U.S. Citizenship and Immigration Services

Non-Precedent Decision of the Administrative Appeals Office

In Re: 23100316

Date: MAY 10, 2023

Appeal of Nebraska Service Center Decision

Form I-140, Immigrant Petition for Alien Workers (Professional)

The Petitioner, an education consulting company, seeks to employ the Beneficiary as an accountant. It requests classification of the Beneficiary as a professional under the third preference immigrant classification. Immigration and Nationality Act (the Act), section 203(b)(3)(A)(ii), 8 U.S.C. § 1153(b)(3)(A)(ii). This employment-based immigrant classification allows a U.S. employer to sponsor a professional with a baccalaureate degree for lawful permanent resident status.

The Director of the Nebraska Service Center denied the petition, concluding the record did not establish the Petitioner's ability to pay the proffered wage. The matter is now before us on appeal. 8 C.F.R. § 103.3.

The Petitioner bears the burden of proof to demonstrate eligibility by a preponderance of the evidence. Matter of Chawathe, 25 I&N Dec. 369, 375-76 (AAO 2010). We review the questions in this matter de novo. *Matter of Christo's*, Inc., 26 I&N Dec. 537, 537 n.2 (AAO 2015). Upon de novo review, we will dismiss the appeal.

I. LEGAL FRAMEWORK

Employment-based immigration generally follows a three-step process. To permanently fill a position in the United States with a foreign worker, a prospective employer must first obtain certification from the U.S. Department of Labor (DOL). See 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.

If DOL approves a position, an employer must next submit the certified labor application (LCA) with an immigrant visa petition to U.S. Citizenship and Immigration Services (USCIS). See section 204 of the Act, 8 U.S.C. § 1154. Among other things, USCIS considers whether a beneficiary meets the requirements of a certified position and a requested immigrant visa classification. If USCIS approves the petition, a foreign national may finally 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.

A petitioner must establish its ability to pay the proffered wage from the priority date of the petition until the beneficiary obtains lawful permanent residence. 8 C.F.R. § 204.5(g)(2). Evidence of ability to pay must generally include annual reports, federal tax returns, or audited financial statements. Id. If a petitioner employs 100 or more workers, USCIS may accept a statement from a financial officer attesting to the petitioner's ability to pay the proffered wage. Id. 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. Id.

In determining ability to pay, USCIS first determines whether the petitioner paid the beneficiary the full proffered wage each year from the priority date. If the petitioner did not pay the proffered wage in any given year, USCIS next determines whether the petitioner had sufficient net income or net current assets to pay the proffered wage (reduced by any wages paid to the beneficiary). If net income and net current assets are insufficient, USCIS may consider other relevant factors, such as the number of years the petitioner has been in business, the size of its operations, the growth of its business over time, its number of employees, the occurrence of any uncharacteristic business expenditures or losses, its reputation within its industry, or whether a beneficiary will replace a current employee or outsourced service. See Matter of Sonegawa, 12 I&N Dec. 612, 614-15 (Reg'l Comm'r 1967).

II. ANALYSIS

The record does not establish the Petitioner's continuing ability to pay the proffered wage from the priority date of the petition onward in accordance with 8 C.F.R. § 204.5(g)(2). While we do not discuss each piece of evidence individually, we have reviewed and considered each one. In this case, the Petitioner filed its petition on November 9, 2020, the proffered wage is $58,344 per year, and the priority date is August 18, 2019.

To demonstrate its ability to pay the wage offered to the Beneficiary, the Petitioner initially submitted a Form 10-Q for the quarterly period ending on June 30, 2020. The Director issued a request for evidence (RFE) informing the Petitioner that the 10-Q did not establish the Petitioner's ability to pay the proffered wage. In response, the Petitioner submitted a statement of ability to pay; a copy of the Petitioner's Form 10-K for 2019; a share issuance and exchange agreement; and a copy of the Petitioner's bank statements from June 2019 to December 2019 and May 2020 to October 2020.

Although the 10-K is one of the listed regulatory required types of evidence, neither the net income nor the net assets shown on the report are sufficient to pay the proffered wage. The share issuance agreement does not demonstrate that any funds mentioned in the document reflect additional funds that were not already reflected on the 10-K. The bank statements feature the amount in an account on a given date and cannot show the sustained ability to pay a proffered wage. See generally 6 USCIS Policy Manual E.4(A)(5), https://www.uscis.gov/policymanual. Additionally, the Petitioner did not provide evidence to demonstrate that the funds reported in its bank statements reflect additional funds not captured in its 10-K. Therefore, the Director determined these pieces of evidence did not establish the Petitioner had the ability to pay the proffered wage from the priority date onward.

In the ability to pay statement, the Petitioner explained that several companies purchased stock shares from the Petitioner's subsidiary, [redacted] but due to government-imposed currency restrictions, the companies could not transfer the investment payments for the shares to the Petitioner's

subsidiary. The Petitioner explained, "[i]nstead, these companies agreed to make a loan to our subsidiary company [] in several installments for the purchase price . . . ." The Petitioner further explained, "these investment payments became short-term loans showing up on our balance sheets" and "counted into our current liabilities." The Petitioner concluded that it "could have" additional funds available "from our share purchase stockholders if there were no foreign currency restrictions imposed . . . " (emphasis added).

While we acknowledge this explanation, it does not overcome the evidentiary deficiencies in the Petitioner's ability to pay. First, the Petitioner has not submitted sufficient documentation to establish it has a subsidiary called [redacted] Second, if the companies issued loans to the subsidiary, the Petitioner would still need to establish how the subsidiary's funds are available to it as the parent. Third, if other companies made a loan to the Petitioner's subsidiary, it would mean the subsidiary received funds that must be repaid. The Petitioner has not sufficiently explained the particulars of how the share issuance agreement transforms loans that must be repaid into income. Finally, the Petitioner confirmed these companies were "unable to wire" the payment and as such, the Petitioner has not established that it actually has the funds. Rather, the Petitioner stated the funds could be available but for the currency restrictions. A visa petition may not be approved based on speculation of future eligibility or after a petitioner becomes eligible under a new set of facts. See Matter of Michelin Tire Corp., 17 I&N Dec. 248, 249 (Reg'l Comm'r 1978). Stated simply, funds hypothetically available under different circumstances cannot satisfy the Petitioner's burden of proof to establish its ability to pay. Accordingly, the Petitioner's explanation does not overcome the evidentiary deficiencies in the record.

On appeal, the Petitioner reiterates its explanation concerning the investment loans and currency restrictions. In addition, the Petitioner provides other employees' 2019 and 2020 W-2 statements, payroll records showing the salaries paid to those employees, and 1099-MISC forms listing miscellaneous "nonemployee compensation" the Petitioner paid to several individuals. This evidence is insufficient, as wages or compensation paid to other employees are not considered available to pay the proffered wage unless the Beneficiary is replacing a former employee. See generally USCIS Policy Manual, supra. The Petitioner also provides its own W-2 statements to evidence its income during those years; however, income reflected on a W-2 does not establish the Petitioner's ability to pay the proffered wage as it does not account for the Petitioner's liabilities. Accordingly, this evidence does not satisfy the Petitioner's burden to establish its ability to pay the proffered wage.

Even under a totality of the circumstances analysis, we still conclude the Petitioner has not established its ability to pay the annual proffered wage from the priority date onward. The record lacks evidence of the Petitioner's reputation and of its historical growth. Although the Petitioner became a corporation in 1999, it is unclear how many years it has actually conducted business since that time. On the Form I-140, the Petitioner stated it has 10 employees, the LCA states the Petitioner has 20 employees, and the payroll documents provided on appeal state the Petitioner has between 12 to 15 employees. As such, the number of employees does not suggest the Petitioner operates on a large scale. The Petitioner has not described any uncharacteristic business expenditures or losses. It does not assert that it intended to replace any of its workers with the Beneficiary, or that the wages already paid to other employees would otherwise be available to pay the Beneficiary. Accordingly, in the totality of circumstances, we conclude the record does not support a finding of the Petitioner's ability to pay.

The Petitioner has not established its ability to pay the proffered wage from the priority date as required by 8 C.F.R. § 204.5(g)(2) or in an examination of the totality of the circumstances. Therefore, the appeal will be dismissed.

ORDER: The appeal is dismissed.