U.S. Citizenship and Immigration Services

Non-Precedent Decision of the Administrative Appeals Office

MATTER OF A-H-C-P-, INC.

DATE: JULY 30, 2019

APPEAL OF TEXAS SERVICE CENTER DECISION

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

The Petitioner, a staffing business, seeks to employ the Beneficiary as a registered nurse. 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 "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 the ground that the Petitioner did not establish that it had the continuing ability to pay the proffered wage to this Beneficiary as well as the proffered wages of the beneficiaries of all its other Form I-140 petitions (I-140 petitions).

On appeal the Petitioner asserts that the Director misapplied several binding decisions in evaluating the Petitioner's ability to pay the proffered wage.[1]

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

I. LAW

This petition is for a Schedule A occupation. A Schedule A occupation is one codified at 20 C.F.R. § 656.5(a) for which the Department of Labor (DOL) has determined that there are not sufficient U.S. workers who are able, willing, qualified and available and that the wages and working conditions of similarly employed U.S. workers will not be adversely affected by the employment of aliens in such occupations. The current list of Schedule A occupations includes professional nurses. *Id*. Petitions for Schedule A occupations do not require the petitioner to test the labor market and obtain a certified ETA Form 9089, Application for Permanent Employment Certification (ETA 9089), from the DOL prior to filing the petition with U.S. Citizenship and Immigration Services (USCIS). Instead, the petition is filed directly with USCIS with an uncertified ETA 9089 in duplicate. *See* 8 C.F.R. §§ 204.5(a)(2) and (k)(4); *see also* 20 C.F.R. § 656.15.

[1] In its notice of appeal, Form I-290B, and accompanying statement from counsel, the Petitioner indicated that it intended to file a brief and/or additional evidence within 30 days. However, no such brief or evidence was submitted.

II. ANALYSIS

The regulation at 8 C.F.R. § 204.5(g)(2) provides as follows:

> 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 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].

In this case the proffered wage of the job offered, as indicated on the labor certification, is $54,800 per year. The priority date of the petition is September 11, 2017.[2]

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. If the petitioner establishes by documentary evidence that it employed the beneficiary at a salary equal to or greater than the proffered wage for the time period in question, that evidence when accompanied by regulatory required documentation is considered proof of the petitioner's ability to pay the proffered wage to that beneficiary. In this case, however, the record indicates that the Petitioner has not employed the Beneficiary. Thus, the Petitioner cannot establish its ability to pay the proffered wage from the priority date onward based on wages paid to the Beneficiary.

If a petitioner has not employed the beneficiary and paid a salary 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, and the petitioner has no additional proffered wage obligations to other I-140 beneficiaries, the petitioner would be considered able to pay the proffered wage during that year. However, if a petitioner has filed I-140 petitions for multiple beneficiaries, it must demonstrate that its job offer to each I-140 beneficiary is realistic, and that it has the ability to pay

[2] The "priority date" of a petition is ordinarily the date the underlying labor certification application was filed with the DOL. *See* 8 C.F.R. § 204.5(d). In this case, however, since the petition did not require a certified ETA 9089, the "priority date" is the date the petition (with the completed but uncertified ETA 9089) was filed with USCIS.

the proffered wage to each beneficiary. *See Patel v. Johnson*, 2 F. Supp. 3d 108, 124 (D. Mass. 2014) (upholding our denial of a petition where a petitioner did not demonstrate its ability to pay multiple beneficiaries). Thus, the Petitioner must establish its ability to pay this Beneficiary as well as the beneficiaries of the other I-140 petitions that were pending or approved as of, or filed after, the priority date of the current petition.[3]

In his decision the Director noted that the Petitioner's 2017 federal income tax return, Form 1120, recorded net income of $174,135 and net current assets of $320,585. Both of these figures exceeded the proffered wage of the instant Beneficiary. However, the Director also cited USCIS records showing that the Petitioner had filed 125 I-140 petitions during the three-year period from the beginning of 2016 until early 2019, of which 54 had been approved and 31 were pending at the time of the decision, and referred to his request for evidence (RFE) about the Petitioner's other I-140 petitions and beneficiaries which had been issued in October 2018.[4] In that RFE the Director advised the Petitioner to submit the following:

- a list of all petition receipt numbers since 2016,
- the proffered wage, priority date, and status of each petition,
- the date each beneficiary's employment with the Petitioner began, and
- evidence of wages paid to each of the beneficiaries.

In response to the RFE the Petitioner submitted a list of 85 beneficiaries and associated petition receipt numbers, along with the priority date of each petition, the offered wage of each petition, and the status of each petition with various notations (including EAD, consular, and others) that were not fully explained. This list did not include all 125 of the I-140 petitions filed by the Petitioner since the beginning of 2016. Even more crucially, it did not include any information about the date each beneficiary's employment began with the Petitioner or any evidence of wages paid to any of the beneficiaries. Due to these evidentiary shortcomings the Director concluded that USCIS could not accurately determine the Petitioner's ability to pay the proffered wages of all its I-140 beneficiaries, and that the Petitioner had failed to establish its ability to pay the proffered wage.

On appeal the Petitioner has not remedied any of the evidentiary shortcomings discussed by the Director. The Petitioner has not furnished a complete list of the I-140 petitions it has filed since the beginning of 2016. Nor has the Petitioner submitted any evidence about the beginning dates of employment and the wages paid to any of the other I-140 beneficiaries, as originally requested in the Director's RFEs. Thus, it is still not possible for us to determine the Petitioner's ability to pay the proffered wage based on the actual figures of the Petitioner's proffered wage obligations and the

[3] A petitioner's ability to pay the proffered wage of one of the other I-140 beneficiaries is not considered:
- after the other beneficiary obtains lawful permanent residence;
- if an I-140 petition filed on behalf of the other beneficiary has been withdrawn, revoked, or denied without a pending appeal or motion; or
- before the priority date of the I-140 petition filed on behalf of the other beneficiary.

[4] An earlier RFE about the Petitioner's other I-140 petitions and beneficiaries had been issued by the Director in December 2017, to which the Petitioner responded in February 2018.

wages paid to its employed beneficiaries. The failure to submit requested evidence that precludes a material line of inquiry shall be grounds for denying the petition. *See* 8 C.F.R. § 103.2(b)(14).

As advocated by the Petitioner, citing *Rizvi v. Department of Homeland Security*, 37 F.Supp. 3d 870 (S.D. Texas 2014), 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 also 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 was established in 2012 and had 31 employees at the time the petition was filed in 2017. The federal income tax returns in the record show that the Petitioner's gross receipts totaled $1,547,306 in 2014, $2,060,924 in 2015, $2,111,265 in 2016 and $3,599,979 in 2017. Thus, the Petitioner recorded substantial growth from 2014 to 2017. This evidence of business growth, however, has minimal utility in our ability to pay analysis without evidence of the Petitioner's overall proffered wage obligations and the wages it paid to its other I-140 beneficiaries. It is the Petitioner's burden to establish eligibility for the immigration benefit it seeks. Section 291 of the Act, 8 U.S.C. § 1361; *Matter of Skirball Cultural Center*, 25 I&N Dec. 799, 806 (AAO 2012). Considering the number of its I-140 petitions and the number of opportunities it has had and failed – in two RFE responses and the instant appeal – to show the amount of its proffered wage obligations to its other I-140 beneficiaries, we cannot conclude that the Petitioner has established its ability to pay the proffered wages of the instant Beneficiary and all its other I-140 beneficiaries based on the totality of its circumstances.

The Petitioner assets that the Director did not take into account a federal district court decision in *Pooya Majdzadeh-Koohbanani v. Jaster-Quintanilla Dallas, LLP*, Civil Action No. 3:09-CV-1951-G-BK (N.D. Texas 2010), holding that a petitioner is not legally obligated to pay the prevailing wage until it actually employs the beneficiary. That holding is irrelevant in this appeal, however, since the issue is not the Petitioner's obligation to pay the prevailing (or proffered) wage when it actually employs its I-140 beneficiaries, but its *ability* to do so as of the priority date, as required in 8 C.F.R. § 204.5(g)(2). As previously noted, the priority date for every Schedule A petition is the date the Petitioner files the labor certification and the I-140 petition with USCIS. Finally, the Petitioner asserts that the Director misapplied the doctrine in *Patel v. Johnson,* 2 F. Supp. 3d at 124, because that decision stated that the petitioner must demonstrate its ability to pay all *employed* beneficiaries, which only applies to about half of the Petitioner's I-140 beneficiaries. Regardless of the Petitioner's reading of *Patel*, the evidence of record does not establish who the Petitioner's employed beneficiaries are, their starting dates of employment, the wages paid to those beneficiaries, or the Petitioner's total proffered wage obligations to those beneficiaries. Moreover, the regulation

at 8 C.F.R. § 204.5(g)(2) makes clear that the Petitioner's ability to pay the proffered wage for each of its I-140 beneficiaries begins when their respective labor certification applications are filed, not when they are employed by the Petitioner.

For all of the reasons discussed above, the Petitioner has not established its continuing ability to pay the proffered wage of the instant Beneficiary and the proffered wages of all of its other I-140 beneficiaries, from the priority date of September 11, 2017, onward.

III. CONCLUSION

The Petitioner has not established its ability to pay the proffered wage from the priority date onward. The appeal will be dismissed for the above stated reason. 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 A-H-C-P-, Inc.,* ID# 5357075 (AAO July 30, 2019)