U.S. Citizenship and Immigration Services

**Non-Precedent Decision of the Administrative Appeals Office**

In Re: 01437023

Date: SEP. 19, 2022

Appeal of Texas Service Center Decision

Form I-140, Immigrant Petition for Other Worker

The Petitioner, a poultry processing business, seeks to employ the Beneficiary as a poultry trimmer. It requests classification of the Beneficiary as an unskilled worker under the third preference employment-based immigrant visa category. Immigration and Nationality Act (the Act) section 203(b)(3)(A)(iii), 8 U.S.C. § 1153(b)(3)(A)(iii). This immigrant visa category allows a U.S. employer to sponsor a noncitizen for lawful permanent resident status to work in a position that requires less than two years of training or experience.

The Director of the Texas Service Center denied the petition, concluding that the Petitioner did not establish that the job offer was *bona fide* and open and available to qualified U.S. workers because it may have sought or received payment from the Beneficiary for activity related to the labor certification. On appeal, the Petitioner contests the Director's findings, asserting that the Director misconstrued the facts and misapplied the law.

In these proceedings, it is the petitioner's burden to establish eligibility for the requested benefit. Section 291 of the Act, 8 U.S.C. § 1361. 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 determine that the Petitioner has established, by a preponderance of the evidence, that the job offer was *bona fide*. Accordingly, we will withdraw the Director's decision. We will remand the matter for adjudication within the statutory and regulatory framework for Form I-140 immigrant visa petitions.

## I. EMPLOYMENT-BASED IMMIGRATION

Employment-based immigration generally follows a three-step process. To permanently fill a position in the United States with a foreign worker, a prospective employer must first obtain certification from the U.S. Department of Labor (DOL). *See* 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 noncitizen will not harm wages and working conditions of U.S. workers with similar jobs. *Id.*

If DOL approves a position, an employer must next submit the certified labor application 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 considers whether a beneficiary meets the requirements of a certified position and a requested immigrant visa classification. If USCIS approves the petition, a noncitizen may finally 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

As indicated in the above regulation, the Petitioner must establish its continuing ability to pay the proffered wage from the priority date of the petition onward.[1] In this case the proffered wage is $17,202 per year and the priority date is February 20, 2017.

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

There is no evidence that the Beneficiary in this case has ever been employed by the Petitioner. Therefore, the Petitioner cannot establish its ability to pay the proffered wage from the priority date of February 20, 2017, onward based on wages paid to the Beneficiary.

We next examine whether the Petitioner had sufficient annual amounts of net income or net current assets to pay the proffered wage. If a petitioner's net income or net current assets are insufficient, we

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

may also consider other evidence of its ability to pay the proffered wage.[2] The regulation at 8 C.F.R. § 204.5(g)(2) requires that "[e]vidence of this ability shall be either in the form of copies of annual reports, federal tax returns, or audited financial statements." The record does not contain regulatory required evidence of the Petitioner's ability to pay the annual proffered wage of $17,202 from the priority date and continuing until the Beneficiary obtains lawful permanent residence.

Furthermore, when a petitioner has filed other Form I-140 petitions, it must establish that its job offer is realistic not only for the instant beneficiary, but also for the beneficiaries of its other Form I-140 petitions. *See* 8 C.F.R. § 204.5(g)(2); *see also 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). 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 this Beneficiary as well as the beneficiaries of the other Form I-140 petitions that were pending or approved as of, or filed after, the priority date of the current petition.[3]

The record includes an excerpt from a 2015 "Private Company Financial Report" for the Petitioner, which includes unaudited financial statistics for the period from 2008 to 2014 and, therefore, covers a period prior to the priority date. The record also includes a letter from the Petitioner's chief financial officer (CFO), dated April 7, 2017, stating that the Petitioner's net income for 2016 is in excess of $57 million and that it has a total of 5,500 employees. As noted by counsel in the appeal, the Petitioner has filed numerous other Form I-140 petitions. The regulation at 8 C.F.R. § 204.5(g)(2), after identifying the three types of required documentation, provides that USCIS "may accept a statement from a financial officer" of an employer with 100 or more workers and/or "additional evidence, such as profit/loss statements, bank account records, or personnel records" as evidence of a petitioner's ability to pay the proffered wage. The regulation does not require USCIS to accept such evidence. Given the Petitioner's history of filing petitions, USCIS need not exercise its discretion to accept the letter from the Petitioner's CFO.

The record lacks evidence of the Petitioner's continuing ability to pay the proffered wages to all of its Form I-140 beneficiaries. 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 onward. On remand, the Petitioner should document the receipt numbers, names of beneficiaries, priority dates, and proffered wages of its other Form I-140 petitions, and indicate the status of each petition and the date of any status change (i.e., pending, approved, withdrawn, revoked, denied, on appeal or motion, beneficiary obtained lawful permanent residence).

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[2] Federal courts have upheld our 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); *Tongatapu Woodcraft Haw., Ltd. v. Feldman*, 736 F.2d 1305, 1309 (9th Cir. 1984); *Estrada-Hernandez v. Holder*, 108 F. Supp. 3d 936, 942-946 (S.D. Cal. 2015); *Rizvi v. Dep't of Homeland Sec.*, 37 F. Supp. 3d 870, 883-84 (S.D. Tex. 2014), *aff'd*, 627 Fed. App'x 292, 294-295 (5th Cir. 2015).

[3] The Petitioner's ability to pay the proffered wage of one of the other Form I-140 beneficiaries is not considered:

- After the other beneficiary obtains lawful permanent residence;
- If a Form I-140 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 Form I-140 filed on behalf of the other beneficiary.

To offset the total wage burden, the Petitioner may submit documentation showing that it paid wages to the other beneficiaries. The Petitioner may also submit evidence of its ability to pay beyond its net income and net current assets, including such factors as: the number of years it has conducted business; the growth of its business; its number of employees; the occurrence of any uncharacteristic business expenditures or losses; its reputation in its industry; whether a beneficiary will replace a current employee or outsourced service; or other evidence of its ability to pay a proffered wage. *See Matter of Sonegawa*, 12 I&N Dec. 612, 614-615 (Reg'l Comm'r 1967). 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 Director's decision is withdrawn. The matter is remanded for the entry of a new decision consistent with the foregoing analysis.