U.S. Citizenship and Immigration Services

Non-Precedent Decision of the Administrative Appeals Office

In Re: 01772231

Date: JULY 7, 2022

Appeal of Texas Service Center Decision

Form I-140, Immigrant Petition for an Alien Worker

The Petitioner, a poultry processing business, seeks to employ the Beneficiary as a poultry trimmer. It requests classification of the Beneficiary as an "other worker" under the third preference immigrant category. Immigration and Nationality Act section 203(b)(3)(A)(iii), 8 U.S.C. § 1153(B)(3)(A)(iii). This employment-based "EB-3" immigrant classification allows a U.S. employer to sponsor for lawful permanent resident status a foreign national who is capable of performing unskilled labor that requires less than two years of training or experience and is not of a temporary or seasonal nature.

The Director of the Texas Service Center denied the petition concluding that the Petitioner did not establish its ability to pay the Beneficiary's proffered wage as well as the proffered wages of the beneficiaries of all its other Form I-140 petitions. The matter is now before us on appeal.

In visa petition proceedings it is the petitioner's burden to establish eligibility for the immigration benefit sought. Section 291 of the Act, 8 U.S.C. § 1361. Upon *de novo* review, we will dismiss the appeal.

I. LAW

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). *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 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.

To be eligible for the classification it requests for the beneficiary, a petitioner must establish that it has the ability to pay the proffered wage stated in the labor certification. As provided in the regulation at 8 C.F.R. § 204.5(g)(2):

> 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 a case where the prospective United States employer employs 100 or more workers, the director may accept a statement from a financial officer of the organization which establishes the prospective employer's ability to pay the proffered wage. 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].

II. ANALYSIS

The issue before us is whether the Petitioner established its continuing ability to pay the proffered wage from the priority date of the petition onward. In this case the proffered wage is $17,202 per year, and the priority date is March 9, 2017.[1]

In determining a petitioner's ability to pay the proffered wage, USCIS first examines whether the beneficiary was employed and paid by the petitioner during the period following the priority date. A petitioner's submission of documentary evidence that it employed the beneficiary at a salary equal to or greater than the proffered wage for the time period in question, when accompanied by a form of evidence required in the regulation at 8 C.F.R. § 204.5(g)(2), may be considered proof of the petitioner's ability to pay the proffered wage.

There is no evidence that the Beneficiary in this case has ever been employed by the Petitioner. Therefore, the Petitioner has not established its ability to pay the proffered wage from the priority date onward based on wages paid.

If a petitioner does not establish that it has paid the beneficiary an amount equal to or above the proffered wage from the priority date onward, USCIS will examine the net income and net current assets figures recorded on the petitioner's federal income tax return(s), annual report(s), or audited financial statements(s). If either of these figures, net income or net current assets, equals or exceeds the proffered wage or the difference between the proffered wage and the amount paid to the beneficiary in a given year, the petitioner would ordinarily be considered able to pay the proffered wage during that year. However, when a petitioner has filed other I-140 petitions it must establish that its job offer is realistic not only for the instant beneficiary, but also for the beneficiaries of its other I-140 petitions (I-140 beneficiaries). A petitioner's ability to pay the proffered wage is an essential element in evaluating whether a job offer is realistic. *See Matter of Great Wall*, 16 I&N Dec. 142 (Acting Reg'l Comm'r 1977). Accordingly, a petitioner must demonstrate its ability to pay the combined proffered wages of the instant beneficiary and every other I-140 beneficiary from the priority date of the instant petition until the other I-140 beneficiaries obtain lawful permanent resident status. *See Patel v.*

[1] The priority date of an employment-based immigrant petition is the date the underlying labor certification was filed with the DOL. *See* 8 C.F.R. § 204.5(d).

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).[2]

Upon reviewing the record, the Director observed evidentiary deficiencies and issued a request for evidence (RFE). The Director noted that USCIS records showed numerous other I-140 petitions filed by the Petitioner and therefore asked that specific information about those other petitions and beneficiaries be submitted along with copies of the Petitioner's most recent federal income tax returns or audited financial statements.[3] The Director also referred to a "Private Company Financial Report," which was not accompanied by an audited financial statement, and a letter containing alleged income and employee figures for 2016 from the Petitioner's chief financial officer (CFO). The Director determined that neither the report nor the letter was acceptable evidence of the Petitioner's ability to pay the proffered wage because multiple I-140 petitions had been filed in a short period of time.

Although the Petitioner responded with additional evidence pertaining to its other I-140 beneficiaries, it did not submit copies of the requested federal income tax return or audited financial statement. Rather, the Petitioner cited to the ability to pay regulatory provisions and the Memorandum from William R. Yates, Associate Director For Operations, *Determination of Ability to Pay under 8 CFR 204.5(g)(2)*, HQOPRD 90/16.45, (May 4, 2004) (Yates Memorandum), in support of its assertion that the requested documentation is not required from a U.S. employer with 100 or more workers. The Petitioner also submitted a document entitled "Unemployment Insurance Tax Information" with a list of figures for wages, taxes, and employees during the first quarter of 2017, and a copy of the letter from the Petitioner's CFO and a copy of the Yates Memorandum.

The Director denied the petition, noting that the Petitioner's RFE response did not include an annual report, a federal tax return, or an audited financial statement as requested and as required by 8 C.F.R. § 204.5(g)(2). The Director stated that although the regulation and the Yates Memorandum allow USCIS the discretionary authority to accept additional types of evidence, it is not obligated to do so. Since the Petitioner in this case had filed multiple I-140 petitions, the Director determined that requesting a form of regulatorily required evidence was warranted and that failure to submit such evidence precluded a material line of inquiry and was grounds for denying the petition pursuant to 8 C.F.R. § 103.2(b)(14).

On appeal the Petitioner maintains that the record establishes its ability to pay all of its proffered wage obligations, and resubmits copies of the Yates Memorandum, its Unemployment Insurance Tax Information document, and the CFO letter. The Petitioner argues that the Director should have accepted the CFO letter and other financial documents submitted in support of this petition as sufficient evidence of the Petitioner's ability to pay its proffered wage obligations. The Petitioner cited to 8 C.F.R. § 204.5(g)(2), which states that USCIS "may" accept a letter from an employer's

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[2] 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.

[3] The RFE also requested evidence pertaining to the Petitioner's recruitment for the proffered position and the terms of the labor certification (as well as the location of the intended employment), but these issues were not further discussed in the Director's denial decision.

financial officer and asserted that the employer has 100 or more workers. Therefore, the Petitioner claimed it has the ability to pay its proffered wage obligations, and also cited to the Yates Memorandum, which states that USCIS is "not required to . . . request" a financial statement from an employer with 100 or more workers.

We disagree. After identifying the three alternative types of required documentation, 8 C.F.R. § 204.5(g)(2) provides that USCIS "*may* accept a statement from a financial officer" of an employer with 100 or more workers and/or "additional evidence, such as profit/loss statements, bank account records, or personnel records" as evidence of a petitioner's ability to pay the proffered wage. The regulation does not require USCIS to accept such evidence. In other words, it is entirely within the discretion of USCIS to decide whether a letter from the employer's CFO and/or other types of financial documents are sufficient to establish a petitioner's ability to pay its proffered wage obligations. Likewise, the Yates Memorandum states that "CIS adjudicators are **not** required to accept, request, or RFE for a financial statement from U.S. employers who employ 100 or more workers . . . or additional financial evidence" to establish the employer's ability to pay its proffered wage obligations.[4] The Yates memorandum further emphasizes that "Acceptance of these documents by CIS is **discretionary**" and need not be accepted if the adjudicator has doubt about whether such documents establish an employer's ability to meet its proffered wage obligation(s). Thus, there is no merit to the Petitioner's contention that the Director misinterpreted the Yates Memorandum and the regulation, should necessarily have excused the submission of regulatorily required evidence.

The Director specifically requested the submission of at least one type of evidence specified in the applicable regulation. Thus, the Petitioner could have complied with 8 C.F.R. § 204.5(g)(2) and addressed issues raised in the RFE by submitting its federal tax return or an audited financial statement for the year(s) requested. However, it chose not to do so. The Director noted the absence of such documentation in his decision, thereby allowing the Petitioner another opportunity to submit the evidence on appeal. However, the Petitioner once again chose not to do so. As previously noted, the regulation at 8 C.F.R. § 103.2(b)(14) provides that failure to submit requested evidence that precludes a material line of inquiry shall be grounds for denying the petition.

Since the Petitioner has not submitted the requested regulatory required evidence of its ability to meet its proffered wage obligations, we are precluded from reaching any determination of whether the Petitioner can pay all of its proffered wages based on the totality of its circumstances. *See Matter of Sonegawa*, 12 I&N Dec. 612, 614-15 (Reg'l Comm'r 1967).

III. CONCLUSION

For the reasons discussed above, the Petitioner has not established its continuing ability to pay the proffered wage of the instant Beneficiary and the proffered wages of all its other I-140 beneficiaries from the priority date of March 9, 2017, onward. The appeal will be dismissed for this reason.

ORDER: The appeal is dismissed.

[4] The Yates Memorandum also emphasizes that regardless of the number of employees a petitioner employs, USCIS adjudicators are not required to accept, request, or RFE for additional financial evidence outside of regulatory required evidence.