U.S. Citizenship and Immigration Services

Non-Precedent Decision of the Administrative Appeals Office

MATTER OF A-L- LLC

DATE: JUNE 13, 2019

APPEAL OF TEXAS SERVICE CENTER DECISION

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

The Petitioner, the operator of a gelato shop, seeks to employ the Beneficiary as a business analyst. 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 for lawful permanent resident status to work in a position requiring at least a master's degree, or a bachelor's degree followed by five years of experience.

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

On appeal, the Petitioner argues that the Director erroneously rejected a financial statement that demonstrates the company's ability to pay without first informing it that the document must be audited.

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

I. EMPLOYMENT-BASED IMMIGRATION

Immigration as an advanced degree professional generally follows a three-step process. To permanently fill a position in the United States with a foreign worker, a prospective employer must first obtain 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). DOL approval signifies that insufficient U.S. workers are able, willing, qualified, and available for an offered position, and that employment of a foreign national will not harm wages and working conditions of U.S. workers with similar jobs. *Id.*

If DOL approves an offered 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. Among other things, USCIS determines whether a beneficiary meets requirements of an offered position and a requested visa classification. If USCIS grants 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 position's proffered wage, from a petition's priority date until a beneficiary obtains lawful permanent residence. 8 C.F.R. § 204.5(g)(2). Evidence of ability to pay must include copies of annual reports, federal tax returns, or audited financial statements. *Id.*

In determining ability to pay, USCIS 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 a beneficiary 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 consider other factors affecting a petitioner's ability to pay a proffered wage. *See Matter of Sonegawa,* 12 I&N Dec. 612 (Reg'l Comm'r 1967).[1]

Here, the accompanying labor certification states the proffered wage of the offered position of business analyst as $71,900 a year. The petition's priority date is October 30, 2017, the date DOL accepted the labor certification application for processing. *See* 8 C.F.R. § 204.5(d) (explaining how to determine a petition's priority date). As of the appeal's filing, required evidence of the Petitioner's ability to pay the proffered wage in 2018 was not yet available. We will therefore consider the company's ability to pay only in 2017, the year of the petition's priority date.

The Petitioner did not submit evidence of payments to the Beneficiary in 2017. Thus, based solely on wages paid, the record does not establish the Petitioner's ability to pay the proffered wage.

The Petitioner submitted a copy of its federal income tax return for 2017. The return reflects net income of -$24,256 and net current assets of $35,768. Neither of those amounts equals or exceeds the annual proffered wage of $71,900. Thus, based on examinations of the Petitioner's wages paid, net income, and net current assets, the record does not establish its ability to pay the proffered wage in 2017.

In response to the Director's written request for additional evidence (RFE), the Petitioner submitted a balance sheet prepared by an accountant. This financial statement indicates that, as of October 30, 2018, the Petitioner had combined net assets and equity of $244,541.[2] The Director found that the balance sheet did not establish the Petitioner's ability to pay because it was unaudited and therefore, contrary to 8 C.F.R. § 204.5(g)(2), did not constitute required evidence.

On appeal, the Petitioner argues that, contrary to the Director's denial, the RFE indicates the Director's acceptance of unaudited "profit/loss statements" as evidence of a company's ability to

[1] 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); *Z-Noorani, Inc. v. Richardson*, 950 F.Supp.2d 1330, 1345-46 (N.D. Ga. 2013).

[2] Neither the balance sheet nor an accompanying letter from the accountant who prepared it specifies the start date of its financial period. We assume the period began on January 1, 2018.

pay. As of the RFE's issuance, however, the record contained evidence of the Petitioner's ability to pay only in 2017. The record therefore indicates that the RFE requested *additional* evidence for 2017, beyond the Petitioner's federal income tax return for that year. *See* Memorandum from William R. Yates, USCIS Assoc. Dir. of Ops., HQOPRD 90/16.45, *Determination of Ability to Pay under 8 CFR 204.5(g)(2)*, 3 (May 4, 2004), https://www.uscis.gov/sites/default/filesfiles/nativedocuments/abilitytopay_4may04.pdf (last visited May 28, 2019) (indicating that, after submission of required evidence of ability to pay, USCIS may accept "additional" evidence). In contrast, the Director's decision appears to reject the unaudited balance sheet as *required* evidence for 2018. *See* 8 C.F.R. § 204.5(g)(2) (stating that evidence of ability to pay "shall be either in the form of copies of annual reports, federal tax returns, or *audited* financial statements") (emphasis added).

Even if the RFE's reference to unaudited profit/loss statements misled the Petitioner, the deficiency would not warrant a reversal or remand. The Petitioner had an opportunity on appeal to submit audited financial statements or other evidence of its ability to pay. *See* Form I-290B, Notice of Appeal, Part 2 (allowing submission of a "brief and/or additional evidence" on appeal). Also, the balance sheet does not establish the Petitioner's ability to pay in either 2017 or 2018. First, the balance sheet does not indicate that it includes financial information for 2017. Also, when determining ability to pay, USCIS examines *net current assets*, not net assets and equity. The balance sheet reflects net current assets of $22,412.47, less than the annual proffered wage. Thus, the balance sheet would not demonstrate the Petitioner's ability to pay the proffered wage in 2017 or, even if it constituted required evidence, in 2018.

As previously indicated, when determining a petitioner's ability to pay, we may consider factors beyond its wages paid, 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 prospective replacement of a current employee or outsourced service; or other factors affecting its ability to pay the proffered wage. *Matter of Sonegawa*, 12 I&N Dec. at 614-15.

Here, the record indicates that the Petitioner employs nine workers. It has only conducted business since 2015, however, less than the 10-year period of the petitioner in *Sonegawa*. Because the Petitioner provided complete financial information for only one year, the record also does not indicate growth in its business. In addition, unlike the petitioner in *Sonegawa*, the Petitioner here has not demonstrated its incurrence of uncharacteristic losses or expenses, or its possession of an outstanding reputation in its industry. Further, the record does not establish that the Beneficiary would replace an existing employee or outsourced service. Thus, a totality of the circumstances under *Sonegawa* does not establish the Petitioner's ability to pay the proffered wage.

III. CONCLUSION

The record on appeal does not establish the Petitioner's ability to pay the position's proffered wage from the petition's priority date onward. We will therefore affirm the petition's denial. Contrary to section 291 of the Act, 8 U.S.C. § 1361, the Petitioner has not met its burden of establishing eligibility for the requested benefit.

ORDER: The appeal is dismissed.

Cite as *Matter of A-L- LLC*, ID# 4698756 (AAO June 13, 2019)