U.S. Citizenship and Immigration Services

Non-Precedent Decision of the Administrative Appeals Office

MATTER OF M-R-D-R- LLC

DATE: JULY 25, 2018

APPEAL OF TEXAS SERVICE CENTER DECISION

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

The Petitioner, a radio broadcasting company, seeks to employ the Beneficiary as a radio station producer. It requests classification of the Beneficiary as a professional under the third preference immigrant classification. 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 record did not establish, as required, that the Petitioner had the continuing ability to pay the proffered wage.

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

Upon *de novo* review, we will withdraw the Director's decision and remand the matter for further proceedings consistent with our opinion and for the entry of a new decision.

I. THE EMPLOYMENT-BASED IMMIGRATION PROCESS

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).[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, the 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 approves the petition, the foreign national applies 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.

[1] The priority date of a petition is the date the DOL accepted the labor certification for processing, which in this case is January 19, 2017. *See* 8 C.F.R. § 204.5(d).

II. ABILITY TO PAY THE PROFFERED WAGE

The Director concluded that the Petitioner did not establish its continuing ability to pay the proffered wage from the petition's priority date of January 19, 2017, onward. The proffered wage is $50,962 per year.

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.

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 had 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]

The record does not demonstrate that the Petitioner paid the Beneficiary any wages from the priority date in 2017 onward. Further, the record does not contain annual reports, federal tax returns, or audited financial statements covering the priority date in 2017 as required by 8 C.F.R. § 204.5(g)(2). Since the appeal was filed prior to the end of 2017, the required documents may not have been available at the time of filing the appeal. Thus, we will remand the matter to the Director for consideration of whether the Petitioner has the continuing ability to pay the proffered wage from the priority date of January 19, 2017, onward. We note the following issues on remand.

With the petition, the Petitioner submitted a draft of the 2016 IRS Form 1120, U.S. Corporation Income Tax Return, of [redacted].[3] In response to the Director's request for evidence (RFE), the Petitioner submitted the 2016 IRS Form 1120 for [redacted] which shows that [redacted] is the parent company of the Petitioner. The Petitioner stated that the "decision was made that [the Petitioner] would be most appropriately included as a wholly-owned

[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); *Rizvi v. Dep't of Homeland Sec.*, 37 F. Supp. 3d 870, 883-84 (S.D. Tex. 2014), *aff'd*, 627 Fed. App'x. 292, 294-295 (5th Cir. 2015).

[3] The Petitioner's company agreement dated November 17, 2011, in the record shows that it was wholly-owned and managed by [redacted]

subsidiary of The cover sheet of the tax return indicated that the return had not been filed with the Internal Revenue Service (IRS). The Petitioner also submitted an email message from its accountant in response to the RFE. The accountant stated that the Petitioner is wholly-owned by and that it is treated as a disregarded entity for tax purposes.

In his decision, the Director declined to accept the 2016 tax return of as evidence of the Petitioner's ability to pay the proffered wage, as the Petitioner did not explain the change in its ownership[4] and it did not submit evidence showing that the tax return was actually accepted and processed by the IRS.

On appeal, the Petitioner asserts that it mistakenly submitted the tax return of with the petition. It states that it became the wholly-owned subsidiary of on February 11, 2015. It submits an affidavit from its chief operating officer (COO) stating that the Petitioner failed to notify its accountant that its ownership had changed, and therefore, the accountant mistakenly filed its 2015 and 2016 federal income tax returns as though the Petitioner was still as subsidiary of The COO states that the accountant was notified on October 30, 2017, of the 2015 ownership change and that on November 17, 2017, the accountant filed amended 2015 and 2016 tax returns for and

On appeal, the Petitioner also submits a letter from its accountant stating that he amended the 2016 tax returns for and and confirming that the Petitioner is a wholly-owned subsidiary of The letter does not indicate if the 2015 returns for and were also amended.[6] It also submits a membership interest purchase agreement dated November 2014, together with an FCC consummation notice effective February 10, 2015, supporting the transfer of the Petitioner's membership interests from to It also submits acknowledgement from the IRS that it accepted the 2016 Form 1120 for on November 17, 2017.

The 2016 IRS Form 1120 for does not cover the 2017 priority date and, therefore, it does not establish the Petitioner's ability to pay the proffered wage from the priority date. Further, notwithstanding the fact that the 2016 tax return for does not cover the year of the priority date, the tax return does not establish the Petitioner's ability to pay the

[4] The Petitioner must resolve this inconsistency in the record with independent, objective evidence pointing to where the truth lies. *Matter of Ho*, 19 I&N Dec. 582, 591-92 (BIA 1988).

[5] The new 2016 tax return for is the only one of the new 2015 and 2016 returns included in the record.

[6] The 2016 tax return for indicates on page 1 that it is an initial return. Presumably, this is because its financial results were previously included on the tax returns of its former parent company. However, if the transfer of the Petitioner's membership interests from to took place before 2016, it is not clear why the initial return for was filed in 2016. The Petitioner must resolve this inconsistency in the record with independent, objective evidence. *Id.*

wage because it does not independently list the Petitioner's net income and net current assets.[7] The Petitioner asserts that it is a disregarded entity for tax purposes under 26 C.F.R. § 301.7701-3, that it does not file its own tax return, and that its financial results are included on the tax returns of its parent entity. The record contains a letter from an accountant verifying this information. However, the parent's tax returns do not independently list the Petitioner's income, expenses, assets, and liabilities. Because the Petitioner, a limited liability company, is a separate and distinct legal entity from its member and other entities,[8] the income, expenses, assets, and liabilities of its parent company and other entities cannot be considered in determining the Petitioner'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*, No. Civ. A. 02-30197-MAP, 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 cannot determine the Petitioner's ability to pay the proffered wage using its parent company's tax return. The record does not contain audited financial statements or an annual report detailing the Petitioner's net income and net current assets. *See* 8 C.F.R. § 204.5(g)(2).

We may consider evidence of a petitioner's ability to pay beyond its net income and net current assets, including 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. *See Matter of Sonegawa*, 12 I&N Dec. 612, 614-615 (Reg'l Comm'r 1967).

In this case, the record indicates that the Petitioner was established in 2011. The Petitioner claims to have eight employees. Unlike in *Sonegawa*, the record does not document the growth of the Petitioner's business, the occurrence of any uncharacteristic business expenditures or losses, its reputation in its industry, or whether the Beneficiary will replace a current employee or outsourced service. 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*.

On remand, the Petitioner must establish its continuing ability to pay the proffered wage from the petition's priority date in 2017 onward.

III. CONCLUSION

The decision of the Director will be withdrawn. The matter is remanded to the Director for consideration of whether the Petitioner has the continuing ability to pay the proffered wage from the priority date of January 19, 2017, onward. The Director may request any additional evidence considered pertinent. Similarly, the Petitioner may provide additional evidence within a reasonable

[7] The Petitioner paid the Beneficiary in 2016, which is less than the proffered wage.
[8] In addition to the Petitioner, the 2016 IRS Form 1120 for includes as a wholly-owned subsidiary.

period of time to be determined by the Director.[1] Upon receipt of all the evidence, the Director will review the entire record and enter a new decision.

ORDER: The decision of the Director is withdrawn. The matter is remanded for further proceedings consistent with the foregoing opinion and for the entry of a new decision.

Cite as *Matter of M-R-D-R- LLC*, ID# 1356606 (AAO July 25, 2018)