U.S. Citizenship and Immigration Services

Non-Precedent Decision of the Administrative Appeals Office

MATTER OF D-E-S-, LLC

DATE: APR. 21, 2017

APPEAL OF NEBRASKA SERVICE CENTER DECISION

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

The Petitioner, a manufacturer of oil field equipment, seeks to permanently employ the Beneficiary in the United States to work in international sales development. 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 Nebraska Service Center denied the petition. The Director determined that the Petitioner had not established its ability to pay the proffered wage from the priority date onward. The Petitioner filed a motion to reopen the Director's decision and the Director reaffirmed his previous determination that the Petitioner had not established its ability to pay the Beneficiary's proffered wage.

The matter is now before us on appeal. The Petitioner asserts that it has established its ability to pay the proffered wage based upon the financial resources of its parent company. The Petitioner also points to the balances in its bank accounts, and to the affirmation of its chief financial officer as evidence of its ability to pay the proffered wage. Upon *de novo* review, we will dismiss the appeal.

I. LEGAL FRAMEWORK AND PROCEDURAL HISTORY

Employment-based immigration generally follows a three-step process. First, an employer must obtain 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 domestic workers similarly employed. Section 212(a)(5)(A)(i)(I)-(II) of the Act. Second, the employer may file 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.

As required by statute, the petition is accompanied by an ETA Form 9089, Application for Permanent Employment Certification (labor certification), approved by the DOL.[1] The priority date of the petition is September 9, 2014.[2] The proffered wage as stated on the labor certification is $153,670 per year.

The Petitioner on the labor certification, [redacted] indicated on the labor certification and on the Form I-140 petition that its Federal Employer Identification Number (FEIN) was [redacted] and that the Beneficiary would work at its office at [redacted] Texas. No other worksite was listed. In support of the Form I-140 petition, the Petitioner submitted a declaration from the chief financial officer (CFO) of [redacted] who affirmed that the company employed over 100 workers, had a gross income for 2014 of over $47 million, and that the company maintained the continuing ability to pay the proffered wage to the Beneficiary.

In response to the Director's request for evidence (RFE) the Petitioner submitted copies of several pages each of the 2013 and 2014 IRS Forms 1065, U.S. Return of Partnership Income, filed by [redacted] with FEIN [redacted] We note that this company claimed the same address as the Petitioner, [redacted] Texas. However, the tax return reflected a different tax identification number from the petitioning entity. The CFO letter also seems to describe the earnings of the larger entity, FEIN [redacted] The Director concluded that the Petitioner, [redacted] had not submitted sufficient evidence to establish its own ability to pay the proffered wage to the Beneficiary from the priority date continuing onward and denied the petition.

On motion to reopen the Director's decision, the Petitioner submitted copies of pages from the 2008, 2009, 2010, and 2011 IRS Forms 1065 filed by [redacted] using the FEIN claimed by the Petitioner [redacted] and the address [redacted] North Dakota. The Petitioner also submitted copies of numerous paystubs issued to several employees by ' [redacted] copies of bank statements regarding accounts owned by ' [redacted] and copies of unaudited consolidated balance sheets relating to several companies. The Petitioner submitted copies of additional pages from the 2014 Form 1065 filed by [redacted] under FEIN [redacted] and asserted that this company had purchased [redacted] in 2012 and had operated the company under the Petitioner's name and FEIN since then.[3] The Director concluded that the assets of [redacted] (FEIN

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[1] *See* section 212(a)(5)(D) of the Act, 8 U.S.C. § 1182(a)(5)(D); *see also* 8 C.F.R. § 204.5(a)(2).

[2] The date the labor certification is filed, in cases such as this one, is called the "priority date." *See* 8 C.F.R. § 204.5(d). A beneficiary must be eligible as of that date.

[3] We note that on page 2 of the Form 1065, which was not previously submitted, the company indicated affirmatively at Line 4b, which asked if it "[owned] directly an interest of 20% or more, or own, directly or indirectly, an interest of 50% or more in the profit, loss, or capital in any foreign or domestic partnership . . . ." The company responded that it owned 100% of the profit, loss, or capital of the partnership named " [redacted] with the Petitioner's FEIN, [redacted]

could not be used to establish the petitioning company's ability to pay the proffered wage. Accordingly, the Director denied the motion.

On appeal, the Petitioner again cites the financial resources of (FEIN in support of its ability to pay the proffered wage to the Beneficiary.

II. BONA FIDE JOB OFFER

As an initial matter, it is not clear that the Petitioner continues to operate a business in good standing, nor is it clear that a *bona fide* job offer continues to exist. Under 20 C.F.R. §§ 626.20(c)(8) and 656.3, the Petitioner must demonstrate that a valid employment relationship exists, that a *bona fide* job opportunity is available to U.S. workers.

On motion to reopen the Director's decision, the Petitioner submitted copies of paystubs issued to several employees by in North Dakota. Beginning with the pay period that started on September 13, 2015, the paystubs identify the employer as a debtor in possession. The paystubs do not identify the company by FEIN. According to the website maintained by the North Dakota Secretary of State,[4] was "Dissolved Involuntarily" on , 2016. The website maintained by the Texas Comptroller of Public Accounts[5] reveals that " (which had been formed in North Dakota) had forfeited its Texas business license. The Texas Comptroller's website also reveals that a company named had its Texas "Franchise Tax Involuntarily Ended." The website maintained by the Texas Secretary of State[6] reveals that ' with FEIN forfeited its existence on , 2016.

If the Petitioner is no longer in business, then no *bona fide* job offer exists, and the petition and appeal are therefore moot. Even if the appeal could be otherwise sustained, the approval of the petition would be subject to automatic revocation due to the termination of the Petitioner's business. *See* 8 C.F.R. § 205.1(a)(iii)(D). This issue must be resolved in any further proceedings to demonstrate that the Petitioning entity is an ongoing concern with the ability to employ the Beneficiary in accordance with the terms of the certified labor certification and pay the Beneficiary's proffered wage from the priority date onward.

III. ABILITY TO PAY THE PROFFERED WAGE

As noted above, the Director denied the petition because the Petitioner did not establish its ability to pay the proffered wage to the Beneficiary from the priority date onward. The regulation 8 C.F.R. § 204.5(g)(2) states in pertinent part:

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[4] Business Records Search, https://apps.nd.gov/sc/busnsrch/busnSearch.htm (last visited April 21, 2017).
[5] Taxable Entity Search, https://mycpa.cpa.state.tx.us/coa/ (last visited April 21, 2017).
[6] SOS Direct, http://sos.state.tx.us/corp/sosda/index.shtml (last visited April 3, 2017).

> *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.

The 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); *see also* 8 C.F.R. § 204.5(g)(2). In evaluating whether a job offer is realistic, USCIS requires the petitioner to demonstrate financial resources sufficient to pay the beneficiary's proffered wages, although the totality of the circumstances affecting the petitioning business will be considered if the evidence warrants such consideration. *See Matter of Sonegawa*, 12 I&N Dec. 612 (Reg'l Comm'r 1967).

A. The Petitioner is Distinct from its Owner

On appeal, the Petitioner asserts that the Director incorrectly applied precedent decisions in coming to his conclusion that the assets of its partner corporation could not establish the Petitioner's ability to pay the proffered wage. The Petitioner explains that its parent company purchased the company with the name '[redacted][7] in 2012 and had since operated it under the Petitioner's name and FEIN, [redacted] The Petitioner asserts that following its acquisition it has not filed its own tax returns because it is in partnership with its parent company.

The Petitioner contests the Director's application of *Matter of Aphrodite Investments, Ltd.*, 17 I&N Dec. 530 (Comm'r 1980) to this matter. However, despite the Petitioner's objections, the petitioning entity operates under a different tax identification number than the entity for which tax returns were submitted. The assets of its owners, or other unrelated entities, cannot be considered in determining the petitioning company's ability to pay the proffered wage. *See Matter of Aphrodite Investments, Ltd.*, 17 I&N Dec. at 530. We also affirm that in a similar case, the court in *Sitar v. Ashcroft*, 2003 WL 22203713 (D.Mass. Sept. 18, 2003) stated, "nothing in the governing regulation, 8 C.F.R.

[7] A limited liability company (LLC), like a corporation, is a legal entity that is separate and distinct from its owners. The debts and obligations of the company generally are not the debts and obligations of the owners or anyone else. An investor's liability is limited to his or her initial investment. As the owners and others only are liable to his or her initial investment, the total income and assets of the owners and others and their ability, if they wished, to pay the company's debts and obligations, cannot be utilized to demonstrate the petitioner's ability to pay the proffered wage. An LLC is an entity formed under state law by filing articles of organization. An LLC may be classified for federal income tax purposes as if it were a sole proprietorship, a partnership or a corporation. If the LLC has two or more owners, it will automatically be considered to be a partnership by the IRS unless an election is made to be treated as a corporation. If the LLC does not elect its classification, a default classification of partnership (multi-member LLC) or disregarded entity (taxed as if it were a sole proprietorship) will apply. *See* 26 C.F.R. § 301.7701-3. Here, the parent company files on Form 1065, U.S. Return of Partnership Income.

§ 204.5, permits [USCIS] to consider the financial resources of individuals or entities who have no legal obligation to pay the wage."

The submitted federal income tax returns for the company with FEIN will not be considered in determining the Petitioner's continuing ability to pay the proffered wage to the Beneficiary. The Petitioner operates under a separate tax identification number and could provide separately audited financial statements for the years in question, but did not submit such documentation with its initial filing, on motion, or on appeal.[8] While the Petitioner submitted consolidated balance sheets for ' for 2012, 2013, and 2014, the documents break down the assets and liabilities of ' and ' but do not identify by FEIN which company's finances are reflected on the documents. Also, the balance sheets are not supported by any evidence that they were audited and not just the representations of management. Thus, the submitted tax returns of the company with FEIN and the balance sheets cannot be accepted as evidence of the Petitioner's ability to pay the proffered wage as of the September 9, 2014, priority date.

B. Bank Statements and Personnel Records

Further, on appeal, counsel challenges the Director's determination that the company's bank statements were not sufficient evidence to establish its ability to pay the proffered wage. The Petitioner submitted copies of documents relating to of North Dakota, including copies of business checking account statements and copies of paystubs issued to several employees.

While the Petitioner is correct that 8 C.F.R. § 204.5(g)(2) states that additional material may be submitted "in appropriate cases," the language of the regulation does not suggest that bank statements would ever be accepted in place of the three types of evidence expressly enumerated in 8 C.F.R. § 204.5(g)(2): copies of annual reports, federal tax returns, or audited financial statements for the petitioning entity. As detailed above, the Petitioner has not submitted copies of its own annual reports, federal tax returns, or audited financial statements.

In addition, we also note that the evidence does not clarify whether this bank account belongs to the Petitioner, or its parent company of the same name. Further, a petitioner's assets (including the balances in its checking accounts) must be balanced by a petitioner's liabilities; otherwise, they cannot properly be considered in the determination of the petitioner's ability to pay the proffered wage. USCIS will consider net current assets as one method of demonstrating the ability to pay the proffered wage, but current assets cannot be considered alone, without being offset by the company's current liabilities. These assets and liabilities would be identified on the company's

[8] We note that even if we could consider the net income and net current assets of (FEIN the company's federal income tax return reveals that in 2014 the company claimed (at Page 5, Line 1) a net income (loss) of -$7,868,939 and (on Schedule L) net current assets of -$5,112,237. Thus, the company would not have established the ability to pay the wage proffered to the Beneficiary in 2014.

federal income tax return, annual report, or audited financial statement; however, the Petitioner's net current assets cannot be calculated in this case because it has submitted none of these required documents.

The Petitioner also points out that 8 C.F.R. § 204.5(g)(2) allows for the submission of additional material such as personnel records. The Petitioner states that it has submitted "personnel records in the form of paystubs for current employees. These paystubs show current employees being paid similar or higher salaries than the beneficiary."[9] We note that none of the paystubs reflect payments to this Beneficiary. Additionally, the Director noted that the paystubs issued since September 2015 indicated that the Petitioner was a debtor in possession and stated that this "casts further doubt on the petitioner's viability and continued ability to pay [the proffered wage to the Beneficiary]." While the Director pointed out that it is incumbent on the Petitioner to resolve any inconsistencies in the record by independent objective evidence, the Petitioner has submitted no evidence on appeal to address what appears to be an issue related to potential bankruptcy. *Matter of Ho*, 19 I&N Dec. 582, 591-592 (BIA 1988). We also note that the evidence does not clarify whether these paystubs were issued by the Petitioner, or by its parent company of the same name. Therefore, in the absence of the regulatory-specified evidence, the submitted paystubs do not establish the Petitioner's ability to pay the proffered wage.

C. Attestation of Chief Financial Officer

Finally, the Petitioner's appeal cites the statement of the company CFO who affirmed that the Petitioner employed over 100 workers, had a gross income for 2014 of over $47 million, and that the company maintained the continuing ability to pay the proffered wage to the Beneficiary. In general, 8 C.F.R. § 204.5(g)(2) requires annual reports, federal tax returns, or audited financial statements as evidence of a petitioner's ability to pay the proffered wage. That regulation further provides: "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." (Emphasis added.)

However, the information cited by the CFO seems to relate to the company that owns the Petitioner, not to the petitioning company itself.[10] Considering the existence of what appears to be several distinct companies doing business, or formerly doing business, under the identical name, in Texas and North Dakota and the Petitioner's history of submitting financial documentation from these various companies interchangeably, the CFO's attestation cannot be considered without additional

[9] In general, wages already paid to other employees are not available to prove the ability to pay the wage proffered to a beneficiary and the Petitioner did not suggest that the Beneficiary would be replacing any of the employees identified in the submitted paystubs.

[10] The most recent tax return submitted by the company using the Petitioner's FEIN reflects gross sales of under $4 million in 2011. The 2014 IRS Form 1065 for [redacted] (FEIN [redacted] reflects gross receipts of nearly $42 million, with substantial losses in both net income and net current assets as noted in a footnote above. However, the Petitioner has not submitted copies of its own 2014 or 2015 federal income tax return. Also, as noted above, it is not clear from the record whether either of the companies are still in business.

identifying information (such as the related FEIN and number of employees specific to the Petitioning entity) to link this attestation to the company that filed the petition and labor certification. In this case, the CFO made no such identification or clarification and the declaration cannot be accepted in place of the evidence expressly enumerated in 8 C.F.R. § 204.5(g)(2); namely, copies of annual reports, federal tax returns, or audited financial statements for the petitioning company.

D. Totality of the Circumstances

USCIS may consider the overall magnitude of a petitioner's business activities in its determination of the petitioner's ability to pay the proffered wage. *See Matter of Sonegawa*, 12 I&N Dec. at 612. USCIS 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 overall number of employees, the occurrence of any uncharacteristic business expenditures or losses, the petitioner's reputation within its industry, whether the beneficiary is replacing a former employee or an outsourced service, or any other evidence that USCIS deems relevant to the petitioner's ability to pay the proffered wage.

In the current matter the Petitioner has submitted financial documentation from multiple distinct companies doing business under similar names, and refers to these companies interchangeably; however, the Petitioner has not submitted copies of its own annual reports, federal tax returns, or audited financial statements that would allow us to assess the factors identified in *Sonegawa*.

Without the required financial documentation from the petitioning company, the company's overall financial position cannot be evaluated; therefore, we conclude that the Petitioner has not established its continuing ability to pay the proffered wage to the Beneficiary as of the priority date.

Additionally, as noted above, whether the Petitioner is still in business is unclear and the Petitioner has not addressed the question of "debtor in possession," which seems to imply that the Petitioner, or its parent is in bankruptcy. This issue must be resolved in any further filings.

IV. CONCLUSION

In visa petition proceedings, it is the petitioner's burden to establish eligibility for the immigration benefit sought. The Petitioner has not met that burden.

ORDER: The appeal is dismissed.

Cite as *Matter of D-E-S- LLC*, ID# 123190 (AAO Apr. 21, 2017)