U.S. Citizenship and Immigration Services

Non-Precedent Decision of the Administrative Appeals Office

In Re: 11105880

Date: NOV. 24, 2020

Appeal of Nebraska Service Center Decision

Form I-140, Petition for Multinational Managers or Executives

The Petitioner, describing itself as a provider a lab testing services, seeks to permanently employ the Beneficiary as its chief executive officer (CEO) and president 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 Nebraska Service Center denied the petition, concluding that the Petitioner did not establish, as required, that: (1) the Beneficiary would be employed in the United States in a managerial or executive capacity, (2) the Beneficiary was employed abroad in a managerial or executive capacity, (3) the Petitioner was doing business as defined by the regulations, (4) the Petitioner had the ability to pay the Beneficiary's proffered wage, and (5) the foreign employer was doing business. On appeal, the Petitioner contends only that it has submitted sufficient evidence to establish that the Beneficiary would act in a managerial and 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 because the Petitioner did not establish that it had the ability to pay the Beneficiary's proffered wage. Since the identified basis for denial is dispositive of the Petitioner's appeal, we decline to reach and hereby reserve the Petitioner's appellate arguments regarding the Beneficiary's claimed employment with the foreign parent entity. 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).

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. ANALYSIS

As indicated above, the Director denied the petition on five different grounds. However, the Petitioner only specifically addresses one of these issues on appeal; namely, whether the Beneficiary would be employed in a managerial or executive capacity in the United States. Since the Petitioner has not addressed four of the five issues at issue on appeal, it has abandoned these issues. Sepulveda v. U.S. Att'y Gen., 401 F.3d 1226, 1228 n. 2 (11th Cir. 2005); Hristov v. Roark, No. 09–CV–27312011, 2011 WL 4711885 at *1, 9 (E.D.N.Y. Sept. 30, 2011) (the court found the plaintiff's claims to be abandoned as he failed to raise them on appeal to the AAO).

When an appellant fails to properly challenge one of the independent grounds upon which the Director based the overall determination, the filing party has abandoned any challenge of that ground, and it follows that the Director's adverse determination will be affirmed. Sapuppo v. Allstate Floridian Ins. Co., 739 F.3d 678, 680 (11th Cir. 2014); United States v. Cooper, No. 17-11548, 2019 WL 2414405, at *3 (11th Cir. June 10, 2019); McCray v. Fed. Home Loan Mortg. Corp., 839 F.3d 354, 361-62 (4th Cir. 2016); In re Under Seal, 749 F.3d 276, 293 (4th Cir. 2014) (finding "an appellant must convince us that every stated ground for the judgment against him is incorrect."); United States v. Kama, 394 F.3d 1236, 1238 (9th Cir. 2005). It is, therefore, unnecessary to analyze the remaining independent grounds when another is dispositive of the appeal. See INS v. Bagamasbad, 429 U.S. 24, 25 (1976) (finding it unnecessary to analyze additional grounds when another independent issue is dispositive of the appeal); 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).

Aside from the Petitioner's failure to challenge most of the Director's bases for denial on appeal, we affirm the decision as the previously submitted evidence is insufficient to establish that the Petitioner had the ability to pay the Beneficiary's proffered wage. The regulation at 8 C.F.R. § 204.5(g)(2) states:

> 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 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 the Form I-140 Immigrant Petition for Alien Worker, Part 6, Item 8 the Petitioner indicated that the Beneficiary's annual wage would be $70,000 per year.[1] In denying the petition, the Director pointed to submitted documentation reflecting that the Beneficiary was only paid $44,700 during 2018 and also noted that its 2018 IRS Form 1120S, U.S. Income Tax Return for an S Corporation indicated that it did not have sufficient assets to pay his proffered wage.

The regulations explicitly state that "the petitioner must demonstrate [the] ability [to pay] at the time the priority date is established and continuing until the beneficiary obtains lawful permanent residence." However, the submitted documentation indicates that the Petitioner no longer had the ability to pay the Beneficiary's proffered wage when the Director denied the petition in February 2020. As noted by the Director, the Petitioner submitted a 2018 IRS Form W-2 Wage and Tax Statement reflecting that it only paid the Beneficiary $44,700 during that year. Likewise, the Petitioner's 2018 IRS Form 1120S indicated that it paid only $44,700 as "compensation of officers." This evidence leaves substantial uncertainty as to the Petitioner's continuing ability to pay the Beneficiary's proffered wage of $70,000, and the Petitioner provided no other supporting documentation to substantiate the payment of his proffered wage thereafter. The Petitioner must resolve inconsistencies 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).

Further, as an alternate means of determining a petitioner's ability to pay, we examine a petitioner's net income figure as reflected on the federal income tax return, without consideration of depreciation or other expenses. Reliance on federal income tax returns as a basis for determining a petitioner's ability to pay the proffered wage is well established by judicial precedent. Elatos Rest. Corp. v. Sava, 632 F. Supp. 1049, 1054 (S.D.N.Y. 1986) (citing Tongatapu Woodcraft Haw., Ltd. v. Feldman, 736 F.2d 1305 (9th Cir. 1984)); Chi-Feng Chang v. Thornburgh, 719 F. Supp. 532 (N.D. Texas 1989); K.C.P. Food Co., Inc. v. Sava, 623 F. Supp. 1080 (S.D.N.Y. 1985); Ubeda v. Palmer, 539 F. Supp. 647 (N.D. Ill. 1982), aff'd, 703 F.2d 571 (7th Cir. 1983).

In K.C.P. Food Co., Inc. v. Sava, 623 F. Supp. at 1084, the court held that former Immigration and Naturalization Service (INS) properly relied on the petitioner's net income figure reflected on its corporate income tax returns rather than gross income. The court rejected the argument that INS should have considered income before expenses were paid rather than net income. There is no precedent that would allow the Petitioner to "add back to net cash the depreciation expense charged for the year." See, e.g., Chi-Feng Chang, 719 F. Supp. at 537; see also Elatos Rest. Corp., 632 F. Supp. at 1054.

As discussed by the Director, the Petitioner's most recent 2018 IRS Form 1120 reflected a net taxable income of -$74,162. As such, not only did the Petitioner not pay the Beneficiary his proffered wage of $70,000 in 2018, it could not pay his wage out of its income during that year.

In addition, if a petitioner does not have sufficient net income to pay the proffered salary, we will review its net current assets. Net current assets are the difference between a petitioner's current assets

[1] The petition was filed on November 26, 2016. The Director issued a request for evidence (RFE) in May 2019 to which the Petitioner responded in August 2019. The petition was denied on February 13, 2020.

and current liabilities. Net current assets identify the amount of "liquidity" that a petitioner has as of the date of the petition and is the amount of cash or cash equivalents that would be available to pay the proffered wage during the year covered by the tax return. As long as we are satisfied that a petitioner's current assets are sufficiently "liquid" or convertible to cash, or cash equivalents, then a petitioner's net current assets may be considered in assessing the prospective employer's ability to pay the proffered wage.

Therefore, we will look to Schedule L of the Petitioner's most recent 2018 Form 1120S to determine the Petitioner's net current assets. Schedule L of the Petitioner's 2018 IRS Form 1120S reflects that it had net assets of $24,496 and net liabilities of $5027 as of the end of 2018. As such, the Petitioner did not establish with sufficient evidence that it had the ability to pay the Beneficiary's proffered wage of $70,000 using net current assets as of its most recent tax return. Further, as noted, the Petitioner does not address this material deficiency on appeal with additional assertions or documentary evidence.

In conclusion, because the Petitioner did not contest the Director's conclusion regarding its continuing ability to pay the Beneficiary's proffered wage, we consider this issue to be abandoned, and the appeal will be dismissed for this reason. Further, notwithstanding the Petitioner's lack of a challenge to this ground for denial, the evidence does not establish that it had the ability to pay the Beneficiary's proffered wage.

ORDER: The appeal is dismissed.