U.S. Citizenship and Immigration Services

Non-Precedent Decision of the Administrative Appeals Office

In Re: 24554386

Date: FEB. 10, 2023

Appeal of Texas Service Center Decision

Form I-140, Petition for Multinational Managers or Executives

The Petitioner, a broadcast media and entertainment company, seeks to permanently employ the Beneficiary as its technical director under the first preference immigrant classification for multinational executives or managers. *See* Immigration and Nationality Act (the Act) section 203(b)(l)(C), 8 U.S.C. § 1153(b)(1)(C). This classification allows a U.S. employer to permanently transfer a qualified foreign employee to the United States to work in an executive or managerial capacity.

The Director of the Texas Service Center denied the petition, concluding that the record did not establish that the Petitioner has the ability to pay the proffered wage. The matter is now before us on appeal. 8 C.F.R. § 103.3.

The Petitioner bears the burden of proof to demonstrate eligibility by a preponderance of the evidence. *Matter of Chawathe*, 25 I&N Dec. 369, 375-76 (AAO 2010). We review the questions in this matter de novo. *Matter of Christo's, Inc.*, 26 I&N Dec. 537, 537 n.2 (AAO 2015). Upon de novo review, we will withdraw the Director's decision and remand the matter for entry of a new decision consistent with the following analysis.

I. LAW

An immigrant visa is available to a beneficiary who, in the three years preceding the filing of the petition, has been employed outside the United States for at least one year in a managerial or executive capacity, and seeks to enter the United States in order to continue to render managerial or executive services to the same employer or to its subsidiary or affiliate. Section 203(b)(1)(C) of the Act.

Consistent with the statute, the regulations at 8 C.F.R. § 204.5(j)(3) require the petitioner to demonstrate that the beneficiary has been employed abroad in a managerial or executive capacity for at least one year in the three years preceding the filing of the petition, that the beneficiary is coming to work in the United States as a manager or executive for the same employer or a subsidiary or affiliate of the foreign employer, and that the prospective U.S. employer has been doing business for at least one year.

In addition, any petition filed 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. 8 C.F.R. § 204.5(g)(2). A petitioner must demonstrate this ability from a petition's priority date until a beneficiary obtains lawful permanent residence. Evidence of this ability to pay shall be either in the form of copies of annual reports, federal tax returns, or audited financial statements. *Id.* In a case where the prospective U.S. 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. *Id.*

II. ANALYSIS

The sole issue addressed by the Director is whether the Petitioner demonstrated its ability to pay the proffered wage from the petition's priority date of January 25, 2021.

In order for U.S. Citizenship and Immigration Services (USCIS) to evaluate whether a petitioner has the ability to pay a proffered wage, the petitioner must submit the initial evidence required by 8 C.F.R. § 204.5(g)(2), in the form of its federal tax returns, audited financial statements or annual reports for the relevant period.

USCIS will then examine whether a petitioner has paid the beneficiary the full proffered wage each year from the priority date. If the petitioner has not paid the beneficiary the full proffered wage each year, USCIS will next examine whether the petitioner had sufficient net income or net current assets to pay the difference between the stated wage and the proffered wage. Finally, we may consider evidence of a petitioner's ability to pay beyond its net income and net current assets, including such factors as: the number of years it has conducted business; the growth of its business; its number of employees; the occurrence of any uncharacteristic business expenditures or losses; its reputation in its industry; whether a beneficiary will replace a current employee or outsourced service; or other evidence of its ability to pay a proffered wage. *See Matter of Sonegawa*, 12 I&N Dec. 612, 614-615 (Reg'l Comm'r 1967).

A. Procedural History

The Petitioner indicated a proffered wage of $114,234 on the Form I-140, Immigrant Petition for Alien Worker, and stated that it has employed the Beneficiary in the offered position in L-1A nonimmigrant status since 2014. Its initial evidence included a copy of its 2019 IRS Form 1165, Return of Partnership Income and copies of the Beneficiary's earnings statements from the last quarter of 2020. The earnings statements reflect that the Beneficiary received the offered wage in 2020, but showed he was paid by [redacted] rather than by the Petitioner.[1]

The Director issued a request for evidence (RFE) in April 2022 advising the Petitioner that it would need to provide additional evidence of its ability to pay the proffered wage from the priority date onwards. The Director requested a complete copy of the Petitioner's 2021 (or most current) annual

[1] The Petitioner stated in its supporting letter that it is part of "[redacted]," based in [redacted] However, the letter did not specifically mention the U.S. company that issued the Beneficiary's earnings statements, describe its relationship with that company, or explain why a different legal entity had paid the Beneficiary's salary in 2020.

report, audited financial statement, or U.S. federal tax return with all accompanying schedules. The RFE listed additional suggested evidence, such as evidence showing the Petitioner had paid the Beneficiary's offered wage since January 2021, and other financial documentation such as profit/loss statements and bank records. In response, the Petitioner submitted:

- 2020 IRS Form 1120, U.S. Corporation Income Tax Return, for [redacted] which lists the Petitioner as its subsidiary at Schedule K. A footnote submitted on Statement 1 states that this entity "became the sole member of [the Petitioner] . . . during 2020," and that "as a result of this change in ownership all activity previously reported on Form 1065 for [the Petitioner] is now being reported on [redacted] Form 1120."

- IRS Form W-2, Wage and Tax Statement, indicating that the Beneficiary received $122,902.60 in wages in 2021. The Form W-2 identifies the issuing employer as [redacted]

- IRS Form 7004, Application for Automatic Extension of Time to File Certain Business Income Tax, Information and Other Returns filed by [redacted] requesting an extension of time to file its 2021 federal tax return with the IRS. An attached list of subsidiaries includes [redacted] and [redacted] but does not name the Petitioner.

A cover letter submitted with the RFE response briefly explained that [redacted] is a payroll company used for disbursement of employees' salaries."

The Director denied the petition concluding that the Petitioner did not submit the regulatorily-prescribed evidence of its ability to pay required by 8 C.F.R. § 204.5(g)(2). Specifically, the Director emphasized that the record did not include the Petitioner's federal tax return, audited financial statements or annual report, or in the alternative, evidence that the company employs at least 100 workers accompanied by a statement from a financial officer establishing the Petitioner's ability to pay as of January 2021. The Director acknowledged receipt of the 2020 IRS Form 1120 for [redacted] but emphasized that "each corporation is a separate legal entity from its owners or stockholders." The Director emphasized that the Petitioner cannot seek to rely on its member's income or assets as evidence of its ability to pay.

On appeal, the Petitioner asserts that it demonstrated its ability to pay, emphasizing that the Director overlooked that the submitted 2020 federal tax return for [redacted] included the Petitioner's own financial information. The Petitioner emphasizes that it is not required to file a separate tax return, and that it was not seeking to rely on its parent company's assets as evidence of its ability to pay. The Petitioner also explains that [redacted] identified as the Petitioner's affiliate) pays the salary, health insurance and benefits of all U.S.-based employees of [redacted] and its subsidiaries, but does not serve as the Beneficiary's employer.

The Petitioner submits additional evidence, including statements from the Vice President of Finance for [redacted] and its subsidiaries, its Director of Human Resources, and its accountant, as well as copies of the Petitioner's bank statements for the period January 2021 through June 2022, its amended operating agreement dated June 2021, and other documentation.

B. Withdrawal of Director's Decision and Basis for Remand

While we agree that the record as presently constituted does not include all required evidence of the Petitioner's ability to pay from the priority date and onward, we will withdraw the Director's decision and remand the matter to the Director for entry of a new decision consistent with the following analysis.

As a preliminary matter, we note that this petition was filed on January 25, 2021, and the record does not include a federal tax return, audited financial statement, or annual report for the 2021 tax year. However, the record reflects that the company's 2021 financial results and corporate tax return had not yet been finalized and were therefore unavailable when the Petitioner submitted its RFE response and when it filed this appeal. Accordingly, on remand, the Director shall issue a new RFE and allow the Petitioner an opportunity to provide the initial evidence required by 8 C.F.R. § 204.5(g)(2) for 2021, and, if available, for 2022.

We agree with the Petitioner that the 2020 Form 1120 for [redacted] contained sufficient information to demonstrate that this tax return included the Petitioner's financial results, a fact that the Director did not acknowledge. Given the Petitioner's status as a disregarded entity for tax purposes in 2020, its submission of [redacted] consolidated tax return demonstrated a reasonable attempt to provide the initial evidence required by 8 C.F.R. § 204.5(g)(2).

However, the tax return for the Petitioner's sole member does not contain the information USCIS requires to evaluate the Petitioner's ability to pay. It does not separately state the Petitioner's financial results and therefore does not identify the Petitioner's income and assets separately from its parent company's income and assets. Therefore, while it appears that the Petitioner is no longer required to file a separate tax return with the IRS, the Form 1120 filed by [redacted] cannot be used as evidence of the Petitioner's ability to pay under 8 C.F.R. § 204.5(g)(2). The Director's decision, which dismissed the tax return on a different basis, did not adequately notify the Petitioner why the evidence was insufficient to establish its ability to pay. Regardless, as noted, the 2020 tax return was for the year ended on December 31, 2020 and could not demonstrate the Petitioner's ability to pay in 2021 even if it had included all required financial information.

On remand, if the Petitioner seeks to rely on a 2021 federal income tax return filed by a related entity to meet the initial evidence requirement at 8 C.F.R. § 204.5(g)(2), the tax return must include a separate statement, filed with the IRS, detailing the Petitioner's own financial results, with sufficient information to enable USCIS to calculate the company's net income and net current assets for 2021. If there is no 2021 federal income tax return that includes this separate financial information, the Petitioner must submit its audited financial statements or an annual report for 2021 to satisfy the evidentiary requirement at 8 C.F.R. § 204.5(g)(2).

We acknowledge that the Petitioner's appeal includes a letter from the Vice President of Finance for [redacted] attesting to the corporate group's employment of over 100 workers in the United States and confirming that [redacted] and [the Petitioner]" have the ability to pay the Beneficiary's proffered salary. As noted, 8 C.F.R. § 204.5(g)(2) provides that in a case where the prospective U.S. employer has 100 or more workers, USCIS may accept a statement from a financial officer of the organization which establishes the employer's ability to pay the proffered wage. The Petitioner stated

on the Form I-140 that it had 15 employees in the United States, therefore it cannot meet the requirements of 8 C.F.R. § 204.5(g)(2) by submitting a letter from a financial officer. The 100 workers referenced in the regulation must be the Petitioner's own employees and cannot include those employed by related entities.

As noted, in determining the Petitioner's ability to pay, USCIS will examine whether the Petitioner has paid the Beneficiary the full proffered wage each year from the priority date. The record reflects that the Beneficiary's salary was paid by [redacted] in 2021. While the Petitioner explained that this related entity handles payroll and administers benefits for all U.S.-based employees in its multinational organization, the record does not contain evidence of any agreements or contracts between the Petitioner and its affiliate related to this arrangement, and it is unclear whether the Petitioner ultimately reimburses [redacted] for some or all of the Beneficiary's payroll costs. Further, the record must contain credible documentary evidence that the affiliate is responsible for administering the Petitioner's payroll and is not the Beneficiary's actual employer. If the Petitioner has not previously paid the Beneficiary's salary, it must show that it has sufficient net income or net current assets to pay the proffered wage.

Finally, as the matter will be remanded, the Director is instructed to review the evidence of record pertaining to the Petitioner's qualifying relationship with the Beneficiary's last foreign employer in Spain. The record reflects that some internal restructuring and name changes likely occurred within the group while the petition was pending. Although the Petitioner submits an updated ownership chart on appeal, the record as presently constituted does not contain a full explanation of these changes or primary evidence of common ownership and control between the Petitioner and the Beneficiary's last foreign employer in Spain.

In sum, based on the lack of evidence of the Petitioner's ability to pay the proffered wage as of the January 2021 priority date, and the previous unavailability of such evidence, we are remanding this matter to the Director for issuance of a new request for evidence and entry of a new decision. The Director is instructed to request: (1) a federal tax return that includes the Petitioner's separately stated financial results, the Petitioner's audited financial statements, or its annual report for each year from the priority date onward; (2) documentary evidence of a pre-existing payroll arrangement between the Petitioner and its affiliate if the Petitioner wishes to have USCIS consider the Beneficiary's prior earnings in its ability to pay analysis; and (3) any other evidence relevant to the ability to pay analysis. As noted, the Director is also instructed to review the previously submitted evidence of the Petitioner's qualifying relationship with the Beneficiary's foreign employer and may request any additional evidence deemed necessary.

III. CONCLUSION

For the reasons discussed above, we will remand this matter to the Director for further consideration of the Petitioner's eligibility for the immigration benefit sought.

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