U.S. Citizenship and Immigration Services

Non-Precedent Decision of the Administrative Appeals Office

MATTER OF K-C-C- CORP

DATE: SEPT. 20, 2017

APPEAL OF NEBRASKA SERVICE CENTER DECISION

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

The Petitioner, a dry cleaning business, seeks to employ the Beneficiary as a dry cleaner presser. It requests classification of the Beneficiary as an "other worker" under the third preference immigrant classification. *See* Immigration and Nationality Act (the Act) section 203(b)(3)(A)(iii), 8 U.S.C. § 1153(b)(3)(A)(iii). This employment-based immigrant classification allows a U.S. employer to sponsor for lawful permanent resident status a foreign national who is capable of performing unskilled labor that requires less than two years of training or experience and is not of a temporary or seasonal nature.

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.

On appeal the Petitioner submits additional evidence and asserts that it possesses the ability to pay the proffered wage.

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.

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.

II. ANALYSIS

The Petitioner's Form I-140, Immigrant Petition for Alien Worker, was accompanied by a certified ETA Form 9089, Application for Permanent Labor Certification (labor certification), with a priority date of November 3, 2015. Section G of the labor certification states that the offered wage for the dry cleaning presser is $16,869 per year. The labor certification did not state that the Beneficiary had ever been employed by the Petitioner up to November 2015, and there is no evidence in the record that the Beneficiary has been employed by the Petitioner since then. Accordingly, the Petitioner cannot establish its ability to pay the proffered wage based on wages actually paid to the Beneficiary.

As evidence of its ability to pay the proffered wage the Petitioner has submitted copies of:

- Its federal income tax return (Form 1120S) for the year 2015;
- A financial report for the eight month period of November 1, 2015, to June 30, 2016, which includes a "Report of Independent Auditors" on the letterhead of [redacted] and associated financial statements; and
- Monthly bank account statements for the one-year period of November 1, 2015, to October 31, 2016

In his decision denying the petition the Director found that this evidence did not establish the Petitioner's ability to pay the proffered wage. The income tax return for 2015 recorded net income of -$8,969 and net current assets of -$35,671. Since the Petitioner had a net loss and net current liabilities in 2015, it had no net income or net current assets with which to pay the proffered wage.

As for the financial report, the Director found that it included an audited balance sheet, rather than an audited financial statement, which did not satisfy the requirements of 8 C.F.R. § 204.5(g)(2) and did not include figures for net income, current assets, or current liabilities.

As for the bank account statements, the Director found that they were not a reliable indicator of the Petitioner's ability to pay the proffered wage over time, especially since there was no evidence that the bank account funds represented additional assets that were not reflected on the Petitioner's income tax return, such as cash on Schedule L.[2]

Finally, the Director found no circumstances under *Matter of Sonegawa*, 12 I&N Dec. 612 (Reg'l Comm'r 1967), which merited a finding that the Petitioner had the ability to pay the proffered wage despite its unprofitable year in 2015.

On appeal the Petitioner only contests one finding by the Director. The Petitioner asserts that its audited financial statement included a figure for net income ($53,571) on page 4 of the "Report of Independent Auditors" for the eight-month period ending on June 30, 2016. Since this figure exceeded the proffered wage of $16,869 and covered the first eight months after the priority date, the Petitioner claims that its net income establishes its continuing ability to pay the proffered wage during the time period relevant to this petition.

For the reasons discussed below, we do not find the "Report of Independent Auditors" and associated financial statements to establish the Petitioner's ability to pay the proffered wage.

The "Report of Financial Auditors" and associated financial statements were included in the Petitioner's initial evidence under a cover sheet entitled [redacted] Financial Report for the Eight Months ended June 30, 2016 (November 1, 2016 through June 30, 2016)" followed by a Table of Contents listing a "Report of Independent Auditors" (two pages) and financial statements (eight pages). It is unclear whether the cover sheet and table of contents are an integral part of the "Report of Independent Auditors" and financial statements that followed, or whether they were prepared separately by the Petitioner.

The "Report of Independent Auditors" appears beneath the letterhead of [redacted] which is in a different font. Yet another font appears in language directly below [redacted] which identifies the organization as "Certified Public Accountants" and provides its address and contact information. Thus, there are three different fonts on page one of this document. Furthermore, there is no proper line spacing between '[redacted] and "Certified Public Accountants" at the top of the page. Finally, there is no personal signature at the end of the letter to shareholders part of the report on page 2. Instead, '[redacted] is handwritten in the signature space.

The financial statements comprise pages 3 to 6 of the report. They include a" statement of balance sheet" on page 3, a "statement of income" on page 4, a "statement of retained earnings" on page 5, and a "statement of cash flows" on page 6. These statements are followed by two pages entitled "Notes to the Financial Statements" which, instead of being numbered 7 and 8, are numbered 5 and

[2] On the Petitioner's Form 1120S for 2015, the cash recorded as a current asset on line 1 of Schedule L – $13,776 – is almost identical to the closing balance of the Petitioner's bank account on December 31, 2015 – $13,782.17.

6. The Petitioner has provided no explanation for this duplicative pagination, which raises further questions about the overall veracity of the documentation.

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).

In this case, the Petitioner has not explained the issues described above with the submitted evidence. Accordingly, we do not find that the submitted evidence establishes the Petitioner's ability to pay the proffered wage. Instead, considering the financial information in the Petitioner's tax returns and the totality of the circumstances in this case, we conclude that the Petitioner has not established its ability to pay the proffered wage.

III. CONCLUSION

The Petitioner has not established its continuing ability to pay the proffered wage from the priority date to the present. Accordingly, we will dismiss the appeal.

ORDER: The appeal is dismissed.

Cite as *Matter of K-C-C- Corp*, ID# 598180 (AAO Sept. 20, 2017)