U.S. Citizenship and Immigration Services

Non-Precedent Decision of the Administrative Appeals Office

In Re: 23093449

Date: APR. 4, 2023

Appeal of Texas Service Center Decision

Form I-140, Immigrant Petition for Alien Workers (Other Worker)

The Petitioner, a purported holding company, seeks to employ the Beneficiary as a dental assistant. It requests classification of the Beneficiary as an unskilled worker under the third preference immigrant classification. Immigration and Nationality Act (the Act) section 203(b)(3)(A)(iii), 8 U.S.C. § 1153(b)(3)(A)(iii). This employment-based immigrant classification 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 record did not establish that the Petitioner would be the Beneficiary's actual employer and, consequently, that the Petitioner did not make a bona fide job offer to the Beneficiary. The matter is now before us on appeal. 8 C.F.R. § 103.3.

The Petitioner bears the burden of proof to demonstrate eligibility by a preponderance of the evidence. *Matter of Chawathe*, 25 I&N Dec. 369, 375-76 (AAO 2010). We review the questions in this matter de novo. *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 matter for entry of a new decision consistent with the following analysis.

A. Bona Fide Job Offer

The Director's basis for denying the Form I-140 was based on the conclusion that "the evidence does not show that the [P]etitioner made a bona fide job offer to the [B]eneficiary, or that the [P]etitioner desires and intends to employ the [B]eneficiary the offered position." Specifically, the Director observed, "The [P]etitioner did not demonstrate that it owns the tools, resources, or equipment, that the [B]eneficiary would use to perform the work. Further, the [P]etitioner did not provide any other evidence to establish how it would supervise the [B]eneficiary," noting that both the Petitioner and a separate entity owned by the Petitioner conduct business at the same physical location that the Petitioner provided as the Beneficiary's primary worksite.

On appeal, the Petitioner asserts that its job offer was bona fide. Specifically, the Petitioner reasserts that "[it] and Beneficiary intend to engage in full-time permanent employment at [the primary worksite provided on the ETA Form 9089] at the appropriate prevailing wage determined by the DOL."

We conclude that the Petitioner has established by a preponderance of the evidence that a bona fide job offer exists. We will therefore withdraw the Director's decision on the bona fides of the job offer. However, as detailed below, the petition is not approvable because the Petitioner has not established that it had the continuing ability to pay the proffered wages to all of its relevant beneficiaries. *See* 8 C.F.R. § 204.5(g)(2). Therefore, we will remand the matter for the entry of a new decision.

B. Ability to Pay the Proffered Wage

Although not addressed by the Director in his decision, the Petitioner has not established that it had the continuing ability to pay the proffered wages to all of its relevant beneficiaries. The regulation at 8 C.F.R. § 204.5(g)(2) states in pertinent part:

> *Ability of prospective employer to pay wage.* Any petition filed by or for an employment-based immigrant which requires an offer of employment must be accompanied by evidence that the prospective United States employer has the ability to pay the proffered wage. 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 determining a petitioner's ability to pay, we first examine whether it paid a beneficiary the full proffered wage each year from a petition's priority date. If a petitioner did not pay a beneficiary the full proffered wage, we next examine whether it had sufficient annual amounts of net income or net current assets to pay the difference between the proffered wage and the wages paid, if any. If a petitioner's net income or net current assets are insufficient, we may also consider other evidence of its ability to pay the proffered wage.[1]

The priority date in this matter is August 21, 2020, the date on which the U.S. Department of Labor (DOL) received the DOL ETA Form 9089, Application for Permanent Employment Certification, for processing. On the ETA Form 9089, the annual proffered wage is listed as $15.34 per hour ($31,907.20 per year based on a 40-hour workweek). On the Form I-140, Immigrant Petition for Alien Workers, and on the labor certification, the Petitioner indicated that it had eight current U.S. employees.

In response to the Director's request for evidence (RFE), the Petitioner acknowledged two of the three Forms I-140 that the Director identified as having been approved after the Petitioner's signatory signed the instant petition; however, the Petitioner asserted that "there is no evidence of wages paid [to them] because none of the beneficiaries have started employment for the [P]etitioner." Nevertheless, where

[1] 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).

a petitioner has filed Form I-140 petitions for multiple beneficiaries, it must demonstrate that its job offer to each beneficiary is realistic, and that it has the ability to pay the proffered wage to each beneficiary. *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). Thus, the Petitioner must establish 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.[2] We do not consider the other beneficiaries for any year that the Petitioner has paid the Beneficiary a salary equal to or greater than the proffered wage.

In response to the Director's RFE, the Petitioner submitted an IRS Form 1120-S, U.S. Income Tax Return for an S Corporation, for calendar year 2020, which covers the priority date. It states net income of $77,143 and net current assets of $246,212. The Petitioner's net current assets[3] appear to be sufficient to pay the proffered wages of all of its relevant petitions in 2020. However, the Petitioner's 2020 tax return indicates that the Petitioner paid neither "compensation of officers" nor "salaries and wages" to any employees during the 2020 calendar year, despite claiming eight employees on the labor certification and Form I-140.[4] The 2020 tax return also does not reflect that the Petitioner has any subsidiaries despite its repeated claims that it is a holding company that holds the shares of subsidiaries it controls. The Petitioner must resolve these inconsistencies with independent, objective evidence pointing to where the truth lies. *Matter of Ho*, 19 I&N Dec. 582, 591-92 (BIA 1988). Unresolved material inconsistencies may lead us to reevaluate the reliability and sufficiency of other evidence submitted in support of the requested immigration benefit. *Id.*

Further, the foregoing discussion casts doubt on the Petitioner's continuing ability to pay. *See* 8 C.F.R. § 204.5(g)(2). Given the unresolved inconsistencies, the Petitioner must establish on remand that it has the continuing ability to pay the proffered wages to all of its relevant beneficiaries from the priority date onward with regulatory-required evidence of its ability to pay in 2021; and the receipt numbers, names of beneficiaries, priority dates, and proffered wages of all of its other relevant 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). Without this information, the Petitioner's continuing ability to pay the combined proffered wages of all of its applicable beneficiaries cannot be determined.

Based on the foregoing, we will withdraw the Director's conclusion that "the evidence does not show that the [P]etitioner made a bona fide job offer to the [B]eneficiary," and we will remand the matter for the entry of a new decision. The Director may request any additional evidence considered pertinent

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

- After the other beneficiary obtains lawful permanent residence;
- If an I-140 petition filed on behalf of the other beneficiary has been withdrawn or denied without a pending appeal or motion, or its approval has been revoked; or
- Before the priority date of the I-140 petition filed on behalf of the other beneficiary.

[3] The Petitioner's RFE response asserted that we should combine its net income and net current assets in determining its "cumulative" ability to pay. However, net income and net current assets are not cumulative.

[4] The Director mistakenly asserted in the decision that "[the Petitioner's] 2020 IRS Form 1120-S shows that it paid only $27,223 in wages for that tax year"; however, the Form 1120-S actually indicates that the $27,223 payment during 2020 is Line 9, corresponding to "repairs and maintenance," not "salaries and wages (less employment credits)," corresponding to Line 8.

to the new determination regarding the Petitioner's continuing ability to pay and any other issue. As such, we express no opinion regarding the ultimate resolution of this case on remand.

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