U.S. Citizenship and Immigration Services

Non-Precedent Decision of the Administrative Appeals Office

In Re: 644852

Date: AUG. 3, 2022

Appeal of Texas Service Center Decision

Form I-140, Immigrant Petition for Other Worker

The Petitioner seeks to employ the Beneficiary as a food service worker. It requests classification of the Beneficiary as an unskilled worker under the third preference immigrant classification. Immigration and Nationality Act (the Act) 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 noncitizen 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 for three separate grounds. First, the Director concluded that the Petitioner did not establish it had the ability to pay the Beneficiary the proffered wage as of the priority date. Second, the Director determined that the Petitioner did not establish that it intended to employ the Beneficiary in a full-time position, and thus failed to establish that it made a *bona fide* job offer. Third, the Director found that the Petitioner willfully misrepresented a material fact in seeking the requested benefit and invalidated the labor certification. On appeal, the Petitioner asserts that it was able to pay the Beneficiary the proffered wage as of the priority date, that it made a *bona fide* job offer, and that it did not misrepresent a material fact in seeking the requested benefit.

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

Immigration as an unskilled worker generally follows a three-step process. To permanently fill a position in the United States with a foreign worker, a prospective employer must first obtain certification from the U.S. Department of Labor (DOL). *See* section 212(a)(5) of the Act, 8 U.S.C. § 1182(a)(5). DOL approval signifies that insufficient U.S. workers are able, willing, qualified, and available for a position. *Id.* Labor certification also indicates that the employment of a noncitizen will not harm wages and working conditions of U.S. workers with similar jobs. *Id.*

If DOL approves a position, an employer must next submit the certified labor application 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 considers whether a beneficiary meets the requirements of a certified position and a requested immigrant visa classification. If USCIS approves the petition, a noncitizen may finally 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.

The term "other worker" is defined in the regulation at 8 C.F.R. § 204.5(l)(2) as follows:

> *Other worker* means a qualified [noncitizen] who is capable, at the time of petitioning for this classification, of performing unskilled labor (requiring less than two years training or experience), not of a temporary or seasonal nature, for which qualified workers are not available in the United States.

The regulation at 8 C.F.R. § 204.5(l)(3)(ii)(D) states that a petition for an unskilled worker must be accompanied by evidence that the noncitizen meets any educational, training and experience, and other requirements of the labor certification.

In addition, a beneficiary must meet all of the education, training, experience, and other requirements specified on the labor certification as of the petition's priority date. *See Matter of Wing's Tea House*, 16 I&N Dec. 158, 159 (Acting Reg'l Comm'r 1977).

II. ANALYSIS

There are three issues on appeal: (1) whether the Petitioner's job offer was *bona fide;* (2) whether the Petitioner willfully misrepresented a material fact in seeking the requested benefit; and (3) whether the Petitioner had the continuing ability to pay the proffered wage from the priority date onward. Before addressing whether the Petitioner had the continuing ability to pay the proffered wage, we first withdraw the Director's conclusions that the Petitioner did not make a *bona fide* job offer and that the Petitioner willfully misrepresented a material fact in seeking the requested benefit.

A. *Bona Fide* Job Offer

In reaching the conclusion that the Petitioner's job offer was not *bona fide*, the Director noted that the Petitioner did not inform DOL that the Beneficiary's work history included working full time as an English teacher at a language institute in South Korea; instead, the Petitioner informed DOL that the Beneficiary worked as the vice president of that language institute. The Director also noted that the Petitioner required prospective workers to provide their employment history, even though its stated job requirements did not require any prior work experience. The Director further noted that the Petitioner's job postings provided inconsistent statements regarding whether the position requires a high school education, or no particular level of education. Additionally, the Director noted that the Petitioner's recruitment report stated that it received no résumés, but the Job Order Print indicates that the Virginia Workforce Commission referred 50 prospective workers. Based on those observations, the Director concluded that "the [P]etitioner failed to submit any evidence to show that the [B]eneficiary has the intent to abandon her family affairs to be employed as a sushi chef with the

[P]etitioner on a full-time basis" and that the record did not establish "whether a *bona fide* job offer exists and whether the job opportunity was clearly open to any qualified U.S. worker."

On appeal, the Petitioner reasserts that the proffered position as a food service worker requires no prior employment experience; therefore, whether the Petitioner disclosed prior employment experience to DOL was immaterial to its function in confirming the unavailability of U.S. workers to fill the position and that the employment of a noncitizen would not adversely affect domestic workers, referencing section 212(a)(5) of the Act. Moreover, the Petitioner submits a declaration from the Beneficiary, which reasserts, as she did in another declaration in the record, that she co-founded the language institute with her former husband, her title was vice president and she performed multiple tasks, including business management, but she primarily taught English until she divorced her husband and ended her employment at the language institute; therefore, she did not fail to disclose her predominant work experience. The Petitioner also clarifies that the Virginia Workforce Commission "referrals" addressed by the Director "'were actually a parameter setting of how many total applications would be allowed to be accepted by the system," not an indication of how many applications were actually received. The Petitioner submits help screen information in support of the appeal that confirms that clarification. Furthermore, the Petitioner asserts that a case cited by the Director in questioning whether the Beneficiary's work experience supports the conclusion that job offer is *bona fide* specifically observes, "Consideration may also be given to the [noncitizen's] own declaration regarding his intended employment," among other factors related to intent to engage in a particular profession. *Matter of Semerjian*, 11 I&N Dec. 751, 754 (Reg'l Comm'r 1966). Furthermore, the Director's reference to the Beneficiary working as a "sushi chef" rather than as a food service worker raises questions regarding the Director's analysis.

Based on the preponderance of evidence standard, the record does not support the Director's conclusion regarding the *bona fides* of the job offer. *See Matter of Chawathe*, 25 I&N Dec. 369, 376 (AAO 2010); *see also Matter of E-M-*, 20 I&N Dec. 77, 79-80 (Comm'r 1989). Therefore, we withdraw the Director's conclusion that the record does not establish a *bona fide* job offer.

B. Willful Misrepresentation of a Material Fact

In reaching the conclusion that the Petitioner willfully misrepresented a material fact in seeking the requested benefit, the Director focused on five issues. First, the Director asserted that an individual named Y-H-H- signed the Form I-140, Immigrant Petition for Alien Workers, on behalf of the Petitioner, thereby taking "legal responsibility for the truth and accuracy of any evidence submitted in support of Form I-140 [*sic*]." Second, the Director noted that the record contains inconsistent information regarding whether the proffered position has any educational or work experience requirements. Third, the Director noted that the record contains inconsistent information regarding whether the proffered position would be full time or "'(30 Hours or More)' which is indicative of part-time employment." Fourth, the Director noted that the phone number the Petitioner provided in a job posting notice was non-functional, "thus, even if there were any individuals interested in the job offered, they would have been unable to speak to anybody about scheduling an interview." Fifth, the Director reiterated the conflicting information regarding whether the Petitioner had received any résumés, addressed above.

On appeal, the Petitioner disavows that an individual named Y-H-H- signed the Form I-140; instead, the Petitioner asserts that its Chief Legal Officer, an individual named D-B-, signed the Form I-140.

A review of the Form I-140 confirms that the Director erred by asserting that an individual named Y-H-H- signed the Form I-140. In fact, the Petitioner's Chief Legal Officer, D-B-, signed the Form I-140. Next, the Petitioner explains that the "'(30 Hours or More)' portion of the job posting is a system limitation of the state workforce site," not a statement by the Petitioner that the proffered position would be limited to part-time, rather than full-time, employment. Further, as addressed above, the Petitioner clarified that the Virginia Workforce Commission "referrals" addressed by the Director "'were actually a parameter setting of how many total applications would be allowed to be accepted by the system," not an indication of how many applications were actually received. Additionally, on appeal, the Petitioner sufficiently addressed the Director's concerns regarding listing education and work requirements, and an inoperable phone number, in its recruiting materials.

Based on the preponderance of evidence standard, the record does not support the Director's conclusion that the Petitioner willfully misrepresented a material fact in seeking the requested benefit. *See Matter of Chawathe*, 25 I&N Dec. at 376; *see also Matter of E-M-*, 20 I&N Dec. at 79-80. Therefore, we withdraw the Director's conclusion that the Petitioner willfully misrepresented a material fact, and we reinstate the labor certification.

C. Ability to Pay

The regulation at 8 C.F.R. § 204.5(g)(2) states in pertinent part:

> *Ability of prospective employer to pay wage.* Any petition filed by or for an employment-based immigrant which requires an offer of employment must be accompanied by evidence that the prospective United States employer has the ability to pay the proffered wage. The petitioner must demonstrate this ability at the time the priority date is established and continuing until the beneficiary obtains lawful permanent residence. Evidence of this ability shall be either in the form of copies of annual reports, federal tax returns, or audited financial statements.

In determining a petitioner's ability to pay, we first examine whether it paid a beneficiary the full proffered wage each year from a petition's priority date. If a petitioner did not pay a beneficiary the full proffered wage, we next examine whether it had sufficient annual amounts of net income or net current assets to pay the difference between the proffered wage and the wages paid, if any. If a petitioner's net income or net current assets are insufficient, we may also consider other evidence of its ability to pay the proffered wage.[1]

Further, 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).

[1] Federal courts have upheld our method of determining a petitioner's ability to pay a proffered wage. *See, e.g., River St. Donuts, LLC v. Napolitano*, 558 F.3d 111, 118 (1st Cir. 2009); *Tongatapu Woodcraft Haw., Ltd. v. Feldman*, 736 F.2d 1305, 1309 (9th Cir. 1984); *Estrada-Hernandez v. Holder*, 108 F. Supp. 3d 936, 942-946 (S.D. Cal. 2015); *Rizvi v. Dep't of Homeland Sec.*, 37 F. Supp. 3d 870, 883-84 (S.D. Tex. 2014), *aff'd*, 627 Fed. App'x 292, 294-295 (5th Cir. 2015).

In this case, the proffered wage is $16,827.00 per year. The Petitioner must demonstrate its continuing ability to pay the proffered wage from the priority date in 2015 until the Beneficiary obtains lawful permanent residence. 8 C.F.R. § 204.5(g)(2). The regulation 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." *Id.* 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 contains the combined audited financial statements for the Petitioner and its affiliates for 2015. The audited financial statements separately state the Petitioner's net income and net current assets for 2015 and appear to establish the Petitioner's ability to pay based on its net income in 2015. However, in the interim, the Petitioner's franchise tax status has ended in the State of Texas. The Texas Comptroller of Public Accounts database lists the Petitioner's corporate status as "franchise tax ended." Tex. Comptroller of Pub. Accounts, https://mycpa.cpa.state.tx.us/coa/coaSearchBtn (last visited Aug. 3, 2022). This indicates that the "entity has ceased to exist in its state or country of formation or has ceased doing business in Texas." Tex. Comptroller of Pub. Accounts, https://mycpa.cpa.state.tx.us/coa/FranchiseStatusHelp.jsp (last visited Aug. 3, 2022).[2]

Because the Petitioner has ceased to exist or ceased doing business in Texas, we will remand the matter to the Director to determine the Petitioner's status and its continuing ability to pay the Beneficiary the proffered wage.[3] We note that the Petitioner has filed multiple Form I-140 petitions for other beneficiaries since the 2015 priority date. Therefore, it 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] On remand, the Director should request additional, updated evidence of the Petitioner's ability to pay all of its applicable beneficiaries. The Director should allow the Petitioner a 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]

---

[2] This information calls into question the Petitioner's intent to employ the Beneficiary at the Texas location specified on the labor certification.

[3] If the Petitioner intends to claim that it has a successor-in-interest, it must: (1) fully describe and document the transaction transferring ownership of all, or a relevant part, of the predecessor's business to the successor; (2) demonstrate that the job opportunity remains the same as certified by the DOL; and (3) establish eligibility for the requested benefit in all respects, including the ability to pay of the predecessor and the successor. *See Matter of Dial Auto Repair Shop, Inc.*, 19 I&N Dec. 481, 482-83 (Comm'r 1986).

[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] 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 id.*

We also note that the record contains a letter dated June 28, 2016, from the Petitioner's chief financial officer (CFO), stating that the Petitioner has the ability to pay the proffered wage. The CFO asserts that the Petitioner employed 1,507 employees at that time and that it had net income of $3,412,224 in 2015. However, given the Petitioner's terminated franchise tax status and its multiple Form I-140 filings, we decline to exercise our discretion to accept the letter from the Petitioner's CFO.

III. CONCLUSION

For the reasons discussed above, we will remand this case to the Director for further consideration of the Petitioner's eligibility for the immigration benefit it seeks on behalf of the Beneficiary.

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