U.S. Citizenship and Immigration Services

Non-Precedent Decision of the Administrative Appeals Office

In Re: 23090779

Date: MAR. 13, 2023

Appeal of Texas Service Center Decision

Form I-140, Immigrant Petition for Professional

The Petitioner, a software consulting company, seeks to employ the Beneficiary as a software developer. It requests classification of the Beneficiary as a professional under the third preference immigrant classification. Immigration and Nationality Act (the Act), section 203(b)(3)(A)(ii), 8 U.S.C. § 1153(b)(3)(A)(ii). This employment-based immigrant classification 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, concluding the record did not establish the Petitioner's ability to pay the proffered wage. 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. 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. Priority Date

As stated, the priority date is the date on which DOL accepted the ETA Form 9089 (labor certification) application for processing. See 8 C.F.R. § 204.5(d). In this matter, DOL accepted the labor certification for filing on November 3, 2013.[1] On appeal, the Petitioner states, "we kindly insist the Priority date as well is established on May 14, 2014 . . . ." Here, the Petitioner requests that we recognize the date DOL certified the labor certification as the priority date. The Petitioner has not cited to any legal authority in support of its request.

B. Ability to Pay

The record does not establish the Petitioner's continuing ability to pay the proffered wage from the priority date of the petition onward. 8 C.F.R. § 204.5(g)(2). While we do not discuss each piece of evidence individually, we have reviewed and considered each one.

A petitioner must establish its ability to pay the proffered wage from the petition's priority date until the beneficiary obtains lawful permanent residence. 8 C.F.R. § 204.5(g)(2). Evidence of ability to pay must generally include annual reports, federal tax returns, or audited financial statements. Id. In determining ability to pay, USCIS first determines whether the petitioner paid the beneficiary the full proffered wage each year from the priority date. If the petitioner did not pay the proffered wage in any given year, USCIS next determines whether the petitioner had sufficient net income or net current assets to pay the proffered wage (reduced by any wages paid to the beneficiary). If net income and net current assets are insufficient, USCIS may consider other relevant factors, such as the number of years the petitioner has been in business, the size of its operations, the growth of its business over time, its number of employees, the occurrence of any uncharacteristic business expenditures or losses, its reputation within its industry, or whether a beneficiary will replace a current employee or outsourced service. See Matter of Sonegawa, 12 I&N Dec. 612, 614-15 (Reg'l Comm'r 1967).

In this case, the proffered wage is $92,248 per year. The record includes the Beneficiary's W-2 statements for the years 2013 to 2020, along with his paystubs for the first several months of 2021. Even if these W-2 statements established that the Petitioner paid the Beneficiary a salary that meets or exceeds the proffered wage, the Petitioner would still need to submit annual reports, federal tax returns, or audited financial statements for each year from the priority date onward.[2]

Except for tax years 2013 and 2018, the evidence demonstrates that the Petitioner paid the Beneficiary the proffered wage or higher each year since the priority date. The Petitioner's 2013 net income ($20,718) was not sufficient to demonstrate its ability to pay the difference between the proffered wage and the wages paid.[3] However, its net current assets in 2013 were $166,728, which sufficiently covers the wage deficiency. Regarding 2018, the Petitioner provided a W-2 for the Beneficiary stating that

[1] The Director noted in the request for evidence (RFE) that "[t]he priority date for this petition is November 3, 2013" because the Petitioner "requested to recapture a previous priority date." However, the Director did not explain the relevance or basis of this statement.

[2] See 8 C.F.R § 204.5(g)(2).

[3] The Petitioner paid the Beneficiary $66,837 in 2013, which is deficient from the proffered wage by $25,411.

he earned $86,722, leaving a wage deficiency of $5,526. The record includes the Petitioner's Form 1120-S for the years 2013, 2019, and 2020 only. Therefore, the record does not contain evidence of the Petitioner's ability to pay the proffered wage in 2018. Without the necessary financial documentation, we are unable to conclude that the Petitioner has established its ability to pay the Beneficiary's proffered wage based on its net income or net current assets in 2018.

When determining the Petitioner's ability to pay, the Director may wish to examine the quality of the financial documentation provided. The Petitioner submitted W-2s for those it claims as current employees. Each of the claimed employees, including the Beneficiary, have a "preview" watermark on their 2018 W-2s. Since the Petitioner has not provided evidence to explain the "preview" nature of these W-2s, we cannot determine whether they represent a final and accurate statement of each employees' income. For example, the Petitioner did not submit signed Forms 1120-S, nor is there any indication that the Petitioner filed these returns or that the Internal Revenue Service (IRS) received or accepted them.

USCIS records indicate that after November 3, 2013, the Petitioner filed numerous I-140 petitions for other beneficiaries. Specifically, the Director stated that:

> USCIS records show (97) ninety-seven petitions filed, (20) twenty are duplicates or rejected, leaving (77) seventy-seven petitions as being filed by the petitioner. The petitioner provided a list of (55) fifty-five names and claims (19) nineteen individuals are identified as having had their petitions withdrawn by the petitioner. However, USCIS records show only (3) three of the (19) nineteen petitions have had a request for withdrawal. The petitioner did not provide any supporting documentation as evidence that a request or withdrawal was completed.

If a petitioner has filed I-140 petitions for multiple beneficiaries, it must demonstrate that its job offer to each beneficiary is realistic, and that it has the ability to pay the proffered wage to each beneficiary. See 8 C.F.R. § 204.5(g)(2); see also Patel v. Johnson, 2 F. Supp. 3d 108, 124 (D. Mass. 2014) (upholding petition's denial where petitioner did not demonstrate ability to pay multiple beneficiaries). Thus, petitions filed on behalf of other beneficiaries are considered from the priority date of each petition, not including any year prior to the priority date of the petition being reviewed on appeal, until the present or until any other beneficiary obtains lawful permanent residence (LPR). Withdrawn or denied petitions would not be considered in this analysis.

In response to the Director's request, the Petitioner provided a spreadsheet containing a list of current and former employees. Some individuals on the list appear to be beneficiaries of approved I-140 petitions, while others appear to have had approved petitions that the Petitioner later withdrew. The spreadsheet also contains names of individuals who appear to have had approved I-140 petitions in the past but now no longer work for the Petitioner.[4] While we acknowledge this evidence, it remains difficult to discern each employees' status based on the spreadsheet provided.

[4] The Petitioner has not provided evidence to support a finding that these employees no longer work for [redacted]. While we acknowledge the Petitioner's claims that one employee works outside of the United States, the Petitioner has not submitted evidence to substantiate this claim.

On appeal, the Petitioner provides updated information regarding its employees, including a spreadsheet that identifies the employees' names, their petitions' receipt numbers, and their petitions' priority dates. A second section of the spreadsheet contains a list of employees and receipt numbers for whom the Petitioner indicates petitions have been withdrawn. In a third section, the list separates certain individuals that appear to be former employees. While certainly helpful toward determining the Petitioner's ability to pay the wages of all beneficiaries, it is not enough, as we cannot determine whether this spreadsheet is complete. The Petitioner has filed a substantial number of I-140 petitions, for which many are not accounted. We therefore question whether the Petitioner has other employees with I-140 petitions filed on their behalf but that do not appear on the Petitioner's list.[5] Moreover, questions remain as to the status of each petition the Petitioner has filed. Specifically, the Petitioner has not identified whether each of its petitions is pending, approved, revoked, withdrawn, rejected, or denied. While we recognize that not every petitioner must provide such comprehensive evidence, we conclude that in this instance, the Petitioner's history of filing a substantial number of employment-based petitions necessitates additional scrutiny into the status of each petition filed.

Moreover, the Petitioner provided incomplete and inconsistent information regarding the purportedly withdrawn petitions. Although the spreadsheet indicates that some petitions have been withdrawn, the Petitioner has not provided sufficient or consistent evidence of such withdrawals. On appeal, the Petitioner presents numerous I-797 Notice of Action printouts which evidence I-140 approval notices for petitions the Petitioner claims to have subsequently withdrawn. The spreadsheet on appeal evidences the names and receipt numbers associated with particular I-140 petitions for which the record includes I-797 approval notices and withdrawal letters. Therefore, in addition to the possibility that the Petitioner's spreadsheet is incomplete as to the number of petitions it filed, another evidentiary deficiency appears to be whether the Petitioner actually sent the withdrawal letters for the petitions it claims to have withdrawn and whether USCIS received and processed the withdrawals.

On appeal, the Petitioner provides 30 withdrawal letters for various I-140 petitions it has filed since the Beneficiary's priority date.[6] However, as the Director noted, the Petitioner did not submit supporting documentation to evidence a completed withdrawal. Service records indicate that many of the receipt numbers listed in the withdraw letters correspond to approved I-140 petitions with no confirmed withdrawal communication. Accordingly, we question the legitimacy and accuracy of the content within the withdrawal letters.

Without annual reports, federal tax returns, or audited financial statements for each year from the priority date or an accurate account of petitions filed for multiple beneficiaries, USCIS cannot calculate the total, combined proffered wages that the Petitioner must demonstrate in order to establish its ability to pay. Also, as we lack information regarding the Petitioner's total wage obligation, we cannot properly and fully assess the Petitioner's totality of the circumstances. See Sonegawa, 12 I&N Dec. at 614-15.

Therefore, we will remand this case for the Director to request the submission of regulatorily required evidence from the Petitioner, as specified in 8 C.F.R. § 204.5(g)(2), for any missing year(s) in the

[5] As explained, petitions filed on behalf of other beneficiaries are considered from the priority date of each petition, not including any year prior to the priority date of the petition being reviewed on appeal, until the present or until any other beneficiary obtains LPR status.

[6] Although the Petitioner provides 31 letters, we do not count a duplicate letter for the same beneficiary and petition.

Director's discretion. The Director may reevaluate the submitted evidence and 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 withdraw the Director's decision and 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.