U.S. Citizenship and Immigration Services

Non-Precedent Decision of the Administrative Appeals Office

In Re: 11931412

Date: OCT. 16, 2020

Appeal of Nebraska Service Center Decision

Form I-140, Immigrant Petition for Skilled Worker

The Petitioner seeks to employ the Beneficiary as a head groom at a horse farm. It requests classification of the Beneficiary under the third-preference, immigrant category as a skilled worker. 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" category allows a U.S. business to sponsor a foreign national for lawful permanent resident status based on a job offer requiring at least two years of training or experience.

The Director of the Nebraska Service Center denied the petition, concluding that the record did not establish that the Petitioner had the ability to pay the proffered wage.

In these proceedings, it is the Petitioner's burden to establish eligibility for the requested benefit. Section 291 of the Act, 8 U.S.C. § 1361. Upon *de novo* review, we will dismiss the appeal.

I. EMPLOYMENT-BASED IMMIGRATION

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. ANALYSIS

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].

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 of a petition is the date the underlying labor certification is filed with the DOL, which in this case was July 2, 2018. The labor certification states that the wage offered for the job of head groom is $31,158 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 there is no evidence the Petitioner has ever employed or paid the Beneficiary. Therefore, the Petitioner cannot establish its continuing ability to pay the proffered wage from the priority date onward based on wages paid to the Beneficiary.

If a petitioner does not establish that it has employed and paid the beneficiary an amount 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 ordinarily be considered able to pay the proffered wage during that year.

We may also consider the totality of the Petitioner's circumstances, as set forth in *Matter of Sonegawa,* 12 I&N Dec. 612 (Reg'l Comm'r 1967), in determining its ability to pay the proffered wage. Per *Matter of Sonegawa* 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.

The Petitioner claims to be a horse farm established in 1995 with nine employees.[1] With the initial filing the Petitioner submitted a 2018 Profit and Loss Statement accompanied by a letter from the chief financial officer stating that the Petitioner is in a financial position to pay the offered annual salary of $31,158. The Director issued a request for evidence (RFE) advising the Petitioner that this evidence was not sufficient to establish its ability to pay the proffered wage because the Petitioner employed less than 100 workers and the Profit and Loss Statement was unaudited.[2]

In response to the RFE, the Petitioner submitted a second letter from its chief financial officer, stating that it is operated and funded by [redacted] The response also included a copy of one page of [redacted]'s October 2019 bank statement, and printouts from Wikipedia and other internet sources regarding [redacted]'s net worth.

The Director concluded that the record did not include any regulatory prescribed evidence of the Petitioner's ability to pay the proffered wage and denied the petition.[3]

On appeal, the Petitioner asserts that it is a partnership whose income and losses pass through its partners and are recorded on each partners' individual tax returns. The Petitioner states that it does not possess a 2018 federal income tax return, annual report or audited financial statement and submits copies of documents already in the record. The only additional evidence submitted on appeal is a 2014 letter from the Petitioner's accounting firm addressed to the DOL, stating:

> A partnership must file an annual information return to report the income, deductions, gains, losses, etc., from its operations, but generally does not pay income tax. Instead, it 'passes through' any income or losses to its partners. Each partner includes his or her share of the partnership's income or loss on his or her tax return. There are no Articles of Incorporation involved in a Partnership.

As the Petitioner's accountant notes, a partnership must file an annual information return to report its income and losses on IRS Form 1065, U.S. Partnership Income Tax Return.[4] The Petitioner has not provided its Form 1065 for any year or explained why this is unavailable. Nor has the Petitioner explained why audited financial statements or other regulatory prescribed evidence is unavailable.

A general partnership consists of two or more partners. A general partner is personally liable for the partnership's total liabilities. As such, a general partner's personal assets may be utilized to show the ability to pay the proffered wage. However, a general partner's personal expenses and liabilities must

[1] The labor certification states that the Petitioner has nine employees, however, Part 5 of Form I-140, Immigrant Petition for Alien Worker, requesting the Petitioner's current number of U.S. employees and gross and net annual income, was left blank.

[2] The regulation at 8 C.F.R. § 204.5(g)(2) makes clear that where a petitioner relies on financial statements to demonstrate its ability to pay the proffered wage, those financial statements must be audited.

[3] The failure to submit requested evidence that precludes a material line of inquiry shall be grounds for denying the petition. *See* 8 C.F.R. § 103.2(b)(14).

[4] *About Form 1065, U.S. Return of Partnership Income*, available at https://www.irs.gov/forms-pubs/about-form-1065.

also be examined in order to make a determination that his or her assets are truly available to pay the proffered wage. The Petitioner has not identified its partners or provided a copy of anyone's IRS Form 1040, U.S. Individual Income Tax Return for any year.[5]

In its brief on appeal, counsel for the Petitioner states that the single bank statement "demonstrates ... that, as of October 2019, the Petitioner has the sustained ability to pay the offered wage for the next 39 years."[6] Even if we accepted that [redacted] is a partner, although nothing in the record officially identifies him as one, the Petitioner has not explained how one bank statement from October 2019 establishes its ability to pay the proffered wage from the priority date of July 2, 2018. Nor does the record demonstrate [redacted]'s willingness to be personally liable for paying the offered wage, or provide his personal expenses and liabilities for any period of time.

While the regulation at 8 C.F.R. § 204.5(g)(2) allows for the submission of other evidence such as bank account records "in appropriate cases," and we may examine other relevant evidence in the totality of the circumstances, the Petitioner has not explained why regulatory prescribed evidence is unavailable and has not provided other relevant evidence to establish its ability to pay the proffered wage from the priority date onward. In the absence of regulatory prescribed evidence, we are also unable to examine the Petitioners' totality of the circumstances.

For the reasons discussed above, we find that the Petitioner has not established its ability to pay the proffered wage from the priority date onward. Thus, we will dismiss the appeal.

ORDER: The appeal is dismissed.

[5] It is incumbent upon a petitioner to resolve any inconsistencies in the record by independent objective evidence. Attempts to explain or reconcile such inconsistencies will not suffice without competent evidence pointing to where the truth lies. *See Matter of Ho*, 19 I&N Dec. 582, 591-92 (BIA 1988). Doubt cast on any aspect of the petitioner's evidence also reflects on the reliability of the petitioner's remaining evidence. *See id.*

[6] Assertions of counsel do not constitute evidence. *Matter of Obaigbena*, 19 I&N Dec. 533, 534 n.2 (BIA 1988) (citing *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980)). Counsel's statements must be substantiated in the record with independent evidence, which may include affidavits and declarations.