U.S. Citizenship and Immigration Services

Non-Precedent Decision of the Administrative Appeals Office

In Re: 17402368

DATE: JUNE 24, 2021

Appeal of Nebraska Service Center Decision

Form I-140, Immigrant Petition for a Professional

The Petitioner, an international school of holistic studies, seeks to employ the Beneficiary as a human resources specialist. It requests professional classification for the Beneficiary under the third preference immigrant category. Immigration and Nationality Act (the Act) section 203(b)(3)(A)(ii), 8 U.S.C. § 1153(b)(3)(A)(ii). This employment-based "EB-3" immigrant classification allows a U.S. employer to sponsor a professional with a baccalaureate degree for lawful permanent resident status.

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 from the priority date of the petition onward.

On appeal the Petitioner submits a brief and additional documentation, and asserts that the evidence of record establishes its ability to pay the proffered wage from the priority date onward.

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. 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 (ETA Form 9089) from the U.S. Department of Labor (DOL). *See* section 212(a)(5) of the Act, 8 U.S.C. § 1182(a)(5). 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 Act. Second, the employer files an immigrant visa petition (Form I-140) 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 abroad or, if eligible, adjustment of status in the United States. *See* section 245 of the Act, 8 U.S.C. § 1255.

To be eligible for the classification it requests for the beneficiary, a petitioner must establish that it has the ability to pay the proffered wage stated in the labor certification. As provided in the regulation at 8 C.F.R. § 204.5(g)(2):

> The petitioner must demonstrate this ability at the time the priority date[1] 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].

II. ANALYSIS

The instant petition was filed in May 2020, accompanied by a labor certification that was filed with the DOL on June 11, 2019. Thus, the priority date of the petition is June 11, 2019, and the Petitioner must establish its continuing ability to pay the proffered wage from that date onward. The labor certification states that the proffered wage for the position of human resources specialist is $67,500 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.

The Petitioner indicates that it has employed the Beneficiary since March 2017 and has submitted a copy of the Form W-2, Wage and Tax Statement, it issued to the Beneficiary for 2019. That document shows that the Beneficiary's gross pay in 2019 was $41,633.61 As this figure was well below the proffered wage, the Petitioner has not established its ability to pay the proffered wage from the priority date of June 11, 2019, onward based on wages paid to the Beneficiary.

If a petitioner does not establish that it has employed and paid the beneficiary an amount 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 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 ordinarily be considered able to pay the proffered wage during that year.

[1] The priority date of an employment-based immigrant petition is the date the underlying labor certification was filed with the DOL. *See* 8 C.F.R. § 204.5(d).

The record does not include any federal tax return, annual report, or audited financial statement of the Petitioner for 2019. Thus, the Petitioner has not submitted any one of the three types of required evidence under 8 C.F.R. § 204.5(g)(2) to establish its ability to pay the proffered wage from the priority date of June 11, 2019, onward based on either its net income or net current assets that year.

On appeal the Petitioner points out that it is not required to file a federal income tax return with the Internal Revenue Service because it is a tax-exempt organization under section 501(c)(3) of the Internal Revenue Code. Accordingly, the Petitioner has no federal tax return for 2019 (or any other year). The lack of a federal tax return, however, does not preclude the Petitioner from submitting one of the other types of required evidence identified in 8 C.F.R. § 204.5(g)(2), whether an annual report or an audited financial statement. The Petitioner broadly asserts that no such documentation is available, but has provided no details in support of this claim. Whether or not the Petitioner prepares annual reports, it is certainly capable of producing an audited financial statement for a given year. Therefore, we do not accept the Petitioner's contention that it cannot furnish any of the three alternative types of required evidence identified in the regulation at 8 C.F.R. § 204.5(g)(2).

On appeal the Petitioner submits as new evidence a copy of its "compiled financial statements for the years ended December 31, 2019 and 2018" prepared by [redacted] Certified Public Accountants. The accompanying "accountant's compilation report" specifically states, however, that "[w]e did not audit or review the financial statements nor were we required to perform any procedures to verify the accuracy or completeness of the information provided by management. Accordingly, we do not provide an opinion, nor provide any form of assurance on these financial statements." Thus, the compiled financial statements for 2019 and 2018 are the representations of the Petitioner's management, not the result of an independent objective audit of the Petitioner's financial statements. In contrast to compiled financial statements, audits are conducted in accordance with generally accepted auditing standards to obtain a reasonable assurance that the financial statements of the organization are free of material misstatements. Compiled financial statements provide no such assurance. Since the they do not comply with the regulatory requirement of an audited financial statement, the Petitioner's compiled financial statements are not reliable evidence of the Petitioner's ability to pay the proffered wage.

The Petitioner asserts on appeal that the Department of Education accepts its compiled financial statements for the purpose of "ACCET review." Whether or not that claim is true, it is irrelevant in this proceeding because the regulation at 8 C.F.R. § 204.5(g)(2) is the guiding authority for USCIS in its determination of a petitioner's ability to pay the proffered wage. The regulation specifically provides that audited financial statements, not compiled financial statements, are a required type of evidence for a petitioner to establish its ability to pay the proffered wage.

The Petitioner refers to previously submitted profit and loss statements (for the time periods of January through December 2019 and January through June 2020) as showing that it has sufficient revenue to pay the proffered wage. While the regulation at 8 C.F.R. § 204.5(g)(2) states that USCIS may consider profit/loss statements "in appropriate cases," they are not among the three types of required evidence identified in the regulation – either annual reports, federal tax returns, or audited financial statements – to demonstrate a petitioner's ability to pay the proffered wage. A profit and loss statement could be

produced as part of an audited financial statement, but the Petitioner has not done so in this case. Therefore, the unaudited profit and loss statements submitted by the Petitioner are not reliable evidence of its ability to pay the proffered wage.

The Petitioner also refers to previously submitted evidence – specifically, monthly bank statements from June, July, and August 2020 – of three bank accounts with [redacted] The Petitioner asserts that it could utilize the funds in these accounts to pay the proffered wage. As with unaudited profit and loss statements, the regulation at 8 C.F.R. § 204.5(g)(2) states that USCIS may consider bank account records "in appropriate cases," though they are not among the three types of required evidence identified in the regulation. Bank statements show an account balance on a given date, not the account holder's sustainable ability to pay a proffered wage over time. Moreover, as the bank account statements in this case cover only three months in mid-2020, they do not demonstrate the Petitioner's ability to pay the proffered wage during the preceding time period back to the priority date in June 2019. Thus, the Petitioner has not established its continuing ability to pay the proffered wage from the priority date of June 11, 2019, onward based on its bank accounts with [redacted]

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. At its discretion, USCIS may 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 historical growth of the 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.

The Petitioner states that it was established in 2010, had 16 employees at the time the petition was filed in May 2020 (though the Form I-140 itself claimed only 11 employees), and that the job of human resources specialist is a new position. The Petitioner asserts that it has a strong reputation in the community, but has submitted no documentary evidence thereof. Nor does the evidence in the record demonstrate a historic pattern of growth. According to the Petitioner, its compiled financial statements for 2019 and 2018 (as well as 2017, previously submitted), three months of bank account records in 2020, and the Form W-2 documenting what it paid the Beneficiary in 2019, show that it has ample financial resources to pay the full proffered wage. For the reasons previously discussed, however, the Petitioner's documentation is either unreliable or insufficient to establish its continuing ability to pay the proffered wage from the priority date in June 2019 onward. In sum, the Petitioner has not demonstrated its ability to pay the proffered wage of $67,500 per year from the priority date onward based on the totality of its circumstances.

III. CONCLUSION

The Petitioner has not established its continuing ability to pay the proffered wage from the priority date of June 11, 2019, onward. The appeal will be dismissed for this reason.

ORDER: The appeal is dismissed.