U.S. Citizenship and Immigration Services

Non-Precedent Decision of the Administrative Appeals Office

MATTER OF B-I-, INC.

DATE: MAY 5, 2017

APPEAL OF TEXAS SERVICE CENTER DECISION

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

The Petitioner, a fitness, training, and nutrition studio, seeks to employ the Beneficiary as a business analytics director. It requests classification of the Beneficiary as a member of the professions holding an advanced degree under the second preference immigrant classification. *See* Immigration and Nationality Act (the Act) section 203(b)(2), 8 U.S.C. § 1153(b)(2). This employment-based immigrant classification allows a U.S. employer to sponsor a professional with an advanced degree for lawful permanent residence.

The Director of the Texas Service Center denied the petition on the ground that the evidence of record did not establish the Petitioner's continuing ability to pay the proffered wage from the priority date up to the present.

On appeal the Petitioner submits a brief and additional documentation and asserts that it has established its continuing ability to pay the proffered wage.

Upon *de novo* review, we will dismiss the appeal.

I. LAW

Employment-based immigration generally follows a three-step process. First, an employer must obtain an approved labor certification from the U.S. Department of Labor (DOL).[1] *See* section 212(a)(5)(A)(i) of the Act, 8 U.S.C. § 1182(a)(5)(A)(i). By approving the labor certification, the DOL certifies that there are insufficient U.S. workers who are able, willing, qualified, and available for the offered position and that employing a foreign national in the position will not adversely affect the wages and working conditions of domestic workers similarly employed. *See* section 212(a)(5)(A)(i)(I)-(II) of the Act. Second, the employer may file an immigrant visa petition with U.S. Citizenship and Immigration Services (USCIS). *See* section 204 of the Act, 8 U.S.C. § 1154. Third, if USCIS approves the petition, the foreign national may apply for an immigrant visa

[1] The date the labor certification is filed, in cases such as this one, is called the "priority date." *See* 8 C.F.R. § 204.5(d). The Petitioner must establish that all eligibility requirements for the petition have been satisfied from the priority date onward.

abroad or, if eligible, adjustment of status in the United States. *See* section 245 of the Act, 8 U.S.C. § 1255.

A petitioner must establish, among other things, that it has the ability to pay the beneficiary the proffered wage, as stated on the labor certification, from the priority date onward. The regulation at 8 C.F.R. § 204.5(g)(2) provides, in pertinent part, as follows:

> *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.

II. ANALYSIS

The Petitioner's Form I-140, Immigrant Petition for Alien Worker, was accompanied by an ETA Form 9089, Application for Permanent Employment Certification (labor certification), which was filed with the Department of Labor (DOL) on December 9, 2014, and certified by the DOL. As stated in section G of the labor certification, as well as in part 6 of the petition, the proffered wage of the job offered is $51,397 per year. Thus, the Petitioner must demonstrate its continuing ability to pay the proffered wage beginning on the priority date, which is December 9, 2014. *See* 8 C.F.R. § 204.5(d).

As evidence of its ability to pay the proffered wage, the Petitioner submitted copies of the Beneficiary's bi-weekly pay statements from December 2014 to November 2015.[2] In a request for evidence (RFE) the Director requested that the Petitioner submit a copy of either its federal income tax return for 2014, its annual report for 2014, or an audited financial statement for 2014. The Petitioner's response to the RFE did not include any of these three types of evidence, at least one of which is required to be submitted by the regulation at 8 C.F.R. § 204.5(g)(2). Since the Petitioner did not submit any one of the three types of required evidence, the Director found that the Petitioner

[2] While the labor certification states that the Beneficiary began working for the Petitioner on June 19, 2013, the pay statements indicate that the "hire date" was December 17, 2014. The first set of pay statements for the months of December 2014 to June 2015 identified the employer as [redacted] whereas a subsequent set of pay statements for the same months identify the employer as simply [redacted] In any further proceedings the Petitioner should explain these evidentiary inconsistencies.

did not establish its continuing ability to pay the proffered wage from the priority date up to the present.

On appeal the Petitioner asserts that its pay statements to the Beneficiary from December 2014 to November 2015 show that his pay exceeded the proffered wage of $51,397 per year from the priority date onward. The earliest pay statement, dated December 19, 2014, shows that the Beneficiary was being paid a bi-weekly salary of $2,403.85, which adds up $52,499.60 over an entire year, and the latest pay statement, dated November 6, 2015, shows that the Beneficiary's pay in 2015 had already reached $55,288.55 by that date. The Petitioner cites to a 2004 USCIS memorandum from William Yates (Yates Memorandum), which addresses a petitioner's ability to pay. The Petitioner refers to specific language from the Yates Memorandum which states that "[US]CIS adjudicators should make a positive ability to pay determination [if] the record contains credibly verifiable evidence that the petitioner not only is employing the beneficiary but also has paid or currently is paying the proffered wage." USCIS Policy Memorandum HQOPRD 90/16.45, *Determination of Ability to Pay under 8 CFR 204.5(g)(2)* at 2 (May 4, 2004), https://www.uscis.gov/laws/policy-memoranda.

The Petitioner overlooks preceding language in the Yates Memorandum, however, which references the regulation at 8 C.F.R. § 204.5(g)(2) and states that "[r]equired initial evidence . . . includes copies of: (1) annual reports, (2) federal tax returns, or (3) audited financial statements. The petitioner must submit a copy of at least one of these required documents." *Id.* Therefore, regardless of whether the Beneficiary has been employed by the Petitioner and paid the proffered wage or more from the priority date onward, the Petitioner is obliged to submit at least one of the three types of required documents identified in the regulation. In accordance with the Yates Memorandum guidance, the Director issued an RFE to obtain one of the three types of required documents from the Petitioner. The Petitioner did not submit any such document, however, and provided no explanation.

Thus, the Petitioner has not submitted copies of its annual reports, or federal tax returns, or audited financial statements for any year since the priority date of December 9, 2014, as expressly required at 8 C.F.R. § 204.5(g)(2). Nothing in the record shows that the Petitioner is unable to submit such documentation. Moreover, without the required federal tax return(s), or annual report(s), or audited financial statement(s) there is insufficient information about the company in the record to conclude that the Petitioner would have the continuing ability to pay the proffered wage.

The Petitioner must establish that its job offer to the Beneficiary was realistic as of the priority date and that the offer remained realistic for each year thereafter, until the Beneficiary obtains lawful permanent residence. Under 8 C.F.R. § 204.5(g)(2) the Petitioner is required to submit evidence of its continuing ability to pay the proffered wage from the priority date until the Beneficiary obtains lawful permanent residence. Without the Petitioner's tax returns, or annual reports, or audited financial statements, we are unable to assess whether the Petitioner has made a realistic job offer and would have the continuing ability to pay the proffered wage from the priority date onward.[3]

[3] Aside from the Beneficiary in this case, USCIS records indicate that the Petitioner filed another Form I-140 petition in

III. CONCLUSION

For the reasons discussed above, the Petitioner has not established its continuing ability to pay the proffered wage from the priority date up to the present. Accordingly, we will affirm the Director's denial of the petition.

ORDER: The appeal is dismissed.

Cite as *Matter of B-I-, Inc.*, ID# 457596 (AAO May 5, 2017)

February 2016 (Receipt number [redacted] The Petitioner must also establish its continuing ability to pay the proffered wage of that petition until it is denied, withdrawn, or the beneficiary obtains lawful permanent residence. In any further proceedings the Petitioner must submit evidence of its ability to pay the proffered wage of that I-140 beneficiary.