U.S. Citizenship and Immigration Services

Non-Precedent Decision of the Administrative Appeals Office

MATTER OF J-E- LLC

DATE: AUG. 27, 2019

APPEAL OF TEXAS SERVICE CENTER DECISION

PETITION: FORM I-140, IMMIGRANT PETITION FOR ALIEN WORKER

The Petitioner, a franchise restaurant, seeks to employ the Beneficiary as a franchise business manager. 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 Texas Service Center denied the petition, concluding that the record did not establish, as required, that the petition contained a valid labor certification. On appeal, the Petitioner asserts that it established by a preponderance of the evidence that the petition contains a valid labor certification.

Upon *de novo* review, we will remand the matter to the Director for further consideration and entry of a new decision.

I. BONA FIDE JOB OFFER

The Director denied the petition for the absence of a valid labor certification. He determined that the Beneficiary will not be employed as a full-time, permanent employee based on the Beneficiary's (a) minority ownership interest in a separate entity which will serve as a master franchisor for a restaurant in [redacted] Florida, and (b) title as a "master franchisor," but not owner, of another restaurant in [redacted] Florida. A petitioner must be "desiring and intending to employ [a foreign national] within the United States." Section 204(a)(1)(F) of the Act. It must intend to employ a beneficiary under the terms and conditions of an accompanying labor certification. *See Matter of Izdebska*, 12 I&N Dec. 54, 55 (Reg'l Comm'r 1966) (affirming denial where, contrary to an accompanying labor certification, a petitioner did not plan to employ a beneficiary as a domestic worker on a full-time, live-in basis). The Director indicated that the Beneficiary will likely be working for these other entities, and not for the Petitioner, and that the job offer was not *bona fide* as a result.

On appeal, the Petitioner asserts that the Beneficiary owns a minority interest in a distinct business entity which signed an agreement with another distinct entity to be the master franchisor for restaurants in Florida. It states that no job offer has been made to the Beneficiary by these other entities, and that

the Beneficiary's ownership interest in a separate entity has no relationship to his permanent, full-time job with the Petitioner. It asserts that it has established by a preponderance of the evidence that the job offer is *bona fide*. Based on our review of the totality of the record, we agree that the Petitioner has established by a preponderance of the evidence that the job offer is *bona fide*.

The Petitioner has established by a preponderance of the evidence that its job offer to the Beneficiary is valid and that the petition is accompanied by a valid labor certification. We will therefore withdraw the Director's decision. Notwithstanding our withdrawal of the Director's decision, we find that the record as presently constituted contains insufficient evidence regarding the Petitioner's continuing ability to pay the proffered wage from the priority date. We will therefore remand the matter to the Director.

II. ABILITY TO PAY

The record does not contain regulatory required evidence of the Petitioner's ability to pay the proffered wage from the priority date on August 3, 2018, and continuing until the beneficiary obtains lawful permanent residence.[1] The regulation at 8 C.F.R. § 204.5(g)(2) requires that "[e]vidence of this ability shall be either in the form of copies of annual reports, federal tax returns, or audited financial statements."

The Petitioner submitted evidence of its ability to pay the proffered wage in 2017, including its federal tax return and evidence of wages it paid to the Beneficiary that year. However, the record does not contain regulatory-prescribed evidence of its ability to pay for 2018. 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. On remand, the Director should request such regulatory-required evidence and allow the Petitioner reasonable time to respond.

III. CONCLUSION

As the Director's decision did not evaluate the Petitioner's continuing ability to pay the proffered wage form the priority date, we will remand the matter to the Director for further consideration.

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

Cite as *Matter of J-E- LLC*, ID# 05623962 (AAO Aug. 27, 2019)

[1] The annual proffered wage is $69,500.