U.S. Citizenship and Immigration Services

Non-Precedent Decision of the Administrative Appeals Office

In Re: 06092689

DATE: JAN. 16, 2020

Appeal of Nebraska Service Center Decision

Form I-140, Immigrant Petition for a Skilled Worker

The Petitioner, a newspaper publisher, seeks to employ the Beneficiary as a graphic designer. It requests skilled worker classification for the Beneficiary 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 Nebraska Service Center initially approved the petition, but subsequently revoked the approval. The Director found that the Petitioner did not establish its ability to pay the proffered wage from the priority date onward, did not establish that it is the successor-in-interest to the company that filed the labor certification, and did not establish that the petition is supported by a valid labor certification. On appeal the Petitioner asserts that the Director misapplied the law to the evidence of record and that previously submitted documentation refutes the Director's findings in the revocation decision.

Upon *de novo* review, we will withdraw the Director's decision. We will 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.

Section 205 of the Act, 8 U.S.C. § 1155, provides that the Secretary of Homeland Security may "for good and sufficient cause, revoke the approval of any petition." By regulation this revocation authority is delegated to any USCIS officer who is authorized to approve an immigrant visa petition "when the necessity for the revocation comes to the attention of [USCIS]." 8 C.F.R. § 205.2(a). USCIS must give the petitioner notice of its intent to revoke the prior approval of the petition and the opportunity to submit evidence in opposition thereto, before proceeding with written notice of revocation. *See* 8 C.F.R. § 205.2(b) and (c). A notice of intent to revoke (NOIR) "is not properly issued unless there is 'good and sufficient cause' and the notice includes a specific statement not only of the facts underlying the proposed action, but also of the supporting evidence." *Matter of Estime*, 19 I&N Dec. 450, 451 (BIA 1987). Per *Matter of Estime*, "[i]n determining what is 'good and sufficient cause' for the issuance of a notice of intention to revoke, we ask whether the evidence of record at the time the notice was issued, if unexplained and unrebutted, would have warranted a denial based on the petitioner's failure to meet his or her burden of proof." *Id.*

II. ANALYSIS

A. Procedural History

The labor certification underlying the Petitioner's Form I-140, Immigrant Petition for Alien Worker (I-140 petition), was filed by [redacted] FEIN (Federal Employer Identification Number) [redacted], a subsidiary of [redacted], on January 24, 2018. Prior to the labor certification's approval the Petitioner purchased [redacted] in an "Agreement for Purchase and Sale of Assets" dated June 27, 2018. The labor certification was approved by the DOL in September 2018 and submitted to USCIS along with the I-140 petition that was filed by the Petitioner, FEIN [redacted], in November 2018. The I-140 petition was approved by USCIS that same month.

In January 2019, however, the Director issued a NOIR that discussed a number of shortcomings in the evidence of record. The Director indicated that the documentation submitted with the I-140 petition did not establish the ability of either the Petitioner, or [redacted], or [redacted] to pay the proffered wage of $38,854 per year from the priority date of January 24, 2018,[1] onward. The Director also stated that because the evidence did not show that [redacted] had the ability to pay the proffered wage from the priority date until the date of its ownership transfer to the Petitioner, the Petitioner had not established its eligibility for the immigration benefit requested as a successor-in-interest for the labor certification filed by [redacted]. As a result, the Director indicated that the petition was not supported by a valid labor certification.

In response to the NOIR the Petitioner submitted additional documentation including copies of its federal income tax return (Form 1120) for 2018; the Forms 941, Employer's QUARTERLY Federal

[1] The priority date of an I-140 petition is the date underlying the labor certification was filed with the DOL. *See* 8 C.F.R. § 204.5(d).

Tax Returns, filed by [redacted] and [redacted] for the first two quarters of 2018; and the Beneficiary's Forms W-2, Wage and Tax Statements, from [redacted] and the Petitioner for 2018.[2]

In the revocation decision the Director found that consolidated federal income tax returns from [redacted] could not be utilized to establish the Petitioner's ability to pay the proffered wage because [redacted] is a separate and distinct legal entity from the Petitioner and had no legal obligation to pay the Beneficiary's proffered wage, citing *Matter of Aphrodite Investments, Ltd.*, 17 I&N Dec. 530 (Comm'r 1980), and *Sitar Restaurant v. Ashcroft*, 2003 WL 22203713, *3 (D. Mass. Sept. 18, 2003). The Director also found that the record did not establish the ability of [redacted] to pay the proffered wage between the priority date in January 2018 and the transfer of its ownership to the Petitioner in June 2018. The Director concluded that the Petitioner did not establish that it is a successor-in-interest to [redacted], and as a consequence that the labor certification approved for [redacted] does not support the instant petition.[3]

On appeal the Petitioner asserts that the consolidated federal income tax return(s) of [redacted] the parent corporation of [redacted] should be taken into consideration in determining the ability of [redacted] to pay the proffered wage prior to the transfer of its ownership to the Petitioner, and that save for this issue the record establishes the successor-in-interest relationship between the Petitioner and [redacted]

B. Ability to Pay the Proffered Wage

To be eligible for the classification requested 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

[2] The record indicates that the Beneficiary began working for [redacted] in 2015 and continued working for the organization after its purchase by the Petitioner in 2018.

[3] Since the Petitioner is a different entity than the labor certification employer, it must establish that it is a successor-in-interest to that entity. *See Matter of Dial Auto Repair Shop, Inc.*, 19 I&N Dec. 481 (Comm'r 1986). The Petitioner may establish a valid successor relationship for immigration purposes if it satisfies three condition. First, it must fully describe and document the transaction transferring ownership of the predecessor. Second, it must demonstrate that the job opportunity is the same as originally offered on the labor certification. A labor certification is only valid for the particular job opportunity stated on the application form. 20 C.F.R. § 656.30(c). Third, the Petitioner must prove by a preponderance of the evidence that it is eligible for the immigrant visa in all respects, including establishing the predecessor's ability to pay the proffered wage from the priority date until the date of ownership transfer to the Petitioner.

> statements, bank account records, or personnel records, may be submitted by the petitioner or requested by [USCIS].

Thus, the Petitioner must establish its continuing ability to pay the proffered wage from the priority date onward. Since the I-140 petition was filed after the company that filed the labor certification, [redacted] was acquired by the Petitioner, the Petitioner must establish that [redacted] had the ability to pay the proffered wage from the priority date until the date its ownership was transferred to the Petitioner, 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).

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.

As previously indicated, the proffered wage in this case is $38,854 per year and the priority date is January 24, 2018. The Beneficiary's Forms W-2 for 2018 show that he received gross pay of $15,835.61 from [redacted] and $20,166.18 from the Petitioner, which adds up to $36,000.99 for the year as a whole. Since this sum was $2,853.01 less than the proffered wage, the Petitioner has not established its ability to pay the proffered wage from the priority date onward based on the wages it and [redacted] paid to the Beneficiary in 2018.

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 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.

The Petitioner's federal income tax return for 2018 recorded net income of $24,246 and net current assets of $140,210.[4] Since each of these figures exceeded the difference between the proffered wage and the wages paid to the Beneficiary in 2018, the Petitioner has established its ability to pay the proffered wage from June 27, 2018, the date it assumed ownership of [redacted] through the end of the year.

There is, however, is no 2018 federal income tax return for [redacted] the entity that filed the labor certification, because it was a subsidiary within a controlled group whose parent corporation, [redacted]

[4] For a C Corporation, like the Petitioner, net income (or loss) is recorded on page 1, line 28, of the Form 1120, and net current assets (or liabilities) are recorded in Schedule L as the difference between current assets listed on lines 1-6 and current liabilities listed on lines 16-18.

[redacted] files a consolidated tax return for all its subsidiaries. The record includes a copy of [redacted]'s federal income tax return for the pre-priority date year of 2017 which contained no information concerning the net income (or loss) and net current assets (or liabilities) of the individual subsidiaries. We may presume that [redacted] filed the same sort of consolidated tax return for 2018. Thus, the Petitioner cannot establish the ability of [redacted] to pay the proffered wage from the priority date in January 2018 through the date of its sale to the Petitioner in June 2018 based on net income or net current assets figures in a federal income tax return.

In view of the unavailability of a federal tax return for [redacted], the other two types of required regulatory evidence in 8 C.F.R. § 204.5(g)(2) – an annual report or an audited financial statement – acquire added importance. We will remand this matter to the Director to afford the Petitioner the opportunity to submit an annual report or an audited financial statement as evidence of the ability of [redacted] to pay the proffered wage from the priority date until the date of its ownership transfer to the Petitioner.

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 allows USCIS to consider the totality of the circumstances affecting a petitioner's ability to pay the proffered wage.

Regarding the successor-in-interest issue, the Director acknowledged in the NOIR that the first two conditions of a successor-in-interest relationship between [redacted] and the Petitioner were met, and the revocation decision makes clear that the only missing element of the third condition is proof of the Petitioner's ability to pay the proffered wage. Therefore, if the Petitioner on remand can establish the ability of [redacted] to pay the proffered wage from the priority date until the date of its ownership transfer to the Petitioner, it will have met all of the conditions to establish its successor-in-interest relationship to [redacted]. In such case the labor certification filed by [redacted] would fully support the I-140 petition.

III. CONCLUSION

We will remand this case for further consideration of the ability of [redacted] the entity that filed the labor certification, to pay the proffered wage from the priority date until the date its ownership was transferred to the Petitioner. In accord with the foregoing discussion the Director may request additional evidence from the Petitioner. The Director shall then issue a new decision.

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