U.S. Citizenship and Immigration Services

Non-Precedent Decision of the Administrative Appeals Office

MATTER OF T-C- INC.

DATE: NOV. 10, 2015

APPEAL OF TEXAS SERVICE CENTER DECISION

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

The Petitioner, a provider of information technology services, seeks to permanently employ the Beneficiary as a software engineer under the immigrant classification of member of the professions holding an advanced degree. *See* Immigration and Nationality Act (the Act) § 203(b)(2)(A), 8 U.S.C. § 1153(b)(2)(A). The Director, Texas Service Center, denied the petition. The matter is now before us on appeal. The appeal will be dismissed.

The Director concluded that the record did not establish the Petitioner's continuing ability to pay the proffered wage. Accordingly, the Director denied the petition on September 4, 2014.

The record shows that the appeal is properly filed and alleges specific errors in law and fact. *See* 8 C.F.R. § 103.3(a)(1)(v) (authorizing summary dismissal of an appeal that does not specifically identify an erroneous conclusion of law or statement of fact). The record documents the procedural history of the case, which is incorporated into the decision. We will elaborate on the procedural history only as necessary.

We conduct appellate review on a *de novo* basis. *See, e.g., Soltane v. Dep't of Justice*, 381 F.3d 143, 145 (3d Cir. 2004). We consider all pertinent evidence of record, including new evidence properly submitted on appeal.[1]

I. THE PETITIONER'S ABILITY TO PAY THE PROFFERED WAGE

A petitioner must demonstrate its continuing ability to pay a proffered wage from a petition's priority date until a beneficiary obtains lawful permanent residence. 8 C.F.R. § 204.5(g)(2). Evidence of ability to pay must include copies of annual reports, federal income tax returns, or audited financial statements. *Id.*

1 The instructions to Form I-290B, Notice of Appeal or Motion, which are incorporated into the regulations by 8 C.F.R. § 103.2(a) (1), allow the submission of additional evidence on appeal. The record in the instant case provides no reason to preclude consideration of any documents newly submitted on appeal.

In determining ability to pay, we first consider whether a petitioner paid a beneficiary. A petitioner demonstrates its *prima facie* ability to pay if its payments to a beneficiary during a relevant period equaled or exceeded a proffered wage. Otherwise, we examine a petitioner's amounts of net income and net current assets. If a petitioner's net income or net current assets during a relevant period equaled or exceeded the difference between wages paid to a beneficiary (if any) and a proffered wage, the petitioner demonstrates its ability to pay. In addition, we may consider other circumstances affecting a petitioner's ability to pay a proffered wage. *See Matter of Sonegawa*, 12 I&N Dec. 612, 614-15 (Reg'l Comm'r 1967).[2]

In the instant case, the accompanying ETA Form 9089, Application for Permanent Employment Certification (labor certification), approved by the U.S. Department of Labor (DOL), states the proffered wage of the offered position of software engineer as $120,016 per year. The petition's priority date is May 9, 2013, the date the DOL accepted the labor certification application for processing. *See* 8 C.F.R. § 204.5(d). Because complete financial documentation is not yet available for 2015, we will consider the Petitioner's ability to pay through 2014.

The Beneficiary attested on the accompanying labor certification to his employment by the Petitioner since March 9, 2010. The record contains copies of the Beneficiary's IRS Forms W-2 Wage and Tax Statements for 2013 and 2014. The Forms W-2 indicate the Petitioner's payments to the Beneficiary of $81,739.89 in 2013 and $90,312.86 in 2014.

Because the amounts paid to the Beneficiary in 2013 and 2014 do not equal or exceed the annual proffered wage of $120,016, the record does not establish the Petitioner's ability to pay the proffered wage based on the wages it paid the Beneficiary. However, we credit the Petitioner's payments to the Beneficiary. The Petitioner need only demonstrate its ability to pay the annual differences between the proffered wage and the respective amounts it paid the Beneficiary, or $38,276.11 in 2013 and $29,703.14 in 2014.

The record indicates the filing of consolidated federal income tax returns by the Petitioner's parent company. The Petitioner submitted a copy of its parent company's consolidated tax return for 2013, which includes the Petitioner's financial information for that year.

The Petitioner also submitted copies of federal income tax returns in its own name for 2013 and 2014. The record indicates that the tax returns in the Petitioner's own name are *pro forma* returns that were not submitted to the Internal Revenue Service (IRS). *See* Internal Revenue Serv., Instructions for Form 1120 U.S. Corporation Income Tax Return (2014), at http://www.irs.gov/instructions/i1120/ch02.html

[2] Federal courts have upheld our method of determining a petitioner's ability to pay a proffered wage. *See River St. Donuts, LLC v. Napolitano*, 558 F.3d 111, 118 (1st Cir. 2009); *Tongatapu Woodcraft Haw. Ltd. v. Feldman*, 736 F.2d 1305, 1309 (9th Cir. 1984); *Estrada-Hernandez v. Holder*, -- F. Supp. 3d --, 2015 WL 3634497, *5 (S.D. Cal. 2015); *Rivzi v. Dep't of Homeland Sec.*, 37 F. Supp. 3d 870, 883-84 (S.D. Tex. 2014); *Just Bagels Mfg., Inc. v. Mayorkas*, 900 F. Supp. 2d 363, 373-76 (S.D.N.Y. 2012).

(accessed Sept. 17, 2015) (stating that corporations filing consolidated returns must include supporting statements for each included corporation, but should not use Form 1120 as a supporting statement).

The consolidated tax return of the Petitioner's parent company and the *pro forma* returns in the Petitioner's name indicate their preparation by the same certified public accountant (CPA). Online government records indicate the revocation of the CPA's accounting license in 2013 for allegedly misrepresenting his qualifications on his license application. *See* Okla. Accountancy Bd. Enforcement Actions, July 2013 to Dec. 2013, at www.ok.gov/oab_web/documents/Enforcement%20Bulletin%202013.pdf (accessed Sept. 17, 2015). The CPA's reported misrepresentation and lack of qualifications cast doubt on the reliability of the tax returns he prepared for the Petitioner and its parent company. Therefore, in a Supplemental request for evidence (Supplemental RFE), dated June 30, 2015, we requested evidence of the valid status of the Petitioner's CPA and additional evidence of the Petitioner's ability to pay the proffered wage.

In response to our Supplemental RFE, the Petitioner stated that it was unaware of the revocation of the CPA's license. The Petitioner submitted amended, *pro forma* 2013 and 2014 federal income tax returns in its name, prepared by a different accountant. The Petitioner also submitted copies of 2013 and 2014 amended Virginia income tax returns prepared by the new accountant.

The Petitioner's amended, *pro forma* federal tax returns for 2013 and 2014 state the correction of calculations for depreciation deductions and net operating loss carryovers. The record appears to support the amendments to the tax returns. We therefore consider the amended returns to be reliable.

The Petitioner's amended, *pro forma* federal tax returns state annual net income amounts of $94,327 in 2013 and $393,086 in 2014. Both of the net income amounts exceed the annual differences between the proffered wage and the wages paid to the Beneficiary by the Petitioner. The record therefore establishes the Petitioner's ability to pay the Beneficiary's individual proffered wage. However, as the Director first notified the Petitioner in his request for evidence (RFE) of June 4, 2014, USCIS records indicate the Petitioner's filing of multiple Forms I-140, Immigrant Petitions for Alien Workers.

A petitioner must demonstrate its ability to pay the proffered wage of each petition it files. *See* 8 C.F.R. § 204.5(g)(2). Each petition must establish "a realistic job offer." *Matter of Great Wall*, 16 I&N Dec. 142, 144 (Acting Reg'l Comm'r 1977). A petitioner with $100,000 in annual net income or net current assets could realistically proffer a wage of $100,000 for a single position. However, that same petitioner could not realistically proffer wages of $100,000 for multiple positions. *See Patel v. Johnson*, 2 F. Supp. 2d 118, 124 (D. Mass. 2014) (upholding our denial of a petition where the petitioner did not demonstrate its ability to pay the proffered wages of multiple beneficiaries).

Therefore, the instant Petitioner must demonstrate its ability to pay the combined proffered wages of the instant petition and of any petitions that remained pending after the instant petition's priority date. The Petitioner must establish its ability to pay the combined proffered wages from the instant petition's priority date until the beneficiaries of the other petitions obtained lawful permanent residence, or until the other petitions were denied, withdrawn, or revoked.

The record indicates the Petitioner's change of name after its acquisition by its parent company in 2009. The Petitioner's tax records indicate its retention of the same federal employer identification number (FEIN) that it used while operating under its former name. In a May 29, 2014, letter the Petitioner acknowledged its responsibility to demonstrate its ability to pay the proffered wages of the petitions filed under its former name. Our Supplemental RFE therefore requested information and documentation regarding I-140 petitions filed by the Petitioner under both its current and former names.

In response to our Supplemental RFE, the Petitioner provided information about 25 other petitions it filed for beneficiaries whom it continues to employ. The Petitioner acknowledged its filing of additional petitions in both its current and former names that remained pending beyond the instant petition's priority date. However, it asserted that it no longer employs the other beneficiaries and therefore "no longer has an obligation to pay the proffered wages of these employees."

USCIS records indicate the Petitioner's filing of at least 58 I-140 petitions for other beneficiaries that remained pending beyond the instant petition's priority date. The petitioner filed 24 of the petitions under its current name.[3] USCIS records identify 34 petitions filed in the Petitioner's former name.[4]

The Petitioner has not established that it need only pay the proffered wages of the 25 other beneficiaries it identified. The Petitioner did not submit documentary evidence to support its assertion that the beneficiaries of the other 58 petitions no longer work for it. *See Matter of Soffici*, 22 I&N Dec. 158, 165 (Comm'r 1998) (citation omitted) (stating that a petitioner's uncorroborated assertions are insufficient to meet its burden of proof in visa petition proceedings). The record also does not indicate when all of the other beneficiaries purportedly terminated employment with the Petitioner. If any of the beneficiaries left the Petitioner's employment after the instant petition's priority date, the Petitioner would still need to demonstrate its ability to pay the proffered wages of their petitions from the priority date until the dates of the petitions' withdrawals.

In addition, the departure of beneficiaries from the Petitioner's employment does not necessarily invalidate their petitions. Beneficiaries need not currently work for their petitioners, or even reside in the United States. USCIS records do not indicate the Petitioner's withdrawal of any of the petitions for the other beneficiaries. Thus, the Petitioner may continue to intend to permanently employ beneficiaries pursuant to their petitions despite the absences of the beneficiaries from its payroll. The

[3] USCIS records identify these petitions by the following receipt numbers:

[4] USCIS records identify these petitions by the following receipt numbers:

instant record does not establish that the Petitioner no longer intends to permanently employ other beneficiaries who have left its employment.

Even if the Petitioner was only responsible for the other 25 beneficiaries it identified, the record would not support its ability to pay their proffered wages from the current petition's priority date. In considering the Petitioner's ability to pay the 25 beneficiaries, we would not expect the Petitioner to demonstrate its ability to pay the proffered wages of nine of the beneficiaries. The nine beneficiaries include seven for whom petitions were not filed until 2015, and two who USCIS records show obtained lawful permanent residence before the instant petition's priority date.

The following table shows the remaining 16 petitions and corresponding proffered wages provided by the Petitioner, along with actual wages paid to the respective beneficiaries by the Petitioner as evidenced by the record.[5]

Petition	Annual Proffered Wage	Actual Wage 2013	Actual Wage 2014
	$114,296	$87,417.73	$95,315.66
	$86,500	N/A	$67,660.18
	$83,761	$65,880.82	$68,390.12
	$120,016	N/A	$106,833.74
	$114,296	$95,013.17	$129,845.93
	$120,016	N/A	$118,532.55
	$83,761	$77,175.40	$89,327.59
	$120,016	N/A	$67,244.89
	$82,514	$94,304.34	$98,670.42
	$120,016	N/A	$94,037.43
	$74,797	No Info	No Info
	$110,448	No Info	No Info
	$120,500	N/A	$100,447.08
	$78,624	$103,741.56	$103,887.65
	$110,448	No Info	No Info
	$110,448	No Info	No Info

The table above indicates that the Petitioner would need to demonstrate its ability to pay total proffered wages of $963,393 in 2013 and $1,650,457 in 2014. The record indicates the Petitioner's payments to the beneficiaries of $523,533.02 in 2013 and $1,140,193.24 in 2014, resulting in annual differences of $439,859.98 in 2013 and $510,263.76 in 2014. The Petitioner's annual amounts of net income in 2013 ($94,327) and in 2014 ($393,086) do not equal or exceed the annual differences. The Petitioner's 2013 and 2014 tax returns also reflect negative amounts of net current assets.

[5] Some of the receipt numbers provided by the Petitioner identify the Forms I-485, Applications for Adjustment of Status, of beneficiaries, rather than the Forms I-140 filed on their behalf by the Petitioner.

Thus, even if the Petitioner was responsible for the limited number of beneficiaries it identified, the record would not establish its continuing ability to pay the proffered wage from the petition's priority date onward.

As previously indicated, we may also consider the scope of a petitioner's business activities in determining its ability to pay a proffered wage. *See Sonegawa*, 12 I&N Dec. at 614-15. In *Sonegawa*, the petitioner conducted business for more than 11 years, routinely earning a net annual income of about $100,000. However, during the year of the petition's filing, the petitioner's federal tax returns did not reflect its ability to pay the proffered wage. During that year, the petitioner relocated its business, causing it to pay rent on two locations for a five-month period, to incur substantial moving costs, and to briefly suspend its business operations. Despite these setbacks, the Regional Commissioner found a likely resumption of successful business operations by the petitioner and its establishment of its ability to pay the proffered wage. The record identified the petitioner as a fashion designer whose work had been featured in national magazines. The record indicated that her clients included the then Miss Universe, movie actresses, society matrons and women included on the lists of the best-dressed in California. The record also established the petitioner's practice of lecturing at U.S. fashion shows and California colleges and universities.

As in *Sonegawa*, we may consider evidence of a petitioner's ability to pay beyond its net income and net current asset amounts. We may consider such factors as: the number of years it has conducted business; the growth of its business; its number of employees; the occurrence of any uncharacteristic business expenditures or losses; its reputation in its industry; whether a beneficiary will replace a current employee or an outsourced service, and any other evidence of a petitioner's ability to pay the proffered wage.

In the instant case, the record indicates the Petitioner's continuous business operations since 1994. Payroll tax returns of record indicate the Petitioner's employment of as many as 70 people in 2013. Copies of the Petitioner's income tax returns show that, for the first time in six years, its gross revenues and wages paid increased in 2014.

However, unlike in *Sonegawa*, the record does not indicate the occurrence of any uncharacteristic business expenditures or losses. The record also does not indicate the Beneficiary's replacement of a current employee or outsourced service. The Petitioner argues that it enjoys an outstanding reputation in its industry, submitting evidence of its work for a large client and its sponsorship of professional conferences. However, the record does not indicate the rise of the Petitioner's reputation in the information technology industry to the level attained by the petitioner in *Sonegawa* in the fashion industry.

Also unlike the petitioner in *Sonegawa*, the instant Petitioner must demonstrate its ability to pay multiple beneficiaries. Thus, assessing the totality of the circumstances in this case, the record does not indicate the Petitioner's ability to pay the proffered wage.

The record does not indicate the Petitioner's continuing ability to pay the proffered wage from the petition's priority date onward. We will therefore affirm the Director's decision and dismiss the appeal.

II. THE BENEFICIARY'S QUALIFYING EXPERIENCE

Beyond the Director's decision, the record also does not establish the Beneficiary's qualifying experience for the offered position.[6]

A petitioner must establish a beneficiary's possession of all the education, training, and experience specified on an accompanying labor certification by a petition's priority date. 8 C.F.R. §§ 103.2(b)(l), (12); *see also Matter of Wing's Tea House,* 16 I&N Dec. 158, 159 (Acting Reg'l Comm'r 1977); *Matter of Katigbak,* 14 I&N Dec. 45, 49 (Reg'l Comm'r 1971).

In evaluating a beneficiary's qualifications, we must examine the job offer portion of an accompanying labor certification to determine the minimum requirements of an offered position. We may neither ignore a term of the labor certification, nor impose additional requirements. *See K.R.K. Irvine, Inc.* v. *Landon,* 699 F.2d 1006, 1009 (9th Cir. 1983); *Madany* v. *Smith,* 696 F.2d 1008, 1012-13 (D.C. Cir. 1983); *Stewart Infra-Red Commissary of Mass., Inc.* v. *Coomey,* 661 F.2d 1 (1st Cir. 1981).

In the instant case, the labor certification states the minimum requirements of the offered position of software engineer as a Bachelor's degree, or a foreign equivalent degree, in computer science, engineering, mathematics, technology, information systems, or a related field, plus 60 months of experience in the job offered or as a programmer analyst, systems analyst, or senior associate-technical. The labor certification also states that "[e]xperience must include MS-SQL Server, ASP.NET, J2EE, and Struts."

The Beneficiary attested on the labor certification to about 11 years, or 132 months, of full-time qualifying experience before the petition's priority date of May 9, 2013. The Beneficiary's stated employment history includes:

- About 38 months with the Petitioner under its current name in the United States as a programmer analyst since March 9, 2010.
- About 17 months with the Petitioner under its former name in the United States as a programmer analyst from September 28, 2008 to March 8, 2010.
- About 76 months with [redacted] in India as a senior associate, technical from May 16, 2002 to September 27, 2008.

[6] We may deny a petition on grounds unidentified by a director in underlying visa petition proceedings. *See* 5 U.S.C. § 557(b) (stating that, except as limited by notice or rule, an administrative agency retains on review all the powers it possessed in issuing the original decision).

A labor certification employer generally cannot require U.S. workers to possess experience beyond what a foreign national possessed at the time of his or her hiring by the employer. 20 C.F.R. § 565.17(i)(3). The rule does not apply if the employer demonstrates the infeasibility of training a worker to qualify for the position, or if the foreign national gained the experience with the employer in a position not "substantially comparable" to the offered position. 20 C.F.R. §§ 656.17(i)(3)(i), (ii).

For these purposes, an "employer" means an entity with the same FEIN as the labor certification employer. 20 C.F.R. § 656.17(i)(5)(i). A "substantially comparable" job means a position requiring performance of the same job duties as the offered position more than 50 percent of the time. 20 C.F.R. § 656.17(i)(5)(ii).

The Beneficiary attested to a total of about 55 months of qualifying experience with the Petitioner under its current and former names. As previously indicated, the Petitioner's tax returns indicate its retention of the same FEIN after its name change. Thus, despite the name change and pursuant to 20 C.F.R. § 656.17(i)(5)(i), these 55 months of experience represent the Beneficiary's employment by the Petitioner.

The accompanying labor certification states that the Beneficiary did not gain any qualifying experience with the Petitioner in a "substantially comparable" position. The duties of the offered position stated on the labor certification include: developing, creating, and modifying general computer applications software or specialized utility programs; analyzing user needs and developing software solutions; designing or customizing software for client use; and possible analyzing and designing of databases within an application area. The labor certification states the Beneficiary's duties as a programmer analyst with the Petitioner as: requirement gathering, design development, and testing; analysis, study, and documentation of workflow requirements; and design, development, and customization of applications.

The offered position and the Beneficiary's current position with the Petitioner appear to share more than 50 percent of the same job duties. The Beneficiary's experience with the Petitioner as a programmer analyst therefore constitutes experience in a substantially comparable position. The Petitioner therefore must rely solely on the Beneficiary's claimed qualifying experience with [redacted] in India.

A petitioner must support a Beneficiary's claimed qualifying experience with a letter from an employer. 8 C.F.R. § 204.5(g)(1). The letter must provide the employer's name, address, and title, and describe a beneficiary's experience. *Id.*

In the instant case, the Petitioner submitted a letter from an assistant manager on the stationery of [redacted] dated February 19, 2014. The letter states the company's employment of the Beneficiary as a senior associate technical from May 16, 2002 to September 27, 2009, and describes his experience.

As stated in our RFE, dated February 4, 2015, the Beneficiary's end date of employment indicated in the [redacted] letter conflicts with the end date stated on the accompanying labor certification

and with the Beneficiary's purported start date in a letter on the Petitioner's former stationery. The labor certification and the letter on the Petitioner's former stationery indicate the Beneficiary's employment by [redacted] from May 16, 2002 to September 27, *2008*. The discrepancy in the end date of employment casts doubt on the Beneficiary's claimed qualifying experience with [redacted] *See Matter of Ho*, 19 I&N Dec. 582, 591-92 (BIA 1988) (requiring a petitioner to resolve inconsistencies of record by independent, objective evidence).

In addition, the [redacted] letter states the Beneficiary's purported employment dates and the date of the letter below the signature in different font sizes. The font sizes of the years exceed the font sizes of the months and days in the employment dates. The different font sizes in the letter suggest alterations to the Beneficiary's purported employment dates with [redacted] and the signature date, casting doubt on the letter's authenticity. *See Ho*, 19 I&N Dec. at 591 (stating that doubt cast on any aspect of a petitioner's proof may lead to a reevaluation of the reliability and accuracy of remaining evidence in support of a petition).

In response to our RFE, the Petitioner submitted a second letter on [redacted] stationery signed by the same assistant manager who signed the first letter on the same date (February 19, 2014). The second letter states the Beneficiary's employment by the company as a senior associate technical from May 16, 2002 to September 27, *2008*. Except for the year of the Beneficiary's purported end date of employment, the content of the second [redacted] letter is identical to that of the first letter, including its date of February 19, 2014.

The dates of the Beneficiary's purported qualifying experience on the second [redacted] letter match the employment dates stated on the accompanying labor certification. However, the record does not explain the discrepancy in the end dates of employment between the first and second letters. Counsel asserted the second letter's reflection of "the Beneficiary's correct period of employment as a Senior Associate Technical," suggesting the date in the first letter was an inadvertent error. However, counsel's assertions do not constitute evidence. *See INS v. Phinpathya*, 464 U.S. 183, 188 n.6 (1984) (stating that counsel's uncorroborated assertions do not establish facts of record).

The record also does not explain the identical dates of February 19, 2014 on the two [redacted] letters. It seems unlikely that the assistant manager of [redacted] signed two letters on February 19, 2014 stating different end dates of employment for the Beneficiary. However, the record does not indicate the assistant manager's signing and "backdating" of the second letter after the issuance of our RFE. In addition, the record does not explain the different font sizes in the first letter or confirm the authenticity of that letter. *See Ho*, 19 I&N Dec. at 591-92 (requiring a petitioner to resolve inconsistencies of record by independent, objective evidence).

Because of the unresolved inconsistences in the letters on [redacted] stationery, the record does not establish the Beneficiary's possession of the required experience specified on the accompanying labor certification by the petition's priority date. We will therefore also dismiss the appeal on this ground.

III. CONCLUSION

The record does not establish the Petitioner's continuing ability to pay the proffered wage from the petition's priority date onward. We will therefore affirm the Director's decision and dismiss the appeal. The record also does not establish the Beneficiary's qualifying experience for the offered position. We will dismiss the appeal on this ground, too.

The petition will be denied for the above-stated reasons, with each constituting a separate and independent ground of denial. In visa petition proceedings, a petitioner bears the burden of establishing eligibility for the requested benefit. INA § 291, 8 U.S.C. § 1361; *see also Matter of Otiende*, 26 I&N Dec. 127, 128 (BIA 2013). Here, the Petitioner has not met that burden.

ORDER: The appeal is dismissed.

Cite as *Matter of T-C- Inc.*, ID# 12405 (AAO Nov. 10, 2015)