U.S. Citizenship and Immigration Services

Non-Precedent Decision of the Administrative Appeals Office

In Re: 27460170

Date: JUL. 25, 2023

Motion on Administrative Appeals Office Decision

Form I-140, Immigrant Petition for Alien Worker (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 immigrant classification. *See* 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 Petitioner did not establish its ability to pay the Beneficiary's proffered wage as well as the proffered wages of the beneficiaries of all its other Form I-140 petitions. We dismissed a subsequent appeal. The matter is now before us on motion to reopen.

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). Upon review, we will dismiss the motion.

A motion to reopen must state new facts and be supported by documentary evidence. 8 C.F.R. § 103.5(a)(2). Our review on motion is limited to reviewing our latest decision. 8 C.F.R. § 103.5(a)(1)(ii). We may grant motions that satisfy these requirements and demonstrate eligibility for the requested benefit. *See Matter of Coelho*, 20 I&N Dec. 464, 473 (BIA 1992) (requiring that new evidence have the potential to change the outcome).

On motion, the Petitioner submits copies of its combined financial statements with an independent auditor's report for the years ended June 2016 and June 2017. The Petitioner asserts that this newly submitted evidence, when considered with the previously submitted documentation, demonstrates its ability to pay all its proffered wage obligations.

To meet the employer eligibility requirements for the requested classification, a petitioner must establish 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[1] 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 [U.S. Citizenship and Immigration Services (USCIS)].

In our February 2021 decision dismissing the appeal, we concluded that the Petitioner had not demonstrated its ability to pay the Beneficiary's proffered wage along with the proffered wages of its other I-140 beneficiaries from the priority date forward. We emphasized that the Petitioner had not provided any of the required initial evidence at 8 C.F.R. § 204.5(g)(2), specifically, its annual reports, federal tax returns or audited financial statements, even after the Director expressly asked for this documentation in a request for evidence (RFE).[2]

Although the Petitioner indicated that it has more than 100 employees and submitted an April 2017 letter from its chief financial officer (CFO) attesting to the company's ability to pay, the Director informed the Petitioner in the RFE that the letter alone did not provide sufficient evidence of its ability to pay the proffered wage because it had filed multiple I-140 petitions in a short period of time. In response to the RFE, and on appeal, the Petitioner maintained that its submission of the CFO's letter was all that was necessary under the applicable regulation and USCIS policy and contended that it was not required to submit annual reports, a federal tax returns, or audited financial statements. Instead, the Petitioner provided personnel records from the first quarter of 2017 with its RFE response.

In dismissing the appeal, we emphasized that the regulation at 8 C.F.R. § 204.5(g)(2) 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 regulations do not compel USCIS to accept such evidence or explicitly exempt all employers with more than 100 workers from submitting annual reports, tax returns or audited financial statements in all cases. Accordingly, we determined that it was within the Director's discretionary authority to require the Petitioner to submit at least one type of initial evidence prescribed at 8 C.F.R § 204.5(g)(2), and that the lack of such evidence provided sufficient grounds for denying the petition.

With its motion to reopen, the Petitioner submits an audited financial statement for the years ended June 2016 and June 2017 and asserts that this evidence establishes its ability to meet its proffered wage obligations for the instant Beneficiary and the beneficiaries of all other I-140 petitions it filed from the priority date of February 23, 2017.

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[1] The priority date of an employment-based immigrant petition is the date the underlying labor certification was filed with the Department of Labor, in this case February 23, 2017. *See* 8 C.F.R. § 204.5(d).

[2] The Petitioner also submitted a "Private Company Financial Report" at the time of filing, but this document, which did not include an income statement, balance sheet, or statement of case flows, did not constitute an "annual report" or "audited financial statement" under 8 C.F.R. § 204.5(g)(2). Nor did this November 2015 report offer evidence of the Petitioner's ability to pay from the priority date of February 23, 2017.

However, the Petitioner was put on notice of the specific evidentiary requirements at 8 C.F.R. § 204.5(g)(2) and was given a reasonable opportunity to provide evidence that meets these requirements prior to the denial of this petition. The Petitioner does not contend that this evidence was unavailable at the time it responded to the Director's RFE in September 2017 or at the time it filed the appeal. Therefore, we will not consider this evidence for the first time on motion to determine the Petitioner's ability to pay the proffered wage. *See* 8 C.F.R. § 103.2(b)(11) (requiring all evidence requested in an RFE to be submitted together at one time and providing that a partial or incomplete RFE response will be considered a request for a decision on the record); *see also Matter of Soriano*, 19 I&N Dec. 764, 766 (BIA 1988) (providing that if "the petitioner was put on notice of the required evidence and given a reasonable opportunity to provide it for the record before the denial, we will not consider evidence submitted on appeal" and that "we will adjudicate the appeal based on the record of proceedings" before the Chief); *see also Matter of Obaigbena*, 19 I&N Dec 533 (BIA 1988).

Although the Petitioner has submitted additional evidence in support of the motion to reopen, it has not shown proper cause for reopening the proceedings. Therefore, the motion will be dismissed. 8 C.F.R. § 103.5(a)(4).

ORDER: The motion to reopen is dismissed.