U.S. Citizenship and Immigration Services

Non-Precedent Decision of the Administrative Appeals Office

MATTER OF N-C- CORP.

DATE: SEPT. 29, 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 Greek specialty 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.

On appeal, the Petitioner submits a statement and copies of documentation already in the record.

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, 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.

[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.

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.

II. ANALYSIS

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 June 30, 2014. Section G of the labor certification stated that the offered wage for the specialty cook position is $33,051.00 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 *prima facie* 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.

The record includes copies of the Petitioner's federal income tax returns, filed on Form 1120, U.S. Corporation Income Tax Return, for 2014 and 2015.[2] The figures for net income (or loss) appear on

[2] The record also contains a copy of the Petitioner's 2013 tax return. We do not address it here because it precedes the priority date.

line 28 of page 1, while net current assets (or liabilities) are the difference between the Petitioner's current assets, entered on lines 1-6 of Schedule L, and its current liabilities, entered on lines 16-18 of Schedule L. As shown in the tax returns, the Petitioner's figures were as follows in 2014 and 2015:

Year	Net Income	Net Current Assets
2014	$8,169	$4,920
2015	$5,580	($1,170)

Thus, in both 2014 and 2015 the Petitioner's net income and net current assets figures were below the proffered wage of $33,051. Thus, the Petitioner cannot establish its ability to pay the proffered wage from the priority date onward based on either its net income or its net current assets in those years.

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. 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.

In this case, the Petitioner indicates that it began operations in 2001 and was incorporated in 2010. In both the labor certification, filed in 2014, and the petition, filed in 2016, the Petitioner stated that it had six employees, though the tax returns for 2013-2015 recorded decreasing expenditures for salaries and wages during that time period, from $103,107 in 2013, to $85,104 in 2014, to $41,610 in 2015. The Petitioner's gross income, as recorded in the tax returns, was $700,928 in 2013, to $820,293 in 2014, to $715,578 in 2015. Thus, the tax returns do not show a historical pattern of growth. There is also no independent evidence of the Petitioner's reputation within the restaurant industry.

On appeal the Petitioner asserts that the Beneficiary will replace a current employee in the specialty cook position, so that no additional funds beyond those currently expended on salaries will be needed to pay the Beneficiary's salary. The Petitioner has not identified the employee to be replaced, however, nor submitted any documentary evidence confirming the Petitioner's intent to replace that employee by the Beneficiary and showing the wages paid to the current employee since the priority date. Going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. *Matter of Soffici*, 22 I&N Dec. 158, 165 (Comm'r 1998) (citing *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg'l Comm'r 1972)).

Considering the totality of the circumstances, the Petitioner has not established its ability to pay the proffered wage of $33,051 per year from the priority date of June 30, 2014, up to the present.

III. CONCLUSION

We will dismiss the appeal because the Petitioner has not established its continuing ability to pay the proffered wage from the priority date onward.

ORDER: The appeal is dismissed.

Cite as *Matter of N-C- Corp.*, ID# 641338 (AAO Sept. 29, 2017)