U.S. Citizenship and Immigration Services

Non-Precedent Decision of the Administrative Appeals Office

In Re: 01437113

Date: JUN. 01, 2022

Appeal of Texas Service Center Decision

Form I-140, Immigrant Petition for 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 employment-based immigrant visa category. Immigration and Nationality Act (the Act) section 203(b)(3)(A)(iii), 8 U.S.C. § 1153(b) (3)(A)(iii). This immigrant visa category allows a U.S. employer to sponsor a foreign national 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 that the job offer was *bona fide*, and open and available to qualified U.S. workers because it may have sought or received payment from the Beneficiary for activity related to the labor certification.

On appeal the Petitioner contests the Director's findings, asserting that the Director misconstrued the facts and misapplied the law.

The AAO conducts appellate review on a *de novo* basis. *See Soltane v. DOJ*, 381 F.3d 143, 145 (3d Cir. 2004). The burden is on the petitioner in visa petition proceedings to establish eligibility for the benefit sought. *See Matter of Brantigan*, 11 I&N Dec. 493 (BIA 1966). The petitioner must prove by a preponderance of the evidence that the beneficiary is fully qualified for the benefit sought. *See Matter of Chawathe*, 25 I&N Dec. 369, 376 (AAO 2010). To establish its eligibility for the immigration benefit it seeks under the preponderance of the evidence standard, the petitioner must submit sufficiently probative and credible evidence to establish that its claim is "more likely than not" or "probably" true. *See Matter of E-M-*, 20 I&N Dec. 77, 79-80 (Comm'r 1989).

Upon *de novo* review, we determine that the Petitioner has established, by a preponderance of the evidence, that the proffered position was a *bona fide* job opportunity open to U.S. workers and that applicable regulations were not violated in the labor certification process. Accordingly, we will withdraw the Director's decision. We will remand the case for adjudication within the statutory and regulatory framework for I-140 immigrant visa petitions.

I. EMPLOYMENT-BASED IMMIGRATION

Employment-based immigration generally follows a three-step process. To permanently fill a position in the United States with a foreign worker, a prospective employer must first obtain certification from the U.S. Department of Labor (DOL). *See* section 212(a)(5) of the Act, 8 U.S.C. § 1182(a)(5). DOL approval signifies that insufficient U.S. workers are able, willing, qualified, and available for a position. *Id.* Labor certification also indicates that the employment of a foreign national will not harm wages and working conditions of U.S. workers with similar jobs. *Id.*

If DOL approves a position, an employer must next submit the certified labor application with an immigrant visa petition to U.S. Citizenship and Immigration Services (USCIS). *See* section 204 of the Act, 8 U.S.C. § 1154. Among other things, USCIS considers whether a beneficiary meets the requirements of a certified position and a requested immigrant visa classification. If USCIS approves the petition, a foreign national may finally 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.

To be eligible for the classification it requests for the beneficiary, a petitioner must establish, among other things, 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 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 [USCIS].

II. ANALYSIS

With respect to the basis for the Director's decision, the Petitioner's assertions on appeal are persuasive. The Petitioner must prove eligibility by a preponderance of evidence, such that the applicant's claim is "probably true" based on the factual circumstances of each individual case. *Matter of Chawathe*; *Matter of E-M-*. We find that the Petitioner has met that burden with respect to the Director's findings. Accordingly, we will withdraw the Director's decision.[1]

[1] We recognize that that the Director raised significant if somewhat speculative concerns. While not sufficiently developed for purposes of this visa petition, the Director is not barred from further inquiry, investigation, or the development of questions for consular processing or adjustment of status proceedings. *See Matter of O*, 8 I&N Dec. 295 (BIA 1959) (stating that the immigrant visa petition is not the appropriate stage of the process for questions regarding admissibility).

As indicated in the above regulation, the Petitioner must establish its continuing ability to pay the proffered wage from the priority date of the petition onward.[2] In this case the proffered wage is $17,202 per year and the priority date is November 23, 2016.

In determining a petitioner's ability to pay the proffered wage, USCIS first examines whether the beneficiary was employed and paid by the petitioner during the period following the priority date. A petitioner's submission of documentary evidence that it employed the beneficiary at a salary equal to or greater than the proffered wage for the time period in question, when accompanied by a form of evidence required in the regulation at 8 C.F.R. § 204.5(g)(2), may be considered proof of the petitioner's ability to pay the proffered wage.

There is no evidence that the Beneficiary in this case has ever been employed by the Petitioner. Therefore, the Petitioner cannot establish its ability to pay the proffered wage from the priority date of November 23, 2016, onward based on wages paid to the Beneficiary.

If a petitioner does not establish that it has paid the beneficiary an amount equal to or above the proffered wage from the priority date onward, USCIS will examine the net income and net current assets figures recorded on the petitioner's federal income tax return(s), annual report(s), or audited financial statements(s). If either of these figures, net income or net current assets, equals or exceeds the proffered wage or the difference between the proffered wage and the amount paid to the beneficiary in a given year, the petitioner would ordinarily be considered able to pay the proffered wage during that year. However, when a petitioner has filed other I-140 petitions it must establish that its job offer is realistic not only for the instant beneficiary, but also for the beneficiaries of its other I-140 petitions (I-140 beneficiaries). A petitioner's ability to pay the proffered wage is an essential element in evaluating whether a job offer is realistic. *See Matter of Great Wall*, 16 I&N Dec. 142 (Acting Reg'l Comm'r 1977). Accordingly, a petitioner must demonstrate its ability to pay the combined proffered wages of the instant beneficiary and every other I-140 beneficiary from the priority date of the instant petition until the other I-140 beneficiaries obtain lawful permanent resident status. *See 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).[3]

The record includes a letter from the Petitioner's chief financial officer (CFO) stating that the Petitioner's gross net income for 2016 is in excess of $57 million and that it has a total of 5,500 employees, as well as an excerpt from a 2015 "Private Company Financial Report" for the Petitioner. As noted by counsel in the appeal, the Petitioner had filed numerous other I-140 petitions. The regulation at 8 C.F.R. § 204.5(g)(2), after identifying the three alternative types of required documentation, 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

[2] The "priority date" of an employment-based immigrant petition is the date the underlying labor certification application is filed with the DOL. *See* 8 C.F.R. § 204.5(d).

[3] 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, revoked, or denied without a pending appeal or motion; or
- Before the priority date of the I-140 petition filed on behalf of the other beneficiary.

records, or personnel records" as evidence of a petitioner's ability to pay the proffered wage. The regulation does not require USCIS to accept such evidence.

The record lacks the evidence required by the regulations of the Petitioner's ability to pay the proffered wage to all beneficiaries from the petition's priority date onward. Therefore, we will remand this case for the Director to request the submission of regulatory required evidence from the Petitioner, as specified in 8 C.F.R. § 204.5(g)(2), for the priority date year of 2016 and any subsequent year(s) in the Director's discretion. The Director may also request any other evidence that may be deemed necessary to determine the Petitioner's eligibility for the requested immigration benefit.

III. CONCLUSION

For the reasons discussed above, we will remand this case to the Director for further consideration of the Petitioner's eligibility for the immigration benefit it seeks on behalf of the Beneficiary.

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