U.S. Citizenship and Immigration Services

Non-Precedent Decision of the Administrative Appeals Office

In Re: 25281873

Date: FEB. 22, 2023

Appeal of Texas Service Center Decision

Form I-140, Immigrant Petition for Other Worker

The Petitioner, a home health care agency, seeks to employ the Beneficiary as a caregiver. It requests her classification as an "other" worker under the third preference immigrant category at section 203(b)(3)(A)(iii) of the Immigration and Nationality Act (the Act), 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 education, training, or experience.

The Director of the Texas Service Center denied the petition, concluding that the record did not establish that the Petitioner had the ability to pay Beneficiary's proffered wage, and that it continued to do business and intended to employ the Beneficiary in the offered position. 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 withdraw the Director's decision and remand the matter for entry of a new decision consistent with the following analysis.

I. LAW

Employment-based immigration generally follows a three-step process. First, an employer obtains an approved labor certification (ETA Form 9089) from the U.S. Department of Labor (DOL). *See* section 212(a)(5) of the Act, 8 U.S.C. § 1182(a)(5). By approving the labor certification, the DOL certifies that there are insufficient U.S. workers who are able, willing, qualified, and available for the offered position and that employing a foreign national in the position will not adversely affect the wages and working conditions of domestic workers similarly employed. *See* section 212(a)(5)(A)(i)(I)-(II) of the Act. Second, the employer files an immigrant visa petition with U.S. Citizenship and Immigration Services (USCIS). *See* section 204 of the Act, 8 U.S.C. § 1154. Third, if USCIS approves the petition, the foreign national 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.

Employment-based immigrant visa petitions "shall remain valid" for certain beneficiaries who obtain new job offers from the same or different employers. Section 204(j) of the Act, 8 U.S.C. § 1154(j). To qualify for job portability, a beneficiary must have filed an application for adjustment of status that remained unadjudicated for at least 180 days, and their new job offer must be in the same or similar occupational classifications as the job stated in their petition. *Id.*

Under 8 C.F.R. § 245.25(a)(2)(ii)(B), if a beneficiary's immigrant petition is pending when the beneficiary notifies USCIS of a new job offer on Form I-485 Supplement J, and such notification is made at least 180 days after the date the beneficiary filed an adjustment of status application, the following conditions apply to the adjudication of the petition:

> *(1)* Adjudication of the pending petition shall be without regard to the requirement in 8 C.F.R. § 204.5(g)(2) to continuously establish the ability to pay the proffered wage after filing and until the beneficiary obtains lawful permanent residence; and
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> *(2)* The pending petition will be approved if it was eligible for approval at the time of filing and until the beneficiary's adjustment of status application has been pending for 180 days unless approval of the qualifying immigrant visa petition at the time of adjudication is inconsistent with a requirement of the Act or another applicable statute.

II. ANALYSIS

The issue before us is whether the Director properly denied the petition based on a determination that the Petitioner did not demonstrate (1) its continuing ability to pay the proffered wage from the priority date until the time of adjudication and (2) that it continued to do business and intended to employ the Beneficiary in the offered position.

The Petitioner filed the Form I-140, Immigrant Petition for Alien Worker, on April 10, 2019, accompanied by a labor certification establishing a priority date of August 20, 2018.[1] The Beneficiary concurrently filed a Form I-485, Application to Register Permanent Residence or Adjust Status, on April 10, 2019. On October 19, 2021, after her Form I-485 had been pending for over 900 days, the Beneficiary filed a Form I-485 Supplement J, with supporting evidence, requesting job portability under section 204(j) of the Act.

In May 2022, the Director issued a request for evidence (RFE) advising that the Petitioner must demonstrate its continuing ability to pay the Beneficiary's offered wage from the priority date. The Director requested copies of the Petitioner's annual reports, audited financial statements, or complete copies of its U.S. federal tax returns for 2020 and 2021, and, if applicable, evidence of wages paid to the Beneficiary in 2021 and 2022. The Director also informed the Petitioner that it must submit evidence to demonstrate it was "doing business" as defined in the regulations for at least one year

[1] 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).

before it filed the petition and that it continued to do business through 2022.[2] The RFE did not mention the Beneficiary's filing of the Form I-485 Supplement J.

The Petitioner's response to the RFE emphasized that the Form I-140 and Form I-485 had been pending for over three years, and that the Beneficiary had filed a Form I-485 Supplement J in October 2021 to request job portability to a new permanent position in which she would be performing the same or similar duties. The response included a copy of the Beneficiary's Form I-485 Supplement J filing.

The Director denied the petition, concluding that the Petitioner did not establish its continuing ability to pay the Beneficiary's wage from the priority date onwards and noting that it did not submit the additional evidence requested in the RFE. The Director also denied the petition because the Petitioner did not provide the requested evidence demonstrating that it was doing business as of the priority date and continues to do business. The Director stated that such evidence was needed "to establish a bona fide job offer and the petitioner intends to employ the beneficiary."

Based on the facts described above, we conclude that the provisions at 8 C.F.R. § 245.25(a)(2)(ii)(B)(*1*) and (*2*) apply to the adjudication of this petition. As such, the Director was required to determine whether: (1) the record established the Petitioner's ability to pay the proffered wage from the priority date until the date of filing; and (2) the petition was eligible for approval at the time of filing and until the Beneficiary's adjustment of status application had been pending for 180 days.

The Director acknowledged the Beneficiary's filing of the Form I-485 Supplement J but emphasized that "the Form I-140 petition must have been 'valid' to be begin with in order to 'remain valid with respect to a new job.'" However, the Director did not elaborate or make an affirmative determination that this petition was not valid when filed. Rather, the focus of the RFE and denial was on whether the Petitioner demonstrated that it continued to do business and had the ability to pay the proffered salary as of 2022.

Accordingly, we will withdraw the Director's decision. As the Director has not yet reviewed the record under the applicable regulatory provisions, we will remand the matter for further consideration and entry of a new decision, consistent with the following discussion.

With respect to the ability to pay, the Director must determine whether the record demonstrates the Petitioner's ability to pay the proffered wage from the priority date of August 20, 2018, through the date of filing the petition on April 10, 2019. *See* 8 C.F.R. § 245.25(a)(2)(ii)(B)(*1*). The record as presently constituted contains the Petitioner's federal tax return for 2018 but does not contain the evidence needed to determine its ability to pay at the time of filing in 2019.

On remand, the Director should review the Petitioner's previously submitted 2018 tax return and determine whether this evidence demonstrates its ability to pay the proffered wage as of the priority

[2] The "doing business" definition and requirement referenced by the Director are found at 8 C.F.R. § 204.5(j)(2) and 204.5(j)(3)(i)(D), respectively, and apply to immigrant petitions for multinational managers and executives filed under 203(b)(1)(C) of the Act, rather than to petitions for other workers filed under section 203(b)(3)(A)(iii) of the Act.

date. To determine the Petitioner's ability to pay at the time of filing, the Director is instructed to request the evidence required by 8 C.F.R. § 204.5(g)(2) in the form of the Petitioner's 2019 annual report, audited financial statements, or 2019 federal tax return. The Director also has the discretion to request any other documentation deemed relevant in determining the Petitioner's ability to pay the proffered wage in 2018 and 2019, in accordance with the factors described in *Matter of Sonegawa*, 12 I&N Dec. 612 (Reg'l Comm'r 1967).

The Director must also determine whether the pending petition was otherwise eligible for approval at the time of filing and until October 7, 2019, which is the date on which the Beneficiary's adjustment of status application had been pending for 180 days. *See* 8 C.F.R. § 245.25(a)(2)(ii)(B)(*2*). Assuming that all eligibility requirements were met at that time, the petition should be approved unless approval of the petition at the time of adjudication would be inconsistent with a requirement of the Act or another applicable statute. *See id.*

If the Director identifies any issues that would have impacted eligibility on or prior to October 7, 2019, or determines that approval of the petition would be inconsistent with a requirement of the Act or another applicable statute, the Director should address these issues in a new RFE or notice of intent to deny (NOID) in accordance with 8 C.F.R. § 103.2(b)(8) and (16)(i), and allow the Petitioner an opportunity to respond before issuing a new decision.

III. CONCLUSION

The Director's decision is withdrawn as the Director did not adjudicate the petition in accordance with the applicable regulations at 8 C.F.R. § 245.25(a)(2)(ii)(B). We will remand the matter to the Director for further consideration under these provisions, issuance of a new RFE or NOID, and entry of a new decision.

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