U.S. Citizenship and Immigration Services

Non-Precedent Decision of the Administrative Appeals Office

In Re: 10856947

Date: OCT. 1, 2020

Appeal of Nebraska Service Center Decision

Form I-140, Petition for Multinational Managers or Executives

The Petitioner seeks to permanently employ the Beneficiary as its President 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 the Beneficiary would be employed in the United States in an executive capacity because he would not be subject to the Petitioner's control, based on his status as the sole shareholder of the Petitioner.

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 remand the matter to the Director for further consideration and entry of a new decision.

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

In his decision, the Director determined that the Beneficiary would not be employed in the United States in an executive capacity because he would not be subject to the Petitioner's control, based on his status as the sole shareholder of the Petitioner.[1] On appeal, the Petitioner asserts that "since the petitioner is a separate legal entity, the regulations do not prevent an owner from eligibility as a beneficiary in the EB1C category." We agree. We therefore withdraw the Director's decision on that issue. However, the Director did not analyze the other issues discussed in his notice of intent to deny (NOID), including whether the Beneficiary's proposed duties as President and the Petitioner's staffing levels indicate that the Beneficiary would be employed in the United States in a managerial or executive capacity. Therefore, we will remand the matter to the Director to analyze the record and to determine whether the Petitioner has established eligibility for the benefit sought.

III. ABILITY TO PAY

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 this case, the priority date is October 18, 2018, the date the immigrant petition was filed. *See* 8 C.F.R. § 204.5(d). The annual proffered wage is $48,000.

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.[2]

The Director noted in his June 2019 NOID that the record does not contain the Petitioner's most recent tax returns. In response, the Petitioner submitted its 2017 federal tax return and its IRS Forms W-2, Wage and Tax Statements, issued to its employees in 2018. The Beneficiary's Form W-2 shows that the Petitioner paid the Beneficiary $32,400 in wages in 2018. However, the record does not contain regulatory-prescribed evidence of the Petitioner's ability to pay the difference between the annual proffered wage of $48,000 and the wages it paid to the Beneficiary in 2018.

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[1] We note that a Form I-526, Immigrant Petition by Alien Investor, was approved for the Beneficiary in May 2020.

[2] 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 does not contain the Petitioner's annual reports, federal tax returns, or audited financial statements from the priority date in 2018 onward. Therefore, we cannot affirmatively find that the Petitioner has the continuing ability to pay. On remand, the Director should request regulatory-required evidence of the Petitioner's continuing ability to pay and allow the Petitioner reasonable time to respond.

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