U.S. Citizenship and Immigration Services

Non-Precedent Decision of the Administrative Appeals Office

MATTER OF C-M- LLC

DATE: AUG. 16, 2017

APPEAL OF TEXAS SERVICE CENTER DECISION

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

The Petitioner, a healthcare investment management business, seeks to permanently employ the Beneficiary in the United States as a lawyer. 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 Texas Service Center denied the petition after determining that the Petitioner had not established its continuing ability to pay the proffered wage to the Beneficiary from the priority date onward.

On appeal, the Petitioner asserts that the Director ignored its response to the request for evidence and that the submitted evidence establishes its ability to pay the proffered wage based upon the financial viability of the network of companies with which it is affiliated.

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

I. LAW

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).[1] *See* section 212(a)(5)(A)(i) of the Act, 8 U.S.C. § 1182(a)(5)(A)(i). By approving the labor certification, 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

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

abroad or, if eligible, adjustment of status in the United States. *See* section 245 of the Act, 8 U.S.C. § 1255.

The regulation at 8 C.F.R. § 204.5(g)(2) states, in pertinent part:

> *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).

II. ANALYSIS

The issue before us is whether the Petitioner has established its continuing ability to pay the $109,117 proffered annual wage to the Beneficiary from the September 28, 2015, priority date onward. In determining a petitioner's ability to pay the proffered wage during a given period, we will first examine whether the petitioner employed and paid the beneficiary during that period. If a petitioner does not establish that it employed and paid the beneficiary an amount at least equal to the proffered wage during that period, we will next examine the petitioner's net income. As an alternate means of determining a petitioner's ability to pay the proffered wage, we may review a petitioner's net current assets.

In this case, the Petitioner, with Federal Employer Identification Number (FEIN) [redacted] is structured as a limited liability company (LLC).[2] The Petitioner did not claim to have employed the Beneficiary and did not submit evidence of any wages paid to the Beneficiary. The Petitioner did

[2] 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 only one owner, it will automatically be treated as a sole proprietorship unless an election is made to be treated as a corporation. If the LLC has two or more owners, it will automatically be considered to be a partnership 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. The election referred to is made using IRS Form 8832, Entity Classification Election. In this case, the Petitioner has not submitted any evidence to establish its membership and election for tax purposes.

not submit copies of its own annual reports, federal tax returns, or audited financial statements as required by regulation.

Rather than submitting the regulatory required evidence, the Petitioner submitted copies of its bank statements for two checking accounts, claiming that the balances demonstrate its ability to pay. However, reliance on the balances in the Petitioner's bank accounts is misplaced. First, bank statements are not among the three types of evidence specifically identified in 8 C.F.R. § 204.5(g)(2) as being required to illustrate a petitioner's ability to pay a proffered wage. While this regulation allows additional material "in appropriate cases," it does not suggest that these additional materials can be submitted in place of the copies of annual reports, federal tax returns, or audited financial statements that are specifically required by regulation. Second, bank statements show the amount in an account on a given date, but cannot show the ongoing ability to pay a proffered wage. Third, while we may review net current assets as an alternate means of determining the ability to pay the proffered wage, the Petitioner did not submit evidence to weigh its current assets (such as the funds available in its bank accounts) against its current liabilities. Therefore, the Petitioner's bank statements alone cannot establish its net current assets or its ability to pay the proffered wage.

On appeal, the Petitioner describes its position within a network of related companies and asserts that this corporate network possesses the ability to pay the proffered wage to the Beneficiary. The Petitioner previously submitted a letter from [redacted] explaining that [redacted] doing business as [redacted] "is the umbrella holding company" within its family of companies. The letter states that [redacted] "holds the ownership of the company commercial and professional office property . . . and each and all of the branch offices, facilities and companies with different aspects of healthcare services including . . . [redacted] . . . [the Petitioner] . . . [redacted] . . . and [redacted]

In support of its claims, the Petitioner submitted documentation regarding real estate owned by [redacted] and by [redacted] a summary of wages [redacted] paid to its employees in 2016, photographs of properties claimed to be owned by [redacted] and copies of bank statements for accounts owned by [redacted] and [redacted] The Petitioner cites the ownership of these properties, the payment of these wages, and the funds in these bank accounts as proof of the financial viability of its corporate family. However, an LLC is a distinct and independent legal entity and the assets of other enterprises or corporations cannot be considered in determining the petitioning entity's ability to pay the proffered wage. *See Matter of Aphrodite Investments, Ltd.*, 17 I&N Dec. 530 (Comm'r 1980). 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. § 204.5, permits [USCIS] to consider the financial resources of individuals or entities who have no legal obligation to pay the wage." Therefore, even if the Petitioner established that the named companies were its "parent" or "siblings," such companies are legally distinct entities and their financial information cannot be used to establish the Petitioner's ability to pay the proffered wage.

In addition to the distinction between the finances of the claimed corporate network and the Petitioner's burden to establish its own ability to pay the proffered wage, we further note that numerous additional pieces of evidence regarding the companies in the claimed corporate network either contradict each other, or contradict the Petitioner's description of the network. The Petitioner must resolve these contradictions with independent, objective evidence pointing to where the truth lies. *Matter of Ho*, 19 I&N Dec. 582, 591-92 (BIA 1988).

Specifically, the Petitioner submitted copies of certificates regarding the formation of the Petitioner, and as LLCs in Delaware, as well as letters from the Internal Revenue Service (IRS) issuing an FEIN to each of these entities. However, the formation of as an LLC is inconsistent with the assertion in the letter and again by the Petitioner on appeal that only used as an operational name and that it was not a separate company.

Another inconsistency is found in Schedule K of the 2015 IRS Form 1065, U.S. Return of Partnership Income, filed by with FEIN which states that the company is jointly owned by and This contradicts the assertion in the letter and again by the Petitioner on appeal that owns and the other companies named as their corporate family. Moreover, although the Petitioner states that it is owned by it provided a copy of an "Operating Agreement" that suggests is the sole shareholder of the Petitioner. We further note that the IRS letter issuing an FEIN to the Petitioner is addressed to This information is further contradicted by the fact that stated on its tax return (at Schedule B, Line 4b) that it did not "[o]wn directly an interest of 20% or more, or own, directly or indirectly, an interest of 50% or more of . . . any foreign or domestic partnership (including any entity treated as a partnership)."

The 2015 IRS Form 1120, U.S. Corporation Income Tax Return, filed by with FEIN also contradicts the Petitioner's claims. The tax return states that owns and is, itself, wholly owned by a citizen and resident of China. This contradicts the assertion in the letter and again by the Petitioner on appeal that owns and the other companies named as their corporate family.

These contradictions regarding corporate ownership call into question the claimed relationships between the named members of the corporate network. Unresolved material inconsistencies may

[3]Supplemental statements to Schedule L of this tax return list moneys due to, and due from, the Petitioner; however, these transactions do not suggest an ownership relationship between and the Petitioner. There is no indication in the tax return that the Petitioner's finances were consolidated into this return and, as explained above, even if the parent/subsidiary relationship was established, and even if it was established that the Petitioner's finances were included in a consolidated federal tax return, the Petitioner's financial data would need to be presented separately on the parent's tax return. Furthermore, we note that the return shows claimed gross receipts of $145,000, salaries and wages paid of $83,148, and net income of -$286,616 for 2015, which would not establish the ability to pay the $109,117 proffered annual wage to the Beneficiary.

lead us to reevaluate the reliability and sufficiency of other evidence submitted in support of the requested immigration benefit. *Matter of Ho*, 19 I&N Dec. at 591-92.

On appeal, the Petitioner also cites a USCIS internal memorandum[4] regarding the determination of a petitioner's ability to pay the proffered wage. The Petitioner summarizes from the memorandum three measures for determining the ability to pay; however, the Petitioner does not claim to have satisfied any of the standards that it identified and the submitted evidence does not establish that the Petitioner has satisfied such standards. The Petitioner does not claim to have employed the Beneficiary or to have paid him any wages, the Petitioner has not submitted any evidence of its own net income, and the Petitioner has not submitted evidence of its own net current assets.

The Petitioner further asserts on appeal that we may consider the overall magnitude of a petitioner's business activities in our determination of its ability to pay the proffered wage. *See Matter of Sonegawa*, 12 I&N Dec. at 612. *Sonegawa* establishes that 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 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 we deem relevant to the petitioner's ability to pay the proffered wage.

The Petitioner speculates that the growth of the health care industry in the United States and China in general, "with the beneficiary's service, will improve our financial condition dramatically." However, while *Sonegawa* allows us to look at the totality of the circumstances in determining a petitioner's resiliency and ability to recover from uncharacteristic business expenditures or losses, *Sonegawa* does not stand for the proposition that a petitioner can establish its ability to pay the proffered wage based on projected future growth alone. A petitioner must establish its ability to pay the proffered wage from the priority date onward, not just in the future after projected growth has materialized. *See Matter of Great Wall*, 16 I&N Dec. at 144-145.

The Petitioner cites the business activities of its claimed parent and sibling companies as evidence of the increasing viability of the startup business network as a whole, and asserts that this evidence establishes its ability to pay the proffered wage by the totality of circumstances. However, as discussed above, the evidence submitted by the Petitioner contains numerous unresolved inconsistencies and does not establish that any of the named companies has a legal obligation to pay the wage.

Moreover, as also discussed above, even if the Petitioner resolved the discrepancies and established the claimed corporate relationships, the Petitioner's financial data would still need to be presented separately from that of any parent company. The only evidence the Petitioner provided regarding its own finances is the copies of bank statements for its two business checking accounts for the period

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[4] Memorandum from William R. Yates, Associate Director for Operations, USCIS, HQOPRD 90/16.45, *Determination of Ability to Pay under 8 CFR 204.5(g)(2)*, 2, (May 4, 2004).

from July 31, 2015, through December 31, 2016. As explained above, absent documentation of the Petitioner's current liabilities, these assets are not sufficient to establish the overall magnitude of the Petitioner's business activities and to establish its ability to pay the proffered wage by the totality of circumstances. Thus, assessing the totality of the circumstances in this case, the Petitioner has not established that it had the continuing ability to pay the proffered wage from the priority date onward.

III. CONCLUSION

The Petitioner has not established its ability to pay the proffered wage to the Beneficiary from the priority date onward.

ORDER: The appeal is dismissed.

Cite as *Matter of C-M- LLC*, ID# 564406 (AAO Aug. 16, 2017)