U.S. Citizenship and Immigration Services

Non-Precedent Decision of the Administrative Appeals Office

In Re: 19823707

Date: MARCH 18, 2022

Appeal of Texas Service Center Decision

Form I-140, Immigrant Petition for an Alien Worker

The Petitioner, a landscaping contractor, seeks to employ the Beneficiary as a landscape laborer. It requests classification of the Beneficiary as an "other worker" under the third preference immigrant category. Immigration and Nationality Act (the Act) section 203(b)(3)(A)(iii), 8 U.S.C. § 1153(B)(3)(A)(iii). This employment-based "EB-3" immigrant classification allows a U.S. employer to sponsor for lawful permanent residence 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 Texas Service Center denied the petition on two grounds. The Director determined that the Petitioner did not establish that it made a *bona fide* job offer to the Beneficiary and intends to employ the Beneficiary in the offered position. The Director also determined that the Petitioner did not establish its ability to pay the proffered wage of the instant Beneficiary in addition to the proffered wages of the beneficiaries of its other Form I-140 petitions (other I-140 beneficiaries).

On appeal the Petitioner asserts that the Director's decision was erroneous in fact and law. The Petitioner asserts that the evidence of record, supplemented by two documents submitted on appeal, establishes the *bona fides* of the job offer and its intent to employ the Beneficiary in the offered position. The Petitioner also asserts that the record before the Director established its ability to pay the proffered wages of the instant Beneficiary and all of its other I-140 beneficiaries.

The AAO reviews the questions in this matter *de novo*. *See Matter of Christo's Inc.*, 26 I&N Dec. 537, 537 n.2 (AAO 2015). It is the Beneficiary's burden in these proceedings to establish eligibility for the requested benefit by a preponderance of the evidence. *See* Section 291 of the Act, 8 U.S.C. § 1361; *Matter of Chawathe*, 25 I&N Dec. 369, 375 (AAO 2010).

Upon *de novo* review, we will withdraw the Director's decision and sustain the appeal.

I. LAW

Employment-based immigration generally follows a three-step process. First, an employer obtains an approved labor certification (ETA Form 9089) from the U.S. Department of Labor (DOL). *See* section

212(a)(5) of the Act, 8 U.S.C. § 1182(a)(5). 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 (Form I-140) 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.

II. ANALYSIS

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].

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. In this case the proffered wage is $13.77 per hour (or $28,641.60 per year based on a standard work year of 2,080 hours) and the priority date is December 23, 2019.

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 record indicates that the Petitioner employed the Beneficiary during a six-month pay period in 2019 that preceded the priority date of December 23, 2019, but not after the priority date. Therefore, the Petitioner cannot establish its ability to pay the proffered wage from the priority date onward based on wages paid to the Beneficiary.

If a petitioner does not establish that it has paid the beneficiary an amount equal to or above the proffered wage from the priority date onward, USCIS will examine the net income and net current

[1] The "priority date" of an employment-based immigrant petition is the date the underlying labor certification application is filed with the DOL. *See* 8 C.F.R. § 204.5(d).

assets figures recorded on the petitioner's federal income tax return(s), annual report(s), or audited financial statements(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 beneficiary in a given year, the petitioner would ordinarily be considered able to pay the proffered wage during that year. When a petitioner has filed other I-140 petitions, however, it must establish that its job offer is realistic not only for the instant beneficiary, but also for its other I-140 beneficiaries. A petitioner's ability to pay the proffered wage is an essential element in evaluating whether a job offer is realistic. *See Matter of Great Wall*, 16 I&N Dec. 142 (Acting Reg'l Comm'r 1977). Accordingly, a petitioner must demonstrate its ability to pay the combined proffered wages of the instant beneficiary and every other I-140 beneficiary from the priority date of the instant petition until the other I-140 beneficiaries obtain lawful permanent resident status. *See 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).[2]

In this case USCIS records show that the Petitioner has filed twelve I-140 petitions, of which ten had been approved and two, including the instant petition, were pending as of the spring of 2021. Therefore, the Petitioner must establish that its net income or net current assets are sufficient to meet its proffered wage obligations to the instant Beneficiary and all of its other I-140 beneficiaries from the priority date of this petition onward. In his decision the Director cited the information provided by the Petitioner about the beneficiaries, including their hourly wages and their priority dates (all between December 19, 2019, and January 15, 2020), and calculated their total proffered wages on an annual basis at $303,685 (based on a 35-hour work week). According to the Director, the Petitioner submitted no "relevant, probative and credible documentation" that it paid any wages to any of its twelve I-140 beneficiaries.

The record includes a copy of the Petitioner's 2019 federal income tax return, Form 1120S, U.S. Income Tax Return for an S Corporation, which was its most recent federal income tax return at the time of this petition's filing and adjudication at the Texas Service Center.[3] As recorded on the 2019 return, the Petitioner had net income of $197,868[4] and net current assets of -$287,551.[5] Since the Petitioner's net income in 2019 was less than its total proffered wage obligations to the instant Beneficiary and its other I-140 beneficiaries, and the Petitioner had no net current assets but rather net

[2] 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.

[3] As indicated, the Petitioner's 2019 Form 1140S (filed in October 2020) was its latest federal income tax return when the instant petition was adjudicated at the Texas Service Center and appealed to the AAO in the first half of 2021. As evidence of its continuing ability to pay the proffered wage after 2019, the Petitioner has submitted copies of its Forms 941, Employer's Quarterly Federal Tax Returns, among other documents.

[4] If an S corporation, like the Petitioner, has income exclusively from a trade or business, USCIS considers its net income (or loss) to be the figure for "Ordinary business income (loss)" on page 1, line 21, of the Form 1120S. However, if there are relevant entries for additional income, credits, deductions or other adjustments from sources other than a trade or business, they are reported on Schedule K of the Form 1120S, and the corporation's net income or loss will be found in line 18 of Schedule K ("Income/loss reconciliation").

[5] For a corporation net current assets (or liabilities) are the difference between its current assets, entered on Schedule L, lines 1-6, of the Form 1120S, and its current liabilities, entered on Schedule L, lines 16-18.

current liabilities in 2019, the Director concluded that the Petitioner did not establish its ability to pay the proffered wages of all its I-140 beneficiaries in 2019 based on either net income or net current assets that year.

The Director's analysis was mistaken, however, because the Petitioner did submit "relevant, probative and credible documentation" (contrary to the Director's finding) of the wages paid to its I-140 beneficiaries during 2019. That evidence consisted of copies of the 2019 Forms W-2, Wage and Tax Statements, issued to the twelve I-140 beneficiaries (including the instant Beneficiary for six months of work from April to October 2019). The gross compensation to the twelve I-140 beneficiaries in 2019 was $199,434. Adding that sum to the Petitioner's net income of $197,868 produces a figure of $397,302, which exceeds its total proffered wage obligation to its twelve I-140 beneficiaries in 2019 of $303,685, as calculated by the Director based on a 35-hour work week. If the Petitioner's total proffered wage obligation were calculated based on a 40-hour work week, the figure for 2019 would have been $347,069. Either way, the Petitioner has established its ability to pay the proffered wages of the instant Beneficiary and all of its other I-140 beneficiaries as of this petition's priority date, December 23, 2019, based on its net income and the wages paid to the beneficiaries in 2019. Accordingly, we will withdraw the Director's finding to the contrary.

We determine, therefore, that the Petitioner has established by a preponderance of the evidence its continuing ability to pay the proffered wages of the instant Beneficiary and its other I-140 beneficiaries from the priority date of December 23, 2019, onward.

Additional documentation submitted on appeal has overcome the *bona fide* job issue.

III. CONCLUSION

As discussed in the foregoing analysis, the Petitioner has overcome the grounds for denial in the Director's decision. Accordingly, we will withdraw that decision and sustain the appeal.

ORDER: The appeal is sustained.