U.S. Citizenship and Immigration Services

Non-Precedent Decision of the Administrative Appeals Office

In Re: 06894176

DATE: DEC. 23, 2019

Appeal of Texas Service Center Decision

Form I-140, Immigrant Petition for a Professional

The Petitioner, a learning and technology solutions business, seeks to employ the Beneficiary as a project leader, e-learning projects. It requests professional classification for the Beneficiary under the third preference immigrant category. Immigration and Nationality Act (the 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 Texas Service Center denied the petition on the ground that the Petitioner did not establish its ability to pay the proffered wage.

On appeal the Petitioner asserts that the Director did not properly calculate its ability to pay based on the documentation submitted and claims that the evidence of record establishes its ability to pay the proffered wage.

Upon *de novo* review, we will withdraw the Director's decision and remand the case for further consideration and the issuance of a new decision.

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 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 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 proffered wage in this case is $93,392 per year and the priority date is December 20, 2010, which was established in connection with an earlier Form I-140 petition filed by the Petitioner's predecessor-in-interest that was approved in 2011. The current petition was filed after the predecessor company was acquired by the Petitioner in 2018. In this petition, therefore, the Petitioner, as the successor entity, must establish its predecessor's ability to pay the proffered wage from the priority date until the date of transfer of ownership, as well as its own ability to pay the proffered wage from the date of ownership transfer forward. *See* 8 C.F.R. § 204.5(g)(2); *see also Matter of Dial Auto Repair Shop, Inc.*, 19 I&N Dec. 481, 482 (Comm'r 1986).

The evidence of record, including copies of the predecessor entity's federal income tax returns and the Beneficiary's Forms W-2, Wage and Tax Statements, establishes the predecessor's ability to pay the proffered wage from the priority date in 2010 through 2017. For 2018, however, the record is incomplete. The Director found in his decision that the Beneficiary's gross earnings from the Petitioner and its predecessor amounted to $74,406.96 in 2018, which was less than the proffered wage. At the time of the Director's decision no federal income tax returns for 2018 had been filed by the Petitioner or its predecessor. Nor is there any evidence that annual reports or audited financial statements were available from either entity at that time. Thus, it was not possible to determine whether the Petitioner and its predecessor had sufficient net income or net current assets to cover the difference between their respective wage payments to the Beneficiary and their respective portions of the proffered wage obligation in 2018. Instead, the Director looked at the predecessor's federal income tax return for 2017 and from that document made a determination about the predecessor's, as well as the Petitioner's, inability to pay the proffered wage in 2018.

Since no form of required evidence specified in 8 C.F.R. § 204.5(g)(2) was available for 2018 when the record was before the Director, we will remand this matter to the Director to request regulatory required evidence of the Petitioner's and its predecessor's ability to pay the proffered wage to the Beneficiary in 2018, as well as the proffered wages of any additional sponsored workers.

[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).

The Petitioner may also submit additional materials in support of the factors discussed in *Matter of Sonegawa*, 12 I&N Dec. 612, 614-15 (Reg'l Comm'r 1967), which permits USCIS to consider the totality of the circumstances affecting a petitioner's ability to pay the proffered wage.

III. CONCLUSION

For the reasons discussed above, we will remand this case to the Director for further consideration of the Petitioner's and its predecessor's ability to pay the proffered wage in 2018.

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