U.S. Citizenship and Immigration Services

Non-Precedent Decision of the Administrative Appeals Office

MATTER OF S-I-, INC.

DATE: FEB. 23, 2017

APPEAL OF TEXAS SERVICE CENTER DECISION

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

The Petitioner, a restaurant operations business, seeks to employ the Beneficiary as a market and branding analyst. 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, Texas Service Center, denied the petition, concluding that the Petitioner had not established its continuing ability to pay the proffered wage from the priority date. The matter is now before us on appeal. The Petitioner submits a brief and asserts that it has established its ability to pay the proffered wage.

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

I. LAW AND ANALYSIS

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). As required by statute, an ETA Form 9089, Application for Permanent Employment Certification (labor certification), approved by the DOL, accompanies this petition. Next, U.S. Citizenship and Immigration Services (USCIS) must approve an immigrant visa petition. *See* section 204 of the Act, 8 U.S.C. § 1154. Finally, the 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.

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). 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). Here, the priority date is October 30, 2015.

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 $71,300 per year. The issue in this case is whether the Petitioner has demonstrated its ability to pay the proffered wage as of the October 30, 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.[1]

In this case, the Petitioner submitted a copy of the Beneficiary's last paystub for 2015 and his 2015 IRS Form W-2, Wage and Tax Statement, demonstrating that it paid the Beneficiary $62,400 in gross pay that year. The amounts paid to the Beneficiary in 2015 do not equal or exceed the annual proffered wage of $71,300. 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 was $8900 in 2015.

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[1] 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).

The record indicates that the Petitioner is structured as an S corporation. The Petitioner's 2015 federal income tax return reflects an annual net loss[2] of $45,635. Therefore, for the year 2015, the Petitioner did not have sufficient net income to pay the difference between the wages paid to the Beneficiary and the proffered wage.

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.[3] 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's 2015 tax return demonstrates end-of-year net current liabilities of $18,543. Therefore, for the year 2015, the Petitioner did not have sufficient net current assets to pay the difference between the wages paid to the Beneficiary and the proffered wage.

On appeal, the Petitioner asserts that it is currently paying the Beneficiary the proffered wage and that, pursuant to a memorandum dated May 4, 2004, from William R. Yates, Associate Director of Operations, USCIS, regarding the determination of ability to pay, it has established its continuing ability to pay the proffered wage beginning on the priority date. *See* Memorandum from William R. Yates, Associate Director for Operations, USCIS, HQOPRD 90/16.45, *Determination of Ability to Pay under 8 CFR 204.5(g)(2)* 2 (May 4, 2004), http://www.uscis.gov/laws/policy-memoranda. The Petitioner urges us to consider the wage rate it paid in 2016 as satisfying the ability to pay requirement.

The Yates Memorandum provides guidance to adjudicators to review a record of proceedings and make a positive determination of a petitioner's ability to pay if, in the context of the beneficiary's employment, "[t]he record contains credible verifiable evidence that the petitioner not only is employing the beneficiary but also has paid or currently is paying the proffered wage." The regulation at 8 C.F.R. § 204.5(g)(2) requires that a petitioner demonstrate its *continuing* ability to pay the proffered wage beginning on the priority date. Thus, in this case, the Petitioner must show

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[2] 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 one 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 18 of Schedule K. *See* Internal Revenue Serv., Instructions to Form 1120S, 22, at https://www.irs.gov/pub/irs-pdf/i1120s.pdf (last visited Feb. 13, 2017). Here, the net loss is shown on line 21 of page one of the Petitioner's IRS Form 1120S.

[3] According to *Barron's Dictionary of Accounting Terms* 117 (3d ed. 2000), "current assets" consist of items having (in most cases) a life of 1 year or less, such as cash, marketable securities, inventory and prepaid expenses. "Current liabilities" are obligations payable (in most cases) within 1 year, such accounts payable, short-term notes payable, and accrued expenses (such as taxes and salaries). *Id.* at 118.

its ability to pay the proffered wage not only in 2016, when the Petitioner claims it actually began paying the proffered wage rate, but it must also show its ability to pay the proffered wage in 2015.

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. *Sonegawa*, 12 I&N Dec. at 612. 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.[4]

In this case, the record indicates that the Petitioner was incorporated in September 2011, less than 5 years prior to filing the petition in this case. Unlike in *Sonegawa*, the record does not indicate the Petitioner's historical growth since its incorporation in 2011, 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.

On the petition, the Petitioner claimed to employ 11 employees.[5] On appeal, the Petitioner asserts that it paid $264,839 in employee wages in 2015.[6] However, the Petitioner's 2015 IRS Form 1120S shows that it paid no salaries or wages (page 1, line 8) and that it paid only $128,350 in costs of labor (IRS Form 1125-A, Costs of Goods Sold, line 3). The Petitioner asserts that its salaries and wages are reflected in costs of goods sold, but not all of its claimed wages are represented in the costs of labor category. It is unclear where the remaining claimed wages are located on its 2015 federal tax return. We also note that the address for the Petitioner listed on its federal tax returns is a residential address that differs from the Petitioner's address listed on the labor certification and Form I-140, Immigrant Petition for Alien Worker. Unresolved inconsistencies may lead us to reevaluate the reliability and sufficiency of other evidence submitted in support of the requested immigration benefit. *Matter of Ho*, 19 I&N Dec. 582, 591-592 (BIA 1988).

On appeal, the Petitioner asserts that it has a reasonable expectation of profits. However, against the projection of future earnings, *Great Wall*, 16 I&N Dec. at 144-145, states:

> I do not feel, nor do I believe the Congress intended, that the petitioner, who admittedly could not pay the offered wage at the time the petition was filed, should subsequently become eligible to have the petition approved under a new set of facts hinged upon probability and projections, even beyond the information presented on appeal.

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[4] On appeal, the Petitioner refers to several decisions issued by us, but does not provide their published citations. While 8 C.F.R. § 103.3(c) provides that precedent decisions of USCIS are binding on all its employees in the administration of the Act, unpublished decisions are not similarly binding. Precedent decisions must be designated and published in bound volumes or as interim decisions. 8 C.F.R. § 103.9(a).

[5] Employment of 11 employees does not indicate that it is a business of considerable magnitude.

[6] The Petitioner's IRS Forms 941, Employer's Quarterly Federal Tax Returns, for 2015 show that it paid $264,880.73 in wages in 2015.

The Petitioner also asserts that it is part of a group of companies engaged in the operation of four restaurants and one location at [redacted] in Florida. It states that it is the management company for the other entities in the group, for which it charges a "royalty fee," and that the net profit for the group of entities in 2015 was $285,948.[7] However, because a corporation is a separate and distinct legal entity from its shareholders, the income and assets of its shareholders or of other entities cannot be considered in determining the petitioning corporation's ability to pay the proffered wage. *See Matter of Aphrodite Invs., 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." Even if we consider the group's total purported net income in 2015, the total does not indicate that it is a business of considerable magnitude.

Further, the Petitioner asserts that it is a personal service corporation and that this is a factor to be considered in the determination of its ability to pay the proffered wage. A personal service corporation is a corporation where the employee-owners are primarily engaged in the performance of personal services. The Internal Revenue Code (IRC) defines "personal services" as services performed in the fields of health, law, engineering, architecture, accounting, actuarial science, performing arts, and consulting. 26 U.S.C. § 448(d)(2). The Petitioner in this case indicated that it is in the restaurant business and, therefore, it does not appear to be a personal service corporation as that term is defined by the IRC.

The Petitioner also asserts that it is "permissible to look at the owner-employee's salaries as evidence of ability to pay the proffered wage." The Petitioner's 2015 federal tax return indicates that it has two shareholders: [redacted] who owns 70% of corporation's stock, and [redacted] who owns 30% of the corporation's stock. [redacted] received $39,000 in officer compensation in 2015, and [redacted] received $26,000 in officer compensation in 2015. However, neither shareholder has personally indicated a willingness to forgo a portion of his or her officer compensation to pay the difference between the proffered wage and the wages paid to the Beneficiary, and neither shareholder has shown an ability to forgo that income.

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.

II. CONCLUSION

[7] The record contains no management agreement(s) supporting the Petitioner's claims regarding payment of royalty fees from other entities.

The Petitioner has not established its continuing ability to pay the proffered wage from the priority date onwards. The Director's decision denying the petition is affirmed.

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. Here, the Petitioner did not meet that burden.

ORDER: The appeal is dismissed.

Cite as *Matter of S-I-, Inc.*, ID# 287282 (AAO Feb. 23, 2017).