U.S. Citizenship and Immigration Services

Non-Precedent Decision of the Administrative Appeals Office

In Re: 1669060

Date: MAY 31, 2022

Appeal of Texas Service Center Decision

Form I-140, Immigrant Petition for Other Worker

The Petitioner, an operator of franchise restaurants, seeks to employ the Beneficiary as a pizza cook. The company requests his classification under the third-preference, immigrant visa category for "other workers." 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 concluded that the Petitioner did not establish its intent to employ the Beneficiary on a required, full-time basis.

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 obtain U.S. Department of Labor (DOL) 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 would 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. THE FULL-TIME NATURE OF THE OFFERED POSITION

A business may file an immigrant visa petition if the enterprise is "desiring and intending to employ [a noncitizen] within the United States." Section 204(a)(1)(F) of the Act. A petitioner must intend to employ a beneficiary under the terms and conditions of an accompanying labor certification. *See Matter of Izdebska*, 12 I&N Dec. 54, 55 (Reg'l Comm'r 1966) (affirming a petition's denial where, contrary to the accompanying labor certification, the petitioner did not intend to employ the beneficiary as a domestic worker on a full-time, live-in basis). For labor certification purposes, the term "employment" means "[p]ermanent, full-time work." 20 C.F.R. § 656.3.

On the petition and accompanying labor certification, the Petitioner attested that it intends to permanently employ the Beneficiary as a full-time, pizza cook. The labor certification states that the position requires neither training, education, nor experience. The certification states the position's proffered wage as $16,744 a year.

The Director questioned the claimed, full-time nature of the position. He found that "it was not credible that the beneficiary, who has worked as a self-employed construction project manager in Iran since 2011, would accept an unskilled pizza cook position with the petitioner . . . earning only $16,744 per year."

The Director's second request for additional evidence (RFE) asked the Petitioner to submit records showing the full- or part-time status of its 1,751 employees and their names, work addresses, job titles, and hourly wages. In response, the Petitioner provided copies of weekly, work schedules from December 2017 to February 2018 at the restaurant where the Beneficiary would work. The company also provided copies of work schedules for a week in January 2018 from seven of its other restaurants.

Of the 194 employees listed in the schedules, the Director noted that most were assigned to work part-time, *i.e.*, less than 35 hours a week. *See* DOL Field Memorandum No. 48-94, *Policy Guidance on Alien Labor Cert. Issues*, 2 (May 16, 1994) (requiring full-time, job opportunities to generally offer at least 35 hours a week). The Director's decision asserts: "Without information about each employee's job title and responsibilities, the petitioner has not established by a preponderance of the evidence that the beneficiary, as a non-supervisory pizza cook, will work for the petitioner on a full-time basis."

The weekly work schedules submitted by the Petitioner distinguish managers from non-supervisory employees. As the Petitioner argues, the documents show that the company scheduled full-time work to some non-managers, including two at the restaurant where the Beneficiary would work. These two non-managers primarily worked full-time during the three-month period reflected on the schedules. Also, online job-search websites indicate the Petitioner's advertising, outside of the labor certification process, for full-time pizza cooks. *See* Salary.com, https://www.salary.com/research/jobs; Jobsearcher, https://jobsearcher.[1]

[1] DOL does not require labor certification employers to advertise non-professional positions online. 20 C.F.R. § 656.17(e)(2); *cf.* 20 C.F.R. § 656.17(e)(1)(ii)(B), (C) (for professional positions, requiring additional recruitment steps that may include advertisements on job-search websites or those of the prospective employers).

Additionally, the Petitioner submitted several letters/affidavits from company officials stating its intent to employ the Beneficiary on a full-time basis. A written statement from the Beneficiary also indicates his desire to work full-time in the offered position.

The Director noted that the Petitioner's RFE response did not include all requested evidence. USCIS may deny a petition if a petitioner omits requested information that "precludes a material line of inquiry." 8 C.F.R. § 103.2(b)(14).

As the Petitioner argues, however, its omission of requested records regarding the full- or part-time status of all its employees does not materially affect the nature of its job offer to the Beneficiary. The Petitioner's employment of mostly part-time workers, even in the offered position, does not preclude the company's intent to employ the Beneficiary in the job full-time. Company officials stated that, although they would prefer to hire more full-time workers, some of its restaurants are understaffed and, to operate, must primarily rely on part-time employees.

The Petitioner has stated its intent to employ the Beneficiary full-time, and he has stated his intent to work for the company on that basis. The record indicates that the Petitioner has scheduled non-supervisory workers to work full-time and, outside of the labor certification process, has advertised for full-time workers in the offered position. Thus, despite the Petitioner's primary reliance on part-time workers, a preponderance of evidence demonstrates its intent to employ the Beneficiary on a full-time basis. We will therefore withdraw the Director's contrary decision.

III. ABILITY TO PAY THE PROFFERED WAGE

Although unaddressed by the Director, the Petitioner has not demonstrated 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.*

As previously indicated, the accompanying labor certification states the proffered wage of the offered position of pizza cook as $16,744 a year. The petition's priority date is June 24, 2016, the date 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).

The record indicates that the Beneficiary lives in Iran. The Petitioner did not claim to have ever employed him and did not submit any evidence of wages it paid to him. Thus, based solely on wages paid, the record does not establish the Petitioner's ability to pay the proffered wage.

The petition included copies of audited financial statements for 2016. The statements show that the company generated net income of $3,613,247 and net current assets of -$5,063,368. The net income amount exceeds the annual proffered wage of $16,744. The Petitioner therefore appears to have the ability to pay the Beneficiary's individual proffered wage in 2016, the year of the petition's priority date.

A petitioner, however, must demonstrate its ability to pay a proffered wage "continuing until the beneficiary obtains lawful permanent residence." 8 C.F.R. § 204.5(g)(2). The record lacks regulatory required evidence of the Petitioner's ability to pay beyond 2016. The Petitioner therefore has not demonstrated its *continuing* ability to pay the proffered wage.

Also, USCIS records show that, since November 2015, the Petitioner has filed more than 300 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 and any other petitions that were pending or approved as of this petition's priority date or filed thereafter. *See Patel v. Johnson*, 2 F.Supp.3d 108, 124 (D. Mass. 2014) (affirming our revocation of a petition where, as of the filing's grant, the petitioner did not demonstrate its ability to pay the combined proffered wages of multiple petitions).[2]

The Director did not notify the Petitioner of these evidentiary deficiencies. We will therefore remand the matter. On remand, the Director should ask the company to submit copies of its annual reports, federal tax returns, or audited financial statements for 2017 through 2022. The Petitioner may also submit additional evidence of its ability to pay in those years, including proof that it paid wages to applicable beneficiaries or materials supporting the factors stated in *Sonegawa*. *See Matter of Sonegawa*, 16 I&N Dec. at 614-15.

If supported by the record, the Director may notify the Petitioner of any additional, potential denial grounds. But he must afford the company a reasonable opportunity to respond to all issued 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 issue a new decision.

IV. CONCLUSION

The record does not support the Petitioner's alleged lack of intent to employ the Beneficiary on a full-time basis. The company, however, has not demonstrated its continuing 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.

[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.