U.S. Citizenship and Immigration Services

Non-Precedent Decision of the Administrative Appeals Office

MATTER OF E-V-D-H-N-, LLC

DATE: SEPT. 8, 2017

APPEAL OF TEXAS SERVICE CENTER DECISION

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

The Petitioner, a newspaper publisher, seeks to employ the Beneficiary as a marketing research analyst. 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 resident status.

The Director of the Texas Service Center denied the visa petition, concluding that the record did not establish that the Petitioner had established its ability to pay the Beneficiary the proffered wage from the priority date of the visa petition onward.

On appeal, the Petitioner submits additional evidence and asserts that its financial documents demonstrate its ability to pay the proffered wage. Upon *de novo* review of the record, we will dismiss the appeal.

I. LAW

Employment-based immigration is generally a three-step process. First, an employer obtains an approved ETA Form 9089, Application for Permanent Employment Certification (labor certification) from the U.S. Department of Labor (DOL). *See* section 212(a)(5)(A)(i) of the Act, 8 U.S.C. § 1182(a)(5)(A)(i). Next, the employer files an immigrant visa petition with U.S. Citizenship and Immigration Services (USCIS). *See* section 204 of the Act, 8 U.S.C. § 1154. Finally, if USCIS approves the immigrant visa petitioner, the foreign national must apply for an immigrant visa abroad or, if eligible, adjustment of status in the United States. *See* section 245 of the Act, 8 U.S.C. § 1255.

II. ANALYSIS

One of the requirements of the requested immigrant classification is that the Petitioner establish its continuing ability to pay the proffered wage. 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 determining a petitioner's ability to pay the proffered wage, USCIS first examines whether it may establish its ability to pay the proffered wage based on its employment of the Beneficiary. Where the record does not demonstrate that the petitioner has employed and paid the beneficiary at a salary equal to or greater than the proffered wage, USCIS then examines the net income figure reflected on its federal income tax returns, 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). If a petitioner's net income during the required time period does not equal or exceed the proffered wage, or when added to any wages paid to the beneficiary does not equal or exceed the proffered wage, USCIS reviews its net current assets.

In cases where neither a petitioner's net income nor its net current assets establish its ability to pay the proffered wage during the required period, USCIS may also consider the overall magnitude of its business activities. *Matter of Sonegawa*, 12 I&N Dec. 612 (Reg'l Comm'r 1967). In assessing the totality of a petitioner's circumstances, USCIS may look at such factors as the number of years it 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.

In the present case, the priority date of the visa petition is August 13, 2015, and the proffered wage is $84,885 per year. Therefore, the Petitioner must demonstrate its ability to pay the Beneficiary the annual wage of $84,885 from August 13, 2015, onward. At the time the Petitioner filed the appeal, its 2015 tax return was the most recent available.

To establish its ability to pay, the Petitioner has submitted the Form W-2, Wage and Tax Statement, it issued to the Beneficiary in 2015, which reflects wages of $54,999.98; her 2015 and 2016 (through September) earnings statements; its bank statements for August to December 2015, and January to September 2016; its bank statements from [redacted] for August through December 2015 and from January through September 2016; its Forms 941, Employer's Quarterly Federal Tax Returns, for all four quarters of 2015 and the first three quarters of 2016; an unaudited September 30, 2016, balance

sheet; an unaudited profit and loss statement covering the period January-September 2016; its 2015 Form 1065, U.S. Return of Partnership Income, which reflects $24,919 in net income and $1,016 in net current assets; a statement from its director certifying its ability to pay the proffered wage; a Form 1065X, Amended Return of Administrative Adjustment Request, for 2015; an amended 2015 Form 1065; and a statement from a certified public accountant explaining the amendment.

The Director denied the visa petition, finding neither the wages paid to the Beneficiary nor the Petitioner's net income and net current assets for 2015, when combined with the Beneficiary's income, to equal or exceed the proffered wage of $84,885. The Director also found the Petitioner's submission of its monthly bank statements for 2015 and 2016, as well as its unaudited financial statements, to be insufficient proof of its ability to meet its proffered wage obligation.

On appeal, the Petitioner contends that in adjudicating the visa petition, the Director subjected it to an "undue burden" in terms of evidence, requesting documentation not required by 8 C.F.R. § 204.5(g)(2) or any other applicable regulation or policy. In support of its claim, the Petitioner points to the Director's reference to the submission of secondary evidence and the regulation at 8 C.F.R. § 103.2(b)(2), which, it argues, reflects the Director's failure to appreciate the difference between additional and secondary evidence in the context of 8 C.F.R. § 204.5(g)(2), and which resulted in an evidentiary burden that was "improper and without any legal basis."

The Petitioner claims a second example of the Director's excessive evidentiary requirements is reflected in his refusal to consider its bank statements as proof of its ability to pay in the absence of evidence that its 2015 tax return was somehow "inapplicable, inaccurate or unavailable." The Petitioner contends that no such evidentiary requirement is found in 8 C.F.R. § 204.5(g)(2) or any other applicable regulation or policy, and that the Director's unwillingness to accept its bank statements as proof of its ability to pay was, therefore, improper and without legal basis. It further asserts that the bank statements it has submitted for the record clearly reflect its ability to pay the difference between the Beneficiary's monthly wages of $4,583.34 and the monthly proffered wage of $7,073.75 from the August 13, 2015, priority date onward. It points to a 2002 decision issued by this office in which a petitioner's ability to pay was established based on the funds reflected in its monthly bank statements.

On appeal, the Petitioner also submits new evidence in the form of an independent audit of its books by an independent certified public accountant, which has resulted in the amendment of the net income reported in its 2015 tax return,[1] raising it from the $24,919 originally reported to $31,488, an amount that exceeds the $29,885.02 shortfall between the Beneficiary's earnings and the proffered wage. The Petitioner supports this claim with the above noted Form 1065X and amended 2015 Form 1065.

We do not find that the Director subjected the Petitioner to an undue evidentiary burden. The Director may request evidence relevant to the Petitioner's ability to pay the proffered wage that is

[1] There is no similar amendment of the assets reported in Schedule L of the Form 1065.

not listed in the regulation. The Director may also choose to disregard the Petitioner's bank statements. First, bank statements are not among the three types of evidence, enumerated in 8 C.F.R. § 204.5(g)(2), required to illustrate a petitioner's ability to pay a proffered wage. While this regulation allows additional material "in appropriate cases," the petitioner in this case has not demonstrated why the documentation specified at 8 C.F.R. § 204.5(g)(2) is inapplicable or otherwise paints an inaccurate financial picture of the petitioner. Second, bank statements show the amount in an account on a given date, and does not show the sustainable ability to pay a proffered wage. Third, no evidence was submitted to demonstrate that the funds reported on the petitioner's bank statements somehow reflect additional available funds that were not reflected on its tax return. Consequently, it was within the Director's authority to not consider the Petitioner's bank statements in this case and to require other evidence that would allow him to judge whether it was appropriate in this case to rely on financial evidence other than that provided by the Petitioner's 2015 Form 1065.

Further, while we note the Petitioner's reference to our decision in *Matter of X*, 2002 WL 32082463 (AAO Jan. 11, 2002) in which we found that the employer had established its ability to pay the proffered wage based, in part, on its bank statements, that decision does not provide a basis on which to sustain the present appeal. The decision in *Matter of X* was not published as a precedent and therefore does not bind USCIS officers in future adjudications. *See* 8 C.F.R. § 103.3(c). Non-precedent decisions apply existing law and policy to the specific facts of the individual case, and are distinguishable based on the evidence in the record of proceedings, the issues considered, and applicable law and policy. Here, the fact that we previously issued a non-precedent decision finding an employer's bank statements to offer proof of its ability to pay the proffered wage does not demonstrate that the Petitioner's bank statements should be similarly considered in this case.

We also conclude that the Petitioner's submission of its amended 2015 Form 1065 does not establish its ability to pay the proffered wage in this matter. While the Petitioner's amended return reports net income of $31,488, an amount in excess of the $29,885.02 shortfall between the proffered wage and the Beneficiary's earnings in 2015, it does not establish its ability to pay in this matter as the Beneficiary in this case is not the only beneficiary for whom the Petitioner must establish its ability to pay the proffered wage.

Where a petitioner has filed Form I-140 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. *See* 8 C.F.R. § 204.5(g)(2); *see also Patel v. Johnson*, 2 F. Supp. 3d 108, 124 (D. Mass. 2014) (upholding our denial of a petition where a petitioner did not demonstrate its ability to pay multiple beneficiaries). However, the wages offered to the other beneficiaries are not considered after the dates any beneficiary obtained lawful permanent residence, or after the date a Form I-140 petition was withdrawn, revoked, or denied without a pending appeal. In addition, USCIS does not require a petitioner to establish the ability to pay additional beneficiaries for any year that the beneficiary of the petition under consideration was paid the full proffered wage.

Here a review of USCIS databases finds the Petitioner to have filed a Form I-140 petition on behalf of a second beneficiary on March 2, 2015, which was pending on the date on which it petitioned for

the Beneficiary in this case. The visa petition in this earlier case, [redacted] was approved on February 6, 2017. Therefore, to establish its ability to pay in this matter, the Petitioner must demonstrate not only its ability to pay the proffered wage to the Beneficiary but must also establish that it is able to meet its proffered wage obligation with regard to this second individual. The record, however, contains no evidence relating to the proffered or actual wages of this additional beneficiary. In the absence of this evidence, we cannot conclude that the Petitioner's net income reported in its 2015 Form 1065 establishes its ability to pay in this matter.

We also do not find the record to contain sufficient evidence to demonstrate that the Petitioner, like the employer in *Matter of Sonegawa*, 12 I&N Dec. at 612, has demonstrated its ability to pay based on the totality of its circumstances. Here, although the record reflects that the Petitioner has been in business since 2010, there is insufficient evidence to establish that it has experienced sustained financial or organizational growth since its founding. Neither do we find evidence that demonstrates the Petitioner is a well-known entity or leader in its industry. Further, the Petitioner does not have a large number of employees or a significant payroll. As a result, we cannot conclude that the totality of the Petitioner's circumstances establishes its ability to pay the proffered wage.

For the reasons already discussed, the Petitioner has not established its ability to pay the Beneficiary the proffered wage and we will affirm the Director's denial of the visa petition on this basis.

III. CONCLUSION

The evidence in the record did not establish the Petitioner's ability to pay the proffered wage from the priority date. Accordingly, we will affirm the Director's denial of the visa petition and dismiss the appeal.

ORDER: The appeal is dismissed.

Cite as *Matter of E-V-D-H-N-, LLC*, ID# 480969 (AAO Sept. 8, 2017)