U.S. Citizenship and Immigration Services

Non-Precedent Decision of the Administrative Appeals Office

In Re: 13111762

DATE: DEC. 14, 2020

Appeal of Nebraska Service Center Decision

Form I-140, Immigrant Petition for a Professional

The Petitioner, a freight trucking business, seeks to employ the Beneficiary as a management analyst. It requests professional classification for the Beneficiary under the third preference immigrant category. Immigration and Nationality 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 from the priority date onward. 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 February 2020, accompanied by a labor certification that was filed with the DOL on March 2, 2019. Thus, the priority date of the petition is March 2, 2019, 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 management analyst position is $58,573 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 there is no evidence that the Beneficiary has been employed by the Petitioner since the priority date. Therefore, the Petitioner cannot establish its ability to pay the proffered wage from the priority date of March 2, 2019, 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.

The record includes a copy of the Petitioner's federal income tax return, Form 1120S, U.S. Income Tax Return for an S Corporation, for 2019.[2] As recorded in that tax return, the Petitioner had net

[1] The priority date of an employment-based immigrant petition is the date the underlying labor certification was filed with the DOL. See 8 C.F.R. § 204.5(d).

[2] The record also includes a copy of the Petitioner's State of California income tax return for 2019, which tracks its federal income tax return.

income of $39,545[3] and net current assets of -$183,736.[4] Thus, the Petitioner had no net current assets in 2019, but rather net current liabilities, and had net income below the proffered wage by approximately $19,000. Therefore, the Petitioner has not established its ability to pay the proffered wage in 2019 based on either net income or net current assets that year.

On appeal the Petitioner submits profit and loss statements for the 11-month period of January through November 2019 and the five-month period of January through May 2020, superseding a previously submitted profit and loss statement for the three-month period of January through May 2020. The Petitioner also submits a balance sheet as of May 31, 2020. The balance sheet and the profit and loss statements are all unaudited, however, and therefore do not meet 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. As stated by the Director in his decision, unaudited financial statements are the representations of management and, as such, are unreliable evidence of the Petitioner's ability to pay the proffered wage. The Petitioner has not remedied this evidentiary deficiency on appeal by submitting any audited financial statement for the post-priority date period after March 2, 2019.

On appeal the Petitioner resubmits copies of the monthly statements from its business checking account with [redacted] Bank from October 2019 through March 2020, which the Director already considered in his decision. The Petitioner asserts that it could utilize the funds in its business checking account to pay the proffered wage. While the regulation at 8 C.F.R. § 204.5(g)(2) states that USCIS may consider bank account records "in appropriate cases," they 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 distinct from the current assets it records in Schedule L of its federal tax return(s). Finally, as the bank account statements cover only six months in late 2019 and early 2020, they do not demonstrate the Petitioner's ability to pay the proffered wage either before October 2019 or after March 2020. Thus, the Petitioner has not established its continuing ability to pay the proffered wage from the priority date of March 2, 2019, onward based on its bank account with [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. 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

[3] If an S corporation, like the Petitioner, has income exclusively from a trade or business, USCIS considers its net income (or loss) to be the figure for "Ordinary business income (loss)" on page 1, line 21, of the Form 1120S. However, if there are relevant entries for additional income, credits, deductions or other adjustments from sources other than a trade or business, they are reported on Schedule K of the Form 1120S, and the corporation's net income or loss will be found in line 18 of Schedule K ("Income/loss reconciliation").

[4] For a corporation net current assets (or liabilities) are the difference between its current assets, entered on lines 1-6 of Schedule L, and its current liabilities, entered on lines 16-18 of Schedule L.

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 was established in 2011 and had four employees at the time the petition was filed in early 2020. Aside from the documentation already discussed in this decision, the only other evidence of the Beneficiary's financial situation are copies of its federal income tax returns for the years 2017 and 2018. Together with the previously discussed tax return for 2019, they show that the Petitioner's gross receipts over that three-year time period were $1,888,157 in 2017, $1,709,665 in 2018, and $1,839,634 in 2019. Thus, the Petitioner's business volume showed stability, but not growth, over the three years from 2017 through 2019. The Petitioner's tax returns recorded net losses in 2017 (-$30,271) and 2018 (-$47,990) before rebounding in 2019 to record net income of $39,545. The tax returns also recorded substantial net current liabilities all three of those years – increasing each year from -$43,640 in 2017, to -$157,138 in 2018, to -$183,736 in 2019. There is no evidence that these negative figures resulted from any uncharacteristic expenditures or losses. The only other documentation of the Petitioner's finances are the balance sheet and the profit and loss statements, all unaudited, and the bank account statements. As previously discussed, the income figures from unaudited financial statements 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 current asset in the Petitioner's federal income tax return(s). The documentation in the record does not demonstrate a historic pattern of growth for the Petitioner, and there is no independent objective evidence of the Petitioner's reputation in the industry. We conclude, therefore, that the Petitioner has not demonstrated its ability to pay the proffered wage of $58,573 per year from the priority date onward based on the totality of its circumstances.

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 March 2, 2019, onward. The appeal will be dismissed for this reason.

ORDER: The appeal is dismissed.