U.S. Citizenship and Immigration Services

Non-Precedent Decision of the Administrative Appeals Office

MATTER OF O-I-G-

DATE: AUG. 24, 2017

APPEAL OF TEXAS SERVICE CENTER DECISION

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

The Petitioner, a real estate property management company, seeks to employ the Beneficiary as a building equipment engineer. It requests classification of the Beneficiary as a professional under the third preference immigrant classification. *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 immigrant classification allows a U.S. employer to sponsor a professional with a baccalaureate 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, and that the Beneficiary did not possess the required field of study for the offered job.

On appeal, the Petitioner submits additional evidence and asserts that it has the ability to pay the proffered wage based on income and assets of its affiliated entities, and that the Beneficiary's master's degree in agricultural mechanization is the equivalent of a master's degree in mechanical engineering as required by the terms of the labor certification.

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 ETA Form 9089, Application for Permanent Employment Certification (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, DOL certifies that there are insufficient U.S. workers who are able, willing, qualified, and available for the offered position and that

[1] The date the labor certification is filed, in cases such as this one, is called the "priority date." *See* 8 C.F.R. § 204.5(d). In this case, the priority date is June 25, 2015. Therefore, the Petitioner must establish that all eligibility requirements for the petition have been satisfied from June 25, 2015, and continuing through the present.

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 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 $94,500 per year. The issue is whether the Petitioner has demonstrated its ability to pay the proffered wage as of the June 25, 2015, 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]

[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).

In this case, the record reflects that the Petitioner employed and paid the Beneficiary $49,325.73 in 2015 and $54,664.50 in 2016.[3] The amounts paid by the Petitioner to the Beneficiary do not equal or exceed the annual proffered wage of $94,500. The record therefore does not establish the Petitioner's ability to pay the proffered wage based on the wages it paid the Beneficiary. But we credit the Petitioner's payments to the Beneficiary. The Petitioner need only demonstrate its ability to pay the difference between the annual proffered wage and the amounts it paid the Beneficiary, which is $45,174.27 in 2015 and $39,835.50 in 2016.

The Petitioner submitted its 2015 federal income tax return. It reflects a net loss of $23,951 and net current assets of $35,453. Therefore, for the year 2015, the Petitioner did not have sufficient net income or net current assets to pay the difference between the annual proffered wage and the wages paid to the Beneficiary. The Petitioner did not submit regulatory prescribed evidence of its ability to pay the difference between the annual proffered wage and the wages paid to the Beneficiary in 2016. *See* 8 C.F.R. § 204.5(g)(2).

On appeal, the Petitioner asserts that it is "an umbrella company providing cash management, payroll, and other administrative services to a group of affiliated real-estate owning entities." It states that while the entities are distinct limited liability companies (LLCs), they share the same offices, bank account, and employees, and have "substantially the same set of multiple beneficial owners." It indicates that employees of all of the affiliated entities are paid as employees of the Petitioner, and the expenses are then allocated to the appropriate affiliated entities. The Petitioner asserts that we should use the combined net income and net current assets of these entities in our determination of the Petitioner's ability to pay the proffered wage. It also notes that in 2015, the entities suffered a combined net loss due to extensive hail damage on several properties totaling $1.4 million.

An LLC, like a corporation, is a legal entity separate and distinct from its owners (members). The debts and obligations of the LLC generally are not the debts and obligations of the members or anyone else.[4] Because an LLC is a separate and distinct legal entity from its members, the assets of its members or of other entities cannot be considered in determining the petitioning LLC's ability to pay the proffered wage. *See Matter of Aphrodite Investments, Ltd.*, 17 I&N Dec. 530 (Comm'r 1980). In a similar case, the court in *Sitar v. Ashcroft*, 2003 WL 22203713 (D.Mass. Sept. 18, 2003) stated, "nothing in the governing regulation, 8 C.F.R. § 204.5, permits [USCIS] to consider the financial resources of individuals or entities who have no legal obligation to pay the wage." Therefore, we will not consider the net income or the net current assets of the affiliated entities, including co-mingled assets in a bank account.

---

[3] The Petitioner's tax return for 2015 indicates that it paid total wages of $9,626 that year. Its IRS Form W-3, Transmittal of Wage and Tax Statements, indicates that it paid total wages of $1,495,130.62 in 2015. Although the Petitioner asserts that it allocated the wages among various affiliated entities, the record does not contain employment tax returns for any of the entities to support the Petitioner's claims. The Petitioner must resolve this incongruity in the record with independent, objective evidence. *Matter of Ho*, 19 I&N Dec. 582, 591-92 (BIA 1988).

[4] Although this general rule might be amenable to alteration pursuant to contract or otherwise, the record contains no evidence to indicate that the general rule is inapplicable in the instant case. Further, the record does not contain a copy of the management agreement between the Petitioner and the affiliated entities.

However, 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; 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 Petitioner stated on the petition that it was established in 1989 and employed 51 employees.[5] Unlike in *Sonegawa*, the Petitioner has not established the historical growth of its business or its reputation in its industry. Further, the Beneficiary will not be replacing a current employee or outsourced service, as he is already employed by the Petitioner in the offered position.

The Petitioner asserts that it suffered an uncharacteristic loss in 2015 due to extensive hail damage on several properties it manages. It states that most of the damage was covered by insurance, but the proceeds were deferred to 2016 until the repairs were completed.[6] While the 2015 tax returns in the record reference hail damage to certain properties, the record does not contain any evidence documenting the hail damage or the insurance proceeds paid as a result of the damage, or detailing the repairs that were necessary to correct the damage. The record also does not contain the 2016 tax returns evidencing the deferred insurance payments. Further, the record does not establish that the weather damage created an *uncharacteristic* tax loss for the properties managed by the Petitioner. Thus, based on the totality of the circumstances, the Petitioner has not established its continuing ability to pay the proffered wage.

C. Beneficiary's Education

The Petitioner must establish that the Beneficiary satisfied all of the educational, training, experience, and any other requirements stated on the labor certification by the priority date of June 25, 2015. 8 C.F.R. § 103.2(b)(l), (12). *See Matter of Wing's Tea House*, 16 I&N Dec. 158, 159 (Acting Reg'l Comm'r 1977); *see also Matter of Katigbak,* 14 I&N Dec. 45, 49 (Reg'l Comm'r 1971).

In evaluating the beneficiary's qualifications, USCIS must look to the job offer portion of the labor certification to determine the required qualifications for the position. USCIS may not ignore a term of the labor certification, nor may it impose additional requirements. *See Madany v. Smith*, 696 F.2d 1008 (D.C. Cir. 1983); *K.R.K. Irvine, Inc. v. Landon*, 699 F.2d 1006 (9th Cir. 1983); *Stewart Infra-Red Commissary of Mass., Inc. v. Coomey*, 661 F.2d 1 (1st Cir. 1981).

[5] The labor certification states that the Petitioner employs 39 workers.

[6] The Petitioner's manager states in a letter that the "damages did not interrupt revenue flows or operations of these Apartment complexes. The fundamental revenue and profit generating relationship remained unchanged."

In this case, the labor certification requires a master's degree in mechanical engineering. No alternate field of study is acceptable, and no combination of education and experience is acceptable. Section J. of the labor certification states that the highest level of education achieved by the Beneficiary relevant to the requested occupation is a master's degree in mechanical engineering from [redacted] in the Ukraine, completed in 2011.

The record contains the following documents relating to the Beneficiary's education:

- Master's degree in agricultural mechanization issued by [redacted] in the Ukraine on June 30, 2011, together with diploma supplement; and
- Certificate for qualification as a typesetting operator issued by the ministry of education and science in the Ukraine on December 18, 2003.[7]

In response to the Director's notice of intent to deny, the Petitioner submitted an evaluation from [redacted] concluding that the Beneficiary "has attained the equivalent of a Master's Degree in mechanical Engineering from an accredited institution of higher education in the United States." The Director's decision denying the petition stated that the [redacted] did not identify what sources of information were used to reach the conclusion regarding the Beneficiary's degree, and that the evaluation does not provide a comparison of the U.S. program curricula in mechanical engineering to the Beneficiary's courses. The Director stated that the [redacted] does not rely on independent evidence of the Beneficiary's education, such as the content of his courses, and thus he determined that the Beneficiary has the foreign equivalent of a U.S. master's degree in agricultural mechanization. Since the Beneficiary does not have a master's degree in mechanical engineering as required by the labor certification, the Director determined that the Beneficiary is not qualified for the offered job.[8]

On appeal, the Petitioner submits an evaluation from [redacted] PhD, of [redacted] concluding that the Beneficiary's credentials are "comparable and substantially similar to the completion of a Master's Degree in Mechanical Engineering program in the United States." The evaluation states that the master's degree program required graduation from bachelor's level studies and competitive entrance examinations for admission and enrollment, but it provides no support for that assertion, and the record contains no evidence of the Beneficiary's graduation from bachelor's level studies and taking competitive entrance examinations. The evaluation also states that the Beneficiary's degree program "required a number of courses in the Mechanical Engineering field which are similar to those which would be required in a Master's Degree program in Mechanical Engineering in the United States."

[7] According to the Certificate, the program was one month in duration, and the Beneficiary was 14 years of age when he completed the program.

[8] The Director noted that U.S. workers without master's degrees in mechanical engineering would have been precluded from applying for the job during the recruitment process based on the advertised requirements of the position.

The evaluation compares several of the Beneficiary's master's courses, and his master's paper, to master's courses in mechanical engineering in the United States. It states that the Beneficiary's degree requirements "focused on application of engineering principles and hands-on industry experience needed for high-quality mechanical design, development, and engineering-related principles, requiring independent study, practice, and research, all of which are integral to the field of Mechanical Engineering." The evaluation concludes that the Beneficiary's master's degree is the foreign equivalent of a U.S. master's degree in mechanical engineering.

We have reviewed the Electronic Database for Global Education (EDGE) created by the American Association of Collegiate Registrars and Admissions Officers (AACRAO). According to its website, AACRAO is "a nonprofit, voluntary, professional association of more than 11,000 higher education professionals who represent approximately 2,600 institutions in more than 40 countries." *About AACRAO*, http://www.aacrao.org/home/about (last visited August 23, 2017). EDGE states that a Ukranian master's degree "represents attainment of a level of education comparable to a master's degree in the United States," and that the entry requirement is a "*Dyplom Bakalayra* (Diploma of Bachelor) or *Dyplom Spetsialista* (Diploma of Specialist)." *AACRAO EDGE*, http://edge.aacrao.org/country/credential/dyplom-magistra?cid=single (last visited August 23, 2017). The Beneficiary's master's diploma supplement references the Beneficiary's "Bachelor's diploma [redacted] as the "access qualification" for his master's degree program, but the record does not contain a copy of that degree. Further, the Beneficiary's resume in the record does not indicate that he received a bachelor's degree. Instead, it states that he received a high school diploma in 2006, and then his master's degree in 2011. Without a copy of the Beneficiary's bachelor's diploma and diploma supplement, we cannot determine that the Beneficiary properly met the entry requirement for the master's degree program as detailed in EDGE.

Further, the website for [redacted] indicates that it has a mechanical engineering department with five sections: manufacturing engineering; machine tools and systems; metal forming and special technology; materials science and foundry; and programming and information security. [redacted] http://www. [redacted] (last visited August 23, 2017). The Petitioner has not established that the Beneficiary's master's degree in agricultural automation was issued by the mechanical engineering department at [redacted] Instead, the website indicates that it may have been issued by the [redacted] or the [redacted][9] On appeal, the Petitioner asserts that agricultural mechanization is a subspecialty in the field of mechanical engineering. However, the Beneficiary's master's degree appears to have been issued by a department other than the

[9] The [redacted] consists of three departments: automation of production processes; electrical systems and energy management; and physical education. This faculty offers a master's degree in power and automation of the agricultural sector, and it appears that this is the degree issued to the Beneficiary. [redacted] http://www. [redacted] (last visited August 23, 2017).

[10] The [redacted] consists of four departments: agricultural machinery; general agriculture; ecology and environment; and foreign languages. [redacted] http://www [redacted] (last visited August 23, 2017).

mechanical engineering department and in a different field of study, which conflicts with the evaluations submitted by the Petitioner.[11]

USCIS may, in its discretion, use as advisory opinions statements submitted as expert testimony. However, where an opinion is not in accord with other information or is in any way questionable, USCIS is not required to accept or may give less weight to that evidence. *Matter of Caron International*, 19 I&N Dec. 791 (Comm'r 1988). *See also Matter of D-R-*, 25 I&N Dec. 445 (BIA 2011) (expert witness testimony may be given different weight depending on the extent of the expert's qualifications or the relevance, reliability, and probative value of the testimony); *Viraj, LLC v. U.S. Att'y Gen.*, 2014 WL 4178338 *4 (11th Cir. 2014) (the AAO is entitled to give letters from professors and academic credentials evaluations less weight when they differ from the information provided in EDGE).

The evidence in the record is insufficient to establish that the Beneficiary's master's degree in agricultural mechanization is the foreign equivalent of a U.S. bachelor's degree in mechanical engineering. Thus, the Petitioner has not established that the Beneficiary is qualified for the offered position.

II. CONCLUSION

The record does not establish the Petitioner's continuing ability to pay the proffered wage. The record also does not establish that the Beneficiary has a degree in the field of study required by the labor certification. Accordingly, the Beneficiary is not qualified for the offered position.

ORDER: The appeal is dismissed.

Cite as *Matter of O-I-G-*, ID# 457664 (AAO Aug. 24, 2017)

[11] On appeal, the Petitioner submits a Wikipedia listing of subspecialties in mechanical engineering. Agricultural automation is not listed as a subspecialty.