U.S. Citizenship and Immigration Services

Non-Precedent Decision of the Administrative Appeals Office

In Re: 11106463

Date: NOV. 27, 2020

Appeal of Texas Service Center Decision

Form I-140, Immigrant Petition for Professional

The Petitioner seeks to employ the Beneficiary as a mechanical casting process engineer. It requests classification of the Beneficiary under the third-preference, immigrant classification for professional workers. 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" category allows a U.S. employer to sponsor a professional with a baccalaureate degree for lawful permanent resident status.

The Director of the Texas Service Center denied the petition, concluding that the record did not establish that the Petitioner had the continuing ability to pay the proffered wage to the Beneficiary, as well as all of the proffered wages owed to its other beneficiaries of Form I-140 employment-based immigrant petitions.

Upon de novo review, we will withdraw the Director's decision and remand the case for further consideration of the Petitioner's ability to pay the proffered wage, and the issuance of a new decision on that issue.

I. LAW

Employment-based immigration generally follows a three-step process. To permanently fill a position in the United States with a foreign worker, a prospective employer must first obtain certification from the U.S. Department of Labor (DOL). See section 212(a)(5) of the Act, 8 U.S.C. § 1182(a)(5). DOL approval signifies that insufficient U.S. workers are able, willing, qualified, and available for a position. Id. Labor certification also indicates that the employment of a foreign national will not harm wages and working conditions of U.S. workers with similar jobs. Id.

If DOL approves a position, an employer must next submit the certified labor application with an immigrant visa petition to U.S. Citizenship and Immigration Services (USCIS). See section 204 of the Act, 8 U.S.C. § 1154. Among other things, USCIS considers whether a beneficiary meets the requirements of a certified position and a requested immigrant visa classification. If USCIS approves the petition, a foreign national may finally 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. ABILITY TO PAY THE PROFFERED WAGE

A petitioner must establish that it has the ability to pay the beneficiary the proffered wage, as stated on the labor certification, from the priority date[1] onward. See 8 C.F.R. § 204.5(g)(2). To show that the job offer to a beneficiary is realistic the petitioner must also establish its ability to pay the proffered wages of its other I-140 beneficiaries.[2]

As indicated in the above regulation, the Petitioner must establish its continuing ability to pay the proffered wage from the priority date of the petition onward. The priority date in this case is January 21, 2019.[3] The labor certification states that the wage offered for the job of mechanical casting process engineer is $62,150 per year.

In determining a petitioner's ability to pay, we first examine whether it paid a beneficiary the full proffered wage each year from a petition's priority date. We next examine whether it had sufficient annual amounts of net income or net current assets to pay the proffered wage. If a petitioner's net income or net current assets are insufficient, we may also consider other evidence of its ability to pay the proffered wage.[4] 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).[5]

With the initial filing, the Petitioner submitted its 2017 Internal Revenue Service (IRS) Form 1065, U.S. Return of Partnership Income, and the 2018 IRS Form W-2, Wage and Tax Statement, it issued to the Beneficiary. The Director determined that the evidence was not sufficient to establish that the Petitioner had the ability to pay the proffered wage to the Beneficiary and to the beneficiaries of other petitions it filed in 2019. The Director issued a Request for Evidence (RFE) to allow the Petitioner the opportunity to provide additional evidence to establish its ability to pay the proffered wage.

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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] See Patel v. Johnson, 2 F.Supp. 3d 108, 124, upholding our denial of a petition when the petitioner did not demonstrate its ability to pay multiple beneficiaries.

[3] The Petitioner notes discrepancies of the priority date as shown on the receipt of filing the instant petition (January 19, 2019) and as noted in the Director's decision (May 20, 2019). In these proceedings, we clarify that the correct priority date is the date of filing shown on the labor certification, which is January 21, 2019.

[4] 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); Tongatapu Woodcraft Haw., Ltd. v. Feldman, 736 F.2d 1305, 1309 (9th Cir. 1984); Estrada-Hernandez v. Holder, -- F. Supp. 3d --, 2015 WL 3634497, *5 (S.D. Cal. 2015); Rizvi v. Dep't of Homeland Sec., 37 F. Supp. 3d 870, 883-84 (S.D. Tex. 2014), aff'd, 627 Fed. App'x 292, 294-295 (5th Cir. 2015).

[5] 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 response to the RFE, the Petitioner provided its 2018 IRS Form 1065, the most recent federal tax return available at the time. The Petitioner also provided the requested information regarding all petitions it filed for other beneficiaries in 2019 and evidence of wages it paid to those two individuals.[6]

The Director concluded that the Petitioner's 2018 tax return did not demonstrate sufficient net income or net current assets to establish its ability to pay the proffered wage (or the difference between the proffered wage and wages already paid) to all of its beneficiaries.

In denying the petition, the Director considered the Petitioner's net income as its ordinary business income listed on Line 22 of its tax return, and the Petitioner's net current assets listed on Schedule L (the difference between Lines 1-6 and Lines 15-17). However, the Director did not consider Schedule K of the Petitioner's tax return. Because Schedule K examines a business's income, deductions, and credits, the analysis of the net income (loss) included in Schedule K is relevant. We further note that the Director's decision does not include an analysis of the totality of the circumstances.

On appeal, the Petitioner submits the following evidence:

- 2019 Forms W-2 demonstrating that it paid $58,383.31 to the Beneficiary, and $55,739.54 and $59,572.45 to each of its other beneficiaries;
- IRS Form 941, Employer's Quarterly Federal Tax Return, for Quarter Four 2019, demonstrating that the Petitioner paid more than $2.5 million in wages to its employees in that quarter;
- 2018 consolidated financial report, and;
- Additional evidence describing an uncharacteristic business loss that occurred in 2017.

The Petitioner did not submit its 2019 federal tax return with the appeal. However, at the time the appeal was filed, it appears that the Petitioner had not yet filed its 2019 tax return.[7]

In this case, the record reflects the following details:

	Wages Owed to the Beneficiary after W-2 consideration	Other wages Owed after W-2 consideration	Net Income
2018	n/a[8]	n/a	$1,144,946 (Sched K)
2019	$3,766.69	$8,988.01	Unavailable

In view of the unavailability of evidence of the Petitioner's net income and net current assets in the year of the priority date, specifically the Petitioner's 2019 tax return, we will remand this matter for further

[6] The Director's decision incorrectly states that the Petitioner did not provide the proffered wage of its other beneficiaries. However, in its RFE response, the Petitioner provided the annual proffered wage as $62,150 for two other beneficiaries.
[7] The Petitioner's 2017 and 2018 tax returns indicate that the Petitioner was granted an extension to file until September in each year.
[8] As noted above, the priority date is January 19, 2019, so that the Beneficiary's proffered wage, and the wages of other beneficiaries, would be measured from this date.

consideration. The Director may request the Petitioner's 2019 tax return and any other documentation deemed relevant at his discretion in determining the Petitioner's ability to pay the proffered wage.

The Director should consider the amount of wages the Petitioner paid to the Beneficiary each year; the Petitioner's net income and net current assets each year; and the proffered wages and wages the Petitioner paid to its other I-140 beneficiaries for the time period in question. At his discretion, in accord with Matter of Sonegawa 12 I&N Dec. 612 (Reg'l Comm'r 1967), the Director may consider evidence relevant to the petitioner's financial situation.

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