U.S. Citizenship and Immigration Services

Non-Precedent Decision of the Administrative Appeals Office

In Re: 23607779

Date: NOV. 29, 2022

Appeal of Nebraska Service Center Decision

Form I-140, Immigrant Petition for Other Worker

The Petitioner, a restaurant business, seeks to employ the Beneficiary as an assistant manager. It requests classification of the Beneficiary as an "other worker" under the third preference immigrant classification. Immigration and Nationality Act (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 a foreign national for lawful permanent resident status to work in a position 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 Nebraska Service Center denied the petition. The Director determined that the primary requirements of the job listed in the labor certification do not meet the immigration petition classification for an unskilled worker.

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). Upon de novo review, we will withdraw the Director's decision and remand the case for further action, consideration, and entry of a new decision in accordance with below.

I. LAW

Employment-based immigration generally follows a three-step process. First, the prospective employer must obtain a labor certification approval from the U.S. Department of Labor (DOL) to establish that there are not sufficient U.S. workers who are available for the offered position. Section 212(a)(5) of the Act, 8 U.S.C. § 1182(a)(5). DOL approval signifies that insufficient U.S. workers are able, willing, qualified, and available for a position. Id. Labor certification also indicates that the employment of a foreign national will not harm wages and working conditions of U.S. workers with similar jobs. Id. Second, the employer must submit the approved labor certification with an immigrant visa petition to USCIS. Section 204 of the Act, 8 U.S.C. § 1154. The immigrant visa petition must establish that the foreign worker qualifies for the offered position, that the foreign worker and the offered position are eligible for the requested immigrant classification, and that the employer has the ability to pay the proffered wage. See 8 C.F.R. § 204.5. Finally, if USCIS approves the immigrant visa petition, the foreign worker may apply for an immigrant visa abroad or, if eligible, for adjustment of status in the United States. Section 245 of the Act, 8 U.S.C. § 1255.

II. ANALYSIS

A. Work Experience

The Director denied the petition because the labor certification requirements do not meet the immigration petition classification of an unskilled (other) worker.

The regulation at 8 C.F.R. § 204.5 states in pertinent part:

> (l) Skilled workers, professionals, and other workers.
>
> > (1) Any United States employer may file a petition on Form 1-140 for classification of an alien under section 203(b)(3) as a skilled worker, professional, or other (unskilled) worker.
> >
> > (2) Definitions. As used in this part:
> >
> > Other worker means a qualified alien who is capable, at the time of petitioning for this classification, of performing unskilled labor (requiring less than two years training or experience), not of a temporary or seasonal nature, for which qualified workers are not available in the United States.
> >
> > Professional means a qualified alien who holds at least a United States baccalaureate degree or a foreign equivalent degree and who is a member of the professions.
> >
> > Skilled worker means an alien who is capable, at the time of petitioning for this classification, of performing skilled labor (requiring at least two years training or experience), not of a temporary or seasonal nature, for which qualified workers are not available in the United States. Relevant post-secondary education may be considered as training for the purposes of this provision.

Section H of the accompanying labor certification states that the minimum requirements for the job offered are as follows:

H.4	Education: minimum level	High School
H.4-B	Major field of study	[No response]
H.5	Training required?	No
H.6	Experience in the job offered required?	Yes
H.6-A	Number of months of experience	6
H.7	Alternate field of study acceptable?	No
H.7-A	Major field of study	[No response]
H.8	Alternate combination of education and experience acceptable?	Yes
H.8-A	Alternate level of education required	Bachelor's

H.8-C	Number of years of alternate experience	0
H.9	Foreign educational equivalent acceptable?	Yes
H.10-A	Is experience in an alternate occupation acceptable?	No

Section H.14, specific skills or other requirements states, "Bachelor's degree in any major will be accepted in lieu of the required experience."

Therefore, to meet the education requirements of the instant labor certification, the Beneficiary must possess a U.S. high school diploma, or its foreign equivalent. In order to meet the experience requirements, the Beneficiary must have six months of job experience. In the alternative of the education and experience requirements, the Beneficiary must possess a U.S. bachelor's degree, or its foreign educational equivalent, and no work experience.[1]

The Director found that the labor certification fell outside the other (unskilled) worker classification due to the inclusion of the bachelor's degree as an acceptable alternative to the six month work experience requirement. Upon de novo review, we conclude the Director's decision was in error.

The skilled worker classification requires "at least two years of training or experience." 8 C.F.R. § 204.5(1)(2). In contrast, the unskilled worker classification requires "less than two years training or experience." Id. A qualifying position for an unskilled worker cannot exceed these limitations. To differentiate between the skilled worker and unskilled worker classification, we must look at "the requirements of training and/or experience" on the labor certification. 8 C.F.R. § 204.5(l)(4). The regulation further provides that post-secondary education may be considered as training. 8 C.F.R. § 204.5(1)(2). Necessarily, the unskilled worker classification must require less training and experience than the skilled worker classification.

Here, the labor certification requires a minimum of a high school education and six months of work experience. We agree with the Petitioner's argument that a bachelor's degree is not a requirement for the labor certification, but instead is an alternate acceptable in lieu of the six months of work experience requirement. Since the labor certification only requires a minimum of a high school diploma and six months work experience, such requirement falls within the definition of unskilled (other) worker, "less than two years of work experience and/or training." We must generally follow the plain and unambiguous language of a statute or regulation. See, e.g., Matter of J.M. Acosta, 27 I&N Dec. 420, 426 (BIA 2018).

The Director erred in denying the petition based on the labor certification not meeting the statutory requirements of the immigrant visa classification. We therefore withdraw the Director's decision on this issue.

[1] USCIS may neither ignore a term of the labor certification, nor impose additional requirements. See, e.g., Madany v. Smith, 696 F.2d 1008, 1015 (D.C. Cir. 1983) (stating that the "DOL bears the authority for setting the content of the labor certification").

B. Ability to Pay

Although not discussed by the Director, the record does not demonstrate the Petitioner's ability to pay the proffered wage from the priority date onward. 8 C.F.R. § 204.5(g)(2).

In determining ability to pay, USCIS first determines whether the petitioner paid the beneficiary the full proffered wage each year from the priority date. If the petitioner did not pay the proffered wage in any given year, USCIS next determines whether the petitioner had sufficient net income or net current assets to pay the proffered wage (reduced by any wages paid to the beneficiary). If net income and net current assets are insufficient, USCIS may consider other relevant factors, such as the number of years the petitioner has been in business, the size of its operations, the growth of its business over time, its number of employees, the occurrence of any uncharacteristic business expenditures or losses, its reputation within its industry, or whether a beneficiary will replace a current employee or outsourced service. See Matter of Sonegawa, 12 I&N Dec. 612, 614-15 (Reg'l Comm'r 1967).

If a petitioner has filed immigrant visa petitions on behalf of multiple beneficiaries, the petitioner must establish that it has had the ability to pay the proffered wage to each beneficiary. See Patel v. Johnson, 2 F.Supp.3d 108, 124 (D. Mass. 2014). Petitions filed on behalf of other beneficiaries are considered from the priority date of each petition (not including any year prior to the priority date of the petition being reviewed on appeal) until the present or until any other beneficiary obtains lawful permanent residence. Petitions that have been withdrawn or denied are not considered in this analysis.

In this case, the proffered wage is $32,843 per year and the priority date is April 20, 2021. The record includes a copy of the Petitioner's 2020 federal income tax return, which covers a time period prior to the priority date. The record does not include sufficient evidence to demonstrate the Petitioner's ability to pay the proffered wage from the priority date onward. USCIS records indicate that, after this petition's priority date of April 20, 2021, the Petitioner filed at least one additional Form I-140 petition for another beneficiary.[2] The record lacks the proffered wage and priority date of the other petition. Thus, USCIS cannot calculate the total, combined proffered wages that the Petitioner must demonstrate its ability to pay. For this additional reason, the record does not demonstrate the Petitioner's ability to pay the proffered wage. Since we lack information regarding the Petitioner's total wage obligation, we also cannot properly and fully assess the Petitioner's totality of the circumstances. See Matter of Sonegawa, 12 I&N Dec. at 614-15.

The Director did not address the Petitioner's ability to pay the proffered wage in the decision. Therefore, we will remand this case for the Director to request the submission of regulatorily required evidence from the Petitioner, as specified in 8 C.F.R. § 204.5(g)(2). The Director may also request any other evidence that may be deemed necessary to determine the Petitioner's eligibility for the requested immigration benefit.

[2] USCIS records identify an additional Form I-140 petition by the receipt number [redacted] filed on July 8, 2019.

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