



U.S. Citizenship
and Immigration
Services

Non-Precedent Decision of the
Administrative Appeals Office

MATTER OF H-F- INC.

DATE: FEB. 28, 2018

APPEAL OF NEBRASKA SERVICE CENTER DECISION

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

The Petitioner, a pharmacy, seeks to employ the Beneficiary as a pharmacy manager. It requests classification of the Beneficiary 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), 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 Nebraska 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.

On appeal, the Petitioner submits a brief and additional documentation and asserts that it has established 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 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 U.S. workers similarly employed. 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, 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 \$128,315 per year. Thus, the Petitioner must demonstrate its continuing ability to pay the proffered wage beginning on the priority date, which is August 26, 2016. 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 Sonogawa*, 12 I&N Dec. 612, 614-15 (Reg'l Comm'r 1967).

The Petitioner stated that its offer of employment is strictly prospective. As the Petitioner does not employ the Beneficiary and has not paid him the full proffered wage in 2016, we next examine the Petitioner's income and net current assets. The Petitioner's federal income tax return for 2016 reflects a net income² of \$37,358 and net current assets³ of \$88,864.

² In 2016, the Petitioner filed an IRS Form 1120S. Where an S corporation's income is exclusively from a trade or business, as in this case, 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. See Instructions for IRS Form 1120S, at <http://www.irs.gov/pub/irs-pdf/i1120s.pdf> (last accessed October 26, 2017).

³ According to *Barron's Dictionary of Accounting Terms* 117 (3d ed. 2000), "current assets" consist of items having (in most cases) a life of one year or less, such as cash, marketable securities, inventory and prepaid expenses. "Current liabilities" are obligations payable (in most cases) within one year, such as accounts payable, short-term notes payable,

In this case, neither the Petitioner's net income nor net current assets for 2016 are sufficient to pay the full proffered wage of \$128,315. The record therefore does not establish the Petitioner's ability to pay the full proffered wage in 2016. Further, because the information for 2017 was not available, we cannot affirmatively find that the Petitioner has the ability to pay in this year.

On appeal, the Petitioner requests that USCIS prorate the proffered wage for the portion of 2016 that occurred after the priority date, and consider its net current assets as sufficient evidence of its ability to pay the prorated wage. We will not, however, consider net current assets for an entire tax year towards an ability to pay a lesser period of the proffered wage any more than we would consider two tax years of net current assets towards paying the annual proffered wage. Although we will not prorate the proffered wage, we may consider the effect of a short time period between the priority date and the end of the priority date year in the context of our totality of the circumstances analysis.

The Petitioner generally contends that we must consider the totality of circumstances and the overall magnitude of its business activities in determining the Petitioner's ability to pay the proffered wage, and that it need only establish its ability to pay by a preponderance of the evidence. We agree that in accordance with *Sonegawa*, 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 overall number of employees, the occurrence of any uncharacteristic business expenditures or losses, the petitioner's reputation within its industry, whether the beneficiary is replacing a former employee or an outsourced service, or any other evidence that we deem relevant to the petitioner's ability to pay the proffered wage. The Petitioner asserts that it has been in business since 1997, and has a gross annual income of \$1,007,774 in the year it filed the petition. However, the Petitioner has not submitted any evidence to support this claimed income and has not provided historical financial documentation to show growth or to explain its gross annual income in the context of its usual business. Without such information, we cannot find a pattern of growth. The Petitioner has not claimed that it has seen uncharacteristic losses or expenses in the period in question and has not asserted or substantiated that it has an outstanding reputation within its industry. As noted, we may also consider the effect of a short time period between the priority date and the end of the priority date year in the context of our totality of the circumstances analysis. Here, the August priority date represents a significant time period of 2016, 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 through under a totality of the circumstances analysis.

The Petitioner also asserts that the wages of seven contractors could have been used to pay the Beneficiary's wage in combination with the net current assets for 2016. With respect to the contractors, the Petitioner has submitted IRS Forms 1099-MISC, Miscellaneous Income, for the year 2016. However, the Forms 1099-MISC do not show the job titles and duties of the individuals to whom they were issued, so they are not sufficient to establish that the recipients perform the duties of the proffered position and will in fact be replaced by the Beneficiary. Moreover, although the

and accrued expenses (such as taxes and salaries). *Id.* at 118.

Petitioner claims that in total the Beneficiary would replace two part-time pharmacy supervisors and five part-time pharmacists, the Petitioner has not explained how the Beneficiary would single handedly replace seven part-time employees. In addition, because the Forms 1099-MISC are issued to independent contractors rather than employees, they do not show other costs to the Petitioner that might be reflected in an employee's IRS Form W-2, Wage and Tax Statement, including employee compensation expenses for the Beneficiary which may include legally required benefits (social security, Medicare, federal and state unemployment insurance, and worker's compensation), employer costs for providing insurance benefits (life, health, and disability), paid leave benefits (vacations, holidays, sick, and personal leave), retirement and savings (defined benefit and defined contribution), and supplemental pay (overtime and premium, shift differentials, and nonproduction bonuses). Consequently, the Petitioner's Forms 1099-MISC, and claims that these additional funds could be used to pay the Beneficiary, are not sufficient to show that the Petitioner has the ability to pay the proffered wage as of the priority date.

Thus, assessing the totality of the circumstances, we find that the Petitioner has not established by a preponderance of the evidence that it had the continuing 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 up to the present. Accordingly, we will affirm the Director's denial of the petition.

ORDER: The appeal is dismissed.

Cite as *Matter of H-F- Inc.*, ID# 791223 (AAO Feb. 28, 2018)