MATTER OF D-T- CORP

DATE: SEPT. 20, 2018

APPEAL OF NEBRASKA SERVICE CENTER DECISION

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

The Petitioner, a software developer, seeks to employ the Beneficiary as a software engineer, applications. It requests classification of the Beneficiary as a professional under the third preference immigrant classification. 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" immigrant classification allows a U.S. employer to sponsor a professional with a baccalaureate degree for lawful permanent resident status

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. On appeal the Petitioner asserts that the evidence of record establishes its ability to pay the proffered wage, and that the Director should not have denied the petition in any event because no federal income tax return was yet available for the year the labor certification was filed.

Upon *de novo* review, we will withdraw the Director's decision and remand the case for further consideration and the issuance of a new decision.

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

To be eligible for the classification it requests 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].

II. ANALYSIS

As indicated in the above regulation, the Petitioner must establish its continuing ability to pay the proffered wage from the priority date[1] of the petition onward. The priority date in this case is February 2, 2017. The labor certification states that the wage offered for the job of software engineer, applications, is $90,000 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, the labor certification states that the Beneficiary started working for the Petitioner in August 2015, before the priority date. The Petitioner has submitted copies of the Form W-2, Wage and Tax Statement, it issued to the Beneficiary for 2017, which shows that he was paid "wages, tips, other compensation" totaling $85,492.68 for the year. That figure is approximately $4,500 short of the proffered wage. The Petitioner has also submitted three bimonthly pay statements from the spring of 2018 showing that the Beneficiary had received "regular" earnings totaling $35,542.10 as of May 31, 2018. The foregoing documentation does not establish that the Beneficiary's pay has equaled or exceeded the proffered wage since the priority date of February 2, 2017.

If a petitioner has not employed the beneficiary and paid him (or her) a salary 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 statement(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

[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).

beneficiary in a given year, the petitioner would be considered able to pay the proffered wage during that year.

In this case, the record includes a copy of the Petitioner's federal income tax return, Form 1120S, U.S. Income Tax Return for an S Corporation, for 2016, which was the most recent filed by the Petitioner at the time of the Director's decision and the subsequent appeal. However, without the Petitioner's 2017 federal tax return (or an annual report or audited financial statement for 2017) we are unable to assess the Petitioner's ability to pay the proffered wage to the Beneficiary from the priority date of February 2, 2017, onward. Accordingly, we will remand this matter to the Director to request regulatory required evidence, as specified in 8 C.F.R. § 204.5(g)(2), of the Petitioner's ability to pay the proffered wage in 2017.

III. CONCLUSION

For the reasons discussed above, we will remand this case to the Director for further consideration of the Petitioner's ability to pay the proffered wage from the priority date onward.

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

Cite as *Matter of D-T- Corp,* ID# 1855624 (AAO Sept. 20, 2018)