U.S. Citizenship and Immigration Services

Non-Precedent Decision of the Administrative Appeals Office

MATTER OF Y-D-, LLC

DATE: APR. 25, 2017

APPEAL OF TEXAS SERVICE CENTER DECISION

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

The Petitioner, a construction and roofing business, seeks to employ the Beneficiary as a slate/clapboard roofer. It requests classification of the Beneficiary as a skilled worker under the third preference immigrant classification. *See* Immigration and Nationality Act (the Act) section 203(b)(3)(A)(i), 8 U.S.C. § 1153(b)(3)(A)(i). This employment-based immigrant classification allows a U.S. employer to sponsor a foreign national for lawful permanent resident status to work in a position that requires at least two years of training or experience.

The Director of the Texas Service Center denied the petition, concluding that the record did not establish, as required, that the Petitioner has the ability to pay the proffered wage to the Beneficiary.

On appeal, the Petitioner asserts that it has the ability to pay the proffered wage in the totality of the circumstances.

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

I. LAW

Employment-based immigration generally follows a three-step process. First, an employer must obtain an approved labor certification from the U.S. Department of Labor (DOL).[1] *See* section 212(a)(5)(A)(i) of the Act, 8 U.S.C. § 1182(a)(5)(A)(i). By approving the labor certification, the DOL certifies that there are insufficient U.S. workers who are able, willing, qualified, and available for the offered position and that employing a foreign national in the position will not adversely affect the wages and working conditions of domestic workers similarly employed. *See* Section 212(a)(5)(A)(i)(I)-(II) of the Act. Second, the employer may file an immigrant visa petition with U.S. Citizenship and Immigration Services (USCIS). *See* section 204 of the Act, 8 U.S.C. § 1154. Third, if USCIS approves the petition, the foreign national may 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.

[1] The date the labor certification is filed, in cases such as this one, is called the "priority date."

II. ANALYSIS

The regulation at 8 C.F.R. § 204.5(g)(2) states, in pertinent part:

> *Ability of prospective employer to pay wage.* Any petition filed by or for an employment-based immigrant which requires an offer of employment must be accompanied by evidence that the prospective United States employer has the ability to pay the proffered wage. The petitioner must demonstrate this ability at the time the priority date is established and continuing until the beneficiary obtains lawful permanent residence. Evidence of this ability shall be either in the form of copies of annual reports, federal tax returns, or audited financial statements.

The Petitioner must demonstrate the continuing ability to pay the proffered wage beginning on the priority date, which in this case is December 4, 2013. The proffered wage as stated on the ETA Form 9089, Application for Permanent Employment Certification (labor certification), is $64,334 per year. The record indicates the Petitioner is structured as a limited liability company (LLC) and filed its tax returns on IRS Form 1065, U.S. Return of Partnership Income.[2]

In evaluating a petitioner's ability to pay the proffered wage, USCIS requires the petitioner to demonstrate financial resources sufficient to pay the beneficiary's proffered wage, although the totality of the circumstances affecting the petitioning business will be considered if the evidence warrants such consideration. *See Matter of Sonegawa*, 12 I&N Dec. 612 (Reg'l Comm'r 1967).

In determining the petitioner's ability to pay the proffered wage during a given period, USCIS will first examine whether the petitioner employed and paid the beneficiary during that period. If the petitioner establishes by documentary evidence that it employed the beneficiary at a salary equal to or greater than the proffered wage, the evidence will be considered proof of the petitioner's ability to pay the proffered wage. In this case, the Petitioner has not employed the Beneficiary.

If the petitioner does not establish that it employed and paid the beneficiary an amount at least equal to the proffered wage during that period, USCIS will next examine the net income figure reflected on the petitioner's federal income tax return, without consideration of depreciation or other expenses. *River Street Donuts, LLC v. Napolitano*, 558 F.3d 111 (1st Cir. 2009); *Taco Especial v.*

[2] An LLC is an entity formed under state law by filing articles of organization. An LLC may be classified for federal income tax purposes as if it were a sole proprietorship, a partnership, or a corporation. If the LLC has only one owner, it will automatically be treated as a sole proprietorship unless an election is made to be treated as a corporation. If the LLC has two or more owners, it will automatically be considered to be a partnership unless an election is made to be treated as a corporation. If the LLC does not elect its classification, a default classification of partnership (multi-member LLC) or disregarded entity (taxed as if it were a sole proprietorship) will apply. *See* 26 C.F.R. § 301.7701-3. The election referred to is made using IRS Form 8832, Entity Classification Election. In this case, the Petitioner, a multi-member LLC, is considered to be a partnership for federal tax purposes.

Napolitano, 696 F. Supp. 2d 873 (E.D. Mich. 2010), *aff'd*, No. 10-1517 (6th Cir. filed Nov. 10, 2011).[3]

The Petitioner's tax returns state its net income as follows:

- In 2013, the Petitioner's IRS Form 1065 stated net income of $49,103.[4]
- In 2014, the Petitioner's IRS Form 1065 stated net income of $40,331.
- In 2015, the Petitioner's IRS Form 1065 stated net income of $79,292.

Therefore, for the years 2013 and 2014, the Petitioner did not establish that it had sufficient net income to pay the proffered wage.

If the petitioner's net income does not equal the amount of the proffered wage or more, USCIS will review the petitioner's net current assets. Net current assets are the difference between the petitioner's current assets and current liabilities.[5] A partnership's year-end current assets are shown on Schedule L, lines 1(d) through 6(d) and include cash-on-hand, inventories, and receivables expected to be converted to cash within one year. Its year-end current liabilities are shown on lines 15(d) through 17(d). If the total of a partnership's end-of-year net current assets are equal to or greater than the proffered wage, the petitioner is expected to be able to pay the proffered wage using those net current assets. The Petitioner's tax returns stated its net current assets as follows:

- In 2013, the Petitioner's IRS Form 1065 stated net current assets of $66,867.
- In 2014, the Petitioner's IRS Form 1065 stated net current assets of $7,795.
- In 2015, the Petitioner's IRS Form 1065 stated net current assets of $47,151.

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[3] In *Matter of K.C.P. Food*, 623 F. Supp. at 1084, the court held that the Immigration and Naturalization Service, now USCIS, had properly relied on the petitioner's net income figure, as stated on the petitioner's corporate income tax returns, rather than the petitioner's gross income. The court specifically rejected the argument that the Service should have considered income before expenses were paid rather than net income. *See Taco Especial v. Napolitano*, 696 F. Supp. 2d at 881 (gross profits overstate an employer's ability to pay because it ignores other necessary expenses).

[4] For an LLC taxed as a partnership, where the petitioner's income is exclusively from a trade or business, USCIS considers net income to be the figure shown on Line 22 of page one of the petitioner's IRS Form 1065, U.S. Return of Partnership Income. However, where the petitioner has income, credits, deductions or other adjustments from sources other than a trade or business, they are reported on Schedule K. If the Schedule K has relevant entries for additional income or additional credits, deductions or other adjustments, net income is found on page 5 (2012-2015) of IRS Form 1065 at line 1 of the Analysis of Net Income (Loss) of Schedule K. *See* Instructions for Form 1065, at http://www.irs.gov/pub/irs-pdf/i1065.pdf (last visited Apr. 6, 2017) (indicating that Schedule K is a summary schedule of all owners' shares of the entity's income, deductions, credits, etc.). In this case, the Petitioner's Schedule K for 2014 and 2015 have relevant entries for additional deductions and, therefore, its net income is found on line 1 of the Analysis of Net Income (Loss) of Schedule K of its tax returns for these years.

[5] According to *Barron's Dictionary of Accounting Terms* 117 (3d ed. 2000), "current assets" consist of items having (in most cases) a life of one year or less, such as cash, marketable securities, inventory and prepaid expenses. "Current liabilities" are obligations payable (in most cases) within one year, such accounts payable, short-term notes payable, and accrued expenses (such as taxes and salaries). *Id.* at 118.

Therefore, for 2013 and 2014, the years at issue, the record reflects that Petitioner had sufficient net current assets to pay the proffered wage for 2013 but not 2014.

Thus, from the priority date onward, the Petitioner has not established that it has the continuing ability to pay the Beneficiary's proffered wage through an examination of the Petitioner's net income or net current assets.

On appeal, counsel asserts that it has the ability to pay the Beneficiary's proffered wage in the totality of the circumstances. USCIS may consider the overall magnitude of the petitioner's business activities in its determination of the petitioner's ability to pay the proffered wage. *See Matter of Sonegawa,* 12 I&N Dec. 612. As in *Sonegawa*, USCIS may, at its discretion, consider evidence relevant to the petitioner's financial ability that falls outside of a petitioner's net income and net current assets. Accordingly, USCIS may consider such factors as the number of years the petitioner has been doing business, the established historical growth of the petitioner's business, the overall number of employees, the occurrence of any uncharacteristic business expenditures or losses, the petitioner's reputation within its industry, whether the beneficiary is replacing a former employee or an outsourced service, or any other evidence that USCIS deems relevant to the petitioner's ability to pay the proffered wage.

Here, the Petitioner's tax returns for 2012 through 2015 provide the following details:

Year	Net Income	Net Current Assets	Gross Receipts	Cost of Goods Sold	Gross Profit
2012[6]	$94,758[7]	$81,499	$887,232	$624,517	$262,715
2013	$49,103	$66,867	$978,242	$768,601	$768,601
2014	$40,331	$7,795	$1,167,099	$1,021,989	$145,110
2015	$79,292	$47,151	$2,424,559	$1,995,773	$428,786

In this case, we note that the Petitioner has had consistent growth in its gross receipts and gross profit from 2012 through 2015. However, the Petitioner's net income decreased significantly from 2012 through 2014 and its net current assets have decreased from 2012 through 2015. We note that the Petitioner's cost of goods sold for 2014 were higher than previous years in relation to its gross receipts. The record does not establish that the Petitioner incurred any unexpected expenses in that year. The Petitioner cites a letter from its accountant who states the Petitioner has been growing rapidly since it was established in February 2010[8] and has been making additional investments into new equipment and other capital expenditures. However, the record does not contain documentation

[6] This precedes the priority date and is only considered here in the totality of the circumstances.

[7] The net income on the Petitioner's 2012 tax return is found on page 5 of the Form 1065 as part of Schedule K due to additional income and deductions for that year.

[8] We note that the Petitioner's tax returns state the business started on January 1, 2010, the Form I-140, Immigrant Petition for Alien Worker, states that the business was established on April 3, 2009, and the labor certification states that the business commenced in 2007. The Petitioner must resolve these discrepancies in any further filings.

to substantiate these investments in new equipment or the capital expenditures. The Petitioner's accountant also states that in 2014, the Petitioner could have used $40,457 that was paid to one of its owners as "guaranteed payments to partners," as indicated on Line 10 of its tax return, toward the Beneficiary's proffered wage. The record does not contain any evidence to support the assertion that this owner was willing to forego this guaranteed payment and had the financial ability to do so. Moreover, the Petitioner has submitted two different versions of its 2014 tax returns. The first, submitted with the initial petition, reflects no guaranteed payment to partners, while the second, submitted in response to a request for evidence, states $40,457 in guaranteed payments to partners. The Petitioner now seeks to rely on the second version of its tax return, which included guaranteed payments to partners, to establish its ability to pay. The Petitioner has not explained why it submitted two different versions of its 2014 tax return, nor has it provided independent, objective evidence pointing to where the truth lies. *See Matter of Ho*, 19 I&N Dec. 582, 591-92 (BIA 1988). Absent such explanation and documentation, the Petitioner may not rely on its claimed payments to partners to establish its ability to pay in 2014.

For the reasons discussed, we conclude that the Petitioner has not established its ability to pay the proffered wage in the totality of the circumstances.

III. CONCLUSION

The Petitioner has not established its continuing ability to pay the proffered wage from the priority date onward.

ORDER: The appeal is dismissed.

Cite as *Matter of Y-D-, LLC*, ID# 399574 (AAO Apr. 25, 2017)