U.S. Citizenship and Immigration Services

Non-Precedent Decision of the Administrative Appeals Office

MATTER OF C- &S-

DATE: JULY 26, 2018

APPEAL OF TEXAS SERVICE CENTER DECISION

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

The Petitioner, a motel, seeks to employ the Beneficiary as a manager. It requests classification of the Beneficiary as a skilled worker under the third preference immigrant category. Immigration and Nationality Act (the Act) section 203(b)(3)(A)(i), 8 U.S.C. § 1153(B)(3)(A)(i). This employment-based "EB-3"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 two years of training or experience.

The Director of the Texas Service Center denied the petition on the ground that the Petitioner did not establish its continuing ability to pay the proffered wage from the priority date onward.

On appeal the Petitioner asserts that the evidence of record establishes its continuing ability to pay the proffered wage from the priority date up to the present.

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

I. LAW

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). *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 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.

To qualify for a requested immigration benefit the petitioner must establish its ability to pay the proffered wage of the job offered from the priority date of the petition[1] 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. *See* 8 C.F.R. § 204.5(g)(2).

II. ANALYSIS

In this case the labor certification in states that the proffered wage for the motel manager position is $18.95 / hour, which amounts to $39,416 / year based on a work year of 2,080 hours. The priority date of the petition is April 30, 2001.

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.

The Petitioner states that it has employed the Beneficiary since 2009 and has submitted copies of the Forms W-2, Wage and Tax Statements, it issued to the Beneficiary for the years 2009-2011 and 2013-2015. This documentation shows that the Beneficiary was paid the following amounts by the Petitioner in those years:

2009 -- $ 8,350
2010 -- $39,600
2011 -- $38,800
2012 – no record
2013 -- $39,600
2014 -- $39,600
2015 -- $39,600

Thus, the wages paid to the Beneficiary equaled or exceeded the proffered wage of $39,416 in 2010, 2013, 2014, and 2015. For those years, therefore, the Petitioner has established its ability to pay the proffered wage based on the wages it paid to the Beneficiary. For 2016 the Petitioner has submitted a copy of the Beneficiary's Form 1040A, U.S. Individual Income Tax Return, which shows that the Beneficiary's gross pay was $47,100 that year. While this figure exceeded the proffered wage, the Form 1040A does not identify the Beneficiary's employer. Therefore, it does not establish the Petitioner's ability to pay the proffered wage in 2016. Since the wages paid to the Beneficiary were less than the proffered wage in 2009 and 2011, and there is no record of wages paid in 2012 or 2016, the Petitioner has not established its ability to pay the proffered wage based on wages paid to the

[1] The priority date of a petition is the date the underlying labor certification was filed with the DOL. *See* 8 C.F.R. § 204.5(d).

Beneficiary in any of those years. Nor can the Petitioner establish its ability to pay the proffered wage based on wages paid to the Beneficiary from 2001 to 2008 because it did not employ the Beneficiary during those years. Therefore, the Petitioner has not established its continuing ability to pay the proffered wage from the priority date of April 30, 2001, up to the present based on wages paid to the Beneficiary.

If a petitioner has not employed the beneficiary and paid him (or her) a salary equal to or above the proffered wage every year from the priority date onward, USCIS will 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 statement(s) for the remaining years. 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 be considered able to pay the proffered wage during that year.

The record includes copies of the Petitioner's federal income tax returns, Form 1120S, Income Tax Return for an S Corporation, for every year from 2001 through 2016. As shown in the tax returns, the Petitioner's net income and net current assets figures were as follows for the years 2001-2009, 2011-2012, and 2016 (the years for which the Petitioner has not established its ability to pay the proffered wage based on wages paid to the Beneficiary):

Year	Remaining Wage Obligation[2]	Net Income (or Loss)[3]	Net Current Assets (or Liabilities)[4]
2001	$39,416	($16,418)	($5,305)
2002	$39,416	$2,637	$17,131
2003	$39,416	($8,232)	$6,378
2004	$39,416	$43,272	$35,212
2005	$39,416	$83,387	$65,545
2006	$39,416	$36,625	$5,553
2007	$39,416	$25,062	($2,793)
2008	$39,416	$31,319	($84,934)
2009	$31,066	$41,369	($107,141)

[2] The remaining wage obligation is the difference between the proffered wage and wages paid.

[3] If an S corporation, like the Petitioner, has income exclusively from a trade or business, USCIS considers its net income (or loss) to be the figure for "Ordinary business income (loss)" on page 1, line 21, of the Form 1120S. However, if there are relevant entries for additional income, credits, deductions or other adjustments from sources other than a trade or business, they are reported on Schedule K of the Form 1120S, and the corporation's net income or loss will be found in line 23 of Schedule K ("Income (loss)") in the years 2001-2003, line 17e of Schedule K ("Income/loss reconciliation") in the years 2004-2005, and line 18 of Schedule K ("Income/loss reconciliation") from 2006 to the present.

[4] For a corporation net current assets (or liabilities) are the difference between its current assets, entered on lines 1-6 of Schedule L, and its current liabilities, entered on lines 16-18 of Schedule L.

2011	$616	$74,999	($105,479)
2012	$39,416	$36,320	($49,852)
2016	$39,416	$80,574	($60,869)

Thus, the Petitioner's net income or net current assets (or both) exceeded the proffered wage of $39,416 in the years 2004, 2005, 2009, 2011, and 2016. For these additional years, therefore, the Petitioner has established its ability to pay the proffered wage. That leaves the years 2001-2003, 2006-2008, and 2012, however, in which the Petitioner did not have sufficient (or any) net income or net current assets to pay the proffered wage.

USCIS may also consider 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 wage. *See Matter of Sonegawa,* 12 I&N Dec. 612. 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.

The Petitioner states that it began operations in 1997, had four employees at the time the petition was filed in 2012, and that the motel manager job is not a new position. The tax returns in the record show that the Petitioner's expenditures for all of its salaries and wages (recorded on page 1, line 8, of the Form 1120S) were less than the proffered wage of the motel manager position for each of the years 2001-2007. The tax returns also show that the Petitioner's gross receipts (recorded on page 1, line 1a, of the Form 1120S) were fairly static during those years, rising modestly from $218,510 in 2001 to $268,069 in 2008. These figures do not demonstrate substantial business growth during that eight-year period. The Petitioner touts its ability to pay the proffered wage in recent years, but acknowledges that the business struggled in some of the years leading up to the financial crisis in 2008. The years 2001-2003 were especially meager as the Petitioner recorded both a net loss and net current liabilities in 2001, net income and net current assets that were far below the proffered wage in 2002, and another net loss as well as net current assets far below the proffered wage in 2003. Regardless of the Petitioner's ability to pay the proffered wage in recent years, it must have been able to pay the proffered wage for the entire period of time from the priority date up to the present to carry its burden of proving its continuing ability to pay the proffered wage. Furthermore, the Petitioner has not demonstrated its reputation within its industry, whether the beneficiary is replacing a former employee or an outsourced service, the amount of compensation paid to officers, or the occurrence of any uncharacteristic business expenditures or losses. Based on the evidence discussed above, we find that the Petitioner has not established its continuing ability to pay the proffered wage from the priority date of April 30, 2001, onward based on the totality of its circumstances.

III. CONCLUSION

We will dismiss the appeal because the Petitioner has not established its continuing ability to pay the proffered wage from the priority date up to the present.

ORDER: The appeal is dismissed.

Cite as *Matter of C-&S-*. ID# 1641274 (AAO July 26, 2018)