U.S. Citizenship and Immigration Services

Non-Precedent Decision of the Administrative Appeals Office

MATTER OF S-M-, LLC

DATE: NOV. 9, 2018

APPEAL OF TEXAS SERVICE CENTER DECISION

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

The Petitioner, a ranch, seeks to employ the Beneficiary as a farmworker-horses. It requests classification of the Beneficiary as an "other worker" 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 for lawful permanent resident status a foreign national who is capable of performing unskilled labor that requires less than two years of training or experience and is not of a temporary or seasonal nature.

The Director of the Texas Service Center denied the petition on the ground that the Petitioner did not establish its ability to pay the proffered wage in 2017 and 2018. On appeal the Petitioner asserts that the evidence of record establishes its ability to pay the proffered wage, and that the Director should not have denied the petition in any event because no federal income tax returns were available at the time of the decision for the years 2017 or 2018.

Upon *de novo* review, we will withdraw the Director's decision and remand the case for further consideration and the issuance of a new decision.

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 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 (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 requested 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 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

As indicated in the above regulation, the Petitioner must establish its continuing ability to pay the proffered wage from the priority date[1] of the petition onward. The priority date in this case is January 13, 2017. The labor certification states that the wage offered for the job of farmworker-horses is $28,000 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 record indicates that the Beneficiary worked for the Petitioner during part of the priority date year of 2017. According to a Form W-2, Wage and Tax Statement, issued to him by the Petitioner, the Beneficiary received "wages, tips, other compensation" of $13,331.06 in 2017. The Petitioner has also submitted a chart of payments to its employees during the first three months of 2018 showing that the Beneficiary received gross pay totaling $8,400 by the end of March 2018. The foregoing documentation does not establish that the Beneficiary's pay has equaled or exceeded the proffered wage since the priority date of January 13, 2017.

If a petitioner has not employed the beneficiary and paid him (or her) 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 statement(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.

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

In this case the Director issued a request for evidence (RFE) in February 2018 in which the Petitioner was requested to submit at least one of the types of evidence – either an annual report, or a federal income tax return, or an audited financial statement – required by the regulation at 8 C.F.R. § 204.5(g)(2) for each of the years 2017 and 2018.[2] In its response to the RFE, submitted to USCIS on May 3, 2018, the Petitioner stated that no federal income tax return for 2017 was yet available because it had requested and received a filing extension.[3] Nevertheless, the Director issued a decision on May 17, 2018, denying the petition. The Petitioner filed a timely appeal, followed by a brief and additional evidence which includes a copy of its 2017 federal income tax return bearing a date by the preparer of June 15, 2018. Since the federal income tax return was evidently not available at the time the denial decision was issued, we will remand this matter to the Director for further consideration of the Petitioner's ability to pay the proffered wage and the issuance of a new decision.

III. CONCLUSION

For the reasons discussed above, we will remand this case to the Director for further consideration of the Petitioner's ability to pay the proffered wage from the priority date onward.

ORDER: The Director's decision is withdrawn. The matter is remanded for the entry of a new decision consistent with the foregoing analysis.

Cite as *Matter of S-M, LLC*, ID# 1864482 (AAO Nov. 9, 2018)

[2] The request for an annual report, or a federal tax return, or an audited financial statement for 2018 was clearly mistaken because no such documents could be prepared and submitted before the end of that year.

[3] The record indicates that the application was granted and the filing deadline extended to October 15, 2018.