U.S. Citizenship and Immigration Services

Non-Precedent Decision of the Administrative Appeals Office

MATTER OF L-I-

DATE: NOV. 18, 2019

APPEAL OF TEXAS SERVICE CENTER DECISION

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

The Petitioner, a finish carpentry contracting business, seeks to employ the Beneficiary as a multi-skilled carpenter. It requests classification of the Beneficiary as a skilled worker under the third preference immigrant category. Immigration and Nationality Act (the Act) section 203(b)(3)(A)(i), 8 U.S.C. § 1153(B)(3)(A)(i). This employment-based "EB-3" 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 Texas 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 onward.

On appeal the Petitioner requests that the petition be approved so that it can utilize the Beneficiary's skills to help complete a recently signed service agreement.

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 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 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):

> 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].

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 the case is September 28, 2017, and the proffered wage is $47,549.

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. In this case, the Petitioner has not employed the Beneficiary at any time since the priority date. Accordingly, the Petitioner cannot establish its ability to pay the proffered wage based on wages paid to the Beneficiary.

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.

The record includes copies of the Petitioner's federal income tax returns, Form 1120, U.S. Corporation Income Tax Return, for 2017 and 2018. As recorded in the tax returns, the Petitioner had a net loss[2] of $2,138.34 and net current assets[3] of $9,052.67 in 2017, and in 2018 had net income of $10,769.81 and net current liabilities of $5,526.88. As these figures were all well below the proffered wage, the Petitioner has not established its ability to pay the proffered wage in 2017 or in 2018 based on its net income or net current assets in either year.

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[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). The Petitioner must establish that all eligibility requirements for the petition have been satisfied as of the priority date.

[2] Net income (or loss) was recorded on page 1, line 30, of the Form 1120.

[3] For a corporation net current assets (or liabilities) are the difference between its current assets, entered on lines 1-6 of Schedule L, and its current liabilities, entered on lines 16-18 of Schedule L.

On appeal, the Petitioner submits the copy of a service contract it signed with [redacted] in January 2019 to provide carpentry and related services in a construction project at [redacted] Airport, and asserts that the Beneficiary is needed to help complete this project. Nothing in the service contract, however, demonstrates the Petitioner's ability to pay the proffered wage to the Beneficiary in 2019, much less in the two prior years of 2017 and 2018.

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. 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.

In this case, the Petitioner states that it began operations in 2003, had one employee at the time the petition was filed in December 2018, and that the job of multi-skilled carpenter is a new position. The tax returns in the record, which cover the four-year period of 2015-2018, show that the Petitioner's gross receipts totaled $308,398.35 in 2015; $341,886.90 in 2016; $266,198.98 in 2017; and $407,062.94 in 2018. While those figures indicate a modest increase in gross receipts from 2015 to 2018, they also indicate a consistently small-scale business with fluctuating revenue and do not support the Petitioner's ability to pay. The Petitioner also does not claim uncharacteristic expenses or an outstanding reputation. Moreover, since the petition indicates that the multi-skilled carpenter job for which the Petitioner seeks the Beneficiary's services is a new position, the proffered wage of $47,549 would be a new expense for the Petitioner which it has not previously covered. Based on the record before us we conclude that the totality of its circumstances does not demonstrate the Petitioner's ability to pay the proffered wage from the priority date of September 28, 2017, onward.

III. CONCLUSION

The Petitioner has not established its continuing ability to pay the proffered wage from the priority date onward. The appeal will be dismissed for the above stated reason. 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. The Petitioner has not met that burden.

ORDER: The appeal is dismissed.

Cite as *Matter of L-I-,* ID# 6221911 (AAO Nov. 18, 2019)