U.S. Citizenship and Immigration Services

**Non-Precedent Decision of the Administrative Appeals Office**

MATTER OF P-S-, INC.

DATE: SEPT. 27, 2019

APPEAL OF TEXAS SERVICE CENTER DECISION

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

The Petitioner, a provider of software consulting and development services, seeks to employ the Beneficiary as a senior software engineer. It requests his classification under the second-preference, immigrant category as a member of the professions holding an advanced degree. *See* 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 job 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 combined proffered wages of this and other positions that it offered to foreign nationals.

On appeal, the Petitioner submits additional evidence. It asserts that it demonstrated its ability to pay in 2018 by compensating the Beneficiary more than the prorated, proffered wage. The Petitioner also contends that it need not show its ability to pay the proffered wages of three other beneficiaries who left its employment. The Petitioner asserts additional evidence of its ability to pay in the forms of its business line of credit and market value.

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 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. Among other things, USCIS determines whether a beneficiary meets the

requirements of a DOL-certified position and the 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 the proffered wage of an offered position, from a petition's priority date until a beneficiary obtains lawful permanent residence. 8 C.F.R. § 204.5(g)(2). For petitioners with less than 100 employees, like this Petitioner, 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 the full proffered wage, USCIS considers whether it generated annual amounts of net income or net current assets sufficient to pay any difference between a proffered wage and the wages actually 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, 614-15 (Reg'l Comm'r 1967).[1]

Here, the labor certification states the proffered wage of the offered position of senior software engineer as $103,688 a year. The petition's priority date is February 14, 2018, 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).

In response to the Director's written request for additional evidence (RFE), the Petitioner submitted a copy of an IRS Form W-2, Wage and Tax Statement, for 2018, the year of the petition's priority date. The form indicates that the Petitioner paid the Beneficiary wages of $27,091.50 that year. That amount does not equal or exceed the annual proffered wage of $103,688. Based solely on wages paid, the record therefore does not establish the Petitioner's ability to pay the proffered wage. Nevertheless, we credit the Petitioner's payment. The company need only demonstrate its ability to the difference between the proffered wage and the wages it paid the Beneficiary in 2018, or $76,596.50.

On appeal, the Petitioner submits a copy of its federal income tax return for 2018. The tax return reflects net income of $33,400 and net current assets of $302,365. The net income amount does not equal or exceed the $76,596.50 difference between the proffered wage and the wages paid. Based on net income, the record therefore does not establish the Petitioner's ability to pay. The net current asset amount, however, exceeds the difference between the proffered wage and the wage paid. The record therefore appears to demonstrate the Petitioner's ability to pay the individual, proffered wage of the Beneficiary.

[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).

As the Director found, however, USCIS records indicate the Petitioner's filing of immigrant petitions for other beneficiaries. 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 that were approved or pending as of this petition's priority date of February 14, 2018, or filed thereafter. *See Patel v. Johnson*, 2 F.Supp.3d 108, 124 (D. Mass. 2014) (affirming our revocation of a petition's approval where, as of the filing's grant, a petitioner did not demonstrate its ability to pay the combined proffered wages of multiple petitions).[2]

The Petitioner's RFE response identified four other immigrant petitions that it filed, and USCIS approved, after February 14, 2018. The proffered wages for all five petitions – including the Beneficiary's – total $583,150. The Petitioner also documented that it paid wages totaling $117,091.50 to applicable beneficiaries in 2018. Subtracting the wages paid from the proffered wages, the record indicates that the Petitioner must demonstrate its ability to pay the difference of $466,058.50. The Petitioner's net current assets of $302,365 do not equal or exceed that amount. Thus, based on examinations of wages the Petitioner paid, its net income, and its net current assets, the record does not establish its ability to pay the combined proffered wages in 2018, the year of the petition's priority date.

Also, USCIS records indicate the Petitioner's filing of an additional immigrant petition that was approved before this petition's priority date.[3] The Petitioner's RFE response neither identified the additional petition, nor provided its proffered wage or priority date. The record therefore does not establish the Petitioner's ability to pay the combined proffered wages of all six petitions.[4]

On appeal, the Petitioner asserts that the $27,091.50 in wages it paid the Beneficiary in 2018 exceeded the proffered wage. Citing an unpublished decision of ours from 2004, the Petitioner contends that it need only have paid the Beneficiary $26,135.05, the prorated proffered wage for the portion of 2018 beginning in October when the Beneficiary worked for the company.

The Petitioner's argument, however, is unconvincing. First, we need not follow our 2004 non-precedent decision. *See* 8 C.F.R. §§ 103.10(b), (c) (requiring USCIS employees, in matters involving the same issues, to follow only published, precedent decisions). Also, Department of Homeland Security regulations require a petitioner to demonstrate its ability to pay a proffered wage from "the time the priority date is established." 8 C.F.R. § 204.5(g)(2). As previously indicated, this petition's priority date is February 14, 2018. Therefore, regardless of the Beneficiary's October 2018 start date of employment with the Petitioner, the company must demonstrate its ability to pay from February 14, 2018. In addition, the Petitioner proposed prorating the proffered wage from

[2] The Petitioner need not demonstrate its ability to pay proffered wages of petitions that it withdrew, or, unless they remain pending on appeal, that USCIS denied, rejected, or revoked. The Petitioner also need not demonstrate its ability to pay proffered wages before the priority dates of their corresponding petitions, or after the dates their corresponding beneficiaries obtained lawful permanent residence.

[3] USCIS records identify the additional petition by receipt number [redacted]

[4] In any future filings in this matter, the Petitioner must provide the proffered wage and priority date of the additional petition. The Petitioner may also submit evidence of any wages it paid to the additional beneficiary in 2018 and materials supporting the factors stated in *Sonegawa*.

February 14, 2018. USCIS policy, however, does not permit a petitioner to prorate a proffered wage. Rather, a petitioner must demonstrate its ability to pay a full proffered wage in the year of a petition's priority date. Contrary to the Petitioner's argument, we therefore decline to prorate the proffered wage in 2018. Although we will not prorate the proffered wage, we will 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 also asserts that it need not demonstrate its ability to pay the combined proffered wages of three of its beneficiaries because the foreign nationals purportedly left the company's employment. But USCIS records indicate, and the Petitioner has not otherwise demonstrated, that the petitions for the three beneficiaries remain unwithdrawn. Therefore, regardless of the beneficiaries' employment status with the Petitioner, the company can continue to offer them the positions reflected in the approved petitions. Unless the Petitioner withdraws the petitions, they remain approved as of this petition's priority date, and the Petitioner must demonstrate its ability to pay the combined proffered wages.

The Petitioner also argues that its business line of credit demonstrates its ability to pay the proffered wage. A credit line, however, does not contractually or legally obligate a bank to provide funds to a customer. Rather, a credit line represents a bank's unenforceable commitment to loan up to a specified maximum to a customer during a certain period. John Downes and Jordan Elliot Goodman, *Barron's Dictionary of Finance and Investment Terms* 45 (5th ed. 1998). Because a credit line is not an existent loan, the Petitioner has not demonstrated the availability of additional funds from the credit line. *See Rahman v. Chertoff*, 641 F.Supp.2d 349, 351-52 (D. Del. 2009) (holding that we reasonably disregarded an employer's line of credit in determining its ability to pay a proffered wage). Even if we accepted the credit line as evidence of ability to pay, the Petitioner submitted documentation indicating the availability of only about $80,000. That amount would not cover the $466,058.50 difference between the combined proffered wages and wages paid.

The Petitioner also contends that its bank accounts contained funds to pay the combined proffered wages, submitting copies of monthly account statements from October 2018 through January 2019. When previously examining the Petitioner's net current assets, however, we considered the amount of cash the company reported at the end of 2018 in its federal income tax returns. The Petitioner has not demonstrated that its bank accountant funds represent additional, unreported money. Moreover, the combined end balances of the accounts in January 2019 totaled $121,137.46, less than the $466,058.50 difference between the combined proffered wages and wages paid.

Finally, the Petitioner argues that we should consider its "market value" when determining its ability to pay. The company asserts that a firm that generated $2 billion in revenue recently raised $20 billion in its initial public offering. The Petitioner, however, has not explained how its market value would have provided it with the ability to pay the combined proffered wages in 2018, nor has it submitted any evidence of its market value. The Petitioner's arguments on appeal therefore do not demonstrate its ability to pay the proffered wage.

As previously indicated, we may look beyond wages paid, net income, and net current assets when determining the Petitioner's ability to pay the proffered wage. Under *Sonegawa*, we may consider: the number of years the 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; the Beneficiary's 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 the Petitioner's continuous business operations since 2008 and, as of the fourth quarter of 2018, its employment of 19 people. Copies of its federal income tax returns also indicate that its annual revenues more than tripled in 2018. Unlike the petitioner in *Sonegawa*, however, the record does not establish the Petitioner's 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. Also unlike the petitioner in *Sonegawa*, the Petitioner here must demonstrate its ability to pay the combined proffered wages of multiple beneficiaries. Finally, although the Petitioner contends that we should prorate the proffered wage in 2018, the time period between the priority date and the end of the year represents a significant period of time 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 the proffered wage for 2018 through a totality of the circumstances analysis.

## III. CONCLUSION

The record on appeal does not establish the Petitioner's continuing ability to pay the proffered wage of the offered position from the petition's priority date onward. We will therefore affirm the petition's denial. A petitioner bears the burden of demonstrating eligibility for a requested benefit. Section 291 of the Act, 8 U.S.C. § 1361. The Petitioner here did not meet that burden.

**ORDER:** The appeal is dismissed.

Cite as *Matter of P-S-, Inc.*, ID# 6271885 (AAO Sept. 27, 2019)