U.S. Citizenship and Immigration Services

Non-Precedent Decision of the Administrative Appeals Office

MATTER OF N-A-, LLC

DATE: DEC. 18, 2018

APPEAL OF TEXAS SERVICE CENTER DECISION

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

The Petitioner, a custom furniture maker, seeks to employ the Beneficiary as a master furniture maker. It requests classification of the Beneficiary as a skilled worker 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 of April 21, 2017, onward. On appeal the Petitioner asserts the evidence of record establishes its ability to pay the proffered wage, and that the Director should not have denied the petition in any event because no federal income tax return had been filed for 2017 at the time of the Director's decision was issued.

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.

To be eligible for the classification requested, 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. The priority date in this case is April 21, 2017. The labor certification states that the wage offered for the job of master furniture maker is $38,064 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 not been employed by the Petitioner since the priority date.

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.

In this case the Director issued a request for evidence (RFE) in March 2018 in which the Petitioner was requested to submit at least one of the types of evidence – either an annual report, or a federal income tax return, or an audited financial statement – required by the regulation at 8 C.F.R. § 204.5(g)(2) for each of the years 2016 and 2017. In its response to the RFE, submitted to USCIS on June 1, 2018, the Petitioner submitted copies of certain federal tax filings for 2017, but no federal income tax return for 2016 or 2017, nor any annual report or audited financial statement for 2016 or 2017. The Director denied the petition on June 26, 2018, stating that the Petitioner, among other

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

evidentiary shortcomings, "failed to submit primary regulatory evidence" of its ability to pay the proffered wage.

On appeal the Petitioner asserts that it did not submit copies of its federal income tax returns with its initial evidence because "it has not yet filed tax returns." While the Petitioner had certainly not filed its 2017 federal income tax return at the time the instant Form I-140, Immigrant Petition for Alien Worker (I-140 petition), was filed and the initial evidence submitted in December 2017, it should have been able to do so at the time it responded to the Director's RFE in June 2018, or when its appeal was filed in August 2018. The Petitioner has provided no explanation why a copy of its 2017 federal income tax return, which would ordinarily have been due in April 2018, could not be provided with its response to the RFE or in support of its appeal. Moreover, the Petitioner has not explained why a copy of its 2016 federal income tax return, also requested in the RFE, could not have been furnished in response to the RFE or on appeal. It is the Petitioner's burden to establish eligibility for the immigration benefit it seeks. Section 291 of the Act, 8 U.S.C. § 1361; *Matter of Skirball Cultural Ctr.*, 25 I&N Dec. 799, 806 (AAO 2012). In this case the Petitioner has not met its burden of proof because it has failed to submit any of the three types of alternative evidence required by 8 C.F.R. § 204.5(g)(2) – either a 2017 annual report, or a 2017 federal income tax return, or an audited financial statement for 2017 – to establish its ability to pay the proffered wage from the priority date of April 21, 2017, onward.

The Petitioner asserts that we should also consider the totality of its circumstances, including the overall magnitude of its business activities, in determining the Petitioner's ability to pay the proffered wage, citing *Matter of Sonegawa*, 12 I&N Dec. 612 (Reg'l Comm'r 1967). 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 expenditures or losses, and any other evidence that USCIS deems relevant to the petitioner's ability to pay the proffered wage.

The Petitioner stated on the I-140 petition that it began operations in 1985, had nine employees at the time this petition was filed in 2017, and had gross annual income of $712,405. The latter figure is not corroborated in the record, however, since the Petitioner has not submitted any federal income tax return, audited financial statement, or annual report. The Petitioner has submitted copies of its Forms 941, Employer's Quarterly Federal Tax Returns, for the four quarter of 2017, which recorded wages paid to the Petitioner's employees and associated taxes during 2017. But no conclusions can be drawn from these figures about the Petitioner's ability to pay the Beneficiary's proffered wage in 2017. The Petitioner has also submitted copies of monthly account statements from Sun Trust Bank which showed closing monthly balances between May 2017 and April 2018 ranging from a high of $11,695.88 to a low of $2,124.80, all of which were far below the proffered wage of $38,064. Even if the monthly balances were higher, bank statements simply show an account balance on a given date, not the account holder's sustainable ability to pay the proffered wage. The only other relevant

evidence in the record is a copy of page one of the Petitioner's 1995 federal income tax return, Form 1120S, which recorded net income of $65,424 that year. This earlier tax return was submitted in support of a prior I-140 petition filed by the Petitioner on behalf of the Beneficiary (receipt number [redacted] which was approved in 1997. Though the net income figure in 1995 exceeded the proffered wage of the instant petition, it preceded the priority date of this petition by 22 years and thus has little probative value in this proceeding, especially since there are no other financial or business records of the Petitioner between 1995 and 2017. The documents in the record do not demonstrate a sustained history of growth or financial stability for the Petitioner. For all of the reasons discussed above, the Petitioner has not established its ability to pay the Beneficiary's proffered wage of $38,064 per year from the priority date on April 21, 2017, onward.

III. CONCLUSION

We will dismiss the appeal because the Petitioner has not established its ability to pay the proffered wage from the priority date of April 21, 2017, onward.

ORDER: The appeal is dismissed.

Cite as *Matter of N-A, LLC*, ID# 2307769 (AAO Dec. 18, 2018)