U.S. Citizenship and Immigration Services

Non-Precedent Decision of the Administrative Appeals Office

MATTER OF T-F-T-

DATE: JULY 30, 2019

APPEAL OF NEBRASKA SERVICE CENTER DECISION

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

The Petitioner, a custom furniture manufacturer, seeks to employ the Beneficiary as a furniture finisher. It requests classification of the Beneficiary as a skilled worker under the third preference immigrant classification. 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, concluding that the record lacked required initial evidence including a complete Form I-140, Immigrant Petition for Alien Worker; a properly signed labor certification application;[1] evidence of the Petitioner's continuing ability to pay the proffered wage; and evidence that the Beneficiary met the minimum qualifications for the offered job.

On appeal, the Petitioner submits additional evidence and asserts that the initial submission was mishandled by a severely ill attorney who later died; that some of the missing initial evidence listed by the Director was actually submitted with the petition; and that the evidence is "sufficient to warrant a favorable outcome in this case."

Upon *de novo* review, we will dismiss the appeal.

I. THE EMPLOYMENT-BASED IMMIGRATION PROCESS

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).[2] *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

[1] The Petitioner submits a signed copy of the labor certification on appeal.

[2] The priority date of a petition is the date the DOL accepted the labor certification for processing, which in this case is June 5, 2017. *See* 8 C.F.R. § 204.5(d).

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 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.

II. INCOMPLETE FORM I-140

The Director denied the petition, in part, because the Petitioner submitted an incomplete Form I-140. Specifically, the Director noted that Parts 1, 4, and 5 are missing required information. On appeal, the Petitioner asserts that a properly completed Form I-140 is attached to the appeal submission. However, a properly completed Form I-140 was not included with the appeal submission. Because the record does not contain a properly completed Form I-140, the petition cannot be approved. *See* 8 C.F.R. § 103.2(b)(1), (8).

III. ABILITY TO PAY THE PROFFERED WAGE

The Director also denied the petition, in part, because the Petitioner did not establish its continuing ability to pay the proffered wage form the priority date of June 5, 2017, onward. The proffered wage is $29,806 per year. 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.

In determining a petitioner's ability to pay, we first examine whether it paid a beneficiary the full proffered wage each year from a petition's priority date. If a petitioner did not pay a beneficiary the full proffered wage, we next examine whether it had sufficient annual amounts of net income or net current assets to pay the difference between the proffered wage and the wages paid, if any. If a petitioner's net income or net current assets are insufficient, we may also consider other evidence of its ability to pay the proffered wage.[3]

Although the Petitioner asserts that it has employed the Beneficiary since 2009, the record contains no evidence of wage payments by the Petitioner to the Beneficiary. Instead, the Petitioner submitted earnings statements with the initial petition demonstrating that [redacted] employed and paid the Beneficiary in 2004, 2005, and 2007. The earnings statement were not issued by the Petitioner and they do not cover dates from the priority date onward. Therefore, the Petitioner did not establish

[3] Federal courts have upheld our method of determining a petitioner's ability to pay a proffered wage. *See, e.g., River St. Donuts, LLC v. Napolitano*, 558 F.3d 111, 118 (1st Cir. 2009); *Tongatapu Woodcraft Haw., Ltd. v. Feldman*, 736 F.2d 1305, 1309 (9th Cir. 1984); *Estrada-Hernandez v. Holder*, -- F. Supp. 3d --, 2015 WL 3634497, *5 (S.D. Cal. 2015); *Rizvi v. Dep't of Homeland Sec.*, 37 F. Supp. 3d 870, 883-84 (S.D. Tex. 2014), *aff'd*, 627 Fed. App'x 292, 294-295 (5th Cir. 2015).

that it paid the Beneficiary any wages from 2017 onward.

On appeal, the Petitioner submits its federal income tax return for fiscal year 2017[4] which stated a net loss of -$34,619[5] and net current assets[6] of $28,609. Therefore, for fiscal year 2017, the Petitioner did not have sufficient net income or net current assets to pay the proffered wage of $29,806. Thus, based on an examination of wages paid and the Petitioner's net income and net current assets, the Petitioner has not established its ability to pay in 2017.

We may consider evidence of a petitioner's ability to pay beyond its net income and net current assets, including such factors as: the number of years it has conducted business; the growth of its business; its number of employees; the occurrence of any uncharacteristic business expenditures or losses; its reputation in its industry; whether a beneficiary will replace a current employee or outsourced service; or other evidence of its ability to pay a proffered wage. *See Matter of Sonegawa*, 12 I&N Dec. 612, 614-615 (Reg'l Comm'r 1967).

In this case, the Petitioner's tax return indicates that it was incorporated in 1989, and it indicated on the petition and labor certification that it has 15 employees. Unlike in *Sonegawa*, however, the record here does not establish the growth of the Petitioner's business; the occurrence of any uncharacteristic business expenditures or losses; its reputation in its industry; or whether a beneficiary will replace a current employee or outsourced service. Thus, assessing the totality of circumstances in this individual case, the record does not establish the Petitioner's continuing ability to pay the proffered wage pursuant to *Sonegawa*.

IV. THE BENEFICIARY'S EXPERIENCE

The Director also denied the petition, in part, because the Petitioner did not establish that the Beneficiary possessed the experience required by the labor certification as of the priority date.

A beneficiary must meet all of the requirements of the offered position set forth on the labor certification by the priority date of the petition. 8 C.F.R. § 103.2(b)(l), (12); *Matter of Wing's Tea House*, 16 I&N Dec. 158, 159 (Acting Reg'l Comm'r 1977). In this case, the labor certification requires two years of experience in the job offered of furniture finisher.

The labor certification states that the Beneficiary has the following employment experience:

- Furniture finisher with the Petitioner in [redacted] California, from March 1, 2009, to June 5,

[4] The Petitioner's 2017 fiscal year ran from February 1, 2017, to January 31, 2018.

[5] Net income is shown on Line 28 of the IRS Form 1120, U.S. Corporation Income Tax Return.

[6] Net current assets are the difference between a petitioner's current assets and current liabilities. Current assets consist of items having (in most cases) a life of one year or less, such as cash, marketable securities, inventory, and prepaid expenses. Joel G. Siegel & Jae K. Shim, *Barron's Dictionary of Accounting Terms* 117 (3d ed. 2000). Current liabilities are obligations payable (in most cases) within one year, such as accounts payable, short-term notes payable, and accrued expenses (such as taxes and salaries). *Id.* at 118. A corporation's year-end current assets are shown on Schedule L, lines 1 through 6. Its year-end current liabilities are shown on lines 16 through 18. If the total of a corporation's end-of-year net current assets and the wages paid to the beneficiary (if any) are equal to or greater than the proffered wage, the petitioner is expected to be able to pay the proffered wage using those net current assets.

2017; and
- Furniture finisher with [redacted] in [redacted] California, from July 1, 2004, to October 26, 2007.

Evidence relating to qualifying experience must be in the form of a letter from a current or former employer and must include the name, address, and title of the writer, and a specific description of the duties performed by the beneficiary. *See* 8 C.F.R. § 204.5(l)(3). The record contains an experience letter dated March 1, 2018, from the Petitioner's shop manager stating that it has employed the Beneficiary as a finisher since September 15, 2009, and that he "was trained by us in our finishing department."

The Director stated that the earnings statements submitted with the initial petition did not meet the regulatory requirements to establish that [redacted] employed the Beneficiary for two years in the job offered. We note that the record does not contain a letter from [redacted] as required by 8 C.F.R. § 204.5(l)(3). Further, the earnings statements do not list the Beneficiary's job title or duties at [redacted].

On appeal, the Petitioner resubmits the letter dated March 1, 2018, from its shop owner.[7] However, a labor certification employer cannot rely on experience that a foreign national gained with it, unless the experience was in a job substantially different than the offered position or the employer demonstrates the impracticality of training a U.S. worker for the offered position. 20 C.F.R. § 656.17(i)(3). For these purposes, a job is substantially different from an offered position if it requires performance of the same job duties less than 50 percent of the time. 20 C.F.R. § 656.17(i)(5)(ii). Here, the labor certification requires 24 months of experience in the job offered. The letter from the Petitioner indicates that the Beneficiary's experience was in the job of finisher, which is not substantially different than the offered position. It has also not demonstrated the impracticality of training a U.S. worker for the offered position. Thus, the record does not support the Petitioner's use of experience that the Beneficiary gained with it.

The record also does not contain sufficient evidence establishing the Beneficiary's qualifying employment with [redacted] Thus, the Petitioner has not established that the Beneficiary possessed the experience required by the labor certification as of the priority date.

V. CONCLUSION

The appeal will be dismissed for the above stated reasons, with each considered an independent and alternative basis for the decision. 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. The Petitioner has not met that burden.

ORDER: The appeal is dismissed.

Cite as *Matter of T-F-T-*, ID# 5829739 (AAO July 30, 2019)

[7] The letter does not list the Beneficiary's duties as required by 8 C.F.R. § 204.5(l)(3).