U.S. Citizenship and Immigration Services

Non-Precedent Decision of the Administrative Appeals Office

MATTER OF P-F-R- INC.

DATE: OCT. 31, 2017

APPEAL OF NEBRASKA SERVICE CENTER DECISION

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

The Petitioner, a restaurant, seeks to employ the Beneficiary as a cook. It requests classification of the Beneficiary as a skilled worker under the third preference immigrant classification. *See* Immigration and Nationality Act (the Act) section 203(b)(3)(A)(i), 8 U.S.C. § 1153(b)(3)(A)(i). This employment-based 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 Nebraska Service Center denied the petition on the ground that the evidence of record did not establish that the Petitioner had the continuing ability to pay the proffered wage from the priority date up to the present, and that the Beneficiary has the minimum of two years' experience in the occupation, as required on the labor certification.

On appeal, the Petitioner submits a brief and additional evidence. We subsequently issued a Notice of Intent to Dismiss (NOID) the appeal, and the Petitioner responded.

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).[1] *See* section 212(a)(5)(A)(i) of the Act, 8 U.S.C. § 1182(a)(5)(A)(i). By approving the labor certification, 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,

[1] The date the labor certification is filed is called the "priority date." *See* 8 C.F.R. § 204.5(d). The Petitioner must establish that all eligibility requirements for the petition have been satisfied from the priority date onward.

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.

II. ANALYSIS

A. Ability to Pay

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 onward. The regulation at 8 C.F.R. § 204.5(g)(2) provides, in pertinent part, as follows:

> *Ability of prospective employer to pay wage.* 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 the Service.

The Petitioner's Form I-140, Immigrant Petition for Alien Worker, was accompanied by an ETA Form 9089, Application for Permanent Employment Certification (labor certification), with a priority date of April 14, 2014. Section G of the labor certification stated that the offered wage for the specialty cook position is $27,435 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. If the petitioner establishes by documentary evidence that it employed the beneficiary at a salary equal to or greater than the proffered wage, the evidence is considered proof of the petitioner's ability to pay the proffered wage. In this case, there is no evidence that the Beneficiary has been employed by the Petitioner in the years since the priority date. Accordingly, the Petitioner cannot establish its ability to pay the proffered wage based on wages actually paid to the Beneficiary.

If a petitioner does not establish that it has paid the beneficiary an amount at least equal to the proffered wage from the priority date onward, USCIS will examine the net income and net current assets figures entered on the petitioner's federal income tax return(s). If either of these figures 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.

As the record does not establish that the Petitioner paid the Beneficiary wages in any year, we next examine the Petitioner's income and net current assets. On appeal, the Petitioner asserts that its

2014 tax returns show it has $20,332 to pay a pro-rated proffered wage of $17,146.88, and that its 2015 tax return shows it had "an income of $41,095" to pay the full proffered wage. However, the Petitioner's federal income tax returns for 2014 and 2015 reflect the following information:

Year	Net Income	Net Current Assets[2]
2014	-$1,983[3]	-$499,464
2015	$33,703	-$411,111

In this case, neither the Petitioner's net income nor net current assets for 2014 and 2015 are sufficient to pay the proffered wage. The record therefore does not establish the Petitioner's ability to pay the proffered wage in those years. Further, because the information for 2016 was not available, we cannot affirmatively find that the Petitioner has the ability to pay in that year.

On appeal, the Petitioner cites to additional case law and contends that we must consider the totality of circumstances and the overall magnitude of its business activities in determining the Petitioner's ability to pay the proffered wage, rather than tax returns or another single factor. *See, e.g., Matter of Sonegawa*, 12 I&N Dec. 612, 614-15 (Reg'l Comm'r 1967); *see also Masonry Masters, Inc. v. Thornburgh*, 875 F.2d 898 (D.C. Cir. 1989) (criticizing USCIS, in part, for failure to specify a formula used in determining the proffered wage). We agree that 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 overall number of employees, the occurrence of any uncharacteristic business expenditures or losses, the petitioner's reputation within its industry, whether the beneficiary is replacing a former employee or an outsourced service, or any other evidence that we deem relevant to the petitioner's ability to pay the proffered wage.

Here, the Petitioner contends that it has been in business for over 15 years and that a factor to be considered is the Petitioner's judgment about its ability to here an employee. However, the Petitioner has not provided additional information regarding its operations over the 15-year period nor does it claim to have experienced uncharacteristic losses or expenses in the period in question. Moreover, the Petitioner has made inconsistent statements regarding its staffing and operations. For example, it submitted a letter dated December 1, 2016, in which its controller stated that the

[2] According to *Barron's Dictionary of Accounting Terms* 117 (3d ed. 2000), "current assets" consist of items having (in most cases) a life of one year or less, such as cash, marketable securities, inventory and prepaid expenses. "Current liabilities" are obligations payable (in most cases) within one year, such as accounts payable, short-term notes payable, and accrued expenses (such as taxes and salaries). *Id.* at 118.

[3] In 2014 and 2015, the Petitioner filed an IRS Form 1120S, U.S. Income Tax Return for an S Corporation. Where an S corporation's income is exclusively from a trade or business, USCIS considers net income to be the figure for ordinary income, shown on line 21 of page one of the petitioner's IRS Form 1120S. However, where an S corporation has income, credits, deductions, or other adjustments from sources other than a trade or business, they are reported on Schedule K and the net income is found on line 18 (2006-2015) of Schedule K. *See* Instructions for IRS Form 1120S, at http://www.irs.gov/pub/irs-pdf/i1120s.pdf (last visited October 17, 2017) (indicating that Schedule K is a summary schedule of all shareholders' shares of the corporation's income, deductions, credits, etc.). Because the Petitioner had additional deductions and other adjustments shown on its Schedules K in 2014 and 2015, its net income is found on Schedule K of its tax return.

Petitioner currently employs over 150 people and has since prior to 2014, but at Part 5 of the Form I-140, filed on February 1, 2016, the Petitioner claimed to have only 41 employees. Also, the Petitioner's tax returns for 2014 and 2015 recorded decreasing expenditures for salaries and wages. Because the Petitioner's representations about the size and nature of its operations are internally inconsistent and are not supported by the related evidence, it has not demonstrated that its stated judgment about its ability to pay to pay the proffered wage is a reliable factor.

The Petitioner's two tax returns are not otherwise sufficient to show a historical pattern of growth, and there is also no independent evidence of the Petitioner's reputation within the restaurant industry. Considering the totality of the circumstances, the Petitioner has not established its ability to pay the proffered wage of $27,435 per year from the priority date up to the present.

B. Beneficiary's Experience

The Petitioner requests classification of the Beneficiary as a skilled worker. In order to qualify as a skilled worker, the Beneficiary must possess at least two years of training or experience and meet the "educational, training or experience, and any other requirements of the individual labor certification." 8 C.F.R. § 204.5(l)(3)(ii)(B). In evaluating a beneficiary's qualifications, we must examine the job offer portion of a labor certification to determine the minimum requirements of an offered position. We may neither ignore a term of the labor certification, nor impose additional requirements. *See, e.g., Madany v. Smith,* 696 F.2d 1008, 1012-13 (D.C. Cir. 1983).

The labor certification states that 24 months of experience as a cook is the minimum experience requirement of the job offered. The Beneficiary attested on the labor certification that he has 24 months of full-time, qualifying experience as a cook in Rome, Italy and listed the following jobs in which he claims to have gained his experience:

- About 24 months as a cook with [redacted] from January 1, 2007, to December 31, 2008; and
- About 18 months as a cook with [redacted] from July 1, 2000, to January 31, 2002.

On appeal, the Petitioner provided a letter from each of the owners of the two restaurants that the Beneficiary listed as his former employers in Italy as required evidence of the Beneficiary's possession of at least 24 months of full-time, qualifying experience as a cook. 8 C.F.R. § 204.5(l)(3)(ii)(A). Each restaurant owner indicated that the Beneficiary worked as a cook during the dates listed on the labor certification, and included a specific list of the Beneficiary's duties during his periods of claimed employment. Other information, however, casts doubt on the Beneficiary's claims and the evidence of his qualifying experience as a cook.

In August 2008, the Beneficiary signed a visa application submitted to the U.S. Department of State (DOS), on which he stated that he was working as a financial advisor for [redacted] in [redacted] Italy. He further stated that his last two jobs were: (1) financial advisor for [redacted]

in Italy from 2002 to 2006; and (2) retail manager director for from 1989 to 2000. He did not list any employment as a cook or in a restaurant.

In addition, the Beneficiary was interviewed by DOS on more than one occasion in 2013, when he sought to obtain an E-2 nonimmigrant treaty investor visa and then a B-1 temporary visitor visa. The Beneficiary initially stated that he had held several managerial positions in the banking and financial sector since 1988, and asserted that he was last employed as the retail banking manager for from 1989 to 2000. On July 29, 2013, the Beneficiary stated that he worked as a financial advisor and executive partner for in Italy from January 1, 2007, to September 30, 2008, where he claimed to have been a financial advisor for mortgages and loans. The Beneficiary did not claim to have held any restaurant or cooking positions. Consequently, the nature and dates of the work experience that the Beneficiary specified in 2008 and 2013 are only in banking and finance and for employers that are inconsistent with his claims on the labor certification to have worked as a cook in restaurants in from July 1, 2000, to January 31, 2002, and again from January 1, 2007, to December 31, 2008.

We advised the Petitioner of the above contradictory information in a NOID. In response, the Petitioner provided a statement from the Beneficiary who confirmed that he worked in finance, and stated that he also engaged in overlapping work in the restaurant industry due to his great desire to develop his cooking skills. The Beneficiary asserted that he worked as a cook in the capacity he had listed on the labor certification at night after work and on Saturdays, and worked in banking during weekdays. The Petitioner also provided new letters from the restaurant owners of and Each restaurant owner stated that the Beneficiary worked as a cook during the dates specified on the labor certification on weeknights and Saturdays. Although the Beneficiary's statement and the new employment letters submitted in response to the NOID discuss the derogatory information, they do not resolve the contradictory evidence. For example, neither of the restaurants included pay stubs or other records documenting the Beneficiary's employment as a cook, nor did the Petitioner include evidence from the Beneficiary establishing that he worked as a cook at night after working as a Director for and a financial advisor and executive partner at during the day. A petitioner must resolve inconsistencies in the record such as this with independent, objective evidence pointing to where the truth lies. *Matter of Ho*, 19 I&N Dec. 582, 591-92 (BIA 1988). In this case, the two new employment letters are not sufficient to resolve the contradictory information.

Based on the unresolved inconsistencies regarding the Beneficiary's employment history, the Petitioner has not submitted sufficient evidence to establish the Beneficiary has qualifying experience as a cook in Rome. As such, the Petitioner's evidence is not sufficient to establish that the Beneficiary has the qualifying experience required by the terms of the labor certification.

III. CONCLUSION

The Petitioner has not established its continuing ability to pay the proffered wage from the priority date onward or that the Beneficiary has the minimum experience required by the labor certification.

ORDER: The appeal is dismissed.

Cite as *Matter of P-F-R- Inc.*, ID# 0591792 (AAO Oct. 31, 2017)