U.S. Citizenship and Immigration Services

Non-Precedent Decision of the Administrative Appeals Office

In Re: 8420708

Date: AUG. 11, 2020

Appeal of Texas Service Center Decision

Form I-140, Petition for Multinational Managers or Executives

The Petitioner seeks to permanently employ the Beneficiary as its senior manager under the first preference immigrant classification for multinational executives or managers. *See* Immigration and Nationality Act (the Act) section 203(b)(1)(C), 8 U.S.C. § 1153(b)(1)(C). This classification allows a U.S. employer to permanently transfer a qualified foreign employee to the United States to work in an executive or managerial capacity.

The Director of the Texas Service Center denied the petition and a subsequent motion to reconsider, concluding that the Petitioner did not establish that it made a permanent job offer to the Beneficiary. The matter is now before us on appeal.

In these proceedings, it is the Petitioner's burden to establish eligibility for the requested benefit. Section 291 of the Act, 8 U.S.C. § 1361. Upon *de novo* review, we will remand the matter to the Director for further consideration and entry of a new decision.

I. LEGAL FRAMEWORK

An immigrant visa is available to a beneficiary who, in the three years preceding the filing of the petition, has been employed outside the United States for at least one year in a managerial or executive capacity, and seeks to enter the United States in order to continue to render managerial or executive services to the same employer or to its subsidiary or affiliate. Section 203(b)(1)(C) of the Act.

The Form I-140, Immigrant Petition for Alien Worker, must include a statement from an authorized official of the petitioning United States employer which demonstrates that the beneficiary has been employed abroad in a managerial or executive capacity for at least one year in the three years preceding the filing of the petition, that the beneficiary is coming to work in the United States for the same employer or a subsidiary or affiliate of the foreign employer, and that the prospective U.S. employer has been doing business for at least one year. *See* 8 C.F.R. § 204.5(j)(3).

II. JOB OFFER

First-preference immigrant status requires that a beneficiary have a permanent employment offer from a petitioner. Section 203(b)(1)(C) of the Act. In his original denial decision, the Director indicated that "no job offer was included with the petition" and that statements submitted with the Beneficiary's nonimmigrant visa petition indicate that the Beneficiary's transfer to the United States was temporary in nature. On a subsequent motion to reconsider,[1] the Petitioner asserted that the Director's prior decision was based on an incorrect application of law or policy and that the decision was incorrect based on the evidence in the record of proceedings at the time of the decision. *See* 8 C.F.R. § 103.5(a)(3). It supported its assertions with citations to statutory and regulatory provisions and a discussion of USCIS policy. *Id.* Specifically, it stated that the Director failed to properly apply section 291 of the Act; the regulation at 8 C.F.R. § 103.2(b)(14); the Form I-140 instructions; and *Matter of E-M-*, 20 I&N Dec. 77 (Comm'r 1989).

However, in his decision on motion, the Director erroneously determined that the Petitioner did not provide pertinent precedent decisions or Service policy to support its claim that it had made a permanent offer of employment to the Beneficiary. He dismissed the motion without properly analyzing the Petitioner's assertions. Therefore, we will remand the matter to the Director to analyze the record and to determine whether the Petitioner has established that it will permanently employ the Beneficiary in a managerial or executive capacity in the United States.

III. ABILITY TO PAY

Although not discussed by the Director, the record does not contain regulatory required evidence of the Petitioner's ability to pay the annual proffered wage of $145,000 from the priority date and continuing until the Beneficiary obtains lawful permanent residence. The regulation at 8 C.F.R. § 204.5(g)(2) requires that "[e]vidence of this ability shall be either in the form of copies of annual reports, federal tax returns, or audited financial statements." In this case, the priority date is January 3, 2018, the date the immigrant petition was filed. *See* 8 C.F.R. § 204.5(d).

The Petitioner submitted paystubs evidencing $137,931.20 in gross wages that it paid to the Beneficiary in 2018. However, the record does not contain the Petitioner's annual reports, federal tax returns, or audited financial statements from the priority date onward.[2] Therefore, we cannot affirmatively find that the Petitioner has the continuing ability to pay.[3]

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[1] A motion to reconsider must establish that the prior decision was based on an incorrect application of law or policy and that the decision was incorrect based on the evidence in the record of proceedings at the time of the decision. 8 C.F.R. § 103.5(a)(3). A motion to reconsider must be supported by a pertinent precedent or adopted decision, statutory or regulatory provision, or statement of U.S. Citizenship and Immigration Services (USCIS) or Department of Homeland Security policy. *Id.*

[2] The Petitioner's 2016 federal tax return in the record covers a fiscal year starting on April 1, 2016, and ending on March 31, 2017.

[3] The regulation at 8 C.F.R. § 204.5(g)(2) states that if a petitioner employs 100 or more workers, we may accept a statement from a financial officer of the petitioner which establishes its ability to pay the proffered wage. The record contains a letter dated December 12, 2017, from the Petitioner's senior human resources manager stating that the Petitioner has 300 employees and that its current gross revenues exceed $86,000,000. However, the Petitioner has not demonstrated that its senior human resources manager is a financial officer of the company as set forth in 8 C.F.R. § 204.5(g)(2).

We note that where a petitioner has filed Form 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 our denial of a petition where a petitioner did not demonstrate its ability to pay multiple beneficiaries). USCIS records show that the Petitioner has filed dozens of Form I-140 petitions for other 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.[4] The other beneficiaries are not considered for any year that the Petitioner has paid the Beneficiary a salary equal to or greater than the proffered wage.

On remand, the Director should request regulatory-required evidence of the Petitioner's continuing ability to pay and allow the Petitioner reasonable time to respond.

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

[4] 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.