U.S. Citizenship and Immigration Services

Non-Precedent Decision of the Administrative Appeals Office

MATTER OF M-, INC.

DATE: JULY 10, 2017

APPEAL OF TEXAS SERVICE CENTER DECISION

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

The Petitioner, an IT staffing company, seeks to employ the Beneficiary as a senior quality assurance analyst. It requests classification of the Beneficiary as a member of the professions holding an advanced degree under the second preference immigrant classification. *See* Immigration and Nationality Act (the Act) section 203(b)(2), 8 U.S.C. § 1153(b)(2). This employment-based immigrant classification allows a U.S. employer to sponsor a professional with an advanced degree for lawful permanent resident status.

The Director of the Texas Service Center denied the petition, concluding that the record did not establish, as required, that the Beneficiary qualified for the offered position and the requested advanced degree professional classification.

The matter is now before us on appeal. We agree with the Petitioner that the Beneficiary has, as required for the offered position and the requested classification, a foreign degree equivalent to a U.S. bachelor's degree followed by five years of progressive experience in the specialty. But, because the record does not establish the Petitioner's ability to pay the proffered wage, we will remand the matter to the Director for further proceedings.

I. LAW

Employment-based immigration generally follows a three-step process. First, an employer must obtain 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).[1] By approving the labor certification, 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 may file 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

[1] The priority date of a petition is the date the DOL accepted the labor certification for processing. *See* 8 C.F.R. § 204.5(d).

abroad or, if eligible, adjustment of status in the United States. *See* section 245 of the Act, 8 U.S.C. § 1255.

II. ANALYSIS

On appeal, the Petitioner demonstrated that the Beneficiary possessed the requisite education and experience to satisfy the requirements of the labor certification and the requested advanced degree professional classification. Therefore, we will withdraw the Director's decision. However, the evidence in the record does not establish that the Petitioner established its continuing ability to pay the proffered wage from the priority date. Therefore, we are remanding the matter to the Director to address this issue.

The regulation at 8 C.F.R. § 204.5(g)(2) states in pertinent part:

> *Ability of prospective employer to pay wage.* Any petition filed by or for an employment-based immigrant which requires an offer of employment must be accompanied by evidence that the prospective United States employer has the ability to pay the proffered wage. 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.

The proffered wage for the position of senior quality assurance analyst is $97,989.00 per year, and the priority date is September 18, 2014.[2] With the petition, the Petitioner submitted the 2014 annual report for [redacted] with federal employer identification number (EIN) [redacted] However, the Petitioner in this case is a separate corporate entity named [redacted] with EIN [redacted] The record does not contain regulatory-prescribed evidence of this organization's ability to pay the proffered wage from 2014 onward.[4]

Therefore, the Director should instruct the Petitioner to submit complete copies of its 2014, 2015, and 2016 federal income tax returns, annual reports, or audited financial statements to establish its continuing ability to pay the proffered wage as of the 2014 priority date onward.

---

[2] The priority date of a petition is the date the U.S. Department of Labor accepted the labor certification for processing. *See* 8 C.F.R. § 204.5(d).

[3] Public records indicate that the Petitioner changed its name to [redacted] in September 2016. Pa. Dept. of State, https://www.corporations.pa.gov/search/CorpSearch (last visited July 5, 2017).

[4] Because a corporation is a separate and distinct legal entity from its shareholders, the assets of its shareholders or of other enterprises or corporations cannot be considered in determining the petitioning corporation's ability to pay the proffered wage. *See Matter of Aphrodite Invs., Ltd.*, 17 I&N Dec. 530 (Comm'r 1980). In a similar case, the court in *Sitar v. Ashcroft*, 2003 WL 22203713 (D.Mass. Sept. 18, 2003) stated, "nothing in the governing regulation, 8 C.F.R. § 204.5, permits [USCIS] to consider the financial resources of individuals or entities who have no legal obligation to pay the wage."

If the Petitioner paid the Beneficiary wages from 2014 onward, it should also submit evidence of these payments, such as the Beneficiary's IRS Forms W-2, Wage and Tax Statement, or his IRS Forms 1099-MISC, Miscellaneous Income.[5]

In addition, USCIS records indicate that the Petitioner has filed of petitions for dozens of other Form I-140 beneficiaries. A petitioner must demonstrate its ability to pay the proffered wage of each I-140 petition.

Therefore, if the Petitioner cannot establish that it paid the Beneficiary the full proffered wage in 2014, 2015, and 2016, it must demonstrate its ability to pay the combined proffered wages of this petition, the other Form I-140 petitions that were pending on or after this petition's priority date, and the Form I-140 petitions that were approved before this petition's priority date. The Petitioner must demonstrate its ability to pay the combined proffered wages from this petition's priority date until the other Form I-140 beneficiaries obtained lawful permanent residence, or until their petitions were denied, withdrawn, or revoked. *See Patel v. Johnson*, 2 Fed. Supp. 3d 108, 124 (D. Mass. 2014) (affirming a petition denial where a petitioner did not demonstrate its ability to pay the proffered wages of multiple, pending beneficiaries).

In this case, the record does not indicate the proffered wages or priority dates of the Petitioner's other petitions, or whether the Petitioner paid wages to the other beneficiaries during the relevant periods. The record also does not indicate whether the beneficiaries obtained lawful permanent residence, or whether their petitions were denied, withdrawn, or revoked. Without this information, the record does not establish the Petitioner's ability to pay the proffered wage.

Accordingly, the Director should instruct the Petitioner to submit the following evidence of its other Form I-140 petitions:

- A list of all receipt numbers for the Form I-140 petitions;
- The name of each beneficiary;
- The proffered wage for each beneficiary;
- The priority date of each petition;
- The status of each petition and the date of any status change (i.e., pending, approved, denied, withdrawn, revoked, on appeal or motion, beneficiary obtained lawful permanent residence);
- Wages paid to each beneficiary for each year starting from the priority date of the current Form I-140 petition or the priority date of the I-140 petition filed on behalf the other beneficiary, whichever is later; and
- Documentary evidence of any wages paid for the relevant years, such as: the beneficiary's IRS Form W-2, Wage and Tax Statements; the beneficiary's IRS Form 1099-MISC, Miscellaneous Income; and the beneficiary's pay vouchers or payroll records, which specify

[5] The labor certification states that the Beneficiary has been employed by the Petitioner as a senior quality assurance analyst since August 11, 2014.

the length of the pay periods and show the beneficiary's gross or net pay, year-to-date income, income tax deductions, and tax withheld.

Because the record does not establish the Petitioner's ability to pay the proffered wage, we will remand the matter to the Director.

III. CONCLUSION

For the reasons set forth above, we will withdraw the Director's decision and remand the matter for further consideration of the Petitioner's ability to pay the proffered wage.

ORDER: The decision of the Director is withdrawn. The matter is remanded for further proceedings consistent with the foregoing opinion and for the entry of a new decision.

Cite as *Matter of M- Inc.*, ID# 353726 (AAO July 10, 2017)