



U.S. Citizenship  
and Immigration  
Services

Non-Precedent Decision of the  
Administrative Appeals Office

MATTER OF C-T-P- CORP.

DATE: APR. 18, 2018

APPEAL OF TEXAS SERVICE CENTER DECISION

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

The Petitioner, a trading company, seeks to employ the Beneficiary as a project engineering manager. It requests his classification as a member of the professions holding an advanced degree under the second-preference, immigrant classification. Immigration and Nationality Act (the Act) section 203(b)(2)(A), 8 U.S.C. § 1153(b)(2)(A). This employment-based, “EB-2” category allows a U.S. business to sponsor a foreign national with a master’s degree, or a bachelor’s degree and five years of experience, for lawful permanent resident status.

After initially granting the petition, the Director of the Texas Service Center revoked the petition’s approval. The Director concluded that, as of approval, the Petitioner did not demonstrate its required ability to pay the combined proffered wages of this and another petition.

On appeal, the Petitioner asserts that, because it withdrew the other petition in response to the proposed revocation of this petition, the record demonstrates its ability to pay the proffered wage.

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

#### I. EMPLOYMENT-BASED IMMIGRATION

Employment-based immigration generally follows a three-step process. First, an employer seeking to permanently employ a foreign national in the United States must obtain U.S. Department of Labor (DOL) certification of the job opportunity. *See* section 212(a)(5)(A)(i) of the Act, 8 U.S.C. § 1182(a)(5)(A)(i). The DOL must determine whether the country lacks able, willing, qualified, and available workers for an offered position, and whether employment of a foreign national would hurt the wages and working conditions of U.S. workers with similar jobs. *Id.*

If the DOL certifies a position, an employer must next submit the certification with an immigrant visa petition to U.S. Citizenship and Immigration Services (USCIS). *See* section 204 of the Act, 8 U.S.C. § 1154. If USCIS approves a petition, a foreign national may finally 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.

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At any time before a foreign national obtains lawful permanent residence, however, USCIS may revoke a petition's approval for "good and sufficient cause." Section 205 of the Act, 8 U.S.C. § 1155. If supported by the record, a petition's erroneous approval may alone justify its revocation. *Matter of Ho*, 19 I&N Dec. 582, 590 (BIA 1988).

USCIS properly issues a notice of intent to revoke if the unexplained and un rebutted record would have warranted the petition's denial. *Matter of Estime*, 19 I&N Dec. 450, 451 (BIA 1987). Similarly, revocation lies if the record, including any response by a petitioner, would have warranted denial. *Id.* at 451-52.

## II. 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.<sup>1</sup> 8 C.F.R. § 204.5(g)(2). Evidence of ability to pay must include copies of annual reports, federal income tax returns, or audited financial statements. *Id.*

In determining ability to pay, USCIS first examines whether a petitioner paid a beneficiary the full proffered wage each year from a petition's priority date. If a petitioner did not annually pay the full proffered wage, USCIS next considers whether it generated sufficient annual amounts of net income or net current assets to pay any difference between the proffered wage and the wages paid. If net income and net current assets are insufficient, USCIS may also consider other factors affecting a petitioner's ability to pay. *See Matter of Sonogawa*, 12 I&N Dec. 612, 614-15 (Reg'l Comm'r 1967).<sup>2</sup>

Here, the record supports the Director's issuance of the notice of intent to revoke (NOIR). The accompanying labor certification states the proffered wage of the offered position of project engineering manager as \$95,202 a year. As of the petition's approval in June 2016, required evidence of the Petitioner's ability to pay in 2015 was not yet available. For 2014, however, the Petitioner established its payment of \$50,068.23 to the Beneficiary and its generation of \$58,092 in net income. The Petitioner's 2014 net income therefore exceeded the difference between the annual proffered wage and the Petitioner's payments to the Beneficiary.

The NOIR, however, notes the Petitioner's prior filing of a petition for another beneficiary that remained approved after this petition's priority date. A petitioner must demonstrate its ability to pay the proffered wage of each petition it files until a beneficiary obtains lawful permanent residence. 8 C.F.R. § 204.5(g)(2). Therefore, the Petitioner here had to demonstrate its ability to pay the combined proffered wages of this and the other petition from this petition's priority date of

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<sup>1</sup> This petition's priority date is December 15, 2014, the date the DOL accepted the accompanying labor certification application for processing. *See* 8 C.F.R. § 204.5(d) (explaining how to determine a petition's priority date).

<sup>2</sup> Federal courts have upheld USCIS' method of determining a petitioner's ability to pay a proffered wage. *See, e.g., River St. Domus, LLC v. Napolitano*, 558 F.3d 111, 118 (1st Cir. 2009).

December 15, 2014. *See Patel v. Johnson*, 2 F. Supp. 3d 108, 124 (D. Mass. 2014) (affirming our revocation of a petition where, as of the filing's grant, the petitioner had not demonstrated its ability to pay the combined proffered wages of multiple beneficiaries).

As of this petition's approval, the Petitioner neither provided the proffered wage of the other petition nor indicated whether its beneficiary obtained lawful permanent residence. Moreover, the combination of the Petitioner's net income and payments to the Beneficiary in 2014 exceeded this petition's proffered wage by only \$12,958.23, and the Petitioner's tax returns for that year reflect a negative amount of net current assets. Thus, the record would not have established the Petitioner's ability to pay the combined proffered wages of both petitions in 2014 and would have warranted this petition's denial.

In response to the NOIR, the Petitioner submitted evidence that, after learning of the intended revocation of this petition, it withdrew the other petition. Because it no longer must demonstrate its ability to pay the proffered wage of the other petition, the Petitioner argues that the record would have established its ability to pay this petition's sole proffered wage. The Petitioner also provided copies of its federal income tax returns and IRS Forms W-2, Wage and Tax Statements, for 2015 and 2016. Based on the Petitioner's payments to the Beneficiary (\$50,000.04 in both years) and its annual net income amounts (\$57,668 in 2015 and \$55,759 in 2016), it notes that its net income amounts in both years exceeded the differences between the proffered wage and the amounts it paid the Beneficiary.

The record establishes the Petitioner's withdrawal of its other petition under 8 C.F.R. § 103.2(b)(6). USCIS records indicate that, as of the withdrawal, the beneficiary had not obtained lawful permanent resident status based on the petition.

Despite the petition's valid withdrawal, however, we agree with the Director that the Petitioner had to demonstrate its ability to pay the combined proffered wages from this petition's priority date until its approval. USCIS does not generally require petitioners with multiple beneficiaries to demonstrate abilities to pay proffered wages of denied, withdrawn, or revoked petitions. In petition revocation proceedings, however, USCIS must focus on the time of a petition's approval. *See Matter of Estime*, 19 I&N Dec. at 451-52 (holding that revocation is proper if the record would have warranted the petition's denial). A petitioner in revocation proceedings therefore must demonstrate its ability to pay the proffered wages of all its petitions that remained pending or approved *at the time of the approval* of the potentially revocable petition.

Here, as of this petition's approval, the other petition remained approved because the Petitioner had not yet withdrawn it. Thus, the Petitioner had to demonstrate its ability to pay the combined proffered wages of both this and the other petition.

As with 2014, the Petitioner's combined net income amounts and payments to the Beneficiary in 2015 and 2016 established its ability to pay this petition's proffered wage, with excess amounts of \$12,466.04 in 2015 and \$10,557.04 in 2016. But the record does not establish the sufficiency of

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those amounts, or the amounts of the Petitioner's net current assets (\$9,021 in 2015 and -\$16,705 in 2016), to pay the proffered wage of the other petition in those years.

As previously indicated, we may consider factors affecting a petitioner's ability to pay other than its payments to a beneficiary, its net income, and its net current assets. Under *Sonegawa*, we may consider: the number of years it has conducted business; its number of employees; the growth of its business; its incurrence of uncharacteristic losses or expenses; its reputation in its industry; a beneficiary's replacement of a current employee or outsourced service; or other evidence of its ability to pay a proffered wage. 12 I&N Dec. at 614-15.

Here, the record indicates the Petitioner's continuous business operations since 2003 and, as of the petition's 2016 approval, its employment of three people. The Petitioner's tax returns, however, indicate that its gross annual revenues decreased in 2015 and 2016. Unlike the petitioner in *Sonegawa*, the Petitioner here has not established its incurrence of uncharacteristic losses or expenses, or its possession of an outstanding reputation in its industry. The record also does not indicate the Beneficiary's replacement of a current employee or outsourced service. In addition, unlike the petitioner in *Sonegawa*, the Petitioner here must demonstrate its ability to pay the combined proffered wages of multiple petitions. Thus, a totality of the circumstances under *Sonegawa*, as of the petition's approval, did not establish the Petitioner's ability to pay the proffered wage.

### III. CONCLUSION

The record as of the petition's approval did not demonstrate the Petitioner's required ability to pay the combined proffered wages from the priority date. We will therefore affirm the Director's decision.

**ORDER:** The appeal is dismissed.

Cite as *Matter of C-T-P- Corp.*, ID# 1007008 (AAO Apr. 18, 2018)