U.S. Citizenship and Immigration Services

Non-Precedent Decision of the Administrative Appeals Office

In Re: 07072256

DATE: DEC. 9, 2019

Motion on Administrative Appeals Office Decision

Form I-140, Immigrant Petition for Advanced Degree Professional

The Petitioner, a gelato coffee shop, seeks to employ the Beneficiary as a business analyst. It requests classification of the Beneficiary an advanced degree professional 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 "EB-2" immigrant classification allows a U.S. employer to sponsor a professional with an advanced degree for lawful permanent resident status.

The Director of the Texas Service Center denied the petition on the ground that the Petitioner did not establish its ability to pay the proffered wage. We dismissed the Petitioner's appeal, finding like the Director that the evidence did not establish the Petitioner's ability to pay the proffered wage.

The matter is now before us on a motion to reopen and a motion to reconsider. Based on the record now before us we will dismiss the combined motions.

I. LAW

A motion to reopen the proceeding must state new facts and be supported by documentary evidence. 8 C.F.R. § 103.5(a)(2). A motion to reconsider must establish that our prior decision was based on an incorrect application of law or policy and that the decision was incorrect based on the evidence of record at the time of the decision. 8 C.F.R. § 103.5(a)(3). We may grant a motion that satisfies these requirements and demonstrates eligibility for the requested immigration benefit.

To be eligible for the classification it requests for the beneficiary, a petitioner must establish that it has the ability to pay the proffered wage stated on the labor certification. As provided in the regulation at 8 C.F.R. § 204.5(g)(2):

> 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 [USCIS].

II. ANALYSIS

As indicated in the above regulation, the Petitioner must establish its continuing ability to pay the proffered wage from the priority date[1] of the petition onward. In this case the proffered wage is $71,900 per year and the priority date is October 30, 2017.

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. A petitioner's submission of documentary evidence that it employed the beneficiary at a salary equal to or greater than the proffered wage for the time period in question, when accompanied by a form of evidence required in the regulation at 8 C.F.R. § 204.5(g)(2), may be considered proof of the petitioner's ability to pay the proffered wage. In this case the record indicates that the Beneficiary has never been employed by the Petitioner. Therefore, the Petitioner cannot established its ability to pay the proffered wage from the priority date onward based on wages paid to the Beneficiary.

If a petitioner does not establish that it has paid the beneficiary an amount 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 ordinarily be considered able to pay the proffered wage during that year.

At the time of the Director's decision the record included a copy of the Petitioner's federal income tax return for 2017 and a balance sheet as of October 31, 2018 prepared by the Petitioner's CPA. The Director found that this documentation did not establish the Petitioner's ability to pay the proffered wage because the tax return recorded net income of -$27,785 and net current assets of $35,768 in 2017, both of which were below the proffered wage of $71,900, and because the 2018 balance sheet was not an audited financial statement in conformance with the regulation at 8 C.F.R. § 204.5(g)(2).

In our dismissal of the appeal we reiterated the Director's findings that the Petitioner's 2017 tax return recorded negative net income and net current assets that were well below the proffered wage. We also found that even if the balance sheet of October 2018 were regarded as probative evidence in conformance with 8 C.F.R. § 204.5(g)(2), and with the Director's request for evidence (RFE), it recorded net current assets of only $22,412.47, a figure well below the proffered wage and insufficient to establish the Petitioner's ability to pay the proffered wage in either 2018 or 2017. Finally, we considered other factors beyond the Petitioner's net income and net currents assets, consistent with

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

the "totality of the circumstances" analysis in *Matter of Sonegawa*, 12 I&N Dec. 612, 614-15 (Reg'l Comm'r 1967), but found that they did not establish the Petitioner's ability to pay the proffered wage.

A. Motion to Reopen

As new facts and evidence in support of its motion to reopen, the Petitioner submits copies of its federal income tax returns for the years 2016 and 2018. Supplementing the previously submitted return for 2017, the record now includes copies of the Petitioner's tax returns for three years, 2016-2018. These returns recorded net income of -$32,746 in 2016, -$24,256 in 2017, and -$3,756 in 2018.[2] Thus, the Petitioner had no net income with which to pay any portion of the proffered wage in those three years.

The Petitioner claims that the three tax returns recorded net current assets of $71,706 in 2016, $65,985 in 2017, and $86,228 in 2018, the first and third of which exceeded the proffered wage. However, the Petitioner's figures are incorrect. Net current assets are the difference between the petitioner's current assets and current liabilities.[3] A partnership's year-end current assets are shown on Schedule L, lines 1(d) through 6(d), and include cash-on-hand, inventories, and receivables expected to be converted to cash within one year. A partnership's year-end current liabilities are shown on Schedule L, lines 15(d) through 17(d), and include accounts payable, debt obligations payable in less than one year, and "other current liabilities." The Petitioner's tax returns show net current assets of $51,069 in 2016 (consisting of current assets totaling $84,779 minus current liabilities of $33,710), $35,768 in 2017 (consisting of current assets totaling $$79,014 minus current liabilities of $43,246), and $44,801 in 2018 (consisting of current assets totaling $112,189 and current liabilities of $67,388). Thus, the Petitioner's net current assets for all three years were well below the proffered wage. The Petitioner's miscalculation of its net current assets in the years 2016-2018 resulted from not including accounts payable (line 15(d) in Schedule L) in its current liabilities.

For the reasons discussed above, the evidence submitted in support of the motion to reopen does not demonstrate the Petitioner's eligibility for the immigration benefit it requests because it does not establish the Petitioner's ability to pay the proffered wage of $71,500 per year from the priority date onward.

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[2] For an LLC taxed as a partnership, where the petitioner's income is exclusively from a trade or business, USCIS considers net income to be the figure shown on Line 22 of page one ("Ordinary business income (loss)") of the petitioner's IRS Form 1065, U.S. Return of Partnership Income. However, if the petitioner has income, credits, deductions or other adjustments from sources other than a trade or business, they are reported in Schedule K. If the Schedule K has relevant entries for additional income or additional credits, deductions or other adjustments, net income is found on page 5 of IRS Form 1065 at line 1 of the Analysis of Net Income (Loss) of Schedule K. In this case the Petitioner's tax returns for 2016 and 2018 have no relevant entries in Schedule K and its net income (loss) is therefore the figure on page 1, line 22 of the Form 1065. The tax return for 2017, on the other hand, has a relevant entry for additional income, and therefore the Petitioner's net income that year is found on line 1 of the Analysis of Net Income (Loss) of Schedule K.

[3] According to *Barron's Dictionary of Accounting Terms* 117 (3rd 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 accounts payable, short-term notes payable, and accrued expenses (such as taxes and salaries). *Id.* at 118.

B. Motion to Reconsider

The Petitioner reiterates its previous argument that the Director's RFE, consistent with the regulation at 8 C.F.R. § 204.5(g)(2), did not require the profit/loss statement prepared by its CPA in 2018 to be an audited financial statement. The subject document is not technically a profit/loss statement, but rather a balance sheet listing assets and liabilities. The Petitioner is correct insofar as the Director's RFE, as well as the regulation, allow for the submission of a profit/loss statement (or other evidence such as a balance sheet) that is not audited. The regulation makes clear, however, that such evidence is secondary to one of the three types of required documentation – which include either an annual report, a federal tax return, or an audited financial statement – to establish an employer's the ability to pay the proffered wage in any given year. Moreover, we already stated in our previous decision that the Petitioner's balance sheet recorded net current assets of only $22,412.47 as of October 31, 2018 (consisting of current assets totaling $77,375.36 and current liabilities of $54,962.89). That figure is far below the proffered wage.

The Petitioner claims that its total fixed assets and other assets, as listed on the CPA's balance sheet, should also be considered in assessing the Petitioner's ability to pay the proffered wage. This claim has no merit. The Petitioner's total assets include depreciable assets utilized in its business which will not be converted to cash during the ordinary course of business and, therefore, will not become funds available to pay the proffered wage.

The Petitioner asserts that we did not properly consider the totality of the Petitioner's circumstances, in accord with *Matter of Sonegawa*, in our decision dismissing the appeal. In particular, the Petitioner contends that we did not take into consideration such factors as the steady growth of employees, salaries, and business income since the company was created in early 2016, and the fact that the Petitioner is a franchise of a successful international enterprise. The Petitioner points to its federal income tax returns for the years 2016-2018 which recorded gross receipts of $247,788 in 2016, $494,757 in 2017, and $495,882 in 2018, and expenditures for salaries and wages totaling $56,292 in 2016, $119,860 in 2017, and $105,034 in 2018. While these figures show a substantial increase in gross income and employee salaries from 2016 to 2017, they do not show much, if any, such increase from 2017 to 2018. The gross income and employee salaries from 2016 to 2018 cover a relatively brief period of time and do not demonstrate a sustained history of growth by the Petitioner.

As another *Sonegawa* factor the Petitioner asserts that we should consider the cash contributions made by each of its two partners as a resource that could be utilized to pay the proffered wage. The Petitioner points to Schedule M-2, Analysis of Partners' Capital Accounts, in its tax returns, which recorded original capital (cash) contributions totaling $322, 083 in 2016 and year-end balances of $289,097 in 2016, $225,911 in 2017, and $206,152 in 2018. The partners' capital accounts, however, are equity accounts in the Petitioner's accounting records. Capital accounts generally represent initial and subsequent contributions by members to the LLC; profits and losses earned by the business and allocated to the members based on the provisions of the LLC's operating agreement; and distributions to the members. They are not current asset items or accounts out of which the Petitioner can withdraw funds to pay the proffered wage.

While individual members may generally take distributions according the terms of an LLC's operating agreement, it is the Petitioner's obligation to pay the proffered wage in this case, and not the obligation of the individual members. An LLC, like a corporation, is a legal entity separate and distinct from its members. The debts and obligations of the LLC generally are not the debts and obligations of its members. Accordingly, the assets of the members and their ability as individuals to pay the LLC's debts and obligations cannot be utilized to demonstrate the Petitioner's ability to pay the proffered wage. *See Matter of Aphrodite Invs., Ltd.*, 17 I&N Dec. 530 (Comm'r 1980). In a similar case, the court in *Sitar v. Ashcroft*, No. Civ. A. 02-30197-MAP, 2003 WL 22203713 (D.Mass. Sept. 18, 2003) stated that "nothing in the governing regulation, 8 C.F.R. § 204.5, permits [USCIS] to consider the financial resources of individuals or entities who have no legal obligation to pay the wage." The Petitioner must show the ability to pay the proffered wage out of its own funds.

For the reasons discussed above, the Petitioner has not established that our dismissal of the appeal was based on an incorrect application of law or policy.

III. CONCLUSION

The Petitioner has not shown proper cause for us to reopen the proceeding or reconsider our prior decision, in accordance with the provisions 8 C.F.R. § 103.5(a)(2) and (3).

ORDER: The motion to reopen is dismissed.

FURTHER MOTION: The motion to reconsider is dismissed.