U.S. Citizenship and Immigration Services

Non-Precedent Decision of the Administrative Appeals Office

In Re: 27775345

Date: AUG. 2, 2023

Appeal of Nebraska Service Center Decision

Form I-140, Immigrant Petition for Alien Workers (Skilled Worker)

The Petitioner, an operator of a Neapolitan-style pizzeria, seeks to permanently employ the Beneficiary as restaurant manager. The business requests her classification under the employment-based, third-preference (EB-3) immigrant visa category as a skilled worker. *See* Immigration and Nationality Act (the Act) section 203(b)(3)(A)(i), 8 U.S.C. § 1153(b)(3)(A)(i). Prospective employers can sponsor noncitizens for permanent residence in this category to work in positions requiring at least two years of training or employment experience. *Id.*

The Director of the Nebraska 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, from the petition's priority date onward. On appeal, the Petitioner submits additional evidence. The business also contends that, although indoor-dining bans during the COVID-19 pandemic hurt its finances the year of the petition's priority date, the record demonstrates its ability to pay the proffered wage.

The Petitioner bears the burden of demonstrating eligibility for the requested benefit by a preponderance of the evidence. *Matter of Chawathe*, 25 I&N Dec. 369, 375-76 (AAO 2010). Exercising de novo appellate review, *see Matter of Christo's, Inc.*, 26 I&N Dec. 537, 537 n.2 (AAO 2015), we conclude that the Director's misstatement of the petition's priority date and omission of a specific explanation of the filing's denial potentially hindered the business's attempt to demonstrate its ability to pay the proffered wage. We will therefore withdraw the decision and remand the matter for entry of a new decision consistent with the following analysis.

I. LAW

Immigration as a skilled worker generally follows a three-step process. First, a prospective employer must obtain certification from the U.S. Department of Labor (DOL) that: there are insufficient U.S. workers able, willing, qualified, and available for an offered position; and a noncitizen's permanent employment 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)(B).

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 permanent residence. 8 C.F.R. § 204.5(g)(2). Evidence of ability to pay must generally include copies of annual reports, federal tax returns, or audited financial statements. *Id.*

When 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 also 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).

The Petitioner's labor certification states the proffered wage of the offered position of restaurant manager as $96,000 a year. The petition's priority date is April 1, 2020, the date DOL received the labor certification application for processing. *See* 8 C.F.R. § 204.5(d) (explaining how to determine a petition's priority date).

The record does not indicate the Petitioner's payment of any wages to the Beneficiary. Thus, based solely on her wages, the business has not demonstrated its ability to pay the offered position's proffered wage.

The Petitioner submitted a copy of the first page of its federal income tax return for 2020, the year of the petition's priority date.[1] The page reflects net income that year of -$282,525. Because this negative amount does not equal or exceed the annual proffered wage of $96,000, the business's net income does not demonstrate its ability to pay the proffered wage in 2020.

[1] "Submitted tax returns should be complete, including all required schedules." *See generally* 6 *USCIS Policy Manual* E.(4)(A)(2), www.uscis.gov/policy-manual.

Also, the first page of the Petitioner's 2020 federal income tax return does not indicate the business's net current assets for that year.[2] Thus, by that additional measure, the Petitioner also did not establish its ability to pay in 2020.

The Director issued the Petitioner a request for additional evidence (RFE), seeking additional proof of the business's ability to pay the offered position's proffered wage. The RFE, however, misstates the petition's priority date as September 21, 2021, the date of the petition's filing. The RFE, therefore, did not clearly notify the Petitioner of the need for additional evidence of its ability to pay in 2020. The business responded to the RFE with copies of its state quarterly wage taxes for parts of 2021 and 2023. Also, on appeal, the Petitioner repeats the misstated priority date.

After reviewing the Petitioner's RFE response, the Director denied the petition. A USCIS officer "shall explain in writing the specific reasons for denial." 8 C.F.R. § 103.3(a)(1)(i). The Director's decision concludes that the business did not demonstrate its ability to pay the offered position's proffered wage. But, contrary to 8 C.F.R. § 103.3(a)(1)(i), the decision does not specify deficiencies in the Petitioner's evidence. The omission of the denial's explanation potentially deprived the business of an appellate opportunity to offer argument, evidence, or both in opposition to the denial grounds.

Because of the foregoing errors, we will withdraw the Director's decision and remand the matter. On remand, the Director should issue a new notice to the Petitioner, stating the petition's correct priority date and explaining why the business's evidence does not establish its continuing ability to pay the proffered wage, from the petition's priority date onward.

B. The Required Experience

Although unaddressed by the Director, the record also does not establish the Beneficiary's qualifying experience for the offered position or the requested immigrant visa category.

A skilled worker must have - and their offered position must require - at least two years of training or experience. 8 C.F.R. § 204.5(l)(2), (3)(ii)(B). Also, 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).

When assessing a beneficiary's qualifications, USCIS must examine the job-offer portion of an accompanying labor certification to determine the job's minimum requirements. USCIS may neither ignore a certification term nor impose an unstated requirement. *See, e.g., Madany v. Smith*, 696 F.2d 1008, 1015 (D.C. Cir. 1983) (holding that "DOL bears the authority for setting the *content* of the labor certification") (emphasis in original).

The Petitioner's labor certification states the minimum requirements of the offered position of restaurant manager as two years of experience "in the job offered."[3] On a labor certification,

[2] Information on IRS Schedules L to U.S. income tax returns for businesses generally allow net current asset calculations. The calculations require subtracting businesses' net current liabilities from their net current assets. *See* Joel G. Siegel & Jae K. Shim, *Barron's Dictionary of Accounting Terms* 117 (3d Ed. 2000).

[3] The labor certification submitted by the Petitioner omits page 3 of 11, which includes the offered position's experience

experience in the job offered means experience performing the offered position's key duties as listed on the certification. *See, e.g., Matter of Symbioun Techs., Inc.*, 2010-PER-01422, slip op. at *3 (BALCA Oct. 24, 2011). The Petitioner's labor certification states that the business will not accept experience in an alternate occupation.

On the labor certification, the Beneficiary attested that, by the petition's April 1, 2020 priority date, she gained almost 10 years of full-time, qualifying experience in Italy. She stated that a restaurant employed her as its manager from September 2006 to June 2016. She did not list any other qualifying experience on the labor certification.

To demonstrate qualifying experience, a petitioner for a skilled worker must submit a letter from a beneficiary's former employer. 8 C.F.R. § 204.5(l)(3)(ii)(A). The letter must contain the employer's name, address, and title, and describe the beneficiary's experience. *Id.*

Contrary to 8 C.F.R. § 204.5(l)(3)(ii)(A), the record lacks a letter from the Beneficiary's purported former employer. The Petitioner therefore has not demonstrated the Beneficiary's qualifying experience for the offered position or the requested immigrant visa category.

The Director did not notify the Petitioner of this evidentiary deficiency. Thus, on remand, the Director's new notice to the business should also explain the need for additional evidence of the Beneficiary's claimed qualifying experience for the offered position and the requested immigrant visa category.

If supported by the record, the new notice may inform the Petitioner of any other potential denial grounds. The notice, however, must give the business 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 misstatement of the petition's priority date and the omission of a specific explanation of the filing's denial may have hindered the Petitioner's attempt to demonstrate its ability to pay the offered position's proffered wage. Also, the business has not established the Beneficiary's qualifying experience for the offered position or the requested immigrant visa category.

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

requirements. USCIS obtained the information on the missing labor certification page by accessing a U.S. government information system.