U.S. Citizenship and Immigration Services

Non-Precedent Decision of the Administrative Appeals Office

In Re: 24551077

Date: FEB. 9, 2023

Appeal of Texas Service Center Decision

Form I-140, Immigrant Petition for Other Worker

The Petitioner, the owner and operator of sandwich shop franchises, seeks to permanently employ the Beneficiary as a [redacted]. The company requests his classification under the third-preference, immigrant visa category for "other workers." *See* Immigration and Nationality Act (the Act) section 203(b)(3)(A)(iii), 8 C.F.R. § 1153(b)(3)(A)(iii). This category allows a prospective U.S. employer to sponsor a noncitizen for lawful permanent residence to perform work requiring less than two years of training or experience. *Id.*

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 combined proffered wages of this and other positions the company has offered to noncitizens. On appeal, the Petitioner argues that U.S. Citizenship and Immigration Services (USCIS) has approved more than 34 similar petitions from the company and that it established its ability to pay all applicable wages.

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). Exercising de novo appellate review, *see Matter of Christo's, Inc.*, 26 I&N Dec. 537, 537 n.2 (AAO 2015), we conclude that, at the time of the petition's denial, the Petitioner's federal income tax return for the year of the filing's priority date was not yet available. We will therefore withdraw the Director's decision and remand the matter for entry of a new decision consistent with the following analysis.[1]

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).

[1] The Petitioner indicated on the Form I-290B, Notice of Appeal or Motion, that it would submit a written brief, evidence, or both within 30 days of the appeal's filing. As of this decision's date, we have not received a brief or additional evidence from the company. Also, USCIS records show that, shortly before the appeal's filing, the Petitioner filed another Form I-140 "other worker" petition for the Beneficiary. As of this decision's date, the second petition remains pending.

Second, an employer must submit an approved labor certification with an immigrant visa petition to 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 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).[2]

The Petitioner's accompanying labor certification states the proffered wage of the offered position of sandwich artist as $23,462 a year. The petition's priority date is June 30, 2021, 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).

The Petitioner did not submit any evidence that it paid the Beneficiary. Thus, based solely on wages paid, the company has not demonstrated its ability to pay the proffered wage.

The Petitioner submitted a copy of its federal income tax return for 2020, the year before the year of the petition's priority date. The return reflects net income of -$500,929 and net current assets of $33,387. The Director issued a request for additional evidence (RFE), noting that USCIS records show the Petitioner's filing of Form I-140 petitions for other noncitizens and stating that the tax return did not reflect the company's ability to pay multiple beneficiaries.

A petitioner must demonstrate its ability to pay the proffered wage of each petition it files before a beneficiary obtains lawful permanent residence. 8 C.F.R. § 204.5(g)(2). This Petitioner must therefore demonstrate its ability to pay the combined proffered wages of this petition and others that were approved or pending at the time of this petition's priority date of June 30, 2021 or filed thereafter. *See*

[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); *Just Bagels Mfg., Inc. v. Mayorkas*, 900 F. Supp. 2d 363, 373-76 (S.D.N.Y. 2012).

Patel v. Johnson, 2 F. Supp. 3d 108, 124 (D. Mass. 2014) (affirming our revocation of a petition's approval, where, as of its filing, the petitioner did not demonstrate its ability to pay the combined proffered wages of multiple petitions).[3]

The Petitioner's RFE response included a letter from its chief financial officer (CFO). The letter states the company's employment of about 180, full-time workers and its generation of more than $4.7 million in revenues in 2021. USCIS may accept a statement from a financial officer as proof of ability to pay if a business employs at least 100 workers. 8 C.F.R. § 204.5(g)(2). The Petitioner also provided information about five other Forms I-140, Petitions for Alien Workers, it filed in 2021 and copies of federal and state payroll tax returns for that year.

In a notice of intent to deny (NOID) the petition, the Director noted that the Petitioner's payroll tax returns indicate the company's employment of less than 100 workers. A federal quarterly wage return for the last quarter of 2021 states the company's employment of 52 people. The Director therefore found that the Petitioner had not demonstrated the acceptability of the CFO's letter as proof of the company's ability to pay. *See* 8 C.F.R. § 204.5(g)(2) (allowing a statement from a financial officer "[i]n a case where the prospective United States employer employs 100 or more workers"); *see also Matter of Ho*, 19 I&N Dec. 582, 591 (BIA 1988) (requiring petitioners to resolve inconsistencies with independent, objective evidence pointing to where the truth lies).

The RFE indicates the insufficiency of the Petitioner's 2020 federal tax return for not demonstrating the company's ability to pay the proffered wages of "all beneficiaries." But the NOID, issued in May 2022, states the return's unacceptability for not relating to 2021, the year of the petition's priority date. The NOID requests the Petitioner to submit copies of an annual report, federal tax return, or audited financial statements for 2021 and a list of additional Form I-140 petitions that the company filed in 2022.

The Petitioner's NOID response lists 20 other petitions it filed in 2022 and states that it asked the U.S. Internal Revenue Service (IRS) for an extension of time in which to file its 2021 federal tax return. The Petitioner also reiterated its employment of 180 people, stating that that number includes workers at its "headquarters."

The Director correctly found insufficient evidence of the Petitioner's employment of at least 100 people and thus the acceptability of the CFO's letter as evidence of the company's ability to pay. *See* 8 C.F.R. § 204.5(g)(2). Employers must generally list all U.S. employees on their payrolls on IRS Forms 941, Employer's Quarterly Federal Tax Returns. IRS, Instructions for Form 941, Part 1, 9-10, https://www.irs.gov/pub/irs-pdf/i941.pdf. The Petitioner's statement of less than 100 employees on its 2021 Forms 941 may indicate that the employees at its "headquarters" work for a different entity or in a different country.[4] The Petitioner's NOID response did not demonstrate the company's employment of at least 100 workers or explain the lesser employee count stated on its 2021 payroll tax returns. The Director therefore properly rejected the CFO's letter as evidence of the company's ability to pay the proffered wage.

[3] The Petitioner need not demonstrate its ability to pay proffered wages of petitions that it withdrew or that USCIS rejected, denied, or revoked. The company also need not demonstrate its ability to pay proffered wages before the priority dates of the corresponding petitions or after the corresponding beneficiaries obtained lawful permanent residence.

[4] Online information suggests the Petitioner's affiliation with a Canadian company.

Despite the letter's rejection, the Petitioner may still submit copies of an annual report, federal tax return, or audited financial statements as proof of its ability to pay in 2021. *See* 8 C.F.R. § 204.5(g)(2). The Director acknowledged the vice president's claim that the company had received an extension of time in which to file its 2021 federal tax return. But the Director faulted the company for omitting documentary evidence of the extension.

At the time of the petition's denial, regulatory required evidence of the Petitioner's ability to pay the combined proffered wages in 2021 was not yet available. We will therefore withdraw the Director's decision and remand the matter. On remand, the Director should ask the Petitioner to submit required evidence of its ability to pay in 2021, and, if available, 2022. The company may also submit additional evidence of its ability to pay the combined proffered wages of all applicable beneficiaries.

If supported by the record, the Director may notify the Petitioner of any additional, 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 issue a new decision.

III. CONCLUSION

The Petitioner did not demonstrate its employment of at least 100 people and thus the acceptability of its CFO's letter as evidence of its ability to pay the proffered wage. At the time of the petition's denial, however, regulatory required evidence of the company ability to pay was not yet available.

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