U.S. Citizenship and Immigration Services

Non-Precedent Decision of the Administrative Appeals Office

MATTER OF J-L-I-, P.C.

DATE: AUG. 15, 2017

APPEAL OF TEXAS SERVICE CENTER DECISION

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

The Petitioner, a law firm, seeks to employ the Beneficiary as an attorney. 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, concluding that the Petitioner had not established its ability to pay the proffered wage from the priority date onward.

On appeal, the Petitioner submits additional evidence and asserts that it has the ability to pay the proffered wage.

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

I. LAW AND ANALYSIS

A. Employment-Based Immigration

Employment-based immigration generally follows a three-step process. First, an employer obtains an approved labor 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).[1] By approving the labor certification, 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 files 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

[1] The priority date of a petition is the date the DOL accepted the labor certification for processing. *See* 8 C.F.R. § 204.5(d). The priority date in this case is February 26, 2014.

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.

B. Ability to Pay the Proffered Wage

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.

A petitioner's ability to pay the proffered wage is an essential element in evaluating whether a job offer is realistic. *See Matter of Great Wall*, 16 I&N Dec. 142 (Acting Reg'l Comm'r 1977); *see also* 8 C.F.R. § 204.5(g)(2). In evaluating whether a job offer is realistic, USCIS requires the petitioner to demonstrate financial resources sufficient to pay the beneficiary's proffered wages, 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).

The proffered wage is $94,598 per year. The issue is whether the Petitioner has demonstrated its ability to pay the proffered wage as of the February 26, 2014, priority date onward.

In determining a petitioner's ability to pay, we first examine whether it paid a beneficiary the full proffered wage each year from a petition's priority date. If a petitioner did not pay a beneficiary the full proffered wage, we next examine whether it generated sufficient annual amounts of net income or net current assets to pay the difference between the proffered wage and the wages paid, if any. If a petitioner's net income or net current assets are insufficient, we may also consider other evidence of its ability to pay the proffered wage.[2]

In this case, the Petitioner submitted copies of IRS Forms W-2, Wage and Tax Statements, demonstrating that it employed the Beneficiary in 2014, 2015, and 2016. At box 1, the Forms W-2 reflect the following amounts:[3]

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[2] Federal courts have upheld our 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); *Tongatapu Woodcraft Haw., Ltd. v. Feldman*, 736 F.2d 1305, 1309 (9th Cir. 1984); *Estrada-Hernandez v. Holder*, -- F. Supp. 3d --, 2015 WL 3634497, *5 (S.D. Cal. 2015); *Rivzi v. Dep't of Homeland Sec.*, 37 F. Supp. 3d 870, 883-84 (S.D. Tex. 2014), *aff'd*, -- Fed. Appx. --, 2015 WL 5711445, *1 (5th Cir. Sept. 30, 2015).

[3] Form W-2, Box 1, shows taxable wages, tips, and other compensation paid to an employee. It does not include elective deferrals of income except those made under IRC section 501(c)(18). *See* 2017 General Instructions for Forms W-2 and W-3, http://www.irs.gov/pub/irs-pdf/iw2w3.pdf (last visited August 11, 2017).

- $71,830 in 2014;
- $71,830 in 2015; and
- $85,625.64 in 2016.

In evaluating the Petitioner's ability to pay the proffered wage, we will use the Beneficiary's gross pay amounts,[4] rather than the somewhat lower amounts of taxable compensation shown on the IRS Form W-2, box 1, if the record contains sufficient evidence of the Beneficiary's gross pay. In this case, the Petitioner has not provided the Beneficiary's end-of-year payroll statements showing her gross pay amounts.

In 2014 and 2015, the Beneficiary's Forms W-2 showed $1,920 at box 12A (code S). In 2016, her Form W-2 showed $2,648.22 at box 12A (code S). Code S represents elective employee salary reduction contributions under an Internal Revenue Code (IRC) section 408(p) SIMPLE plan.[5] *See* 2017 General Instructions for Forms W-2 and W-3, http://www.irs.gov/pub/irs-pdf/iw2w3.pdf (last visited August 11, 2017). On appeal, the Petitioner asserts that the amounts represented by Code S on the Beneficiary's Form W-2 should be included in the calculation of the wages paid by the Petitioner. We agree. For our ability to pay analysis, because these Code S amounts represent elective deferrals of income by the Beneficiary, they may be added to the Form W-2, box 1, wage amounts listed above. Thus, the Petitioner has established that it paid the Beneficiary $73,750 in 2014 and 2015, and $88,273.86 in 2016, with the addition of the Code S amounts. The Petitioner need only demonstrate its ability to pay the difference between the annual proffered wage and these amounts each year, which is $20,648 in 2014 and 2015, and $6,324.14 in 2016.

In 2014 and 2015, the Beneficiary's Forms W-2 showed $7,125.60 at box 12.b. (code DD). In 2016, the Form W-2 showed $6,326.64 at box 12.b. (code DD). Code DD represents the cost of employer-sponsored health coverage and includes both employee and employer contributions.[6] *Id.* The Petitioner asserts that it offers a cafeteria plan to its employees under IRC § 125, and that amounts paid by the Beneficiary for healthcare under the cafeteria plan should be added back to the Beneficiary's Form W-2 wages. Cafeteria plans are employer-established benefit plans under which employees may choose between receiving cash and certain nontaxable benefits, such as health insurance. *See* IRS Publication 15-B, Employer's Guide to Fringe Benefits, http://www.irs.gov/pub/irs-pdf/p15b.pdf (last visited August 11, 2017).[7] Nontaxable benefits received under a cafeteria plan are exempt from both income and employment taxes.

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[4] Gross pay includes total pay before any deductions.

[5] However, if the SIMPLE plan is part of a section 401(k) arrangement, code D is used. *See* 2017 General Instructions for Forms W-2 and W-3, http://www.irs.gov/pub/irs-pdf/iw2w3.pdf (last visited August 11, 2017).

[6] The value of an employer's contribution to health care coverage reported with code DD is not taxable, and is excludable from an employee's income. The reporting is for informational purposes only. IRS, *Form W-2 Reporting of Employer-Sponsored Coverage*, https://www.irs.gov/affordable-care-act/form-w-2-reporting-of-employer-sponsored-health-coverage (last visited August 11, 2017).

[7] A general tax rule is that taxpayers given these options would be taxed on whichever option they choose, because they are deemed to be in constructive receipt of the cash. However, the cafeteria plan provisions of the IRC provide an

For our ability to pay analysis, if a petitioner establishes that the Code DD amounts represent elective, nontaxable deferrals of income by a beneficiary under a cafeteria plan, they may be added back to the Form W-2, box 1, wage amounts. In this case, the Petitioner has not established that the Code DD amounts represent elective deferrals of income by the Beneficiary under a cafeteria plan. The record contains payroll statements for the Beneficiary which show no elective deferrals of income under a cafeteria plan by the Beneficiary in 2015 or 2016.[8] Thus, these amounts will not be added to the Form W-2, box 1, wage amounts listed above for our ability to pay analysis.

The Petitioner's federal tax returns reflect annual net income/loss amounts as follows:

- $5,476 in 2014;
- -$2,599 in 2015; and
- $24,850 in 2016.

Therefore, for the years 2014 and 2015, the Petitioner did not have sufficient net income to pay the difference of $20,648 between the proffered wage and the wages paid to the Beneficiary each year. In 2016, the Petitioner had sufficient net income to pay the difference of $6,324.14 between the proffered wage and the wages paid to the Beneficiary.

As an alternate means of determining a petitioner's ability to pay the proffered wage, USCIS may review a petitioner's net current assets. Net current assets are the difference between a petitioner's current assets and current liabilities.[9] A corporation's year-end current assets are shown on Schedule L, lines 1 through 6. Its year-end current liabilities are shown on lines 16 through 18. If the total of a corporation's end-of-year net current assets and the wages paid to the beneficiary (if any) 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 amended its 2014 tax return in 2016. The amendment changed the "reporting of Prepaid Rent on the Balance Sheet in the amount of $12,000 from Other Assets (Line 12) to Other Current Assets (Line 6)."[10] The Petitioner's 2015 and 2016 balance sheets also list $12,000 in prepaid rent as a current asset. However, the Petitioner prepares its tax returns on a cash basis of accounting, in which revenue is recognized when it is received, and expenses are recognized when

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express exception to this rule when the plan meets various reporting and nondiscrimination requirements. IRC § 125.

[8] The only deductions from her gross pay that are listed on her payroll statements are her SIMPLE plan deductions. The record does not contain the Beneficiary's payroll statements for 2014. The Petitioner notes on appeal that cafeteria plan deferral amounts would be designated as "Cafe 125" on the Form W-2. The Beneficiary's Forms W-2 do not contain this designation.

[9] 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.

[10] Prepaid rent is rent that is paid for in advance.

they are paid. Cash basis taxpayers do not generally list prepaid expenses as current assets on their balance sheets. If the Petitioner pursues this matter further, it must explain the listing of prepaid rent on its balance sheets in 2014, 2015, and 2016, and provide copies of the relevant leases to support its tax filings.[11] Further, the amended 2014 tax return shows no evidence of submission to the Internal Revenue Service (IRS) or its receipt or acceptance by the IRS. USCIS requires IRS-certified copies of the amended return to establish that the amended return was actually received and processed by the IRS. Thus, we will only examine the version of the Petitioner's 2014 tax return that was initially submitted and not the amended version as submitted on appeal.

The Petitioner's federal tax returns[12] demonstrate its end-of-year net current assets as follows:

- $9,533 in 2014;[13] and
- $17,886 in 2015.[14]

Therefore, for the years 2014 and 2015, the Petitioner did not have sufficient net current assets to pay the difference of $20,648 between the proffered wage and the wages paid to the Beneficiary.

The record contains several of the Petitioner's bank statements. Bank statements are not among the three types of evidence, enumerated in 8 C.F.R. § 204.5(g)(2), required to illustrate a petitioner's ability to pay a proffered wage. While this regulation allows additional material "in appropriate cases," the Petitioner has not demonstrated why the documentation specified at 8 C.F.R. § 204.5(g)(2) is inapplicable or otherwise paints an inaccurate financial picture of the Petitioner. Further, bank statements show the amount in an account on a given date, and cannot show the sustainable ability to pay a proffered wage. In addition, no evidence was submitted to demonstrate that the funds reported on the Petitioner's bank statements somehow reflect additional available funds that were not reflected on its tax returns, such as the Petitioner's taxable income (income minus deductions) or the cash specified on Schedule L that was considered in determining the Petitioner's net current assets.

As previously indicated, pursuant to *Sonegawa*, we may consider evidence of a petitioner's ability to pay beyond its net income and net current assets. As in *Sonegawa*, we may consider such factors as: the number of years it has conducted business; the growth of its business; its number of employees; the occurrence of any uncharacteristic business expenditures or losses; its reputation in its industry;

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[11] The Petitioner must resolve this discrepancy in the record with independent, objective evidence pointing to where the truth lies. *Matter of Ho*, 19 I&N Dec. 582, 591-592 (BIA 1988).

[12] The record contains unaudited financial statements for the Petitioner. The regulation at 8 C.F.R. § 204.5(g)(2) states that when a petitioner relies on financial statements to demonstrate its ability to pay the proffered wage, those financial statements must be audited. As there is no accountant's report accompanying these statements, we cannot conclude that they are audited statements. Unaudited financial statements are the representations of management. The unsupported representations of management are not reliable evidence and are insufficient to demonstrate the ability to pay the proffered wage.

[13] This figure is from the Petitioner's original, unamended tax return.

[14] This figure includes $12,000 in prepaid rent as a current asset.

whether a beneficiary will replace a current employee or outsourced service; or other evidence of its ability to pay a proffered wage.

In this case, the record indicates that the Petitioner was incorporated in 1996. While the record establishes that the Petitioner's gross receipts have increased between 2014 and 2016, the record does not establish its historical growth since its incorporation.

Further, unlike in *Sonegawa*, the record here does not indicate the occurrence of any uncharacteristic business expenditures or losses, or the Petitioner's outstanding reputation in its industry. The record also does not indicate the Beneficiary's replacement of a current employee or outsourced service. The petition and labor certification indicate that the Petitioner employs only eight employees.

Thus, assessing the totality of circumstances in this individual case, the record does not establish the Petitioner's continuing ability to pay the proffered wage pursuant to *Sonegawa*.

For the foregoing reasons, the record does not establish the Petitioner's continuing ability to pay the proffered wage from the petition's priority date onward.

B. The Beneficiary's Experience

Although not addressed by the Director, we note that, even if the Petitioner had established that it had the ability to pay the proffered wage, the record does not establish that the Beneficiary possesses the required experience for the position.

The Beneficiary must meet all of the requirements of the offered position set forth on the labor certification by the priority date of the petition. In this case, the labor certification states that the minimum experience requirement for the offered position is three months of experience in international refugee law. On the labor certification, the Beneficiary represented that she had the following experience:

- Attorney with the Petitioner from April 1, 2008, through September 22, 2015;[15] and
- Intern with the [redacted] from August 29, 2005, through November 30, 2005.

Evidence relating to qualifying experience must be in the form of a letter from a current or former employer/trainer and must include the name, address, and title of the writer, and a specific

[15] In general, experience with a petitioner may be used by a beneficiary to qualify for the offered position if the position was not substantially comparable. The regulation at 20 C.F.R. § 656.17(i)(5)(ii) states that a "substantially comparable" job means a job requiring performance of the same job duties more than 50 percent of the time. Based on the evidence in the record, the Beneficiary's employment with the Petitioner was in a position substantially comparable to the offered position and, therefore, cannot be used to qualify the Beneficiary for the offered position.

description of the duties performed by the beneficiary. 8 C.F.R. § 204.5(g)(1). If such evidence is unavailable, USCIS may consider other documentation relating to the beneficiary's experience. *Id.* The record contains an attestation from [redacted] stating that the Beneficiary worked as an intern with [redacted] from August 29, 2005, to November 30, 2005. However, the attestation does not appear to be signed, does not list the title of its author, and does not give a specific description of the Beneficiary's duties as an intern as required by 8 C.F.R. § 204.5(g)(1). Therefore, the letter is insufficient to establish the Beneficiary's three months of experience in international refugee law.

The record also contains a letter from [redacted] who states that he worked as an intern at [redacted] from September 2005 to January 2006. The letter describes the Beneficiary's duties. However, the letter is not from [redacted] and the record does not establish that a letter from [redacted] meeting the requirements of 8 C.F.R. § 204.5(g)(1) was unavailable. Further, [redacted] internship began in September 2005, so [redacted] cannot verify the Beneficiary's experience in August 2005 and any portion of September 2005 that [redacted] was not working at [redacted] Accordingly, the submitted evidence does not establish that the Beneficiary possessed three months of experience in international refugee law as required by the labor certification.

II. CONCLUSION

The Petitioner has not established its ability to pay the proffered wage from the priority date onward. The Petitioner has also not established the Beneficiary's possession of the required experience by the petition's priority date.

ORDER: The appeal is dismissed.

Cite as *Matter of J-L-I-, P.C.*, ID# 434112 (AAO Aug. 15, 2017)