U.S. Citizenship and Immigration Services

Non-Precedent Decision of the Administrative Appeals Office

MATTER OF W- CORP.

DATE: MAR. 21, 2017

APPEAL OF TEXAS SERVICE CENTER DECISION

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

The Petitioner, a designer, manufacturer, and installer of closets and storage systems, seeks to employ the Beneficiary as a management analyst. It requests classification of the Beneficiary as a member of the professions holding an advanced degree under the second preference immigrant category. *See* Immigration and Nationality Act (the Act) section 203(b)(2)(A), 8 U.S.C. § 1153(b)(2)(A). This category allows a U.S. business to sponsor a professional with an advanced degree or its equivalent for lawful permanent resident status.

The Director of the Texas Service Center denied the petition. The Director concluded that the record did not establish the Petitioner's ability to pay the proffered wage.

The matter is now before us on appeal. The Petitioner submits additional evidence and asserts that its federal income tax returns and the overall magnitude of its business activities demonstrate its ability to pay the proffered wage.

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

I. LAW AND ANALYSIS

A. Employment-Based Immigration Process

Employment-based immigration is generally a three-step process. First, a prospective U.S. employer obtains a certified ETA Form 9089, Application for Permanent Employment Certification (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). Next, the employer files a Form I-140, Immigrant Petition for Alien Worker, with U.S. Citizenship and Immigration Services (USCIS). *See* section 204 of the Act, 8 U.S.C. § 1154. If the Form I-140 is approved, 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.

By approving the labor certification, the DOL certified that there are insufficient U.S. workers who are able, willing, qualified, and available for the offered position of management analyst in the area of intended employment. *See* section 212(a)(5)(A)(i)(I) of the Act. The DOL also certified that the employment of 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)(II).

In these proceedings, USCIS must determine whether the Beneficiary meets the requirements of the offered position certified by the DOL. USCIS must also determine whether the Petitioner and the Beneficiary qualify for the requested classification, including whether the Petitioner demonstrated its ability to pay the proffered wage. *See, e.g., Tongatapu Woodcraft Haw., Ltd. v Feldman*, 736 F.2d 1305, 1309 (9th Cir. 1984) (holding that the immigration service "makes its own determination of the alien's entitlement to [the requested] preference status").

B. The Petitioner's Ability to Pay the Proffered Wage

A petitioner must demonstrate its continuing ability to pay a proffered wage from a petition's priority date until a beneficiary obtains lawful permanent residence. 8 C.F.R. § 204.5(g)(2). Evidence of ability to pay must include copies of annual reports, federal income tax returns, or audited financial statements. *Id.*

In this case, the labor certification states the proffered wage of the offered position of management analyst as $58,000 per year. The petition's priority date is December 2, 2013. This is the date the DOL accepted the labor certification application for processing. *See* 8 C.F.R. § 204.5(d) (explaining how to determine a petition's priority date).

In determining ability to pay, we first examine whether a petitioner paid a beneficiary the full proffered wage each year from a petition's priority date. If a petitioner did not pay the full proffered wage each year, we consider whether it generated sufficient annual amounts of net income or net current assets to pay any difference between the wage paid and the proffered wage. If a petitioner's net income or net current assets are insufficient, we may also consider the overall magnitude of its business activities. *See Matter of Sonegawa*, 12 I&N Dec. 612, 614-15 (Reg'l Comm'r 1967).[1]

Here, the record does not indicate the Petitioner's employment of the Beneficiary. The record therefore does not demonstrate the Petitioner's ability to pay the proffered wage based on payments to him.

[1] 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); *Estrada-Hernandez v. Holder*, 108 F. Supp. 3d 936, 942-43 (S.D. Cal. 2015); *Rivzi v. Dep't of Homeland Sec.*, 37 F. Supp. 3d 870, 883-84 (S.D. Tex. 2014), *aff'd*, 627 Fed. App'x. 292 (5th Cir. 2015).

The Petitioner submitted copies of its federal income tax returns for 2013 through 2015. The tax returns reflect annual net income amounts of -$5971 for 2013, $57,233 for 2014, and $225,204 for 2015. For 2013 through 2015, the Petitioner filed its tax returns as an S corporation. S corporations that report adjustments to their incomes from sources other than their trades or businesses reconcile their incomes on Schedules K to IRS Forms 1120S, U.S. Income Tax Returns for S Corporations.[2] For 2013 through 2015, the Petitioner reported income adjustments from sources other than its business. We therefore consider lines 18 of the Petitioner's Schedules K for those years to reflect its annual amounts of net income.

The annual net income amount for 2015 exceeds the annual proffered wage of $58,000. The record therefore establishes the Petitioner's ability to pay the proffered wage in 2015.

The annual net income amounts for 2013 and 2014, however, do not equal or exceed the annual proffered wage. The record therefore does not demonstrate the Petitioner's ability to pay the proffered wage in 2013 and 2014 based on its net income amounts. The Petitioner's tax returns reflect annual net current asset amounts of $40,154 in 2013 and $38,176 in 2014. These amounts do not equal or exceed the annual proffered wage. The record therefore does not demonstrate the Petitioner's ability to pay the proffered wage in 2013 and 2014 based on its net current assets. Thus, based on examinations of the Petitioner's payments to the Beneficiary and its net income and net current assets, the record does not establish its ability to pay the proffered wage in 2013 and 2014.

On appeal, the Petitioner notes that it need only demonstrate its ability to pay the proffered wage from the petition's priority date. Because the petition's priority date is December 2, 2013, the Petitioner states that it need only demonstrate its ability to pay about a month of the annual proffered wage in 2013, or about $4833. The Petitioner therefore asserts that its net current asset amount of $40,154 in 2013 demonstrates its ability to pay the proffered wage that year.

The Petitioner correctly states that it need only demonstrate its ability to pay from the petition's priority date. But the Petitioner disproportionately uses net current assets generated over a full year to demonstrate its ability to pay proffered wages of 1 month. To demonstrate its ability to pay 1 month of proffered wages, the Petitioner must proportionately use net current assets generated over the same 1-month period. The record does not demonstrate the Petitioner's generation of sufficient net current assets in December 2013 to pay the proffered wage that month. We therefore reject the Petitioner's assertion that its net current assets establish its ability to pay the proffered wage in 2013.

The Petitioner also asserts its generation of $139,205 in net income in 2014. That amount is listed as "ordinary income" on line 21 of the Petitioner's federal income tax return for that year. As previously noted, however, the Petitioner is an S corporation that reported adjustments to its income in 2014 from sources other than its business. Thus, we consider the reconciled income amount of $57,233 on line 18 of its Schedule K to reflect its net income for 2014.

[2] *See* Internal Revenue Serv., Instructions to Form 1120S, 22 at https://www.irs.gov/pub/irs-pdf/i1120s.pdf (last visited Mar. 15, 2017).

As previously indicated, we may consider evidence of a petitioner's ability to pay a proffered wage beyond its net income and net current assets. Under *Sonegawa*, we may consider such factors as: the number of years a petitioner has conducted business; its number of employees; the growth of its business; its reputation in its industry; the occurrence of uncharacteristic expenses or losses; a beneficiary's replacement of a current employee or an outsourced service; or other evidence of its ability to pay.

In this case, the record indicates the Petitioner's continuous business operations since 2002 and its most recent employment of 16 people. Copies of the Petitioner's federal income tax returns from 2011 through 2015 reflect increasing annual amounts of gross revenue and salaries/wages paid. The Petitioner also submitted documentation reflecting its possession of a good reputation in its industry.

As in *Sonegawa*, the Petitioner's asserts its incurrence of uncharacteristic expenses during the year of the petition's priority date. The record indicates that the Petitioner relocated its business in April 2013, incurring about $83,000 in moving, remodeling, and equipment leasing expenses. Without these uncharacteristic expenses, the Petitioner would likely have been able to demonstrate its ability to pay the proffered wage in 2013. But the Petitioner still has not demonstrated its ability to pay the proffered wage in 2014.

In *Sonegawa*, the petitioner did not demonstrate its ability to pay in 1 year, but established its incurrence of uncharacteristic expenses that year. *Sonegawa*, 12 I&N Dec. at 614. Here, the Petitioner did not demonstrate its ability to pay in 2 years, but demonstrated its incurrence of uncharacteristic expenses in only one of the years. Considering the totality of the circumstances, therefore, the record does not establish the Petitioner's ability to pay the proffered wage pursuant to *Sonegawa*.

For the foregoing reasons, we find that the record does not establish the Petitioner's ability to pay the proffered wage from the petition's priority date onward.

C. Labor Certification Does Not Support Classification

Although unaddressed by the Director, the record also does not demonstrate that the labor certification supports the requested advanced degree classification.

If not submitted with an application for Schedule A designation or documentation of a beneficiary's qualifications for a shortage occupation, a petition for an advanced degree professional must be accompanied by a valid, individual labor certification. 8 C.F.R. § 204.5(k)(4)(i).

The job offer portion of a labor certification accompanying such a petition "must demonstrate that the job requires a professional holding an advanced degree or the equivalent." *Id.* The term "advanced degree" means "any United States academic or professional degree or a foreign equivalent degree above that of baccalaureate. A United States baccalaureate degree or a foreign

equivalent degree followed by five years of progressive experience in the specialty shall be considered the equivalent of a master's degree." 8 C.F.R. § 204.5(k)(2).

Here, the labor certification states the primary requirements of the offered position of management analyst as a U.S. master's degree or a foreign equivalent degree in industrial engineering or management, plus 6 months of experience as an industrial engineer, management analyst, or department chief. The labor certification also states the Petitioner's acceptance of an alternate combination of education and experience.

In determining a job offer's requirements, we must examine the job offer portion of a labor certification to determine the minimum requirements of an offered position. We may not ignore a term of the labor certification, nor impose additional requirements. *See K.R.K. Irvine, Inc.* v. *Landon,* 699 F.2d 1006, 1009 (9th Cir. 1983); *Madany* v. *Smith,* 696 F.2d 1008, 1012-13 (D.C. Cir. 1983); *Stewart Infra-Red Commissary of Mass., Inc.* v. *Coomey,* 661 F.2d 1, 3 (1st Cir. 1981).

In this case, part H.8 of the labor certification states the acceptable, alternate combination of education and experience as an "MS dgr. or equiv. accept any suitable comb. of educ. trng. & exp. accep" and 5 years of experience. Also, part H.14 of the labor certification, which lists "[s]pecific skills or other requirements," states: "Master's degree or equivalent and experience. Will accept work experience in lieu of a master's degree."

Thus, in lieu of the primary requirement of a U.S. master's degree or a foreign equivalent degree plus 6 months of experience, the plain language of the labor certification states the Petitioner's acceptance of a master of science degree or a foreign equivalent degree and 5 years of experience. The labor certification also clearly states the Petitioner's acceptance of "work experience in lieu of a master's degree."

The Petitioner's acceptance of work experience in lieu of a master's degree allows a worker without a college or university degree to qualify for the offered position based solely on his or her employment experience. As previously indicated, an "advanced degree" or its equivalent requires, at a minimum, a master's degree or a bachelor's degree plus 5 years of experience. 8 C.F.R. § 204.5(k)(2). The requirements listed in part H.14 of the labor certification allow a worker with lesser or no education to qualify for the offered position. Therefore, contrary to 8 C.F.R. § 204.5(k)(4)(i), the labor certification does not demonstrate that the job requires an advanced degree professional. We cannot ignore this term of the labor certification, which accepts lesser education than required by regulation for an advanced degree professional. *See Madany*, 696 F.2d at 1015 (stating "it is the language of the labor certification job requirements that will set the bounds of the . . . burden of proof").

For the foregoing reasons, the job offer portion of the labor certification does not demonstrate the offered position's requirement of an advanced degree professional.

D. The Beneficiary's Possession of the Required Experience

Also unaddressed by the Director, the record does not establish the Beneficiary's possession of the experience required for the offered position or the requested classification.

A petitioner must establish a beneficiary's possession of all the education, training, and experience specified on an accompanying labor certification by a petition's priority date. 8 C.F.R. § 103.2(b)(l), (12); *see also Matter of Wing's Tea House,* 16 I&N Dec. 158, 159 (Acting Reg'l Comm'r 1977); *Matter of Katigbak,* 14 I&N Dec. 45, 49 (Reg'l Comm'r 1971). A petitioner for an advanced degree professional must also document a beneficiary's status as a professional holding an advanced degree. 8 C.F.R. § 204.5(k)(3).

As previously indicated, in evaluating a beneficiary's qualifications for an offered position, we must examine the job offer portion of a labor certification to determine the minimum requirements of the position. We may neither ignore a term of the labor certification, nor impose additional requirements. *See Irvine*, 699 F.2d at 1009; *Madany,* 696 F.2d at 1012-13; *Stewart,* 661 F.2d at 3.

As previously discussed, the labor certification states the minimum requirements of the offered position of management analyst as a master's degree plus 6 months of experience as industrial engineer, management analyst, or department chief, or a master's degree plus 5 years of experience. The labor certification also states the Petitioner's acceptance of "work experience in lieu of a master's degree."

The record establishes the Beneficiary's possession of the foreign equivalent of a U.S. bachelor's degree in industrial engineering. Thus, the Petitioner appears to assert the Beneficiary's possession of a bachelor's degree plus 5 years of experience in the specialty. *See* 8 C.F.R. § 204.5(k)(2) (requiring a foreign national with the foreign equivalent of a U.S. bachelor's degree to possess at least 5 years of progressive, post-baccalaureate experience in the specialty).

On the labor certification, the Beneficiary attested to possession of more than 10 years of full-time, qualifying experience in Colombia. The Beneficiary stated the following experience:

- About 7 years, 5 months as an industrial engineer with [redacted] from August 1, 2005, to January 13, 2013; and
- About 3 years, 6 months as a department chief with [redacted] from November 2, 2002, to May 15, 2005.

A petitioner must support a beneficiary's claimed qualifying experience with letters from employers. 8 C.F.R. § 204.5(g)(1). The letters must provide the employers' names, addresses, and titles, and describe a beneficiary's experience. *Id.*

The petitioner submitted copies of March 2013 letters from [redacted] and [redacted] The letter from a human resources coordinator on [redacted] stationery states the company's employment of the

Beneficiary as an industrial engineer from August 1, 2005, to January 6, 2013, and describes the Beneficiary's duties. But the purported author did not sign the letter. Without a signature, the unauthenticated letter lacks sufficient reliability to establish the Beneficiary's claimed qualifying experience.

The copy of a letter from a legal representative on stationery is signed and states the company's employment of the Beneficiary as a "production chief" from November 2, 2002, to May 15, 2005. But, contrary to 8 C.F.R. § 204.5(g)(1), the letter does not describe the Beneficiary's duties. The letter therefore does not establish the Beneficiary's claimed, qualifying experience with

The record does not sufficiently document any of the Beneficiary's claimed qualifying experience. As such, we find that the Petitioner has not established the Beneficiary's possession of the experience required for the offered position or the requested classification.

II. CONCLUSION

The Petitioner did not demonstrate its continuing ability to pay the proffered wage from the petition's priority date onward. We will therefore affirm the Director's decision. In addition, the record does not establish the validity of the accompanying labor certification for the requested classification, or the Beneficiary's possession of the experience required for the offered position or the requested classification.

ORDER: The appeal is dismissed.

Cite as *Matter of W- Corp.*, ID# 171481 (AAO Mar. 21, 2017)