U.S. Citizenship and Immigration Services

Non-Precedent Decision of the Administrative Appeals Office

In Re: 06738188

Date: MAY 26, 2022

Appeal of Texas Service Center Decision

Form I-140, Immigrant Petition for an Alien Worker

The Petitioner, a wholesale plant grower, seeks to employ the Beneficiary as a production worker. It requests classification of the Beneficiary as an "other worker" under the third preference immigrant category. Immigration and Nationality Act (the Act) section 203(b)(3)(A)(iii), 8 U.S.C. § 1153(B)(3)(A)(iii). This employment-based "EB-3" immigrant classification allows a U.S. employer to sponsor for lawful permanent residence a foreign national who is capable of performing unskilled labor that requires less than two years of training or experience and is not of a temporary or seasonal nature.

The Director of the Texas Service Center denied the petition. The Director determined that fees paid by the Beneficiary violated the regulation at 8 C.F.R. § 656.12 and that the Petitioner misrepresented a material fact involving the *bona fides* of the job opportunity for other qualified applicants by attesting at section I.e.23 of the labor certification (ETA Form 9089) that it received no payment or reimbursement from the agency that recruited the Beneficiary for the offered position. The Director invalidated the labor certification based on the material misrepresentation at section I.e.23, leaving the I-140 petition without an accompanying labor certification as required by 8 C.F.R. § 204.5(a)(2).

On appeal the Petitioner asserts that the Director's findings in the decision were erroneous.

The AAO reviews the questions in this matter *de novo*. *See Matter of Christo's Inc.*, 26 I&N Dec. 537, 537 n.2 (AAO 2015). It is the Beneficiary's burden in these proceedings to establish eligibility for the requested benefit. *See* Section 291 of the Act, 8 U.S.C. § 1361; *Matter of Chawathe*, 25 I&N Dec. 369, 375 (AAO 2010). The Petitioner must prove by a preponderance of the evidence that the beneficiary is fully qualified for the benefit sought. *See Matter of Chawathe*, 25 I&N Dec. 369, 376 (AAO 2010). To establish its eligibility for the immigration benefit it seeks under the preponderance of the evidence standard, the Petitioner must submit sufficiently probative and credible evidence to establish that its claim is "more likely than not" or "probably" true. *See Matter of E-M-*, 20 I&N Dec. 77, 79-80 (Comm'r 1989).

Upon *de novo* review, we will withdraw the Director's decision to deny the petition and invalidate the labor certification. We will remand the case for adjudication within the statutory and regulatory framework for I-140 immigrant visa petitions.

I. LAW

Employment-based immigration generally follows a three-step process. First, an employer obtains an approved labor certification from the U.S. Department of Labor (DOL). *See* section 212(a)(5) of the Act, 8 U.S.C. § 1182(a)(5). By approving the labor certification, the DOL certifies that there are insufficient U.S. workers who are able, willing, qualified, and available for the offered position and that employing a foreign national in the position will not adversely affect the wages and working conditions of domestic workers similarly employed. *See* section 212(a)(5)(A)(i)(I)-(II) of the Act. Second, the employer files an immigrant visa petition with U.S. Citizenship and Immigration Services (USCIS). *See* section 204 of the Act, 8 U.S.C. § 1154. Third, if USCIS approves the petition, the foreign national 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.

To be eligible for the classification it requests for the beneficiary, a petitioner must establish, among other things, that it has the ability to pay the proffered wage stated in the labor certification. As provided in the regulation at 8 C.F.R. § 204.5(g)(2):

> 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 a case where the prospective United States employer employs 100 or more workers, the director may accept a statement from a financial officer of the organization which establishes the prospective employer's ability to pay the proffered wage. In appropriate cases, additional evidence, such as profit/loss statements, bank account records, or personnel records, may be submitted by the petitioner or requested by [USCIS].

II. ANALYSIS

With respect to the basis for the Director's decision, the Petitioner's assertions on appeal are persuasive. The Petitioner must prove eligibility by a preponderance of evidence, such that the applicant's claim is "probably true" based on the factual circumstances of each individual case. *Matter of Chawathe*; *Matter of E-M-*. We find that the Petitioner has met that burden with regard to the Director's findings. Accordingly, we will withdraw the Director's decision.[1]

As indicated in the above regulation, the Petitioner must establish its continuing ability to pay the proffered wage from the priority date[2] of the petition onward. In this case the proffered wage is $18,034 per year and the priority date is January 6, 2017.

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[1] We recognize that that the Director raised significant if somewhat speculative concerns. While not sufficiently developed for purposes of this visa petition, the Director is not barred from further inquiry, investigation, or the development of questions for consular processing or adjustment of status proceedings. *See Matter of O*, 8 I&N Dec. 295 (BIA 1959) (stating that the immigrant visa petition is not the appropriate stage of the process for questions regarding admissibility).

[2] The "priority date" of an employment-based immigrant petition is the date the underlying labor certification application is filed with the DOL. *See* 8 C.F.R. § 204.5(d).

In determining a petitioner's ability to pay the proffered wage, USCIS first examines whether the beneficiary was employed and paid by the petitioner during the period following the priority date. A petitioner's submission of documentary evidence that it employed the beneficiary at a salary equal to or greater than the proffered wage for the time period in question, when accompanied by a form of evidence required in the regulation at 8 C.F.R. § 204.5(g)(2), may be considered proof of the petitioner's ability to pay the proffered wage.

In this case there is no evidence that the Petitioner has ever employed the Beneficiary. Therefore, the Petitioner has not established its ability to pay the proffered wage from the priority date of January 6, 2017, onward based on wages paid to the Beneficiary.

If a petitioner does not establish that it has paid the beneficiary an amount equal to or above the proffered wage from the priority date onward, USCIS will examine the net income and net current assets figures recorded on the petitioner's federal income tax return(s), annual report(s), or audited financial statements(s). If either of these figures, net income or net current assets, equals or exceeds the proffered wage or the difference between the proffered wage and the amount paid to the beneficiary in a given year, the petitioner would ordinarily be considered able to pay the proffered wage during that year. If a petitioner has filed other I-140 petitions, however, it must establish that its job offer is realistic not only for the instant beneficiary, but also for the beneficiaries of its other I-140 petitions (I-140 beneficiaries). A petitioner's ability to pay the proffered wage is an essential element in evaluating whether a job offer is realistic. *See Matter of Great Wall*, 16 I&N Dec. 142 (Acting Reg'l Comm'r 1977). Accordingly, a petitioner must demonstrate its ability to pay the combined proffered wages of the instant beneficiary and every other I-140 beneficiary from the priority date of the instant petition until the other I-140 beneficiaries obtain lawful permanent resident status. *See 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).[3] While the record in this case is unclear, it appears that the Petitioner may have filed additional I-140 petitions for other beneficiaries.

The Petitioner has not submitted any form of regulatory required evidence – neither federal income tax returns, nor annual reports, nor audited financial statements – for the priority date year of 2017 or any subsequent year. Without such documentation we are unable to determine the Petitioner's continuing ability to pay the proffered wage based on its net income or net current assets from the priority date of January 6, 2017, onward.

Therefore, we will remand this case for the Director to request the submission of regulatory required evidence from the Petitioner, as specified in 8 C.F.R. § 204.5(g)(2), for the priority date year of 2017 and any subsequent year(s) in the Director's discretion. The Director may also request any other evidence that may be deemed necessary to determine the Petitioner's eligibility for the requested immigration benefit.

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[3] 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.

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.