U.S. Citizenship and Immigration Services

Non-Precedent Decision of the Administrative Appeals Office

MATTER OF D-&J-I-T-L-F-C-

DATE: JAN. 31, 2020

APPEAL OF TEXAS SERVICE CENTER DECISION

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

The Petitioner, a cleaners and tailors business, seeks to employ the Beneficiary as a garment fitter (gowns). It requests classification of the Beneficiary as a skilled worker 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 Texas Service Center denied the petition on two grounds: (1) that the petition was not accompanied by an original labor certification properly certified by the Department of Labor (DOL), and (2) that the evidence submitted by the Petitioner was insufficient to establish that the Beneficiary had the requisite experience to meet the terms of the labor certification application and to qualify for skilled worker classification. The Petitioner filed a motion to reopen, which the Director dismissed.

On appeal the Petitioner asserts that its labor certification application was properly certified by the DOL and that the evidence of record includes an employment verification letter which assertedly establishes that the Beneficiary meets the experience requirement of the labor certification and qualifies for skilled worker classification.

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 withdraw the Director's finding that the instant petition is not accompanied by a valid labor certification. We will affirm the Director's finding that the Petitioner has not established that the Beneficiary has the requisite experience to meet the terms of the labor certification and to qualify for classification as a skilled worker. We also find that the Petitioner has not established its continuing ability to pay the proffered wage from the priority date onward. Accordingly, 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 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 U.S. 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.

II. ANALYSIS

A. Procedural History

The current petition is the fourth Form I-140, Immigrant Petition for Alien Worker (I-140 petition), filed by this Petitioner on behalf of the Beneficiary. The first (Receipt Number [redacted] was filed in April 2003, accompanied by correspondence from the Petitioner's counsel (with the DOL and USCIS) indicating that the original labor certification had been lost and that a duplicate copy had not been provided by the DOL. The petition was denied by the Vermont Service Center Director in August 2005 on the ground that the petition was not accompanied by an individual labor certification from the DOL as required by the regulation at 8 C.F.R. § 204.5(l)(3)(i).

The Petitioner filed an appeal, and we issued a decision in July 2007 withdrawing the Director's decision. After reviewing the evidence of record – including written correspondence among the Petitioner, the DOL, and USCIS; a photocopy of the uncertified Form ETA 750, Application for Alien Employment Certification (ETA 750), bearing a DOL receipt date of November 17, 1997; handwritten notes of the DOL certifying officer stating that the application was certified on September 22, 2000; and documentation of the Petitioner's attempts to obtain a duplicate copy of the labor certification from the DOL – we found that the labor certification application was duly certified by the DOL, that the priority date of the petition was November 17, 1997,[1] and that the petition should be addressed on the merits. We proceeded to dismiss the appeal on the ground that the evidence of record did not establish the Petitioner's continuing ability to pay the proffered wage from the priority date onward.

[1] The priority date of a petition, as indicated, is the date the underlying labor certification application is filed with the DOL. *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.

The Petitioner filed a second I-140 petition (Receipt Number [redacted]) in January 2007, prior to our decision on the appeal of the first I-140 petition. The petition was accompanied by a copy of the completed labor certification application before its filing with and certification by the DOL. Despite our decision in July 2007 in which we recounted the evidence showing that the labor certification application was filed with the DOL in November 1997 and certified by the DOL in September 2000, the Director of the Nebraska Service Center denied the second I-140 petition in August 2009 on the ground that it was not accompanied by a valid labor certification.

The Petitioner filed a third I-140 petition (Receipt Number [redacted]) in December 2014, accompanied by evidence that a labor certification application had been filed with the DOL in November 1997 and certified by the DOL in September 2000. In a request for evidence (RFE) the Nebraska Service Center recognized November 17, 1997, as the priority date of the petition, and requested additional evidence of the Petitioner's ability to pay the proffered wage from that date up to the present. The Petitioner did not respond to the RFE, however, and the petition was denied on the basis of abandonment in June 2015.

The instant I-140 petition, the Petitioner's fourth, was filed in November 2017. It was accompanied (like the second I-140 petition) by a copy of the completed labor certification application prior to its filing with and certification by the DOL and evidence of the Petitioner's ongoing efforts to obtain a duplicate labor certification from the DOL. The Petitioner also submitted information obtained from the DOL through the Freedom of Information Act (FOIA) which includes a screenshot verifying pertinent data elements of the labor certification. The Director issued an RFE for additional documentation of the Petitioner's ability to pay the proffered wage. Following the Petitioner's response to the RFE, the Director issued a notice of intent to deny (NOID) advising that the petition could not be approved without an original labor certification from the DOL and additional evidence that the Beneficiary had two years of qualifying experience as required on the ETA 750. After receiving the Petitioner's response to the NOID the Director denied the petition on the grounds set forth in the NOID.

Thus, the petition was denied on the grounds that it was not accompanied by an original labor certification and that the Beneficiary's qualifying work experience was not adequately documented. The Director made no finding with respect to the Petitioner's ability to pay the proffered wage.

B. Labor Certification Issue

In general, every petition for skilled worker classification "must be accompanied by an individual labor certification from the Department of Labor." 8 C.F.R. § 204.5(l)(3)(i). In this case, based on the evidence submitted, we find that the Petitioner filed an ETA 750 with the DOL on November 17, 1997, and that this application was certified by the DOL on September 22, 2000.[2]

[2] The record indicates that the Petitioner has made repeated attempts over the years to obtain a duplicate labor certification from the DOL.

Based on the circumstances in this case, we conclude that the petition is supported by a valid labor certification. Accordingly, we will withdraw the Director's finding to the contrary.

C. Beneficiary's Experience

To qualify for classification as a skilled worker a beneficiary must have at least two years of training or experience. *See* 8 C.F.R. § 204.5(l)(3)(ii)(B). A beneficiary must also meet the specific educational, training, experience, or other requirements of the labor certification. *Id.* All requirements must be met by the petition's priority date. *See Matter of Wing's Tea House*, 16 I&N Dec. 158, 159 (Acting Reg'l Comm'r 1977). With respect to the evidentiary requirements, the regulation at 8 C.F.R. § 204.5(g)(1) provides as follows:

> Evidence relating to qualifying experience or training shall be in the form of letter(s) from current or former employer(s) or trainer(s) and shall include the name, address, and title of the writer, and a specific description of the duties performed by the alien or of the training received.

In this case the labor certification requires two years of experience as a garment fitter (gowns). In the "Work Experience" section of the labor certification, two such jobs are listed for the Beneficiary. The first was with [redacted] in [redacted] Colombia, from September 1982 to July 1985. The second was with the Petitioner, where the Beneficiary's employment began in June 1989 and was ongoing at the time the labor certification application was filed in 1997. The evidentiary package supporting the Petitioner's initial I-140 petition in 2003 included a letter dated October 27, 1997, from [redacted], General Manager, on the letterhead of [redacted] in [redacted] stated that the Beneficiary was employed by the company as a full-time garment fitter from September 1982 to July 1985 and described his job duties. This letter was not submitted in support of any of the Petitioner's subsequent I-140 petitions. Instead, starting with its response to an RFE in the second I-140 petition and continuing with the current petition, the Petitioner has submitted a different letter as evidence of the Beneficiary's employment experience. The letter is dated [redacted] May 14, 2009, and signed by [redacted] who identified herself as the manager of [redacted]. [redacted] stated that she employed the Beneficiary as a garment cutter from March 1983 to June 1985. The job with [redacted] is not listed in the "Work Experience" section of the labor certification, even though the ETA 750 specifically instructed that any "jobs related to the occupation for which the alien is seeking certification" should be listed. We also note that the Beneficiary's alleged dates of employment at [redacted] overlap with his dates of employment at [redacted] as asserted in the earlier submitted letter from that business.

In the decision denying the current petition the Director focused exclusively on the 2009 letter from [redacted], which was the only evidence of the Beneficiary's employment experience submitted in this proceeding. The Director noted that the Beneficiary's employer and dates of employment, as asserted in that letter, were inconsistent with the name of the employer and dates of

employment stated in the ETA 750. The Director also noted that the 2009 letter did not indicate the address of the business, [redacted], and whether the Beneficiary was a full-time employee. The Director concluded that the 2009 letter from [redacted] did not demonstrate that the Beneficiary met the experience requirement of the labor certification.

The Petitioner has not submitted any further evidence of the Beneficiary's employment history on appeal. Therefore, the only document before us in the current proceeding is the letter from [redacted] asserting that the Beneficiary was employed by [redacted] as a garment cutter from March 1983 to June 1985. The Petitioner has not remedied the deficiencies in this letter – specifically, the lack of a business address and no information about whether the Beneficiary worked full-time – that were mentioned in the Director's decision. In addition, the letter does not provide a specific description of the Beneficiary's job duties. Thus, the "employment verification" letter does not comply with the substantive requirements of 8 C.F.R. § 204.5(g)(1), which include a specific list of the job duties performed and the address of the employer. As previously discussed, the alleged employment with [redacted] was not listed on the labor certification, as it should have been if the Beneficiary actually worked for that business, and the dates of employment overlap with those of the earlier alleged employment with [redacted] from September 1982 to July 1985. The failure to list work experience on a labor certification lessens the credibility of the claimed experience and supporting evidence. *See Matter of Leung*, 16 I&N Dec. 2530 (BIA 1976).

It is incumbent upon a petitioner to resolve any inconsistencies in the record by independent objective evidence. Attempts to explain or reconcile such inconsistencies will not suffice without competent evidence pointing to where the truth lies. *See Matter of Ho*, 19 I&N Dec. 582, 591-92 (BIA 1988). Doubt cast on any aspect of the petitioner's evidence also reflects on the reliability of the petitioner's remaining evidence. *See id.* As discussed above, the Petitioner has not submitted independent objective evidence to resolve the inconsistencies in the record regarding the Beneficiary's employment history. In particular, the Petitioner has not established that the Beneficiary gained any qualifying experience with [redacted], which is the only experience for which evidence has been submitted in this proceeding.

Based on the foregoing analysis, we conclude that the Petitioner has not established that the Beneficiary had at least two years of qualifying experience as a garment fitter by the priority date of November 17, 1997.

D. Petitioner's Ability to Pay the Proffered Wage

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 on 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].

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 $12.50 per hour (or $25,750 per year based on a standard work year of 2,080 hours) and the priority date is November 17, 1997.

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.

The record in this proceeding indicates that the Beneficiary has been employed by the Petitioner continuously since the priority date year of 1997. The evidence includes copies of the Beneficiary's Forms W-2, Wage and Tax Statements, for every year from 1997 to 2017 (except 1998, for which a copy of the Beneficiary's federal income tax return, Form 1040EZ, has been submitted). These documents show that the Beneficiary's gross pay from the Petitioner was less than the proffered wage in the years 1997-1999, 2001, 2003, 2004, and 2006-2008. Therefore, the Petitioner has not established its continuing ability to pay the proffered wage from the priority date onward based on wages paid to the Beneficiary year by year.

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.

The record in this proceeding includes partial copies of the Petitioner's federal income tax returns for each of the years 1997-2017. The tax returns show that the Petitioner had net income[3] and/or net

[3] For the years 1997-2005 the Petitioner filed its federal income tax returns as a C corporation on Form 1120. For a C corporation net income (or loss) in those years was recorded on page 1, line 28, of the Form 1120. For the years 2006-2017 the Petitioner filed its federal income tax returns as an S corporation on Form 1120S. If an S corporation has income exclusively from a trade or business, USCIS considers its net income (or loss) to be the figure for "Ordinary

current assets[4] that were sufficient to cover the difference between the proffered wage and the wages paid to the Beneficiary in the years 1998, 1999, 2001, 2003, 2004, and 2006, but not in 1997, 2007, and 2008. For those latter three years, the Petitioner had no net income and no net current assets.[5] In fact, the tax returns recorded net losses of $32,833 in 1997, $63,835 in 2007, and $766 in 2008, and net current liabilities of $37,645 in 1997, $290 in 2007, and $22,127 in 2008. Thus, for the years 1997, 2007, and 2008 the Petitioner has not established it ability to pay the proffered wage based on a combination of wages paid plus net income or net current assets.

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.

In this case, the Petitioner states that it began operations in 1976 and had 10 employees at the time this petition was filed in 2017. Previous I-140 petitions in 2007 and 2014 also claimed 10 employees, while the initial I-140 petition in 1997 did not provide an employee figure. The Petitioner's tax returns over the 12-year time period of 1997 through 2008 (encompassing the first and last years for which the Petitioner's ability to pay the proffered wage is still at issue) show that gross receipts were fairly static, rising gradually from $1,820,312 million in 1997 to $2,049,731 in 2008. Thus, the Petitioner does not appear to have experienced significant growth during that time period, and has submitted no evidence regarding its reputation in the industry. There is no evidence in the record of any uncharacteristic expenditures by the Petitioner in the years 1997, 2007, or 2008. While the tax returns recorded substantial compensation of officers in each of those years, there is no evidence in the record that any officers were willing and able to commit any of their compensation to cover the balance between the proffered wage and the wages actually paid to the Beneficiary during those years. Based on the record before us we conclude that the totality of its circumstances does not demonstrate the Petitioner's continuing ability to pay the proffered wage from the priority date of November 17, 1997, up to the present.

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business income (loss)" on page 1, line 21, of the Form 1120S. However, if there are relevant entries for additional income, credits, deductions or other adjustments from sources other than a trade or business, they are reported on Schedule K of the Form 1120S, and the corporation's net income or loss will be found in line 18 of Schedule K ("Income/loss reconciliation").

[4] For a corporation net current assets (or liabilities) are the difference between its current assets, entered on lines 1-6 of Schedule L, and its current liabilities, entered on lines 16-18 of Schedule L.

[5] For the years 2007 and 2008, as an S corporation, the Petitioner's net income (or loss) was the figure in line 18 of Schedule K.

III. CONCLUSION

The Petitioner has established that the instant petition is supported by a valid labor certification. However, the Petitioner has not established that the Beneficiary had the requisite two years of experience by the priority date to meet the terms of the labor certification and to qualify for the requested classification of skilled worker. Nor has the Petitioner established its continuing ability to pay the proffered wage from the priority date onward. The appeal will be dismissed for the above stated reasons, with each considered an independent and alternative basis for the decision.

ORDER: The appeal is dismissed.

Cite as *Matter of D-&J-I-T-L-F-C-*, ID# 6249901 (AAO Jan. 31, 2020)