U.S. Citizenship and Immigration Services

Non-Precedent Decision of the Administrative Appeals Office

In Re: 23114355

Date: FEB. 09, 2023

Appeal of Texas Service Center Decision

Form I-140, Immigrant Petition for Professional

The Petitioner seeks to employ the Beneficiary as a restaurant cook. It requests classification of the Beneficiary under the third-preference, immigrant classification for professional workers. Immigration and Nationality Act (the Act) section 203(b)(3)(A)(ii), 8 U.S.C. § 1153(b)(3)(A)(ii). This employment-based, "EB-3" category allows a U.S. employer to sponsor a professional with a baccalaureate degree for lawful permanent resident status.

The Director of the Texas Service Center denied the petition on the ground that the labor certification does not require a minimum bachelor's degree, and that the job opportunity therefore does not qualify for professional worker classification. The Director also found that the Petitioner did not submit sufficient evidence of its ability to pay the proffered wage, the Petitioner did not submit evidence of the Beneficiary's work experience required under the labor certification, and the preparer of the labor certification did not execute the labor certification. The matter is now before us on appeal. 8 C.F.R. § 103.3.

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). We review the questions in this matter de novo. *Matter of Christo's*, Inc., 26 I&N Dec. 537, 537 n.2 (AAO 2015). Upon de novo review, we will dismiss the appeal.

I. LAW

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.

II. ANALYSIS

A. Immigration Visa Classification

On the Form I-140, Immigrant Petition for Alien Worker, the Petitioner marked box "e" at Part 2, indicating that it seeks to classify the Beneficiary as a professional pursuant to section 203(b)(3)(A)(ii) of the Act, 8 U.S.C. § 1153(b)(3)(A)(ii).

A professional must hold at least a U.S. bachelor's degree or a foreign equivalent degree and must be a member of a profession that requires the minimum of a baccalaureate degree for the occupation. 8 C.F.R. § 204.5(1). The regulation at 8 C.F.R. § 204.5(l)(2) defines a professional as "a qualified alien who holds at least a United States baccalaureate degree or a foreign equivalent degree and who is a member of the professions."

As required by statute, the petition was accompanied by a labor certification approved by the DOL.[1] The labor certification indicates the job offer is for a restaurant cook requiring 24 months of work experience and three months of training in principles and processes/customer service. The job offered has no minimum educational requirement. After issuing a notice of intent to deny (NOID) and receiving the Petitioner's response, the Director denied the petition stating the Petitioner did not submit evidence demonstrating the job offered under the labor certification supported the immigration classification of professional as indicated in the petition.

The Petitioner argues on appeal that USCIS committed an error in its denial by not considering the documentation submitted with its reply to the NOID. The Petitioner states that it answered the NOID and mailed the answer to USCIS. With the appeal, the Petitioner included a request to reconsider its NOID reply evidence, together with mail tracking documentation.

The record indicates the NOID explained that the labor certification did not support the classification of the Beneficiary's proffered job as a professional. The NOID requested evidence to overcome this deficiency and satisfy classifying the Beneficiary's proffered job as a professional. The record shows the Petitioner submitted a reply to the NOID, which was received by USCIS on April 6, 2021. However, the reply to the NOID only included the Petitioner's 2019 income tax return and a 2020 statement of assets, liabilities, and equity related to the Petitioner's ability to pay the proffered wage. The reply did not include an explanation or evidence that the Beneficiary's position satisfies the definition of a professional.

The labor certification does not require that the Beneficiary's proffered job hold a United States baccalaureate degree or a foreign equivalent degree. Also, the record does not demonstrate the job

[1] The priority date of the petition, which is the date the DOL accepted the labor certification for processing, is October 8, 2019. If the petition is approved, the priority date is also used in conjunction with the Visa Bulletin issued by the U.S. Department of State to determine when a beneficiary can apply for adjustment of status or for an immigrant visa abroad. See 8 C.F.R. § 204.5(d).

position, restaurant cook, is a member of a profession. See 8 C.F.R. § 204.5(l)(2). The proffered job therefore does not support the requested immigrant classification of a professional.

B. Ability to Pay the Proffered Wage

Here, the proffered wage is $29,453 per year. The regulation at 8 C.F.R. § 204.5(g)(2) requires a petitioner to establish its continuing ability to pay the proffered wage from the priority date until the beneficiary obtains lawful permanent residence. The petition's priority date is October 8, 2019, the date DOL received the labor certification application for processing. See 8 C.F.R. § 204.5(d). Thus, the Petitioner must establish its continuing ability to pay the proffered wage from that date onward.

In determining a petitioner's ability to pay, we first examine whether it paid a beneficiary the full proffered wage each year from a petition's priority date. Here, the record does not demonstrate that the Petitioner has paid the Beneficiary any wages from the priority date onward.

When a petitioner does not pay a beneficiary the full proffered wage, we next examine whether the petitioner had sufficient annual amounts of net income or net current assets recorded on its federal tax return(s), annual report(s), or audited financial statements(s) to pay the difference between the proffered wage and the wages paid, if any. See 8 C.F.R. § 204.5(g)(2). 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 a beneficiary in a given year, a petitioner would ordinarily be considered able to pay the proffered wage during that year. [2]

With a priority date of October 8, 2019, the proffered wage is prorated to $6,858.65 for 2019. The record includes a copy of the Petitioner's federal income tax return, Form 1120, U.S. Income Tax Return for a C Corporation, for 2019, as well as a statement of assets, liabilities, and equity as of December 31, 2020. As indicated on the 2019 tax return, the Petitioner had net income of $185[3] and net current assets of -$50.[4] Thus, the Petitioner had no net current assets in 2019, but rather net current liabilities, and had net income below the proffered wage. Therefore, for the year 2019, the Petitioner has not demonstrated that it has ability to pay the proffered wage.

For the year 2020, the Petitioner submitted unaudited financial statements as of December 31, 2020. While the regulation at 8 C.F.R. § 204.5(g)(2) states that USCIS may consider unaudited financial statements "in appropriate cases," they are not among the three types of required evidence identified in the regulation – either annual reports, federal tax returns, or audited financial statements – to

[2] Federal courts have upheld our 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); Tongatapu Woodcraft Haw., Ltd. v. Feldman, 736 F.2d 1305, 1309 (9th Cir. 1984); Estrada-Hernandez v. Holder, 108 F. Supp. 3d 936, 942-946 (S.D. Cal. 2015); *Rizvi v. Dep't* of Homeland Sec., 37 F. Supp. 3d 870, 883-884 (S.D. Tex. 2014), *aff'd*, 627 Fed. App'x 292, 294-295 (5th Cir. 2015).

[3] If a C corporation, like the Petitioner, has income exclusively from a trade or business, USCIS considers its net income (or loss) to be the figure for "Taxable income before net operating loss deduction and special deductions" on page 1, line 28 of the Form 1120.

[4] For a corporation net current assets (or liabilities) are the difference between its current assets, entered on lines 1-6 of Schedule L, and its current liabilities, entered on lines 16-18 of Schedule L. We note that the Director made an error in the denial decision when he indicated that the Petitioner's income tax returns indicate net current assets of -$6050 for 2019. However, this error does not change the fact that the Petitioner's net current assets for 2019 were insufficient to pay the proffered wage.

demonstrate a petitioner's ability to pay the proffered wage. As the Director pointed out, the statements show that the Petitioner had net income of -$2414.36 for 2020. Therefore, even though we do not consider these statements to be as reliable as the regulatory named financial documents, the statements do not show that the Petitioner has a net income sufficient to pay the proffered wage for 2020.

If a petitioner's net income or net current assets are insufficient, we may also consider other evidence of its ability to pay the proffered wage. See Matter of Sonegawa, 12 I&N Dec. 612, 614-15 (Reg'l Comm'r 1967). At its discretion, USCIS may consider evidence relevant to the petitioner's financial ability that falls outside of its net income and net current assets. We may consider such factors as the number of years the petitioner has been doing business, the historical growth of the business, the petitioner's reputation within its industry, the overall number of employees, whether the beneficiary is replacing a former employee or an outsourced service, the amount of compensation paid to officers, the occurrence of any uncharacteristic business expenditures or losses, and any other evidence that USCIS deems relevant to the petitioner's ability to pay the proffered wage.

The Petitioner indicated in the petition that it was established in 1981. However, the Petitioner submitted its federal income tax returns from 2016 through 2019, and these returns indicate the Petitioner was incorporated on [redacted] 1990. The Petitioner indicates it had 12 employees at the time the petition was filed in August 2020, and the job of cook is a new position. Therefore, the Petitioner is not replacing a current employee or outsourced service that may already be reflected in its financial documents. The record does not include evidence relating to the Petitioner's reputation in the community. The Petitioner's income tax returns for 2016 through 2019 do not reflect that the Petitioner generated net income and net current assets showing financial growth, or the incurrence of uncharacteristic losses or expenses. In sum, the Petitioner has not demonstrated its ability to pay the proffered wage of $29,453 per year from the priority date onward based on the totality of its circumstances.

C. Training and Work Experience

Section H of the labor certification states that the offered position of restaurant cook requires 24 months of experience in the job offered. Experience in an alternate occupation is not acceptable. The labor certification also requires three months of training in principles and processes/customer service. Evidence relating to qualifying experience or training must be in the form of a letter from the employer or trainer, and must include the name, address, and title of the writer, and a specific description of the duties performed or of the training received by the beneficiary. See 8 C.F.R. § 204.5(1)(3)(ii)(A).

The Petitioner's initial submission did not contain any regulatory-required evidence of the Beneficiary's work experience or training. In the NOID, the Director asked the Petitioner to submit evidence of the Beneficiary's work experience.[5] As discussed above, the record indicates that the Petitioner's response included its income tax returns and financial statements; however, it did not contain evidence to demonstrate the Beneficiary's qualifying experience. Therefore, the Petitioner

[5] The Director did not request evidence to demonstrate the Beneficiary received the training required under the labor certification and such evidence is required under 8 C.F.R. § 204.5(1)(3)(ii).

has not provided sufficient evidence to demonstrate the Beneficiary's work experience and training, as required under the labor certification.

D. Labor Certification

The Director determined that the labor certification was not acceptable for filing with this Form I-140 petition because it lacks the signature of its preparer in section M, Declaration of Preparer. Section M indicates the labor certification was not prepared by the Petitioner and was instead prepared by [redacted] the Petitioner's attorney. The labor certification states that a preparer is required to certify the labor certification by signing it prior to filing with DOL if the labor certification is submitted by mail to DOL, or prior to filing the Form I-140 petition with USCIS if the labor certification is submitted electronically to DOL.

In the NOID, the Director notified the Petitioner that the labor certification was not signed by the preparer when it was submitted to USCIS, thereby offering the Petitioner an opportunity to submit a labor certification signed by the preparer. The Petitioner submitted a reply to the NOID but did not provide an explanation or any evidence relating to the labor certification being incomplete. On appeal, the Petitioner argues that USCIS committed an error in its denial by not considering the documentation submitted with its reply to the NOID. Since the record does not demonstrate the labor certification was signed by the preparer prior to filing it with this petition, we agree with the Director that the labor certification is incomplete and not accepted as being properly filed with this petition.

III. CONCLUSION

The record on appeal does not demonstrate the proffered job meets the immigration classification of a professional, the Petitioner's continuing ability to pay the proffered wage, the Beneficiary has the required work experience, and the Petitioner submitted a complete labor certification signed by the preparer. We will therefore affirm the petition's denial.

ORDER: The appeal is dismissed.