U.S. Citizenship and Immigration Services

Non-Precedent Decision of the Administrative Appeals Office

MATTER OF A-T-S-G-

DATE: APR. 16, 2019

APPEAL OF NEBRASKA SERVICE CENTER DECISION

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

The Petitioner, a provider of information technology services, seeks to employ the Beneficiary as a customer services network engineer. It requests his classification under the third-preference, immigrant category as a professional. *See* Immigration and Nationality Act (the Act) section 203(b)(3)(A)(ii), 8 U.S.C. § 1153(b)(3)(A)(ii). This employment-based, "EB-3" 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 bachelor's degree.

The Director of the Nebraska 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 asserts that the Director disregarded evidence of its ability to pay, including bank account funds and available financing.

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

I. EMPLOYMENT-BASED IMMIGRATION

Immigration as a professional generally follows a three-step process. First, to permanently fill a position in the United States with a foreign worker, a prospective employer must 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 the United States lacks sufficient able, willing, qualified, and available workers for the offered position and that employment of a foreign national in the job will not harm the wages or working conditions of U.S. workers similarly employed. *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). Section 204 of the Act, 8 U.S.C. § 1154. Among other things, USCIS determines whether a foreign national meets the requirements of the DOL-certified position and the requested immigrant classification. If USCIS grants a petition, a foreign national may finally apply abroad for an immigrant visa or, if eligible, for 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). Evidence of ability to pay must generally include copies of a petitioner's 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 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 actual 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 labor certification states the proffered wage of the offered position of customer services network engineer as $87,280 a year. The petition's priority date is February 15, 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 in 2018 was not yet available. We will therefore consider the Petitioner's ability to pay only in 2017, the year of the petition's priority date.

The Petitioner submitted a copy of an IRS Form W-2, Wage and Tax Statement, indicating that it paid the Beneficiary $68,147.66 in 2017. This amount does not equal or exceed the annual proffered wage of $87,280. Based solely on wages paid to the Beneficiary, the record therefore does not establish the Petitioner's ability to pay the proffered wage. Nevertheless, we credit the Petitioner's payments to the Beneficiary. The Petitioner need only demonstrate its ability to pay the difference between the proffered wage and the wages it paid the Beneficiary in 2017, or $19,132.34.

Copies of the Petitioner's audited financial statements for 2017 reflect negative amounts of net income and net current assets. Thus, based on examinations of the wages paid by the Petitioner and its net income and net current assets, the record does not establish its ability to pay the proffered wage in 2017.

On appeal, the Petitioner asserts that USCIS errs in determining its ability to pay the proffered wage by disregarding evidence of its "cash flow." Citing a decision of the U.S. Court of Appeals for the Seventh Circuit, the Petitioner argues that, if a prospective employer's net income and net current assets are insufficient to pay a proffered wage, USCIS must further investigate and consider the petitioner's cash flow. *See Constr. & Design Co. v. USCIS*, 563 F.3d 593,595 (7th Cir. 2009). As evidence of its cash flow, the Petitioner points to copies of its bank statements from February 2017 through April 2018 showing month-end balances exceeding the proffered wage.

[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); *Just Bagels Mfg., Inc. v. Mayorkas*, 900 F. Supp. 2d 363, 373-76 (S.D.N.Y. 2012).

The Seventh Circuit, however, lacks jurisdiction over the geographic area of intended employment of the offered position. The court's decision therefore does not require us to consider the Petitioner's cash flow in this matter. *See Matter of K-S-*, 20 I&N Dec. 715, 718 (BIA 1993) (explaining that precedential U.S. circuit court decisions are binding only within their individual circuits). Federal courts outside the Seventh Circuit have held that immigration officials reasonably rely on net income and net current assets to determine a petitioner's ability to pay. *See, e.g., Elatos Rest. Corp. v. Sava*, 632 F. Supp. 1049. 1054 (S.D.N.Y. 1986). Moreover, the Petitioner's bank statements do not demonstrate its ability to pay in 2017. We already considered the Petitioner's net current assets. Current assets generally include funds in bank accounts. *See* Jae K. Shim & Joel G. Siegel, *Barron's Dictionary of Accounting Terms* 117 (3d ed. 2000) (defining "current assets" as typically consisting of assets that can be liquidated within a year, such as cash, marketable securities, inventory, and prepaid expenses). The Petitioner has not demonstrated that its bank statements refer to funds that we did not previously consider. *See Just Bagels*, 900 F. Supp. 2d at 375 (holding that USCIS may reject bank statements as insufficient evidence of ability to pay if a petitioner does not demonstrate the availability of the bank funds to pay wages, rather than other expenses).

The Petitioner also argues that USCIS disregarded the company's ability to pay the proffered wage based on its access to financing. Copies of an agreement and its amendments indicate that, beginning in 2014, a financing company preliminarily agreed to loan the Petitioner up to $8 million, including a $6 million inventory facility and a $2 million revolving line of credit. The Petitioner's 2017 balance sheet states that it owed the company about $3.5 million, suggesting the potential availability of another $4.5 million or so in financing.

The agreement, however, does not establish the financing company's legal obligation to loan the Petitioner more money. The agreement and its amendments repeatedly state that the financing company's "decision to advance funds is discretionary, and will not be binding until the funds are actually advanced." The record therefore does not demonstrate the Petitioner's ability, as of the petition's priority date, to obtain additional financing. *See Rahman v. Chertoff*, 641 F. Supp. 2d 349, 351-52 (D. Del. 2009) (affirming USCIS' finding that a line of credit does not demonstrate a petitioner's ability to pay a proffered wage because the additional funding is unguaranteed).

As previously indicated, however, our determination of the Petitioner's ability to pay may consider factors beyond the wages the company paid, its net income, and its net current assets. 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 the Petitioner's ability to pay the proffered wage. *Matter of Sonegawa*, 12 I&N Dec. at 614-15.

Here, the record indicates the Petitioner's continuing business operations since 1994 and its employment of 66 people.[2] Copies of audited financial statements also indicate that, from 2015 through 2017, the Petitioner's gross annual revenues consistently grew. Unlike the petitioner in *Sonegawa*, however, which suffered a loss in only one of 10 consecutive years, the Petitioner reported

[2] The petitioning corporation did not form until 2013. But the Petitioner stated that another corporation began providing the Petitioner's services in 1994 and later "spun off" the Petitioner as a separate corporation.

negative net income amounts in 2015 through 2017. The record also does not establish the Petitioner's incurrence of uncharacteristic losses or expenses, its possession of an outstanding reputation in its industry, or the Beneficiary's replacement of a current employee or outsourced service. Thus, a totality of circumstances under *Sonegawa* does not establish the Petitioner's ability to pay the proffered wage.

III. CONCLUSION

Contrary to 8 C.F.R. § 204.5(g)(2), the record does not establish the Petitioner's continuing ability to pay the proffered wage. For this reason, we will 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. Here, the Petitioner has not met that burden.

ORDER: The appeal is dismissed.

Cite as *Matter of A-T-S-G-*, ID# 3867687 (AAO Apr. 16, 2019)