U.S. Citizenship and Immigration Services

Non-Precedent Decision of the Administrative Appeals Office

In Re: 10729245

Date: JUL. 8, 2021

Appeal of Texas Service Center Decision

Form I-140, Immigrant Petition for Professional

The Petitioner seeks to employ the Beneficiary as a programmer analyst. It requests classification of the Beneficiary under the third-preference, immigrant classification for professional workers. Immigration and Nationality Act (the Act) section 203(b)(3)(A)(ii), 8 U.S.C. § 1153(b)(3)(A)(ii). This employment-based, "EB-3" category allows a U.S. employer to sponsor a professional with a baccalaureate degree for lawful permanent resident status.

After the filing's initial grant, the Director of the Texas Service Center revoked the petition's approval. The Director concluded that the Petitioner did not provide regulatory prescribed evidence of its ability to pay the offered wage as stated in the labor certification. The Beneficiary filed a subsequent motion to reopen that was dismissed. The matter is now before us on the Petitioner's appeal.

In these proceedings, it is the Petitioner's or Applicant's burden to establish eligibility for the requested benefit by a preponderance of the evidence. Section 291 of the Act, 8 U.S.C. § 1361; *Matter of Chawathe*, 25 I&N Dec. 369, 375 (AAO 2010). The AAO reviews the questions in this matter *de novo*. *See Matter of Christo's Inc.*, 26 I&N Dec. 537, 537 n.2 (AAO 2015). Upon *de novo* review, we will remand the case for further consideration of the Petitioner's ability to pay the proffered wage and the issuance of a new decision on this issue.

I. EMPLOYMENT-BASED IMMIGRATION

Employment-based immigration generally follows a three-step process. To permanently fill a position in the United States with a foreign worker, a prospective employer must first obtain certification from the U.S. Department of Labor (DOL). *See* section 212(a)(5) of the Act, 8 U.S.C. § 1182(a)(5). DOL approval signifies that insufficient U.S. workers are able, willing, qualified, and available for a position. *Id*. Labor certification also indicates that the employment of a foreign national will not harm wages and working conditions of U.S. workers with similar jobs. *Id*.

If DOL approves a position, an employer must next submit the certified labor application with an immigrant visa petition to U.S. Citizenship and Immigration Services (USCIS). *See* section 204 of the Act, 8 U.S.C. § 1154. Among other things, USCIS considers whether a beneficiary meets the requirements of a certified position and a requested immigrant visa classification. If USCIS approves

the petition, a foreign national may finally 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.

Section 205 of the Act, 8 U.S.C. § 1155, provides that the Secretary of Homeland Security may "for good and sufficient cause, revoke the approval of any petition." By regulation this revocation authority is delegated to any USCIS officer who is authorized to approve an immigrant visa petition "when the necessity for the revocation comes to the attention of [USCIS]." 8 C.F.R. § 205.2(a). USCIS must give the petitioner notice of its intent to revoke the prior approval of the petition and the opportunity to submit evidence in opposition thereto, before proceeding with written notice of revocation. *See* 8 C.F.R. § 205.2(b) and (c). A notice of intent to revoke (NOIR) "is not properly issued unless there is 'good and sufficient cause' and the notice includes a specific statement not only of the facts underlying the proposed action, but also of the supporting evidence." *Matter of Estime*, 19 I&N Dec. 450, 451 (BIA 1987). Per *Matter of Estime*, "[i]n determining what is 'good and sufficient cause' for the issuance of a notice of intention to revoke, we ask whether the evidence of record at the time the notice was issued, if unexplained and unrebutted, would have warranted a denial based on the petitioner's failure to meet his or her burden of proof." *Id.*

II. THE BENEFICIARY AS AN AFFECTED PARTY

Beneficiaries generally cannot file appeals or motions in visa petition proceedings. *See* 8 C.F.R. § 103.3(a)(1)(iii)(B) (excluding a beneficiary of a visa petition as an "affected party"). USCIS, however, treats beneficiaries as affected parties if they are eligible to "port" under section 204(j) of the Act, 8 U.S.C. § 1154(j), and properly request to do so. *See Matter of V-S-G- Inc.*, Adopted Decision 2017-06, *14 (AAO Nov. 11, 2017). "A beneficiary's request to port is 'proper' when USCIS has evaluated the request and determined that the beneficiary is indeed eligible to port prior to the issuance of a NOIR [notice of intent to revoke] or NOR [notice of revocation]." USCIS Policy Memorandum PM 602-0152, *Guidance on Notice to, and Standing for, AC 21 Beneficiaries about I-140 Approvals Being Revoked After Matter of V-S-G- Inc.* 5 (Nov. 11, 2017), https://www.uscis.gov/legal-resources/policy-memoranda (last visited October 22, 2020). Thus, a beneficiary becomes an "affected party" with legal standing in a revocation proceeding when USCIS makes a favorable determination that the beneficiary is eligible to port. *Id.*

In this case, the Beneficiary filed Form I-485 Supplement J, Request for Job Portability Under INA Section 204(j), which was approved on June 25, 2019. The Director's NOIR is dated October 7, 2019 and was issued to both the Petitioner and the Beneficiary. The Director's decision states, "The beneficiary was found to be eligible to receive notices and, therefore, was granted the opportunity to respond in revocation proceedings … in accordance with the findings in the adopted decision in *Matter of V-S-G-, Inc.* …" Therefore, the Beneficiary is considered in affected party in these revocation proceedings.

III. ABILITY TO PAY THE PROFFERED WAGE

To be eligible for the classification it requests for the beneficiary, a petitioner must establish that it has the ability to pay the proffered wage stated in the labor certification.

As provided in the regulation at 8 C.F.R. § 204.5(g)(2):

> 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. In a case where the prospective United States employer employs 100 or more workers, the director may accept a statement from a financial officer of the organization which establishes the prospective employer's ability to pay the proffered wage. In appropriate cases, additional evidence, such as profit/loss statements, bank account records, or personnel records, may be submitted by the petitioner or requested by [USCIS].

As indicated in the above regulation, the Petitioner must establish its continuing ability to pay the proffered wage from the priority date of the petition onward.[1] The priority date in this case is June 26, 2009. The labor certification states that the wage offered for the job of programmer analyst is $32.16 per hour ($66,892.80 based on a 40-hour work week).

In determining a petitioner's ability to pay the proffered wage, USCIS first examines whether the beneficiary was employed and paid by the petitioner during the period following the priority date. A petitioner's submission of documentary evidence that it employed the beneficiary at a salary equal to or greater than the proffered wage for the time period in question, when accompanied by a form of evidence required in the regulation at 8 C.F.R. § 204.5(g)(2), may be considered proof of the petitioner's ability to pay the proffered wage.

Absent evidence that the Petitioner has paid the Beneficiary a salary equal to or above the proffered wage from the priority date onward, USCIS will generally examine the net income and net current assets figures recorded on the petitioner's federal income tax return(s), annual report(s), or audited financial statements(s). If either of these figures, net income or net current assets, equals or exceeds the proffered wage, or the difference between the proffered wage and the amount paid to the beneficiary in a given year, the petitioner would ordinarily be considered able to pay the proffered wage during that year.

With the initial filing of the petition on August 25, 2010, the Petitioner submitted the Beneficiary's 2009 Internal Revenue Service (IRS) Form W-2, Wage and Tax Statements, and pay stubs it issued to the Beneficiary in 2009 and 2010. The Petitioner also submitted its unaudited 2009 compiled balance sheet[2] and the Petitioner's president's 2009 IRS Form 1040, U.S. Individual Income Tax Return, the most recent return available at the time of filing.[3]

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[1] The "priority date" of a petition is the date the underlying labor certification is filed with the DOL. *See* 8 C.F.R. § 204.5(d). The Petitioner must establish that all eligibility requirements for the petition have been satisfied as of the priority date.

[2] The regulation at 8 C.F.R. § 204.5(g)(2) makes clear that where a petitioner relies on financial statements to demonstrate its ability to pay the proffered wage, those financial statements must be audited. 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.

[3] In this case the record indicates that the Petitioner is a single member LLC (limited liability company) wholly owned by its president. An LLC may be classified for federal income tax purposes as if it were a sole proprietorship, a partnership,

In issuing the NOIR, the Director determined that the record did not include regulatory prescribed evidence of the Petitioner's ability to pay the proffered wage. However, the NOIR addresses only the Petitioner's unaudited balance sheet and makes no mention of the Petitioner's president's 2009 tax return (evidence prescribed in 8 C.F.R. § 204.5(g)(2)), or the evidence of wages the Petitioner paid the Beneficiary.

Therefore, we will withdraw the Director's decision. However, based on the current record, the Petitioner has not established eligibility for the benefit sought and we will remand the matter to the Director for further consideration.

In this case the record indicates that the Beneficiary was employed by the Petitioner from June 15, 2008 to June 1, 2011. The record includes Forms W-2 and monthly pay stubs demonstrating that the Petitioner paid the Beneficiary as follows:

	Annual Wage on W2	Hourly Wage on Pay Stub	Remaining Wages
2009	$54,514.13	$40.87 December 1, 2008 to August 31, 2009	$12,378.67
2010	$46,383.28	$33.00 April 1, 2010 to June 30, 2010	$20,509.52
2011	$28,493.44	$33.76 December 1, 2010 to May 31, 2011	$38,399.36

Although the Petitioner appears to have paid the Beneficiary above the hourly proffered wage for some periods, the record does not include the Beneficiary's pay stubs for the entire period of employment from the priority date[4] or demonstrate that the Petitioner paid the full annual wage in any year. Accordingly, the Petitioner has not established its continuing ability to pay the proffered wage based on wages paid to the Beneficiary from the priority date onward.

As in this case, if an LLC elects to be treated as a sole proprietorship, a business in which one person operates the business in his or her personal capacity, it does not exist as an entity apart from the individual owner for tax purposes. *See Matter of United Investment Group*, 19 I&N Dec. 248, 250 (Comm'r 1984). Accordingly, the sole proprietor's adjusted gross income, assets, and personal liabilities are also considered as part of the LLC's ability to pay a proffered wage. Sole proprietors report income and expenses from their businesses on their individual federal income tax return (Form 1040) each year. The business-related income and expenses are reported on Schedule C and are carried forward to the first page of the tax return. Sole proprietors must show that they can cover their existing business expenses as well as pay the proffered wage out of their adjusted gross income or other available funds. In addition, sole proprietors must show that they can sustain themselves and their

or a corporation. If the LLC has only one owner it will automatically be treated as a sole proprietorship by the IRS unless an election is made to be treated as a corporation. If a single-owner LLC does not elect its classification, a default classification of disregarded entity (taxed as if it were a sole proprietorship) will apply. *See* 26 C.F.R. § 301.7701-3. The election is made using IRS Form 8832, Entity Classification Election. The Petitioner here states that it is a disregarded entity for tax purposes.

[4] The record does not include the Beneficiary's pay stubs from September 1, 2009 to March 30, 2010, and from July 1, 2010 to November 30, 2010. Although the record includes correspondence between the Beneficiary and the Petitioner's president granting a leave of absence from September 2009 to an unspecified date, the correspondence does not indicate whether this leave was unpaid. Further, the record does not explain the absence of pay stubs in later 2010.

dependents. *See Ubeda v. Palmer*, 539 F. Supp. 647 (N.D. Ill. 1982), *aff'd*, 703 F.2d 571 (7th Cir. 1983).

Here, the record includes the LLC owner's complete federal income tax return for 2009, 2010 and 2012. The Petitioner asserts that its 2011 tax return was lost and is no longer available. The Petitioner does not explain what steps, if any, it has taken to request a transcript of its 2011 tax return from the IRS. *See* Internal Revenue Service, Get Transcript FAQs, https://www.irs.gov/individuals/get-transcript-faqs.

Schedule C of the Petitioner's president's IRS Form 1040, U.S. Individual Income Tax Return, lists net income below the balance of wages still owed to the Beneficiary in 2009.

On appeal, counsel for the Beneficiary asserts that the taxable income[5] shown on the Petitioner's president's tax returns in 2009 and 2010 is sufficient to establish its ability to pay the proffered wage. As noted above, in determining an LLC's ability to pay the proffered wage, we will consider the sole proprietor's adjusted gross income, assets, and personal liabilities. The Petitioner's president's adjusted gross income was greater than the balance of wages still owed to the Beneficiary in 2009 and 2010.

Although the adjusted gross income is above the difference between the proffered wage and wages already paid to the Beneficiary in each year, the record lacks evidence required in the case of a sole proprietor that in any year the Petitioner's president could sustain himself and his dependents with this amount paid out of his adjusted gross income. Therefore, the record does not establish that the Petitioner had the ability to pay the proffered wage based on adjusted gross income, or combined wages and adjusted gross income in each year. The record also does not contain the Petitioner's 2011 federal tax return as evidence for 2011. Therefore, nothing establishes that the Petitioner could pay the difference between the wages paid and the proffered wage in 2011.

Additionally, we note that where a petitioner has filed I-140 petitions for multiple beneficiaries, it must demonstrate that its job offer to each beneficiary is realistic, and that it has the ability to pay the proffered wage to each beneficiary. *See Patel v. Johnson*, 2 F.Supp.3d 108, 124 (D. Mass. 2014) (affirming our revocation of a petition's approval where, as of the filing's grant, a petitioner did not demonstrate its ability to pay the combined proffered wages of multiple petitions). USCIS records show that the Petitioner has filed a number of additional Form I-140 petitions for other beneficiaries in 2010 and 2011. Thus, the Petitioner must establish its ability to pay this Beneficiary as well as the beneficiaries of the other Form I-140 petitions that were pending or approved as of, or filed after, the priority date of the current petition. These additional petitions might impact whether the Petitioner's President had sufficient adjusted gross income to pay the wages of all the Petitioner's sponsored workers, if the additional workers were not paid their respective full proffered wages.

In his decision, the Director did not discuss the totality of the Petitioner's circumstances, including the overall magnitude of its business activities, in determining the Petitioner's ability to pay the proffered

[5] Line 43 of IRS Form 1040 indicates that taxable income is adjusted gross income minus any itemized deductions and exemptions.

wage. *See Matter of Sonegawa,* 12 I&N Dec. 612 (Reg'l Comm'r 1967).[6] The record includes the Petitioner's business bank account statements for four different months in 2017 to 2019, and the Petitioner's IRS Form 940, Employer's Annual Federal Unemployment Tax Return, for 2009 through 2018, demonstrating its payment of wages to employees in each year. While this evidence does not fall under the regulatory prescribed evidence in 8 C.F.R. § 204.5(g)(2), this evidence may be considered generally in evaluating the Petitioner's totality of the circumstances related to its continuing ability to pay the proffered wage.

In view of these evidentiary deficiencies, we will remand this matter for further consideration. The Director, at his discretion, may issue a new NOIR to both the Petitioner and the Beneficiary to request any other documentation deemed relevant in determining the Petitioner's ability to pay the proffered wage. The Petitioner may also submit materials in support of the factors discussed in *Matter of Sonegawa*, 12 I&N Dec. 612, at 614-15, which allows the Director to consider the totality of the circumstances affecting the Petitioner's ability to pay the proffered wage.

IV. CONCLUSION

We will remand this case to the Director for further consideration of the Petitioner's ability to pay the proffered wage from the priority date onward pursuant to 8 C.F.R. § 204.5(g)(2).

ORDER: The Director's decision is withdrawn. The matter is remanded for the entry of a new decision consistent with the foregoing analysis.

[6] USCIS may, at its discretion, consider evidence relevant to the petitioner's financial ability that falls outside of its net income and net current assets. We 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 petitioner's reputation within its industry, the overall number of employees, whether the beneficiary is replacing a former employee or an outsourced service, the amount of compensation paid to officers, the occurrence of any uncharacteristic business expenditures or losses, and any other evidence that USCIS deems relevant to the petitioner's ability to pay the proffered wage.