U.S. Citizenship and Immigration Services

Non-Precedent Decision of the Administrative Appeals Office

In Re: 22681924

Date: SEP. 28, 2022

Appeal of Texas Service Center Decision

Form I-140, Immigrant Petition for Skilled Worker

The Petitioner, a real estate business, seeks to employ the Beneficiary as an administrative assistant. It requests classification of the Beneficiary as a skilled worker under the third preference immigrant classification. Immigration and Nationality Act (the Act) section 203(b)(3)(A)(i), 8 U.S.C. § 1153(b)(3)(A)(i). This employment-based "EB-3" immigrant classification allows a U.S. employer to sponsor a foreign national for lawful permanent resident status to work in a position that requires at least two years of training or experience.

The Director of the Texas Service Center denied the petition on the ground that the Petitioner did not establish its continuing ability to pay the proffered wage from the priority date of the petition onward.

In these proceedings, it is the Petitioner's burden to establish eligibility for the requested benefit. See section 291 of the Act, 8 U.S.C. § 1361. Upon de novo review, we will dismiss the appeal.

I. LAW

Immigration as a skilled worker usually follows a three-step process. First, the prospective employer must obtain a labor certification approval 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 foreign national will not harm wages and working conditions of U.S. workers with similar jobs. Id. Second, the employer must submit the approved labor certification with an immigrant visa petition to U.S. Citizenship and Immigration Services (USCIS). Section 204 of the Act, 8 U.S.C. § 1154. The immigrant visa petition must establish that the foreign worker qualifies for the offered position, that the foreign worker and the offered position are eligible for the requested immigrant classification, and that the employer has the ability to pay the proffered wage. See 8 C.F.R. § 204.5.[1] Finally, if USCIS approves the immigrant visa petition, the foreign worker may apply for an immigrant

[1] These requirements must be satisfied by the priority date of the immigrant visa petition. See 8 C.F.R. § 204.5(g)(2), Matter of Wing's Tea House, 16 I&N Dec. 158, 159 (Act. Reg'l Comm'r 1977). For petitions that require a labor certification, the priority date is the date on which the DOL accepted the labor certification application for processing. See 8 C.F.R. § 204.5(d). In this case, the priority date is January 20, 2020.

visa abroad or, if eligible, for adjustment of status in the United States. Section 245 of the Act, 8 U.S.C. § 1255.

II. ABILITY TO PAY

The Director concluded that the Petitioner did not establish its continuing ability to pay the proffered wage from the priority date onward. The proffered wage is listed as $36,000 per year on the labor certification, and the priority date is January 20, 2020.

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

> 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 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].[2]

In determining ability to pay, USCIS examines whether a petitioner paid a beneficiary the full proffered wage each year from a petition's priority date. If a petitioner did not annually pay the full proffered wage, USCIS next examines whether it generated sufficient annual amounts of net income or net current assets to pay any difference between the proffered wage and wages paid. If net income and net current assets are insufficient, USCIS may consider other factors affecting a petitioner's ability to pay a proffered wage. See Matter of Sonegawa, 12 I&N Dec. 612, 614-15 (Reg'l Comm'r 1967).[3]

The record indicates that the Beneficiary began working for the Petitioner in October 2021. The Petitioner submitted a copy of the Internal Revenue Service (IRS) Form W-2, Wage and Tax Statement, it issued to the Beneficiary in 2021, demonstrating that it paid the Beneficiary $9,000. On appeal, the Petitioner also submitted pay records for the Beneficiary for 2022, demonstrating that the Beneficiary's year-to-date earnings with the Petitioner totaled $10,500 as of March 20, 2022. As the Petitioner did not submit evidence of any wages paid to the Beneficiary in 2020, the year of the priority date, and the amounts paid in 2021 are below the proffered wage of $36,000 per year, the Petitioner

[2] We note that where a petitioner has filed 1-140 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 Patel v. Johnson, 2 F.Supp.3d 108, 124 (D. Mass. 2014).

[3] 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); Estrada-Hernandez v. Holder, 108 F. Supp. 3d 936, 942-43 (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 (5th Cir. 2015).

has not established its continuing ability to pay the Beneficiary's proffered wage from the priority date of January 20, 2020 through 2021 based on the wages it actually 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 in 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 generally be considered able to pay the proffered wage during that year.

For the year 2020, the record includes a copy of the Petitioner's 2020 federal income tax return, IRS Form 1120, U.S. Corporate Income Tax Return, which shows that it had a net income loss of -$89,652[4] and current net assets of -$431,192.[5] This tax return does not demonstrate that the Petitioner has a net income, or current net assets, equal to or greater than the proffered wage. Therefore, the Petitioner has not established its ability to pay the proffered wage in 2020 based on either net income or net current assets that year.

For the year 2021, the Petitioner must demonstrate its ability to pay the difference between the proffered wage and any wages paid to the Beneficiary for 2021. Since the Petitioner paid $9000 in wages to the Beneficiary in 2021, the Petitioner must demonstrate its ability to pay the Beneficiary $27,000. On appeal the Petitioner submits profit and loss statements for 2021, superseding the previously submitted profit and loss statement for the ten-month period of January through October 2021. The profit and loss statements are unaudited. As stated by the Director in his decision, unaudited financial statements are the representations of management and, as such, are unreliable evidence of the Petitioner's ability to pay the proffered wage. Absent the regulatorily required evidence of an annual report, tax records, or audited financial statements, the profit and loss statements in the record are insufficient to establish the Petitioner's ability to pay the Beneficiary the proffered wage for 2021.

With the petition and on appeal, the Petitioner also submitted bank statements from its business checking account with Regions from September 1, 2021 to March 31, 2022; however, these bank records also do not remedy the evidentiary deficiency to demonstrate the Petitioner's ability to pay the proffered wage. The Petitioner asserts that these statements demonstrate the Petitioner's ongoing operations; its ability to receive payments and pay debts; and its utilization of the funds in its business checking account to pay the proffered wage. While the regulation at 8 C.F.R. § 204.5(g)(2) states that USCIS may consider bank account records "in appropriate cases," they are not among the three types of required evidence identified in the regulation – either annual reports, federal tax returns, or audited financial statements – to demonstrate a petitioner's ability to pay the proffered wage. Bank statements show an account balance on a given date, not the account holder's sustainable ability to pay a proffered wage over time. Moreover, the Petitioner has not shown that the money in its bank account constitutes a financial resource separate and distinct from the current assets it records in Schedule L of its federal

[4] If a corporation, like the Petitioner, USCIS considers its net income (or loss) to be the figure for "Taxable income before net operating loss deduction and special deductions" on page 1, line 28, of the Form 1120.
[5] For a corporation net current assets (or liabilities) are the difference between its current assets, entered on lines 1-6 of Schedule L, and its current liabilities, entered on lines 16-18 of Schedule L.

tax return(s). Finally, as the bank account statements cover only six months in late 2021 and early 2022, they do not demonstrate the Petitioner's ability to pay the proffered wage from the priority date, January 20, 2020, through 2021.

We may consider evidence of a petitioner's ability to pay beyond its net income and net current assets, including such factors as: the number of years it has conducted business; the growth of its business; its number of employees; the occurrence of any uncharacteristic business expenditures or losses; its reputation in its industry; whether a beneficiary will replace a current employee or outsourced service; or other evidence of its ability to pay a proffered wage. See Matter of Sonegawa, 12 I&N Dec. 612, 614-615 (Reg'l Comm'r 1967).

The Petitioner argues that although its business was not profitable in 2020 due to the impact of the COVID-19 pandemic on small businesses and the property management industry, it has a "stable track record where it has always billed a significant amount with the ability to pay its employees decent salaries." Evidencing this statement, the Petitioner provided seven employee 2021 IRS Form W-2, Wage and Tax Statements, including the Beneficiary's statement. The Petitioner further argues that 2021 was a profitable year for its business, but explains its inability to submit its 2021 tax returns with the appeal because the Petitioner requested an extension of its filing with the IRS.

The Petitioner has been in business for only six years and, according to the petition, has a small number of employees, approximately eight. While the Petitioner's losses in 2020 could be an uncharacteristic business loss, the Petitioner did not submit sufficient evidence to demonstrate the growth of its business over time, or that it is considered a reputable real estate business. Without further evidence, we are unable to determine whether the Petitioner's losses in 2020 were an uncharacteristic business loss. Upon review of the totality of the circumstances in this case, the Petitioner has not established by a preponderance of the evidence that it has the continuing ability to pay the proffered wage pursuant to Matter of Sonegawa.

The Petitioner further argues that it made a bona fide job offer to the Beneficiary, kept the position open to her throughout the COVID-19 pandemic, and on good faith agrees to continue to pay the salary to the Beneficiary until the Beneficiary has her residence status. The Petitioner submitted recruitment materials, including DOL audit documentation. However, such evidence is not relevant to demonstrate the Petitioner's ability to pay the proffered wage.

In sum, the Petitioner has not established its continuing ability to pay the proffered wage from the petition's priority date onward.

III. CONCLUSION

In accord with the analysis above, the Petitioner has not established its ability to pay the proffered wage to the Beneficiary from the priority date as required by 8 C.F.R. § 204.5(g)(2). 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). The Petitioner has not met that burden. Therefore, the appeal will be dismissed.

ORDER: The appeal is dismissed.