U.S. Citizenship and Immigration Services

Non-Precedent Decision of the Administrative Appeals Office

In Re: 25053543

Date: FEB. 3, 2023

Appeal of Nebraska Service Center Decision

Form I-140, Immigrant Petition for Professional

The Petitioner, an interior design and furniture supply company, seeks to permanently employ the Beneficiary as a business operations analyst.[1] The company requests her classification under the third-preference, immigrant visa category for professionals. *See* Immigration and Nationality Act (the Act) section 203(b)(3)(A)(ii), 8 U.S.C. § 1153(b)(3)(A)(ii). This category allows a prospective, U.S. employer to sponsor a noncitizen with at least a bachelor's degree for lawful permanent residence. *Id.*

The Director of the Nebraska Service Center denied the petition. The Director concluded that the Petitioner did not establish its required ability to pay the offered position's proffered wage or the Beneficiary's qualifying experience for the job. On appeal, the Petitioner asserts that the Director overlooked factors establishing the company's ability to pay and evidence of the Beneficiary's qualifications.

The Petitioner bears the burden of demonstrating eligibility for the requested benefit by a preponderance of evidence. *Matter of Chawathe*, 25 I&N Dec. 369, 375-76 (AAO 2010). We exercise de novo, appellate review. *Matter of Christo's, Inc.*, 26 I&N Dec. 537, 537 n.2 (AAO 2015). Upon de novo review, we conclude that the Petitioner did not submit regulatory required evidence that the Director requested. We will therefore dismiss the appeal.

I. LAW

Immigration as a professional generally follows a three-step process. First, a prospective employer must obtain DOL certification that: there are insufficient U.S. workers able, willing, qualified, and available for an offered position; and permanent employment of a noncitizen in the position would not harm wages and working conditions of U.S. workers with similar jobs. Section 212(a)(5)(A)(i) of the Act, 8 U.S.C. § 1182(a)(5)(A)(i).

Second, an employer must submit an approved labor certification with an immigrant visa petition to U.S. Citizenship and Immigration Services (USCIS). Section 204(a)(1)(F) of the Act, 8 U.S.C.

[1] On the Form I-140, Immigrant Petition for Alien Workers, the Petitioner identified the offered position as "computer systems analyst." We use the title "business operations analyst" listed on the accompanying certification from the U.S. Department of Labor (DOL). Despite the different job titles, the record consistently describes the position's job duties.

§ 1154(a)(1)(F). Among other things, USCIS determines whether a noncitizen beneficiary meets the requirements of a DOL-certified position and a requested immigrant visa category. 8 C.F.R. § 204.5(l)(3)(ii)(A), (C).

Finally, if USCIS approves a petition, a beneficiary may 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.

II. ANALYSIS

A. Ability to Pay the Proffered Wage

A petitioner must demonstrate its continuing ability to pay an offered position's proffered wage, from a petition's priority date until a beneficiary obtains lawful permanent residence. 8 C.F.R. § 204.5(g)(2). Evidence of ability to pay must generally include copies of a business's annual reports, federal tax returns, or audited financial statements. *Id.*

In determining ability to pay, USCIS examines whether a petitioner paid a beneficiary the full proffered wage each year, beginning with the year of a petition's priority date. If a petitioner did not annually pay the full proffered wage or did not pay a beneficiary at all, USCIS considers whether the business generated annual amounts of net income or net current assets sufficient to pay any differences between the proffered wage and wages paid. If net income and net current assets are insufficient, USCIS may consider other factors affecting a petitioner's ability to pay a proffered wage. *Matter of Sonegawa,* 12 I&N Dec. 612, 614-15 (Reg'l Comm'r 1967).[2]

The Petitioner's labor certification states the proffered wage of the offered position of business operations analyst as $87,000 a year. The petition's priority date is November 19, 2020, the date DOL accepted the labor certification application for processing. *See* 8 C.F.R. § 204.5(d) (explaining how to determine a petition's priority date).

At the time of the appeal's filing in September 2022, regulatory required evidence of the Petitioner's ability to pay the proffered wage that year was not yet available. For purposes of this decision, we will therefore consider the company's ability to pay only in 2020 - the year of the petition's priority date - and 2021.[3]

The petition included a letter from the Petitioner's operations manager stating that the company would pay the Beneficiary at least the proffered wage amount. But a statement from a petitioner's financial officer may establish ability to pay only if the business employs at least 100 people. 8 C.F.R. § 204.5(g)(2). On the Form I-140, the Petitioner stated it had only 16 employees. Also, the Petitioner did not establish the operations manager as a "financial officer of the organization." *Id.* The

[2] Federal courts have upheld USCIS' 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); *Estrada-Hernandez v. Holder*, 108 F. Supp. 3d 936, 942-43 (S.D. Cal. 2015).

[3] In any future filing in this matter, the Petitioner must submit regulatory required evidence of its ability to pay the proffered wage in 2022. *See* 8 C.F.R. § 204.5(g)(2) (requiring a petitioner to demonstrate its ability to pay "continuing until the beneficiary obtains lawful permanent residence").

operations manager's letter therefore does not demonstrate the Petitioner's ability to pay the proffered wage.

Consistent with 8 C.F.R. § 204.5(g)(2), the Director mailed a request for additional evidence (RFE) asking the Petitioner to submit required, initial proof of its ability to pay: i.e., copies of annual reports, federal tax returns, or audited financial statements for 2020 and 2021. The RFE also invited the company to submit additional evidence, including IRS Forms W-2, Wage and Tax Statements. But the RFE noted: "You may not submit additional evidence in place of initial evidence unless you demonstrate that initial evidence does not exist or that you cannot obtain it."

The Petitioner's RFE response consisted only of copies of the Beneficiary's Form I-94, Arrival/Departure Record, and Form W-2 for 2021, indicating that the company paid her $83,062.66 that year. The Petitioner did not submit the requested annual report, federal tax return, or audited financial statement for 2020 or 2021. Noting that the amount on the Form W-2 falls short of the annual proffered wage of $87,000, the Director found the evidence insufficient to demonstrate the company's ability to pay the proffered wage in 2021. The record also lacked required evidence of the Petitioner's ability to pay in 2020.

On appeal, the Petitioner argues that, because the 2021 Form W-2 shows the company's payment to the Beneficiary of nearly the required amount, the document demonstrates that the company "more than likely" can pay the proffered wage. Also, the Petitioner contends that the Director should have favorably considered the company's continuous business operations since 2017 and its full-time employment of 13 people. *See Matter of Sonegawa*, 12 I&N Dec. at 614 (considering the number of years a petitioner had conducted operations and the business's number of employees in determining its ability to pay a proffered wage).

Contrary to 8 C.F.R. § 204.5(g)(2) and the Director's RFE, however, the Petitioner did not submit required initial evidence of its ability to pay the proffered wage in 2020 or 2021: i.e., copies of annual reports, federal tax returns, or audited financial statements. The Director's RFE did not cite 8 C.F.R. § 204.5(g)(2), but the notice requested the specific evidence that the regulation requires. Thus, by omitting the requested evidence, the Petitioner did not demonstrate its ability to pay the proffered wage consistent with the regulation.

Also, "[f]ailure to submit requested evidence which precludes a material line of inquiry shall be grounds for denying the benefit request." 8 C.F.R. § 103.2(b)(14). Thus, the Petitioner's omission of the requested evidence also merits the petition's denial under 8 C.F.R. § 103.2(b)(14). Further, because the company did not submit required initial evidence or establish its nonexistence or unavailability, consideration of additional factors under *Sonegawa* would serve no purpose. *See* 8 C.F.R. § 204.5(g)(2) (stating that evidence of ability to pay "*shall be* in the form of copies of annual reports, federal tax returns, or audited financial statements") (emphasis added).

Contrary to regulatory criteria and the Director's request, the Petitioner did not submit or establish the unavailability of required evidence demonstrating the company's ability to pay the offered position's proffered wage. We will therefore affirm the petition's denial.

B. The Required Experience

A petitioner must also demonstrate a beneficiary's possession of all DOL-certified job requirements of an offered position by a petition's priority date. *Matter of Wing's Tea House*, 16 I&N Dec. 158, 160 (Acting Reg'l Comm'r 1977). When assessing a beneficiary's qualifications, USCIS must examine the job-offer portion of an accompanying labor certification to determine a position's minimum requirements. USCIS may neither ignore a certification term nor impose unstated requirements. *See, e.g., Tongatapu Woodcraft Haw., Ltd. v. Feldman*, 736 F.2d 1305, 1309 (9th Cir. 1984) (citations omitted) (holding that the immigration service generally "is bound by the DOL's certification").

The Petitioner's labor certification states the primary requirements of the offered position of business operations analyst as a U.S. master's degree in computer science, business administration, or mathematics, plus three years of experience in the job offered.[4] The Petitioner stated that it will not accept a foreign equivalent degree or experience in an alternate occupation.[5] The certification, however, indicates the Petitioner's acceptance of an alternate combination of education and experience: a bachelor's degree and five years of experience.

On the labor certification, the Beneficiary attested that, by the petition's priority date, she received a U.S. master's degree in business administration and more than five years of full-time, qualifying experience. She stated the following experience:

- About 25 months as a business systems analyst for a women's clothing business in Canada, from September 2018 to October 2020;
- About four months as a business analyst for another clothing company in Canada, from May 2018 through August 2018;
- About seven months as a senior business analyst for an airline in the United States, from May 2017 through November 2017;
- About 26 months as a business analyst for a staffing company in the United States, from March 2015 to May 2017; and
- About five months as a business systems analysis for a communications business in the United States, from May 2014 through September 2014.[6]

Evidence of qualifying experience must include letters from a beneficiary's former employers. 8 C.F.R. § 204.5(l)(3)(ii)(A). The letters must contain the employers' names, addresses, and titles, and descriptions of the beneficiary's experience. *Id.*

As proof of the Beneficiary's claimed qualifying experience, the Petitioner's filing consisted of a copy of her resume and the letter from the company's operations manager. Consistent with 8 C.F.R.

[4] Besides computer science, business administration, and mathematics, part H.14 of the labor certification - "Specific skills or other requirements" - also states the Petitioner's acceptance of a degree in a "related discipline."

[5] Part H.14 states the Petitioner's acceptance of "relevant experience." The record does not clearly indicate the meaning of the phrase "relevant experience" or whether the company intended to accept experience beyond performance of duties "in the job offered."

[6] The record indicates that the Beneficiary contracted her services to the businesses through third-party entities.

§ 204.5(l)(3)(ii)(A), the Director's RFE asked the company to submit letters from the Beneficiary's claimed former employers.

The Petitioner's RFE response included copies of USCIS approval notices for nonimmigrant visa petitions allowing the Beneficiary to temporarily work in the United States as a computer systems analyst and letters that a couple of the petitioners submitted in support of the prior nonimmigrant filings. The materials indicate the Beneficiary's permission to work in the United States for more than three years. But the Director found the documentation insufficient to establish her qualifying experience. The Director noted that the evidence demonstrates the prior petitioners' intent to employ the Beneficiary but does not confirm her actual employment, duties, or length of work.

The Petitioner argues that the letters from the nonimmigrant petitioners specify the Beneficiary's proposed duties and that USCIS admission records would confirm her continuing employment during the petition validity periods. The company therefore contends that the evidence sufficiently demonstrates her qualifying experience for the offered position.

But, contrary to 8 C.F.R. § 204.5(l)(3)(ii)(A) and the Director's RFE, the Petitioner did not submit letters from the Beneficiary's former employers describing her experience. On appeal, the Beneficiary states in an affidavit that she has not remained in contact with her former employers and that obtaining letters from them would be "impossible." If required letters from former employers are "unavailable," USCIS may consider other proof of claimed qualifying experience. 8 C.F.R. § 204.5(g)(1). But the Petitioner has not demonstrated that it or the Beneficiary tried to obtain letters from her former employers. The company also has not submitted additional evidence of her claimed employment experience or demonstrated the materials' unavailability. Additional evidence could include: tax records; payroll records; or affidavits from former co-workers of her.

Contrary to 8 C.F.R. § 204.5(l)(3)(ii)(A) and the Director's RFE, the Petitioner did not submit, or demonstrate the unavailability of, required evidence of the Beneficiary's claimed qualifying experience for the offered position. For this additional reason, we will affirm the petition's denial.

III. CONCLUSION

The Petitioner has not demonstrated its required ability to pay the offered position's proffered wage or the Beneficiary's qualifying experience for the job. We will therefore affirm the petition's denial.

ORDER: The appeal is dismissed.