U.S. Citizenship and Immigration Services

Non-Precedent Decision of the Administrative Appeals Office

In Re: 27694316

Date: SEP. 22, 2023

Appeal of Nebraska Service Center Decision

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

The Petitioner, an LED lighting importer, seeks to employ the Beneficiary as an accountant. 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 Nebraska Service Center denied the petition, concluding that the record did not establish that the labor certification supports the requested classification or that the Petitioner has the 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 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 noncitizen, a prospective employer must first obtain certification from the U.S. Department of Labor (DOL). 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 noncitizen 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). 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 noncitizen may finally apply for an immigrant visa abroad or, if eligible, adjustment of status in the United States. Section 245 of the Act, 8 U.S.C. § 1255.

II. ANALYSIS

The Petitioner seeks to employ the Beneficiary as an accountant and to classify him as an EB-3 professional using a labor certification that was filed on the Beneficiary's behalf in 2005. After reviewing the Petitioner's initial filing, the Director issued a request for evidence (RFE) requesting further documentation to demonstrate that the Beneficiary qualifies for the offered position, that the Petitioner has the ability to pay the proffered wage, and that the Petitioner is the successor-in-interest to the entity that filed the original labor certification.

Upon receiving the Petitioner's response, the Director denied the petition on the grounds that the labor certification does not support the requested classification and the Petitioner does not have the ability to pay the proffered wage. On appeal, the Petitioner submits a brief and supporting documentation and asserts that the present petition should be approved based on the prior approval of the Form I-140, Immigrant Petition for Alien Worker(s), that was filed on the Beneficiary's behalf in 2007.[1] For the reasons below, we conclude that the Petitioner has not overcome the Director's denial grounds.

A. Labor Certification Does Not Support the Requested Professional Classification

A professional petition "must demonstrate that the job requires the minimum of a baccalaureate degree." 8 C.F.R. § 204.5(l)(3)(i). In order to determine a job opportunity's requirements, USCIS must examine the language of the labor certification, and may neither ignore a stated requirement nor impose additional requirements. *See, e.g., Madany v. Smith*, 696 F.2d 1008, 1015 (D.C. Cir. 1983).

The terms of the labor certification in this case allow a worker to qualify for the offered position with less than a U.S. bachelor's degree or a foreign equivalent degree. Specifically, the labor certification states that the position requires a baccalaureate degree in accounting and five years of experience in the offered position, but also states, under "other requirements," that the employer "[w]ill accept foreign equivalency or any combination of education and experience for Bachelor's degree." The EB-3 professional classification requires beneficiaries to hold a single-source U.S. baccalaureate degree or a single-source foreign equivalent degree. 8 C.F.R. § 204.5(l)(2); *see Snapnames.com, Inc. v. Michael Chertoff*, No. 06-65-MO, 2006 WL 3491005 (D. Or. Nov. 20, 2006). There is no provision in law or regulation for USCIS to classify a position as professional when the employer will accept any combination of education and experience in lieu of a qualifying degree.

A plain reading of the labor certification form in this case indicates that the employer would accept "any combination of education and experience" in place of a baccalaureate degree. Because a worker may qualify for this position using a combination of lesser education and work experience, the position does not require the minimum of a baccalaureate degree, as required by 8 C.F.R. § 204.5(l)(3)(i), and does not meet the definition of the professional classification.

On appeal, the Petitioner states: "We are well aware that the beneficiary qualifies as a Skilled Worker which would qualify the beneficiary for EB 3rd Preference," noting that the Beneficiary's 2007 Form

[1] USCIS records indicate that this prior petition's approval was revoked in 2017. 8 C.F.R. § 205.2. The Petitioner does not mention or address this issue on appeal.

I-140 was approved as a skilled worker petition under the third preference immigrant classification.[2] The Petitioner then states that it filed a Form I-485, Application to Register Permanent Residence or Adjust Status, on the Beneficiary's behalf in October 2021, and that since it "met the requirements for the EB 3rd Preference and the visa was available" at the time the I-485 was filed, the present petition should be approved.[3] In support of this statement, the Petitioner provides a copy of the approval notice for the Beneficiary's 2007 Form I-140, a copy of the October 2021 visa bulletin, and a new Form I-140 which requests the Beneficiary's classification as a skilled worker.

In versions before 2010, Form I-140 did not distinguish between requests to classify beneficiaries as EB-3 professionals and EB-3 skilled workers. In qualifying cases, such as the Beneficiary's 2007 petition, a worker could therefore be considered for both classifications simultaneously. However, every visa petition has its own record of proceeding and burden of proof and is adjudicated based on the evidence provided to support it. *See* 8 C.F.R. § 103.2(b)(1), (b)(16)(ii). The present petition was filed using the 2020 version of Form I-140, which separates professionals and skilled workers into discrete options. In Part 2, which asks what type of petition is being filed, the Petitioner selected option 1.e., "A professional (at a minimum, possessing a bachelor's degree or a foreign degree equivalent to a U.S. bachelor's degree)." The Petitioner did not select option 1.f., which is for skilled workers.

While a petitioner may ask USCIS to change a requested visa classification in order to correct a clerical error, the classification cannot be changed after USCIS has made a decision on the Form I-140.[4] The Form I-140 in this case has already been denied, and furthermore the Petitioner does not allege any clerical error in its request to change the requested classification. As such, the present case will be adjudicated as a request to classify the Beneficiary as an EB-3 professional.

Because the labor certification does not support the requested EB-3 professional classification, the petition will remain denied.

B. Petitioner Does Not Have the Continuing Ability to Pay

A petitioner must establish its ability to pay the proffered wage from the priority date of the petition 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.* If a petitioner employs 100 or more workers, USCIS may accept a statement from a financial officer attesting to the petitioner's ability to pay the proffered wage. *Id.* In appropriate cases, additional evidence, such as profit/loss statements, bank account records, or personnel records, may be submitted by the petitioner or requested by USCIS. *Id.*

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[2] The skilled worker classification is a third-preference classification which requires workers to have at least two years of training or experience in the offered occupation. Relevant post-secondary education may be considered training for purposes of eligibility for this classification. 8 C.F.R. § 204.5(l)(2).

[3] The Petitioner did not provide a receipt number for this Form I-485 and USCIS systems do not reflect any such filing in October 2021. Furthermore, as noted above, the approval of the Beneficiary's 2007 Form I-140 was revoked in 2017 and therefore cannot act as the basis of any such application.

[4] USCIS, *Petition Filing and Processing Procedures for Form I-140, Immigrant Petition for Alien Workers*, https://www.uscis.gov/forms/all-forms/petition-filing-and-processing-procedures-for-form-i-140-immigrant-petition-for-alien-workers (last visited Aug. 22, 2023) (stating that petitioners may request a change in the I-140 visa classification, but only prior to a decision being made, and that USCIS will make the final determination on whether to make such a change).

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 the current case, the Petitioner seeks to employ the Beneficiary based on a labor certification with a priority date of March 24, 2005. While the offered wage listed on the labor certification is $36,733, the Petitioner's Form I-140 states that the position will pay $72,000 a year. The evidence does not establish the Petitioner's continuing ability to pay either proffered wage.

The Petitioner has never employed the Beneficiary or paid him a wage. Therefore, in order to establish eligibility, the Petitioner provided its federal tax returns for the years from 2018 to 2021.[5] These tax returns state that in 2019, the Petitioner had $82,767 in net current assets, and in 2020, it had $214,715 in net income. These amounts are sufficient pay the proffered wage in those years. However, the other provided tax returns state the following:

- 2018: -$9,075 net income, -$664,641 net current assets.
- 2021: -$503,816 net income, -$224,468 net current assets.

The Petitioner's net losses and net current liabilities are insufficient to pay the proffered wage in 2018 and 2021. Furthermore, while we acknowledge that the Petitioner had been in business for ten years at the time of filing, the record does not contain any evidence of factors such as its reputation within the industry, the growth of its business over time, the occurrence of any uncharacteristic business expenditures or losses, whether the Beneficiary will replace a current employee or outsourced service,[6] or any other reason why the Petitioner's net income or net current assets do not reflect its actual ability to pay the proffered wage. *See id.* The record therefore does not establish the Petitioner's continuing ability to pay the proffered wage.

Additionally, USCIS records indicate that the Petitioner has filed Forms I-140 on behalf of other beneficiaries. If a petitioner has filed immigrant visa petitions on behalf of multiple beneficiaries, the

[5] The Petitioner is not the same entity that filed the labor certification. In such "successor-in-interest" cases, the Petitioner is required to show that it and each predecessor employer maintained the continuing ability to pay the Beneficiary starting on the petition priority date. *Matter of Dial Auto Repair Shop, Inc.*, 19 I&N Dec. 481 (Comm'r 1986). However, for the reasons below, the Petitioner has not established that it is a valid successor-in-interest, so we will confine ourselves to analyzing the Petitioner's ability to pay the proffered wage. *See INS v. Bagamasbad*, 429 U.S. 24, 25 (1976) ("courts and agencies are not required to make findings on issues the decision of which is unnecessary to the results they reach").

[6] The Petitioner's Form I-140, Part 6, Question 7 states that the proffered position is not a new position. However, no further information is provided about what existing employee the Beneficiary would replace.

petitioner must establish that it has had the ability to pay the proffered wage to each beneficiary. *See Patel v. Johnson*, 2 F.Supp.3d 108, 124 (D. Mass. 2014) (affirming our revocation of a petition's approval where the petitioner did not demonstrate its ability to pay the combined proffered wages of multiple beneficiaries). Thus, the Petitioner must establish its ability to pay this Beneficiary as well as the beneficiaries of the other Form I-140 petitions that were pending or approved as of, or filed after, the priority date of the current petition.[7]

In this instance, the record does not contain any information about the other Forms I-140 that it filed, including the proffered wages and the adjudicative status of those petitions. For this additional reason, the Petitioner has not documented its continuing ability to pay the proffered wage, and the petition will remain denied on this basis.

C. Beneficiary Not Qualified for the Professional Classification

Beyond the decision of the Director, the record indicates that the Beneficiary is not qualified for the EB-3 professional classification. The regulation at 8 C.F.R. § 204.5(l)(2) defines a "professional" as a qualified noncitizen who holds at least a U.S. baccalaureate degree or a foreign equivalent degree and who is a member of the professions. A petition for a professional must therefore demonstrate a beneficiary's possession of at least a U.S. baccalaureate degree or a foreign equivalent degree. 8 C.F.R. § 204.5(l)(3)(ii)(C) as of the petition priority date.[8] The evidence accompanying such a petition must include "an official college or university record showing the date the baccalaureate degree was awarded and the area of concentration of study." *Id.*

In this instance, the Petitioner submitted a diploma and transcripts establishing that the Beneficiary has a three-year Bachelor of Commerce degree in accounting from [redacted] University in India. According to the Electronic Database for Global Education (EDGE),[9] an online resource regarding foreign educational equivalencies, a three-year Bachelor of Commerce degree from an Indian university "represents attainment of a level of education comparable to 3 years of university study in the United States."[10] Therefore, this degree is neither a U.S. baccalaureate degree nor a foreign equivalent degree, as required by regulation.

The initial filing also included an educational equivalency evaluation which states that the Beneficiary has the equivalent of a U.S. baccalaureate degree in accounting based on a combination of education

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[7] The Petitioner's ability to pay the proffered wage of one of the other I-140 beneficiaries is not considered:

- After the other beneficiary obtains lawful permanent residence;
- If an I-140 petition filed on behalf of the other beneficiary has been withdrawn, revoked, or denied without a pending appeal or motion; or
- Before the priority date of the I-140 petition filed on behalf of the other beneficiary.

[8] The "priority date" of a petition is the date the underlying labor certification is filed with DOL. 8 C.F.R. § 204.5(d). In this instance, the petition priority date is March 24, 2005.

[9] EDGE was created by the American Association of Collegiate Registrars and Admissions Officers (AACRAO). AACRAO is a non-profit, voluntary association of more than 11,000 professionals in more than 40 countries. *See* AACRAO, "Who We Are," https://www.accrao.org/who-we-are (last visited Aug. 22, 2023); *see also Viraj, LLC*, v. *U.S. Att'y Gen.*, 578 Fed. Appx. 907, 910 (11th Cir. 2014) (describing EDGE as "a respected source of information").

[10] AACRAO, *India - 3-Year Bachelor's Degrees*, https://www.aacrao.org/edge/country/credentials/credential/india/3-year-bachelor-of-arts-(b.a.)-bachelor-of-commerce-(b.com.)-bachelor-of-science-(b.sc.)-bachelor-of-computer-applications-(b.c.a.) (last visited Sep. 22, 2023, and added to the record).

and work experience. However, this evaluation relies on the assumption that three years of specialized work experience are equivalent to one year of college-level training, a formula which only applies to evaluating the credentials of H-1B specialty occupation workers. 8 C.F.R. § 214.2(h)(4)(iii)(D). The EB-3 professional immigrant classification requires the Beneficiary to have either "a United States baccalaureate degree or *a* foreign equivalent degree." 8 C.F.R. § 204.5(l)(2) (emphasis added). There is no provision in the regulation for a noncitizen who does not hold such a degree to qualify through a combination of education and work experience.

Because the educational equivalency evaluation relies on the incorrect legal standard, we decline to grant it evidentiary weight. *See Matter of Caron Int'l, Inc.*, 19 I&N Dec. 791, 795 (stating that we may give less weight to or decline to accept an expert opinion that is not in accord with other information or is in any way questionable). Since the record does not show that the Beneficiary has a foreign equivalent degree to a U.S. baccalaureate degree, as required by 8 C.F.R. § 204.5(1)(3)(ii)(C), the Petitioner has not established the Beneficiary's qualifications for the professional classification.

The record does not include an official academic record indicating that the Beneficiary holds a U.S. baccalaureate degree or a foreign equivalent. Therefore, he does not qualify for the professional classification. 8 C.F.R. § 204.5(l)(3)(ii)(C). In any future filings, the Petitioner must address this issue.

D. Petitioner is Not Successor-In-Interest to Labor Certification Employer

Beyond the decision of the Director, we further note that a permanent labor certification is only valid for the particular job opportunity and particular area of intended employment stated on the form. 20 C.F.R. § 656.30(c)(2). In this instance, the Petitioner has a different name and Federal Employer Identification Number (FEIN) than the labor certification employer, indicating that it is not the same employer.[11] Because a job offer from a different employer constitutes a different job opportunity, a petitioner generally cannot use a labor certification filed by another business. *Matter of Dial Auto Repair Shop, Inc.*, 19 I&N Dec. at 482. However, an exception exists if the petitioner is a successor-in-interest of the labor certification employer. *Id.*

In order to establish that it is a successor-in-interest, a petitioner must meet the following three requirements:

- The job opportunity offered by the successor must be the same as the job opportunity originally offered on the permanent labor certification;
- The successor must establish eligibility for the visa in all respects, including the provision of required evidence from the predecessor entities, such as evidence of the predecessors' ability to pay the proffered wage; and
- The evidence fully describes and documents the transfer and assumption of ownership of the predecessors by the successor.

[11] *See* 20 C.F.R. § 656.3 (defining an "employer" for purposes of a labor certification as an entity that, among other things, must have a valid FEIN).

See generally 6 *USCIS Policy Manual* E.3, https://www.uscis.gov/policymanual. As explained above, the Petitioner has not established its ability to pay the proffered wage. Additionally, the certified position was at a gas station/convenience store in Georgia and paid $36,733, while the present position is at an LED lighting importer in Kansas and pays $72,000. It is therefore not apparent that the offered position is the same as the one certified by DOL. *See generally id.* at E.3(F)(1) (stating that any successor claim must be denied where changes to the position's pay, location, or job description, if made at the time the labor certification was filed with DOL, could have affected the number or type of available U.S. workers who applied for the job opportunity). Finally, the Petitioner has not sufficiently described or documented its assumption of ownership of its predecessors, including the labor certification employer.

The Petitioner has not met any of the three evidentiary requirements to show that it is the successor-in-interest to the labor certification employer. *Matter of Dial Auto Repair Shop, Inc.*, 19 I&N Dec. at 482. Therefore, the labor certification is not valid for the instant petition. In any future filings, the Petitioner must address this issue.

III. CONCLUSION

The Petitioner has not established that the labor certification supports the requested classification or that the Petitioner has the continuing ability to pay the proffered wage. The petition will therefore remain denied on these bases, with each considered an independent and alternative basis for denial. Further, beyond the decision of the Director, the Petitioner has not established that the Beneficiary qualifies for the requested classification or that it is the successor-in-interest to the labor certification employer.

ORDER: The appeal is dismissed.