U.S. Citizenship and Immigration Services

Non-Precedent Decision of the Administrative Appeals Office

MATTER OF S-F-S-, INC.

DATE: JUNE 19, 2019

APPEAL OF TEXAS SERVICE CENTER DECISION

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

The Petitioner,[1] which claims to be a mortgage brokerage business,[2] seeks to employ the Beneficiary as a loan officer. 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 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 petition was initially approved. The Director of the Texas Service Center subsequently revoked the approval on the grounds that the Petitioner did not establish its continuing ability to pay the proffered wage from the priority date of the petition[3] and did not establish that there is a *bona fide* job available to the Beneficiary.

On appeal the Petitioner asserts that the evidence of record establishes its continuing ability to pay the proffered wage and that there is a *bona fide* job as a loan officer available to the Beneficiary.

Upon *de novo* review, 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 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). By approving the labor certification, the

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[1] The record indicates that the Petitioner was incorporated under the name [redacted] in 2003. In 2011 the Petitioner amended its articles of incorporation to change its name to [redacted] The name change was filed with the Illinois Secretary of State on April 27, 2011. The company's federal employer identification number (FEIN) remained the same.

[2] It is not clear if the Petitioner is actually operational. During a 2012 site visit by U.S. Citizenship and Immigration Services (USCIS), the Petitioner's president informed USCIS that the Petitioner has not had any employees since 2009-2010.

[3] The priority date of the petition is the date the underlying labor certification was filed with the Department of Labor (DOL). *See* 8 C.F.R. § 204.5(d). In this case the priority date is July 11, 2006.

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 files an immigrant visa petition with U.S. Citizenship and Immigration Services. *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.

Section 205 of the Act. 8 U.S.C. § 1155, provides that the Secretary of Homeland Security may "for good and sufficient cause, revoke the approval of any petition." By regulation this revocation authority is delegated to any USCIS officer who is authorized to approve an immigrant visa petition "when the necessity for the revocation comes to the attention of [USCIS]." 8 C.F.R. § 205.2(a). USCIS must give the petitioner notice of its intent to revoke the prior approval of the petition and the opportunity to submit evidence in opposition thereto, before proceeding with written notice of revocation. *See* 8 C.F.R. § 205.2(b) and (c).

II. ANALYSIS

The issues in this case are whether the Petitioner has established its continuing ability to pay the proffered wage from the priority date of July 11, 2006, onward and whether it is offering a *bona fide* job opportunity to the Beneficiary.

A. Ability to Pay the Proffered Wage

The regulation at 8 C.F.R. § 204.5(g)(2) provides, in pertinent part, 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 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 stated in the labor certification, the proffered wage for the proffered position of loan officer is $32,000 per year. 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. In this case, the Petitioner

has not employed the Beneficiary at any time since the priority date. Accordingly, the Petitioner cannot establish its continuing ability to pay the proffered wage based on wages paid to the Beneficiary from the priority date onward.

If a petitioner has not employed the beneficiary and paid her (or him) 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, the petitioner would be considered able to pay the proffered wage during that year.

In this case, the Petitioner submitted copies of its federal income tax returns, Forms 1120S, for the years 2005 (before the priority date) and 2006 as initial evidence in support of the petition. The 2006 return shows that the Petitioner's net income of $32,158 and its net current assets of $53,531 both exceeded the proffered wage of $32,000. Based on its tax return, therefore, the Petitioner established its ability to pay the proffered wage in 2006.

In the notice of intent to revoke (NOIR), issued in September 2016, the Director noted that the record contained copies of the Petitioner's federal income tax returns for the years 2005 and 2006, showing its ability to pay in 2006, but that contrary to 8 C.F.R. § 204.5(g)(2), the petition lacked required evidence of the Petitioner's continuing ability to pay the proffered wage as of the filing's approval in 2007. Thus the Director properly issued the NOIR requesting evidence of the Petitioner's ability to pay in that year.[4]

In its response to the NOIR the Petitioner did not submit any of the requested evidence. Instead, the Petitioner submitted an unaudited financial statement with a compilation report and balance sheet, dated September 29, 2016, and [redacted] Bank account statements from September 2016, December 2016, and February 2017. This evidence was supplemented on appeal with another unaudited financial statement with a compilation report and balance sheet, dated December 31, 2016, [redacted] Bank account statements from October 2016 through August 2017, and an audited financial statement for 2017.

Despite the Director's request in the NOIR for regulatory required evidence from 2007 (which could be in the form of a federal tax return, or an annual report, or an audited financial statement) and the Petitioner's further opportunity to submit such evidence on appeal, the Petitioner has not submitted any such documentation. Given the absence of regulatory required documentation for 2007 the record does not establish that the Petitioner had net income or net current assets equaling or exceeding the proffered wage in 2007.

[4] As noted in *Matter of Estime*, "with respect to a decision to revoke, we ask whether the evidence of record *at the time the decision was issued*... warranted such a denial." 19 I&N Dec. at 452 (emphasis added).

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.

However, the absence the required forms of evidence identified in 8 C.F.R. § 204.5(g)(2) for 2007 greatly restricts our ability to consider the totality of the Petitioner's circumstances. The financial documentation in the record does not establish a historical pattern of growth for the Petitioner. The Petitioner does not make arguments or provide evidence of its reputation, employee replacement, outsourcing services or uncharacteristic expenses. In short, the evidence of record is insufficient to support a finding that the totality of the Petitioner's circumstances establishes its continuing ability to pay the proffered wage from the priority date onward.

For all of the reasons discussed above, the Petitioner has not established its ability to pay the proffered wage, and we therefore affirm the Director's revocation.

B. *Bona Fides* of the Job Offer

The regulation at 8 C.F.R. § 204.5(c) provides that "[a]ny United States employer desiring and intending to employ an alien may file a petition for classification of the alien under section 203(b)(1)(B), 203(b)(1)(C), 203(b)(2), or 203(b)(3) of the Act." It must intend to employ a beneficiary under the terms and conditions of an accompanying labor certification. *See Matter of Izdebska,* 12 I&N Dec. 54, 55 (Reg'l Comm'r 1966) (affirming denial where, contrary to an accompanying labor certification, a petitioner did not plan to employ a beneficiary as a domestic worker on a full-time, live-in basis). In this case the Director identified concerns about the Petitioner's ability and intent to employ the Beneficiary as a mortgage broker, which according to the labor certification, involves the following duties: "Evaluate, authorize, or recommend approval of residential, commercial or credit loans. Originate loans and advise borrowers of financial status and methods of payment."

In the revocation decision the Director referenced a statement by the Petitioner, submitted in response to the NOIR, that although it was a residential and commercial mortgage broker, it had surrendered its license for residential mortgage loans and did not currently broker residential mortgages. According to the Director, however, public records showed that the Petitioner was still operating as a residential mortgage broker and the Petitioner had not submitted evidence of its registration as an "exempt mortgage company" (available under Illinois state law for companies that employ licensed mortgage loan originators but do not operate as residential mortgage brokers). The Director concluded that there did not appear to be a *bona fide* job available to the Beneficiary.

On appeal, the Petitioner maintains that a *bona fide* job is available to the Beneficiary pending approval of this petition. Contrary to the Director's finding, the Petitioner asserts that it is not operating as a residential mortgage broker and is not required under Illinois state law to register as an exempt mortgage company. The Petitioner claims that following the surrender of its residential mortgage license (by consent order in 2012), and consistent with its name change to [redacted] it continues to broker commercial mortgage loans and credit loans which, unlike residential mortgage loans, do not require a license. According to the Petitioner, the duties of the proffered position are unaffected by the surrender of its residential mortgage license, except that the Beneficiary's brokerage activities would be restricted to commercial and credit loans. The Petitioner states that it intends to reapply for a residential mortgage license when the residential real estate market improves.

Upon review of the record, we find that the Petitioner has not demonstrated its intent to employ the beneficiary in a *bona fide* job. The Petitioner has not submitted any evidence or documentation to corroborate its claims that it no longer acts as a residential mortgage broker or that it is exempt from the licensing requirements. The Petitioner has also not demonstrated that it is exempt from registration as a commercial or credit loan broker, as it claims on appeal. According to the Illinois Loan Brokers Act of 1995, as amended, 815 ILCS 175/15-1, sec. 15-10, submitted by the Petitioner on appeal, "It shall be unlawful for any person to engage in the business of loan brokering unless registered under this Act." The Petitioner asserts that it is exempt from registration under the Illinois Loan Brokers Act because it fits the exception granted at sec. 15-80(a). That section lists a number of exemptions for the required registration under section 15-10, including an exception for "[a]ny person whose fee is wholly contingent on the successful procurement of a loan from a third party and to whom no fee, other than a bona fide third party fee, is paid before procurement." *Id.* sec. 15-80(a)(5). The Petitioner claims that it meets this exemption; however, the Petitioner has not provided evidence to corroborate the claim that its business model fits this exception. Rather the record is devoid of evidence concerning the Petitioner's business operations. Without evidence that the Petitioner is appropriately licensed or registered, the record does not demonstrate the Petitioner's intent to employ the Beneficiary in the offered position.[5] Moreover, the lack of information about how the Petitioner conducts its business or even whether the Petitioner is operational, supports the Director's conclusion that the offered job is not *bona fide*. The audited financial statement submitted on appeal is not reflective of an operational business; rather it shows roughly $1,800 in income and $0 in sales, along with skeletal expenses including only rent, office supplies, postage, telephone, and business license and permits. There is no other evidence in the record to suggest that the petitioner has employees or is operational such that there is a *bona fide* job offered.

[5] We further note that engaging in activity in contravention of federal or state law precludes the approval of a petition. *See Matter of I- Corp.* Adopted Decision 2017-02 (AAO Apr. 12, 2017). Here, the offered job is that of a mortgage broker. If the Beneficiary were to be employed while the company brokered loans without proper authorization, then the Beneficiary's employment as a mortgage broker would be contrary to state law.

III. CONCLUSION

The Petitioner has not established its ability to pay the proffered wage for the time period in question. The Petitioner has also not demonstrated that the job offer is *bona fide.* We will dismiss the appeal 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 S-F-S, Inc.*, ID# 953218 (AAO June 19, 2019)