U.S. Citizenship and Immigration Services

Non-Precedent Decision of the Administrative Appeals Office

In Re: 05904890

DATE: DEC. 3, 2019

Appeal of Texas Service Center Decision

Form I-140, Immigrant Petition for Skilled Worker

The Petitioner, an industrial textiles business, seeks to employ the Beneficiary as a senior process engineer. It requests skilled worker classification for the Beneficiary under the third preference immigrant category. 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" immigrant classification allows a U.S. employer to sponsor a foreign national for lawful permanent resident status to work in a position that requires at least two years of training or experience.

The Director of the Texas Service Center denied the petition on the ground that the Petitioner did not establish its continuing ability to pay the proffered wage from the priority date onward.

On appeal the Petitioner submits additional evidence and asserts that the documentation of record establishes its ability to pay the proffered wage.

In visa petition proceedings it is the Petitioner's burden to establish eligibility for the requested benefit. *See* 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.

II. ANALYSIS

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):

> Any petition filed by or for an employment-based immigrant which requires an offer of employment must be accompanied by evidence that the prospective United States employer has the ability to pay the proffered wage. 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 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 priority date[1] of the petition onward. In this case the proffered wage is $90,000 per year and the priority date is December 11, 2017.

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. In this case, the Petitioner indicates that it has employed the Beneficiary since December 2011. The record includes a copy of an annual pay statement for 2017 showing that the Beneficiary received gross pay of $83,427.36 that year, which was $6,572.64 less than the proffered wage. The Petitioner states that the Beneficiary did not receive a full year's pay in 2018 because his employment was terminated during the year when his H-1B visa expired and he departed the United States. Thus, the Petitioner has not established its ability to pay the proffered wage from the priority date onward based on wages paid to the Beneficiary.

If a petitioner has not employed the beneficiary and paid him (or her) a salary 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 statement(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 be considered able to pay the proffered wage during that year.

The record includes a copy of the first page of the Petitioner's federal income tax return, Form 1120, U.S. Corporation Income Tax Return, for 2017. As recorded on page 1, line 28, of the tax return, the Petitioner incurred a net loss of $190,541 in 2017. Current assets and liabilities were recorded in Schedule K of the Petitioner's tax return. Since that part of the return has not been submitted, however, we cannot determine the Petitioner's net current assets (or losses) for 2017. Therefore, the Petitioner

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

has not established its ability to pay the proffered wage in 2017 based on its net income or net current assets that year.

On appeal, the Petitioner submits a copy of the 2017 annual report and audited financial statement of its British parent, [redacted]. This company is a separate and distinct legal entity from the Petitioner, however, and its 2017 annual report does not contain a specific listing of the Petitioner's income, expenses, assets, and liabilities. Moreover, because a corporation is a separate and distinct legal entity from its owners and shareholders, the income and assets of its owners and shareholders cannot be considered in determining the petitioning corporation's ability to pay the proffered wage.[2] *See Matter of Aphrodite Investments, Ltd.*, 17 I&N Dec. 530 (Comm'r 1980). In a similar case the court in *Sitar v. Ashcroft*, 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." Thus, the financial resources of the Petitioner's parent company, [redacted], cannot be considered in determining the Petitioner's ability to pay the proffered wage.

The Petitioner asserts that it could utilize the funds in its business checking account with [redacted] to pay the Beneficiary's proffered wage. The Petitioner has submitted bank statements showing that the account balance stood at $378,131.31 at the end of 2017, and $287,392.04 at the end of 2018. While the regulation at 8 C.F.R. § 204.5(g)(2) allows for the submission of other evidence such as bank account records "in appropriate cases," bank account records are not among the three types of required evidence identified in the regulation – either annual reports, federal tax returns, or audited financial statements – to demonstrate a petitioner's ability to pay the proffered wage. 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 account constitutes a financial resource separate and apart from its current assets that would have been recorded in Schedule K of its federal income tax returns. As previously indicated, the Petitioner has not submitted Schedule K (or anything else after page one) of its tax return for 2017. Therefore, the Petitioner has not established its continuing ability to pay the proffered wage from the priority date onward based on its bank account at [redacted].

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. 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

[2] Even if we did consider the financial resources of the Petitioner's parent, we note that its 2017 annual report and audited financial statement indicate that its profit (net income) was only $2,881 for the last nine months of 2017 and its net current assets at the end of 2017 were only $4,574. Neither of these figures was sufficient to cover the $6,572.74 deficiency between the proffered wage and the wages paid to the Beneficiary in 2017.

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 2004 and had 58 U.S. employees at the time the petition was filed in 2018, though these numbers appear less than certain since the Petitioner has conflated the business of its parent corporation(s) with its own in much of the documentation submitted in these proceedings. The record includes page one of the Petitioner's federal income tax returns for each of the years 2013-2017,[3] which recorded gross receipts of approximately $16.9 million in 2013, $17.7 million in 2014, $15 million in 2015, $13.5 million in 2016, and $10.9 million for the last nine months of 2017. During those same years the tax returns recorded net income of $1,044,141 in 2013, a net loss of $579,704 in 2014, net income of $777,681 in 2015, net income of $43,318 in 2016, and the aforementioned net loss of $190,541 in 2017. Expenditures on salaries and wages were approximately $1 million in 2013, $839,840 in 2014, $942,000 in 2015, $993,000 in 2016, and $741,000 in the last nine months of 2017. The foregoing figures indicate a fluctuating business during that five-year period with a modest decrease in gross revenues from 2013 to 2017, and amid stark yearly differences a sharp decline in net income of nearly $1.2 million from 2013 to 2017. Thus, the business did not look nearly as healthy in 2017 as it looked in 2013. The Petitioner does not claim any uncharacteristic expenses in 2017, or submit any evidence regarding its overall reputation in the industry. The Petitioner cites a $5 million loan facility agreement with its ultimate parent [redacted], the parent of [redacted] which gives the Petitioner access to cash via intracompany funding for various business purposes. The provisions of the agreement are not sufficiently clear, however, to draw definitive conclusions about whether the Petitioner could utilize this funding mechanism for the purpose of paying the Beneficiary's full proffered wage. There is no specific confirmation from the ultimate parent that the loan facility agreement could be used for this purpose. Based on the record before us 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 December 11, 2017, onward.

Finally, even if we were persuaded by the documentation as a whole that the Petitioner could pay the proffered wage, we would not sustain the appeal based on the present record because the Petitioner has not submitted any of the required forms of documentation specified in 8 C.F.R. § 204.5(g)(2). The regulation requires either an annual report, a federal tax return, or an audited financial statement for the priority date year of 2017 (and any subsequent year USCIS might request). The Director requested the submission of at least one of those documents for the priority date year 2017 in the request for evidence (RFE) he sent to the Petitioner. In response to the RFE the Petitioner submitted an annual report and audited financial statement for its parent, but not for itself. The Petitioner submitted page one of its federal tax return for 2017, as well as for the four previous years, but no complete return for 2017 as specified in the RFE. The failure to submit a complete tax return for 2017 has prevented USCIS from determining the Petitioner's net current assets (or liabilities) in the priority date year, as well as other aspects of the Petitioner's financial situation. 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.

[3] The tax returns for 2013-2016 covered the fiscal year April 1 to March 31. The 2017 tax return covered the last nine months of calendar year 2017.

III. CONCLUSION

For the reasons discussed above, the Petitioner has not established its continuing ability to pay the proffered wage from the priority date onward.

ORDER: The appeal is dismissed.