U.S. Citizenship and Immigration Services

Non-Precedent Decision of the Administrative Appeals Office

In Re: 10856943

DATE: AUG. 19, 2020

Appeal of Nebraska Service Center Decision

Form I-140, Immigrant Petition for Alien Worker

The Petitioner, an assisted living facilities business, seeks to employ the Beneficiary as a caregiver. It requests classification of the Beneficiary as an "other worker" under the third preference immigrant category. Immigration and Nationality Act section 203(b)(3)(A)(iii), 8 U.S.C. § 1153(B)(3)(A)(iii). This employment-based "EB-3" immigrant classification allows a U.S. employer to sponsor for lawful permanent resident status a foreign national who is capable of performing unskilled labor that requires less than two years of training or experience and is not of a temporary or seasonal nature.

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. On appeal the Petitioner submits a brief and supporting documentation, much of which was already in the record, and asserts that the evidence establishes its ability to pay the proffered wage.

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) 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[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 August 2019, accompanied by a labor certification that was filed with the DOL on November 14, 2018. Thus, the priority date of the petition is November 14, 2018, and the Petitioner must establish its continuing ability to pay the proffered wage from that date onward. The labor certification states that the proffered wage for the position of caregiver is $21,570 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.

In this case the record indicates that the Beneficiary has never been employed by the Petitioner. Therefore, the Petitioner cannot establish its ability to pay the proffered wage from the priority date of November 14, 2018, onward based on wages paid to the Beneficiary.

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 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.

In this case the Petitioner has not submitted a copy of any annual report, federal tax return, or audited financial statement for the priority date year of 2018, or any other year. Therefore, the Petitioner has not established its ability to pay the proffered wage from the priority date of November 14, 2018, onward based on its net income or net current assets.

[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).

On appeal the Petitioner asserts that its "2018 Annual Financial Report" for the period ending December 31, 2018, shows that its net income was sufficient to pay the proffered wage in 2018. This financial report is unaudited, however, and therefore does not comply with the regulatory requirement in 8 C.F.R. § 204.5(g)(2) that financial statements submitted as evidence of a petitioner's ability to pay the proffered wage be audited. The Petitioner submitted this same document with its initial evidence, and the Director stated in his decision that the unaudited financial report was insufficient to demonstrate the Petitioner's ability to pay the proffered wage. The Petitioner has not remedied this evidentiary deficiency on appeal by submitting an audited financial statement for the period ending December 31, 2018. Nor has the Petitioner submitted an annual report for 2018 or a copy of its federal tax return for 2018.

Thus, the Petitioner has not submitted any type of regulatory required evidence as specified in 8 C.F.R. § 204.5(g)(2) – neither an annual report, nor a federal tax return, nor an audited financial statement – for the priority date year of 2018 (or 2019) to establish its continuing ability to pay the proffered wage from the priority date of November 14, 2018, onward.

Citing the regulatory provision that bank account records may be submitted "in appropriate cases" the Petitioner claims that its two bank accounts with [redacted] documented with copies of previously submitted account statements for the months of September to November 2019, show its ability to pay the proffered wage. For the same reasons discussed in the Director's decision, we do not agree. Aside from the fact that bank account records are not among the three types of required evidence identified in 8 C.F.R. § 204.5(g)(2), 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 accounts constituted a financial resource separate and distinct from its current assets that would have been recorded in its federal tax return or an audited financial statement for the year in question, in this case 2019. Finally, as the bank account statements cover only three months in late 2019, they do not in any way demonstrate the Petitioner's ability to pay the proffered wage in the preceding priority date year of 2018, or for the majority of 2019.

The Petitioner also claims that a letter from its president dated December 17, 2019, asserting that the Petitioner had 104 full- and part-time employees and referring to the gross and net income figures on its unaudited 2018 financial report, establishes its ability to pay the proffered wage. The Director rejected the evidentiary weight of this letter, noting the discrepancy between the number of employees claimed in the petition filed in August 2019 – 65 – and the significantly greater number claimed in the letter. We note that the Petitioner claimed to have 85 employees on the labor certification application filed in November 2018. The president's letter was accompanied by a list of 104 individuals ostensibly employed by the Petitioner in December 2019 and acknowledged that the Petitioner had trouble retaining employees due to the high turnover rate in the senior living industry. There is no corroborating documentation that the Petitioner actually had 104 employees in December 2019, such as quarterly wage statements evidencing the number of quarterly employees. Even if there were such documentation, we would not consider the president's letter to be persuasive evidence of the Petitioner's ability to pay the proffered wage because the only data it cites aside from its employee total are the gross and net income figures from the 2018 financial report, which are not reliable because the report is not an audited financial statement. The regulation at 8 C.F.R. § 204.5(g)(2) provides that

USCIS "may" accept a statement from an employer with 100 or more employees as evidence of its ability to pay the proffered wage. It does not require USCIS to do so when other evidence in the record does not support the employer's claim that it has 100 employees or casts doubt on its ability to pay the proffered wage. Since the record is unclear as to how many employees the Petitioner has and no regulatory required evidence as specified in 8 C.F.R. § 204.5(g)(2) or any other credible evidence of the Petitioner's financial situation has been submitted, we will not accept the letter from the Petitioner's president as persuasive evidence of its ability to pay the proffered wage from the priority date onward.

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. At its discretion, USCIS may 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.

The Petitioner states that it began operations in 2015. The Petitioner asserts that its employee roster has fluctuated from a total of 85 at the time the labor certification was filed in November 2018, to 65 at the time the petition was filed in August 2019, to 104 full- and part-time employees at the time of the president's letter to USCIS in December 2019. The only documentary evidence of the Petitioner's finances are the unaudited financial report for the year 2018 and bank account statements for three months in 2019. As previously discussed, the income figures from an unaudited financial statement are not reliable evidence of the Petitioner's ability to pay the proffered wage. Nor are the bank account statements reliable evidence of the Petitioner's ability to pay the proffered wage absent evidence that the accounts are an independent financial resource not included as a net current asset in the Petitioner's federal income tax return. Moreover, since the documentation submitted by the Petitioner dates exclusively from 2018 and 2019, even if it were reliable evidence it does not cover a sufficient time period to demonstrate a historic pattern of growth. On appeal the Petitioner submits excerpts from its website with photographs and descriptions of its residential facilities, along with a Yelp! review. These materials are not substantial enough to demonstrate the Petitioner's overall reputation in the industry. Additionally, without a single type of required regulatory evidence from the priority date year of 2018, we cannot make any totality of the circumstances determination on the Petitioner's ability to pay the proffered wage. Based on the evidence of record we conclude that the totality of its circumstances does not demonstrate the Petitioner's ability to pay the proffered wage from the priority date of November 14, 2018, onward.

As discussed above, the Petitioner has not submitted any of the required forms of documentation specified in 8 C.F.R. § 204.5(g)(2). The Director requested the submission of at least one of those documents – either an annual report, a federal tax return, or an audited financial statement – for the priority date year of 2018 in the request for evidence (RFE) sent to the Petitioner in September 2019. The Petitioner did not submit any one of those documents with its response to the RFE in December

2019 or with its appeal brief in March 2020, and has not supplemented the record since then with any one of those documents. The regulation at 8 C.F.R. § 103.2(b)(14) provides that the failure to submit requested evidence that precludes a material line of inquiry shall be grounds for denying the petition.

III. CONCLUSION

For the reasons discussed above, the Petitioner has not established its continuing ability to pay the proffered wage from the priority date of November 14, 2018, onward. The appeal will be dismissed for this reason.

ORDER: The appeal is dismissed.