U.S. Citizenship and Immigration Services

Non-Precedent Decision of the Administrative Appeals Office

MATTER OF C-H-H-S-, INC.

DATE: APR. 20, 2017

MOTION ON ADMINISTRATIVE APPEALS OFFICE DECISION

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

The Petitioner, a home health services provider, seeks to employ the Beneficiary as an operations manager. It requests classification of the Beneficiary as a member of the professions holding an advanced degree under the second preference immigrant classification. *See* Immigration and Nationality Act (the Act), section 203(b)(2), 8 U.S.C. § 1153(b)(2). This employment-based 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, finding that the record did not establish the Petitioner's ability to pay the proffered wage. He affirmed his decision in response to the Petitioner's motion to reopen. Thereafter, we dismissed the Petitioner's appeal and denied its two combined motions to reopen and reconsider. The Petitioner now files a third combined motion.

On motion, the Petitioner contends that, pursuant to *Matter of Sonegawa*, 12 I&N Dec. 167 (Reg'l Comm'r 1967), the totality of its circumstances demonstrate its ability to pay the proffered wage. It also maintains that, pursuant to U.S. Department of Labor (DOL) regulation, we have erred in requiring it to establish its ability to pay the Beneficiary as of the visa petition's priority date.[1] Our consideration of the record will be limited to these issues and the evidence submitted by the Petitioner in support of its arguments.

Upon review, we will deny the motion to reopen and motion to reconsider.

I. MOTION TO REOPEN

A motion to reopen is based on evidence of new facts. The requirements for a motion to reopen are located at 8 C.F.R. § 103.5(a)(2). We may grant a motion that satisfies these requirements and demonstrates eligibility for the requested immigration benefit.

[1] The priority date of the visa petition is the date that the Petitioner filed the labor certification with DOL.

The Petitioner's current motion to reopen seeks to rebut our negative analysis of its ability to pay under *Matter of Sonegawa*,[2] an appeal case in which the petitioning employer successfully established its ability to pay the proffered wage based on the totality of its circumstances. As discussed in our prior decision, the petitioner in *Sonegawa*, a California-based fashion designer whose work had been featured in *Time* and *Look* magazines and whose clients included Miss Universe, movie actresses, and society matrons, had experienced disruptions in her business operations during the year in which she had filed the visa petition. A change in the business' location had required it to pay rent on both its old and new sites for five months, and to cover moving costs. Further, the move had also prevented it from conducting regular business for a time. Nevertheless, the Regional Commissioner sustained the appeal that had been filed by the petitioner and approved the visa petition, determining that despite its immediate financial strains, the business' prospects for the resumption of successful operations were well-established. The Regional Commissioner based his decision, in part, on the petitioner's outstanding reputation in its industry.

The Petitioner asserts that, like the employer in *Sonegawa*, its ability to pay may also demonstrated by the totality of its circumstances if we will consider its history of profitability; its ability to pay the proffered wage out of "cash on hand;" and its reasonable expectation of increased profits in the future. For the reasons that follow, we do not find the record to overcome our prior finding that the Petitioner has not established its ability to pay the Beneficiary from the priority date of September 22, 2010, onward.

A. History of Profitability

To establish its claim of sustained profitability, the Petitioner submits an Internal Revenue Service (IRS) account transcript for 2011[3] and IRS tax return transcripts for the years 2012 through 2015, which report its gross business income and the amount paid in salaries and wages.

The Petitioner also submits a letter from its administrator-executive vice president discussing its income for 2016, as well as an overview of revenue generated during the period January 1, 2016, through October 31, 2016. The Petitioner further provides a chart that compares its revenue as of October 31, 2015, with that on October 31, 2016, showing an increase; and [redacted] reports reflecting its net revenue for the years 2012 through 2015, and from January 1, through October 31, 2016.

However, having considered the above evidence, we do not find it to establish that the Petitioner has a history of sustained growth or profitability. For the reasons discussed in our prior decision, the

[2] As noted in our prior decisions, the Petitioner has not established its ability to pay the proffered wage based on wages paid to the Beneficiary nor has it established that it had sufficient net income or net current assets in the years in questions to establish its ability to pay. On motion, the Petitioner does not dispute this finding, rather it address only our analysis of its ability to pay under the totality of circumstances.

[3] We note that the Petitioner has submitted two IRS statements that indicate tax return transcripts for the years 2010 and 2011 are no longer available.

Petitioner's reliance on its gross income and wage totals as proof of its ability to pay is misplaced. Moreover, the submitted evidence does not reflect the steady growth in gross income claimed by the Petitioner. Instead, we find the record to reflect that the Petitioner's gross income, which totaled $6,451,346 in 2010 (as reported in its amended 2010 tax return), experienced a significant decline in 2011, when it came to $4,754,612. This decrease in revenue, from which the Petitioner had not yet recovered as of 2015, is unexplained by the record. Finally, we note that, even if the record did demonstrate a steady increase in the Petitioner's revenues between 2010 and 2016, the six years documented by the Petitioner would be insufficient proof that it has experienced consistent economic growth over its nearly 19-year business history.[4]

The Petitioner's financial reports for the years 2012 through 2015, and the period January 1 through October 31, 2016, also do not demonstrate its claim of sustained financial growth. While we acknowledge that these reports reflect increases in the Petitioner's net revenue during the documented time period, they are not supported by evidence explaining how the net revenue in these reports was calculated or the financial documentation relied upon. Instead, the Petitioner submits a printout of online information on the company, [redacted] that created the software used to generate the reports. Accordingly, we will not consider the Petitioner's [redacted] generated reports in determining the totality of its circumstances. The unsupported representations of a petitioner's management do not constitute reliable evidence. A petitioner must support its assertions with relevant, probative, and credible evidence. *Matter of Chawathe*, 25 I&N Dec. 369 (AAO 2010).

For the above reasons, the record does not demonstrate the Petitioner's history of profitability, the first of the circumstances that, it claims, establish its ability to pay under a *Sonegawa* analysis.

B. Cash on Hand For Payment of Proffered Wage

On motion, the Petitioner also contends that in determining its ability to pay in this matter, we should consider the fact that it has "cash on hand" to pay the proffered wage. It does not, however, discuss this claim further or submit documentation in support of its assertion.

Therefore, as the Petitioner does not explain or document its "cash on hand" claim, it has also not established the second of the circumstances it has put forward as a basis for approving the visa petition.

C. Reasonable Expectation of Increased Profits

To establish that it has a reasonable expectation of a positive financial future, the Petitioner submits a letter from its administrator-executive vice president. In her statement, the Petitioner's administrator asserts that the business is expecting growth of eight percent a month in 2016, based

[4] The underlying labor certification and online business data bases reflect that the Petitioner began operations in 1998.

on its acceptance into the [redacted] clinical improvements that will allow it to partner with other health organizations to become the preferred home health services provider in northern Virginia, and the doubling of its marketing efforts. Regarding these claims, the Petitioner submitted the previously noted revenue report covering the period January 1, 2016, through October 31, 2016; the chart comparing the Petitioner's revenue as of October 31, 2015, with that on October 31, 2016; the [redacted] charts reflecting the Petitioner's business performance in 2012 through 2015, and in 2016, through October 31, 2016; and evidence of its marketing efforts, including a printout of the information on its website.

As a further indication of its profitability, the Petitioner states that it has been accredited by the [redacted] and that such accreditation is recognized nationwide as a symbol of quality in home care. It also states that it has been endorsed by the [redacted] and [redacted] as a certified home health agency. The Petitioner's claims of [redacted] accreditation and endorsement by the [redacted] and [redacted] are also found in its website materials.

However, the above assertions and the evidence the Petitioner submits in support of them do not establish a reasonable expectation of increased profits. Here again, we find that the documentation submitted by the Petitioner to establish its increased income in 2016 is not supported by actual financial data. A petitioner must support its assertions with relevant, probative, and credible evidence. *Matter of Chawathe*, 25 I&N Dec. at 369. The Petitioner also provides no evidence that demonstrates its acceptance into the [redacted] reflects its positive reputation or standing within the healthcare industry and will result in increased profits.[5] Neither does it submit documentation of its accreditation by the [redacted] or its endorsement by the [redacted] and [redacted] Although the Petitioner's website reflects these affiliations, the claims made by the Petitioner on its website are not proof of the existence of these affiliations or their impact on the Petitioner's future profitability. A petitioner must support assertions with relevant, probative, and credible evidence. *Id.*

The Petitioner has also submitted no evidence that identifies and documents the clinical improvements noted in its administrator's letter or that establishes the impacts of these improvements on its financial future.[6] Further, it has provided insufficient evidence to establish that it has increased its marketing efforts. Although we note the copies of the Petitioner's website materials, advertisements, and poster submitted on motion, this documentation is not proof of what the Petitioner's administrator describes as a doubling of its marketing efforts. The Petitioner has submitted no business-related evidence, e.g., business plans or personnel actions, that reflects it has increased its marketing budget or staff in 2016. A petitioner must support assertions with relevant, probative, and credible evidence. *Id.*

[5] In our previous denial of the Petitioner's motion to reopen, we indicated that such evidence was required if the Petitioner was to be successful in making this claim.

[6] The need for this evidence was also specifically identified in our prior decision.

Therefore, the record does not establish that the Petitioner has a reasonable expectation of increased profits; the third of the circumstances that it contends establish its ability to pay under *Sonegawa.*

Accordingly, the record does not demonstrate that the Petitioner may establish its ability to pay the proffered wage based on its history of profitability, its "cash on hand," and its expectation of increasing profits.

On motion, the Petitioner also asserts that in determining its ability to pay under *Sonegawa*, we wrongly considered a $326,912.07 federal tax lien that it had already cleared. The Petitioner, however, has misunderstood this aspect of our prior decision.

In reviewing what we found to be several federal tax liens entered against the Petitioner, we focused not on the $326,912.07 lien that had been paid, but on the fact that this payment had not cleared all the tax liens against the Petitioner, which, in 2014, totaled more than $500,000 (including the $326,912.07 lien). In filing the current motion, the Petitioner submits no additional release certificates relating to these other tax liens. Neither does it claim that these additional liens do not exist or that we incorrectly calculated the $500,000 total.[7] Moreover, we note that the Petitioner on motion submits copies of a March 16, 2016, IRS letter, which reflects that it is the subject of a new federal tax lien in the amount of $375,988.20, with the first installment payment due on April 21, 2016, as well as an Annual Installment Agreement Statement issued by the IRS on August 15, 2016, listing the Petitioner's installment payments. Accordingly, the federal tax liens filed against the Petitioner, both those previously identified and that filed in 2016, remain appropriate considerations in determining the Petitioner's ability to pay and must be considered in any future filings.

For the above reasons, we do not find the record to contain sufficient evidence to establish that, pursuant to *Sonegawa*, the totality of the Petitioner's circumstances establish its ability to pay the Beneficiary the proffered wage. Accordingly, we will deny the Petitioner's motion to reopen.

II. MOTION TO RECONSIDER

A motion to reconsider must establish that our decision was based on an incorrect application of law or policy, and that the decision was incorrect based on the evidence in the record of proceeding at the time of the decision. 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 U.S. Citizenship and Immigration Services or Department of Homeland Security policy.

In the present case, the Petitioner asserts that we erred in finding that it had not established its ability to pay in this matter as DOL regulation does not require it to pay the proffered wage to the Beneficiary until she acquires lawful permanent resident status.[8] In support of this assertion, the Petitioner references *Matter of T-S-, Inc.*

[7] These same observations were included in our prior decision.

[8] The Petitioner incorrectly identifies the controlling DOL regulation as 20 C.F.R. § 656.20(c)(2). However, the

Although the Petitioner correctly states that it need not pay the Beneficiary the proffered wage prior to her adjustment, its argument ignores the requirements imposed by 8 C.F.R. § 204.5(g)(2), which states that the Petitioner must demonstrate its ability to pay the proffered wage from the time the priority date is established and continuing until the Beneficiary obtains lawful permanent residence.

Therefore, while the Petitioner may not be required to pay the Beneficiary the proffered wage until such time as she becomes a lawful permanent resident, it must still establish its ability to do so from the date it filed the labor certification with DOL. Accordingly, contrary to the Petitioner's assertions, we have not erred as a matter of law or policy in finding that it must establish its ability to pay the proffered wage as of the visa petition's priority date.

We also find that the decision referenced by the Petitioner, *Matter of T-S-, Inc.*, in support of the motion to reconsider does not appear relevant in this case. Based on the limited information provided by the Petitioner, *Matter of T-S-, Inc.* appears to relate to a decision issued by this office in response to an appeal involving an L-1B intracompany transferee. Contrary to the Petitioner's assertion, *Matter of T-S-, Inc.* does not address the issue of ability to pay, but rather beneficiary qualifications. Moreover, it is not the precedent or adopted decision required to support a motion to reconsider, but a non-precedent decision, binding only the parties involved. Further, the Petitioner has not submitted evidence demonstrating that our denial of its prior motion to reconsider was incorrect based on the evidence of record at the time of the decision. Therefore, we will also deny the motion to reconsider.

III. CONCLUSION

The Petitioner has not overcome our prior finding that it does not have the ability to pay the Beneficiary the proffered wage from the priority date onward. As such, the Petitioner has not established eligibility for the benefit sought.

ORDER: The motion to reopen is denied.

FURTHER ORDER: The motion to reconsider is denied.

Cite as *Matter of C-H-H-S-, Inc.*, ID# 271888 (AAO Apr. 20, 2017)

---

regulation at 20 C.F.R. § 656.20(c)(2) relates to DOL audit procedures. The DOL regulation that requires an employer to pay the beneficiary of an employment-based visa as of the date that lawful permanent residence is acquired is found at 20 C.F.R. § 656.10(c)(4).