U.S. Citizenship and Immigration Services

Non-Precedent Decision of the Administrative Appeals Office

MATTER OF T-U-S-

DATE: APR. 19, 2018

MOTION ON ADMINISTRATIVE APPEALS OFFICE DECISION

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

The Petitioner, a sole proprietorship that operates retail shipping stores, seeks to employ the Beneficiary as an administrative assistant. It requests his classification under the third-preference immigrant category as a skilled worker. Immigration and Nationality Act (the Act) section 203(b)(3)(A)(i), 8 U.S.C. § 1153(b)(3)(A)(i). This employment-based, "EB-3" category allows a U.S. business to sponsor a foreign national with at least two years of training or experience for lawful permanent resident status.

The Director of the Nebraska Service Center denied the petition and the Petitioner's following motion to reconsider. After affirming the Director's decision on appeal, we denied the Petitioner's subsequent 11 motions. All of these decisions concluded that the Petitioner did not demonstrate its required ability to pay the proffered wage. We denied the Petitioner's most recent motions to reopen and reconsider, finding that it did not demonstrate its ability to pay from 2009 through 2013. *See Matter of T-U-S-*, ID# 839342 (AAO Oct. 27, 2017).

The matter is now before us on the Petitioner's motion to reconsider. The Petitioner states that we mischaracterized evidence accompanying its motion to reopen. The Petitioner also asserts that, by using the sole proprietor's estimates of his annual expenses in determining its ability to pay, we violated a U.S. Citizenship and Immigration Services (USCIS) National Standard Operating Procedure (SOP).

Upon review, we will deny the motion.

I. MOTION TO RECONSIDER

A motion to reconsider must establish that, based on the record at that time, our decision misapplied law or policy. 8 C.F.R. § 103.5(a)(3). A motion to reconsider must be supported by a pertinent precedent or adopted decision, statutory or regulatory provision, or statement of USCIS or Department of Homeland Security policy.

II. ABILITY TO PAY THE PROFFERED WAGE

A. The Evidence

The Petitioner states that, in denying its motion to reopen, we mischaracterized and ignored evidence of its ability to pay the proffered wage. *See* 8 C.F.R. § 103.5(a)(2) (requiring a motion to reopen to state new facts, supported by documentary evidence). We described the motion's evidence as copies of the Beneficiary's IRS Forms W-2, Wage and Tax Statements, for 2011 through 2013. Because prior decisions of ours had considered these documents, we concluded that the motion did not state new facts.

As the Petitioner contends, however, the Forms W-2, which it submitted with the motion for the first time, reflected its payments to other workers, not to the Beneficiary. The Petitioner states that it employed the workers part-time in the offered position of administrative assistant. Had it employed the Beneficiary full-time in the position, the Petitioner argues that it would not have needed to pay the part-time workers. It therefore contends that the payment amounts would have been available from 2011 through 2013 to pay part of the annual proffered wage of $35,692.80.

In a prior decision, we considered the adjusted gross income (AGI) of the Petitioner's sole proprietor in relation to his personal expenses and the proffered wage. *See, e.g., Ubeda v. Palmer*, 539 F. Supp. 647, 650 (N.D. Ill. 1982), *aff'd*, 703 F.2d 571 (7th Cir. 1983) (considering a sole proprietor's personal assets and expenses in determining his business's ability to pay a proffered wage because the business is legally inseparable from him). The following table shows that, from 2009 through 2013, the sole proprietor's AGI did not equal or exceed the sum of his expenses and the proffered wage.

Year	2009	2010	2011	2012	2013
Shortfall	$4,988	$33,755	$36,824	$51,793	$4,067

The Forms W-2 indicate that the Petitioner paid one worker $13,446.47 in 2011 and $14,829.72 in 2013. Another worker received $849.28 in 2012. The wages paid in 2013 exceed that year's shortfall. Thus, crediting that payment to the Petitioner establishes its ability to pay in 2013.

The part-time wages in 2011 and 2012, however, do not equal or exceed the corresponding shortfalls. Therefore, the Forms W-2 do not establish the Petitioner's ability to pay the proffered wage in those years. The forms also do not demonstrate the Petitioner's ability to pay in 2009 or 2010. Thus, the evidence does not establish the Petitioner's ability to pay the proffered wage.

B. The SOP

The Petitioner also asserts that, in determining its ability to pay, we violated a USCIS National SOP. The SOP for Form I-140, Immigration Petition for Alien Worker, states:

> The sole proprietor must be able to demonstrate that he or she can meet their existing business expenses and pay the proffered wage. In addition they must show that they can sustain themselves and their dependents. . . . The Federal Poverty Guidelines for the year that the priority date is established may be used as a reference point for evaluating the ability to pay.

USCIS I-140 National SOP, 5-152, http://www.olender.pro/sites/default/files/Standard%20Operating%20Procedures%20%28SOP%29%20I-140%20-%20USCIS%20-%202007.pdf (last visited Apr. 2, 2018).

Here, to consider the ability of the Petitioner's sole proprietor to support himself and his family, USCIS required estimates of his personal expenses. The estimates ranged from $48,000 in 2009 to $53,160 in 2013.

The Petitioner, however, contends that the SOP required us to use the annual amounts listed on the poverty guidelines, rather than the sole proprietor's estimates. For families of the same size in the continental United States, the annual poverty guideline amounts fall well below the Petitioner's estimated expenses, ranging from $18,310 in 2009 to $23,550 in 2013.[1] *See, e.g.*, U.S. Dep't of Health & Human Servs., 2012 HHS Poverty Guidelines, https://aspe.hhs.gov/2012-hhs-poverty-guidelines (last visited Apr. 2, 2018).

Contrary to the Petitioner's argument, however, the SOP does not bind us in this matter. The SOP is a written collection of procedures for the internal use of USCIS employees. It therefore lacks the force or effect of law. *See, e.g., Loa-Herrera v. Trominski*, 231 F.3d 984, 989 (5th Cir. 2000) (stating that an agency's internal guidelines neither confer substantive rights nor provide procedures upon which applicants or petitioners may rely).

Also, the SOP does not require USCIS officers to substitute the poverty guideline amounts for the estimated expenses of sole proprietors. Rather, the SOP states that the guidelines "may be used as a reference point." Thus, the guidelines may help USCIS officers evaluate the accuracy and reliability of estimated expenses of sole proprietors. For example, USCIS may question or reject expenses that fall significantly below corresponding guideline amounts.

In addition, in determining ability to pay proffered wages, we believe that estimates by sole proprietors of their actual expenses are more accurate and realistic than poverty guideline amounts. *See Matter of Great Wall*, 16 I&N Dec. 142, 144 (Acting Reg'l Comm'r 1977) (requiring a petitioner to establish "a realistic job offer"). Like the Petitioner, many sole proprietors may incur expenses significantly above corresponding poverty guideline amounts. Also, for a family of a certain size in the continental United States, the guidelines state a single amount. But expenses of sole proprietors may widely vary depending on where they live in the country. Thus, we find that

[1] The federal tax returns of the Petitioner's sole proprietor indicate his support of three people in 2009 and four people thereafter.

estimates of actual expenses are more accurate and reliable than poverty guidelines in determining the abilities of sole proprietors to pay.

Finally, even if we substituted the poverty guideline amounts for the sole proprietor's estimated expenses, the record would not establish the Petitioner's ability to pay the proffered wage in 2010 or 2012. The differences between the poverty guideline amounts of $22,050 in 2010 and $23,050 in 2012 and the Petitioner's corresponding estimated expenses of $50,520 and $53,160 would not cover the shortfalls in those years. For the foregoing reasons, substitution of the poverty guideline amounts for the estimated expenses of the sole proprietor would not establish the Petitioner's ability to pay.

The Petitioner previously established its ability to pay in 2014 and 2015. The record, however, lacks required evidence of the Petitioner's ability to pay in 2016 or 2017. *See* 8 C.F.R. § 204.5(g)(2) (requiring a petitioner, in demonstrating its continuing ability to pay a proffered wage, to submit copies of annual reports, federal income tax returns, or audited financial statements). Thus, in addition to establishing its ability to pay from 2009 through 2012, the Petitioner must submit copies of annual reports, federal income tax returns, or audited financial statements for 2016 and 2017 in any future filings in this matter. For the same two years, the Petitioner must also submit estimated expenses of its sole proprietor.

Because the record lacks required evidence of the Petitioner's finances for the past two years, we cannot completely or accurately consider its ability to pay under *Matter of Sonegawa*. *See* 12 I&N Dec. 612, 614-15 (Reg'l Comm'r 1967) (allowing immigration officers to consider factors affecting a petitioner's ability to pay beyond its net income and net current assets).

III. CONCLUSION

The Petitioner's motion does not establish its continuing ability to pay the proffered wage from the petition's priority date onward.

ORDER: The motion to reconsider is denied.

Cite as *Matter of T-U-S-*, ID# 1208664 (AAO Apr. 19, 2018)