U.S. Citizenship and Immigration Services

Non-Precedent Decision of the Administrative Appeals Office

MATTER OF 3- LLC

DATE: JAN. 30, 2017

APPEAL OF NEBRASKA SERVICE CENTER DECISION

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

The Petitioner, a provider of social customer relationship management (CRM) software, seeks to permanently employ the Beneficiary as an information technology project manager. It requests classification of the Beneficiary as a member of the professions holding an advanced degree under the second preference immigrant category. *See* Immigration and Nationality Act (the Act) section 203(b)(2)(A), 8 U.S.C. § 1153(b)(2)(A). This category allows a U.S. business to sponsor a professional with an advanced degree or its equivalent for lawful permanent resident status.

On February 8, 2016, the Director, Nebraska Service Center, denied the petition. The Director concluded that the record did not establish the Petitioner's ability to pay the proffered wage.

The matter is now before us on appeal. The Petitioner submits additional evidence of its ability to pay. Upon *de novo* review, we will dismiss the appeal.

I. LAW AND ANALYSIS

A. USCIS' Role in the Employment-Based Immigration Process

Employment-based immigration is generally 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). Next, U.S. Citizenship and Immigration Services (USCIS) must approve an immigrant visa petition. *See* section 204 of the Act, 8 U.S.C. § 1154.[1] Finally, a foreign national must 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] USCIS records indicate that, after the appeal's filing, the Petitioner filed another petition for the Beneficiary in the same requested classification. In the second petition, the Petitioner seeks to employ the Beneficiary in a different position at a significantly lower annual wage. USCIS records indicate the approval of the second petition on October 20, 2016. The regulation at 8 C.F.R. § 204.5(c) provides that "[a]ny United States employer desiring and intending to employ an alien may file a petition for classification of the alien under section 203(b)(1)(B), 203(b)(1)(C), 203(b)(2), or 203(b)(3) of the Act." In any future filings in the instant case, the Petitioner must establish its intent to employ the Beneficiary as an information technology project manager pursuant to the terms of the corresponding labor certification and petition.

By approving the accompanying ETA Form 9089, Application for Permanent Employment Certification (labor certification), in the instant case, the DOL certified that there are insufficient U.S. workers who are able, willing, qualified, and available for the offered position of information technology project manager. *See* section 212(a)(5)(A)(i)(I) of the Act. The DOL also certified that the employment of a foreign national in the position will not adversely affect the wages and working conditions of domestic workers similarly employed. *See* section 212(a)(5)(A)(i)(II).

In these visa petition proceedings, USCIS determines whether a foreign national meets the job requirements specified on a labor certification and the requirements of the requested immigrant classification. *See* section 204(b) of the Act (stating that USCIS must approve a petition if the facts stated in it are true and the foreign national is eligible for the requested preference classification); *see also, e.g., Tongatapu Woodcraft Haw., Ltd. v. Feldman,* 736 F. 2d 1305, 1309 (9th Cir. 1984); *Madany v. Smith*, 696 F.2d 1008, 1012-13 (D.C. Cir. 1983) (both holding that USCIS has authority to make preference classification decisions).

B. 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). Initial evidence of ability to pay must include copies of annual reports, federal income tax returns, or audited financial statements. *Id.*

In the instant case, the accompanying labor certification states the proffered wage of the offered position of information technology project manager as $117,000 per year. As previously indicated, the petition's priority date is October 7, 2014.

The record before the Director closed on January 29, 2016, with his receipt of the Petitioner's response to his notice of intent to deny. At that time, required initial evidence of the Petitioner's ability to pay the proffered wage in 2015 was unavailable. We will therefore consider the Petitioner's ability to pay only in 2014, the year of the petition's priority date.

In determining ability to pay, we 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 consider whether it generated sufficient, annual amounts of net income or net current assets to pay any differences between the proffered wage and the wages paid. If a petitioner's net income or 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).[2]

[2] Federal courts have upheld our method of determining a petitioner's ability to pay a proffered wage. *See, e.g., River St. Donuts, LLC v. Napolitano*, 558 F.3d 111, 118 (1st Cir. 2009); *Estrada-Hernandez v. Holder*, 108 F. Supp. 3d 936, 942-43 (S.D. Cal. 2015); *Rivzi v. Dep't of Homeland Sec.*, 37 F. Supp. 3d 870, 883-84 (S.D. Tex. 2014), *aff'd*, 627 Fed. App'x. 292 (5th Cir. 2015); *Taco Especial v. Napolitano*, 696 F. Supp. 2d 873, 880-82 (E.D. Mich. 2010), *aff'd*, No. 10-1517 (6th Cir. Nov. 10, 2011).

The record indicates the Petitioner's employment of the Beneficiary since March 29, 2010. As evidence of its payments to the Beneficiary in 2014, the Petitioner submitted copies of an IRS Form W-2, Wage and Tax Statement, and payroll records.

The Form W-2 reflects the Petitioner's total payments to the Beneficiary in 2014 of $85,227.70. The amount on the Form W-2 does not equal or exceed the annual proffered wage of $117,000. The Form W-2 therefore does not establish the Petitioner's ability to pay the proffered wage.[3]

Based on the Petitioner's payments to the Beneficiary, the record does not establish its ability to pay the proffered wage in 2014. But we credit the Petitioner's payments. It need only demonstrate its ability to pay the difference between the annual proffered wage of $117,000 and the wages of $85,227.70 it paid the Beneficiary, or $31,772.30.

The Petitioner submitted a copy of the consolidated federal income tax return of its parent company for 2014. The tax return, which indicates the parent company's ownership of three other firms besides the Petitioner, reflects negative amounts of net income and net current assets. The tax return therefore does not demonstrate the Petitioner's ability to pay the difference between the annual proffered wage and the wages the Petitioner paid to the Beneficiary.

The record also contains copies of financial statements of the Petitioner for 2014. The statements reflect positive amounts of net income and net current assets that exceed the difference between the annual proffered wage and the wages the Petitioner paid to the Beneficiary.

The Petitioner's financial statements, however, do not indicate that an accountant audited them. Thus, the statements reflect merely the assertions of the Petitioner's management. The regulation at 8 C.F.R. § 204.5(g)(2) makes clear that where a petitioner relies on financial statements to demonstrate its ability to pay the proffered wage, those financial statements must be audited. The financial information on the statements therefore does not constitute reliable evidence of the Petitioner's ability to pay the proffered wage.

A December 17, 2015, letter from the Petitioner's accountant confirms that the Petitioner's financial statements are unaudited. The letter states that, as a single-member limited liability company, the Petitioner is not required to file a separate U.S. income tax return. The letter states that the Petitioner does not produce audited financial statements and that the accountant uses the Petitioner's unaudited financial statements to prepare the tax returns of its parent company.

On appeal, the Petitioner submits a copy of a federal income tax return for 2014 in its own name. Like the financial statements, the tax return reflects a positive amount of net income exceeding the

[3] The Petitioner's payroll records indicate the Beneficiary's receipt of total gross pay in 2014 of $86,440, including a bonus of $6040. The record does not explain why the annual pay amount listed in the payroll records is higher than the amount on the IRS Form W-2. We therefore consider the IRS Form W-2 to reflect the Petitioner's total payments to the Beneficiary in 2014.

difference between the annual proffered wage and the wages the Petitioner paid to the Beneficiary. The Petitioner asserts that its 2014 tax return "is part of its Parent's consolidated tax return, but [was] never filed separately." However, the Petitioner's tax return is prepared on an accrual basis, but its parent's return was prepared on a cash basis.[4] If revenues are not recognized in a given year pursuant to the cash accounting method then the Petitioner, whose activities are included on its parent's tax return and prepared pursuant to cash rather than accrual, may not use those revenues as evidence of its ability to pay the proffered wage during that year on its own, unfiled tax return. Similarly, if expenses are recognized in a given year on its parent's tax return, the Petitioner may not shift those expenses to some other year in an effort to show its ability to pay the proffered wage.

Further, by signing and submitting a federal income tax return to the Internal Revenue Service (IRS), a company states under penalty of perjury that the financial information contained in the return is true, correct, and complete. *See* IRS, "Signing an Electronic Tax Return," at https://www.irs.gov/uac/ signing-an-electronic-tax-return (stating that a taxpayer must sign an electronic or paper return, declaring under penalties of perjury that the return is true, correct, and complete) (accessed Jan. 17, 2017). The record indicates that the copy of the 2014 tax return in the Petitioner's name was neither signed nor submitted to the IRS. The tax return therefore lacks the reliability of a return filed with and processed by the IRS.

Also, the 2014 tax return in the Petitioner's name is dated February 24, 2016, after the Director denied the petition. Thus, the record suggests that the Petitioner had the return prepared solely for the purpose of demonstrating its ability to pay the proffered wage. For the foregoing reasons, the 2014 tax return in the Petitioner's name does not constitute reliable evidence of the Petitioner's ability to pay.

The Petitioner also asserts that copies of its checking account statements demonstrate its ability to pay the proffered wage. However, bank statements are not among the three types of evidence, enumerated in 8 C.F.R. § 204.5(g)(2), required to illustrate a petitioner's ability to pay a proffered wage. While bank statements show the amount in an account on a given date, they cannot generally show the sustainable ability to pay a proffered wage.

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

[4] Pursuant to the cash method of accounting, revenue is recognized when it is received, and expenses are recognized when they are paid. Pursuant to the accrual method of accounting, revenue is recognized when it is earned, and expenses are recognized when they are incurred.

In the instant case, the record indicates the Petitioner's continuous business operations since 2006 and its recent employment of about 25 employees. The record, however, does not contain financial information for multiple years. The record therefore does not indicate whether the Petitioner's business has grown since its incorporation.

Unlike the petitioner in *Sonegawa*, the record also does not indicate the instant Petitioner's possession of an outstanding reputation in its industry or its incurrence of uncharacteristic business losses or expenses in 2014.[5] The record also does not indicate that the Beneficiary will replace a current employee or outsourced service. Thus, the *Sonegawa* factors in this matter do not indicate the Petitioner's ability to pay the proffered wage.

For the foregoing reasons, the record does not establish the Petitioner's continuing ability to pay the proffered wage from the petition's priority date onward.

II. CONCLUSION

The Petitioner has not demonstrated its 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.

In visa petition proceedings, a petitioner bears the burden of establishing eligibility for the requested benefit. Section 291 of the Act, 8 U.S.C. § 1361; *Matter of Otiende*, 26 I&N Dec. 127, 128 (BIA 2013). Here, the instant Petitioner did not meet that burden.

ORDER: The appeal is dismissed.

Cite as *Matter of 3- LLC*, ID# 86784 (AAO Jan. 30, 2017)

[5] On appeal, the Petitioner states that it was entirely funded by a "very successful entrepreneur, who is a co-founder and chairman of " However, the Petitioner has provided no evidence to correlate purported success in another enterprise to success in this enterprise.