U.S. Citizenship and Immigration Services

Non-Precedent Decision of the Administrative Appeals Office

In Re: 26349992

Date: APR. 20, 2023

Appeal of Texas Service Center Decision

Form I-140, Immigrant Petition for a Professional

The Petitioner, an exhibition management services company, seeks to employ the Beneficiary as a senior programmer analyst. 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 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 that the Petitioner did not establish its ability to pay the proffered wage. The matter is now before us on appeal.

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.

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 (Form I-140) 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.

A petitioner must demonstrate its continuing ability to pay an offered position's 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 copies of a business's annual reports, federal tax returns, or audited financial statements. *Id.* If a petitioner submits such evidence, USCIS

will then examine whether a petitioner has paid the beneficiary the full proffered wage each year from the petition's priority date. If a petitioner has not paid the beneficiary the full proffered wage each year, USCIS will consider whether the business generated annual amounts of net income or net current assets sufficient to pay any difference 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 such as the number of years it has conducted business, the growth of its business, its number of employees, the occurrence of any uncharacteristic business expenditures or losses, or its reputation in its industry. *See Matter of Sonegawa*, 12 I&N Dec. 612, 614-15 (Reg'l Comm'r 1967).

The Petitioner's accompanying labor certification states the proffered wage of the offered position of senior programmer analyst as $120,589.00 a year. The petition's priority date is August 19, 2019, 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 filed the Form I-140 on October 29, 2020.[1]

In the matter at hand, the Petitioner initially submitted the 2019 annual report for its parent company.[2] In a subsequent request for evidence (RFE), the Director stated that the Petitioner had not submitted sufficient documentation to establish its ability to pay the proffered wage. Accordingly, the Director requested additional evidence of the Petitioner's ability to pay, including evidence of annual reports, audited financial statements, federal tax returns, or a statement from the company's financial officer establishing its ability to pay the offered wage.

In response, the Petitioner provided its parent company's annual reports from 2014 through 2021. In denying the petition, the Director stated that the annual reports are for "the parent company as opposed to [the Petitioner] on the labor certificate and Form I-140."[3] The Director's decision further indicated that the annual reports for the Petitioner's parent company do "not show separate financial data or net income for [the Petitioner]." The Director concluded therefore that the Petitioner had not demonstrated it met the ability to pay requirement.

On appeal, the Petitioner contends that the Director's decision "erroneously concluded that the annual reports of the Petitioner's parent company did not show separate financial data or net income for [the Petitioner]." The Petitioner argues that the Director did not properly review the financial information relating to the Petitioner in these annual reports. We agree with the Petitioner that the Director did not conduct a proper review of the submitted evidence.

The appellate submission includes copies of the Beneficiary's earnings statements from April 2018

[1] The Director's request for evidence (RFE) incorrectly identified the priority date of this petition as September 5, 2014.

[2] This report indicated that the Petitioner had 4,223 employees as of December 31, 2019. In addition, the Petitioner's financial data is presented separately within its parent company's 2019 annual report. For example, the report lists the Petitioner's segment's operating income as $39,602,000 in 2018 and $35,933,000 in 2019.

[3] Generally, USCIS does not consider the financial resources of persons or entities that have no explicit legal obligation to pay the proffered wage, including a parent company, shareholders and officers of a corporation, members or managers of a limited liability company (LLC) (even if the LLC is taxed as a partnership or disregarded entity), and limited partners. An annual report, audited financial statement, or tax return of a parent company is more probative of a subsidiary's ability to pay the proffered wage where the subsidiary's financial data is presented separately within the document. *See generally* 6 USCIS Policy Manual E.4(A)(5), https://www.uscis.gov/policy-manual/volume-6-part-e-chapter-4.

(listing a salary of $120,589.56 per year) until October 2022 (listing a salary of $135,892.04 per year). These earnings statements reflect that the Beneficiary has received a salary from the Petitioner that meets or exceeds the proffered wage during the aforementioned period.

We will therefore remand the matter for the Director to render a new decision regarding the Petitioner's ability to pay. The Director should consider the separate financial data specific to the Petitioner contained in its parent company's annual reports. In addition, the Director should consider the evidence offered on appeal indicating that the Petitioner has paid the Beneficiary the full proffered wage each year from the priority date. *See* 8 C.F.R. § 204.5(g)(2) (requiring a petitioner to demonstrate their ability to pay "continuing until the beneficiary obtains lawful permanent residence"). Finally, the Director should consider all remaining evidence relevant to the Petitioner's financial strength and the significance of its business activities, whether listed in the regulation or related to other metrics.[4]

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

[4] *See generally* 6 USCIS Policy Manual E.4(B), https://www.uscis.gov/policy-manual/volume-6-part-e-chapter-4. *See also Matter of Sonegawa*, 12 I&N Dec. at 614-15.