U.S. Citizenship and Immigration Services

Non-Precedent Decision of the Administrative Appeals Office

In Re: 6500373

Date: JAN. 30, 2020

Appeal of Texas Service Center Decision

Form I-140C, Immigrant Petition for Alien Workers (Multinational Managers or Executives)

The Petitioner, describing itself as a wholesale distributor, seeks to permanently employ the Beneficiary as an "executive manager" in the United States 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).

The Director of the Texas Service Center denied the petition on multiple grounds, concluding that the Petitioner did not establish that: (1) the Petitioner was doing business as defined by the regulations; (2) Beneficiary would be employed in a managerial or executive capacity in the United States; (3) the Beneficiary was employed in a managerial or executive capacity in his former position abroad; and (4) the Petitioner had the ability to pay the Beneficiary's proffered wage.

On appeal, the Petitioner points to 2015 tax documentation and asserts that this demonstrates it was doing business as required by the regulations and that it had the ability to pay the Beneficiary's proffered wage. Further, the Petitioner contends that it submitted detailed duty descriptions for the Beneficiary that establish he acted in a managerial or executive capacity abroad and that he would act in a managerial or executive capacity in the United States.

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.

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.

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).

II. PETITIONER DOING BUSINESS

The first issue we will address is whether the Petitioner established that it had been doing business for at least one year prior to the date the petition was filed.

The regulations require that the beneficiary 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). The regulations define doing business as "the regular, systematic, and continuous provision of goods and/or services by a firm, corporation, or other entity and does not include the mere presence of an agent." 8 C.F.R. § 204.5(j)(2).

In support of the petition, the Petitioner submitted the Beneficiary's 2015 IRS Form 1040 U.S. Individual Income Tax Return reflecting in schedule C that he reported $953,419 in revenue for the Petitioner as a sole proprietorship.[1] In a request for evidence (RFE), the Director requested that the Petitioner submit supporting documentation to substantiate that had been doing business for at least one year prior to the date of the petition, including leases, purchase agreements, federal income tax returns, employer's quarterly tax returns, invoices, contracts, and/or other such relevant documentation. In response, the Petitioner submitted a letter stating that "due to health issues, [the Petitioner] has paralyzed most of its activities in 2017 but is now returning with full activity for the year 2018." Further, the Petitioner provided the Beneficiary's 2017 IRS Form 1040 indicating in schedule C that the sole proprietorship did not earn any revenue in 2017. On appeal, the Petitioner again points to the Beneficiary's 2015 IRS Form 1040 and notes that this reflects it earned over $950,000 in revenue and approximately $126,000 in income during that year.

The Petitioner's statements and the supporting evidence indicate that it was not regularly, systematically, and continuously providing goods or services as of the date the petition was filed and for at least one year prior to this date. As discussed, the Petitioner acknowledged that it had "paralyzed most of its activities in 2017" and submitted supporting 2017 IRS Form 1040 indicating that it did not generate any revenue during that year. The Petitioner submits no evidence to remedy this deficiency on appeal, but only emphasizes tax documentation from 2015. However, this tax document is dated well before the date the petition was filed and does not demonstrate that it was doing business as of the date the petition was filed in February 2017 or for at least one year prior to this date. In addition, it is noteworthy that the Petitioner provides no other evidence that it was regularly providing goods and services as of February 2017 or during 2016, despite the Director's evidentiary request. We acknowledge that the Petitioner submitted several invoices meant to demonstrate the sale of goods; however, these invoices are all dated in 2018 and do not reflect its regular provision of goods or services as of the date the petition was filed or for at least one year prior to this date. We note that the Petitioner must establish that all eligibility requirements for the immigration benefit have been satisfied from the time of the filing and continuing through adjudication. 8 C.F.R. § 103.2(b)(1).

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[1] The petition was filed on February 28, 2017.

For the foregoing reasons, the Petitioner has not established that it was doing business as of the date the petition was filed and for at least one year prior to this date.

III. ABILITY TO PAY

The next issue we will address is whether the Petitioner established that it had the ability to pay the Beneficiary's proffered wage.

The pertinent regulation at 8 C.F.R. § 204.5(g)(2) states:

> 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 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 the Service.

In determining a petitioner's ability to pay the proffered wage, we first examine whether it 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, we 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. If the petitioner's net income or net current assets are not sufficient to demonstrate its ability to pay the proffered wage, we may also consider the overall magnitude of the company's business activities. *See Matter of Sonegawa*, 12 I&N Dec. 612 (Reg'l Comm'r 1967).

The Petitioner indicated that the Beneficiary would earn $780 per week under an approved petition, or approximately $40,560 per year. The Petitioner did not submit evidence that it was paying the Beneficiary's proffered wage as of the date the petition was filed. On appeal, the Petitioner again points to the Beneficiary's 2015 IRS Form 1040 and states that this reflects a net income of over $125,000, an amount sufficient to pay his proffered wage. However, the Beneficiary's 2015 IRS Form 1040 is relevant to a time period well before the date the petition was filed and does not establish the Petitioner's ability to pay the Beneficiary's proffered wage in February 2017. In fact, the Petitioner submitted a 2017 IRS Form W-2 Wage and Tax Statement reflecting that the Beneficiary was paid only $15,000 by a different unidentified company, [redacted], not the Petitioner. Further, as we have discussed, the Petitioner acknowledges that it "mostly paralyzed" its operations in 2017 and provided the Beneficiary's 2017 IRS Form 1040 indicating that it earned no revenue during that year, thereby leaving substantial uncertainty as to its ability to pay the Beneficiary's wage as of the date the petition was filed. The Petitioner provides no contemporaneous objective evidence to establish that it had the ability to pay the Beneficiary wage as of the date the petition was filed in February 2017. The Petitioner must resolve inconsistencies and ambiguities in the record with

independent, objective evidence pointing to where the truth lies. *Matter of Ho*, 19 I&N Dec. 582, 591-92 (BIA 1988). Again, the Petitioner must establish that all eligibility requirements for the immigration benefit have been satisfied from the time of the filing and continuing through adjudication. 8 C.F.R. § 103.2(b)(1).

For the foregoing reasons, the Petitioner has not established that it had the ability to pay the Beneficiary's wage as of the date the petition was filed.

IV. REMAINING ISSUES

As we have discussed, the Director also denied the petition concluding that the Petitioner did not establish that the Beneficiary would be employed in a managerial or executive capacity in the United States or that he was employed abroad in one of these capacities. Because of the dispositive effect of the above findings of ineligibility, we will only briefly address the remaining issues addressed by the Director.

In denying the petition on these grounds, the Director concluded that the Petitioner submitted generic duties for the Beneficiary that did not effectively convey his actual day-to-day managerial or executive tasks abroad or in the United States. The Director further noted that the Petitioner did not submit more detailed duties in response to the RFE, but only resubmitted the same generic duties specific to the Beneficiary's former role abroad and his proposed capacity in the United States. On appeal, the Petitioner again resubmits the same foreign and U.S. duties. It asserts that these duties are "detailed" and that the Director's analysis in the denial was "out of reality."

Upon review, we concur with the Director's conclusion that the Petitioner did not establish that the Beneficiary was employed abroad or in the United States in a managerial or executive capacity. For instance, the Petitioner set forth several generic duties for the Beneficiary abroad that could apply to any executive or manager acting in any industry and these vague tasks did not sufficiently corroborate his day-to-day tasks abroad. For instance, the Petitioner indicated that the Beneficiary was tasked abroad with preparing "business plans, campaigns, and special development plans," analyzing "operational systems and designation of products," evaluating the "final section [*sic*] of equipment," establishing "operational objectives," developing "contacts with existing and potential clients," negotiating "sales contracts," and investigating "potential product improvements." However, the Petitioner submitted few specifics and no supporting documentation to substantiate the business plans and campaigns the Beneficiary worked on, the operational systems he analyzed, equipment he dealt with, operational objectives he set, clients he developed, or contracts he negotiated. Likewise, the Petitioner provided similarly vague duties for the Beneficiary's proposed U.S. employment and did not articulate or document the administrative matters he would oversee, policies and strategies we would work on, executive decisions he would make, contracts he would negotiate, costs he would reduce, or budgets he would allocate.

Specifics are clearly an important indication of whether a beneficiary's duties are primarily managerial or executive in nature, otherwise meeting the definitions would simply be a matter of reiterating the regulations. *Fedin Bros. Co., Ltd. v. Sava*, 724 F. Supp. 1103, 1108 (E.D.N.Y. 1989), *aff'd*, 905 F.2d 41 (2d. Cir. 1990). The Petitioner did not provide sufficiently detailed duty descriptions for the Beneficiary abroad or in the United States, evidence which is required to demonstrate his eligibility as

a manager or executive in each instance. The Director specifically noted these insufficiencies in the RFE and in the denial decision; however, the Petitioner still provides no additional detail or documentation with respect to the Beneficiary's duties and does not remedy these material deficiencies on appeal.

In addition, as discussed, the submitted evidence indicates that the Petitioner was not doing business as of the date the petition was filed. As such, this leaves substantial question as to whether it was operating sufficiently to support the Beneficiary in a managerial or executive capacity as of the date the petition was filed; or more specifically, that it could employ subordinates in the United States to primarily relieve him from performing non-qualifying operational tasks.

For these reasons, the Petitioner did not demonstrate that the Beneficiary was employed abroad in a managerial or executive capacity or that he would employed in either of these capacities in the United States.

V. CONCLUSION

The appeal must be dismissed because the Petitioner has not established that: (1) the Petitioner was doing business as defined by the regulations; (2) the Petitioner had the ability to pay the Beneficiary's proffered wage; (3) the Beneficiary was employed in a managerial or executive capacity in his former position abroad; and (4) Beneficiary would be employed in a managerial or executive capacity in the United States.

ORDER: The appeal is dismissed.