U.S. Citizenship and Immigration Services

Non-Precedent Decision of the Administrative Appeals Office

In Re: 11105889

Date: OCT. 1, 2020

Appeal of Nebraska Service Center Decision

Form I-140, Immigrant Petition for Other Worker

The Petitioner seeks to employ the Beneficiary as a truck driver. It requests classification of the Beneficiary as an unskilled worker under the third preference immigrant classification. Immigration and Nationality Act (the Act) section 203(b)(3)(A)(iii), 8 U.S.C. § 1153(b)(3)(A)(iii). This employment-based immigrant classification allows a U.S. employer to sponsor a foreign national for lawful permanent resident status to work in a position that requires less than two years of training or experience.

The Director of the Nebraska Service Center denied the petition, concluding that the record did not establish that the Beneficiary met the requirements of the labor certification as of the priority date.

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 dismiss the appeal.

I. THE EMPLOYMENT-BASED IMMIGRATION PROCESS

Employment-based immigration generally follows a three-step process. First, an employer obtains an approved labor certification from the U.S. Department of Labor (DOL).[1] *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 id.* Second, the employer files an immigrant visa petition 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 applies 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.

[1] The priority date of a petition is the date the DOL accepted the labor certification for processing, which in this case is February 13, 2019. *See* 8 C.F.R. § 204.5(d).

II. BENEFICIARY'S QUALIFICATIONS

A beneficiary must meet all of the requirements of the offered position set forth on the labor certification by the priority date of the petition. 8 C.F.R. § 103.2(b)(1), (12); *Matter of Wing's Tea House*, 16 I&N Dec. 158, 159 (Acting Reg'l Comm'r 1977). In this case, the labor certification states that the offered position of truck driver requires 12 months of experience in the offered position. Part H.14 of the labor certification states the following specific skills or other requirements: "IL CDL or within 45 days from employment."

Evidence relating to qualifying experience must be in the form of a letter from a current or former employer and must include the name, address, and title of the writer, and a specific description of the duties performed by the beneficiary. *See* 8 C.F.R. § 204.5(l)(3). With the petition, the Petitioner submitted an employment verification letter, with English translation, confirming his more than 12 months of experience as a truck driver in Poland. It also submitted a copy of his Polish commercial driver's license (CDL).[2]

In a notice of intent to deny (NOID), the Director stated that according to www.cyberdriveillinois.com, in order to obtain a new Illinois CDL, the Beneficiary must show proof of legal presence and domicile. The Director indicated that "the record does not establish that the beneficiary has or can meet the requirement of legal presence and domicile." In response to the NOID, the Petitioner provided a letter dated June 15, 2018, from [redacted] the owner of a driving school in Illinois. He stated that he often assists drivers with foreign CDLs in completing the process to obtain an Illinois CDL. He stated that based on his 15 years of experience, it is his opinion that foreign truck drivers with a foreign CDL and at least one year of experience are able to obtain the Illinois driver's license within 45 days. The Petitioner also submitted an excerpt from www.cyberdriveillinois.com and an excerpt from Wikipedia regarding European driving licenses.

In his denial decision, the Director determined that the record does not establish that the Beneficiary had an Illinois CDL as of the priority date or that he would be eligible to obtain one within 45 days as required on the labor certification. On appeal, the Petitioner states that the Beneficiary "was able to obtain CDL as of the priority date, but for the legal presence and domicile." It asserts that this requirement is "impossible to meet while being abroad" and that the Beneficiary "will be able to comply with this requirement upon entry into the United States with an immigrant visa." It asserts that a petitioner must show that the beneficiary intends to pursue the license at the place of intended employment and that its application is similar to that of a doctor, who must have a license at the time the labor certification is filed or must be able to obtain a license within a proximate amount of time of entry through the completion of a ministerial process. It asserts that the Beneficiary will be able to obtain his Illinois CDL within 45 days from employment after completing a ministerial process to obtain his license.

[2] Any document in a foreign language must be accompanied by a full English language translation. 8 C.F.R. § 103.2(b)(3). The translator must certify that the English language translation is complete and accurate, and that the translator is competent to translate from the foreign language into English. *Id.* The Petitioner did not submit a properly certified English language translation of the Beneficiary's Polish CDL. Thus, we cannot meaningfully determine whether the translated material is accurate and thus supports the Petitioner's claims.

Contrary to the Petitioner's argument, however, the Act reflects Congress' intention that an "other worker" qualify for an offered position before a petition's approval. The Act makes visas available to "[o]ther qualified immigrants who are capable, *at the time of petitioning for classification under this paragraph*, of performing unskilled labor." Section 203(b)(3)(A)(iii) of the Act (emphasis added).

As previously indicated, case law further requires a beneficiary to meet all job requirements by a petition's priority date. *See Matter of Wing's Tea House*, 16 I&N Dec. at 160 (rejecting a beneficiary's after-acquired experience); *Matter of Katigbak*, 14 I&N Dec. 45, 49 (Reg'l Comm'r 1971) (rejecting a beneficiary's after-acquired education). This requirement stems from the importance of a priority date, which establishes a beneficiary's place in line for an immigrant visa. If unqualified for an offered position by a priority date, a beneficiary would unjustly enjoy an earlier place in line. *See Matter of Katigbak*, 14 I&N Dec. at 49 (stating that a "beneficiary cannot expect to... claim a priority date as of... a date on which he [or she] was not qualified"). "To do otherwise would make a farce of the preference [s]ystem and priorities set up by statute and regulation." *Id.* Thus, we cannot permit the Beneficiary to meet an offered position's requirements after a petition's priority date.

The Act also indicates that Congress did not want beneficiaries, after immigrating to the United States, to discover that they do not qualify for their offered positions. *See* section 212(a)(4)(A) of the Act, 8 U.S.C. § 1182(a)(4)(A) (barring foreign nationals likely to become "public charges" from immigrating). The Petitioner's refusal to employ the Beneficiary based on lack of an Illinois CDL after 45 days would leave him unemployed and possibly unable to financially support himself in an unfamiliar country. Moreover, the Petitioner attested on the labor certification that it "will be able to place the alien on the payroll on or before the date of the alien's proposed entrance into the United States." 20 C.F.R. § 656.10(c)(4) (requiring labor certification employers to so certify). The Beneficiary cannot be permitted to meet the job requirements after his entrance into the United States.

On appeal, the Petitioner cites *Matter of Maher*, 12 I&N Dec. 680 (R.C. 1968); *Matter of Semerjan*, 11 I&N Dec. 751 (R.C. 1966); and *Matter of Naufahu*, 11 I&N Dec. 904 (R.C. 1966), which are employment-based immigration cases involving a dentist, engineer, and lawyer, respectively. Based on these cases, the Petitioner asserts that it must show that the Beneficiary intends to pursue a license at the place of intended employment, and not that the Beneficiary actually holds a license. However, the cited cases dealt with whether the beneficiaries could be considered members of the professions,[3] and the cases were decided before Congress' 1990 amendment of the Act, requiring the capability of an "other worker" to perform unskilled labor "at the time of petitioning for classification." Section 203(b)(3)(A)(iii) of the Act. Therefore, the cases' allowance of a beneficiary to meet a licensing requirement after a petition's approval conflicts with current law.

The Petitioner further cites three Board of Alien Labor Certification Appeals (BALCA) cases and states that its petition is similar to that of a doctor, who must have a license at the time the labor certification is filed or must be able to obtain a license within a proximate amount of time of entry through the completion of a ministerial process. Although 8 C.F.R. 103.3(c) provides that precedent decisions of USCIS are binding on all its employees in the administration of the Act, BALCA

[3] While the skilled and unskilled third preference worker categories specifically require the capability to perform labor at the time of petitioning for classification, section 203(b)(3)(A)(ii) of the Act relating to members of the professions holding bachelor's degrees and section 203(b)(2)(A) of the Act relating to members of the professions holding advanced degrees do not have the same requirement.

decisions are not similarly binding. Precedent decisions must be designated and published in bound volumes or as interim decisions. 8 C.F.R. § 103.9(a).

Further, the BALCA cases cited to by counsel, *Matter of Perla-Tate*, 90-INA-175 (BALCA Dec. 4, 1992) (*en banc*); *Matter of Glendale Family Med. Ctr.*, 95-INA-40 (BALCA Oct. 3, 1996); and *Matter of Aspire Pub. Sch.*, 2003-INA-254 (BALCA Sept. 9, 2004), are distinguishable from the facts of the instant petition. In *Perla-Tate*, physicians and physician assistants were deemed ineligible for labor certification if they did not have a state license or if obtaining that state license was not feasible "within a proximate time of the alien's entry into the United States through the completion of a ministerial process." *Matter of Perla-Tate*, 90-INA-175 (BALCA Dec. 4, 1992). In *Glendale*, the issue was similar to *Perla-Tate* and involved physician assistants. Neither case dealt with unskilled workers whose immigrant classification specifically requires the capability to perform labor at the time of petitioning for classification. *See* Section 203(b)(3)(A)(iii) of the Act. In *Aspire*, the position involved a teacher with a bachelor's degree and did not involve an unskilled worker. Additionally, *Perla-Tate*, *Glendale*, and *Aspire* involved state licensing requirements not delineated on the labor certification applications. In the case at hand, the Petitioner set forth the requirement of an Illinois CDL license on the labor certification application. Further, obtaining a CDL in Illinois is not purely ministerial, but, as further detailed below, involves numerous written, screening, and driving tests. Thus, even if this office accepted the BALCA cases as binding precedent, they would not support the Petitioner's position in this matter.[4]

On appeal, the Petitioner also cites former Immigration and Naturalization Service Operation Instruction § 204.4(d)(4) for the proposition that a license is not required for approval of petitions under the third preference immigrant classification. However, Operation Instructions are no longer available, and Operation Instruction § 204.4(d)(4) specifically relates to third preference professionals. The outdated Operation Instructions will not be given more weight than the Act, which clearly requires an "other worker" qualify for an offered position before a petition's approval. Further, as noted above, the license requirement was specifically set forth by the Petitioner at Part H.14 of the labor certification.

The Petitioner also cites USCIS Adjudicator's Field Manual (AFM)[5] chapter 22.2(j)(5)(A). However, chapter 22.2(j)(5)(A) of the AFM deals with petitions under the second preference employment-based immigrant classification and, specifically, U.S. state and territorial U.S. medical degree requirements. It does not apply to third preference unskilled worker petitions. *Adjudicator's Field Manual* 22.2(j)(5)(A), https://www.uscis.gov/sites/default/files/document/policy-manual-afm/afm22-external.pdf. The Petitioner further cites a portion of AFM chapter 22.2(g), but it but left out the last sentence:

[4] In *Aspire*, BALCA determined that the process for obtaining a teaching credential is not ministerial in nature, as the beneficiary had to pass a licensing examination before qualifying for her teaching credential. BALCA stated that a "licensing procedure which requires the successful completion of such an exam can hardly be called ministerial in nature." *Matter of Aspire Pub. Sch.*, 2003-INA-254 *5-6 (BALCA Sept. 9, 2004).

[5] The USCIS Policy Manual is the agency's centralized online repository for immigration policies. The USCIS Policy Manual will ultimately replace the AFM, the USCIS Immigration Policy Memoranda site, and other policy repositories. *See* USCIS Policy Manual, https://www.uscis.gov/policy-manual (last visited Aug. 31, 2020).

> (g) Licensure General: Neither the statute nor the regulations require that the beneficiary of an employment-based petition be able to engage in the occupation immediately. There are often licensing and other additional requirements that an alien must meet before he or she can actually engage in the occupation. *Unless needed to meet the requirements of a labor certification*, such considerations are not a factor in the adjudication of the petition.

Id. at 22.2(g) (emphasis added). Here, the labor certification requires an Illinois CDL and, therefore, the requirement must be considered in the adjudication of the petition. Similarly, the Petitioner cites a memorandum that amends the AFM by providing guidance on the adjudication of second preference petitions filed for certain physicians. Memorandum from Donald Neufeld, Acting Associate Director, Domestic Operations, USCIS, HQ 70/6.2, *Revisions to Adjudicator's Field Manual (AFM) Regarding Certain Alien Physicians Chapter 22.2(b) General Form I-140 Issues (AFM Update AD09-10)*(June 17, 2009), http://www.uscis.gov/legal-resources/policy-memoranda. However, the memorandum does not apply to third preference unskilled worker petitions.[6]

Moreover, even if we accepted the Petitioner's assertion that a beneficiary may meet an offered position's requirements after a petition's priority date, which we do not, the record does not establish that the Beneficiary in this case would be able to obtain an Illinois CDL within 45 days from employment. The pertinent requirements to obtain an Illinois commercial learner's permit (CLP) or transfer a CDL from another state are stated on www.cyberdriveillinois.com. The process is not ministerial as asserted by the Petitioner. Instead, it is a complex process that requires significant testing over a prolonged period.

Specifically, to obtain a CLP, an applicant must possess either a valid Illinois CDL or non-CDL license as a base license.[7] As the record does not contain the Beneficiary's valid Illinois CDL or non-CDL license, he must first obtain a non-CDL driver's license before becoming eligible to apply for his Illinois CDL.[8] Next, a CDL applicant must successfully pass the general knowledge, combination knowledge, and air brake knowledge written tests, and any applicable endorsement knowledge written tests that are required to operate the desired vehicle. After passing the applicable written testing, applicants are required to pass the skills/drive testing. All CLP holders will be required to have had their temporary or permanent CLP issued for a minimum of 14 days prior to conducting their

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[6] The memorandum states that although "a given labor certification may not specify that an MD license is required for a physician position, physicians involved in patient care must obtain a license to practice medicine in the location where they are to be employed as a matter of state or territorial law." *Id.* at 3. Here, the Illinois CDL is a requirement of the labor certification.

[7] Office of the Ill. Sec'y of State, CDL and CLP Driver Servs., https://www.cyberdriveillinois.com/departments/drivers/drivers_license/CDL/cdl.html#requireobtain (last visited Aug. 31, 2020).

[8] To obtain an Illinois driver's license, an applicant must visit a designated facility in Illinois, show required identification documents, and have their photo taken; surrender all valid out-of-state licenses, state ID cards, instruction permits and commercial driver's licenses; pay the appropriate fee; and pass the appropriate exams (vision screening, written, and/or driving). Office of the Ill. Sec'y of State, Driver Servs., https://www.cyberdriveillinois.com/departments/drivers/drivers_license/drlicid.html#tvdl (last visited Aug. 31, 2020). The Petitioner asserts that the Beneficiary may use his Polish driver's license for 90 days to drive in Illinois. However, this temporary driving allowance does not appear to change the requirement that he must obtain an Illinois base driver's license before he is eligible to obtain an Illinois CDL.

skills/drive testing.[9] On appeal, the Petitioner states that it is possible to complete all of the steps required to obtain an Illinois CDL "within 4-5 weeks, depending on the scheduling availability of the Secretary of State driving facility." However, the record contains no information regarding the scheduling availability of the Illinois Secretary of State driving facility. It is the Petitioner's burden to establish eligibility for the immigration benefit sought. Section 291 of the Act, 8 U.S.C. § 1361; *Matter of Skirball Cultural Ctr.*, 25 I&N Dec. 799, 806 (AAO 2012). Additionally, there is no guarantee that the Beneficiary will pass each applicable test for the Illinois driver's license and CDL or, even if he does, that he would be guaranteed to complete the process within 45 days from employment with the Petitioner.[10]

We note that the letter dated June 15, 2018, from [redacted], the owner of a driving school in Illinois, indicates that it is his opinion that foreign truck drivers with a foreign CDL and at least one year of experience are able to obtain the Illinois driver's license within 45 days. However, the letter does not indicate that he has any personal knowledge of the Beneficiary or that he has verified the Beneficiary's knowledge and skills. Further, the letter does not appear to take into account that the Beneficiary must first obtain a non-CDL driver's license before becoming eligible to apply for his Illinois CDL. Thus, the letter is not probative evidence establishing the Beneficiary's ability to obtain an Illinois CDL within 45 days of employment. The Petitioner must support its assertions with relevant, probative, and credible evidence. *See Matter of Chawathe*, 25 I&N Dec. 369, 376 (AAO 2010). We also note that CDL tests are administered in English only in Illinois,[11] and the record does not establish the Beneficiary's English proficiency. Further, a CDL holder or applicant wishing to obtain a hazardous materials or a combined tank/hazardous materials endorsement must complete a Transportation Security Administration threat assessment.[12] It is not clear if the offered job requires one of these endorsements and, if so, how long the process takes to obtain one.

Finally, the Petitioner notes on appeal that the Beneficiary has a CDL issued in Poland which permits him to drive trucks in certain categories without an Illinois CDL. However, the labor certification requires an Illinois CDL, and the issue in this case is whether the Beneficiary met the requirements of the labor certification as of the priority date. For the reasons detailed above, the Petitioner has not established by a preponderance of the evidence that the Beneficiary met the requirements of the labor certification as of the priority date.

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[9] Office of the Ill. Sec'y of State, CDL and CLP Driver Servs., https://www.cyberdriveillinois.com/departments/drivers/drivers_license/CDL/cdl.html#requireobtain (last visited Aug. 31, 2020).

[10] Applicants must score a minimum of 80% to pass each applicable test. CDL applicants who fail any CDL exam three times are required to wait 30 days from the date of the third failed exam. Three additional failures of the same exam will result in a 90-day waiting period. Three additional failures of the same exam after the 90-day waiting period will result in a one-year waiting period from the date of the last failed exam. Office of the Ill. Sec'y of State, CDL and CLP Driver Servs., https://www.cyberdriveillinois.com/departments/drivers/drivers_license/CDL/cdl.html#requireobtain (last visited Aug. 31, 2020).

[11] *Id.*

[12] *Id.*

III. ABILITY TO PAY THE PROFFERED WAGE

Although not addressed by the Director in his decision, the record does not demonstrate the Petitioner's continuing ability to pay the proffered wage from the petition's priority date in 2019 onward. The proffered wage is $49,733 per year.

The regulation at 8 C.F.R. § 204.5(g)(2) states in pertinent part:

> *Ability of prospective employer to pay wage.* Any petition filed by or for an employment-based immigrant which requires an offer of employment must be accompanied by evidence that the prospective United States employer has the ability to pay the proffered wage. The petitioner must demonstrate this ability at the time the priority date is established and continuing until the beneficiary obtains lawful permanent residence. Evidence of this ability shall be either in the form of copies of annual reports, federal tax returns, or audited financial statements.

In determining a petitioner's ability to pay, we first examine whether it paid a beneficiary the full proffered wage each year from a petition's priority date. If a petitioner did not pay a beneficiary the full proffered wage, we next examine whether it had sufficient annual amounts of net income or net current assets to pay the difference between the proffered wage and the wages paid, if any. If a petitioner's net income or net current assets are insufficient, we may also consider other evidence of its ability to pay the proffered wage.[13] The record does not demonstrate that the Petitioner has paid the Beneficiary any wages from the priority date onward, and the record does not contain regulatory-prescribed evidence of the Petitioner's ability to pay the proffered wage from 2019 onward. *See* 8 C.F.R. § 204.5(g)(2).[14]

Additionally, 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 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

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[13] Federal courts have upheld our 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); *Tongatapu Woodcraft Haw., Ltd. v. Feldman*, 736 F.2d 1305, 1309 (9th Cir. 1984); *Estrada-Hernandez v. Holder*, 108 F. Supp. 3d 936, 942-946 (S.D. Cal. 2015); *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, 294-295 (5th Cir. 2015).

[14] We note that the record contains the 2017 and 2018 consolidated federal income tax returns for a holding company that owns the Petitioner and several other entities. However, the Petitioner is an Illinois corporation that is a separate and distinct legal entity. The assets of other enterprises cannot be considered in determining the Petitioner's ability to pay the proffered wage. *See Matter of Aphrodite Invs., Ltd.*, 17 I&N Dec. 530 (Comm'r 1980). In a similar case, the court in *Sitar v. Ashcroft*, No. Civ. A. 02-30197-MAP, 2003 WL 22203713 (D.Mass. Sept. 18, 2003) stated, "nothing in the governing regulation, 8 C.F.R. § 204.5, permits [USCIS] to consider the financial resources of individuals or entities who have no legal obligation to pay the wage." The consolidated tax returns in the record are not evidence of the Petitioner's ability to pay the proffered wage. *See* 8 C.F.R. § 204.5(g)(2) (requiring evidence that the *prospective United States employer* has the ability to pay the proffered wage) (emphasis added).

priority date of the current petition.[15] We do not consider the other beneficiaries for any year that the Petitioner has paid the Beneficiary a salary equal to or greater than the proffered wage.

The Petitioner must document the receipt numbers, names of beneficiaries, priority dates, and proffered wages of these other petitions, and indicate the status of each petition and the date of any status change (i.e., pending, approved, withdrawn, revoked, denied, on appeal or motion, beneficiary obtained lawful permanent residence). To offset the total wage burden, the Petitioner may submit documentation showing that it paid wages to other beneficiaries. To demonstrate that it has the ability to pay the Beneficiary and the other beneficiaries, the Petitioner must, for each year at issue (a) calculate any shortfall between the proffered wages and any actual wages paid to the primary Beneficiary and its other beneficiaries, (b) add these amounts together to calculate the total wage deficiency, and (c) demonstrate that its net income or net current assets exceed the total wage deficiency.[16] Without this information, we cannot determine the Petitioner's ability to pay the combined proffered wages of all of its applicable beneficiaries. For the above-referenced reasons, the Petitioner has not established its continuing ability to pay the proffered wage.

ORDER: The appeal is dismissed.

[15] 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.

[16] It is the Petitioner's burden to establish eligibility for the immigration benefit sought. Section 291 of the Act, 8 U.S.C. § 1361; *Matter of Skirball Cultural Ctr.*, 25 I&N Dec. at 806.