U.S. Citizenship and Immigration Services

Non-Precedent Decision of the Administrative Appeals Office

MATTER OF Z-S-, LLC

DATE: SEPT. 13, 2018

APPEAL OF TEXAS SERVICE CENTER DECISION

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

The Petitioner, a provider of cleaning services, seeks to permanently employ the Beneficiary as its "CEO" under the first preference immigrant classification for multinational executives or managers. *See* Immigration and Nationality Act (the Act) section 203(b)(1)(C), 8 U.S.C. § 1153(b)(1)(C). This classification allows a U.S. employer to permanently transfer a qualified foreign employee to the United States to work in an executive or managerial capacity.

The Director of the Texas Service Center denied the petition concluding that the Petitioner did not establish, as required, that it had the ability to pay the Beneficiary's proffered wage as of the date the petition was filed. The Director later denied the Petitioner's motion to reopen and reconsider, upholding its original decision.

On appeal, the Petitioner contends that it submitted sufficient evidence to support its prior motion and establish that it met the ability to pay requirement.

Upon *de novo* review, we find that the Petitioner has not overcome the basis for denial. Therefore, we will dismiss the appeal.

I. LEGAL FRAMEWORK

An immigrant visa is available to a beneficiary who, in the three years preceding the filing of the petition, has been employed outside the United States for at least one year in a managerial or executive capacity, and seeks to enter the United States in order to continue to render managerial or executive services to the same employer or to its subsidiary or affiliate. Section 203(b)(1)(C) of the Act.

The Form I-140, Immigrant Petition for Alien Worker, must include a statement from an authorized official of the petitioning United States employer which demonstrates that the beneficiary has been employed abroad in a managerial or executive capacity for at least one year in the three years preceding the filing of the petition, that the beneficiary is coming to work in the United States for the same employer or a subsidiary or affiliate of the foreign employer, and that the prospective U.S. employer has been doing business for at least one year. *See* 8 C.F.R. § 204.5(j)(3).

II. ABILITY TO PAY

The primary issue in this matter is whether the correctly denied the Petitioner's motion to reopen and reconsider the original decision, which was based on the conclusion that the Petitioner did not establish that it had the ability to pay the Beneficiary's proffered wage at the time this petition was filed.

When filing a Form I-140, a petitioner is required to provide copies of its annual reports, federal tax returns, or audited financial statements to establish that it had the ability to pay the beneficiary's proffered wage at the time the priority date is established and continuing until the beneficiary obtains lawful permanent residence. 8 C.F.R. § 204.5(g)(2).

In the present matter, the petition was filed in October 2014; it indicates that the Petitioner had 11 employees at the time of filing and that it would pay the Beneficiary a proffered wage of "$36,802.64" per year.

The Director issued a request for evidence (RFE) asking that the Petitioner submit one of three documents – its 2014 federal tax return, its 2014 annual reports, or its 2014 audited financial statements – to establish its ability to pay the Beneficiary's proffered wage.

In response, the Petitioner stated in a letter that it meets the ability to pay requirement through its foreign parent entity. The Petitioner provided the parent entity's financial documents and evidence showing that the foreign entity compensated the Beneficiary in 2014; the Petitioner submitted the Beneficiary's tax return, which shows that she was compensated above the proffered wage. The Petitioner also provided its own 2014 federal tax return, which shows that it did not pay salaries, wages, or officer compensation and had a negative net income, despite the fact that it was established in 2011.

Although the Director issued a decision acknowledging the submission of the foreign parent entity's financial documents, he denied the petition based on the lack of evidence of the *Petitioner's* ability to pay, relying on the Petitioner's 2014 tax return, which showed a negative net income and negative net current assets. The Director determined that the regulations do now allow for the submission of the foreign entity's financial documents as a means of meeting the ability to pay requirement. In the decision that followed the Petitioner's motion to reopen and reconsider, the Director followed similar reasoning, and again did not consider evidence of the foreign entity's ability to pay. Despite acknowledging the Petitioner's cited references to *Matter of Sonegawa*, 12 I&N Dec. 612 (Reg'l Comm'r 1967), and *Full Gospel Portland Church v. Thornburgh*, 730 F.Supp. 441 (DDC 1988), the Director denied the combined motion, differentiating the facts in the instant matter from those in the cited decisions and finding that the Petitioner did not provide new evidence that would warrant reopening the matter and reversing the prior decision.

The record shows that the Petitioner also provided its 2015 federal tax return, which again shows that the Petitioner paid no compensation to employees or company officers and only had a net

income of $3766 – nearly ten times below the Beneficiary's proffered wage – and showed net current assets of only $7575,[1] which also falls far short of the proffered wage.

On appeal, the Petitioner states that it provided federal tax returns for 2014 and 2015 and contends that the Director did not respond to the part in the motion where it discussed its current net assets. However, as noted above, neither tax return indicates that the Petitioner had sufficient current net assets to pay the Beneficiary's proffered wage at the time of filing.

The Petitioner also, again, cites *Matter of Sonegawa*, asserting that we have discretionary authority to consider the totality of the evidence that concerns the Petitioner's finances and its ability to pay the Beneficiary's proffered wage. Having done so, however, we find that the facts and circumstances in the cited case are notably different from those in the matter at hand. Namely, the petitioner in *Matter of Sonegawa* had been doing business for 11 years by the time it filed the petition and it had consistently generated income that was well above the beneficiary's proffered wage and the wages paid to the petitioner's other employees. That petitioner also established that its decreased earnings during the year of filing resulted from a number of circumstances that were specific to that isolated time period and were not common throughout its prolonged history of doing business in the United States. In addition, the petitioner in the cited case provided ample evidence that there was a reasonable likelihood that its business would grow and that its revenues would likely increase to account for the beneficiary's proffered wage. The same cannot be said of the Petitioner in the matter at hand, which shows that it had been doing business for only three years at the time of filing and did not generate an income that was equal to or greater than the Beneficiary's proffered wage. Although the Petitioner indicates that it has undergone staffing changes, it has not provided evidence to show that such changes would free up sufficient funds that can be used to pay the Beneficiary's salary. In fact, there is no evidence that the Petitioner, rather than its foreign parent entity, ever paid any employee salaries; as such, it is unclear how a staff reduction would result in the Petitioner gaining the ability to pay the Beneficiary's proffered wage.

Further, we find that the decision in *Full Gospel* is not binding here. Although we may consider the reasoning of the decision, we are not bound to follow the published decision of a United States district court in cases arising within the same district. *See Matter of K-S-*, 20 I&N Dec. 715 (BIA 1993). We also note that the facts in *Full Gospel* are distinguishable from those in the instant case. Namely, the church as a new parish of a larger church is not the same as the separate and distinct foreign corporation claiming the ability to pay in the matter at hand. U.S. Citizenship and Immigration Services (USCIS) has long held that it may not "pierce the corporate veil" and look to the assets of the petitioning corporation's owner – in this instance, the Petitioner's foreign parent

[1] Net current assets are the difference between a petitioner's current assets and current liabilities. Net current assets identify the amount of "liquidity" that a petitioner has as of the date of the petition and is the amount of cash or cash equivalents that would be available to pay the proffered wage during the year covered by the tax return. As long as we are satisfied that a petitioner's current assets are sufficiently "liquid" or convertible to cash, or cash equivalents, then a petitioner's net current assets may be considered in assessing the prospective employer's ability to pay the proffered wage.

company – to satisfy the Petitioner's ability to pay the proffered wage. It is a fundamental rule that a corporation is a separate and distinct legal entity from its owners and shareholders. *See Matter of M*, 8 I&N Dec. 24 (BIA 1958), *Matter of Aphrodite Investments, Ltd.*, 17 I&N Dec. 530 (Comm'r 1980), and *Matter of Tessel*, 17 I&N Dec. 631 (Acting Assoc. Comm'r 1980). Consequently, assets of its shareholders or of other enterprises or corporations cannot be considered in determining the petitioning corporation's ability to pay the proffered wage. Furthermore, there is nothing in the governing regulation that allows USCIS to consider the assets or resources of individuals or entities that have no legal obligation to pay the wage. *See* 8 C.F.R. § 204.5(g)(2). Therefore, the Petitioner's focus on the Beneficiary's "actual wage," which was paid by the foreign parent entity, is misplaced as there is no precedent that would allow us to determine the Petitioner's ability to pay based on the finances of the foreign entity.

In light of the above discussion, we find that the Director's decision denying the motion was correct.

III. U.S. EMPLOYMENT IN A MANAGERIAL OR EXECUTIVE CAPACITY

In addition, while not previously discussed in the Director's decisions, information that the Petitioner has provided in support of its previously filed motion and again in support of this appeal leads us to question whether the Beneficiary would be employed in the United States in a managerial or executive capacity. Namely, the Petitioner has stated that it has terminated the employment of its manager and several other workers "due to poor performance"; the Petitioner indicates that these employees have not been replaced and that their combined salaries would now be available to pay the Beneficiary's wages. Although the Petitioner claims that the Beneficiary's spouse will continue to be employed as the organization's manager, it states that "the spouse will be working fewer hours and will become more dependent upon the Beneficiary to lead and manage the company" due to his health complications. This explanation indicates that the Beneficiary would have to perform additional job duties that were previously assigned to another employee. The Petitioner has not established that its diminished management structure will allow it to employ the Beneficiary in a managerial or executive capacity.

While we are not making an adverse determination based on this new information, the Petitioner may need to address the statements it made on appeal regarding the Beneficiary's proposed employment in the United States in any future proceedings.

IV. CONCLUSION

For the reasons discussed above, we find that the Director correctly denied the Petitioner's motion to reopen and reconsider. The appeal will be dismissed for this reason.

ORDER: The appeal is dismissed.

Cite as *Matter of Z-S-, LLC*, ID# 1572108 (AAO Sept. 13, 2018)