U.S. Citizenship and Immigration Services

Non-Precedent Decision of the Administrative Appeals Office

MATTER OF V-C- LLC

DATE: MAY 24, 2019

APPEAL OF TEXAS SERVICE CENTER DECISION

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

The Petitioner, a software development and consulting company, seeks to employ the Beneficiary as a senior software engineer. 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 (1) that the Beneficiary did not meet the educational requirement of the labor certification and (2) that the Petitioner did not establish its ability to pay the proffered wage of this Beneficiary and the beneficiaries of all the other Form I-140, Immigrant Petitions for Alien Workers (I-140 petitions), it had filed.

On appeal the Petitioner submits a brief and asserts that the evidence already in the record establishes the Beneficiary's qualifying education under the terms of the labor certification as well as the Petitioner's ability to pay the proffered wages of all the beneficiaries of its I-140 petitions.

Upon *de novo* review, we find that the record demonstrates that the Beneficiary's educational credentials meet the minimum educational requirements of the labor certification. Accordingly, we will withdraw the Director's finding to the contrary. However, we will affirm the Director's finding that the Petitioner has not established its ability to pay the proffered wages of the instant Beneficiary and the beneficiaries of all its other I-140 petitions. Therefore, 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

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[1] of the petition onward. In this case the proffered wage is $90,813 per year and the priority date is May 17, 2017.

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 was not employed by the Petitioner as of the priority date in 2017 and began working for the Petitioner sometime in 2018, as evidenced by copies of two earnings statements showing that the Beneficiary had received gross pay for the year of $33,776.91 as of August 31, 2018. There is no further evidence of wages paid to the Beneficiary in the rest of 2018. Therefore, the Petitioner has not established its ability to pay the proffered wage from the priority date of May 17, 2017, 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

[1] 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.

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 ordinarily be considered able to pay the proffered wage during that year.

The record includes a copy of the Petitioner's federal income tax return, Form 1120, U.S. Corporation Income Tax Return, for 2017. As recorded at page 1, line 28, the Petitioner had net income of $15,134 in 2017, which was less than the proffered wage. As for the Petitioner's net current assets (or liabilities), they are determined by calculating the difference between current assets and current liabilities, as recorded in lines 1-6 and lines 16-18 of Schedule L. In this case the Petitioner has net current assets of $501,043. Thus, the Petitioner's net current assets were greater than the Beneficiary's proffered wage in 2017.

When a petitioner has filed other I-140 petitions, however, it 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). USCIS records show that the Petitioner has filed multiple I-140 petitions for other beneficiaries. Therefore, the Petitioner must establish its ability to pay this Beneficiary as well as the beneficiaries of the other I-140 petitions that were pending or approved as of, or filed after, the priority date of the current petition.[2]

In a request for evidence (RFE) in August 2018 the Director requested the Petitioner to submit a list by receipt number of all the I-140 petitions it had filed, the name of each beneficiary, the proffered wage and wages paid to each beneficiary in 2017 with supporting documentation, the priority date of each petition, the status of each petition (pending, approved, or denied), and whether any beneficiary had obtained lawful permanent resident (LPR) status. Responding to the RFE in November 2018 the Petitioner submitted a chart[3] listing 18 beneficiaries, including the instant Beneficiary, for whom it had filed I-140 petitions in 2017 and 2018, along with their priority dates, their proffered wages, the

[2] 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.

[3] The chart is entitled "[redacted] List of all the I-140 [petitions] filed for each year as of the priority date November 07, 2016 and until date of Service notice November 8, 2018." Since the priority date of the instant petition is May 17, 2017, and the service date of the RFE was August 22, 2018, it is clear that this chart was prepared for another petition.

wages paid to 14 of the beneficiaries in 2017 (corroborated with documentary evidence), and the status of each petition.

In his decision the Director noted that the Petitioner had not submitted a complete list of its I-140 petitions and beneficiaries, identifying three petitions specifically by receipt number that were not included in the Petitioner's list.[4] Without a complete accounting of its I-140 petitions, the Director pointed out, the Petitioner failed to establish its total proffered wage obligation to its I-140 beneficiaries. The Director cited the regulation at 8 C.F.R. § 103.2(b)(14), which provides that failure to submit requested evidence which precludes a material line of inquiry shall be grounds for denying the petition. The Director also stated that if some of the I-140 beneficiaries had left the Petitioner to work elsewhere, the Petitioner would still have to establish its ability to pay their proffered wages unless it provided evidence that it had asked USCIS to withdraw the petitions.

On appeal the Petitioner does not submit any additional documentation regarding its other I-140 beneficiaries. Thus, it has not addressed any of the evidentiary shortcomings discussed by the Director. The Petitioner has not submitted a complete listing of its I-140 beneficiaries with associated documentation of its proffered wage obligations to them. As for the incomplete list of 18 I-140 beneficiaries (including the instant Beneficiary) provided in response to the RFE, we note that the Petitioner's proffered wage obligation to them in 2017 was several hundred thousand dollars higher than the Petitioner's net current assets that year. Thus, the Petitioner has not established its ability to pay the proffered wages of all its I-140 beneficiaries from the priority date of May 17, 2017, until the end of that year based on its net income or net current assets in 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 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 established in 1999 and had 75 employees at the time this petition was filed in 2018. The Petitioner asserts that it has a record of profitability, pointing to its federal income tax returns for the years 2016 and 2017, which recorded gross receipts of $8,092,296 in 2016 and $9,151,466 in 2017, net income of $50,341 and net current assets of $483,287 in 2016, and the aforementioned net income of $15,134 and net current assets of $501,043 in 2017. While the Petitioner's business volume, as measured by gross receipts, grew by over a million dollars from

[4] In addition to these three petitions, USCIS records list seven other I-140 petitions that were filed by the Petitioner in 2015, 2016, and 2017, and approved by USCIS, which were not included in the Petitioner's list.

2016 to 2017, this time period is too brief to demonstrate a sustained pattern of growth. As evidence of its ability to pay substantial amounts of money on salaries the Petitioner cites its Form 914, Employer's Quarterly Federal Tax Returns, for 2017 and 2018. However, without a complete listing of its I-140 beneficiaries, the proffered wages of these beneficiaries, and the wages paid to them, the totality of the Petitioner's circumstances remains unknown to us. Therefore, the Petitioner has not established its ability to pay the proffered wages of all of its I-140 beneficiaries from the priority date of the instant petition onward based on the totality of its circumstances, in large part because it has not presented the totality of its circumstances for consideration.

III. CONCLUSION

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 17, 2017, onward. The appeal will be dismissed for the above stated reason. In visa petition proceedings, it is the petitioner's burden to establish eligibility for the immigration benefit sought. Section 291 of the Act, 8 U.S.C. § 1361. The Petitioner has not met that burden

ORDER: The appeal is dismissed.

Cite as *Matter of V-C- LLC*, ID# 4642129 (AAO May 24, 2019)