U.S. Citizenship and Immigration Services

Non-Precedent Decision of the Administrative Appeals Office

In Re: 1722110

Date: MAY 31, 2022

Appeal of Texas Service Center Decision

Form I-140, Immigrant Petition for Other Worker

The Petitioner, a poultry producer, seeks to employ the Beneficiary as a poultry processing worker. The company requests her classification under the third-preference, immigrant visa category for "other workers." *See* Immigration and Nationality Act (the Act) section 203(b)(3)(A)(iii), 8 U.S.C. § 1153(b)(3)(A)(iii).

The Director of the Texas Service Center denied the petition. The Director found that, contrary to a U.S. Department of Labor (DOL) regulation, the Petitioner did not demonstrate that it paid the company that prepared the application for the accompanying certification. The Director therefore found insufficient evidence of the availability of the job opportunity to U.S. workers.

The Petitioner bears the burden of establishing eligibility for the requested benefit by a preponderance of evidence. *See* section 291 of the Act, 8 U.S.C. § 1361 (discussing the burden of proof); *see also Matter of Chawathe*, 25 I&N Dec. 369, 375 (AAO 2010) (discussing the standard of proof). 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 an "other," or unskilled, worker generally follows a three-step process. First, a prospective employer must apply to DOL for certification that: (1) there are insufficient U.S. workers able, willing, qualified, and available for an offered position; and (2) employment of a noncitizen in the position will not harm wages and 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 DOL-certified position and a requested immigrant visa category. 8 C.F.R. § 204.5(l).

Finally, if USCIS approves a petition, a beneficiary 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. BONA FIDES OF THE JOB OPPORTUNITY

A labor certification employer must attest that "[t]he job opportunity has been and is clearly open to any U.S. worker." 20 C.F.R. § 656.10(c)(8). To ensure the *bona fides* of job opportunities, DOL bars businesses and individuals from selling, bartering, or buying labor certifications. 20 C.F.R. § 656.12(a). Also, a labor certification employer cannot:

> seek or receive payment of any kind for any activity related to obtaining permanent labor certification, including payment of the employer's attorneys' fees, whether as an incentive or inducement to filing, or as a reimbursement for costs incurred in preparing or filing a permanent labor certification application.

20 C.F.R. § 656.12(b). For these purposes, the term "payment" includes: "monetary payments; wage concessions, including deductions from wages, salary, or benefits; kickbacks, bribes, or tributes; in kind payments; and free labor." *Id.*

The Director found that the company that recruited the Beneficiary for the offered position also prepared the labor certification application. The Director further determined that the Petitioner omitted requested evidence of its payment to the other company for the application's preparation. The purported omission appeared to indicate the Petitioner's receipt of improper "payment" from the application's preparer in the form of "free labor." *See* 20 C.F.R. § 656.12(b). The Director therefore concluded that the Petitioner did not demonstrate the availability of the offered position to U.S. workers.

The Director, however, did not explain his legal authority to determine the *bona fides* of the job opportunity. We will therefore withdraw the decision.

III. ABILITY TO PAY THE PROFFERED WAGE

The record does not support the Director's denial of the petition. The Petitioner, however, has not established the petition's approvability. The company 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). This petition's priority date is April 25, 2017, the date DOL received the accompanying labor certification application for processing. *See* 8 C.F.R. § 204.5(d) (explaining how to determine a petition's priority date). Evidence of ability to pay must generally include copies of annual reports, federal tax returns, or audited financial statements. 8 C.F.R. § 204.5(g)(2).

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 labor certification states the proffered wage of the offered position of poultry processing worker as $10.50 an hour, or - based on a 40-hour, work week - $21,840 a year.

The Form I-140 indicates the Beneficiary's residence in Vietnam. The Petitioner does not claim to have ever employed her and did not submit any evidence of payments to her. Thus, based solely on wages paid, the Petitioner has not demonstrated its ability to pay the proffered wage.

The record lacks copies of the Petitioner's annual reports, federal tax returns, or audited financial statements. But a USCIS director has discretion to accept a statement from a financial officer of a petitioner with at least 100 workers as proof of the business's ability to pay a proffered wage. 8 C.F.R. § 204.5(g)(2). The Petitioner submitted a letter from its chief financial officer (CFO), stating that, as of April 1, 2017, the company employed more than 6,000 workers and generated annual net income of more than $114 million. The Director, however, did not indicate whether he accepted the letter as proof of the company's ability to pay. The record therefore did not demonstrate the Petitioner's ability to pay the proffered wage.

On remand, the Director should determine whether the CFO's statement sufficiently demonstrates the Petitioner's ability to pay the proffered wage. If the Director finds the statement insufficient, he must explain why and request copies of the company's annual reports, federal tax returns, or audited financial statements for 2017 through 2022. *See* 8 C.F.R. § 204.5(g)(2) (requiring a petitioner to demonstrate its ability to pay "continuing until the beneficiary obtains lawful permanent residence").

Also, 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 wage of each petition it files until a beneficiary obtains lawful permanent residence. 8 C.F.R. § 204.5(g)(2). The Petitioner must therefore demonstrate its ability to pay the combined proffered wages of this Form I-140 petition and any others it filed that were approved or pending as of this petition's priority date of April 25, 2017 or filed thereafter. *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 petitions).[2]

USCIS records indicate that, since April 25, 2017, the Petitioner has filed about 400 Form I-140 petitions for other beneficiaries. The record lacks the proffered wages and priority dates of the other petitions. USCIS therefore cannot determine the total combined proffered wages that the Petitioner must demonstrate its ability to pay. For this additional reason, the company has not demonstrated its ability to pay.

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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); *Rivzi v. Dep't of Homeland Sec.*, 37 F.Supp.3d 870, 883-84 (S.D. Tex. 2014), *aff'd*, 627 Fed. App'x. 292 (5th Cir. 2015).

[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 Petitioner also need not demonstrate its ability to pay proffered wages before the priority dates of corresponding petitions or after corresponding beneficiaries obtained lawful permanent residence.

Thus, if the Director finds the CFO's statement insufficient to demonstrate the Petitioner's ability to pay, the Director should further ask the company for a list of all Form I-140 petitions it has filed since April 25, 2017 and their corresponding proffered wages and priority dates. The Petitioner may also submit additional evidence of its ability to pay the combined proffered wages, including proof of any wages it paid applicable beneficiaries in relevant years or materials supporting the factors stated in *Sonegawa*. *See Matter of Sonegawa*, 12 I&N Dec. at 614-15.

If supported by the record, the Director may notify the Petitioner of any additional, potential grounds of denial. The Director, however, must afford the company a reasonable opportunity to respond to all issues raised on remand. *See* 8 C.F.R. § 103.2(b)(8)(iv). Upon receipt of a timely response, the Director should review the entire record and enter a new decision.

IV. CONCLUSION

The Director did not explain his legal authorization for denying the petition based on the alleged unavailability of the job opportunity to U.S. workers. The Petitioner, however, did not demonstrate its required ability to pay the position's proffered wage.

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