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RECENT TRENDS IN REQUESTS FOR EVIDENCE ON I-140 PETITIONS

Posted on September 28, 2021 by Cyrus Mehta

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Employers who have filed concurrent "downgrade" I-140 petitions are facing an increasing number of requests for evidence (RFE). These I-140 petitions were concurrently filed with I-485 applications when the India employment-based third preference (EB-3) date in the October 2020 Visa Bulletin advanced ahead of the India employment-based Second preference (EB-2) date. Below are some examples of RFEs we have been seeing. Although the USCIS is required to adjudicate over 100,000 pending I-485 adjustment cases by September 30, it is very likely that the USCIS will not be able to do so, and so we will continue to see these issues in the new 2022 fiscal year with respect to pending I-140 and I-485 cases.

Retention of the Priority Date, Ability to Pay

Under 8 C.F.R. § 204.5(g)(2), an employer filing an I-140 petition must demonstrate its ability to pay the proffered wage "at the time the priority date is established and continuing until the beneficiary obtains lawful permanent residence." According to a policy memo dated May 4, 2004, by William R. Yates, the petitioning employer may receive a positive determination of this ability to pay with initial evidence establishing that its net income or net current assets are equal to or greater than the proffered wage or that it has paid or is paying the proffered wage to the beneficiary.

This seemingly unambiguous burden is often applied erroneously when an employer files an I-140 petition on behalf of a foreign national who is already the beneficiary of a previously approved I-140 petition and seeks to recapture the priority date associated with the earlier I-140.The new employer is required

to obtain a new labor certification, but the new I-140 petition would ultimately receive the earlier priority date established by the former employer.

When this retention of the priority date is requested by a new employer under 8 C.F.R. § 204.5(e), the UCSIS interprets 8 C.F.R. § 204.5(g)(2) to insist that the new employer must show its ability to pay from a priority date that it seeks to retain, even though the labor certification establishing the earlier priority date was obtained with a job offer made by a former employer and is not claimed by the new employer as the legal basis for filing a new I-140 petition.

The relevant regulation does not support the USCIS' interpretation. On ETA Form 9089, an employer attests in the context of a specific job offer that an offered wage "will equal or exceed the prevailing wage" and that it has "enough funds available to pay the wage." 20 C.F.R. §§ 656.10(c)(1). Accordingly, determining the employer's ability to pay should not exceed the scope of the employer's attestation made with respect to the specific job offer for which certification is sought and obtained. Subjecting the employer to the conditions of a different job offer made by a former employer would violate 20 C.F.R. § 656.30(c)(2), which provides that " permanent labor certification involving a specific job offer is valid only for the particular job opportunity." It would also be impossible for the current employer to obtain the financial documents from a prior employer. Furthermore, the current employer is also not required to provide financial records from the year when the prior employer filed the labor certification. Indeed, the current employer may not have existed when the prior employer filed the labor certification.

It should be argued that the USCIS should not confuse the current employer's ability to retain a prior pririty date under 8 C.F.R. § 8 C.F.R. § 204.5(e) with its ability to pay pursuant to 8 C.F.R. § 204.5(g)(2). The current employer must be required to establish its ability to pay at the time when it filed the current labor certification based upon which the I-140 petition was filed, and not based on an earlier recaptured priority date.

Beneficiary's Current Position v. Offered Position

With respect to an I-485 application, the USCIS sometimes questions the validity of a job offer if the beneficiary is currently employed by a petitioning employer but not in the offered position, even when the current position falls within the same SOC code as the offered position in the labor certification, with only minor distinctions such as a differe job title. In such casse, the USCIS argues

that the employer failed to establish that it would permanently employ the beneficiary in the offered position set forth in the labor certification. But, there is no requirement that the employer must offer the PERM position to the beneficiary prior to obtaining permanent residence. 8 C.F.R. § 204.5(c) provides only that "ny United States employer desiring and intending to employ an alien may file a petition." The Board of Immigration Appeals has noted that "n alien is not required to have been employed by the certified employer prior to adjustment of status." *Matter of Rajah*, 25 I&N Dec. 127, 132–33 (BIA 2009). As long as the employer provides evidence demonstrating that the beneficiary would be employed as set forth on the labor certification, the employment of the beneficiary in a different capacity or position during the pendency of an I-485 application would not, despite the USCIS' contention, necessarily be relevant to the validity of a job offer made to the beneficiary.

Determining Ability to Pay When There is a Financial Loss

Because 8 C.F.R. § 204.5(g)(2) requires the employer to be able to demonstrate its ability to pay from the date when the labor certification is filed to the date when the beneficiary obtains permanent residence, the employer must put forth evidence, at the time of filing and/or in response to a request for evidence, establishing its ability to pay for the entire period. However, due to unforeseen intervening factors, the employer may report a loss for some part of this period. For example, many petitioners may have suffered financially in 2020 due to distruptions caused by the COVID-19 pandemic. In these instances, the USCIS may argue that the employer has failed to maintain its ability to pay as required by the regulation, but the then Immigration and Naturalization Service took a broad approach and indicated that the important question is whether the loss would preclude the employer from establishing that she will be able to meet the conditions of the certification in the 'Job Offer.'" *Matter of Sonegawa*, 12 I&N Dec. 612, 615 (Reg. Comm. 1967). To answer this question, the Board analyzed the factors that led the employer to report a substantially lower income in one year and accepted evidence indicating that the employer's business was likely to grow and report profits. *Id.* 614-15. Accordingly, reporting a loss for one year would not automatically prevent an employer from establishing its ability to pay, but attention needs to be devoted to presenting a well-documented and plausible argument that the employer would be able to pay the proffered wage as set forth on the labor certification.

Work Experience

With respect to establishing that the beneficiary has qualifying experience, 8 C.F.R. § 204.5(g)(1) instructs that evidence be provided "in the form of letter(s) from current or former employer(s) … and shall include … a specific description of the duties performed." In general, an experience letter is prepared by a supervisor who has direct knowledge of duties performed by the beneficiary, but sometimes a former employer may have a policy of provides letters that include only the start and end date of the employment, the job title, and a very brief description of the duties. When the beneficiary cannot obtain a more detailed letter from the employer itself, a separate affidavit from a supervisor may provide a more complete description of the actual duties performed by the beneficiary that comports more closely with the description of the beneficiary's experience in Section K of the ETA 9080 labor certifcation. However, the USCIS sometimes asserts that the petitioning employer must first establish "the non-existence or other unavailability" of an expereince letter from the former employer before submitting an affidavit from a supervisor for consideration.

Because 8 C.F.R. § 204.5(l)(3)(ii)(A) states only that "ny requirements of training or experience for skilled workers, professionals, or other workers must be supported by letters from trainers or employers giving the name, address, and title of the trainer or employer, and a description of the training received or the experience of the alien", one can argue that letters from supervisors are primary, rather than secondary evidence. Letters from trainers or employers must be authored by a person, such as a supervisor or a human resources professional, and are rarely signed by a corporation itself. 8 C.F.R. § 204.5(l)(3)(ii)(A) does not specify who must author an experience letter. Indeed, the fact that Form ETA-9089 requests the contact information for an employee's supervisor during the period of experience suggests that a supervisor and not human resources or some other officer within a company may actually be the preferred source of a letter from an employer.

Even if USCIS does not accept that letters from supervisors are primary evidence, a petitioning employer can argue that primary evidence is unavailable because the former employer has a policy of not providing detailed experience letters. When responding to an RFE that question's the beneficiary's work experience, the petitioning employer should instruct the beneficiary to reach out the the former empoyer(s) and request a new, detailed experience letter

that includes all the necessary components. Ideally, the beneficiary will be able to obtain an updated experience letter that can be included with the RFE response. Even if the employee is unsuccessful, however, and the former employer's policy prevents it from issuing a more detailed letter, copies of the emails or letter from the former employer can serve as proof that an experience letter is unavailable.

Other RFEs question the content, rather than the format, of the experience letters. For example, if the requirements in the labor certification state that candidates must have experience in a certain industry, such as IT or finance, USCIS may reject experience letters that do not specifically mention the field of experience. Petitioners should follow a similar process to respond to these RFEs, and ask the employee to attempt to obtain new experience letters. If more detailed letters are not available, publicly available information about the former employer, such as website printouts, can be submitted with the RFE response to demonstrate that the company operates within a certain industry and so the beneficiary gained the necessary experience.

Many of these RFEs emanate when an EB-3 I-140 petition is upgraded to premium processing, and are issued even when the prior EB-2 was approved based on the same supporting evidence. Therefore, care must be taken to properly address the RFEs, particularly because a denial of an EB-3 I-140 can potentially even jeopardize the underlying EB-2 I-140. Because many employment-based second and third preference green card backlogs, employers should also evaluate whether the job has drastically changed since the filing of the original labor certification before beneficiaries file a downgrade and concurrent adjustment. As outlined in our previous blog, however, employers may still rely on the old labor certification if the job duties remain largely the same and the beneficiary is merely using updated tools or technologies. Cases involving a slight change in the job are thankfully not being questioned by USCIS at this time.

(*The information procided in this blog is for information purposes, and should not be viewed as a substitute for legal advice*)

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