U.S. Citizenship and Immigration Services

Non-Precedent Decision of the Administrative Appeals Office

MATTER OF P-S-, INC.

DATE: APR. 26, 2018

APPEAL OF TEXAS SERVICE CENTER DECISION

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

The Petitioner, a provider of content management software, seeks to employ the Beneficiary as a senior technical consultant. It requests her classification under the second-preference, immigrant category as a member of the professions holding an advanced degree. 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 followed by five years of experience, for lawful permanent resident status.

The Acting Director of the Texas Service Center denied the petition. The Director concluded that the Petitioner did not demonstrate its required ability to pay the proffered wage.

On appeal, the Petitioner asserts that its recent payments to the Beneficiary, which exceed the proffered wage rate, and a totality of circumstances establish its ability to pay.

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

I. EMPLOYMENT-BASED IMMIGRATION

Employment-based immigration generally follows a three-step process. To permanently fill a position in the United States with a foreign national, an employer must first obtain a 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) (requiring the DOL to certify that insufficient U.S. workers are able, willing, qualified, and available for a position and that employment of a foreign national will not harm wages and working conditions of U.S. workers with similar jobs). If the DOL certifies a position, an employer must next submit the labor 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.

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.[1] 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.*

Here, the accompanying labor certification states the proffered wage of the offered position of senior technical consultant as $112,174 a year. As of this appeal's filing, required evidence of the Petitioner's ability to pay in 2017 was not yet available. We will therefore consider the Petitioner's ability to pay only from 2013, the year of the petition's priority date, through 2016.

The Petitioner submitted copies of its federal income tax returns for 2013 and 2016. The record, however, lacks required evidence of the Petitioner's ability to pay the proffered wage in 2014 and 2015. The Petitioner therefore has not demonstrated its continuing ability to pay the proffered wage in those years.

Also, despite its submission of required evidence for 2013, the Petitioner has not demonstrated its ability to pay the proffered wage that year. In determining ability to pay for a given year, USCIS first considers whether a petitioner paid a beneficiary the full proffered wage. If a petitioner did not pay the full proffered wage, USCIS next examines whether it generated amounts of net income or net current assets sufficient to pay any difference between the annual proffered wage and wages paid. If net income and net current assets are insufficient, USCIS may consider other factors affecting a petitioner's ability to pay. *See Matter of Sonegawa*, 12 I&N Dec. 612, 614-15 (Reg'l Comm'r 1967).[2]

Here, the Petitioner submitted copies of an IRS Form W-2, Wage and Tax Statement, and payroll records for 2013. These materials indicate that it paid the Beneficiary $95,000.04 that year. This amount does not equal or exceed the annual proffered wage of $112,174. Based on the Petitioner's payments to the Beneficiary, the record therefore does not establish its ability to pay the proffered wage in 2013. Nevertheless, we credit the Petitioner's payments to the Beneficiary. It need only demonstrate its ability to pay the difference between the proffered wage and the wages paid, or $17,173.96.

The Petitioner's tax returns for 2013 reflect negative amounts of net income and net current assets. The tax returns therefore do not establish the Petitioner's ability to pay. Thus, based on

[1] This petition's priority date is June 12, 2013, 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). USCIS records indicate that the Petitioner filed a prior petition for the Beneficiary before the labor certification's expiration. *See* 20 C.F.R. § 656.30(b)(1) (invalidating a labor certification that is not filed with a petition within 180 days of the labor certification's approval).

[2] Federal courts have upheld USCIS' 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).

examinations of the Petitioner's payments to the Beneficiary, its net income, and its net current assets, the record does not demonstrate its ability to pay the proffered wage in 2013.

In addition, USCIS records indicate the Petitioner's filing of least three immigrant petitions for other beneficiaries that were approved or pending as of, or submitted after, this petition's priority date.[3] 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). The Petitioner here must therefore demonstrate its ability to pay the combined proffered wages of this and its other petitions.[4] *See Patel v. Johnson*, 2 F. Supp. 3d 108, 124 (D. Mass. 2014) (affirming revocation of a petition's approval where, as of the filing's grant, the petitioner did not demonstrate its ability to pay combined proffered wages of multiple beneficiaries).

The record does not indicate the proffered wages and priority dates of the Petitioner's other petitions. The record also lacks evidence that, from 2013 through 2015, the Petitioner paid other beneficiaries or that they received lawful permanent residence status. Thus, the record does not establish the Petitioner's ability to pay the combined proffered wages of all relevant beneficiaries. For this additional reason, the Petitioner has not demonstrated its ability to pay the proffered wage in 2013, 2014 or 2015.[5]

On appeal, the Petitioner asserts that USCIS mistakenly focused on the absence of the company's annual reports, federal income tax returns, or audited financial statements for 2014 and 2015. The Petitioner notes that the regulations state: "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." 8 C.F.R. § 204.5(g)(2). The Petitioner's argument, however, disregards the regulation's command that evidence of ability to pay "shall be either in the form of copies of annual reports, federal tax returns, or audited financial statements." 8 C.F.R. § 204.5(g)(2). Thus, the regulation allows consideration of additional evidence of ability to pay only after submission of required evidence. Because the Petitioner did not submit required evidence for 2014 and 2015, the company has not demonstrated its continuing ability to pay the proffered wage from the petition's priority date.

Even if we could excuse the missing required evidence, the Petitioner's additional evidence does not establish its ability to pay the proffered wage in 2014 or 2015. With a prior petition, the Petitioner

[3] USCIS records identify the three other petitions by the following receipt numbers:

[4] The Petitioner's ability to pay the proffered wage of one of the other I-140 beneficiaries is not considered:

- After the other beneficiary obtains lawful permanent residence;
- If an I-140 petition filed on behalf of the other beneficiary has been withdrawn, revoked, or denied without a pending appeal or motion; or
- Before the priority date of the I-140 petition filed on behalf of the other beneficiary.

[5] For 2016, the Petitioner has submitted the required documentation and has shown that the Beneficiary was paid in excess of the proffered wage in that year. As such, the record demonstrates the Petitioner's ability to pay in 2016.

submitted copies of the Beneficiary's payroll records from July 2014 through September 2014. As of September 30, 2014, the records indicate that the Petitioner paid the Beneficiary that year a total of $75,179.85, less than the annual proffered wage of $112,174. The records indicate that the Beneficiary received a 2014 monthly salary of $8,333.33, which would result in a total annual salary of $99,999.96. As this amount is below the annual proffered wage, the Petitioner's additional evidence does not establish its ability to pay the proffered wage in 2014.

With its 2016 tax returns, the Petitioner submitted a "comparison," which stated the company's loss of more than $1.2 million in 2015. In a letter, the Petitioner's chief executive officer (CEO) asserts that, but for the Petitioner's $1.4 million investment in another company, its tax returns for 2015 would have reflected profits. The record, however, lacks evidence corroborating the claimed investment or the Petitioner's purported profits in its absence. If a petitioner employs at least 100 people, a statement from a company financial officer, like the one from the Petitioner's CEO, may demonstrate its ability to pay. 8 C.F.R. § 204.5(g)(2). The Petitioner here, however, has not demonstrated its employment of at least 100 people. The Petitioner's additional evidence therefore does not establish its ability to pay the proffered wage in 2014 or 2015.

On appeal, the Petitioner also notes that a copy of a Form W-2 establishes that it paid the Beneficiary more than the annual proffered wage in 2016. Citing a USCIS memorandum and a non-precedent decision of ours, the Petitioner asserts that its payment of the proffered wage to the Beneficiary in 2016 establishes its ability to pay in all years from the petition's priority date. The memo states that a petitioner establishes its ability to pay if "[t]he record contains credible evidence that the petitioner not only is employing the beneficiary but also has paid or currently is paying the proffered wage." Memorandum from William R. Yates, Assoc. Dir. for Ops., 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. Because the Petitioner "currently is paying the proffered wage," it appears to argue that, consistent with the memo, it has demonstrated its ability to pay the proffered wage.

The memo, however, addresses ability to pay under 8 C.F.R. § 204.5(g)(2), which requires a petitioner to demonstrate its "continuing" ability to pay, from a petition's priority date until a beneficiary obtains lawful permanent residence. In that context of a continuing ability to pay, the memo implicitly requires a petitioner to demonstrate its ability to pay in each year, beginning with the year of a petition's priority date. The memo's acceptance of either a past or current payment of a proffered wage merely indicates that, depending on a petition's priority date and the year at issue, a past or current payment could demonstrate a petitioner's ability to pay. The memo does not state that establishing an ability to pay a proffered wage in one of multiple relevant years demonstrates a continuing ability to pay.

Moreover, the memo states that, to demonstrate ability to pay under 8 C.F.R. § 204.5(g)(2), a petitioner "must" submit copies of an annual report, federal income tax return, or audited financial statements. (emphasis in original). As previously discussed, the Petitioner here did not submit

required evidence for 2014 or 2015. The memo therefore does not support the Petitioner's continuing ability to pay the proffered wage from the petition's priority date.

The non-precedent decision submitted on appeal, also does not help the Petitioner. First, non-precedent decisions do not bind us in other matters. *See* 8 C.F.R. § 103.10(b) (stating that only precedent decisions bind USCIS officers in other proceedings involving the same issue). Second, the 2009 decision does not support the Petitioner's assertions. As the Petitioner argues, the decision states, "[i]f the petitioner establishes by documentary evidence that it employed the beneficiary at a salary equal to or greater than the proffered wage, the evidence will be considered *prima facie* proof of the petitioner's ability to pay the proffered wage." The Petitioner appears to interpret the statement as allowing it to demonstrate its ability to pay for the entire period in question based on its payment of the proffered wage to the Beneficiary only in 2016. In the 2009 case, however, the petitioner paid the beneficiary a full proffered wage in one year, but a lesser amount in another. Despite its payment of the proffered wage in one year, we required the petitioner to demonstrate its ability *in the other year* to pay the difference between the proffered wage and the wages it paid the beneficiary. Thus, the 2009 decision does not support the Petitioner's assertion that its payment of the Beneficiary's proffered wage in 2016 also establishes its ability to pay in 2013, 2014, and 2015. *See also Matter of Great Wall*, 16 I&N Dec. 142, 145 (Acting Reg'l Comm'r 1977) (stating that a petitioner "cannot expect to establish a priority date for visa issuance for the beneficiary when at the time of making the job offer . . . [it] could not, in all reality, pay the salary as stated in the job offer").

As previously indicated and as the Petitioner urges on appeal, we may also consider evidence of ability to pay beyond a petitioner's wage payments, net income, and net current assets. Under *Sonegawa*, we may consider: the number of years a petitioner 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 the proffered wage. *Matter of Sonegawa*, 12 I&N Dec. at 614-15.

Here, the record indicates the Petitioner's continuous business operations since 1994. But other *Sonegawa* factors do not weigh in its favor. On the labor certification (filed in June 2013) and the petition (submitted in January 2017), the Petitioner stated that it employed 62 and 30 people, respectively. By May 2017, copies of the Petitioner's payroll register reflect wages paid to only 14 workers. Also, copies of the Petitioner's tax returns indicate, from 2012 to 2016, a decline in gross revenues. As previously discussed, the Petitioner's CEO asserts that an investment caused the company's reported loss in 2015. But the Petitioner's tax returns indicate that it also lost money in 2013. The record therefore does not establish the 2015 loss as uncharacteristic. Also, as previously indicated, the record lacks corroborating evidence of the investment and the Petitioner's purported profitability in its absence. Unlike the petitioner in *Sonegawa*, the Petitioner has not demonstrated its possession of an outstanding reputation in its industry, and it must demonstrate its ability to pay the combined proffered wages of multiple beneficiaries. Thus, a totality of circumstances under *Sonegawa* does not establish the Petitioner's ability to pay the proffered wage.

For the foregoing reasons, the Petitioner has not demonstrated its continuing ability to pay the proffered wage, from the petition's priority date onward.

III. MINIMUM EXPERIENCE REQUIRED FOR THE OFFERED POSITION

Although unaddressed by the Director, the record also does not establish the Beneficiary's possession of the minimum experience required for the offered position. A petitioner must establish a beneficiary's possession, by a petition's priority date, of all DOL-certified job requirements. *Matter of Wing's Tea House*, 16 I&N Dec. 158, 160 (Acting Reg'l Comm'r 1977). Here, the Petitioner seeks to qualify the Beneficiary for the offered position of senior technical consultant based on alternate job requirements of a master's degree and three years of experience in the job offered or in a position involving "Java-based web application development."[6] Part H.14 of the certification also requires "demonstrated expertise" with specified duties and technologies.

On the labor certification, the Beneficiary attested to her possession, by the petition's priority date, of more than ten years of full-time, qualifying experience. She stated that she worked as a senior professor/program coordinator at a technical and vocational education agency in Jamaica for more than seven years, from June 2001 to November 2008. She also stated that she obtained more than three years of experience, from January 2009 to August 2012, as a programmer analyst/consultant at two consulting firms in the United States.

To support the Beneficiary's claimed experience, the Petitioner submitted a letter from the Jamaican agency. *See* 8 C.F.R. § 204.5(g)(1) (requiring a petitioner to support claimed, qualifying experience with letters from a beneficiary's former employers). The letter states the Beneficiary's job title and dates of employment. Contrary to 8 C.F.R. § 204.5(g)(1), however, the letter does not describe the Beneficiary's experience at the agency. The letter also does not indicate the Beneficiary's expertise with the duties and technologies listed in Part H.14 of the labor certification. The letter therefore does not establish the Beneficiary's qualifications for the offered position.

The Petitioner also submitted a letter from a purported co-worker of the Beneficiary in Jamaica. This letter, printed on the stationery of a more recent employer of the signatory, describes the Beneficiary's experience at the Jamaican agency and her expertise in the duties and technologies specified on the labor certification. The record, however, lacks evidence corroborating the signatory's purported employment by the agency during the Beneficiary's tenure there. As such, we find that the letter does not establish the Beneficiary's claimed, qualifying experience in Jamaica.

The Petitioner also submitted three letters to support the Beneficiary's claimed, qualifying experience in the United States. None of these letters are from the Beneficiary's purported former employers and the Petitioner has not shown that letters from her claimed former employers are

[6] The labor certification identifies the primary job requirements of the offered position as a bachelor's degree and five years of experience.

unavailable, such that alternative evidence can be considered. Rather, the letters are from companies - including the Petitioner - who purportedly contracted the Beneficiary's services from her two claimed U.S. employers. The record, however, lacks copies of contracts or other documentary evidence of the Beneficiary's employment by her claimed employers during the relevant periods. The letters therefore do not establish the Beneficiary's claimed, qualifying employment.

Also, a labor certification employer cannot rely on experience a beneficiary gained with it, unless she gained the experience in a job substantially different from the offered position or the employer can demonstrate the impracticality of training a U.S. worker for the position. 20 C.F.R. § 656.17(i)(3). For these purposes, experience with an employer includes experience gained "as a contract employee." 20 C.F.R. § 656.17(i)(3)(i). Here, the Petitioner's letter states that, as a contract employee, the Beneficiary gained experience with all the duties and technologies specified in Part H.14 of the labor certification. The record therefore indicates that the Beneficiary gained her experience with the Petitioner in a job substantially comparable to the offered position. *See* 20 C.F.R. § 656.17(i)(5)(ii) (stating that a "substantially comparable" job means a "position requiring performance of the same job duties more than 50 percent of the time"). The record also lacks evidence of the impracticality of training a U.S. worker for the offered position. The Petitioner therefore cannot rely on the experience the Beneficiary's gained with it as a contract employee.

In any future filings in this matter, the Petitioner must submit reliable, objective evidence establishing the Beneficiary's possession of at least three years of claimed, qualifying experience.

IV. 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.

ORDER: The appeal is dismissed.

Cite as *Matter of P-S-, Inc.*, ID# 1176647 (AAO Apr. 26, 2018)