U.S. Citizenship and Immigration Services

Non-Precedent Decision of the Administrative Appeals Office

In Re: 15526831

Date: APR. 07, 2021

Appeal of Texas Service Center Decision

Form I-140, Immigrant Petition for Skilled Worker

The Petitioner seeks to employ the Beneficiary as a software developer. It requests classification of the Beneficiary under the third-preference, immigrant category as a skilled worker. 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" category allows a U.S. business to sponsor a foreign national for lawful permanent resident status based on a job offer requiring at least two years of training or experience.

The Director of the Texas Service Center denied the petition, concluding that the Petitioner did not establish that it made a *bona fide* job offer to the Beneficiary, or that it desires and intends to employ the Beneficiary in the offered position. The Director also concluded that the Petitioner did not establish its continuing ability to pay the proffered wage to the Beneficiary and to the beneficiaries of the other petitions that it had filed.

In these proceedings, it is the Petitioner's burden to establish eligibility for the requested benefit by a preponderance of the evidence. Section 291 of the Act, 8 U.S.C. § 1361; *Matter of Chawathe*, 25 I&N Dec. 369, 375 (AAO 2010). The Administrative Appeals Office (AAO) reviews the questions in this matter *de novo*. *See Matter of Christo's Inc.*, 26 I&N Dec. 537, 537 n.2 (AAO 2015). Upon *de novo* review, we will withdraw the decision of the Director. The matter is remanded for the entry of a new decision consistent with the following analysis.

I. EMPLOYMENT-BASED IMMIGRATION

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 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.

II. THE BONA FIDES OF THE JOB OFFER

A business may file a petition if it is "desiring and intending to employ [a foreign national] within the United States." Section 204(a)(1)(F) of the Act. A petitioner must intend to employ a beneficiary under the terms and conditions specified in an accompanying labor certification. *Matter of Izdeska*, 12 I&N Dec. 54, 55 (Reg'l Comm'r 1966) (affirming a petition's denial where, contrary to the terms of the accompanying labor certification, the petitioner did not intend to employ the beneficiary as a domestic worker on a full-time, live-in basis). A petitioner must establish this intent to employ a beneficiary in a *bona fide* position at the time of filing. *See Matter of Katigbak*, 14 I&N Dec. 45, 49 (Comm'r 1971). USCIS must consider the merits of a petitioner's job offer to determine whether the job offer is realistic. *Matter of Great Wall*, 16 I&N Dec. 145 (Acting Reg'l Comm'r 1977). For labor certification purposes, the term "employment" means "[p]ermanent, full-time work." 20 C.F.R. § 656.3.

The Petitioner here is an information technology services provider established in 2008 with 19 employees. The Petitioner filed the accompanying labor certification on August 30, 2019.[1] The labor certification and the petition indicate that the Petitioner is located in [redacted] North Carolina. On the labor certification, the Petitioner attested that it will permanently employ the Beneficiary in the full-time position of software developer at its own address. The labor certification describes the duties of the offered position as follows:

> Part H-11. Job duties
>
> Limited domestic travel and/or relocate occasionally to client locations nationwide to analyze, design, develop software applications using ETL Tools (Ab Initio Graphical Development Environment), Abinitio Web EME in multiplatform environment. Work with DB2, IMS, Oracle. Test, troubleshoot, maintain existing applications.

After the initial filing, the Director issued a request for evidence (RFE). In the RFE, the Director stated that the Petitioner was a contractor to other business entities, but it did not submit copies of contracts as evidence of work that it has available to provide the Beneficiary. He also noted that the labor certification lists the primary worksite as the Petitioner's headquarters in [redacted] North Carolina, but that the Beneficiary resides in [redacted] Virginia. However, the Petitioner claimed on the labor certification that the Beneficiary was currently employed in the offered position at its address in [redacted] North Carolina. To establish that the job offer was *bona fide*, the Director requested copies of agreements or contracts for projects to which the Beneficiary is or would be assigned, agreements or contracts between the Petitioner and the Beneficiary outlining the nature of employment, the Petitioner's lease, its quarterly employment reports for 2018 and 2019, and evidence of its recruitment efforts for the offered position.

[1] The date DOL accepted the labor certification application for processing is the petition's priority date. *See* 8 C.F.R. § 204.5(d) (explaining how to determine a petition's priority date).

In response to the Director's RFE, the Petitioner stated that the offered position in the labor certification represents future employment, upon approval of the Beneficiary's lawful permanent resident status. The Petitioner further explained that, because the Beneficiary's future work locations could not be anticipated, it listed the primary work location as its headquarters while including travel and relocation in the job duties. The Petitioner also submitted the following documentation to demonstrate work assigned to the Beneficiary:

- A letter from the end-client explaining that its managed service provider is responsible for contracting and coordinating staff augmentation services.
- A letter from the end-client's managed service provider confirming that the Beneficiary is an employee of the Petitioner assigned to the end-client for a project with "a 24-months tenure limit" as a "Data Analyst-Inter."
- A letter from the mid-vendor, confirming that the Beneficiary is an employee of the Petitioner assigned to the end-client for a project with "a 24-months tenure limit" as a "Data Analyst-Inter."
- A staffing agreement between the end-client's managed service provider and the mid-vendor.

Both the letter from the mid-vendor and the managed service provider state the anticipated start date for the Beneficiary's assignment as May 1, 2020. Both letters provide the following job description for the position of Data Analyst-Inter:

> Responsible for the design, development and administration of transactional and analytical data constructs/structures. Included within those responsibilities are the areas of data access and delivery technologies. Includes expertise in data quality, data organization, metadata, and data profiling. May provide technical support on data warehouse teams. Data set sizes are usually huge (in excess of millions of records).

The Petitioner did not submit any employment agreement between it and the Beneficiary, its lease, or evidence of its recruitment for the offered position, as specifically requested by the Director.

The Director denied the petition, concluding that the Petitioner had not established that it had work to be performed by the Beneficiary in the offered position when the labor certification was filed. He stated that, although the Petitioner provided letters from the end-client and vendor, it "has not provided the actual copies of these contracts." He also noted that the offered position of software developer did not match the job description of data analyst and the Petitioner did not provide evidence that any of its end-clients or other entities in the sub-contracting chain required the services of a software developer as described on the labor certification. The Director did not address the absence of other evidence specifically requested in the RFE, including the Petitioner's lease or recruitment efforts.

On appeal, the Petitioner asserts that USCIS does not have the authority to determine whether a job offer is *bona fide*, as this authority is exclusively with the DOL. The Petitioner further asserts that the Director overstepped his authority in requiring contracts to document the *bona fide* nature of the job offer. The Petitioner asks us to find that "once DOL has certified a position on behalf of an intended employer and employee, the USCIS is bound by that determination and has no authority to second guess it." On appeal, the Petitioner also submits copies of its recruitment evidence.

At the outset, we note that DOL's certification of the labor application does not supersede USCIS' review and evaluation of the criteria the petitioner must prove in order to establish that the petition is approvable, and that includes a review of whether a petitioner is "desiring and intending to employ [a foreign national] within the United States," pursuant to section 204(a)(1)(F) of the Act.

The court in *Snapnames.com, Inc. v. Michael Chertoff*, 2006 WL 3491005, provided an accurate assessment of the employment-based immigrant petition process and the division of authority between the DOL and USCIS, as follows:

> [T]he petitioner submits an application for certification to the DOL describing the job at issue and identifying the alien beneficiary. The petitioner also defines the 'minimum education, training, and experience for a worker to perform satisfactorily the job duties.' In issuing the certification, the DOL considers the job, as defined by the petitioner, and certifies that (1) 'there are not sufficient workers who are able, willing, qualified ... and available at the time of application for a visa and admission to the United States and at the place where the alien is to perform such skilled ... labor,' and (2) 'the employment of such alien will not adversely affect the wages and working conditions of workers in the United States similarly employed.' 8 U.S.C. § 1182(a)(5)(A)(i).

SnapNames.com, Inc., 2006 WL 3491005, at 4-5. *See also Madany v. Smith*, 696 F.2d 1008, 1012-1013 (D.C. Cir. 1983) (stating that "Congress did not intend DOL to have primary authority to make any determinations other than the two stated in section 212(a)[(5)(A)]"); *K.R.K. Irvine, Inc. v. Landon*, 699 F.2d 1006, 1008 (9th Cir. 1983) (stating that "DOL is responsible only for determining the availability of suitable American workers for a job and the impact of alien employment upon the domestic labor market.")

Therefore, the authority of the DOL regarding employment-based visa petitions under section 212(a)(5)(A)(i) of the Act, 8 U.S.C. § 1182(a)(5)(A)(i), is to certify:

> (1) That there are not sufficient workers who are able, willing, qualified ... and available at the time of application for a visa and admission to the United States and at the place where the alien is to perform such skilled or unskilled labor, and
> (2) That the employment of such alien will not adversely affect the wages and working conditions of workers in the United States similarly employed.

While we decline to find as the Petitioner requests, that the Director did not have authority to consider the *bona fides* of the job offer, we agree with the Petitioner that the petition represents future employment. Because the petition represents future employment, the Director also erred in focusing on the different job description in the client letters for a current project, from the description on the labor certification. We will therefore withdraw the Director's decision.

We note, however, that the Petitioner must still establish its intent to employ the Beneficiary in the offered position on a permanent, full-time basis. A petitioner must establish eligibility for a requested benefit as of a petition's filing and continuing throughout its adjudication. 8 C.F.R. § 103.2(b)(1).

While evidence in the form of contracts and agreements is not specifically required to establish that a job offer is *bona fide*, the Petitioner, given the nature of its business as a services provider, is not absolved of its responsibility to establish that it is in a position to employ the Beneficiary in providing these services permanently and full-time in accordance with the terms of the labor certification. The specific work described in the labor certification requires working to "analyze, design, develop software applications using ETL Tools (Ab Initio Graphical Development Environment), Abinitio Web EME in multiplatform environment."

Here, in attempt to establish its desire and intent to employ the Beneficiary in a permanent, full-time position, the Petitioner submitted letters from its mid-vendor and the end-client's management services provider, stating that the Beneficiary is expected to work on a project as a data analyst beginning May 1, 2020, and for a period of 24 months. In relying solely on the Petitioner's failure to submit contracts in his decision, the Director did not fully consider whether the Petitioner had established eligibility for the requested benefit.

Considering the deficiency discussed above, we are withdrawing the Director's decision and remanding the petition for further consideration. On remand the Director may wish to consider the additional evidence provided by the Petitioner on appeal, or to issue a new RFE and allowing the Petitioner an opportunity to respond. The Director must state how the record fails to demonstrate eligibility for the classification sought under the pertinent regulatory scheme.

III. ABILITY TO PAY

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 on 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].

As indicated in the above regulation, the Petitioner must establish its continuing ability to pay the proffered wage from the priority date of the petition. The priority date in this case is August 30, 2019. The labor certification states that the wage offered for the job of software developer is $85,426 per year.

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.

Absent evidence that the Petitioner has paid the Beneficiary a salary equal to or above the proffered wage from the priority date onward, USCIS will generally 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.

USCIS may also consider the totality of the Petitioner's circumstances, including the overall magnitude of its business activities, in determining the Petitioner's ability to pay the proffered wage. *See Matter of Sonegawa,* 12 I&N Dec. 612 (Reg'l Comm'r 1967). USCIS may, at its discretion, consider evidence relevant to the petitioner's financial ability that falls outside of its net income and net current assets. We may consider such factors as the number of years the petitioner has been doing business, the established historical growth of the petitioner's business, the petitioner's reputation within its industry, the overall number of employees, whether the beneficiary is replacing a former employee or an outsourced service, the amount of compensation paid to officers, the occurrence of any uncharacteristic business expenditures or losses, and any other evidence that USCIS deems relevant to the petitioner's ability to pay the proffered wage.

With the initial submission, as evidence of its ability to pay the proffered wage, the Petitioner submitted Internal Revenue Service (IRS) Form W-2, Wage and Tax Statement, it issued to the Beneficiary in 2019 with total wages paid of $43,242.48. The Petitioner also submitted its IRS Form 1040 U.S. Individual Income Tax Return, Schedule C, Profit or Loss From Business, for 2018. Schedule C reflects that the Petitioner's net profit in 2018 was $105,017.

In his RFE, the Director advised that the Petitioner must demonstrate its ability to pay the proffered wage for each beneficiary of petitions it filed from the priority date until the beneficiary obtains permanent residence. *See* 8 C.F.R. § 204.5(g)(2). The Director noted 10 other petitions and requested evidence of the Petitioner's ability to pay the proffered wage for these beneficiaries.

In response to the RFE, the Petitioner provided details for five beneficiaries of its petitions, indicating that none of the beneficiaries had been granted lawful permanent resident status. The Petitioner also submitted its quarterly tax returns for 2018 and 2019, and payroll records to demonstrate salaries paid to beneficiaries of its other petitions.

The Director denied the petition, finding that the Petitioner did not provide information for at least five other beneficiaries. Thus, the Director concluded that he was unable to determine that the Petitioner had the ability to pay the Beneficiary's proffered wage.

On appeal, the Petitioner asserts that "[t]he only question relevant in this case is whether the Petitioner can pay the Beneficiary's prevailing wage, not whether the Petitioner has the ability to pay the prevailing wages from the I-140 petitions filed previously." In his brief on appeal, counsel for the Petitioner states that the Petitioner's 2019 tax return has not yet been filed. However, the Petitioner

submits a personal guaranty from the its sole proprietor, stating that she will use her personal funds to pay the difference in any wages to the Beneficiary.

First, as noted above, where a petitioner has filed 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 Patel v. Johnson*, 2 F.Supp.3d 108, 124 (D. Mass. 2014) (affirming our revocation of a petition's approval where, as of the filing's grant, a petitioner did not demonstrate its ability to pay the combined proffered wages of multiple petitions). A petitioner must establish that a job offer was realistic as of the priority date and that the offer remained realistic for each year thereafter, until a beneficiary obtains lawful permanent residence. The 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). Therefore, an examination of the Petitioner's ability to pay the proffered wage to this Beneficiary, must take into account wages which the Petitioner is obligated to pay to other beneficiaries. Further, the Petitioner is obligated to pay wages to its beneficiaries as of the priority date and continuing until each beneficiary obtains lawful permanent residence.

In this case, the Petitioner is a limited liability company (LLC) regarded as a sole proprietor for tax purposes. An LLC, like a corporation, is a legal entity separate and distinct from its owners. *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 debts and obligations of the company generally are not the debts and obligations of the owner or anyone else.[2] An investor's liability is limited to his or her initial investment. As the owner and others only are liable to his or her initial investment, the total income and assets of the owner and others and their ability, if they wished, to pay the company's debts and obligations, cannot be utilized to demonstrate a petitioner's ability to pay the proffered wage. Therefore, the Petitioner erroneously relies on its owner's personal guaranty in attempt to establish its ability to pay the proffered wage.

On appeal, the Petitioner provides information for the beneficiaries of all petitions it claims to have filed in a two-year period. This includes nine beneficiaries and the Petitioner indicates that none of the beneficiaries has been granted lawful permanent resident status. Counsel for the Petitioner also notes that two of the beneficiaries are no longer employed with the Petitioner and that the Petitioner no longer wishes to sponsor those individuals. However, those petitions remain approved and the record does not indicate that the Petitioner has requested withdrawal of those approvals. Assertions made without supporting documentation are of limited probative value and do not carry the weight to satisfy the Petitioner's burden of proof. *See Matter of Soffici*, 22 I&N Dec. 158, 165 (Comm'r 1998).

On appeal, the record does not contain regulatory-prescribed evidence of the Petitioner's ability to pay for 2019. Without this regulatory-required evidence, we cannot affirmatively find that the Petitioner has the continuing ability to pay the proffered wage from the priority date.

[2] Although this general rule might be amenable to alteration pursuant to contract or otherwise, no evidence appears in the record to indicate that the general rule is inapplicable in the instant case.

In view of the unavailability of evidence of the Petitioner's net income and net current assets in the year of the priority date, specifically the Petitioner's 2019 tax return, we will remand this matter for further consideration. The Director may request the Petitioner's 2019 tax return, as well as its 2020 tax return, and any other documentation deemed relevant at his discretion in determining the Petitioner's ability to pay the proffered wage.

The Director should consider the amount of wages the Petitioner paid to the Beneficiary each year; the Petitioner's net income and net current assets each year; and the proffered wages and wages the Petitioner paid to its other I-140 beneficiaries for the time period in question. At his discretion, in accord with *Matter of Sonegawa* 12 I&N Dec. 612 (Reg'l Comm'r 1967), the Director may consider evidence relevant to the petitioner's financial situation.

IV. CONCLUSION

Considering the above discussed deficiencies, we are withdrawing the Director's decision. However, the record does not demonstrate affirmatively that the Petitioner is eligible for the benefit sought, including whether the Petitioner's job offer is bona fide and whether the Petitioner has the ability to pay the proffered wage to the Beneficiary. The record before the Director did not contain the Petitioner's recruitment evidence or priority date year documentation to determine whether the Petitioner has the ability to pay the proffered wage to the Beneficiary as required by 8 C.F.R. § 204.5(g)(2). Therefore, we will remand this case to the Director for further consideration.

ORDER: The decision of the Director is withdrawn. The matter is remanded for the entry of a new decision consistent with the foregoing analysis.