U.S. Citizenship and Immigration Services

Non-Precedent Decision of the Administrative Appeals Office

In Re: 06828414

DATE: APR. 17, 2020

Appeal of Nebraska Service Center Decision

Form I-140, Immigrant Petition for a Skilled Worker

The Petitioner, a textile distribution business, seeks to employ the Beneficiary as an international marketing analyst. It requests professional classification for the Beneficiary under the third preference immigrant category. Immigration and Nationality Act (the Act) section 203(b)(3)(A)(ii), 8 U.S.C. § 1153(b)(3)(A)(ii). This employment-based "EB-3" 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 on the ground that the Petitioner did not establish its ability to pay the proffered wage. The Petitioner filed a motion to reopen and a motion to reconsider along with a brief and additional documentation. The Director dismissed the combined motions, stating that they were not accompanied by new evidence and did not establish that the denial decision was incorrect based on the existing evidence of record. On appeal the Petitioner asserts that the Director's dismissal of the combined motions was erroneous because it did not address the new evidence submitted with the motions.

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)(A)(i) of the Act, 8 U.S.C. § 1182(a)(5)(A)(i). 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 requested 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[1] 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 instant petition was filed in April 2018, accompanied by a labor certification that was filed with the DOL on November 27, 2017. Thus, the priority date of the petition is November 27, 2017, and labor certification states that the proffered wage for the position of international marketing analyst is $110,718 per year. As evidence of its ability to pay the proffered wage the Petitioner submitted a copy of its federal income tax return for the pre-priority date year of 2016. The Director issued a request for evidence (RFE) of the Petitioner's ability to pay the wage in 2017, to which the Petitioner responded in February 2019 with a copy of its 2017 federal income tax return.

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. If a petitioner does not establish that it has employed and 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.

Since there is no evidence that the Petitioner has ever employed and paid wages to the Beneficiary, the Director proceeded directly to the Petitioner's federal income tax returns in assessing its ability to pay the proffered wage. In his decision, issued on March 12, 2019, the Director noted that the Petitioner had negative net income and negative net current assets (that is, a net loss and net current liabilities) in 2016, the year before the priority date, and that in 2017 the Petitioner's net income and

[1] The priority date of a Form I-140 petition is the date the underlying labor certification was filed with the DOL. See 8 C.F.R. § 204.5(d).

net current assets were each well below the proffered wage of $110,718. The Director concluded, therefore, that the Petitioner had not established its ability to pay the proffered wage.

The Petitioner filed a motion to reopen and a motion to reconsider. The motions were accompanied by a brief and additional documentation consisting of six monthly statements of its business checking account at [redacted] Bank, covering the months of October 2018 through March 2019, and a copy of the USCIS Interoffice Memorandum HQOPRD 90/16.45, *Determination of Ability to Pay under 8 CFR 204.5(g)(2)* (May 4, 2004). [*https://www.uscis.gov/legal-resources/policy-memoranda.*] The Petitioner asserted that the bank account balances were sufficient to pay the proffered wage during the six-month period they covered in 2018 and 2019, and that it always maintained enough cash in its bank account to support its ability to pay the proffered wage. The Petitioner also claimed that the USCIS memorandum supported its contention that it is the agency's practice to combine a petitioner's net income and net current assets in determining its ability to pay the proffered wage. Following that practice with the figures in its 2017 federal income tax return, the Petitioner asserted, would establish its ability to pay the proffered wage that year.

The Director dismissed the motions in May 2019. In his decision the Director quoted from the regulations at 8 C.F.R. § 103.5(a)(2) and (3) which provide, in pertinent part, that a motion to reopen must state new facts and be supported by documentary evidence, and that a motion to reconsider must establish that our decision was based on an incorrect application of law or policy and that the decision was incorrect based on the evidence of record at that time. As grounds for dismissal the Director stated that the Petitioner's motions were not accompanied by any new evidence and did not establish that the denial decision was incorrect based on the evidence then in the record.

On appeal the Petitioner asserts that the Director did not take any of the documentary evidence submitted on motion into account. The Petitioner reiterates its claim that the bank account statements and USCIS memorandum submitted in support of the motions to reopen and reconsider, together with other previously submitted evidence, establishes its ability to pay the proffered wage.

We do not agree with the Petitioner's contentions. While the Director did not discuss the individual documents submitted in support of the motions, they did not address or remedy the specific evidentiary shortcomings that were discussed in the original decision denying the petition. In particular, the bank statements covered a time frame in 2018 and 2019 that did not address the Director's determination that the Petitioner's 2017 federal income tax return did not establish its ability to pay the proffered wage that year.[2] The bank records from 2018 and 2019, in other words, were not relevant to the threshold question of whether the Petitioner had the ability to pay the proffered wage as of the petition's priority date, November 27, 2017. As for the USCIS memorandum, the Petitioner's claim that it established the practice in USCIS of combining a petitioner's net income and net current assets in determining its ability to pay a proffered wage is incorrect. The language of the memorandum is clear that a positive ability to pay determination is warranted if either the petitioner's net income or its net current assets were greater than the proffered wage. It does not authorize combining the two for

[2] Had the Petitioner submitted bank account statements covering the year 2017, they would have been material evidence to be considered by the Director, in conjunction with the 2017 federal income tax return, in determining whether the Petitioner had established its ability to pay the proffered wage in the priority date year of 2017.

purposes of the ability to pay determination, and there has never been any such practice at USCIS. The Director was correct in his denial decision, therefore, that since the Petitioner's net income and net current assets in 2017 were each well below the proffered wage, neither one nor the other established the Petitioner's ability to pay the proffered wage that year.

III. CONCLUSION

The Petitioner has not established its continuing ability to pay the proffered wage from the priority date of November 27, 2017, onward. The appeal will be dismissed for this reason.

ORDER: The appeal is dismissed.