U.S. Citizenship and Immigration Services

Non-Precedent Decision of the Administrative Appeals Office

MATTER OF S-S- INC.

DATE: DEC. 22, 2016

APPEAL OF TEXAS SERVICE CENTER DECISION

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

The Petitioner, a provider of information technology development and consulting services, seeks to permanently employ the Beneficiary as a software engineer. It requests classification of the Beneficiary as a member of the professions holding an advanced degree under the second-preference, immigrant category. *See* Immigration and Nationality Act (the Act) section 203(b)(2)(A), 8 U.S.C. § 1153(b)(2)(A). This classification allows a U.S. employer to sponsor a professional with an advanced degree or its equivalent for lawful permanent resident status.

On September 22, 2015, the Director, Texas Service Center, denied the petition. The Director concluded that the record did not establish the Petitioner's continuing ability to pay the proffered wage from the petition's priority date onward.

The matter is now before us on appeal. On appeal, the Petitioner submits additional evidence and asserts its ability to pay the proffered wage. The record does not demonstrate the Petitioner's ability to pay the combined proffered wages of all of its petitions pending from the instant petition's priority date. Upon *de novo* review, we will dismiss the appeal.

I. LAW AND ANALYSIS

A. The Petitioner's Ability to Pay the Proffered Wage

A petitioner must demonstrate its continuing ability to pay a proffered wage from a petition's priority date until a beneficiary obtains lawful permanent residence. 8 C.F.R. § 204.5(g)(2). Evidence of ability to pay must include copies of annual reports, federal income tax returns, or audited financial statements. *Id.*

In the instant case, an ETA Form 9089, Application for Permanent Employment Certification (labor certification), approved by the U.S. Department of Labor (DOL), accompanies the petition. The petition's priority date is November 6, 2013, the date the DOL accepted the labor certification application for processing. *See* 8 C.F.R. § 204.5(d).

The accompanying labor certification states the proffered wage of the offered position of software engineer as $97,400 per year.

The record before the Director closed on June 22, 2015, with his receipt of the Petitioner's response to his request for evidence (RFE). At that time, the Petitioner documented the unavailability of its federal income tax return for 2014. We will therefore consider the Petitioner's ability to pay the proffered wage only in 2013, the year of the petition's priority date.[1]

In determining a petitioner's ability to pay a proffered wage, we first consider 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 each year, we next consider whether it generated sufficient annual amounts of net income or net current assets to pay the difference between any wages paid and the proffered wage. If a petitioner's net income or net current assets are insufficient, we may also consider the overall magnitude of its business activities. *See Matter of Sonegawa,* 12 I&N Dec. 612, 614-15 (Reg'l Comm'r 1967).[2]

In the instant case, the record does not indicate that the Petitioner paid the Beneficiary in 2013. The record therefore does not demonstrate the Petitioner's ability to pay the proffered wage based on wages paid to the Beneficiary.

A copy of the Petitioner's federal income tax return for 2013 reflects net income of $30,264. Because this amount does not equal or exceed the annual proffered wage of $97,400, the record does not establish the Petitioner's ability to pay based on its net income.

The Petitioner's tax return for 2013 reflects net current assets of $225,755. This amount exceeds the difference between the annual proffered wage and the wages paid to the Beneficiary.

As indicated in the Director's RFE and decision, however, USCIS records indicate the Petitioner's filing of multiple Forms I-140, Immigrant Petitions for Alien Workers. In response to the RFE, the Petitioner identified nine other petitions that remained pending after the instant petition's priority date.[3]

The Petitioner asserts that its net current assets of $225,755 cover a difference of $210,724.36 between the combined proffered wages and the 2013 wages it paid to its beneficiaries. It therefore asserts that the record demonstrates its ability to pay the proffered wage.

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[1] The Petitioner's additional evidence on appeal does not include copies of its annual reports, federal income tax returns, or audited financial statements for 2014 or 2015. In any future filings in this matter, the Petitioner must submit required evidence of its ability to pay in those years.

[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); *Estrada-Hernandez v. Holder,* 108 F. Supp. 3d 936, 942-43 (S.D. Cal. 2015); *Rivzi v. Dep't of Homeland Sec.*, 37 F. Supp. 3d 870, 883-84 (S.D. Tex. 2014), *aff'd*, 627 Fed. App'x. 292 (5th Cir. 2015).

[3] USCIS records identify the nine petitions by the following receipt numbers: [redacted] and [redacted]

But the Petitioner's combined proffered wage figure is incorrect. The Petitioner asserts that it paid $297,947.59 of the total combined proffered wages of $519,941.62 in 2013. Therefore, the difference between the combined proffered wages claimed by the Petitioner and the wages paid by the Petitioner is $221,994.03, not $210,724.36 as stated by the Petitioner.

Also, the Petitioner's combined proffered wage figure improperly "pro rates" some of the proffered wages. The priority dates of some petitions - including the instant petition – were established in 2013. The Petitioner therefore asserts that it need only pay the portions of the proffered wages of those petitions from their priority dates. *See* 8 C.F.R. § 204.5(g)(2) (requiring a petitioner to demonstrate its ability to pay a proffered wage "at the time the priority date is established" and continuing until the beneficiary obtains permanent residence).

But the Petitioner inequitably counts net current assets accumulated over the entire year of 2013 - including before the priority dates of some petitions - to demonstrate its ability to pay proffered wages of lesser periods. The record does not demonstrate the Petitioner's accrual of net current assets in 2013 from the periods after all of the petitions' priority dates. We therefore will not allow the Petitioner to pro rate the proffered wages.

Substituting the full proffered wages for the pro rated proffered wages, the combined proffered wages in 2013 total $779,700. Subtracting the $297,947.59 in wages paid by the Petitioner, the record does not establish the Petitioner's ability to pay the difference of $481,752.41.

In addition, USCIS records identify four other petitions filed by the Petitioner that remained pending after the instant petition's priority date and before the Petitioner's RFE response.[4] Two of these petitions - [redacted] and [redacted] - were pending in 2013. The Petitioner did not provide evidence of the proffered wages of the pending petitions or whether it paid wages to the petitions' beneficiaries in 2013.[5] But, based on the additional pending petitions, the difference between the combined proffered wages and the amounts of wages paid in 2013 is likely greater.

Moreover, inconsistencies of record render the financial figures in the Petitioner's 2013 tax return unreliable. The tax return identifies the Petitioner by the federal employer identification number (FEIN) stated on the Form I-140 and the accompanying labor certification ([redacted])[6] But the Petitioner's most recent Florida annual corporate reports identify the company by a different FEIN ([redacted]). *See* Fla. Dep't of State, Div. of Corps., http://search.sunbiz.org/Inquiry/CorporationSearch/ByName (last visited Sept. 7, 2016).

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[4] USCIS records identify the additional two petitions by the following receipt numbers: [redacted] and [redacted]

[5] The failure to submit requested evidence that precludes a material line of inquiry shall be grounds for denying the petition. *See* 8 C.F.R. § 103.2(b)(14).

[6] A labor certification employer must possess a valid, distinctive FEIN. 20 C.F.R. § 656.3 (defining the term "employer" for labor certification purposes).

The discrepancy in the Petitioner's FEIN has not been resolved. A petitioner bears the burden of establishing eligibility for a requested beneficiary. Section 291 of the Act, 8 U.S.C. § 1361. In any future proceedings, the Petitioner must resolve the discrepancy in its FEIN. *See Matter of Ho*, 19 I&N Dec. 582, 591 (BIA 1988) (requiring a petitioner to resolve inconsistencies of record by independent, objective evidence pointing to where the truth lies).

For the foregoing reasons, the record does not establish the Petitioner's ability to pay the combined proffered wages of all of its petitions pending from the instant petition's priority date onward. We will therefore affirm the Director's decision and dismiss the appeal.

B. The Beneficiary's Possession of the Required Experience

Although not addressed by the Director, the record also does not establish the Beneficiary's possession of the required experience for the offered position.

A petitioner must establish a beneficiary's possession of all the education, training, and experience specified on an accompanying labor certification by a petition's priority date. 8 C.F.R. §§ 103.2(b)(l), (12); *see also Matter of Wing's Tea House,* 16 I&N Dec. 158, 159 (Acting Reg'l Comm'r 1977); *Matter of Katigbak,* 14 I&N Dec. 45, 49 (Reg'l Comm'r 1971).

In evaluating a beneficiary's qualifications, we must examine the job offer portion of an accompanying labor certification to determine the minimum requirements of an offered position. We may neither ignore a term of the labor certification, nor impose additional requirements. *See K.R.K. Irvine, Inc.* v. *Landon,* 699 F.2d 1006, 1009 (9th Cir. 1983); *Madany* v. *Smith,* 696 F.2d 1008, 1012-13 (D.C. Cir. 1983); *Stewart Infra-Red Commissary of Mass., Inc.* v. *Coomey,* 661 F.2d 1, 3 (1st Cir. 1981).

As previously indicated, the instant petition's priority date is November 6, 2013. The accompanying labor certification states the minimum requirements of the offered position of software engineer as a U.S. bachelor's degree or a foreign equivalent degree in computer science, technology, computer engineering, mathematics, or a related field. The labor certification also states that the offered position requires at least 60 months of experience in the job offered or as a computer or engineering professional.

The Beneficiary attested on the accompanying labor certification to about 66 months of full-time, qualifying experience as a computer professional. The Beneficiary stated the following experience:

- About 61 months with [redacted] in the United States from October 1, 2008, to the date of filing of the labor certification on November 6, 2013; and
- About 5 months with [redacted] in the United States from April 17, 2008, to September 30, 2008.

A petitioner must support a beneficiary's claimed qualifying experience with letters from employers. 8

C.F.R. § 204.5(g)(1). The letters must provide the names, addresses, and titles of the employers, and descriptions of a beneficiary's experiences. *Id.*

In the instant case, the Petitioner submitted a November 3, 2014, letter from a human resources manager on the stationery of The letter states the Beneficiary's employment by as a senior programmer analyst from October 1, 2008, to June 30, 2014, and describes her job duties.

The letter complies with 8 C.F.R. § 204.5(g)(1). But other evidence of record casts doubt on the claimed continuous and full-time nature of the Beneficiary's employment with the company.

In 2012, public records indicate that agreed to stop filing nonimmigrant and immigrant petitions for a 1-year period after violating labor condition application (LCA) regulations involving H-1B nonimmigrant workers. *See* 2011 2012), *available at* U.S. Dep't of Labor, Office of Admin. Law Judges, (last visited Sept. 7, 2016).

The record indicates the Beneficiary's H-1B status with from October 2008 to June 2014. debarment for LCA violations casts doubt on whether the company employed the Beneficiary during that period on a continuous, full-time basis.

In response to the RFE, the Petitioner submitted additional documentation of the Beneficiary's employment by But copies of IRS Forms W-2, Wage and Tax Statements, indicate that paid the Beneficiary only $7,975 in 2008 (covering 3 months of work) and $17,666.67 in 2010.[7] The relatively small amounts on the Forms W-2 suggest that the Beneficiary did not work full-time or continuously for during those years.

In addition, Forms W-2 for the Beneficiary in 2010 and 2011 state their issuances by a different company with a different FEIN than Copies of the Beneficiary's payroll records from December 2011 to June 2014 were issued by The record does not contain an agreement between and authorizing to manage payroll from 2011 to 2014. Therefore, the record does not establish that the payments made by to the Beneficiary were made on behalf of Contrary to the Beneficiary's claims, these materials do not establish that the Beneficiary worked for from 2008 to 2014 on a continuous basis.

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[7] As noted herein, the Beneficiary received two Forms W-2 in 2010, one from and one from The record does not contain an agreement between and authorizing to manage payroll in 2010. Therefore, the record does not establish that the payments made by to the Beneficiary were made on behalf of

[8] The Beneficiary's only Form W-2 in 2011 was issued by The record does not contain an agreement between and authorizing to manage payroll in 2011. Therefore, the record does not establish that the payments made by to the Beneficiary were made on behalf of

Based on debarment and the discrepancies in the Beneficiary's Forms W-2 and payroll records, the evidence does not establish the Beneficiary's claimed 61 months of qualifying experience with The Petitioner has not resolved the discrepancies of record regarding the Beneficiary's claimed qualifying experience with *See Matter of Ho*, 19 I&N Dec. at 591 (requiring a petitioner to resolve inconsistencies of record by independent, objective evidence pointing to where the truth lies).

The record does not establish the Beneficiary's possession of the required experience for the offered position. For this reason, we will also dismiss the appeal.

II. CONCLUSION

The record does not establish the Petitioner's continuing ability to pay the proffered wage from the petition's priority date onward. We will therefore affirm the Director's decision and dismiss the appeal. The record also does not establish the Beneficiary's possession of the required experience for the offered position. For this additional reason, we will dismiss the appeal.

The petition will remain denied for the above-stated reasons, with each considered an independent and alternate ground of denial. In visa petition proceedings, a petitioner bears the burden of establishing eligibility for the requested benefit. Section 291 of the Act; *Matter of Otiende*, 26 I&N Dec. 127, 128 (BIA 2013). Here, the instant Petitioner did not meet that burden.

ORDER: The appeal is dismissed.

Cite as *Matter of S-S- Inc.*, ID# 10054 (AAO Dec. 22, 2016)