U.S. Citizenship and Immigration Services

Non-Precedent Decision of the Administrative Appeals Office

In Re: 10647942

DATE: AUG. 19, 2020

Appeal of Texas Service Center Decision

Form I-140, Immigrant Petition for a Professional

The Petitioner, an accounting firm, seeks to employ the Beneficiary as an accountant. 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 Texas Service Center denied the petition on the ground that the Petitioner did not establish its ability to pay the proffered wage.

On appeal the Petitioner asserts that the Director's decision was erroneous and that the evidence of record establishes its ability to pay the proffered wage.

Upon de novo review, we will withdraw the Director's decision and remand the case for further consideration and the issuance of a new decision.

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

As indicated in the above regulation, the Petitioner must establish its continuing ability to pay the proffered wage from the priority date[1] of the petition onward. In this case the proffered wage is $79,934 per year and the priority date is January 3, 2019.

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.

The Petitioner indicates that the Beneficiary's employment as an accountant began in 2017. In response to a request for evidence (RFE) issued in October 2019 the Petitioner submitted a copy of the Beneficiary's Form W-2, Wage and Tax Statement, for the pre-priority date year of 2018 showing that the Beneficiary received "wages, tips, other compensation" in the amount of $34,400 that year. No Form W-2 for the Beneficiary was available for the uncompleted year of 2019 at the time the Petitioner responded to the RFE in November 2019, and no such form was submitted with the appeal in January 2020 or subsequent thereto. Therefore, the Petitioner has not established its ability to pay the proffered wage from the priority date of January 3, 2019, onward based on wages paid to the Beneficiary.

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.

[1] The "priority date" of the petition is the date the underlying labor certification application is filed with the DOL. See 8 C.F.R. § 204.5(d).

With its initial evidence the Petitioner submitted a copy of its federal income tax return for 2018, which was still the Petitioner's most recently filed return at the time of the Director's decision in December 2019 and the Petitioner's subsequent appeal. As the priority date of the petition is in 2019, however, that is the first year for which the Petitioner must demonstrate its ability to pay the proffered wage. Without a copy of the Petitioner's 2019 federal tax return (or an annual report or audited financial statement for 2019), we are unable to determine the Petitioner's ability to pay the proffered wage based on its net income or net current assets from the priority date of January 3, 2019, onward. Therefore, we will remand this case for the Director to request the submission of regulatory required evidence from the Petitioner, as specified in 8 C.F.R. § 204.5(g)(2), for the year 2019, and any other evidence the Director may deem necessary to determine the Petitioner's eligibility for the requested immigration benefit.

III. CONCLUSION

For the reasons discussed above, we will remand this case to the Director for further consideration of the Petitioner's ability to pay the proffered wage from the priority date of January 3, 2019, onward.

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