U.S. Citizenship and Immigration Services

Non-Precedent Decision of the Administrative Appeals Office

In Re: 00786847

Date: JUL. 15, 2022

Motion on Administrative Appeals Office Decision

Form I-140, Immigrant Petition for Skilled Worker

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

After the filing's initial grant, the Director of the Texas Service Center revoked the petition's approval. The Director concluded that, on the accompanying certification from the U.S. Department of Labor (DOL), the Petitioner misrepresented the required availability of the offered position to U.S. workers. On appeal, we affirmed the decision. *See Matter of U- Corp.*, ID# 123484 (AAO Jun. 14, 2017).

The matter returns to us on the Petitioner's motion to reconsider. The company asserts the availability of the job to U.S. workers and denies misrepresenting any material facts.

The Petitioner bears the burden of demonstrating 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 in revocation proceedings); *see also Matter of Chawathe*, 25 I&N Dec. 369, 375 (AAO 2010) (discussing the standard of proof). Upon review, 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 ALLEGED MISREPRESENTATION

A labor certification employer must attest on its application that "[t]he job opportunity has been and is clearly open to any U.S. worker." 20 C.F.R. § 656.20(c)(8) (2004).[1] Based primarily on an undisclosed family relationship between the Beneficiary and a corporate officer/shareholder of the Petitioner, the Director concluded that the Petitioner misrepresented the availability of the offered position to U.S. workers. We will withdraw the Director's decision.

[1] DOL's current labor certification regulations apply to applications filed on or after March 28, 2005. Final Rule for Labor Certifications, 69 Fed. Reg. 77326, 77326 (Dec. 27, 2004). The Petitioner filed its labor certification application before that date. We therefore cite to prior DOL regulations.

II. ABILITY TO PAY THE PROFFERED WAGE

Although unaddressed by the Director, at the time of the issuance of the notice of intent to revoke (NOIR), the Petitioner did not demonstrate its required ability to pay the proffered wage of the offered position. A petitioner must demonstrate its continuing ability to pay a proffered wage, from a petition's priority date 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).[2]

The Petitioner's accompanying labor certification states the proffered wage of the offered position of assistant retail manager as $13.00 an hour, or - based on the specified 35-hour work week - $23,660 a year. The petition's priority date is August 23, 2001, the date an office in DOL's employment service system accepted the labor certification application for processing. *See* 8 C.F.R. § 204.5(d) (explaining how to determine a petition's priority date). USCIS approved the petition in September 2003. Thus, the Petitioner had to demonstrate its ability to pay the proffered wage in: 2001, the year of the petition's priority date; 2002; and 2003, the year of the filing's approval.

The Petitioner did not submit evidence that it paid wages to the Beneficiary. Thus, based solely on wages paid, the record did not demonstrate the Petitioner's ability to pay the proffered wage.

The Petitioner submitted a copy of its federal income tax return for 2001. The return reflects net income of $36,022 and net current assets of $57,114. Both amounts exceed the annual proffered wage of $23,660. The Petitioner therefore appears to have demonstrated its ability to pay the proffered wage in 2001.

The company, however, did not submit regulatory required evidence of its ability to pay in 2002 or 2003. The record at the time of the NOIR's issuance therefore did not demonstrate the Petitioner's continuing ability to pay the proffered wage.

The Director did not notify the Petitioner of this potential revocation ground. We will therefore remand the matter. On remand, the Director should issue a new NOIR instructing the company to demonstrate its ability to pay the proffered wage in 2002 and 2003. For the applicable years, the Petitioner must submit copies of annual reports, federal tax returns, or audited financial statements. *See* 8 C.F.R. § 204.5(g)(2). The company may also submit additional evidence of its ability to pay,

[2] 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).

including proof of any wages it paid the Beneficiary in 2002 or 2003 or materials supporting the factors stated in *Sonegawa*. *See* 12 I&N Dec. at 614-15.

If supported by the record, the new NOIR may allege additional, potential grounds of revocation. The Director, however, must notify the Petitioner of all alleged grounds and afford it a reasonable opportunity to respond. *See* 8 C.F.R. § 205.2(b). Upon receipt of a timely response, the Director should review the entire record and enter 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.