U.S. Citizenship and Immigration Services

Non-Precedent Decision of the Administrative Appeals Office

In Re: 19085094

Date: AUG. 08, 2022

Appeal of Nebraska Service Center Decision

Form I-140, Immigrant Petition for Professional

The Petitioner, an engineering and architecture firm, seeks to employ the Beneficiary as an architectural engineer. It requests classification of the Beneficiary as a professional under the third preference immigrant classification. Immigration and Nationality Act (the Act), section 203(b)(3)(A)(ii), 8 U.S.C. § 1153(b)(3)(A)(ii). This employment-based immigrant classification allows a U.S. employer to sponsor a professional with a baccalaureate degree for lawful permanent resident status.

The Director of the Nebraska Service Center denied the petition, concluding that the record did not establish that the Petitioner had the ability to pay the proffered wage or that the beneficiary qualified for the offered position. 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. EMPLOYMENT-BASED IMMIGRATION

Immigration as a professional 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 the wages or 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.

Finally, if USCIS approves a petition, a designated noncitizen 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. ANALYSIS

A. Ability to Pay the Proffered Wage

A petitioner must establish that it has the ability to pay the beneficiary the proffered wage from the priority date[1] onward. 8 C.F.R. § 204.5(g)(2). To demonstrate that the job offer to the beneficiary is realistic, the petitioner must also establish its ability to pay the proffered wages of its other Form I-140 beneficiaries.[2]

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. We next examine whether the petitioner had sufficient annual amounts of net income or net current assets to pay the proffered wage. 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.[3] USCIS may also consider the totality of the petitioner's circumstances, including the overall magnitude of its business activities, in determining the Petitioner's ability to pay the proffered wage. *See Matter of Sonegawa,* 12 I&N Dec. 612 (Reg'l Comm'r 1967).[4]

The record does not demonstrate that the Petitioner has paid the Beneficiary any wages from the priority date onward, and the Director found that the Petitioner's annual net income and net assets, as documented in its 2019 tax return, were insufficient to pay the proffered wage. On appeal, the Petitioner provides its amended 2019 tax return, payroll statements for 2019 and 2020, bank statements from 2021, and documentation of projects it is contracted to perform and the value of those projects.

The regulation at 8 C.F.R. § 204.5(g)(2) states that documentation of ability to pay shall be in the form of copies of annual reports, federal tax returns, or audited financial statements, and that in appropriate cases, additional financial evidence may be submitted. This documentation should demonstrate the Petitioner's continuing ability to pay the proffered wage of $38,376 starting on the priority date, which in this instance is January 16, 2020.

However, the record does not include the Petitioner's federal tax returns, audited financial statements, or annual reports from 2020 onward. Because the record is not clear whether this documentation was available at the time of filing the appeal, we will remand the matter to the Director for further

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[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).

[2] *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 when the petitioner did not demonstrate its ability to pay multiple beneficiaries).

[3] 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).

[4] USCIS may, at its discretion, consider evidence relevant to the petitioner's financial ability that falls outside of its net income and net current assets. We may consider such factors as the number of years the petitioner has been doing business, the established historical growth of the petitioner's business, the petitioner's reputation within its industry, the overall number of employees, whether the beneficiary is replacing a former employee or an outsourced service, the occurrence of any uncharacteristic business expenditures or losses, and any other evidence that USCIS deems relevant to the petitioner's ability to pay the proffered wage. *See Matter of Sonegawa*, 12 I&N Dec. at 614-15.

consideration. The Director may request any additional documentation deemed relevant to determine the Petitioner's continuing ability to pay the proffered wage.

USCIS records indicate that the Petitioner has filed a Form I-140 for another beneficiary. 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 at 124. On remand, the Director should consider the Petitioner's net income and net current assets each year from 2020 onward, as well as information related to the Petitioner's other Form I-140 beneficiaries for the relevant time period. At their discretion, in accord with *Matter of Sonegawa*, 12 I&N Dec. 612, the Director may consider other evidence that is relevant to the Petitioner's financial situation.

B. Beneficiary Qualifications

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). In assessing 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 additional requirements. *See e.g. Madany* v. *Smith,* 696 F.2d 1008, 1015 (D.C. Cir. 1983) (holding that "DOL bears authority for setting the *content* of the labor certification") (emphasis added).

In addition to a bachelor's degree in architectural engineering, the labor certification accompanying the petition states that the offered position of architectural engineer requires at least one year of experience in the job offered, and that experience in an alternate occupation is not acceptable. Part H.14 of the labor certification states: "Only requires education and experience of at least 1 year as an architectural designer and architectural engineer, whether consecutive or concurrent."

On the labor certification, the Beneficiary attested that he was employed by the [redacted] as a resident engineer/architect for four months. He further attested that he was employed by the [redacted] as an architectural engineer for approximately two years and seven months.[5] To support claimed qualifying experience, a petitioner must submit a letter from the beneficiary's former employer. 8 C.F.R. § 204.5(l)(3)(ii)(A). The letter must contain the writer's name and title and the employer's address and describe the Beneficiary's experience. *Id.*

In its initial filing, the Petitioner did not provide employer letters to demonstrate the Beneficiary's qualifying experience. In response to the Director's request for evidence (RFE), the Petitioner provided a letter from [redacted] stating that the Beneficiary worked for the company as a full-time resident engineer/architect from May to September 2013 and a letter from [redacted] stating that he worked for the company as a full-time architectural engineer from May 2015 to November 2017. The Director found that these letters were insufficient to demonstrate that the Beneficiary had the required work experience because they only stated the month and year when the Beneficiary started

[5] The Beneficiary also attested to employment with other organizations as a graphic designer and a graduate assistant pursuant to his studies in the field of computer software engineering. Since these are not architectural engineer positions and the Petitioner indicated that it will only accept experience as an architectural designer and architectural engineer these positions do not qualify the Beneficiary for the job offered.

and ended each job, and not the specific day. We will withdraw this finding because the specific day the job started or ended is not material to the determination of whether the Beneficiary has sufficient work experience in this case. Here, the labor certification required one year of prior work experience, and the claimed work experience in the letters provided adds up to over a year regardless of what specific day the Beneficiary's employment began or ended. However, beyond the decision of the director, the documentation of the Beneficiary's work experience is insufficient to demonstrate eligibility for the reasons stated below.

The record indicates that in December 2018, the Petitioner filed another Form I-140 on the Beneficiary's behalf, seeking to employ him as an architectural engineer. The labor certification submitted in support of that petition only stated that he had worked at [redacted] as an architectural drawer, and did not mention [redacted] This petition also included a copy of the Beneficiary's resume, which stated he had worked at [redacted] as a project assistant and architectural drawer, and independently as a guitar teacher. This document also did not mention [redacted] Furthermore, in November 2018, the Beneficiary filed a nonimmigrant visa application with the U.S. Department of State. In that application, he stated that he had no previous employment.

The resume submitted with the current petition states that the Beneficiary's title at [redacted] was architectural engineer, rather than architectural drawer, and also states that he worked as a resident engineer/architect (intern) at [redacted] Additionally, on appeal, the Petitioner submits a new letter from [redacted] this time stating that the Beneficiary was employed as an architectural designer from May 2015 to June 2016, and after "gaining sufficient knowledge and experience," worked as an architectural engineer from June 2016 to November 2017.

On remand, the Director should address the inconsistencies in the Beneficiary's employment record and may request the Petitioner to resolve those inconsistencies with independent, objective evidence pointing to where the truth lies. *Matter of Ho*, 19 I&N Dec. 582, 591-92 (BIA 1988).[6] The Director may also request the Petitioner to establish how the Beneficiary worked full-time at [redacted] and [redacted] while also earning his college degree.

III. CONCLUSION

In view of the foregoing, the previous decision of the Director will be withdrawn. The petition is remanded to the Director. The Director may request any additional evidence considered pertinent. Similarly, the Petitioner may provide additional evidence within a reasonable period of time to be determined by the Director. Upon receipt of all the evidence, the Director will review the entire record and enter a new decision.

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

[6] Doubt cast on any aspect of the Petitioner's evidence also reflects on the reliability of its remaining evidence. *See Matter of Ho*, 19 I&N Dec. at 591-92.