U.S. Citizenship and Immigration Services

Non-Precedent Decision of the Administrative Appeals Office

MATTER OF S-, INC.

DATE: DEC. 22, 2017

APPEAL OF TEXAS SERVICE CENTER DECISION

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

The Petitioner, a supplier of software products, seeks to employ the Beneficiary as a computer programmer. It requests classification of the Beneficiary as a professional under the third preference immigrant category. *See* 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 on the ground that the evidence of record did not establish that the Petitioner had the continuing ability to pay the proffered wage from the priority date onward.

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

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).[1] *See* section 212(a)(5)(A)(i) of the Act, 8 U.S.C. § 1182(a)(5)(A)(i). By approving the labor certification, 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.

[1] The date the labor certification is filed is called the "priority date." *See* 8 C.F.R. § 204.5(d). The Petitioner must establish that all eligibility requirements for the petition have been satisfied from the priority date onward.

A petitioner must establish that it has the ability to pay the proffered wage, as stated on the labor certification, from the priority date until the beneficiary obtains lawful permanent residence. *See* 8 C.F.R. § 204.5(g)(2). Evidence of ability to pay must include copies of annual reports, federal income tax returns, or audited financial statements. *Id.*

II. ANALYSIS

At issue in this case is whether the Petitioner has established its continuing ability to pay the proffered wage from the priority date onward. The Petitioner's Form I-140, Immigrant Petition for Alien Worker, was accompanied by a labor certification with a priority date of October 15, 2015. Section G of the labor certification states that the offered wage for the computer programmer position is $66,500 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. If the petitioner establishes by documentary evidence that it employed the beneficiary at a salary equal to or greater than the proffered wage, the evidence is considered proof of the petitioner's ability to pay the proffered wage.

In this case, the Petitioner indicates that it has employed the Beneficiary since 2011. It has submitted a copy of the Form W-2, Wage and Tax Statement, it issued to the Beneficiary for 2015, which states that the Beneficiary received "wages, tips, other compensation" in the amount of $53,460 that year. This figure was approximately $13,000 below the proffered wage. The Petitioner has also submitted copies of the bimonthly pay statements it issued to the Beneficiary for the pay periods beginning on October 1, 2015, and ending on May 31, 2016. The Petitioner asserts that it began paying the Beneficiary the proffered wage of $66,500 per year in mid-October 2015, and that it increased her salary to $69,169 in mid-April 2016. The Beneficiary's pay statements, however, do not state her annual salary. For the five-month period of January through May 2016 the statements show that the Beneficiary received "adjusted earnings" of $28,112.39 and "gross earnings" of $30,701.79. Without the full year of pay statements for 2016, however, we cannot to determine whether the Beneficiary's pay equaled or exceeded the proffered wage in 2016. Thus, the Petitioner has not established its continuing ability to pay the proffered wage since the priority date of October 15, 2015, based on wages it actually paid to the Beneficiary.

On appeal, the Petitioner asserts that it has paid the Beneficiary the proffered wage rate since the priority date of October 15, 2015, and therefore according to the language in a memorandum dated May 4, 2004, from William R. Yates, Associate Director of Operations, United States Citizenship and Immigration Services (USCIS), regarding the determination of a petitioner's ability to pay, it has established its continuing ability to pay the proffered wage from the priority date onward. *See* Memorandum from William R. Yates, Associate Director for Operations, USCIS, HQOPRD 90/16.45, *Determination of Ability to Pay under 8 CFR 204.5(g)(2)* 2 (May 4, 2004), http://www.uscis.gov/laws/policy-memoranda.

As we discussed above, however, the Petitioner has not established that its pay to the Beneficiary has equaled or exceeded the proffered wage at any time since the priority date.

If a petitioner does not establish that it has 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 income 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 be considered able to pay the proffered wage during that year.

In this case, the Petitioner has not submitted any federal income tax returns, annual reports, or audited financial statements for 2015 or 2016.[2] In its response to the Director's request for evidence, the Petitioner stated that it had filed an extension application with the Internal Revenue Service for its 2015 income tax return, but did not submit any annual reports or audited financial statements for that year. On appeal, the Petitioner has not submitted any form of required evidence for 2015 nor has the Petitioner explained the absence of this documentation. Without a form of regulatory required evidence of its ability to pay, per 8 C.F.R. § 204.5(g)(2), for the priority date year or anytime thereafter, the Petitioner cannot establish 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. 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.

However, the absence of any of the required forms of evidence identified in 8 C.F.R. § 204.5(g)(2) for the priority date year or any time thereafter greatly restricts out ability to consider the totality of the Petitioner's circumstances and precludes us from finding that the Petitioner has the ability to pay the proffered wage. Moreover, the historical evidence that was submitted, specifically tax returns for 2013 and 2014, show that the Petitioner experienced net losses and had net current liabilities in those years. Thus, the financial documentation in the record does not establish a historical pattern of growth for the Petitioner. To the contrary, the documents appear to show a pattern of losses, and the Petitioner does not claim that they involve uncharacteristic business expenditures or other anomalous

[2] The record does include copies of the Petitioner's federal income tax returns for 2013 and 2014, but they preceded the priority date of October 15, 2015.

situations. The record includes some industry publications and announcements which mention the Petitioner, but they do not demonstrate that the Petitioner has a reputation that stands out from competitors in the industry.

Considering the lack of regulatory required evidence of the Petitioner's ability to pay, along with the totality of the Petitioner's circumstances, we find that the Petitioner has not established its ability to pay the proffered wage of $66,500 per year from the priority date of October 15, 2015, onward.

III. CONCLUSION

The Petitioner has not established its continuing ability to pay the proffered wage from the priority date onward.

ORDER: The appeal is dismissed.

Cite as *Matter of S-, Inc.*, ID# 905871 (AAO Dec. 22, 2017)