U.S. Citizenship and Immigration Services

Non-Precedent Decision of the Administrative Appeals Office

MATTER OF J-H-O-S-, LLC

DATE: MAR. 29, 2018

APPEAL OF NEBRASKA SERVICE CENTER DECISION

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

The Petitioner, a seller of aftermarket car parts, seeks to employ the Beneficiary as its advertising and promotions director. It requests classification of the Beneficiary as a professional under the third preference immigrant classification. Immigration and Nationality Act (the Act) section 203(b)(3)(A)(ii), 8 U.S.C. § 1153(B)(3)(A)(ii). This employment-based 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 two grounds. The Director found that the Petitioner did not establish its continuing ability to pay the proffered wage from the priority date of the petition up to the present and did not establish that the Beneficiary had the specific skills required by the labor certification.

On appeal the Petitioner asserts that the evidence of record establishes its continuing ability to pay the proffered wage and that the Beneficiary meets the specific skills requirement of the labor certification.

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 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 U.S. 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 (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.

II. ANALYSIS

A. Petitioner's Ability to Pay the Proffered Wage

The first issue in this appeal is whether the Petitioner has established its continuing ability to pay the proffered wage from the priority date[1] onward. For the following reasons we conclude that it has not.

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].

The priority date of the petition is March 24, 2016. The proffered wage of the job offered is $78,458 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. If the petitioner establishes by documentary evidence that it employed the beneficiary at a salary equal to or greater than the proffered wage, the evidence is 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.

The record indicates that the Petitioner is a sole proprietorship, a business in which one person operates the business in his or her personal capacity, *Black's Law Dictionary* 1398 (7th Ed. 1999).

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

Unlike a corporation, a sole proprietorship does not exist as an entity apart from the individual owner. *See Matter of United Investment Group*, 19 I&N Dec. 248, 250 (Comm'r 1984). Therefore the sole proprietor's adjusted gross income, assets, and personal liabilities are also considered as part of the petitioner's ability to pay. Sole proprietors report income and expenses from their businesses on their individual federal tax return (Form 1040) each year. The business-related income and expenses are reported on Schedule C and are carried forward to the first page of the tax return. Sole proprietors must show that they can cover their existing business expenses as well as pay the proffered wage out of their adjusted gross income or other available funds. In addition, sole proprietors must show that they can sustain themselves and their dependents. *See Ubeda v. Palmer*, 539 F. Supp. 647 (N.D. Ill. 1982), *aff'd*, 703 F.2d 571 (7th Cir. 1983).

As initial evidence the Petitioner submitted a copy of its Schedule C (Form 1040) for 2015, but not its complete federal tax return for that year. Nor did the Petitioner submit its tax returns for the priority date year, 2016, or any time thereafter. The Petitioner also submitted a statement and a compilation report from EA (Enrolled Agent), with unaudited financial statements consisting of income and expenses for the period of January 1 to August 31, 2016, and assets and liabilities as of August 31, 2016.

In a request for evidence (RFE) the Director requested the submission of annual reports, complete federal tax returns, or audited financial statements for the years 2015 and 2016. In its response to the RFE the Petitioner did not submit any of the requested evidence. Instead, the Petitioner submitted monthly account statements from for the six-month period of January to June 2017 and another compilation report from its EA with unaudited financial statements consisting of income and expenses for the period of January 1 to June 30, 2017, and assets and liabilities as of June 30, 2017.

The Director found that the above evidence did not establish the Petitioner's ability to pay the proffered wage because the financial statements were not audited by a certified public accountant (CPA), as required by 8 C.F.R. § 204.5(g)(2), and the Petitioner had not demonstrated that this was an "appropriate case" under the regulation for the consideration of bank account records since it had not submitted any of the required evidence – either annual reports, complete federal tax returns, or audited financial statements – specifically requested in the RFE.

On appeal the Petitioner has not submitted any additional evidence of its ability to pay the proffered wage. Thus, there is no evidence of the Petitioner's net income (or loss), or of its net current assets (or liabilities), in 2016, or 2017. Accordingly, the Petitioner has not established its ability to pay the proffered wage based on its net income or net current assets at any time since the priority date of March 24, 2016.

The Petitioner claims that its previously submitted bank account records show that it could have paid the proffered wage at any point during the six-month period of January through June 2017, and that USCIS has not explained why this is not an appropriate case for considering the bank records. The Petitioner's claim is not persuasive. First, bank statements are not among the three types of

evidence, enumerated in 8 C.F.R. § 204.5(g)(2), required to illustrate a petitioner's ability to pay a proffered wage. While the regulation allows bank account records to be considered "in appropriate cases" as additional evidence, it does not allow the absence of the required documentation. Second, bank statements show the amount in an account on a given date, and cannot show the sustainable ability to pay a proffered wage. For the reasons discussed, the lack of regulatory prescribed evidence prohibits us from finding that the Petitioner has the ability to pay.

The Petitioner acknowledges that it should have submitted an audited financial statement, but states that its current accountant is an EA and that it would cost a lot more to hire a CPA to prepare an audited financial statement. While stating that it was willing to spend the money on a CPA if necessary, the Petitioner has not submitted any audited financial statement on appeal. The regulation at 8 C.F.R. § 204.5(g)(2) makes clear that when a petitioner relies on financial statements to demonstrate its ability to pay the proffered wage, those financial statements must be audited. An audit is conducted in accordance with generally accepted auditing standards to obtain a reasonable assurance that the financial statements of the business are free of material misstatements. The unaudited financial statements submitted with the petition and in response to the RFE are not persuasive evidence. The EA's reports that accompanied those financial statements make clear that each of them was produced pursuant to a compilation rather than an audit. The EA's reports also state that financial statements produced pursuant to a compilation are the representations of management. The unsupported representations of management are not reliable evidence and are insufficient to demonstrate the Petitioner's ability to pay the proffered wage.

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 (Reg'l Comm'r 1967). 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 of any of the required forms of evidence identified in 8 C.F.R. § 204.5(g)(2) greatly restricts out ability to consider the totality of the Petitioner's circumstances. The financial documentation in the record is weak, consisting primarily of an incomplete federal tax return from before the priority date year, unaudited financial statements, and six monthly bank account statements. These materials date exclusively from the years 2015-2017, and do not demonstrate a historical pattern of growth for the business since its formation in 2010. Moreover, the Petitioner claimed to have just one employee at the time the petition was filed. In short, the evidence of record does not 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 continuing ability to pay the proffered wage of $78,458 per year from the priority date of March 24, 2016, up to the present.

B. Requirements of the Labor Certification

The second issue in this appeal is whether the Petitioner has established that the Beneficiary has the specific skills required by the labor certification to qualify for the job offered. For the following reasons we conclude that it has not.

A beneficiary must meet all of the education, training, experience, and other requirements of the labor certification as of the petition's priority date. *See Matter of Wing's Tea House*, 16 I&N Dec. 158, 159 (Acting Reg'l Comm'r 1977). In this case the labor certification states in section H.14 that, in addition to educational and experience requirements, the following specific skills are required:

> [S]kill in Video Creation and Editing Software such as Windows Life Video Editor, AVS Video Editor, Microsoft Photoshop, EASYGIG Animator, Corel Draw, Graphic Design, Photo Imaging and Publishing Software, Canon Professional Camera and Canon EOS Editor.

No evidence was submitted with the petition that the Beneficiary had those specific skills. In the RFE the Director stated that the letter from attesting to the Beneficiary's work experience with that company did not indicate that the Beneficiary had the specific skills identified at section H.14 of the labor certification. The Director requested that such evidence be submitted. In response to the RFE the Petitioner asserted generally that the Beneficiary had the requisite skills, but did not submit persuasive evidence thereof, such as a new letter from or a prior employer. Accordingly, the Director found that the evidence was insufficient to establish that the Beneficiary acquired the specific skills required for the job offered.

On appeal the Petitioner resubmits a copy of the letter from that was originally submitted with the petition. This letter, dated July 27, 2015, attested that the Beneficiary had been employed as advertising and promotions director since November 2011, described her job duties, and stated that the Beneficiary had "special skills such as photography, Photoshop, video production, and social media to successfully create all new print materials." The Petitioner also submits a new letter from , dated September 9, 2017, which indicated that the Beneficiary was still an employee and described her job duties once again. Neither letter, however, confirmed whether the Beneficiary possessed and utilized all of the specific skills identified at section H.14 of the labor certification. "Photoshop" is the only specific skill identified in the first letter from that is included in the list of required skills at section H.14 of the labor certification.

Thus, the Petitioner has not overcome the Director's finding that the record does not show that the Beneficiary has all of the specific skills to qualify for the proffered position under the terms of the labor certification.

III. CONCLUSION

The Petitioner has not established its continuing ability to pay the proffered wage from the priority date up to the present. In addition, the Petitioner has not established that the Beneficiary has all of the specific skills identified at section H.14 of the labor certification to qualify for the job offered.

ORDER: The appeal is dismissed.

Cite as *Matter of J-H-O-S-, LLC*, ID# 1106743 (AAO Mar. 29, 2018)