U.S. Citizenship and Immigration Services

Non-Precedent Decision of the Administrative Appeals Office

MATTER OF M.S.I-, INC.

DATE: FEB. 7, 2017

APPEAL OF TEXAS SERVICE CENTER DECISION

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

The Petitioner, a convenience store, seeks to employ the Beneficiary as a manager and requests classification 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 2 years of training or experience.

The petition was initially approved. Subsequently, the Director, Texas Service Center, issued the Petitioner a notice of intent to revoke the approval of the petition (NOIR) on August 4, 2015. On November 24, 2015, the Director issued a notice of revocation revoking the approval of the petition, and concluding that the Petitioner had not established its continuing ability to pay the proffered wage to the Beneficiary as of the 2001 priority date onward. The Director also noted other Forms I-140, Immigrant Petitions for Alien Workers, filed by the Petitioner and stated that "USCIS cannot consider the petitioner's ability to pay a single beneficiary by itself when the petitioner has filed multiple immigrant visa petitions."

The matter is now before us on appeal. On appeal, the Petitioner submits a copy of its response to the NOIR and states that the Director did not review the tax returns from 2001 to 2005. The Petitioner states that this evidence demonstrates that it has the ability to pay the proffered wage to the Beneficiary and its other sponsored workers.

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

I. LAW AND ANALYSIS

A. The Employment-Based Immigration Process

Employment-based immigration is generally a three-step process. First, an employer must obtain 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). By approving a labor certification application, the DOL certifies that there are insufficient U.S. workers who are able, willing, qualified, and available for an offered position. *See* section 212(a)(5)(A)(i)(I) of the Act. The DOL also certifies that the employment

of 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)(II) of the Act. Next, USCIS must approve an immigrant visa petition. *See* section 204 of the Act. Finally, a foreign national must 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.

In these visa petition proceedings, USCIS determines whether a foreign national meets the job requirements specified on a labor certification and the requirements of the requested immigrant classification. *See* section 204(b) of the Act (stating that USCIS must approve a petition if the facts stated in it are true and the foreign national is eligible for the requested preference classification); *see also, e.g., Tongatapu Woodcraft Haw., Ltd. v. Feldman,* 736 F. 2d 1305, 1309 (9th Cir. 1984); *Madany v. Smith*, 696 F.2d 1008, 1012-13 (D.C. Cir. 1983) (both holding that USCIS has authority to make preference classification decisions).

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 is used to calculate when the beneficiary of the visa petition is eligible to adjust his or her status to that of a lawful permanent resident. *See* 8 C.F.R. § 245.1(g). A petitioner must establish the elements for the approval of the petition at the time the priority date is established and continuing until the beneficiary obtains lawful permanent residence. *See* 8 C.F.R. §§ 204.5(g)(2), 103.2(b)(l), (12); *see also Matter of Wing's Tea House,* 16 I&N Dec. 158, 159 (Acting Reg'l Comm'r 1977); *Matter of Katigbak,* 14 I&N Dec. 45, 49 (Reg'l Comm'r 1971). The priority date in this case is April 30, 2001.

B. The Notice of Intent to Revoke

After granting a petition, USCIS may revoke the petition's approval "at any time" for "good and sufficient cause." Section 205 of the Act, 8 U.S.C. § 1155. If supported by the record, a director's realization that a petition was erroneously approved may justify revocation. *Matter of Ho*, 19 I&N Dec. 582, 590 (BIA 1988).

Good and sufficient cause exists to issue a notice of intent to revoke where the record at the time of the notice's issuance, if unexplained or unrebutted, would have warranted the petition's denial. *Matter of Estime*, 19 I&N Dec. 450, 451 (BIA 1987). Similarly, revocation is proper if the record at the time of the decision, including any explanation or rebuttal evidence provided by a petitioner, warranted a petition's denial. *Id.* at 452.

In the instant case, good and sufficient cause supported the Director's issuance of the NOIR. The Director indicated that the record did not contain regulatory evidence of the Petitioner's continuing ability to pay the proffered wage in all relevant years, and that it did not contain evidence of the Petitioner's ability to pay the proffered wages of the beneficiaries of all of its pending petitions.[1]

[1] The Director also stated that the Petitioner failed to establish that it made a bona fide job offer to the Beneficiary, and that it was not clear if the job offer was valid.

If unexplained or unrebutted, the record at the time of the NOIR's issuance would have warranted the petition's denial, as it did not establish the Petitioner's continuing ability to pay the proffered wage from the priority date. The Director therefore properly issued the NOIR.

C. 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 as stated on the labor certification is $3500 per month ($42,000 per year).

According to USCIS records, the Petitioner has filed Form I-140 petitions on behalf of three other beneficiaries, two of whom had petitions filed on their behalf in 2003 and 2004 with priority dates in April 2001. The Director noted that the Petitioner must establish that it has had the continuing ability to pay the combined proffered wages to each beneficiary from the priority date of the instant petition. *See Matter of Great Wall*, 16 I&N Dec. 142, 144-145 (Acting Reg'l Comm'r 1977); 8 C.F.R. § 204.5(g)(2). The Petitioner must demonstrate its ability to pay the combined proffered wages from the instant petition's priority date until the other beneficiaries obtain lawful permanent residence, or until their petitions are denied, withdrawn, or revoked. *See Patel v. Johnson*, 2 F. Supp. 3d 108, 124 (D. Mass. 2014) (affirming our denial of a petition where a petitioner did not demonstrate its ability to pay multiple beneficiaries).

In response to the Director's NOIR, the Petitioner demonstrated that it must pay the following proffered wages, as indicated in the table below:

Receipt number		Proffered wage
	(the Beneficiary)	$42,000
		$36,700
		$36,600

Therefore, the Petitioner must demonstrate it had the ability to pay combined annual proffered wages of $115,300 starting in 2001.

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.[4]

In this case, the Petitioner has not established that it employed and paid the Beneficiary or its other sponsored workers their full proffered wages from their respective priority dates onward.

The Petitioner's tax returns indicate that it is structured as an S corporation.[5] The Petitioner's tax returns demonstrate its net income for 2001 through 2005, as shown in the table below.

- In 2001, the Form 1120S stated net income of $28,233.00.
- In 2002, the Form 1120S stated net income of $57,901.00.[6]

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[2] This petition was approved on March 8, 2005, but a notice of intent to revoke the approval of the petition was issued on September 26, 2016.

[3] This petition was denied on June 29, 2009.

[4] 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).

[5] Where an S corporation's income is exclusively from a trade or business, USCIS considers net income to be the figure for ordinary income, shown on line 21 of page 1 of a petitioner's IRS Form 1120S, U.S. Income Tax Return for an S Corporation. However, where an S corporation 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, credits, deductions or other adjustments, net income is found on line 23 for 2001 to 2003, and line 17e for 2004 to 2005. *See* Instructions for Form 1120S, at http://www.irs.gov/pub/irs-pdf/i1120s.pdf (last visited Feb. 3, 2017) (indicating that Schedule K is a summary schedule of all shareholders' shares of the corporation's income, deductions, credits, etc.).

[6] The Petitioner states that it bifurcated its operations between itself and for tax purposes in 2002 and 2003, but does not explain how the bifurcation occurred. We note that the tax returns for the two entities state different federal employer identification numbers, but list the same address. The Petitioner's shareholder indicates in an affidavit dated September 17, 2009, that the Petitioner owned "the property" and operated the

- In 2003, the Form 1120S stated net income of $57,145.00.
- In 2004, the Form 1120S stated net income of $77,336.00.
- In 2005, the Form 1120S stated net income of $80,616.00.

Therefore, for the years 2001 through 2005, the Petitioner did not have sufficient net income to pay the combined proffered wages of the Beneficiary and the Petitioner's other sponsored workers, which as stated above equates to a total of $115,300 each year.

As an alternate means of determining the petitioner's ability to pay the proffered wage, USCIS may review the petitioner's net current assets. Net current assets are the difference between the petitioner's current assets and current liabilities.[7] 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, a petitioner is expected to be able to pay the proffered wage using those net current assets. The Petitioner's tax returns demonstrate its end-of-year net current assets for 2001 through 2005, as shown in the table below.

- In 2001, the Form 1120S stated net current assets of $39,387.00.
- In 2002, the Form 1120S stated net current assets of $17,198.00.
- In 2003, the Form 1120S stated net current assets of $102,190.00.[8]
- In 2004, the Form 1120S stated net current assets of $73,486.00.
- In 2005, the Form 1120S stated net current assets of $130,127.00.

Therefore, for the years 2001 through 2004, the Petitioner did not have sufficient net current assets to pay the combined proffered wages to the Beneficiary and its other sponsored workers. The Petitioner did have sufficient net current assets to pay these combined wages of $115,300 in 2005.

Thus, from the date the labor certification was accepted for processing by DOL, the Petitioner has not established that it had the continuing ability to pay the Beneficiary and the Petitioner's other

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retail/convenience store. The job offer in this case relates to management of a retail store. A labor certification is only valid for the particular job opportunity stated on the application form. 20 C.F.R. § 656.30(c). Thus, if the Petitioner did not operate the retail store in 2002 and 2003, then the job offer was no longer valid unless the Petitioner can establish that [redacted] was its successor-in-interest. Even if we were to take this bifurcation into account, the tax returns for [redacted] do not state higher amounts of net income than indicated on the Petitioner's tax returns for these years. Therefore, for 2002 and 2003, this would not change our analysis of the Petitioner's ability to pay the proffered wages at issue.

[7] According to *Barron's Dictionary of Accounting Terms* 117 (3rd 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.

[8] As stated above, the Petitioner indicates that it bifurcated its operations between itself and [redacted] for 2002 and 2003. Even if we were to take this into account, the tax returns for [redacted] do not state sufficient amounts of net current assets to change our analysis for 2002 and do not state any amount of net current assets for 2003.

sponsored workers their proffered wages as of the priority date through an examination of wages paid or its net income or net current assets.

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 (Reg'l Comm'r 1967). 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.

In this case, the Petitioner was established in 1999. The Petitioner's tax return for 2002 did not state any amount of gross receipts for 2002. While this may have been due in part to the bifurcation of operations between the Petitioner and the Petitioner did not establish that the job offer was for a full-time, bona fide job due to the lack of gross receipts in 2002. Further, the Petitioner's tax returns for 2001, 2002, and 2003 did not state any amounts of wages paid. While the Petitioner did have modest increases in net income from 2001 through 2005, these were not sufficient to pay the combined proffered wages of the Beneficiary and the Petitioner's other sponsored workers from 2001 through 2004. The record does not contain sufficient evidence that establishes the Petitioner's historical growth or reputation in the industry. The Petitioner has not demonstrated that its tax returns paint an inaccurate picture of its financial status. Therefore, the Petitioner has not established its ability to pay the proffered wages to the Beneficiary and the other sponsored workers based on the totality of the circumstances.

D. AC21

We note that the Petitioner indicated that the Beneficiary sought to "port" under the American Competitiveness in the Twenty-First Century Act of 2000 (AC21)[9] to another employer, in February 2005, and then he sought to "port" to another employer, in September 2008. However, the Beneficiary is not eligible to port to another employer under the terms of AC21.[10]

The Beneficiary in this case filed his Form I-485, Application to Register Permanent Residence or Adjust Status, concurrently with the Form I-140 on November 19, 2003. The Form I-485 was denied on February 17, 2016, following the revocation of the approval of the Form I-140 on the Beneficiary's behalf. AC21 allows an application for adjustment of status to be approved despite the fact that the initial job offer is no longer valid. Codified at section 204(j) of the Act, 8 U.S.C. § 1154(j), the provision reads:

[9] Pub. L. No. 106-313, 114 Stat. 1251, codified in relevant part within the Act at section 204(j), 8 U.S.C. § 1154(j).
[10] In *Matter of Al Wazzan*, 25 I&N Dec. 359 (AAO 2010), we determined that the petition must have been valid to begin with if it is to remain valid with respect to a new job.

JOB FLEXIBILITY FOR LONG DELAYED APPLICANTS FOR ADJUSTMENT OF STATUS TO PERMANENT RESIDENCE

> A [employment-based] petition for an individual whose application for adjustment of status pursuant to section 245 has been filed and remained unadjudicated for 180 days or more shall remain valid with respect to a new job if the individual changes jobs or employers if the new job is in the same or a similar occupational classification as the job for which the petition was filed.

A plain reading of the phrase "shall remain valid" suggests that the Form I-140 petition must be valid *prior* to any consideration of whether or not the adjustment application was pending more than 180 days and/or the new position is same or similar. In other words, it is not possible for a petition to remain valid if it is not valid currently. We would not consider a petition wherein the initial petitioner has not demonstrated its eligibility to be a valid petition for purposes of AC21. This position is supported by the fact that when AC21 was enacted, USCIS regulations required that the underlying Form I-140 was approved prior to the beneficiary filing for adjustment of status. Thus, when AC21 was enacted, the only time that an application for adjustment of status could have been pending for 180 days was when it was filed based on an approved immigrant petition.[11] The only possible meaning for the term "remain valid" was that the underlying petition was approved and would not be invalidated by the fact that the job offer was no longer a valid offer. *See Matter of Al Wazzan*, 25 I&N Dec. 359 (AAO 2010).

In this case, the initial Form I-140 petition is not approvable because the Petitioner did not establish its ability to pay the proffered wage as of the priority date. Therefore, the Beneficiary is not eligible to port to another employer under AC21.

II. CONCLUSION

The record at the time of the revocation of the petition's approval did not establish that the Petitioner had the continuing ability to pay the proffered wage to the Beneficiary and its other sponsored workers.

In visa petition proceedings, it is the petitioner's burden to establish eligibility for the immigration benefit sought. Section 291 of the Act, 8 U.S.C. § 1361; *Matter of Otiende*, 26 I&N Dec. 127, 128 (BIA 2013). Here, that burden has not been met.

[11] After the enactment of AC21, USCIS altered its regulations to provide for the concurrent filing of immigrant visa petitions and applications for adjustment of status. This created a possible scenario wherein after an adjustment application had been pending for 180 days, the applicant could receive and accept a job offer from a new employer, potentially rendering him or her eligible for AC21 portability, prior to the adjudication of his or her underlying employment-based visa petition.

ORDER: The appeal is dismissed.

Cite as *Matter of M.S.I-, Inc.*, ID# 78339 (AAO Feb. 7, 2017)