U.S. Citizenship and Immigration Services

Non-Precedent Decision of the Administrative Appeals Office

MATTER OF C-C-, INC.

DATE: NOV. 3, 2015

APPEAL OF TEXAS SERVICE CENTER DECISION

PETITION: FORM I-140, IMMIGRANT PETITION FOR ALIEN WORKER

The Petitioner, a linen supply business, seeks to employ the beneficiary permanently in the United States as Facilities Engineer-Electrical pursuant to section 203(b)(2) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 203(b)(2). The Director, Texas Service Center, denied the petition. The matter is now before us on appeal. The appeal will be dismissed.

The record reflects that the appeal is properly filed, timely and makes a specific allegation of error in law or fact. The procedural history in this case is documented by the record and incorporated into the decision. Further elaboration of the procedural history will be made only as necessary.

The Form I-140 petition is accompanied by an ETA Form 9089, Application for Permanent Employment Certification, which has been certified by the U.S. Department of Labor (DOL). The priority date of the visa petition, which is the date that DOL accepted the labor certification for processing, is September 12, 2013. *See* 8 C.F.R. § 204.5(d). The Petitioner checked box 1.d. in Part 2. of the Form I-140 indicating that it seeks to classify the beneficiary as an advanced degree professional under section 203(b)(2) of the Act.

The Director denied the Form I-140 based on his determination that the record did not establish that the Petitioner had the ability to pay the Beneficiary the proffered annual wage of $117,104.00. On appeal, the Petitioner submits new evidence and contends that this evidence, in addition to that already provided, establishes its ability to pay.

We conduct appellate review on a *de novo* basis. *See Soltane v. DOJ*, 381 F.3d 143, 145 (3d Cir. 2004). An application or petition that fails to comply with the technical requirements of the law may be denied even if the director does not identify all of the grounds for denial in the initial decision. *See Spencer Enterprises, Inc. v. United States,* 229 F.Supp. 2d 1025, 1043 (E.D. Cal. 2001), *aff'd,* 345 D.3d 683 (9th Cir. 2003); *see also Soltane v. DOJ,* at 145. We consider all pertinent evidence in the record, including new evidence properly submitted on appeal. The submission of additional evidence on appeal is allowed by the instructions to the Form I-290B, Notice of Appeal or Motion, which are incorporated into the regulation by 8 C.F.R. § 103.2(a)(1).

I. ABILITY TO PAY

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

A petitioner must establish that its job offer to a beneficiary is a realistic one. Because the filing of a labor certification application establishes a priority date for any subsequently filed immigrant visa petition, a petitioner must establish that a job offer is realistic as of the priority date and that the offer remains realistic for each year thereafter, until the beneficiary obtains lawful permanent residence. Where a petitioner has filed 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 sponsored worker. *See Matter of Great Wall,* at 144-145; *see also* 8 C.F.R. § 204.5(g)(2).

In the present case, the priority date of the visa petition is September 12, 2013. The proffered wage, as stated on the labor certification, is $117,104.00 a year. Accordingly, in the present case, the Petitioner must establish a continuing ability to pay the beneficiary the proffered annual wage of $117,104.00 from September 12, 2013 until December 1, 2014, the date on which the record before the Director closed with the receipt of the Petitioner's response to the request for evidence (RFE). On that date, the most recent tax return available was that for 2013.

The record contains the following evidence relating to the petitioner's ability to pay: copies of its Forms 1120S, U.S. Income Tax Returns for an S Corporation, for 2012 and 2013; a Form 941, Employer's Quarterly Federal Tax Return, for the Fourth Quarter of 2014; earning statements for the Beneficiary for the period, September 13 through November 14, 2014; April 25, 2014 and February 27, 2015, statements from [redacted] the Petitioner's President and General Manager, attesting to his company's financial ability to pay the proffered wage; and the Petitioner's interim financial statement for the period January through November 2014.

In determining a petitioner's ability to pay the proffered wage during a given period, U.S. Citizenship and Immigration Services (USCIS) will first examine whether it has employed and paid the beneficiary during that period. If a petitioner establishes by documentary evidence that it has employed the beneficiary at a salary equal to or greater than the proffered wage, the evidence will be considered *prima facie* proof of the petitioner's ability to pay the proffered wage.

If a petitioner does not establish that it employed and paid a beneficiary an amount at least equal to the proffered wage during that period, USCIS will next examine the net income figure reflected on a

petitioner's federal income tax return, without consideration of depreciation or other expenses. *River Street Donuts, LLC v. Napolitano*, 558 F.3d 111 (1st Cir. 2009); *Taco Especial v. Napolitano*, 696 F. Supp. 2d 873 (E.D. Mich. 2010), *aff'd*, No. 10-1517 (6th Cir. filed Nov. 10, 2011). 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 Restaurant Corp. v. Sava*, 632 F. Supp. 1049, 1054 (S.D.N.Y. 1986) (*citing Tongatapu Woodcraft Hawaii, Ltd. v. Feldman*, 736 F.2d 1305 (9th Cir. 1984)); *see also 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). Reliance on a petitioner's gross receipts and wage expense is misplaced. Proof that a petitioner's gross receipts exceeded the proffered wage is insufficient, as is evidence that a petitioner paid wages in excess of the proffered wage.

In *K.C.P. Food Co., Inc. v. Sava*, 623 F. Supp. at 1084, the court held that the U.S. Immigration and Naturalization Service, now USCIS, had properly relied on the petitioner's net income figure, as stated on the petitioner's corporate income tax returns, rather than the petitioner's gross income. The court specifically rejected the argument that USCIS should have considered income before expenses were paid rather than net income. *See Taco Especial v. Napolitano*, 696 F. Supp. 2d at 881 (gross profits overstate an employer's ability to pay because it ignores other necessary expenses).

With respect to depreciation, the court in *River Street Donuts* noted:

> The AAO recognized that a depreciation deduction is a systematic allocation of the cost of a tangible long-term asset and does not represent a specific cash expenditure during the year claimed. Furthermore, the AAO indicated that the allocation of the depreciation of a long-term asset could be spread out over the years or concentrated into a few depending on the petitioner's choice of accounting and depreciation methods. Nonetheless, the AAO explained that depreciation represents an actual cost of doing business, which could represent either the diminution in value of buildings and equipment or the accumulation of funds necessary to replace perishable equipment and buildings. Accordingly, the AAO stressed that even though amounts deducted for depreciation do not represent current use of cash, neither does it represent amounts available to pay wages.
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> We find that the AAO has a rational explanation for its policy of not adding depreciation back to net income. Namely, that the amount spent on a long term tangible asset is a "real" expense.

River Street Donuts at 118. "[USCIS] and judicial precedent support the use of tax returns and the *net income figures* in determining petitioner's ability to pay. Plaintiffs' argument that these figures should be revised by the court by adding back depreciation is without support." *Chi-Feng Chang* at 537 (emphasis added).

In cases where an employer's net income or net current assets do not establish a consistent ability to pay the proffered wage during the required period, USCIS may also consider the overall magnitude

of that organization's business activities. *Matter of Sonegawa*, 12 I&N Dec. 612 (Reg. Comm. 1967). In assessing the totality of a petitioner's circumstances to determine ability to pay, USCIS may look at such factors as the number of years a petitioner has been in business, its record of growth, the number of individuals it employs, abnormal business expenditures or losses, its reputation within its industry, whether the beneficiary is replacing a former employee or an outsourced service, or any other evidence it deems relevant.

The Petitioner in the present case has indicated that it did not employ the Beneficiary until 2014 and, therefore, cannot establish its ability to pay the proffered wage based on wages paid to the Beneficiary in 2013. We also note that the 2013 tax return submitted by the Petitioner reports negative net income of $16,905.00 and negative current assets of $456,599.00. Therefore, the record does not establish that the Petitioner had the financial resources to pay the proffered wage in 2013.

On appeal, the Petitioner submits a February 27, 2015, statement from its President, [redacted] who asserts that his company has 110 full-time employees and that it has the financial ability to pay the proffered wage. In support of his claim, the Petitioner also provides a Form 941 for the fourth quarter of 2014, which reflects that it has 110 employees and an interim financial statement that reflects $457,918.00 in net income as of November 30, 2014. The Petitioner also references the Beneficiary's previously submitted 2014 earning statements as proof that he is being paid the proffered wage.

While we acknowledge the preceding evidence, we do not find it to establish the Petitioner's ability to pay. Although the regulation at 8 C.F.R. § 204.5(g)(2) states that in cases where a U.S. employer employs 100 or more workers, USCIS may accept a statement from a financial officer of the organization of that employer's ability to pay, we are not required to do so.

We note that the submitted Form 941 reflects the Petitioner's employment of 110 individuals during the fourth quarter of 2014, but do not find it to demonstrate that the Petitioner's workforce exceeds 100 employees. The Form I-140 in this matter and a prior statement from [redacted] dated April 25, 2014, report the Petitioner's full-time employment of six persons, not 110. Although the Petitioner on appeal claims that the reference to six employees on the Form I-140 is the result of error, it offers no explanation as to why its President and General Manager made this same claim in his April 25, 2014, statement. Accordingly, we find it reasonable to conclude that the 110 employees listed on the Petitioner's rolls during the fourth quarter of 2014 do not reflect normal employment levels and, therefore, will not accept [redacted] February 27, 2015, statement as proof of the Petitioner's ability to pay the proffered wage.[1]

[1] Our review of the Validation Instrument for Business Enterprises (VIBE) database finds that the Petitioner employs 14 workers, not 110. The Petitioner must resolve this inconsistency in any further filings relating to the instant petition. Inconsistencies must be resolved by the submission of "independent objective evidence, and attempts to explain or reconcile such inconsistencies, absent competent objective evidence pointing to where the truth, in fact, lies, will not suffice." *Matter of Ho*, 19 I&N Dec. 582, 591-92 (BIA 1988). For more information about VIBE, please visit USCIS's website at: www.uscis.gov/VIBE.

The interim financial statement from 2014 and the Beneficiary's earning statements are also insufficient to establish the Petitioner's ability to pay. USCIS will not accept unaudited financial statements. The regulation at 8 C.F.R. § 204.5(g)(2) makes clear 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. We view unaudited financial statements as the representations of management, which, if unsupported, do not provide reliable evidence of a petitioner's ability to pay the proffered wage.

The Beneficiary's earning statements for the period September 13, 2014 through November 14, 2014 also do not demonstrate that the Petitioner has the ability to pay the proffered wage. While USCIS will consider prorating the proffered wage where a petitioner submits evidence of net income or payment of the beneficiary's wages specifically covering the portion of the year that follows the priority date (and only that period), e.g., monthly income statements or pay stubs, we will not do so where a petitioner submits such evidence as proof of its ability to pay in subsequent years. Earnings statements may not be substituted for the types of evidence required by the regulation at 8 C.F.R. § 204.5(g)(2), i.e., copies of annual reports, federal tax returns, or audited financial statements.

Moreover, even if we were to accept the submitted financial statement and earnings statements as proof of the Petitioner's ability to pay in 2014, this documentation would not demonstrate the Petitioner's ability to pay the Beneficiary the proffered wage as of the petition's September 12, 2013, priority date. Accordingly, like the Director, we do not find the record to establish the Petitioner's ability to pay the Beneficiary the proffered wage of $117,104.00 from the priority date forward and will dismiss the appeal on this basis.

Beyond the decision of the Director, we also do not find the record to establish that the Beneficiary meets the requirements for the proffered position, as they are set forth in the labor certification.

II. BENEFICIARY QUALIFICATIONS

When determining whether a beneficiary is eligible for a preference immigrant visa, USCIS may not ignore a term of the labor certification, nor may it impose additional requirements. *Madany v. Smith*, 696 F.2d 1008, 1012-1013 (D.C. Cir. 1983). We must examine "the language of the labor certification job requirements" in order to determine what the job requires. *Id.* The only rational manner by which USCIS can be expected to interpret the meaning of terms used to describe the requirements of a job in a labor certification is to examine the certified job offer *exactly* as it is completed by the prospective employer. *See Rosedale Linden Park Company v. Smith*, 595 F. Supp. 829, 833 (D.D.C. 1984) (emphasis added). Our interpretation of the job's requirements, as stated on the labor certification must involve reading and applying *the plain language* of the alien employment certification application form. *Id.* at 834. We cannot and should not look beyond the plain language of the labor certification that the U.S. Department of Labor (DOL) has formally issued.

Here, the labor certification establishes the following requirements for the proffered position:

H.4.	Education: Bachelor's.
H.4-B.	Major field of study: Electrical.
H.5.	Training: None required.
H.6.	Experience in the job offered: Required.
H.6-A.	Length of required experience: 60 months.
H.7.	Alternate field of study: None accepted.
H.8.	Alternate combination of education and experience: None accepted.
H.9.	Foreign educational equivalent: Accepted.
H.10.	Experience in an alternate occupation: Accepted.
H.10-A.	Length of experience in alternate occupation: 60 months.
H.10-B.	Title of acceptable alternate occupation: Electrical Engineer, Production Engineer, Product Dispatcher.
H.11.	Develop scope of work, installation specifications, and electrical load requirements for site electrical equipment; develop facility electrical system specifications, power distribution designs, and basic and detailed design/drawing requirements; manage contracted services for electrical system design and installation ensuring compliance [with] all governmental (county, state and federal) regulations and industry best practices; ensure the facility infrastructure is built per approved specifications, designs and budget, and is commissioned on a timely basis. Ensure as-built documents are prepared at the time of commissioning; develop and update preventive maintenance schedules/procedures and plant operation troubleshooting guide, with LOTO, Arc Flash, OSHA compliance [policies] and procedures; prepare and present periodic project progress reports summarizing plant construction project progress; actively participate in the commissioning and validation of new equipment and process systems.

In Parts J. and K. of the labor certification, the Beneficiary indicates that he holds a 2002 Bachelor's degree in Electrical Engineering from in the Philippines. He further indicates that he worked full-time for the in The Philippines as a Production Engineer from February 16, 2007 until August 26, 2009 and for this same company as an Electrical Engineer from June 16, 2003 until February 15, 2007. In support of the Beneficiary's claims, the Petitioner submits a copy of the Beneficiary's baccalaureate degree in electrical engineering from the Philippines and his academic transcripts, as well as a January 25, 2013, employment certificate from

The employment certificate from does not, however, provide the same employment history as that claimed by the Beneficiary on the labor certification. While it indicates that the Beneficiary was employed as a Production Engineer from February 16, 2007 until August 26, 2009, it does not reflect that he was employed as an Electrical Engineer from June 16, 2003 until February 15, 2007. Instead, it states that the Beneficiary worked as a Product Dispatcher during this period.

In light of the inconsistent accounts of the Beneficiary's employment at , we do not find the record to establish that the Beneficiary has the five years of qualifying employment experience required by the labor certification. Doubt cast on any aspect of a petitioner's proof may lead to a reevaluation of the reliability and sufficiency of the remaining evidence offered in support of the visa petition. *Matter of Ho*, 19 I&N Dec. 582, 591-92 (BIA 1988). However, even if the information provided in the employment certificate issued by did coincide with the information provided by the Beneficiary in Part K. of the labor certification, we would not find the record to establish that the Beneficiary has the required five years of employment experience.

The regulation at 8 C.F.R. § 204.5(g)(1) requires that letters submitted to establish a beneficiary's qualifying employment experience provide "a specific description of the duties performed by the alien." Here the employment certificate issued by indicates only the titles of the jobs held by the Beneficiary while he was in its employ. We also note that while the certificate states that the Beneficiary was a "regular" employee of , it does not specifically indicate that he was employed on a full-time basis. For these reasons as well, the record does not establish the Beneficiary's employment experience.

III. CONCLUSION

A petitioner must establish the elements for the approval of a petition at the time of filing. *Matter of Katigbak*, 14 I&N Dec. 45, 49 (Comm. 1971). In the present case, the record does not establish either the Petitioner's continuing ability to pay the Beneficiary the proffered wage or the Beneficiary's qualifications for the offered position as of the September 12, 2013 priority date.

Therefore, we will affirm the Director's December 30, 2014 decision for the above stated reasons, with each considered as an independent and alternative basis for the denial of the petition. In visa petition proceedings, it is a petitioner's burden to establish eligibility for the immigration benefit sought. Section 291 of the Act, 8 US.C. § 1361; *Matter of Otiende*, 26 I&N Dec. 127, 128 (BIA 2013). Here that burden has not been met. Accordingly, the appeal will be dismissed.

ORDER: The appeal is dismissed.

Cite as *Matter of C-C-, Inc.*, ID# 14924 (AAO Nov. 3, 2015)