U.S. Citizenship and Immigration Services

Non-Precedent Decision of the Administrative Appeals Office

In Re: 22610250

Date: OCT. 12, 2022

Appeal of Texas Service Center Decision

Form I-140, Immigrant Petition for Other Worker

The Petitioner, a dental office, seeks to employ the Beneficiary as a dental assistant. 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 Texas Service Center denied the petition. The Director determined that the Petitioner did not include all the required initial evidence, namely the Petitioner did not submit verification that U.S. Citizenship and Immigration Services (USCIS) authorized the Beneficiary to work as an F2 student with the Petitioner.

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.[1] 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. Verification of Status

The instant petition for unskilled worker classification was filed on May 7, 2021, accompanied by a labor certification that was filed with the DOL on June 7, 2019, and certified in March 2020.[2] On December 21, 2021, the Director issued a notice requesting evidence of the Petitioner's ability to pay the Beneficiary's wages; a valid labor certification; and verification of the Beneficiary's status and authorization for employment in the U.S. as an F2 dependent. On December 21, 2021, the Director denied the petition for failure to submit evidence verifying the authorization of the Beneficiary's employment as an F2 student. Upon review, we will withdraw the Director's decision and remand the matter to the Director to determine whether the Petitioner has demonstrated that the Beneficiary qualifies for the EB-3 classification as an unskilled worker, and whether she meets the specific requirements of the labor certification.

The Director concluded that the Petitioner failed to properly file the Form I-140 petition with all the required initial evidence because the Petitioner did not submit:

- Verification that [USCIS] authorized the [B]eneficiary's employment, including the [B]eneficiary's current school in the United States that permit the [B]eneficiary to work as an F2 student with the [redacted] in Florida State
- . . . documentation from the [B]eneficiary's school that allow her to seek [sic] for a job as an F2 student.

The Director's decision was in error. A petitioner of a Form I-140 who is seeking classification of a beneficiary as an "other worker" is not required to submit evidence of the beneficiary's USCIS and/or F-1 school employment authorization, when the beneficiary is in F2 dependent status at the time of filing. The initial evidence required with filing a Form I-140 for classification of a beneficiary as an "other worker", includes a labor certification and evidence that the beneficiary meets any education, training, or experience requirements of the labor certification. See Section 204 of the Act, 8 U.S.C. § 1154; 8 C.F.R. § 103.2(b)(1). Also, the petitioner is required to submit general evidence, including the petitioner's ability to pay the proffered wage, and if the beneficiary is in the US, the beneficiary's arrival record information. See 8 C.F.R. §§ 103.2(b)(1) and 204.5. The record includes information

[1] These requirements must be satisfied by the priority date of the immigrant visa petition. See 8 C.F.R. § 204.5(g)(2), Matter of Wing's Tea House, 16 I&N Dec. 158, 159 (Act. Reg'l Comm'r 1977). For petitions that require a labor certification, the priority date is the date on which the DOL accepted the labor certification application for processing. See 8 C.F.R. § 204.5(d). In this case, the priority date is June 7, 2019.

[2] The Petitioner previously filed an I-140 petition on behalf of the Beneficiary on August 19, 2020 using the same labor certification, which was denied by the Texas Service Center on December 1, 2020, based on the Petitioner's failure to establish the Beneficiary had the requisite job experience in the primary or alternative occupation as required by the labor certification.

relating to the Beneficiary's arrival to the U.S., which indicates the Beneficiary arrived in the U.S. on January 1, 2019 under B2 status, and the record includes documentation indicating the Beneficiary's status changed to F2 as of December 30, 2019.

The Director erred in denying the petition based on the Petitioner's failure to submit evidence of the Beneficiary's work authorization. We therefore withdraw the Director's decision on this issue.

B. Work Experience

Although not discussed by the Director, the record does not establish the Beneficiary has the requisite 12 months of qualifying experience stated in the labor certification. The accompanying labor certification states that the offered position requires 12 months of experience as a dental assistant, or an alternate occupation of "dentist, hygienist or any medical or allied health profession".

The labor certification indicates the Beneficiary gained experience being self-employed in the alternate occupation as a dentist from January 2, 2002, to December 30, 2018. The record includes the Beneficiary's income tax return for the tax year 2018, as well as affidavits from the Beneficiary and other individuals. The income tax return appears to indicate that the Beneficiary did not work full time during 2018. Also, the affidavits do not appear to sufficiently demonstrate the Beneficiary's 12 months of work experience. Therefore, the record does not sufficiently demonstrate that the Beneficiary has the experience required by the labor certification.

C. Ability to Pay

Additionally, 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 $14.09 per hour ($29,307.20 per year) and the priority date is June 7, 2019. The record includes copies of the Petitioner's 2019 and 2020 federal income tax returns. The

record indicates the Petitioner's net income for 2019 and 2020 exceeds the proffered wage; however, the record does not include sufficient evidence to demonstrate the Petitioner's ability to pay the proffered wage during 2019 and 2020. USCIS records indicate that, after this petition's priority date of June 7, 2019, the Petitioner filed at least two additional Form I-140 petitions for other beneficiaries.[3] The record lacks proffered wages and priority dates of the other petitions. 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. Also, as we lack information regarding the Petitioner's total wage obligation, we 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 Beneficiary's work experience or 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.

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.

[3] USCIS records identify the two other petitions by the following receipt numbers: [redacted] filed on Aug. 20, 2020 and [redacted] filed on May 27, 2022.