U.S. Citizenship and Immigration Services

Non-Precedent Decision of the Administrative Appeals Office

In Re: 11283624

Date: OCT. 19, 2020

Appeal of Nebraska Service Center Decision

Form I-140, Immigrant Petition for Skilled Worker

The Petitioner seeks to employ the Beneficiary as a social media manager. 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 on the ground that the Petitioner did not establish its ability to pay the proffered wage from the priority date onward. The Director granted a subsequent motion to reopen and affirmed the denial.

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. ABILITY TO PAY THE PROFFERED WAGE

A petitioner must demonstrate its continuing ability to pay a proffered wage, from a petition's priority date until a beneficiary obtains lawful permanent residence. 8 C.F.R. § 204.5(g)(2). Evidence of ability to pay must include copies of annual reports, federal tax returns, or audited financial statements. *Id.*

In determining ability to pay, USCIS examines whether a petitioner paid a beneficiary the full proffered wage each year from a petition's priority date. If a petitioner did not annually pay the full proffered wage, USCIS next examines whether it generated sufficient annual amounts of net income or net current assets to pay any difference between the proffered wage and wages paid. If net income and net current assets are insufficient, USCIS may consider other factors affecting a petitioner's ability to pay a proffered wage. *See Matter of Sonegawa,* 12 I&N Dec. 612, 614-15 (Reg'l Comm'r 1967).[1]

The record reflects that the Petitioner's business was established in 2014 and that it employs nine individuals. Here, the accompanying labor certification, with a priority date of September 12, 2018, states the proffered wage of the offered position of social media manager as $187,221 per year ($15,601.75 per month).[2]

The Petitioner asserts that it began employing the Beneficiary in October 2019. A copy of the Petitioner's payroll report indicates that the Petitioner paid the Beneficiary $15,601.75 per month from November 1, 2019 to January 31, 2020.[3] While this demonstrates that the Petitioner paid the Beneficiary a salary equal to the monthly proffered wage for three months, the record does not include evidence that it annually paid the Beneficiary the full proffered wage from the September 12, 2018 priority date. The record does not contain the Beneficiary's W-2 form reflecting annual wages paid for 2018 or 2019.

If a petitioner does not establish that it has 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 that year.

The record includes a copy of the Petitioner's federal income tax return, Form 1120S, for 2018. If an S corporation, like the Petitioner, has income exclusively from a trade or business, USCIS considers its net income (or loss) to be the figure for "Ordinary business income (loss)" on page 1, line 21, of the Form 1120S. However, if there are relevant entries for additional income, credits, deductions or

---

[1] 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); *Estrada-Hernandez v. Holder*, 108 F. Supp. 3d 936, 942-43 (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 (5th Cir. 2015).

[2] The petition's priority date is the date the DOL accepted the accompanying labor certification application for processing. *See* 8 C.F.R. § 204.5(d) (explaining how to determine a petition's priority date).

[3] The payroll report indicates that the Petitioner paid the Beneficiary $10,081.13 for the period October 14 to October 31, 2019.

other adjustments from sources other than a trade or business, they are reported on Schedule K of the Form 1120S, and the corporation's net income or loss will be found in line 18 of Schedule K ("Income/loss reconciliation"). In this case, a figure of -$1,276,768 is entered on page 1, line 21, and the same figure is entered on line 18 of Schedule K. Thus, the Petitioner had a net loss of $1,276,768 in 2018. As for net current assets (or liabilities), they are determined by calculating the difference between current assets and current liabilities, as recorded in lines 1-6 and lines 16-18, respectively, of Schedule L. In this case the Petitioner's current assets were $679,212 and its current liabilities were $784,723 in 2018, resulting in net current assets of -$105,511. Accordingly, the Petitioner had no net income nor any net current assets with which to pay the proffered wage in 2018.

The record also includes the Petitioner's unaudited balance sheet as of August 31, 2019. 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. 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 that the Petitioner submitted are not persuasive evidence. Even if we were to accept the unaudited balance sheet, the figures shown reflect a net loss, with total current assets of approximately $1.9 million and total current liabilities of approximately $3.8 million.

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.

Here, the record includes the Petitioner's monthly bank statements from September 2018 to October 2019. While bank statements are not among the three types of evidence enumerated in 8 C.F.R. § 204.5(g)(2) required to demonstrate a petitioner's ability to pay a proffered wage, the regulation allows additional material "in appropriate cases," and we may examine other relevant evidence in the totality of the circumstances under *Sonegawa*.

In his decision, the Director determined that the Petitioner's bank statements do not conclusively demonstrate its ability to pay the proffered wage because the Petitioner's daily ending balance in mid-October 2019 was below the proffered wage. On appeal, the Petitioner asserts that the Beneficiary is paid on a monthly basis, as is demonstrated by the payroll records, and the bank statements reflect that it had a consistent amount of cash on hand each month to pay the monthly salary of $15,601.75.

Although the Director's focus on the daily balance for a brief period in October 2019 when the Petitioner was paying wages to the Beneficiary was misplaced and does not reflect a full analysis of the evidence, we agree with the Director that the monthly bank statements do not conclusively establish the Petitioner's ability to pay. Bank statements show the amount in an account on a given

date, and cannot show the sustainable ability to pay an annual proffered wage. Moreover, the Petitioner has not shown that the money in its bank account constitutes a financial resource separate and apart from its current assets as recorded in Schedule L of its federal income tax returns for 2018, its unaudited 2019 balance sheet, or what would be reflected on its 2019 tax return.

Here, the record lacks evidence of the Petitioner's reputation or of its historical growth over its six years in business. The Petitioner has not described any uncharacteristic business expenditures or losses, nor explained how its 2018 tax returns and August 2019 balance sheet paint an inaccurate financial picture. We find that the Petitioner has not established its ability to pay the annual proffered wage from the priority date based on the totality of the circumstances.

In accord with the analysis above, the Petitioner has not established its ability to pay the proffered wage from the priority date as required by 8 C.F.R. § 204.5(g)(2) or in an examination of the totality of the circumstances. Therefore, the appeal will be dismissed.

III. THE BENEFICIARY'S EXPEIRENCE

Although not addressed by the Director, the Petitioner did not establish that the Beneficiary possessed the experience required by the labor certification as of the priority date.

The accompanying labor certification states that the offered position requires no education and 48 months of experience in the offered job of social media manager. Experience in an alternate occupation is not accepted. On the labor certification, the Petitioner asserts that the Beneficiary gained more than six years of experience as a social media manager with [redacted] in Argentina.

The initial evidence submitted with the petition included a letter detailing the Beneficiary's experience with [redacted] The letter is written and signed by the Beneficiary.

The regulation at 8 C.F.R. § 204.5(l)(3) provides:

> (ii) *Other documentation*—
>
> (A) *General.* Any requirements of training or experience for skilled workers, professionals, or other workers must be supported by letters from trainers or employers giving the name, address, and title of the trainer or employer, and a description of the training received or the experience of the alien.

Here, the Beneficiary relies only on his own testimonial evidence to establish his claimed employment experience, without providing independent, objective evidence in support of this testimony. The Beneficiary's letter is self-serving and does not provide independent, objective evidence of his prior work experience. *See Matter of Ho*, 19 I&N Dec. 582, 591-92 (BIA 1988). The Beneficiary's experience letter is an assertion rather than evidence to support his claimed experience. Assertions made without supporting documentation are of limited probative value and do not carry the weight to satisfy the Petitioner's burden of proof. *See Matter of Soffici*, 22 I&N Dec. 158, 165 (Comm'r 1998).

A preponderance of evidence does not demonstrate the Beneficiary's possession of 48 months of experience required for the offered position as required by the labor certification and for the requested skilled worker classification. Therefore, the appeal is also dismissed on this basis.

IV. THE VALIDITY OF THE LABOR CERTIFICATION

Also unaddressed by the Director, we note that the underlying labor certification (ETA 9089, Application for Permanent Employment Certification) is not signed by the Beneficiary. Therefore, this petition was not eligible for approval at filing because it was not accompanied by a valid labor certification. The regulation at 20 C.F.R. § 656.17 describing the basic labor certification process provides in pertinent part:

> (a) Filing applications.
>
> > (1) . . . . Applications filed and certified electronically must, upon receipt of the labor certification, be signed immediately by the employer in order to be valid. Applications submitted by mail must contain the original signature of the employer, alien, attorney, and/or agent when they are received by the application processing center. DHS will not process petitions unless they are supported by an original certified ETA Form 9089 that has been signed by the employer, alien, attorney and/or agent.

Although an ETA 9089 approved by DOL, accompanied the petition, it was not signed by the Beneficiary. Because the petition was not accompanied by a properly signed labor certification, the appeal is also dismissed on this basis.

V. CONCLUSION

As discussed above, we conclude that the Petitioner has not established its ability to pay the proffered wage, that the Beneficiary possesses the experience required by the labor certification, or that the labor certification is valid and properly executed. It is the Petitioner's burden to establish eligibility for the immigration benefit sought. Section 291 of the Act, 8 U.S.C. § 1361; *Matter of Skirball Cultural Ctr.*, 25 I&N Dec. 799, 806 (AAO 2012). The Petitioner has not met that burden.

ORDER: The appeal is dismissed.