U.S. Citizenship and Immigration Services

Non-Precedent Decision of the Administrative Appeals Office

MATTER OF A-, INC.

DATE: JULY 24, 2017

MOTION ON ADMINISTRATIVE APPEALS OFFICE DECISION

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

The Petitioner, a business consulting services company, seeks to employ the Beneficiary as a director of project management. It requests classification of the Beneficiary as a skilled worker under the third preference immigrant classification. *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 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 denied the petition on the ground that the Petitioner did not establish its continuing ability to pay the proffered wage of the job offered from the priority date of the petition onward. The Petitioner filed an appeal, which we dismissed on the same ground as well as the additional ground that the evidence of record did not establish that the Beneficiary met the minimum requirements of the labor certification.

The matter is now before us on a motion to reconsider. The Petitioner has submitted the same brief that was previously submitted in support of the appeal. We will deny the motion.

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).[1] *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. 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 applies 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.

[1] The date the labor certification is filed is called the "priority date." A beneficiary must be eligible for the requested classification as of that date.

The Petitioner must establish that the Beneficiary possessed all of the education, training, and experience specified on the labor certification as of the priority date. *See Matter of Wing's Tea House,* 16 I&N Dec. 158, 159 (Acting Reg'l Comm'r 1977). The Petitioner must also establish its continuing ability to pay the proffered wage from the priority date until the beneficiary obtains lawful permanent residence. *See* 8 C.F.R. § 204.5(g)(2).

A motion to reconsider is based on an *incorrect application of law or policy*. The requirements of a motion to reconsider are located at 8 C.F.R. § 103.5(a)(3). We may grant a motion that satisfies these requirements and demonstrates eligibility for the requested immigration benefit.

A motion to reconsider must establish that our decision was incorrect based on the evidence in the record of proceedings at the time of the decision. *Id.* We do not consider new facts or evidence in a motion to reconsider. A motion to reconsider must also be supported by a pertinent precedent or adopted decision, statutory or regulatory provision, or statement of USCIS or Department of Homeland Security policy.

A motion that does not meet applicable requirements shall be denied. 8 C.F.R. § 103.5(a)(4).

II. ANALYSIS

The Petitioner's Form I-140, Immigrant Petition for Alien Worker, was accompanied by an ETA Form 9089, Application for Permanent Employment Certification (labor certification), which had been filed with the DOL on June 2, 2014 (the priority date), and certified by the DOL. Section G of the labor certification stated that the proffered wage for the job offered is $145,891 per year. Section H of the labor certification specified that four years of qualifying experience and a bachelor's degree, or six years of qualifying experience without a bachelor's degree, were required for the job.

The Director denied the petition on the ground that the Petitioner did not establish its ability to pay the Beneficiary the proffered wage. In making this decision the Director reviewed the Beneficiary's Form W-2 and pay statements for 2014 and 2015 showing that he was paid less than the proffered wage in both of those years, as well as the Petitioner's federal income tax return for 2014 showing a net loss and net current liabilities that year.

On appeal the Petitioner submitted a brief claiming that the Director's decision was erroneous because he did not consider all of the evidence in the record and did not consider the totality of the circumstances in determining the Petitioner's ability to pay the proffered wage.

In reaching our decision on the appeal we conducted a *de novo* review of the record. We analyzed all of the Petitioner's documentary evidence and factual assertions, and considered the totality of the Petitioner's circumstances in accord with *Matter of Sonegawa*, 12 I&N Dec. 612 (Reg'l Comm'r 1967). Based on the entire record we concluded that the Petitioner had not established its continuing ability to pay the proffered wage from the priority date up to the present. We also reviewed the

documentation of the Beneficiary's experience and education and determined that the record did not establish that the Beneficiary met the minimum requirements of the labor certification to qualify for the job offered. For both of these reasons we dismissed the appeal.

In the current motion the Petitioner has submitted a brief that is virtually identical to the brief submitted in support of the appeal. The motion does not state reasons for reconsideration of our previous decision that is supported by a pertinent precedent or adopted decision, statutory or regulatory provision, or official statement of policy showing that our decision was based on an incorrect application of law or USCIS policy. Nor does the motion address the second ground for dismissal of the appeal – namely, the Petitioner did not establish that the Beneficiary met the minimum requirements of the labor certification. Since the Petitioner has not met the requirements for a motion to reconsider, we will deny the motion. *See* 8 C.F.R. § 103.5(a)(4).

III. CONCLUSION

We will deny the motion to reconsider because it does not meet the requirements of a motion set forth at 8 C.F.R. § 103.5(a)(3).

ORDER: The motion is denied.

Cite as *Matter of A-, Inc.*, ID# 395304 (AAO July 24, 2017)