U.S. Citizenship and Immigration Services

Non-Precedent Decision of the Administrative Appeals Office

In Re: 10769247

Date: OCT. 1, 2020

Appeal of Nebraska Service Center Decision

Form I-140, Petition for Multinational Managers or Executives

The Petitioner, a structural engineering design consulting firm, seeks to permanently employ the Beneficiary as its deputy CEO under the first preference immigrant classification for multinational executives or managers. Immigration and Nationality Act (the Act) section 203(b)(1)(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 Nebraska Service Center denied the petition, concluding that the record did not establish that (a) the Beneficiary was employed abroad in a primarily executive capacity; (b) the Beneficiary would be employed in a primarily executive capacity in the United States; (c) the Petitioner is doing business; (d) the Petitioner had the continuing ability to pay the proffered wage from the priority date onward; and (e) the Beneficiary had at least one continuous year of full-time employment abroad with a qualifying organization within the three years preceding the filing of the petition.[1]

In these proceedings, it is the Petitioner's burden to establish eligibility for the requested benefit. Section 291 of the Act, 8 U.S.C. § 1361. Upon *de novo* review, we will dismiss the appeal.[2]

I. LEGAL FRAMEWORK

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.

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[1] The Director specifically noted that the record conflicts as to who currently employs the Beneficiary, and that the Petitioner did not provide the date that the Beneficiary transferred to the Petitioner's U.S. organization and the dates that he held the qualifying position with the foreign entity. If a beneficiary entered the United States to work for a qualifying entity as a nonimmigrant, USCIS will reach back three years from the date of his or her admission to determine whether he or she had the requisite one year of employment. *Matter of S-P- Inc.*, Adopted Decision 2018-01 (AAO Mar. 19, 2018); 8 C.F.R. § 204.5(j)(3)(i)(B).

[2] A new Form G-28, Notice of Entry of Appearance, must be filed with an appeal. 8 C.F.R. § 292.4(a). The Petitioner did not submit a new Form G-28 on appeal. Therefore, although an attorney submitted a letter in support of the appeal, we do not recognize the attorney's appearance.

The Form I-140, Immigrant Petition for Alien Worker, must include a statement from an authorized official of the petitioning United States employer which demonstrates 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 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. *See* 8 C.F.R. § 204.5(j)(3).

A petitioner must establish its ability to pay the proffered wage from the priority date and continuing until the beneficiary obtains lawful permanent residence. 8 C.F.R. § 204.5(g)(2).

II. ABILITY TO PAY

The Director determined that the record did not establish the Petitioner's continuing ability to pay the annual proffered wage of $180,000[3] from the priority date of November 13, 2018, onward.[4] The regulation at 8 C.F.R. § 204.5(g)(2) states, in part:

> *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 determining a petitioner's ability to pay, we first examine whether it paid a beneficiary the full proffered wage each year from a petition's priority date. If a petitioner did not pay a beneficiary the full proffered wage, we next examine whether it had sufficient annual amounts of net income or net current assets to pay the difference between the proffered wage and the wages paid, if any. If a petitioner's net income or net current assets are insufficient, we may also consider other evidence of its ability to pay the proffered wage.[5]

In this case, the Petitioner states that it has employed the Beneficiary in the United States in L-1A nonimmigrant status since October 2018, but that the Beneficiary remained on the payroll of the foreign entity because he simultaneously held an executive position with the foreign entity while working in the United States. The record contains no evidence of any wages paid to the Beneficiary by the Petitioner and, therefore, the Petitioner has not established its ability to pay the proffered wage based on wages it paid to the Beneficiary.

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[3] In a letter submitted with the petition, the Petitioner indicated that in addition to paying his $180,000 salary, it would pay the Beneficiary's living expenses of $61,000 per year. The petition indicates that the job offer is for part-time employment of 24 hours per week.

[4] The priority date is the date the immigrant petition was filed. *See* 8 C.F.R. § 204.5(d).

[5] Federal courts have upheld our method of determining a petitioner's ability to pay a proffered wage. *See, e.g., River St. Donuts, LLC v. Napolitano*, 558 F.3d 111, 118 (1st Cir. 2009); *Tongatapu Woodcraft Haw., Ltd. v. Feldman*, 736 F.2d 1305, 1309 (9th Cir. 1984); *Estrada-Hernandez v. Holder*, 108 F. Supp. 3d 936, 942-946 (S.D. Cal. 2015); *Rizvi v. Dep't of Homeland Sec.*, 37 F. Supp. 3d 870, 883-84 (S.D. Tex. 2014), *aff'd*, 627 Fed. App'x. 292, 294-295 (5th Cir. 2015).

The record contains unaudited financial statements for 2018.[6] However, the regulation at 8 C.F.R. § 204.5(g)(2) states that where a petitioner relies on financial statements to demonstrate its ability to pay the proffered wage, those financial statements must be audited. As there is no accountant's report accompanying these statements, we cannot conclude that they are audited statements.[7] The unaudited financial statements submitted by the Petitioner are not reliable evidence and are insufficient to demonstrate its ability to pay the proffered wage in 2018. The record does not contain regulatory-prescribed evidence of the Petitioner's ability to pay the proffered wage from the priority date in 2018 onward.

The record contains the petitioner's bank account statements for a portion of 2019. However, bank statements are not among the three types of evidence required to illustrate a petitioner's ability to pay a proffered wage. *See* 8 C.F.R. § 204.5(g)(2). While this regulation allows additional material "in appropriate cases," the Petitioner has not demonstrated why the documentation specified at 8 C.F.R. § 204.5(g)(2) is inapplicable. Additionally, bank statements show the amount in an account on a given date and cannot show the sustainable ability to pay a proffered wage.

We note that 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). USCIS records show that the Petitioner filed a Form I-140 petition for another beneficiary. 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 date of the current petition.[8]

The Petitioner must document the receipt number, name of the 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 the 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

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[6] The Petitioner submitted unaudited balance sheets and income statements for 2018 in response to the Director's request for evidence, and it submits additional unaudited financial statements for 2018 on appeal.

[7] The unaudited financial statements submitted on appeal include the statement: "No assurance is provided on the financial statements or supplementary information. Statement of cash flows and substantially all disclosures have been omitted."

[8] 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.

its applicable beneficiaries.

We may generally 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). On appeal, the Petitioner asserts that it has been operational since 2009 and has had "tremendous growth." However, unlike in *Sonegawa*, the record does not indicate the growth of the Petitioner's business. The Petitioner must support its assertions with relevant, probative, and credible evidence. *See Matter of Chawathe*, 25 I&N Dec. 369, 376 (AAO 2010). On appeal, the Petitioner also states that it has branded itself as a leader in its industry and that its "employees are responsible for several patents and have co-authored numerous manuals and books within the area of eliminating construction waste." It also cites the Beneficiary's notable work "leading growth in this area of construction." The record also indicates that the Beneficiary served on a panel to contribute to a handbook related to the concrete industry, but it does not establish that he or others in the Petitioner's company were responsible for "several patents" and have "co-authored numerous manuals and books" as stated on appeal. *Id.* The record contains pictures of several awards that the Petitioner and/or the foreign entity received, but it does not indicate the guidelines or eligibility requirements for the awards or how they contributed to the Petitioner's reputation in the industry.

The Petitioner further states on appeal that "a quick search of their entity would have shown USCIS not only the viability of the business, but the need for this business... due to the urgent concerns related to our aging infrastructure." However, it is the Petitioner's burden to establish eligibility for the requested benefit. Section 291 of the Act, 8 U.S.C. § 1361. Additionally, unlike in *Sonegawa*, the record does not show the occurrence of any uncharacteristic business expenditures or losses; the Beneficiary will not replace a current employee or outsourced service; and the Petitioner in this case must demonstrate its ability to pay multiple beneficiaries. Further, without regulatory-prescribed evidence of the Petitioner's ability to pay the proffered wage from the priority date in 2018 onward, the record does not establish the Petitioner's continuing ability to pay the proffered wage under *Sonegawa*.

The Petitioner has not established its continuing ability to pay by a preponderance of the evidence. The appeal will be dismissed for this reason.

III. RESERVED ISSUES

The Director also concluded that the record did not establish that (a) the Beneficiary was employed abroad in a primarily executive capacity; (b) the Beneficiary would be employed in a primarily executive capacity in the United States; (c) the Petitioner is doing business; and (d) the Beneficiary had at least one continuous year of full-time employment abroad with a qualifying organization within the three years preceding the filing of the petition. However, because the issue discussed in Part II above is dispositive in this case, we need not reach the four remaining issues and therefore reserve

them.[9]

ORDER: The appeal is dismissed.

[9] *See INS v. Bagamasbad*, 429 U.S. 24, 25 (1976) ("courts and agencies are not required to make findings on issues the decision of which is unnecessary to the results they reach"); *see also Matter of L-A-C-*, 26 I&N Dec. 516, 526 n.7 (BIA 2015) (declining to reach alternative issues on appeal where an applicant is otherwise ineligible).