U.S. Citizenship and Immigration Services

Non-Precedent Decision of the Administrative Appeals Office

MATTER OF V-, INC.

DATE: DEC. 28, 2017

MOTION ON ADMINISTRATIVE APPEALS OFFICE DECISION

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

The Petitioner, a provider of software consulting services, seeks to employ the Beneficiary as a software engineer. 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 residence.

The Director of the Texas Service Center denied the petition on the ground that the evidence of record did not establish the Petitioner's continuing ability to pay the proffered wage from the priority date up to the present. We summarily dismissed a subsequent appeal.

On motion to reconsider, the Petitioner submits evidence that it timely filed a brief on appeal, and asserts that it has established its continuing ability to pay the proffered wage.

Upon review, we will deny the motion.

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

[1] The date the labor certification is filed is called the "priority date." 8 C.F.R. § 204.5(d).

A petitioner must establish, among other things, that it has the ability to pay the beneficiary the proffered wage, as stated on the labor certification, from the priority date onward. The regulation at 8 C.F.R. § 204.5(g)(2) provides, in pertinent part, as follows:

> *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. 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 the Service.

II. ANALYSIS

The Petitioner's Form I-140, Immigrant Petition for Alien Worker, was accompanied by a labor certification. As stated in section G of the labor certification, as well as in part 6 of the petition, the proffered wage of the job offered is $82,451 per year. Thus, the Petitioner must demonstrate its continuing ability to pay the proffered wage beginning on the priority date, which is March 19, 2013. *See* 8 C.F.R. § 204.5(d).

In determining ability to pay, we first examine whether a petitioner paid a beneficiary the full proffered wage each year from a petition's priority date. If a petitioner did not pay the full proffered wage each year, we next consider whether it generated sufficient annual amounts of net income or net current assets to pay any differences between the wages paid and the proffered wage. If a petitioner's net income and net current assets are insufficient, we may also consider the overall magnitude of its business activities. *See Matter of Sonegawa,* 12 I&N Dec. 612, 614-15 (Reg'l Comm'r 1967).

As evidence of its ability to pay the proffered wage, the Petitioner submitted copies of the Beneficiary's Internal Revenue Service (IRS) Forms W-2, Wage and Tax Statements, for 2013 to 2016. The Petitioner also provided a copy of its 2013 and 2014 IRS Forms 1120, U.S. Corporation Income Tax Return, and its 2015 Form 1120S, U.S. Income Tax Return for an S Corporation. The Petitioner included an undated copy of an application for an extension of time to file its 2016 tax returns; however, because the Petitioner's prior tax returns are signed and dated in either August or September of the calendar year, it is not apparent from this single document that the Petitioner's 2016 tax return is unavailable.[2]

[2] The Petitioner also submitted a pay statement for the period ending on June 30, 2017, showing the Beneficiary had

The Petitioner's Forms W-2 reflect that it paid the Beneficiary a yearly salary of $60,000 from 2013 through 2015, and a yearly salary of $66,000 in 2016. In this case, the Petitioner has not established that it paid the Beneficiary the proffered wage of $82,451 in any year, but we may credit the wages paid from 2013 through 2016.

As the record does not establish that the Petitioner paid the Beneficiary the full proffered wage in from 2013 through 2016, we next examine the Petitioner's income and net current assets. The Petitioner's federal income tax returns for 2015 and 2016, in conjunction with the Petitioner's evidence of wages paid in 2016, reflect the following information:

Year	Wages Paid	Difference between Proffered Wage and Wages Paid	Net Income[3]
2013	$60,000	$22,451	$486,721
2014	$60,000	$22,451	$438,766
2015	$60,000	$22,451	$ 1,250,292
2016	$66,000	$16,451	N/A

In this case, the Petitioner's net income for 2013 through 2015 would appear to be sufficient to pay the difference between the proffered wage and the wages paid; however, USCIS records show that the Petitioner had multiple immigrant visa petitions that were pending or filed after this petition's priority date of March 19, 2013, which also must be considered in assessing the Petitioner's ability to pay the proffered wage.[4]

A petitioner must demonstrate its ability to pay the proffered wage of each petition it files from the petition's priority date onward. 8 C.F.R. § 204.5(g)(2). Therefore, the Petitioner must demonstrate its ability to pay the combined proffered wages of this petition and all other immigrant petitions that it filed and that remained pending after this petition's priority date. *See Patel v. Johnson*, 2 Fed. Supp. 3d 108, 124 (D. Mass. 2014) (affirming a petition denial where a petitioner did not demonstrate its ability to pay the proffered wages of multiple, pending beneficiaries).

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received a year-to-date salary of $47,500.

[3] In 2015, the Petitioner filed an IRS Form 1120S. Where an S corporation's income is exclusively from a trade or business, USCIS considers net income to be the figure for ordinary income, shown on line 21 of page one of the petitioner's IRS Form 1120S. However, where an S corporation has income, credits, deductions, or other adjustments from sources other than a trade or business, they are reported on Schedule K and the net income is found on line 18 (2006-2015) of Schedule K. *See* Instructions for IRS Form 1120S, at http://www.irs.gov/pub/irs-pdf/i1120s.pdf (last accessed December 18, 2017) (indicating that Schedule K is a summary schedule of all shareholders' shares of the corporation's income, deductions, credits, etc.). Because the Petitioner had additional deductions and other adjustments shown on its Schedule K for 2015, its net income is found on Schedule K of its tax return.

[4] We may also consider the net current assets, but as the record does not contain the Petitioner's 2016 tax returns, annual report, or audited financial statements, we cannot determine whether the Petitioner had sufficient net current assets to pay the difference between the proffered wage and wages paid in that year.

In this case, the record did not indicate the proffered wages or priority dates of all the Petitioner's other Form I-140 petitions, and whether it had paid wages to all of the other beneficiaries during the relevant periods. The record also did not indicate whether all of the other beneficiaries obtained lawful permanent residence, or whether their petitions were denied, withdrawn, or revoked. Because the record did not demonstrate the Petitioner's ability to pay the proffered wage in this case without the additional information, we issued a request for evidence (RFE) for the Petitioner to submit the following on motion:

- The receipt numbers, proffered wages, and priority dates of all Form I-140 petitions pending on or filed since March 19, 2013;
- Evidence of any wages paid to the beneficiaries of the other Form I-140 petitions pending or filed since March 19, 2013;
- Evidence that any of the remaining beneficiaries obtained lawful permanent residence, or that their respective petitions were denied, withdrawn, or revoked; and
- Regulatory-required evidence of the Petitioner's ability to pay in 2016. Evidence of ability to pay must include copies of annual reports, federal income tax returns, or audited financial statements.

In response, the Petitioner provides a statement and documents it describes as:

- A partial list of I-140 petitions filed since 2013;
- Forms W-2 for its I-140 beneficiaries from 2013 -2016;
- The most recent pay statements for its I-140 beneficiaries; and
- The Petitioner's tax returns for 2013-2015, and its tax extension request for 2016.

The Petitioner's response is incomplete, as it did not include information relating to withdrawn, revoked, or denied petitions or beneficiaries who have adjusted their status to that of lawful permanent residents. Instead, they only provided payroll records and W-2s for a population of Form I-140 petitions that had been approved and that remained pending. However, we specifically requested information on the other beneficiaries of all Form I-140 petitions pending on or filed since March 19, 2013, and evidence as to whether the beneficiaries obtained lawful permanent residence, or had their petitions denied, withdrawn or revoked.[5] Rather than provide all of the requested information, the Petitioner asserted that it was providing information only about its "active" Form I-140 beneficiaries. However, the Petitioner's representation of what is "active" is inaccurate because it was pursuing the appeal of another Form I-140 before us even after we had issued the RFE for this petition, and that appeal was not noted on the Petitioner's list of "active" cases. Clearly, the Petitioner's other I-140 petition was "active" and pending a final agency determination even though it had been denied by the Director. Consequently, the Petitioner's response to our specific RFE is not an accurate representation of the Petitioner's universe of cases for which it is

[5] Failure to submit requested evidence that precludes a material line of inquiry shall be grounds for denying the petition. 8 C.F.R. § 103.2(b)(14).

required to demonstrate its ability to pay the proffered wage.[6] We requested the specific information noted in the RFE in order to accurately calculate the Petitioner's wage burden for the years in question. Absent the requested information, we cannot find that the Petitioner has the ability to pay the combined proffered wages.

On motion, the Petitioner contends that it has submitted sufficient evidence to establish its ability to pay the proffered wage, citing to a 2004 USCIS memorandum from William Yates (Yates Memorandum), which generally addresses a petitioner's ability to pay. *See* 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), https://www.uscis.gov/laws/policy-memoranda.

The Petitioner states that the 2004 memo provides no basis for allowing us to consider its ability to pay the beneficiaries of any of its other petitions, and that there is no such basis in any statute, regulation, USCIS guidance, or precedent decision.

Here, the Petitioner states that it has established its ability to pay the proffered wage by demonstrating a net income in excess of the proffered wage for 2013 through 2016 (although it did not provide tax returns for 2016 with which we can assess its net income or net current assets for that year), and by paying the actual proffered wage in 2017 (when considering the pro-rated wage as of June 30, 2017). However, where a petitioner has filed I-140 petitions for multiple beneficiaries, it must demonstrate that its job offer to each beneficiary is realistic, and that it has the ability to pay the proffered wage to each beneficiary. *See* 8 C.F.R. § 204.5(g)(2); *see also Patel v. Johnson*, 2 F. Supp. 3d at 124. As discussed, USCIS records show that the Petitioner filed multiple I-140 petitions for other beneficiaries. Thus, 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 filed after the priority date of the current petition. We only consider the other beneficiaries for any year that the Petitioner has not paid the Beneficiary a salary equal to or greater than the proffered wage, which in this case is 2013 through 2016.

Although the Petitioner has been paying the Beneficiary a pro-rated salary equal to the proffered wage rate during 2017, the Petitioner must establish that it had the ability to pay the full proffered wage as of the March 19, 2013, priority date. Importantly, the regulation at 8 C.F.R. § 204.5(g)(2) requires that a petitioner demonstrate its *continuing* ability to pay the proffered wage *beginning* on the priority date. Thus, in this case, the Petitioner must show its ability to pay the proffered wage not only in a portion of 2017, when the Petitioner claims it actually began paying the proffered wage rate, but it must also show its ability to pay the proffered wage from 2013 onward for the beneficiaries of all of its Form I-140 petitions. Here, the Petitioner has not done so.

[6] By restricting the information provided to those petitions filed in 2013 or later, the Petitioner excludes a number of Form I-140 petitions that were filed in 2012 or earlier, for which the Petitioner continues to have a wage burden from 2013 onward.

On motion the Petitioner also cites to a 2009 decision in which we found that a petitioner had the ability to pay the beneficiary the proffered wage. In contrast to precedent decisions, unpublished decisions from our office such as the 2009 decision are not binding. 8 C.F.R. § 103.3(c). Moreover, the 2009 decision involved a small entity that claimed only five employees, and our decision does not reflect that the petitioner in that case was required to establish its ability to pay for any of its other employees and is therefore distinguishable from this case.

USCIS may also consider the overall magnitude of a Petitioner's business activities. *Matter of Sonegawa*, 12 I&N Dec. at 612. In *Sonegawa*, the petitioning entity had been in business for over 11 years but had changed locations in the year it filed the visa petition, resulting in unusual expenses and a temporary inability to conduct regular business operations. Nevertheless, the former U.S. Immigration and Naturalization Service (now USCIS) approved the visa petition, determining that the totality of the petitioner's circumstances established its ability to pay the proffered wage. That determination was, in part, based on the Petitioner's history of successful business operations and its outstanding reputation within its industry.

In assessing the totality of the petitioner's circumstances, USCIS may consider such factors as the number of years it has been in business, its record of growth, the number of individuals it employs, abnormal business expenditures or losses, its reputation within its industry, whether the beneficiary is replacing a former employee or an outsourced service, or any other evidence it deems relevant. In this case, the Petitioner seeks to rely solely on its net income for 2013 and 2016, in addition to wages that it is paying the Beneficiary in 2017, and does not make any claims to have the ability to pay the proffered wage under a totality of the circumstances. Regardless, the evidence of record would not support such a claim. For example, the Petitioner has not claimed or established that it has experienced uncharacteristic losses or expenses in the period in question. Moreover, the Petitioner has not included materials regarding its reputation such as, for example, letters from current or former clients or similar companies that could establish its reputation within its industry. Finally, in *Sonegawa,* the Petitioner had not sponsored multiple beneficiaries, as the Petitioner in this case has done. As a result, we do not find the record to contain sufficient evidence to conclude that the totality of the Petitioner's circumstances establish its ability to pay the proffered wage from the priority date onward.

III. CONCLUSION

For the reasons discussed above, the Petitioner has not established its continuing ability to pay the proffered wage from the priority date onward.

ORDER: The motion to reconsider is denied.

Cite as *Matter of V-, Inc.*, ID# 531950 (AAO Dec. 28, 2017)