U.S. Citizenship and Immigration Services

Non-Precedent Decision of the Administrative Appeals Office

MATTER OF B-I-S-, INC.

DATE: OCT. 11, 2018

APPEAL OF TEXAS SERVICE CENTER DECISION

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

The Petitioner, an IT consulting and software development company, seeks to employ the Beneficiary as a business analyst. It requests classification of the Beneficiary as a member of the professions holding an advanced degree under the second preference immigrant category. Immigration and Nationality Act (the Act) section 203(b)(2), 8 U.S.C. § 1153(b)(2). This employment-based "EB-2" 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 petition on two grounds. The Director found that (1) the minimum requirements of the labor certification allow a beneficiary to qualify for the job offered with less than an advanced degree, and therefore do not support the requested classification of advanced degree professional; and (2) the Petitioner did not establish its ability to pay the proffered wages of all the beneficiaries of the Forms I-140, Immigrant Petitions for Alien Workers (I-140 petitions), it had filed.

On appeal the Petitioner asserts that the evidence of record establishes its ability to pay the proffered wages of all the beneficiaries of its I-140 petitions (I-140 beneficiaries) and that the labor certification requires an advanced degree, thus supporting the petition's requested classification.

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

I. LAW

Employment-based immigration generally follows a three-step process. First, an employer obtains an approved 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). 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 U.S. workers similarly employed. *See* section 212(a)(5)(A)(i)(I)-(II) of the Act. Second, 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. Third, if USCIS approves the petition, the foreign national may 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

A. Minimum Requirements of the Labor Certification

A petition for an advanced degree professional must be accompanied by a valid, individual labor certification which demonstrates that the job requires a professional holding an advanced degree or the equivalent. *See* 8 C.F.R. § 204.5(k)(4)(i). An advanced degree is defined at 8 C.F.R. § 204.5(k)(2) as:

> [a]ny United States academic or professional degree or a foreign equivalent degree above that of baccalaureate. A United States baccalaureate degree or a foreign equivalent degree followed by at least five years of progressive experience in the specialty shall be considered the equivalent of a master's degree. If a doctoral degree is customarily required by the specialty, the alien must have a United States doctorate or a foreign equivalent degree

If the labor certification allows for less than an advanced degree, the job opportunity will not qualify for advanced degree professional classification.

In determining whether the proffered position qualifies for advanced degree professional classification, we look to the terms of the labor certification. The education, training, experience, and other requirements for the proffered position are set forth in Part H of the labor certification. In this case Part H states as follows regarding the requirements to qualify for the job of business analyst:

4.	Education: Minimum level required:	Master's degree
4-B.	Major Field of Study:	CS/IS/BA/IT
5.	Is training required in the job opportunity?	No
6.	Is experience in the job offered required?	Yes
6-A.	How long?	12 months
7.	Is an alternate field of study acceptable?	No
8.	Is an alternate combination of education and experience acceptable?	Yes
8-A.	What level of education?	Bachelor's degree
8-C.	How much experience?	5 years
9.	Is a foreign educational equivalent acceptable?	Yes
10.	Is experience in an alternate occupation acceptable?	Yes
10-A.	How long?	12 months
10-B.	Job titles of alternate occupations	Programmer Analyst or equivalent position

At section H, box 14, of the labor certification (Specific skills and other requirements) the Petitioner reiterated the minimum educational and experience requirements for the job as set forth in boxes H.4 to

H.10-B and added that "[e]mployer will accept any other suitable combination of education, training and/or experience."

In order to determine what a job opportunity requires, we must examine "the language of the labor certification job requirements." *Madany v. Smith*, 696 F.2d 1008, 1015 (D.C. Cir. 1983). USCIS must 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). Our interpretation of the job's requirements must involve reading and applying the plain language of the alien employment certification application form. *Id.* at 834. Moreover, we read the labor certification as a whole to determine its requirements. "The Form ETA 9089 [labor certification] is a legal document and as such the document must be considered in its entirety." *Matter of Symbioun Techs., Inc.*, 2010-PER-10422, 2011 WL 5126284 (BALCA Oct. 24, 2011) (finding that a "comprehensive reading of all of Section H" of the labor certification clarified an employer's minimum job requirements).[1]

In his decision the Director found that the labor certification did not support the requested classification of advanced degree professional based on the above quoted language in section H, box 14, that the "employer will accept any *other* suitable combination of education, training and/or experience (emphasis added)." The statement that "any suitable combination of education, training or experience is acceptable" is commonly referred to as "Kellogg language." It originated in a case before the Board of Alien Labor Certification Appeals, *Matter of Francis Kellogg*, 1994-INA-465 and 544, 1995, INA 68 (Feb. 2, 1998) (*en banc*) and was codified at 20 C.F.R. § 656.17(h)(4)(ii). The Director stated that the use of the word "other" added to, and therefore modified, the standard "Kellogg language" and indicated the Petitioner's acceptance of some combination of education and experience that may or may not meet the definition of an advanced degree.

On appeal the Petitioner asserts that its use of the word "other" in box H.14 did not change the meaning of the standard *Kellogg* language, and thus did not change the primary and alternative requirements for the proffered position as described in boxes H.4 through H.10 of the labor certification. According to the Petitioner, therefore, the minimum requirements of the labor certification are a master's (or foreign equivalent) degree and 12 months of qualifying experience or a bachelor's (or foreign equivalent) degree and five years of qualifying experience, either combination of which meets the definition of an advanced degree.

While we do not generally read the inclusion of *Kellogg* language to alter the stated minimum requirements of the labor certification, when a petitioner goes beyond the *Kellogg* language we must evaluate the effect of that additional language. In this case the Petitioner's acceptance of any "other" suitable combination of education, training and/or experience went beyond *Kellogg* language to create a different minimum requirement that allows for a combination of education and/or experience that could be less than a single master's degree or a single bachelor's degree plus five

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[1] Although we are not bound by decisions issued by the Board of Alien Labor Certification Appeals, we may nevertheless take note of the reasoning in such decisions when considering issues that arise in the employment-based immigrant visa process.

years of progressive experience. Neither the Act nor USCIS regulations allow a position to be classified as an advanced degree professional position if the minimum educational requirement can be met with anything other than a single academic degree.

The Petitioner's allowance of any "other" suitable combination of education, training and/or experience, without defining what any "other" suitable combination of education, training or experience would be, prohibits us from finding that the labor certification requires an advanced degree. Since the minimum requirements of the labor certification in this case can be satisfied with less than a single U.S. master's or foreign equivalent degree, and with less than a single U.S. bachelor's or foreign equivalent degree followed by five years of progressive experience, the labor certification does not support the requested classification of advanced degree professional under section 203(b)(2) of the Act.

B. Petitioner's Ability to Pay the Proffered Wage

To be eligible for the classification it requests for the beneficiary, a petitioner must establish that it has the ability to pay the proffered wage stated on the labor certification. As provided in the regulation at 8 C.F.R. § 204.5(g)(2):

> 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 [USCIS].

As indicated in the above regulation, the Petitioner must establish its continuing ability to pay the proffered wage from the priority date[2] of the petition onward. In this case the proffered wage is $103,750 per year and the priority date is May 18, 2016.

In determining a petitioner's ability to pay the proffered wage, USCIS first examines whether the beneficiary was employed and paid by the petitioner during the period following the priority date. A petitioner's submission of documentary evidence that it employed the beneficiary at a salary equal to or greater than the proffered wage for the time period in question, when accompanied by a form of evidence required in the regulation at 8 C.F.R. § 204.5(g)(2), may be considered proof of the petitioner's ability to pay the proffered wage. In this case, the record indicates that the Beneficiary

[2] The "priority date" of a petition is the date the underlying labor certification application is filed with the DOL. *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.

began working for the Petitioner on March 21, 2016, which was before the priority date. The record includes copies of the Forms W-2, Wage and Tax Statements, which the Petitioner issued to the Beneficiary for 2016 and 2017. They show that the Beneficiary received "wages, tips, other compensation" totaling $82,078.25 in 2016 and $88,777.91 in 2017. Since the amounts paid to the Beneficiary did not equal or exceed the proffered wage in either year, the Petitioner has not established its continuing ability to pay the proffered wage from the priority date onward based on wages paid to the Beneficiary.

If a petitioner does not establish that it has paid the beneficiary an amount equal to or above the proffered wage from the priority date onward, USCIS will examine the net income and net current assets figures recorded on the petitioner's federal income tax return(s), annual report(s), or audited financial statements(s). If either of these figures, net income or net current assets, equals or exceeds the proffered wage or the difference between the proffered wage and the amount paid to the beneficiary in a given year, the petitioner would be considered able to pay the proffered wage during that year. However, when a petitioner has filed other I-140 petitions, the petitioner must establish that its job offer is realistic not only for the instant beneficiary, but also for its other I-140 beneficiaries. A petitioner's ability to pay the proffered wage is an essential element in evaluating whether a job offer is realistic. *See Matter of Great Wall*, 16 I&N Dec. 142 (Acting Reg'l Comm'r 1977). Accordingly, the petitioner must demonstrate its ability to pay the combined proffered wages of the instant beneficiary and every other I-140 beneficiary from the priority date of the instant petition until the other I-140 beneficiaries obtain lawful permanent resident status. *See 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).[3] In this case USCIS records show that the Petitioner has filed multiple I-140 petitions. Therefore, the Petitioner must establish that its net income or net current assets in a given year are sufficient to pay the proffered wages of the instant Beneficiary and all of its other I-140 beneficiaries, or the difference between their total proffered wages and the wages paid to them.

In a request for evidence (RFE) in January 2018 the Director requested the Petitioner to submit a list of all I-140 petitions it filed during 2016 and in 2017, the proffered wage and priority date of each beneficiary, documentation of the wages paid to these beneficiaries in 2016 and 2017, the status of each petition (pending, approved, or denied), and whether any beneficiary had obtained lawful permanent resident (LPR) status. In response to the RFE the Petitioner submitted a chart listing 13 beneficiaries for whom it had filed I-140 petitions in 2016 and 2017, along with their priority dates, proffered wages, the wages paid to them in 2016 and 2017 (corroborated with documentary evidence), and the status of each petition. The chart indicated that four of the beneficiaries had priority dates after the priority date of the instant Beneficiary, and that five of the beneficiaries

[3] The Petitioner's ability to pay the proffered wage of one of the other I-140 beneficiaries is not considered:

- After the other beneficiary obtains lawful permanent residence;
- If an I-140 petition filed on behalf of the other beneficiary has been withdrawn, revoked, or denied without a pending appeal or motion; or
- Before the priority date of the I-140 petition filed on behalf of the other beneficiary.

obtained LPR status in 2017, one of whom had also left the Petitioner's employ in 2017. The chart contained no information, however, about three additional I-140 petitions which USCIS records indicated were filed by the Petitioner in 2017 and approved.[4] Finally, the Petitioner submitted copies of letters to USCIS in May 2017 withdrawing 18 other I-140 petitions which had been filed in the years 2009 to 2015.

In his decision the Director noted that the Petitioner had not submitted all of the evidence requested in the RFE, and identified by receipt number the three I-140 petitions filed and approved in 2017 for which no information had been provided. Absent any information about the priority dates, proffered wages, and the wages paid to those three beneficiaries, it was not possible for the Director to determine whether the Petitioner had met its total proffered wage obligation to all of its I-140 beneficiaries in 2016 and 2017. The Director cited the regulation at 8 C.F.R. § 103.2(b)(8), (14), which provides that failure to submit requested evidence which precludes a material line of inquiry shall be grounds for denying the petition.

The record includes a copy of the Petitioner's federal income tax return, Form 1120S, for 2016. It recorded net income of $232,801[5] and net current assets of $230,101.[6] While the Petitioner's net income and net current assets both exceeded the instant Beneficiary's proffered wage in 2016 and 2017, we cannot determine whether they equaled or exceeded the Petitioner's total proffered wage obligation to its I-140 beneficiaries in those two years because our information about the Petitioner's other I-140 beneficiaries is incomplete. The Petitioner did not provide all of the information requested by the Director in the RFE, and has not remedied that deficiency on appeal. We still have no information about the three I-140 petitions identified in the Director's decision that were filed and approved in 2017. Thus, we have no information about priority dates, proffered wages, and wages paid to those three I-140 beneficiaries in 2016 and 2017. Accordingly, the Petitioner has not established its ability to pay the proffered wages of all its I-140 beneficiaries from the priority date of May 18, 2016, onward based on its net income or net current assets in 2016 and 2017.

USCIS may also consider the totality of the Petitioner's circumstances, including the overall magnitude of its business activities, in determining the Petitioner's ability to pay the proffered wage. *See Matter of Sonegawa,* 12 I&N Dec. 612 (Reg'l Comm'r 1967). USCIS may, at its discretion, consider evidence relevant to the petitioner's financial ability that falls outside of its net income and net current assets. We may consider such factors as the number of years the petitioner has been doing business, the established historical growth of the petitioner's business, the petitioner's

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[4] USCIS records also show that three other I-140 petitions filed by the Petition in 2016 and 2017 (including the instant petition) were denied.

[5] If an S corporation, like the Petitioner, has income exclusively from a trade or business, USCIS considers its net income (or loss) to be the figure for "Ordinary business income (loss)" on page 1, line 21, of the Form 1120S. However, if there are relevant entries for additional income, credits, deductions or other adjustments from sources other than a trade or business, they are reported on Schedule K of the Form 1120S, and the corporation's net income or loss will be found in line 18 of Schedule K ("Income/loss reconciliation").

[6] Net current assets are determined by calculating the difference between current assets and current liabilities, as recorded in lines 1-6 and lines 16-18 of Schedule K.

reputation within its industry, the overall number of employees, whether the beneficiary is replacing a former employee or an outsourced service, the amount of compensation paid to officers, the occurrence of any uncharacteristic business expenditures or losses, and any other evidence that USCIS deems relevant to the petitioner's ability to pay the proffered wage.

The Petitioner states that it was incorporated in 2007 and had 71 employees at the time this petition was filed in 2017. Its federal income tax returns for the years 2014 to 2016 recorded gross receipts of approximately $5.2 million in 2014, $7.5 million in 2015, and $6.5 million in 2016. These figures do not demonstrate a consistent pattern of growth, especially considering gross receipts declined by $1 million from 2015 to 2016. Furthermore, in view of the Petitioner's failure to submit a complete inventory of its I-140 petitions, in particular the three identified in the Director's decision, there is no basis for us to conclude that the Petitioner has established its ability to pay the proffered wages of all its I-140 beneficiaries from the priority date of May 18, 2016, onward based on the totality of its circumstances.

III. CONCLUSION

We will dismiss the appeal on two grounds. The labor certification does not support the requested classification of advanced degree professional because it does not require at least a master's degree or foreign equivalent degree, or a bachelor's degree or foreign equivalent degree and five years of qualifying experience, to meet the minimum educational requirement for the job. In addition, the Petitioner has not established its continuing ability to pay the proffered wages of the instant Beneficiary and all of its other I-140 beneficiaries from the priority date of May 18, 2016, onward.

ORDER: The appeal is dismissed.

Cite as *Matter of B-I-S-*, Inc. ID# 1874383 (AAO Oct. 11, 2018)