U.S. Citizenship and Immigration Services

Non-Precedent Decision of the Administrative Appeals Office

In Re: 23069350

Date: JAN. 23, 2023

Appeal of Texas Service Center Decision

Form I-140, Immigrant Petition for Other Worker

The Petitioner operates doctors' offices and seeks to permanently employ the Beneficiary as a file clerk. The company requests her classification under the third-preference, immigrant visa category as an "other worker" requiring less than two years of training or experience. *See* Immigration and Nationality Act (the Act) section 203(b)(3)(A)(iii), 8 C.F.R. § 1153(b)(3)(A)(iii).

The Director of the Texas Service Center denied the petition. The Director concluded that the Petitioner did not demonstrate its required ability to pay the offered position's proffered wage. On appeal, the company argues that the Director miscalculated its ability to pay.

The Petitioner bears the burden of establishing eligibility for the requested benefit by a preponderance of evidence. *See Matter of Chawathe*, 25 I&N Dec. 369, 375 (AAO 2010). We exercise de novo, appellate review. *Matter of Christo's*, 26 I&N Dec. 537, 537 n.2 (AAO 2015).

Upon de novo review, we agree with the Petitioner that the Director miscomputed the company's net current assets. We will therefore withdraw the Director's contrary decision. But, because the company did not demonstrate the Beneficiary's qualifying experience for the offered position, we will remand the matter for entry of a new decision consistent with the following analysis.

I. LAW

Immigration as an "other worker" generally follows a three-step process. First, a prospective employer must obtain U.S. Department of Labor (DOL) certification that: (1) there are insufficient U.S. workers able, willing, qualified, and available for an offered position; and (2) 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. § 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)(D), (4).

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 the 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. *See Matter of Sonegawa,* 12 I&N Dec. 612, 614-15 (Reg'l Comm'r 1967).[1]

The Petitioner's accompanying labor certification states the proffered wage of the offered position of file clerk as $30,971 a year. The petition's priority date is July 30, 2019, 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 the Director issued a notice of intent to deny (NOID) the petition in November 2021, required evidence of the Petitioner's ability to pay the proffered wage in 2021 was not yet available. Thus, for purposes of this decision, we will consider the company's ability to pay in only 2019, the year of the petition's priority date, and 2020.

The record supports the Director's finding that the Petitioner demonstrated its ability to pay in 2020. For 2019, the Director concluded that the company submitted insufficient evidence of its ability to pay. The Petitioner did not provide any proof that it paid the Beneficiary wages that year. Thus, based solely on wages paid, the company has not demonstrated its ability to pay in 2019.

The Petitioner submitted a copy of its 2019 federal income tax return. The return reflects net income of -$75,245. As that amount does not equal or exceed the annual proffered wage of $30,971, the company's net income also does not establish its ability to pay in 2019.

The Director found that the Petitioner's 2019 tax return reflects net current assets of -$58,796. As the Petitioner argues, however, the Director miscalculated the net current asset amount. The Director

[1] 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); *Four Holes Land & Cattle, LLC v Rodriguez*, No. 5:15-cv-03858, 2016 WL 4708715, *X (D.S.C. Sept. 9, 2016).

neglected to include more than $1 million in current assets listed on Line 6, Schedule L, of the company's IRS Form 1120-S, U.S. Income Tax Return for an S Corporation. Adding the missing current assets, the tax return shows the Petitioner's generation of $978,346 in net current assets, well above the annual proffered wage of $30,971. Thus, the record demonstrates the company's ability to pay the proffered wage in both 2019 and 2020.

The Petitioner has demonstrated its continuing ability to pay the offered position's proffered wage through 2020. We will therefore withdraw the Director's contrary decision.

B. Qualifying Experience

The appeal overcomes the petition's denial ground. The Petitioner, however, has not demonstrated the Beneficiary's qualifying experience for the offered position.

A petitioner must 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). As indicated above, this petition's priority date is July 30, 2019.

In assessing a beneficiary's qualifications, USCIS must examine the job-offer portion of an accompanying labor certification to determine a position's minimum job requirements. USCIS may neither disregard certification terms nor impose unstated requirements. *See, e.g., Madany v. Smith*, 696 F.3d 1008, 1015 (D.C. Cir. 1983) (holding that "DOL bears the authority for setting the *content* of the labor certification") (emphasis in original).

The accompanying labor certification states the minimum job requirements of the offered position of file clerk as a U.S. high school diploma, or a foreign educational equivalent, and at least one year of experience in the job offered. The Beneficiary's educational qualifications are not at issue.

On the labor certification, the Beneficiary attested that, by the petition's priority date, she gained more than three years of full-time qualifying experience in the United Arab Emirates (UAE). She stated that a garments warehouse employed her as a file clerk from July 1, 2015 through February 8, 2019.

As proof of claimed qualifying experience, a petitioner must submit a letter from a beneficiary's former or current employer. 8 C.F.R. § 204.5(l)(3)(ii)(A). The letter must include the name, address, and title of the employer and describe the beneficiary's experience. *Id.*

Consistent with the regulation, the Petitioner submitted a letter from a managing director of the Beneficiary's claimed former employer. The letter, however, states the warehouse's employment of her as a file clerk from July 1, 2015 to February 1, *2018* - about one year before the employment end date the Beneficiary stated on the labor certification. The letter is undated. But it does not establish her claim that the warehouse employed her in the offered job until February 2019 and therefore, in the absence of further independent objective evidence, casts doubt on her claimed qualifying employment. *See Matter of Ho*, 19 I&N Dec. 582, 591 (BIA 1988) (requiring a petitioner to resolve inconsistencies with independent, objective evidence pointing to where the truth lies).

The Beneficiary's March 2016 application for a U.S. visitor's visa casts further doubt on her claimed, qualifying experience. She applied for the visa in the UAE, describing her "primary occupation" as "homemaker" and stating that she had "no" previous employment. The information on the visa application conflicts with her claimed, full-time work at the garments warehouse from July 2015 to February 2019. *See Matter of Ho*, 19 I&N Dec. at 591 (requiring a petitioner to resolve inconsistencies).

In response to the NOID, the Petitioner submitted an affidavit from the Beneficiary in which she reiterated her claim of full-time work as a file clerk at the garments warehouse from July 2015 to February 2019. A native and citizen of Pakistan, she stated that, in the UAE, she derived status from her former spouse, whose UAE work/residence visa listed her as a homemaker. For the sake of consistency with her former spouse's UAE visa, she said she indicated on her U.S. visa application that she had never worked outside the home. The Beneficiary, however, also stated that her "independent employment" in the UAE was "customary by local law." But, if local law permitted the garments warehouse to employ the Beneficiary, the record does not explain why she would omit the work from her U.S. visa application. Also, the record lacks independent evidence of her claimed status and employment authorization in the UAE. *See Matter of Kodwo*, 24 I&N Dec. 479, 482 (BIA 2008) ("When the petitioner relies on a foreign law to establish eligibility for the beneficiary, the application of the foreign law is a question of fact, which must be proved by the petitioner.")

The Petitioner submitted copies of monthly pay records that the Beneficiary claims the garments warehouse issued to her during her employment as a file clerk. The dates of the eight records range from August 2015 to February 2019 and include records from each year the warehouse purportedly employed her. The records indicate that, each month, she received 2,500 Emirati dirhams, or about $680.73. She stated that she lacks additional evidence of her claimed employment because, after her divorce from her former spouse and her U.S. relocation, she misplaced or lost belongings.

But, except for parts of stamps on the Beneficiary's purported pay records, the records are all in English and do not indicate their translation from another language. The UAE's official language is Arabic. *See, e.g.,* U.S. Cent. Intelligence Agency, "The World Factbook," https://www.cia.gov/the-world-factbook/countries/united-arab-emirates/#people-and-society. The submission of pay records in the English language therefore casts doubt on their authenticity. *See Matter of Ho*, 19 I&N Dec. at 591 (requiring a petitioner to resolve inconsistencies). Also, the pay records do not list the number of hours the Beneficiary worked, and her wage amount suggests part-time employment. For labor certification purposes, part-time employment experience does not equate to full-time experience. *See Matter of 1 Grand Express*, 2014-PER-00783 (BALCA Jan. 16, 2018) (equating 29.5 months of part-time experience to about 18.5 months of full-time experience based on multiplication of the employment's duration (29.5 months) by 0.625, representing 25/40 weekly hours).

Further, the Petitioner has not demonstrated that it or the Beneficiary tried to obtain additional evidence of her claimed qualifying work from her former employer or the UAE or local government. In the Petitioner's NOID response, counsel asserted: "Most of the other supporting records such as bank statements and tax records are unavailable because of the unfortunate family estrangement resulting in divorce and the documentation being in possession and control of the ex-spouse." But counsel's assertion does not constitute evidence. *See Matter of Obaigbena*, 19 I&N Dec. 533, 534 n.2 (BIA 1988) (citing *Matter of Ramirez-Sanchez*, 17 I&N De. 503, 506 (BIA 1980)). The Petitioner

must substantiate counsel's assertion by submitting independent proof, which may include affidavits or declarations.

Because of the unresolved inconsistencies discussed above, the record does not sufficiently demonstrate the Beneficiary's qualifying experience for the offered position. We will therefore remand the matter.

On remand, the Director should notify the Petitioner of the evidentiary deficiencies regarding the Beneficiary's claimed qualifying experience. Also, the Director should ask the company to submit additional evidence of its ability to pay the proffered wage in 2021 and 2022. *See* 8 C.F.R. § 204.5(g)(2) (requiring a petitioner to demonstrate their ability to pay "continuing until the beneficiary obtains lawful permanent residence").

If supported by the record, the Director may notify the Petitioner of any other potential denial grounds. The Director, however, must afford the company a reasonable opportunity to respond to all issues raised on remand. Upon receipt of a timely response, the Director should review the entire record and enter a new decision.

III. CONCLUSION

The Petitioner demonstrated its ability to pay the offered position's proffered wage through 2020. But the record does not establish the Beneficiary's qualifying experience for the offered position.

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