U.S. Citizenship and Immigration Services

Non-Precedent Decision of the Administrative Appeals Office

In Re: 26557394

Date: MAY 4, 2023

Appeal of Texas Service Center Decision

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

The Petitioner, a wholesale florist, seeks to permanently employ the Beneficiary as an accountant. The company requests her classification under the third-preference, immigrant visa category for professionals. *See* Immigration and Nationality Act (the Act) section 203(b)(3)(A)(ii), 8 U.S.C. § 1153(b)(3)(A)(ii). This category allows prospective, U.S. employers to sponsor noncitizens for lawful permanent residency to work in positions requiring at least bachelor's degrees. 8 C.F.R. § 204.5(l)(3)(i).

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 offered position's proffered wage. On appeal, the Petitioner contends that the Director misanalysed its ability to pay.

The Petitioner bears the burden of demonstrating eligibility for the requested benefit by a preponderance of evidence. *See 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 company demonstrated its ability to pay the offered position's proffered wage and will therefore withdraw the Director's decision. But, as the record lacks sufficient evidence of the Beneficiary's qualifying experience for the offered position, we will remand the matter for entry of a new decision consistent with the following analysis.

I. LAW

Immigration as a professional 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 job would not harm wages and working conditions of U.S. workers with similar positions. 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)(A), (C).

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 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).[1]

The petition's accompanying labor certification states the proffered wage of the offered position of accountant as $53,747 a year. The petition's priority date is August 3, 2021, the date DOL accepted the accompanying labor certification application for processing. *See* 8 C.F.R. § 204.5(d) (explaining how to determine a petition's priority date).

At the time of the appeal's filing, regulatory required evidence of the Petitioner's ability to pay the proffered wage was not yet available for 2022. We will therefore consider the company's ability to pay only in 2021, the year of the petition's priority date.

The Petitioner submitted a copy of the Beneficiary's IRS Form W-2, Wage and Tax Statement, for 2021. The form indicates that the company paid her $49,724.49. This amount does not equal or exceed the annual proffered wage of $53,747. Thus, as the Director found, the record does not establish the Petitioner's ability to pay the proffered wage based solely on wages paid.

The Director, however, neglected to credit the Petitioner's 2021 payment to the Beneficiary. The company need only demonstrate the difference between the annual proffered wage and the amount it paid the Beneficiary: $4,022.51.

---

[1] 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); *Rizvi v. Dep't of Homeland Sec.*, 37 F. Supp. 3d 870, 883-84 (S.D. Tex. 2014), *aff'd*, 627 Fed. App'x. 292 (5th Cir. 2015).

The Petitioner submitted a copy of its 2021 federal income tax return. The Director found that the return reflects net income of -$24,782 and net current assets of -$336,821. The Director therefore concluded that the Petitioner did not demonstrate its ability to pay the proffered wage in 2021.

The Director, however, miscited the net income indicated on the Petitioner's 2021 tax return. The return shows that the limited liability company derived income not only from its florist business, but also from renting real estate. The Petitioner listed the additional profit on Schedule K, Partners' Distributive Share Items, to IRS Form 1065, U.S. Return of Partnership Income, which is "a summary schedule of all the partners' shares of the partnership's income, credits, deductions, etc." Internal Revenue Serv. (IRS), "2021 Instructions for Form 1065," 28, www.irs.gov/pub/irs-prior/i1065sk1--2021.pdf Thus, we consider Schedule K to reflect the Petitioner's net income more accurately than Form 1065. The Director therefore should have cited the Petitioner's net income of $24,006, as listed on the company's Schedule K.

The Petitioner's 2021 net income of $24,006 exceeds the $4,022.51 difference between the annual proffered wage and the amount the company paid the Beneficiary that year. Thus, the Petitioner demonstrated its ability to pay the offered position's proffered wage. We will therefore withdraw the Director's contrary decision.

B. The Beneficiary's Experience

The appeal overcomes the petition's denial ground. But the record does not demonstrate the filing's approvability. The Petitioner did not establish the Beneficiary's qualifying experience for the offered position.

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 a position's minimum job requirements. USCIS may neither ignore certification terms nor impose unstated requirements. *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 accountant as a U.S. bachelor's degree, or a foreign equivalent degree, in business administration and two years of experience "in the job offered" or in an alternate occupation involving "Accounts Payable." The Beneficiary's educational qualifications are not at issue.

On the labor certification, the Beneficiary attested that, by the petition's August 3, 2021 priority date, she gained more than nine years of full-time qualifying experience. She stated the following employment history:

- About two years, 10 months of experience as a junior finance manager with the Petitioner, from October 2018 to August 2021;
- About nine months of experience as an accounts payable analyst with the Petitioner, from January 2018 to October 2018;

- About three years, two months of experience as an "AR, AP and Intercompany Co[nsultant]"[2] with a consultancy in Mexico, from January 2014 to March 2017; and
- About two years, five months of experience as a junior accounts payable analyst for the same Mexican consultancy, from July 2011 to December 2013.

To establish claimed qualifying experience, a petitioner must submit letters from a beneficiary's employers. 8 C.F.R. § 204.5(l)(3)(ii)(A). The letters must include the employers' names, addresses, and titles and descriptions of the beneficiary's experience. *Id.*

The petition included a letter from the Petitioner's general manager, asserting the Beneficiary's satisfaction of the offered position's experience requirements. But, contrary to 8 C.F.R. § 204.5(l)(3)(ii)(A), the letter does not describe her experience with the Petitioner. The letter therefore does not establish the Beneficiary's qualifying experience for the offered position.

Also, the record lacks a letter from the Beneficiary's claimed Mexican employer. The Petitioner therefore has not demonstrated her qualifying experience for the offered position.

The Director did not notify the Petitioner of this evidentiary deficiency. We will therefore remand the matter. On remand, the Director should ask the Petitioner for regulatory required evidence of the Beneficiary's claimed qualifying experience and afford the company a reasonable opportunity to respond.

If the Petitioner intends to rely on experience that the Beneficiary gained with it, it must demonstrate the impracticality of training a worker for the position or that the Beneficiary gained the experience with it in a position substantially different than the offered one. 20 C.F.R. § 656.17(i)(3). In this context, a substantially different position means one requiring performance of the same job duties less than 50% of the time. 20 C.F.R. § 656.17(i)(5)(ii). To demonstrate a substantially different position, the Petitioner may submit "position descriptions, the percentage of time spent on various duties, organization charts, and payroll records." *Id.*

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

III. CONCLUSION

The Petitioner demonstrated its ability to pay the offered position's proffered wage. The record, however, lacks sufficient evidence of the Beneficiary's qualifying experience for the offered position.

[2] The Beneficiary's job title did not fit in the space provided on the labor certification application form. Because she described the Mexican company on the application as a consultancy, we presume that the job title's final word is "Consultant."

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