order for an employer to proceed further in the job posting process. The Petitioner also explained that the site has a drop-down menu with limited options to select for answers. According to the Petitioner, the options available for it to select under the "[a]nticipated job duration" field were limited to: None Selected; Over 150 Days; 4 – 150 Days; and 1 – 3 Days. Therefore, the Petitioner states that it selected "Over 150 Days," as this selection most closely approximated the

[1] The Petitioner filed the Form I-140 using the September 30, 2020 edition of the form. In this edition, the referenced information appears on page 4.

[2] [redacted] is "a statewide system of workforce programs that prepare North Carolinians for employment." It can be accessed at [redacted].

permanent nature of the job. The Petitioner also contends that the "Full-Time or Part-Time" field offered the options: None Selected; Full Time (30 Hours or More); Part Time (Less than 30 Hours); Full and Part Time Positions; PRN (As Needed); Information Not Provided. The Petitioner selected "Full Time (30 Hours or More)," reasoning that this selection most closely approximated the full-time nature of the job, even though the [redacted] site defines "full-time" differently than DOL. While it could have selected "Information Not Provided" in response to the question, the Petitioner explains that the Director may have likewise concluded that such a selection did not confirm the full-time nature of the position either.

As the Director did not have the information and explanation concerning the limited drop-down selections available to the Petitioner on mandatory questions within the SWA site, we will withdraw the decision and remand the matter for the Director to reconsider whether the Petitioner has established that its position is permanent and full-time. When reconsidering the issue, the Director may wish to acknowledge that once a decision is issued, a petitioner may not make material changes to a petition in an effort to make a deficient petition conform to USCIS requirements. See Matter of Izummi, 22 I&N Dec. 169, 176 (Assoc. Comm'r 1998). The Director may wish to further note that, in this instance, the Petitioner provided a corrected Form I-140 in response to the Director's RFE, which it submitted before the Director adjudicated the petition.

B. Ability to Pay

Although the Director did not address this issue, we will also remand this matter for a determination on the Petitioner's ability to pay the Beneficiary the proffered wage. A petitioner must establish its ability to pay the proffered wage from the priority date of the petition until the beneficiary obtains lawful permanent residence. 8 C.F.R. § 204.5(g)(2). Evidence of ability to pay must generally include annual reports, federal tax returns, or audited financial statements. Id. In determining ability to pay, USCIS first determines whether the petitioner paid the beneficiary the full proffered wage each year from the priority date. If the petitioner did not pay the proffered wage in any given year, USCIS next determines whether the petitioner had sufficient net income or net current assets to pay the proffered wage (reduced by any wages paid to the beneficiary). If net income and net current assets are insufficient, USCIS may consider other relevant factors, such as the number of years the petitioner has been in business, the size of its operations, the growth of its business over time, its number of employees, the occurrence of any uncharacteristic business expenditures or losses, its reputation within its industry, or whether a beneficiary will replace a current employee or outsourced service. See Matter of Sonegawa, 12 I&N Dec. 612, 614-15 (Reg'l Comm'r 1967).

In the instant case, the Petitioner provided the Beneficiary's paystubs covering June 2021 through December 2021, and one paystub from January 2022. As previously stated, the priority date for this petition is April 2, 2021. The record does not contain evidence that the Petitioner paid the Beneficiary the full proffered wage from the priority date onward. We do not have all of the Beneficiary's 2021 paystubs necessary to make such a determination and the Petitioner did not provide the Beneficiary's 2021 Form W-2. However, the Petitioner provided its 2021 Internal Revenue Service (IRS) Form 1120, which states that the Petitioner's taxable income before deductions was $443,085. While this level of income demonstrates the Petitioner's ability to pay the Beneficiary the proffered wage of $85,488 per year, USCIS records indicate that the Petitioner has filed Form I-140 petitions on behalf

of other beneficiaries. As such, there may be a question as to whether the petitioner can meet the ability to pay obligation on all of its petitions.

An analysis of multiple beneficiaries is not necessary in cases where a petitioner has paid the beneficiary a salary equal to or greater than the proffered wage and has also submitted the required regulatory evidence. However, in this case, the Petitioner has not provided all of the Beneficiary's paystubs for 2021, nor does the record include the Beneficiary's 2021 Form W-2. Accordingly, it may be necessary to determine whether the petitioner can meet the ability to pay obligation for all its petitions.

The Director may request additional evidence of the wages the Petitioner has paid the Beneficiary since the priority date. If such evidence demonstrates that the Petitioner has paid the proffered wage from the priority date onward, then this would establish the Petitioner's ability to pay, and the Director would not need to analyze the Petitioner's ability to pay multiple beneficiaries. On the other hand, if the evidence does not support a finding that the Petitioner paid the Beneficiary the proffered wage from the priority date onward, the Director would need to undertake an analysis of the Petitioner's ability to pay multiple beneficiaries. Therefore, we remand the matter to the Director to request additional evidence of the wages paid to the Beneficiary and to analyze the Petitioner's ability to pay. The Director may only consider the issue of multiple beneficiaries if the Petitioner's evidence does not demonstrate that it paid the Beneficiary the full proffered wage from the priority date onward.

III. CONCLUSION

We hereby withdraw the Director's decision and remand to the matter so that the Director may reconsider whether the Petitioner has established that it has a bona fide, permanent, and full-time job opportunity available. In addition, we remand the matter for the Director to analyze the Petitioner's ability to pay the Beneficiary the proffered wage. The Director may request evidence bearing upon these issues and any other evidence deemed necessary to determine the Petitioner's eligibility for the requested immigration benefit. We express no opinion regarding the ultimate resolution of this case on remand.

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