U.S. Citizenship and Immigration Services

Non-Precedent Decision of the Administrative Appeals Office

In Re: 01139382

DATE: FEB. 24, 2021

Appeal of Texas Service Center Decision

Form I-140, Immigrant Petition for an Alien Worker

The Petitioner, a poultry processing business, seeks to employ the Beneficiary as a poultry trimmer. It requests classification of the Beneficiary as an "other worker" under the third preference immigrant category. Immigration and Nationality Act section 203(b)(3)(A)(iii), 8 U.S.C. § 1153(B)(3)(A)(iii). This employment-based "EB-3" immigrant classification allows a U.S. employer to sponsor for lawful permanent resident status a foreign national who is capable of performing unskilled labor that requires less than two years of training or experience and is not of a temporary or seasonal nature.

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 of the instant Beneficiary as well as the proffered wages of the beneficiaries of all its other Form I-140 petitions. On appeal the Petitioner asserts that the evidence of record establishes its ability to pay all of its proffered wage obligations.

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

As indicated in the above regulation, the Petitioner must establish its continuing ability to pay the proffered wage from the priority date of the petition onward. In this case the proffered wage is $17,202 per year, and the priority date is November 18, 2016.

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.

There is no evidence that the Beneficiary in this case has ever been employed by the Petitioner. Therefore, the Petitioner cannot establish its ability to pay the proffered wage from the priority date of November 18, 2016, onward based on wages paid to the Beneficiary.

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 ordinarily be considered able to pay the proffered wage during that year. However, when a petitioner has filed other I-140 petitions it must establish that its job offer is realistic not only for the instant beneficiary, but also for the beneficiaries of its other I-140 petitions (I-140 beneficiaries). A petitioner's ability to pay the proffered wage is an essential element in evaluating whether a job offer is realistic. *See Matter of Great Wall*, 16 I&N Dec. 142 (Acting Reg'l Comm'r 1977). Accordingly, a petitioner must demonstrate its ability to pay the combined proffered

[1] The priority date of an employment-based immigrant petition is the date the underlying labor certification was filed with the DOL, in this case November 26, 2016. *See* 8 C.F.R. § 204.5(d).

wages of the instant beneficiary and every other I-140 beneficiary from the priority date of the instant petition until the other I-140 beneficiaries obtain lawful permanent resident status. *See Patel v. Johnson*, 2 F.Supp. 3d 108, 124 (D.Mass. 2014) (upholding our denial of a petition where a petitioner did not demonstrate its ability to pay multiple beneficiaries).[2]

In this case USCIS records indicated that the Petitioner had filed numerous other I-140 petitions. Therefore, the Director issued a request for evidence (RFE) on July 13, 2017, in which the Petitioner was asked to submit specific information about those other petitions and beneficiaries. The Petitioner was also requested to submit copies of its most recent federal income tax returns or audited financial statements.[3] In the RFE the Director referred to two pieces of evidence submitted with the petition. One was a "Private Company Financial Report" which the Director noted did not contain any audited financial statement to meet the requirements of 8 C.F.R. § 204.5(g)(2). The other was a letter from the Petitioner's chief financial officer (CFO) with alleged income and employee figures for 2016 (indicating that the Petitioner was a lucrative business employing well over 100 workers), which the Director indicated was not acceptable evidence of the Petitioner's ability to pay the proffered wage because multiple I-140 petitions had been filed in a short period of time.

In response to the RFE the Petitioner submitted additional evidence pertaining to its other I-140 beneficiaries. However, it did not submit copies of any federal income tax return or audited financial statement, as specifically requested. The Petitioner asserted that such documentation is not required from a U.S. employer with 100 or more workers under the regulation at 8 C.F.R. § 204.5(g)(2) or the Memorandum from William R. Yates, Associate Director For Operations, *Determination of Ability to Pay under 8 CFR 204.5(g)(2)*, HQOPRD 90/16.45, (May 4, 2004) (Yates Memorandum). Instead, the Petitioner submitted a document entitled "Unemployment Insurance Tax Information" with a list of figures for wages, taxes, and employees during the first quarter of 2017, and a copy of the letter from the Petitioner's CFO originally submitted with the petition, in addition to a copy of the Yates Memorandum.

In denying the petition the Director pointed out that the Petitioner's response to the RFE did not include any of the three types of evidence – either an annual report, or a federal tax return, or an audited financial statement – required by 8 C.F.R. § 204.5(g)(2) and requested in the RFE. The Director stated that USCIS has the discretionary authority under the regulation and the Yates Memorandum to accept additional types of evidence, like the Petitioner's Unemployment Insurance Tax Information document and the letter from its CFO, but is not obligated to do so. Since the Petitioner in this case had filed multiple I-140 petitions, the Director indicated that requesting a form of regulatory required evidence was warranted and the Petitioner's failure to submit such evidence precluded a material line of inquiry that was grounds for denying the petition, citing 8 C.F.R. § 103.2(b)(14).

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[2] The Petitioner's ability to pay the proffered wage of one of the other I-140 beneficiaries is not considered:

- After the other beneficiary obtains lawful permanent residence;
- If an I-140 petition filed on behalf of the other beneficiary has been withdrawn, revoked, or denied without a pending appeal or motion; or
- Before the priority date of the I-140 petition filed on behalf of the other beneficiary.

[3] The RFE also requested evidence pertaining to the Petitioner's recruitment for the proffered position and the terms of the labor certification (as well as the location of the intended employment), but these issues were not further discussed in the Director's denial decision.

On appeal the Petitioner reiterates its contention that the record establishes its ability to pay all of its proffered wage obligations, and resubmits copies of the Yates Memorandum, its Unemployment Insurance Tax Information document, and the CFO letter. The Petitioner asserts that in view of the regulation at 8 C.F.R. § 204.5(g)(2) stating that USCIS "may" accept a letter from an employer's financial officer stating that the employer has 100 or more workers and has the ability to pay its proffered wage obligations and the Yates Memorandum stating that USCIS is "not required to . . . request" a financial statement from an employer with 100 or more workers, the Director should have accepted the CFO letter and other financial documents submitted in support of this petition as sufficient evidence of the Petitioner's ability to pay its proffered wage obligations, and should have excused the submission of any regulatory required evidence.

We do not agree. The regulation at 8 C.F.R. § 204.5(g)(2), after identifying the three alternative types of required documentation, provides that USCIS "*may* accept a statement from a financial officer" of an employer with 100 or more workers and/or "additional evidence, such as profit/loss statements, bank account records, or personnel records" as evidence of a petitioner's ability to pay the proffered wage. The regulation does not require USCIS to accept such evidence. In other words, it is entirely within the discretion of USCIS to decide whether a letter from the employer's CFO and/or other types of financial documents are sufficient to establish a petitioner's ability to pay its proffered wage obligations. Likewise, the Yates Memorandum states that "CIS adjudicators are **not** required to accept, request, or RFE for a financial statement from U.S. employers who employ 100 or more workers . . . or additional financial evidence" to establish the employer's ability to pay its proffered wage obligations.[4] "Acceptance of these documents by CIS is **discretionary**," the Yates memorandum emphasizes, and need not be accepted if the adjudicator has any doubt about whether such documents establish an employer's ability to meet its proffered wage obligation(s). Thus, there is no merit to the Petitioner's contention that the Director misinterpreted the Yates Memorandum and the regulation, and should necessarily have excused the submission of any regulatory required evidence.

The Director specifically requested the submission of at least one type of regulatory required evidence in the RFE sent to the Petitioner on July 13, 2017. In response to the RFE the Petitioner could have submitted its federal tax return or an audited financial statement for the priority date year of 2016, in compliance with 8 C.F.R. § 204.5(g)(2) and the Director's RFE. It chose not to do so. The Director noted the absence of such documentation in his decision. On appeal the Petitioner had another chance to submit its federal tax return or an audited financial statement for 2016, but once again chose not to do so. 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.

Since the Petitioner has not submitted the requested regulatory required evidence of its ability to meet its proffered wage obligations, we are precluded from reaching any determination of whether the Petitioner can pay all of its proffered wages based on the totality of its circumstances, as in *Matter of Sonegawa*, 12 I&N Dec. 612, 614-15 (Reg'l Comm'r 1967).

[4] The Yates Memorandum also emphasizes that regardless of the number of employees a petitioner employs USCIS adjudicators are not required to accept, request, or RFE for additional financial evidence outside of regulatory required evidence.

III. CONCLUSION

For the reasons discussed above, the Petitioner has not established its continuing ability to pay the proffered wage of the instant Beneficiary and the proffered wages of all its other I-140 beneficiaries from the priority date of November 18, 2016, onward. The appeal will be dismissed for this reason.

ORDER: The appeal is dismissed.