U.S. Citizenship and Immigration Services

Non-Precedent Decision of the Administrative Appeals Office

MATTER OF K- INC.

DATE: SEPT. 24, 2019

APPEAL OF NEBRASKA SERVICE CENTER DECISION

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

The Petitioner, an apparel wholesale company, seeks to employ the Beneficiary as a fashion designer. 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 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, concluding that the record did not establish, as required, that the labor certification requires the minimum of a bachelor's degree. Thus, the Director determined that the labor certification does not support the requested professional classification.

On appeal, the Petitioner asserts that the preference category should be based on the Beneficiary's actual qualifications and not the requirements listed on the labor certification.

Upon *de novo* review, we will dismiss the appeal.

I. THE EMPLOYMENT-BASED IMMIGRATION PROCESS

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, 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 applies 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.

[1] The priority date of a petition is the date the DOL accepted the labor certification for processing, which in this case is January 19, 2018. *See* 8 C.F.R. § 204.5(d).

II. PROFESSIONAL CLASSIFICATION

At Part 2 of the Form I-140, Immigrant Petition for Alien Worker, the Petitioner checked the box at 1.e. requesting classification as a professional. The regulation at 8 C.F.R. § 204.5(l)(2) defines "professional" as "a qualified alien who holds at least a United States baccalaureate degree or a foreign equivalent degree." A petition seeking professional classification, therefore, must be accompanied by a labor certification that requires a minimum of a baccalaureate degree. 8 C.F.R. § 204.5(l)(3)(i).

In this case, Section H of the labor certification submitted with the petition states that the offered position of fashion designer has the following minimum requirements:

H.4. Education: Associate's degree in merchandise product development or related field.
H.5. Training: None required.
H.6. Experience in the job offered: None required.
H.8. Alternate combination of education and experience: None accepted.
H.9. Foreign educational equivalent: Not accepted.
H.10. Experience in an alternate occupation: None accepted.
H.14. Specific skills or other requirements: None.

The record contains a copy of the Beneficiary associate's degree in merchandise product development, issued in 2013 by the Fashion Institute of Design & Merchandising in California, together with her transcripts. The Director determined that the labor certification does not support the requested professional classification because it does not require the minimum of a bachelor's degree. On appeal, the Petitioner asserts that the preference category should be based on the Beneficiary's actual qualifications and not the requirements listed on the labor certification. We disagree.

The labor certification permits an applicant to qualify for the offered job with an associate's degree and no experience. Since an individual can qualify for the offered position with less than a baccalaureate, the petition does not qualify for the professional classification. *See* 8 C.F.R. § 204.5(l)(3)(ii)(C). Therefore, the petition cannot be approved for a member of the professions under section 203(b)(3)(A)(ii) of the Act. Thus the Director correctly concluded that this petition cannot be approved under the requested professional classification.

On appeal, the Petitioner asserts that it marked 1.g. at Part 2 of the Form I-140, which is the unskilled worker classification. It asserts that it selected the unskilled worker classification even though the Beneficiary has an associate's degree because her degree courses "are not completely correspondent with ones in fashion design." It states that her degree "cannot be regarded as two year fashion designer's training and so Part 2, 1.g, 'any other worker' should be checked up." However, as previously noted, the Petitioner selected 1.e. at Part 2 of the Form I-140, indicating that it was requesting the professional classification. Thus, the Petitioner's assertion that it marked 1.g. at Part 2 is erroneous. If the Petitioner is asserting that its professional classification request for the Beneficiary was in error, we will not change the requested classification on appeal. A petitioner "may not make material changes to a petition that has already been filed in an effort to make an apparently deficient

petition conform to [USCIS] requirements." *Matter of Izummi,* 22 I&N Dec. 169, 175 (Assoc. Comm'r 1998).

On appeal, the Petitioner submits a copy of a previously certified labor certification filed by a different employer for a different beneficiary where the employer required an associate's degree for the position of fashion designer. The minimum requirements for that position included an associate's degree and 24 months of experience in the job offered. The Petitioner asserts that the Form I-140 petition was approved in that case even though an associate's degree was the minimum requirement. However, the Petitioner did not submit the corresponding petition for the other labor certification or an approval notice for that petition, so it is unclear if it was approved and, if so, in which classification. The Petitioner must support its assertions with relevant, probative, and credible evidence. *See Matter of Chawathe*, 25 I&N Dec. 369, 376 (AAO 2010). The labor certification from another employer is not relevant, probative, or credible evidence of eligibility for the professional classification in this case.

On appeal, the Petitioner states that the visa classification is not mentioned on the labor certification application, but only on the Form I-140. It asserts that the labor certification and prevailing wage determination do not determine the visa category, and that the visa classification should be based on the Petitioner's "own minimum requirement." We disagree. The regulation at 8 C.F.R. § 204.5(l)(3)(i) makes clear that an immigrant petition for professional classification must be supported by a labor certification that requires a minimum of a baccalaureate degree for the job offered. As the labor certification in this case allows candidates to qualify for the job with less than a bachelor's degree, it cannot support the requested classification.

III. ABILITY TO PAY

Although not addressed by the Director in his decision, the record does not contain regulatory required evidence of the Petitioner's ability to pay the proffered wage from the priority date on January 19, 2018, and continuing until the Beneficiary obtains lawful permanent residence.[2] The regulation at 8 C.F.R. § 204.5(g)(2) requires that "[e]vidence of this ability shall be either in the form of copies of annual reports, federal tax returns, or audited financial statements."

The Petitioner submitted its federal tax return for 2017. However, the record does not contain regulatory-prescribed evidence of the Petitioner's ability to pay for 2018. Without this regulatory-required evidence, we cannot affirmatively find that the Petitioner has the continuing ability to pay the proffered wage from the priority date.

Further, USCIS records show that the Petitioner has filed a Form I-140 petition for another beneficiary. Where a petitioner has filed Form I-140 petitions for multiple beneficiaries, it must demonstrate that its job offer to each beneficiary is realistic, and that it has the ability to pay the proffered wage to each beneficiary. *See* 8 C.F.R. § 204.5(g)(2); *see also Patel v. Johnson*, 2 F. Supp. 3d 108, 124 (D. Mass. 2014) (upholding our denial of a petition where a petitioner did not demonstrate its ability to pay multiple beneficiaries). Thus, the Petitioner must establish its ability to pay this Beneficiary as well as the beneficiary of the other Form I-140 petition that was pending or approved as of, or filed after, the priority

[2] The annual proffered wage is $36,816.

date of the current petition.[3] We do not consider the other beneficiary for any year that the Petitioner has paid the Beneficiary a salary equal to or greater than the proffered wage.

The Petitioner must document the receipt number, name of beneficiary, priority date, and proffered wage of the other petition, and indicate the status of the petition and the date of any status change (i.e., pending, approved, withdrawn, revoked, denied, on appeal or motion, beneficiary obtained lawful permanent residence). To offset the total wage burden, the Petitioner may submit documentation showing that it paid wages to other beneficiary. To demonstrate that it has the ability to pay the Beneficiary and the other beneficiary, the Petitioner must, for each year at issue (a) calculate any shortfall between the proffered wages and any actual wages paid to the primary Beneficiary and its other beneficiary, (b) add these amounts together to calculate the total wage deficiency, and (c) demonstrate that its net income or net current assets exceed the total wage deficiency. Without this information, we cannot determine the Petitioner's ability to pay the combined proffered wages of all of its applicable beneficiaries. For this additional reason, the petition cannot be approved.

IV. CONCLUSION

The appeal will be dismissed for the above stated reasons, with each considered an independent and alternative basis for the decision. In visa petition proceedings, it is the petitioner's burden to establish eligibility for the immigration benefit sought. Section 291 of the Act, 8 U.S.C. § 1361. The Petitioner has not met that burden.

ORDER: The appeal is dismissed.

Cite as *Matter of K- Inc.*, ID# 6457753 (AAO Sept. 24, 2019)

[3] The Petitioner's ability to pay the proffered wage of one of the other I-140 beneficiaries is not considered:

- After the other beneficiary obtains lawful permanent residence;
- If an I-140 petition filed on behalf of the other beneficiary has been withdrawn, revoked, or denied without a pending appeal or motion; or
- Before the priority date of the I-140 petition filed on behalf of the other beneficiary.