



**U.S. Citizenship
and Immigration
Services**

**Non-Precedent Decision of the
Administrative Appeals Office**

In Re: 18398365

Date: AUG. 08, 2022

Appeal of Nebraska Service Center Decision

Form I-140, Immigrant Petition for Skilled Worker

The Petitioner, an ethnic food store, seeks to employ the Beneficiary as a Polish specialty pastry chef. It requests classification of the Beneficiary as a skilled worker under the third preference immigrant classification. Immigration and Nationality Act (the Act) section 203(b)(3)(A)(i), 8 U.S.C. § 1153(b)(3)(A)(i). 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 at least two years of training or experience.

The Director of the Nebraska Service Center denied the petition, concluding that the record did not establish that the offered position qualifies for the requested immigrant classification. The Petitioner filed a motion to reconsider, which the Director dismissed for the same reason. 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 for entry of a new decision consistent with the following analysis.

I. LAW

Employment-based immigration 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). 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). 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 foreign national may finally apply for an immigrant visa abroad or, if eligible, adjustment of status in the United States. Section 245 of the Act, 8 U.S.C. § 1255.

II. ANALYSIS

A. Skilled Worker Classification

On the petition, the Petitioner requested classification as a skilled worker. The regulation at 8 C.F.R. § 204.5(l)(2) defines the term “skilled worker” as follows:

Skilled worker means an alien who is capable, at the time of petitioning for this classification, of performing skilled labor (requiring at least two years training or experience), not of a temporary or seasonal nature, for which qualified workers are not available in the United States. Relevant post-secondary education may be considered as training for the purposes of this provision.

The regulation at 8 C.F.R. § 204.5(l)(4) states:

Differentiating between skilled and other workers. The determination of whether a worker is a skilled or other worker will be based on the requirements of training and/or experience placed on the job by the prospective employer, as certified by the Department of Labor. In the case of a Schedule A occupation or a shortage occupation within the Labor Market Pilot Program, the petitioner will be required to establish to the director that the job is a skilled job, i.e., one which requires at least two years of training and/or experience.

The Director denied the petition, finding that the offered position did not meet the requirements for the skilled worker classification because it did not require the minimum of two years of training or experience. On appeal, the Petitioner asserts that the skilled worker classification permits a combination of experience and training to meet the two year minimum. We agree. Under the skilled worker classification, the required two years may be comprised of a combination of training, experience, and/or relevant post-secondary education. *See* 8 C.F.R. § 204.5(l)(2), (4).

The labor certification in this instance states that the position of Polish specialty pastry chef requires six months of training as a pastry chef and 18 months of experience in the offered position, for a total of 24 months of required training and/or experience. We therefore find that the offered position meets the requirements for the skilled worker classification, and we will withdraw the Director’s decision. Although the Director’s decision is withdrawn, we cannot affirmatively conclude that the Petitioner has established eligibility for the benefit sought, as further detailed below. We will therefore remand the matter to the Director for further consideration.

B. Beneficiary Qualifications

A petition for a skilled worker must be accompanied by evidence that the noncitizen meets the educational, training, and/or experience, and any other requirements of the labor certification as of the priority date. 8 C.F.R. § 204.5(l)(3)(ii)(B). Evidence of a noncitizen’s qualifying experience or training shall be in the form of letters from relevant employers or trainers and shall include the name, address, and title of the writer, and a specific description of the duties performed by the noncitizen or of the training received. 8 C.F.R. § 204.5(g)(1).

The labor certification states that the Beneficiary acquired the required 18 months of work experience for the offered position while employed at [REDACTED] a bakery/pastry shop, from December 1, 2011, to December 31, 2013. To support this claim, the Petitioner provided an employment certification letter written in Polish and a partial English translation. However, any foreign-language document submitted to USCIS must be accompanied by a full English-language translation which is certified by the translator as complete and accurate, as well as the translator's certification that they are competent to translate from the foreign language to English. 8 C.F.R. § 103.2(b)(3). In this instance, the translation omits part of the text of the original document and therefore cannot be accepted. It is further noted that while the employment certification letter includes the name of the writer, it does not include the writer's title, as required by 8 C.F.R. § 204.5(g)(1). It also does not include a description of the Beneficiary's duties. *Id.*

Based on the evidence of record, the Petitioner has not established that the Beneficiary has sufficient work experience for the offered position. Since this issue was not previously addressed by the Director, we will remand the case for further consideration.

C. Ability to Pay

The regulation at 8 C.F.R. § 204.5(g)(2) states that a petitioner must establish that it has the ability to pay the beneficiary the proffered wage from the priority date¹ onward. Documentation of ability to pay shall be in the form of copies of annual reports, federal tax returns, or audited financial statements, and in appropriate cases, additional financial evidence may be submitted. *Id.* This documentation should demonstrate the Petitioner's continuing ability to pay the annual proffered wage of \$52,978 starting on the priority date, which in this instance is January 16, 2020.

In order to demonstrate its ability to pay the proffered wage, the Petitioner submitted its 2019 federal tax return. The record does not include the Petitioner's federal tax returns, annual reports, or audited financial statements from 2020 onward. Without this regulatorily-prescribed evidence, we cannot affirmatively find that the Petitioner had the continuing ability to pay the proffered wage from the priority date. Since this additional issue was not previously addressed by the Director, we will remand the matter to the Director for further consideration.

III. CONCLUSION

The evidence of record is sufficient to overcome the ground stated in the Director's denial decision. However, it is not sufficient to satisfy the remaining eligibility requirements. The matter will therefore be remanded to the Director to consider all the evidence and enter a new decision. The Director may request additional evidence regarding the Beneficiary's work experience, the Petitioner's ability to pay the proffered wage, and any other evidence that may be deemed relevant. We express no opinion regarding the ultimate resolution of this case on remand.

¹ The "priority date" of a petition is the date the underlying labor certification is filed with DOL. 8 C.F.R. § 204.5(d). The Petitioner must establish that all eligibility requirements for the petition have been satisfied as of the priority date.

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