U.S. Citizenship and Immigration Services

Non-Precedent Decision of the Administrative Appeals Office

MATTER OF J-D-D-, INC.

DATE: JAN. 24, 2018

MOTION ON ADMINISTRATIVE APPEALS OFFICE DECISION

PETITION: I-140, IMMIGRANT PETITION FOR ALIEN WORKER

The Petitioner, a franchise restaurant operator, seeks to employ the Beneficiary as a quality control manager. It requests classification of the Beneficiary as a skilled worker under the third preference immigrant category. *See* Immigration and Nationality Act (the Act) section 203(b)(3)(A)(i), 8 U.S.C. § 1153(b)(3)(A)(i). This employment-based immigrant classification allows a U.S. employer to sponsor a foreign national with at least two years of training or experience for lawful permanent resident status.

The Director of the Texas Service Center denied the petition on the grounds that the Petitioner did not establish (1) its continuing ability to pay the proffered wage from the priority date onward, (2) that the Beneficiary had the minimum amount of experience required for the offered position, and (3) the *bona fides* of the job offer to the Beneficiary. The Director also invalidated the accompanying labor certification on the ground that the Petitioner and the Beneficiary willfully misrepresented a material fact.

The Petitioner filed an appeal, which we dismissed, affirming the Director's findings that the Petitioner did not establish its continuing ability to pay the proffered wage and did not establish that the Beneficiary met the minimum experience requirement for the offered position. We also found that the *bona fides* of the job opportunity for U.S. workers had not been established. Since this issue was not addressed by the Director, we advised that in any future filings the Petitioner must submit documentation of its recruitment efforts during the labor certification process. We further found that the evidence did establish the *bona fides* of the job offer to the Beneficiary and concluded that the record did not support the invalidation of the labor certification. Accordingly, we withdrew the Director's contrary finding and reinstated the labor certification.

The matter is now before us on a motion to reopen and a motion to reconsider. Upon review, we will deny the motions.

I. LAW

A motion to reopen must state new facts and be supported by documentary evidence. 8 C.F.R. § 103.5(a)(2). A motion to reconsider must establish that our decision was based on an incorrect application of law or policy and that the decision was incorrect based on the evidence in the record

of proceedings at the time of the decision. 8 C.F.R. § 103.5(a)(3). A motion to reconsider must be supported by a pertinent precedent or adopted decision, statutory or regulatory provision, or statement of U.S. Citizenship and Immigration Services (USCIS) or Department of Homeland Security (DHS) policy. *Id.*

We may grant a motion that satisfies these requirements and demonstrates eligibility for the requested immigration benefit.

II. ANALYSIS

A. Motion to Reopen

Although the Petitioner has submitted new facts, the record on motion does not demonstrate that the Petitioner has the ability to pay the proffered wage, that the Beneficiary meets the minimum experience requirement for the position of quality control manager, or that the position represents a *bona fide* job opportunity for U.S. workers.

1. Ability to Pay the Proffered Wage

A petitioner must establish that it has the ability to pay the proffered wage, as stated on the labor certification, from the priority date of the petition until the beneficiary obtains lawful permanent residence. 8 C.F.R. § 204.5(g)(2). The proffered wage in this case is $56,000 per year. The priority date is April 11, 2008.

In our previous decision we found that the Petitioner had established its ability to pay the proffered wage during the fiscal year of October 1, 2011, to September 30 2012, based on its net income as recorded on its federal income tax return, and that it also established its ability to pay the proffered wage in the fiscal years of 2009-10 and 2010-11 based on a combination of wages paid to the Beneficiary and its net current assets in those fiscal years. For all other time periods from 2008 to 2015, however, the Petitioner did not establish its ability to pay the proffered wage based on wages paid to the Beneficiary and/or the net income and net current assets on its federal income tax returns. Nor did any other evidence in the record establish the Petitioner's continuing ability to pay the proffered wage from the priority date onward.

On motion the Petitioner submits a recapitulation of key figures from its federal income tax returns for the years 2007-2015 (which were already in the record), as well as new evidence of its payments to the Beneficiary in the years 2013-2016, including Forms W-2 for 2013 and 2015 and payroll statements for 2014 and 2016. This new evidence shows that the Beneficiary was paid below the prevailing wage in each of those years and that the Petitioner's federal income tax returns for the fiscal years ending on September 30, 2013, 2014, and 2015, recorded net losses and net current liabilities. Thus, the Petitioner had no net income and no net current assets in any of the years 2013, 2014, and 2015 with which to cover the difference between the proffered wage and the wages paid to the Beneficiary in those years. The Petitioner has not submitted its federal income tax return for the

fiscal year ending on September 30, 2016, so there is no evidence that it had any net income or net current assets with which to cover the difference between the proffered wage and the wages paid to the Beneficiary in 2016. Additionally, the Petitioner did not submit any new evidence regarding its ability to pay from the priority date in 2008 through September 30, 2009.

While we may consider the totality of the Petitioner's circumstances in assessing its ability to pay the proffered wage, *see Matter of Sonegawa*, 12 I&N Dec. 612, 614-15 (Reg'l Comm'r 1967), we already conducted a totality of the circumstances analysis in our previous decision. The only new evidence submitted on motion documents the fact that the Beneficiary's pay was below the proffered wage in four consecutive years, 2013-2016. No further evidence has been submitted to establish, based on the totality of its circumstances, that the Petitioner has been continuously able to pay the full proffered wage of $56,000 per year from the priority date of April 11, 2008, up to the present.

For the reasons discussed above, the new evidence submitted on motion does not establish the Petitioner's continuing ability to pay the proffered wage from the priority date onward.

2. Experience Requirement

A petitioner must establish that the beneficiary has all of the experience specified on the labor certification as of the petition's priority date. *See Matter of Wing's Tea House*, 16 I&N Dec. 158 (Acting Reg'l Comm'r 1977). In this case the labor certification requires 48 months of experience in the job offered (quality control manager) and asserts that the Beneficiary acquired the requisite experience before the priority date of April 11, 2008, by working for in Israel as a shift manager of quality control from February 1995 to September 2005.

In our previous decision we found that letters from verifying the Beneficiary's prior employment in the years 1995-2005 did not establish that the Beneficiary met the experience requirement of the labor certification. letters indicated that from February 1995 to 2002 the Beneficiary worked as a line operator, then as a lead operator, then as a shift manager coordinator, and that sometime in 2002 he was promoted to shift manager of quality control. Based on the job duties described in the letters we found that the Beneficiary's initial positions with did not qualify as experience in the proffered position of quality control manager. While we did find that the Beneficiary's subsequent position with as shift manager of quality control from sometime in 2002 until September 30, 2005, qualifies as experience in the job offered, we found that it did not meet the labor certification requirement of at least four years of qualifying experience. We also discussed a letter from an Israeli kibbutz indicating that the Beneficiary was quality controller in the chicken hatchery from 1989 to 1993 (a job not listed in the labor certification) and found that this work did not qualify as experience in the job offered.

On motion the Beneficiary resubmits copies of the employment verification letters from and the kibbutz that were already in the record. The Petitioner claims that the Beneficiary exceeds the

[1] The employer was misidentified in the labor certification as

labor certification requirement of at least four years of experience as a quality control manager, but does not state any new facts and does not submit any new documentation in support of its claim. Accordingly, there no reason to alter our previous finding that the Petitioner has not established that the Beneficiary meets the minimum experience requirement of the labor certification.

3. *Bona Fides* of Job Opportunity

Despite our finding that the *bona fides* of the job opportunity for U.S. workers had not been established, and our stating that in any future filings the Petitioner should submit documentation of its recruitment efforts during the labor certification process, the Petitioner did not submit any evidence or even address this issue on motion. Thus, the Petitioner has not established the existence of a *bona fide* job opportunity for U.S. workers.

B. Motion to Reconsider

The Petitioner does not state any reason for reconsideration of our previous decision dismissing the appeal. The Petitioner does not allege that our previous decision was based on an incorrect application of law or policy, and has not submitted any pertinent precedent decisions, statutes, regulations, or agency policy showing an incorrect application of law or of USCIS or DHS policy. Thus, the Petitioner has presented no basis for us to reconsider our previous findings that the Petitioner has not established its continuing ability to pay the proffered wage from the priority date onward, has not established that the Beneficiary meets the minimum experience requirement of the labor certification, and has not established the *bona fides* of the job opportunity for U.S. workers.

III. CONCLUSION

The Petitioner has not shown proper cause for reopening or reconsideration, or established eligibility for the immigrant benefit sought. Therefore, the motions must be denied.

ORDER: The motion to reopen is denied.

FURTHER ORDER: The motion to reconsider is denied.

Cite as *Matter of J-J-D-, Inc.* ID# 943502 (AAO Jan. 24, 2018)