U.S. Citizenship and Immigration Services

Non-Precedent Decision of the Administrative Appeals Office

In Re: 24443266

Date: AUG. 23, 2023

Appeal of Nebraska Service Center Decision

Form I-140, Immigrant Petition for Professional

The Petitioner seeks to employ the Beneficiary as an accounting assistant. It requests classification of the Beneficiary as a professional under the third preference immigrant classification. Immigration and Nationality Act 203(b)(3)(A)(ii), 8 U.S.C. § 1153(b)(3)(A)(ii). This employment-based immigrant classification allows a U.S. employer to sponsor a professional with a baccalaureate degree for lawful permanent resident status.

The Director of the Nebraska Service Center revoked the approval of the petition, concluding that the record did not establish that the Petitioner had the ability to pay the Beneficiary the proffered wage at the time of the priority date and continuing through adjudication. The Director also concluded that the record did not establish that there is a bona fide position available for 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.

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 16, 2018, the date on which the 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 $45,282.

The Director initially approved the Form I-140, Immigrant Petition for Alien Workers. In a subsequent notice of intent to revoke (NOIR), the Director acknowledged that the record contains a copy of the Petitioner's 2017 IRS Form 1120S, U.S. Income Tax Return for an S Corporation, "which established its ability to pay the wage offered to the [B]eneficiary in 2017." However, the NOIR, dated 2021, requested evidence of the Petitioner's ability to pay the Beneficiary from 2018 through adjudication and continuing until the Beneficiary obtains lawful permanent residence. *See* 8 C.F.R. § 204.5(g)(2). In the decision, the Director acknowledged that additional IRS Forms 1120S submitted in response to the NOIR for the years 2018 and 2019 establish the Petitioner's ability to pay the Beneficiary the proffered wage in those years. However, the Director stated that the company bank statements for February, June, and December 2020, and March, May, June, and July 2021 "are not among the types of evidence, enumerated in 8 CFR 204.5(g)(2), which are the requisite evidence of a petitioner's ability to pay a proffered wage." The Director also acknowledged that the regulation permits additional material in appropriate cases; however, the Director found that the Petitioner "has not demonstrated that this required evidence is inapplicable, inaccurate, or unavailable." The Director did not address the factors discussed in *Matter of Sonegawa*, 12 I&N Dec. 612, 614-15 (Reg'l Comm'r 1967), which permits U.S. Citizenship and Immigration Services to consider the totality of the circumstances affecting a petitioner's ability to pay the proffered wage.

On appeal, the Petitioner submits new evidence material to the determination of whether the Petitioner had the ability to pay the proffered wage in the years 2020 and 2021. Because this new information is material to the basis for revocation, a remand is appropriate for the Director to have the opportunity to review it and address whether it may establish eligibility.

Additionally, we note that the NOIR response contains copies of lease agreements, an explanatory letter, and information from the California Secretary of State that address the Director's concerns regarding whether there is a bona fide position available for the Beneficiary, which the Director did not discuss in the decision. On remand, the Director should fully evaluate this evidence.

Based on the foregoing, we will remand the matter for the entry of a new decision. The Director may request any additional evidence considered pertinent to the new determination 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.

[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).