U.S. Citizenship and Immigration Services

Non-Precedent Decision of the Administrative Appeals Office

In Re: 01318608

Date: JUL. 12, 2022

Motion on Administrative Appeals Office Decision

Form I-140, Immigrant Petition for Skilled Worker

The Petitioner, a provider of janitorial services, seeks to employ the Beneficiary as an assistant manager. The company requests his classification under the third-preference, immigrant visa category as a skilled worker. *See* Immigration and Nationality Act (the Act) section 203(b)(3)(A)(1), 8 U.S.C. § 1153(b)(3)(A)(i).

After first granting the filing, the Director of the Texas Service Center revoked the petition's approval. We dismissed the Petitioner's following appeal. We agreed with the Director that the record supports the Petitioner's willful concealment of a material fact: a family relationship between a company co-owner and the Beneficiary. *See Matter of A-M- Co.*, ID# 743577 (AAO Dec. 12, 2017).

The matter returns to us on the Petitioner's motion to reconsider. The company asserts that we erred in finding that its misrepresentation was willful and material.

In revocation proceedings, the Petitioner bears the burden of establishing eligibility for the requested benefit by a preponderance of evidence. *See Matter of Ho*, 19 I&N Dec. 582, 589 (BIA 1988) (discussing the burden of proof); *see also Matter of Chawathe*, 25 I&N Dec. 369, 375 (AAO 2010) (discussing the standard of proof). Upon review, we find that the Director overlooked additional, potential grounds of revocation. Because of the omissions, we will grant the motion, withdraw the Director's decision, and remand the matter for entry of a new decision consistent with the following analysis.

I. THE REQUIRED EXPERIENCE

Although unaddressed by the Director, the record at the time of the petition's approval did not demonstrate the Beneficiary's qualifying employment experience for the offered position. A petitioner must establish a beneficiary's possession of all job requirements of a 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). This petition's priority date is April 7, 2011, the date the U.S. Department of Labor (DOL) accepted the labor certification application for processing. *See* 8 C.F.R. § 204.5(d) (explaining how to determine a petition's priority date).

When assessing a beneficiary's qualifications, U.S. Citizenship and Immigration Services (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 unstated requirements. *See, e.g., Madany v. Smith*, 696 F.2d 1008, 1015 (D.C. Cir. 1983) (holding that "DOL bears the authority for setting the *content* of the labor certification") (emphasis in original).

The Petitioner's labor certification states the minimum requirements of the offered position of assistant manager as two years of experience "in the job offered." The certification states that the position requires neither education nor training.

On a labor certification application, the phrase "in the job offered" means experience performing the key duties of the offered position as stated on the application. *See, e.g., Matter of Symbioun Techs., Inc.*, 2010-PER-01422, *3 (BALCA Oct. 24, 2011). The Petitioner's application states the key duties of the offered position as: overseeing and coordinating activities of janitorial employees; training new employees; ordering and issuing supplies; maintaining equipment inventory; managing projects and ensuring their completions; scheduling workloads; ensuring maintenance of equipment and cleanliness standards; and substituting in for employees as needed. The company indicated on the certification that it will not accept experience in an alternate occupation.

On the labor certification, the Beneficiary attested that he gained almost four years of full-time, qualifying experience in South Korea. He stated that, from February 2003 to February 2007, he worked for a communications services company as an assistant manager.

Consistent with 8 C.F.R. § 204.5(l)(3)(ii)(A), the Petitioner submitted a letter from the Beneficiary's purported former employer as proof of the claimed experience. The "Employment Certification" states the company's employment of the Beneficiary for the claimed period as a "Department Chief (Assistant Manager)." The certification also states his "Affiliation" with the "Takeoff Technical Consulting Team for Oversee Business."

Contrary to 8 C.F.R. § 204.5(l)(3)(ii)(A), the employment certification lacks a sufficient "description of the . . . experience of the alien." The certification does not detail the Beneficiary's former job duties. Also, the document does not demonstrate his performance of the key duties of the offered position. Further, contrary to 8 C.F.R. § 103.2(b)(3), the document's English translation lacks certification of its completeness and accuracy and the translator's competency to translate from Korean into English. The record therefore did not demonstrate the Beneficiary's qualifying experience for the offered position.

The Director did not notify the Petitioner of these evidentiary deficiencies. We will therefore withdraw the Director's decision and remand the matter. On remand, the Director should issue a new notice of intent to revoke (NOIR) the petition's approval, informing the Petitioner that it must submit additional evidence of the Beneficiary's qualifying experience "in the job offered" and consistent with the requirements of 8 C.F.R. § 204.5(l)(3)(ii)(A). The new NOIR should also notify the Petitioner to provide certification of the translation's accuracy from a competent translator. *See* 8 C.F.R. § 103.2(b)(3).

II. ABILITY TO PAY THE PROFFERED WAGE

Also unaddressed by the Director, the record at the time of the petition's approval did not establish the Petitioner's ability to pay the proffered wage of the offered position. A petitioner must demonstrate its ability to pay a proffered wage, from a petition's priority date onward until a beneficiary obtains lawful permanent residence. 8 C.F.R. § 204.5(g)(2). Evidence of ability to pay must generally include copies of annual reports, federal tax returns, or audited financial statements. *Id.*

In determining ability to pay, USCIS examines whether a petitioner paid a beneficiary the full, proffered wage each year, beginning with the year of a petition's priority date. If a petitioner did not annually pay the full, proffered wage or did not pay a beneficiary at all, USCIS considers whether the business generated annual amounts of net income or net current assets sufficient to pay any differences between the proffered wage and the wages paid. If net income and net current assets are insufficient, USCIS may consider other factors affecting a petitioner's ability to pay a proffered wage. *See Matter of Sonegawa*, 12 I&N Dec. 612, 614-15 (Reg'l Comm'r 1967).[1]

The Petitioner's labor certification states the proffered wage of the offered position of assistant manager as $33,925 a year. As previously indicated, the petition's priority date is April 7, 2011.

USCIS approved the petition in July 2012. Thus, at the time of approval, the Petitioner had to demonstrate its ability to pay the proffered wage in 2011, the year of the petition's priority date, and 2012.

The record contains evidence that the Petitioner paid wages to the Beneficiary from 2014 through 2017. But the company did not submit proof that it paid him in 2011 or 2012. Thus, based solely on wages paid, the Petitioner did not demonstrate its ability to pay the proffered wage.

The record contains copies of the Petitioner's federal income tax returns for 2011 and 2012. The 2011 tax return reflects net income of $24,491 and net current assets of $31,959. Neither amount equals nor exceeds the annual proffered wage of $33,925. The record therefore does not demonstrate the Petitioner's ability to pay the proffered wage in 2011. The 2012 return reflects a net current income of $40,944 and net current assets of $37,756. Both amounts exceed the annual proffered wage of $33,925. The Petitioner therefore appears to have demonstrated its ability to pay the proffered wage in 2012. But USCIS records indicate the Petitioner's filing of Form I-140 petitions for other beneficiaries. A petitioner must demonstrate its ability to pay the proffered wages of each petition it files until a beneficiary obtains lawful permanent residence. 8 C.F.R. § 204.5(g)(2). This Petitioner must therefore demonstrate its ability to pay the combined proffered wages of its petitions that were pending or approved as of this petition's priority date of April 7, 2011, or filed thereafter in 2011 or 2012. *See Patel v. Johnson*, 2 F.Supp.3d 108, 124 (D. Mass. 2014) (affirming our revocation of a petition's approval where, as of the filing's grant, the petitioner did not demonstrate its ability to pay the combined proffered wages of multiple pending petitions).[2]

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[1] Federal courts have upheld USCIS' 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).

[2] The Petitioner need not demonstrate its ability to pay proffered wages of petitions that it withdrew or - unless pending on appeal or motion - that USCIS rejected, denied, or revoked. The company also need not demonstrate its ability to pay

USCIS records indicate that, as of April 7, 2011, three of the Petitioner's other petitions were approved.[3] The record lacks their proffered wages or priority dates. Thus, USCIS cannot calculate the total combined proffered wages that the Petitioner must demonstrate its ability to pay in 2011 and 2012. For this additional reason, the record did not demonstrate the company's ability to pay the proffered wage.

The Director did not notify the Petitioner of insufficient evidence of its ability to pay the proffered wage. Thus, the new NOIR should notify the company that it must provide the proffered wages and priority dates of its three petitions that were approved as of April 7, 2011. The Petitioner may submit additional evidence of its ability to pay the combined proffered wages, including proof of any wages it paid to applicable beneficiaries in 2011 or 2012 and any materials supporting the factors stated in *Sonegawa*. *See* 12 I&N Dec. at 614-15. Also, the Director's new NOIR may reallege the Petitioner's concealment of a family relationship between a company co-owner and the Beneficiary.

III. CONCLUSION

The Director's NOIR omitted additional, potential grounds of revocation. We will therefore grant the motion and withdraw the Director's decision. On remand, the Director's new NOIR should notify the Petitioner of both the new and prior revocation grounds and afford the company a reasonable opportunity to respond. Upon receipt of a timely response, the Director should review the entire record and issue a new decision.

ORDER: The motion to reconsider is granted, and the matter is remanded for entry of a new decision consistent with the foregoing analysis.

proffered wages before the priority dates of corresponding petitions or after corresponding beneficiaries obtain lawful permanent residence.

[3] USCIS records identify the petitions by the following receipt numbers: [redacted]