U.S. Citizenship and Immigration Services

Non-Precedent Decision of the Administrative Appeals Office

MATTER OF T-U-S-

DATE: JUNE 29, 2017

MOTION ON ADMINISTRATIVE APPEALS OFFICE DECISION

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

The Petitioner, a sole proprietor operating retail shipping stores, seeks to employ the Beneficiary as an administrative assistant. 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. The Director determined that the Petitioner had not established its continuing ability to pay the Beneficiary's proffered wage from the priority date of December 8, 2006, onward. We dismissed the subsequent appeal, concluding that the Petitioner had not established its ability to pay the proffered wage. The Petitioner has filed nine motions to reopen and reconsider. In our most recent decision, we affirmed our previous decision holding that the Petitioner had not established its ability to pay the proffered wage for 2009 through 2013 and that the Petitioner had not established the existence of a *bona fide* job offer.

The matter is now before us on a motion to reconsider. On motion, the Petitioner asserts that we have not properly weighed the documentation submitted regarding the ability to pay the proffered wage. Upon review, we will deny the motion to reconsider.

I. LAW

Employment-based immigration generally follows a three-step process. First, an employer must obtain 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, 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. Section 212(a)(5)(A)(i)(I)-(II) of the Act. Second, the employer may file 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

[1] The date the labor certification is filed, in cases such as this one, is called the "priority date."

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.

A motion to reconsider must establish that our decision was based on an incorrect application of law or policy and that the decision was incorrect based on the evidence in the record of proceedings at the time of the decision. 8 C.F.R. § 103.5(a)(3). A motion to reconsider must be supported by a pertinent precedent or adopted decision, statutory or regulatory provision, or statement of USCIS or Department of Homeland Security policy.

II. ANALYSIS

Petitioners must demonstrate the continuing ability to pay the proffered wage beginning on the priority date. *See* 8 C.F.R. § 204.5(g)(2). The petitioner's ability to pay the proffered wage is an essential element in evaluating whether a job offer is realistic. *See Matter of Great Wall*, 16 I&N Dec. 142 (Acting Reg'l Comm'r 1977). In evaluating whether a job offer is realistic, the petitioner must demonstrate financial resources sufficient to pay the beneficiary's proffered wages, although the totality of the circumstances affecting the petitioning business will be considered if the evidence warrants such consideration. *See Matter of Sonegawa*, 12 I&N Dec. 612 (Reg'l Comm'r 1967).

At the outset, we find that the Petitioner has not established that our prior decision regarding the ability to pay the proffered wage was based on an incorrect application of law or policy. That said, we will respond briefly to the assertions made by the Petitioner in this motion.

We held in our prior decision that the Petitioner has not established its ability to pay the proffered wage of $35,692.80 from 2009 through 2013. We considered the Petitioner's Adjusted Gross Income (AGI) in relation to his personal expenses to determine whether the Petitioner had the ability to pay the difference between the proffered wage and the wages paid to the Beneficiary. In doing so, we found the following shortfalls in the Petitioner's ability to pay the proffered wage:

Year	2009	2010	2011	2012	2013
Shortfall[2]	$4,988	$33,755[3]	$36,824	$51,793[4]	$4,067

In our prior decision, we reiterated the reasons why the record did not establish the Petitioner's ability to pay the proffered wage from 2009 through 2013. For 2009 through 2012, we considered each of the Petitioner's claims that the sale of his car could have covered the deficiency in 2009, that

[2] We reach this amount by determining whether the difference between the Petitioner's AGI and annual personal expenses is sufficient to cover the deficiency in wages paid to the Beneficiary. Thus, these figures are calculated by subtracting the Petitioner's annual expenses and any deficiency in wages paid from the AGI.

[3] In our June 8, 2015 decision, we subtracted the wages paid to two part-time workers in 2010, which left an annual shortfall of $33,755.

[4] We note that this amount differs from the deficiency we stated in our decision dated November 26, 2013, in which we stated the difference between wages paid and the proffered wage was $16,345.15 where the shortfall was actually $16,325.15.

lines of credit were available for 2010, that funds spent on remodeling in 2011 could have been used to pay the Beneficiary's wages, and that an unconditional loan guaranty could have covered the shortfall in 2012. For 2013, we noted that the Petitioner had not established that it had the ability to cover the shortfall of $4,067. We concluded that an "SBA unconditional loan guaranty" could not be used to pay the shortfall because that this loan guaranty is a debt that will increase the Petitioner's liabilities and will not improve his overall financial position.

On motion, the Petitioner states that we have not properly analyzed whether the documentation in the record meets the preponderance of the evidence standard. Here, we again assess the documentation in the record regarding the Petitioner's car, credit lines and loans, and do not find that the Petitioner has established that our prior decisions were based on an incorrect application of law or policy.

The Petitioner states that we overlooked his declaration regarding business operations and the use of credit lines. In the Petitioner's declaration, he states that in 2010, the Beneficiary could have been paid from the store's account for that year. We note that the gross receipts stated for the store in 2010 were approximately $170,000 less than the gross receipts in 2009, 2011, and 2012. The decrease in gross receipts for 2010 tends not to support the Petitioner's assertion that it could cover the shortfall for that year from the store. In addition, we are not persuaded that the average credit line of $17,723 at the store could cover the shortfall of $33,755 in that year. The Petitioner refers to incurring extra expenses totaling $42,000 in 2011 due to remodeling expenses, which he states will be depreciated on his tax returns over a ten-year period. While this amount exceeds the shortfall for 2011, the amount will be depreciated over a ten-year period of time and does not have a significant impact on the Petitioner's tax return for 2011. The Petitioner states that he had a burst water pipe in 2012, requiring the installation of new carpet totaling $3,602.96. The Petitioner also states that the SBA loan allowed for $25,000 in construction reserve and an additional $15,000 for working capital. Even if we were to consider the carpet installation and these parts of the SBA loan toward the ability to pay the proffered wage for 2012, these amounts do not overcome the deficiency of $51,793 in that year, as stated above. We do not find that the Petitioner has met the burden to establishing its ability to pay the proffered wage from 2009 through 2013.[5]

[5] In our prior decision, we held that the Petitioner had not established the *bona fide* nature of the job opportunity. We noted in our prior decision that a search of government databases indicates that the Beneficiary entered the United States on a B-1 visa in 2001 and stated his address as in California, which was the same address as the sole proprietor. We stated that this information made it appear that the Beneficiary knew the sole proprietor before the job offer was made and that he had close ties to the Petitioner, thus calling into question the existence of a *bona fide* job offer. We further discussed the factors that may determine whether a *bona fide* job offer exists. On motion, the Petitioner submits documentation addressing this issue, and we now withdraw our prior finding of a lack of *bona fide* job offer.

III. CONCLUSION

The Petitioner has not established its continuing ability to pay the Beneficiary's proffered wage from 2009 through 2013.

ORDER: The motion to reconsider is denied.

Cite as *Matter of T-U-S-*, ID# 509898 (AAO June 29, 2017)