U.S. Citizenship and Immigration Services

Non-Precedent Decision of the Administrative Appeals Office

MATTER OF P-S- INC.

DATE: APR. 17, 2018

APPEAL OF NEBRASKA SERVICE CENTER DECISION

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

The Petitioner, an international media company, seeks to employ the Beneficiary as a research associate. It requests classification of the Beneficiary as a member of the professions holding an advanced degree under the second preference immigrant category. 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 on the ground that the Petitioner did not establish its continuing ability to pay the proffered wage from the priority date (September 2, 2015) up to the present.[1]

On appeal the Petitioner asserts that the evidence of record, previously submitted, establishes its continuing ability to pay the proffered wage.

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

I. LAW

Employment-based immigration generally follows a three-step process. First, an employer obtains 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. *See* section 212(a)(5)(A)(i)(I)-(II) of the Act. Second, the employer files an immigrant visa petition with U.S. Citizenship and Immigration Services (USCIS). *See* section 204 of the Act, 8 U.S.C. § 1154. Third,

[1] The "priority date" of a petition is the date the underlying labor certification was filed with the DOL. *See* 8 C.F.R. § 204.5(d). A petitioner must establish that all eligibility requirements for the petition have been satisfied from the priority date onward.

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.

A petitioner must establish its ability to pay the proffered wage of the job offered from the priority date of the petition onward. As provided in the regulation at 8 C.F.R. § 204.5(g)(2):

> 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 appropriate cases, additional evidence, such as profit/loss statements, bank account records, or personnel records, may be submitted by the petitioner or requested by [USCIS].

II. ANALYSIS

As stated in the labor certification, the proffered wage for the proffered position of research associate is $45,000 per year. The priority date of the petition is September 2, 2015. In determining a petitioner's ability to pay the proffered wage, USCIS first examines whether the beneficiary was employed and paid by the petitioner during the period following the priority date. If the petitioner establishes by documentary evidence that it employed the beneficiary at a salary equal to or greater than the proffered wage in a given year, the evidence is considered proof of the petitioner's ability to pay the proffered wage in that year.

In this case, the labor certification states that the Petitioner began employing the Beneficiary, on a part-time basis of 17 hours per week, on September 11, 2012. The Petitioner has submitted copies of the Forms W-2, Wage and Tax Statements, it issued to the Beneficiary for 2015 and 2016. They show that the Beneficiary received "wages, tips, other compensation" of $17,952 in both of those years. Those figures were $27,048 below the proffered wage of $45,000 per year. Thus, the Petitioner has not established its continuing ability to pay the proffered wage from the priority date onward based on the wages it paid to the Beneficiary.

On appeal the Petitioner claims that its pay to the Beneficiary exceeded the proffered wage in 2015 because only one-third of the annual proffered wage – or $15,000 – was due for the four months after the priority date of September 2, 2015. We are not persuaded by this claim.[2] The record indicates that the Beneficiary was employed by the Petitioner in a part-time capacity for all of 2015. Thus, only a fraction of the $17,952 earned by the Beneficiary and paid by the Petitioner that year was for work performed after the priority date, and the Petitioner has not shown what that amount

[2] Although, we will not prorate proffered wages in this case, we may consider the effect of a short period between the priority date and the end of the priority date year in the context of our totality of the circumstances analysis.

was. Contrary to the Petitioner's claim, therefore, the wages paid to the Beneficiary in 2015 do not establish its ability to pay the full proffered wage in 2015.

If a petitioner has not employed the beneficiary and paid her (or him) a salary equal to or above the proffered wage from the priority date onward, USCIS will examine the net income and net current assets figures recorded on the petitioner's federal income tax return(s), annual report(s), or audited financial statements(s). If either of these figures, net income or net current assets, equals or exceeds the proffered wage or the difference between the proffered wage and the amount paid to the beneficiary in a given year, the petitioner would be considered able to pay the proffered wage during that year.

The record includes copies of the Petitioner's federal income tax returns, Forms 1120S, U.S. Income Tax Return for an S Corporation, for the years 2015 and 2016. As recorded in the tax returns, the Petitioner's net income was $10,093 in 2015 and $7,030 in 2016,[3] and it had no net current assets in 2015 or 2016, but instead net current liabilities of $7,676 and $9,701 in those two years.[4] Thus, the Petitioner did not have sufficient net income, or any net current assets, in either 2015 or 2016 to cover the $27,048 difference between the proffered wage and the wages it paid to the Beneficiary in those years. Accordingly, the Petitioner has not established its continuing ability to pay the proffered wage from the priority date onward based on its net income or net current assets.

The Petitioner asserts that its corporate bank account with [redacted] had sufficient funds to cover the difference between the proffered wage of $45,000 and wages paid to the Beneficiary plus the Petitioner's net income in 2015 and 2016. That difference was $16,955 in 2015 and $20,018 in 2016. The record includes copies of the Petitioner's monthly account statements from January 2015 to April 2017 showing end-of-the-month balances of $59,169 at the beginning of that time period, $42,522 at the end of it, with a low of $35,885 and a high of $66,965 in between. Bank statements, however, 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 the regulation allows bank account records to be considered "in appropriate cases" the Petitioner has not explained why this is such a case. The funds reported on the Petitioner's bank statements would ordinarily be reflected on its tax return(s), and would thus not represent additional financial resources. Furthermore, bank statements show the amount in the account on a given date, and do not show the sustainable ability to pay a proffered wage. Accordingly, the Petitioner's [redacted] bank account statements are not persuasive evidence of its continuing ability to pay the full proffered wage from the priority date onward.

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[3] If an S corporation, like the Petitioner, has income exclusively from a trade or business, USCIS considers its net income (or loss) to be the figure for "Ordinary business income (loss)" on page 1, line 21 of the Form 1120S. However, if there are relevant entries for additional income, credits, deductions or other adjustments from sources other than a trade or business, they are reported on Schedule K of the Form 1120S, and the corporation's net income or loss will be found in line 18 (income/loss reconciliation) of Schedule K.

[4] For a corporation net current assets (or liabilities) are the difference between its current assets, entered on lines 1-6 of Schedule L, and its current liabilities, entered on lines 16-18 of Schedule L.

On appeal the Petitioner cites a 1993 decision by the Administrative Appeals Unit (AAU, the forerunner office of the AAO) which, according to a brief synopsis by the found that the Petitioner established is ability to pay the proffered wage based on a checking account with a sufficient monthly balance over time to pay the proffered wage from the priority date onward. While the regulation at 8 C.F.R. § 103.3(c) provides that precedent decisions of USCIS are binding on all its employees in the administration of the Act, unpublished decisions like the one cited by the Petitioner are not similarly binding. Precedent decisions must be designated and published in bound volumes or as interim decisions. *See* 8 C.F.R. § 103.9(a). Thus, the above referenced AAU decision from 1993 is not a precedent decision or binding on our office in any other way (like, for instance, recent "adopted decisions"). For the reasons previously discussed, we do not find the Petitioner's bank account statements from to be persuasive evidence of its continuing ability to pay the proffered wage from the priority date onward.

USCIS may also consider the totality of the Petitioner's circumstances, including the overall magnitude of its business activities, in determining the Petitioner's ability to pay the proffered wage. *See Matter of Sonegawa*, 12 I&N Dec. 612. USCIS may, at its discretion, consider evidence relevant to the petitioner's financial ability that falls outside of its net income and net current assets. 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 petitioner's reputation within its industry, the overall number of employees, whether the beneficiary is replacing a former employee or an outsourced service, the amount of compensation paid to officers, the occurrence of any uncharacteristic business expenditures or losses, and any other evidence that USCIS deems relevant to the petitioner's ability to pay the proffered wage.

The Petitioner indicates that it was incorporated in 2010 and had six employees at the time the petition was filed in 2016. The Petitioner points out that its gross receipts increased each year from 2013 to 2016, as shown in its federal income tax returns recording net receipts of $480,240 in 2013, $590,856 in 2014, $722,496 in 2015, and $831,545 in 2016. But that time period is not long enough, and the volume of business is not large enough, to demonstrate a historic pattern of growth. The Petitioner claims that it could have reallocated expenditures in its tax returns from "outside services" – which totaled $149,149 in 2015 and $107,642 in 2016 – to "salaries and wages" for the purpose of making more funds available to pay the Beneficiary's full proffered wage.[5] However, the Petitioner has provided no evidence of what "outside services" it paid for in 2015 and 2016, and whether those services could have been sacrificed for the purpose of freeing additional funds to pay the Beneficiary's full proffered wage. The Petitioner asserts that employing the Beneficiary full-time would significantly increase its revenues. Even if true, that fact would not retroactively enhance the Petitioner's ability to pay the proffered wage during the Beneficiary's part-time employment back to the priority date in September 2015. Finally, although the Petitioner contends that we should prorate the proffered wage in 2015, the time period between the priority date and the end of the year

[5] In the Petitioner's 2015 and 2016 (as well as 2014) federal income tax returns, the figure entered on page 1, line 8, for "salaries and wages" was $17,952, the exact amount of pay received by the Beneficiary, as indicated on her Forms W-2. Thus, the Beneficiary appears to have been the Petitioner's only formal employee in those years.

represents a significant period of time over which the Petitioner must demonstrate its ability to pay. Considering the timing of the priority date with the negative factors discussed above, we do not find that the Petitioner has demonstrated its ability to pay the proffered wage for 2015 through a totality of the circumstances analysis. The Petitioner has also not established its ability to pay the proffered wage in 2016 or in succeeding years based on the totality of its circumstances.

For all of the reasons discussed above, the Petitioner has not established its continuing ability to pay the proffered wage of $45,000 per year from the priority date of September 2, 2015, onward.

III. CONCLUSION

The Petitioner has not established its continuing ability to pay the proffered wage from the priority date up to the present.

ORDER: The appeal is dismissed.

Cite as *Matter of P-S- Inc.* ID# 1209750 (AAO Apr. 17, 2018)