U.S. Citizenship and Immigration Services

Non-Precedent Decision of the Administrative Appeals Office

MATTER OF S-R- INC.

DATE: JULY 26, 2018

MOTION ON ADMINISTRATIVE APPEALS OFFICE DECISION

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

The Petitioner, an owner and manager of restaurants, seeks to employ the Beneficiary as a business training specialist. It requests his classification under the third-preference immigrant category as a professional. 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. business to sponsor a foreign national with a bachelor's degree for lawful permanent resident status.

The Acting Director of the Nebraska Service Center denied the petition, concluding that the accompanying certification from the U.S. Department of Labor (DOL) did not support the requested classification. On appeal, we affirmed the Director's decision and found that the Petitioner did not demonstrate its required ability to pay the proffered wage. *See Matter of S-R- Inc.*, ID# 989331 (AAO Feb. 27, 2018).

The matter is now before us on the Petitioner's motions to reopen and reconsider. The Petitioner submits additional evidence and contends that, consistent with criteria for the professional classification, the offered position requires at least a bachelor's degree, excluding equivalencies based on combinations of education, training, and/or experience. Relying on the personal resources of its sole shareholder/president, the Petitioner also asserts its ability to pay the proffered wage.

Upon review, we will deny the motions.

I. MOTION REQUIREMENTS

A motion to reconsider must establish that our prior decision misapplied law or policy based on the evidence of record at that time. 8 C.F.R. § 103.5(a)(3). A motion to reconsider must also be supported by a pertinent precedent or adopted decision, statutory or regulatory provision, or statement of U.S. Citizenship and Immigration Services (USCIS) or Department of Homeland Security policy. Here, the Petitioner does not assert that our prior decision was incorrect based on the evidence of record. The Petitioner's filing also lacks support by a pertinent statute, regulation, or statement of policy. We will therefore deny the motion to reconsider.

A motion to reopen must state new facts, supported by documentary evidence, and demonstrate eligibility for the requested immigration benefit. 8 C.F.R. § 103.5(a)(2). For the reasons discussed

below, however, the Petitioner's new evidence does not demonstrate eligibility for the benefit sought.

II. VALIDITY OF THE LABOR CERTIFICATION

A labor certification accompanying a professional petition "must demonstrate that the job requires the minimum of a baccalaureate degree." 8 C.F.R. § 204.5(l)(3)(i). Here, in parts H.4 and H.9, the labor certification states that the offered position of business training specialist requires a U.S. bachelor's degree or a foreign equivalent degree. In part H.14, however, the labor certification states: "Employer will accept educational equivalency evaluation prepared by qualified evaluation service or in accordance with 8 CFR Section 214.2(h)(4)(iii)(D)." A portion of that regulation allows baccalaureate equivalencies for H-1B nonimmigrant purposes based on combinations of training, education, and/or experience. *See* 8 C.F.R. § 214.2(h)(4)(iii)(D)(*5*). We therefore found the record insufficient to support the Petitioner's claimed minimum requirements of a bachelor's degree.

On motion, the Petitioner submits materials from its labor certification proceedings that advertised the offered position to U.S. workers. All of the materials - including copies of newspaper, Internet, and college campus advertisements - state that the position requires a bachelor's degree "or its educational Equivalent." Noting that the ads require a baccalaureate equivalency based solely on education, the Petitioner argues that the materials establish its intention to require at least a bachelor's degree.

The recruitment materials indicate the Petitioner's rejection of a baccalaureate equivalency based on combinations of education and experience, education and training, and training and experience. The materials, however, do not exclude the Petitioner's acceptance of combinations of education. For example, an applicant with two associate's degrees would meet the ads' equivalency requirement if he or she obtained an evaluation stating that the degrees together equated to a bachelor's degree. Such a combination of lesser degrees, however, would not meet the requirements of the EB-3 professional category. *See, e.g.,* Final Rule on Employment-Based Immigrant Visa Petitions, 56 Fed. Reg. 60897, 60900 (Nov. 29, 1991) (stating that "both the Act and its legislative history make clear that, in order to qualify as a professional under the third classification . . ., *an alien must have at least a bachelor's degree"*) (emphasis added). The record also does not indicate whether U.S. workers applied for the position and, if so, why the Petitioner found them unqualified. The record therefore does not establish a bachelor's degree as a minimum requirement of the offered position.

For the foregoing reasons, the record does not establish the labor certification's validity for the requested classification of professional. We will therefore affirm our appellate decision.

III. ABILITY TO PAY THE PROFFERED WAGE

On motion, the Petitioner submits copies of its federal income tax returns for 2014 through 2017. The record, however, does not establish the Petitioner's continuing ability to pay the proffered wage of $50,900 a year from the petition's priority date of August 27, 2014, onward. A copy of an IRS Form W-2, Wage and Tax Statement, demonstrates the Petitioner's ability to pay the proffered wage in 2015, as the company paid the Beneficiary more than the proffered wage that year. But a copy of a Form W-2 for 2014 indicates that the Petitioner paid the Beneficiary less than the proffered wage, and the Petitioner omitted evidence of payments to him in other years. Also, the Petitioner's tax returns for 2014, 2016, and 2017 reflect insufficient annual amounts of net income and net current assets to pay the proffered wage or, in 2014, the difference between the proffered wage and the wages paid to the Beneficiary.

As the Petitioner argues, we may consider factors beyond its wages paid, net income, and net current assets in determining its ability to pay the proffered wage. Under *Matter of Sonegawa*, 12 I&N Dec. 612, 614-15 (Reg'l Comm'r 1967), we may consider: the number of years it has conducted business; its number of employees; the growth of its business; its incurrence of uncharacteristic losses or expenses; its reputation in its industry; the Beneficiary's replacement of a current employee or outsourced service; or other evidence of its ability to pay. *Id.* at 614-15.

The record indicates the Petitioner's continuous business operations since 2008 and, as of the second quarter of 2016, its employment of 10 people. The Petitioner's sole shareholder also stated that the company has grown from managing one restaurant to several. The Petitioner's tax returns, however, indicate that its gross annual revenues decreased from 2014 to 2017. During that same period, the company also reported only one profitable year. In addition, unlike in *Sonegawa*, the record here does not indicate the Petitioner's incurrence of uncharacteristic losses or expenses, or its possession of an outstanding reputation in its industry. The record also does not indicate the Beneficiary's replacement of a current employee or outsourced service.

On appeal, the Petitioner submits copies of its sole shareholder's personal income tax returns. Because the Petitioner files income taxes as an S corporation, it asserts that USCIS may consider the personal income of its sole shareholder in determining its ability to pay. S corporations allow shareholders to report company incomes on their individual tax returns, thereby avoiding "double taxation" on profits. 26 U.S.C. § 1366. But, unlike sole proprietors, S corporations remain separate entities from their shareholders. *Matter of Aphrodite Invs., Ltd.*, 17 I&N Dec. 530, 531 (Comm'r 1980). Thus, shareholders of S corporations have no personal obligations to pay proffered wages of the companies they own. *See Sitar Rest. v. Ashcroft*, No. Civ.A.02-30197-MAP, 2003 WL 22203713, *2 (D. Mass. Sept. 18, 2003) (holding that "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"). We therefore will not consider the personal income of the Petitioner's sole shareholder in determining its ability to pay.[1]

[1] Even if we considered the sole shareholder's personal income, the record would not establish her ability to pay the

IV. CONCLUSION

The Petitioner has not shown proper cause to reconsider or reopen the proceedings, as the record on motion does not establish the validity of the labor certification for the requested classification or the Petitioner's ability to pay the proffered wage.

ORDER: The motion to reopen is denied.

FURTHER ORDER: The motion to reconsider is denied.

Cite as *Matter of S-R- Inc.*, ID# 1585189 (AAO July 26, 2018)

proffered wage. The Petitioner did not submit copies of the sole shareholder's tax returns for 2014, the year of the petition's priority date. Also, the joint tax returns of her and her spouse reflect an adjusted gross income (AGI) amount of less than the proffered wage in 2017 and a negative AGI amount in 2016. In addition, the returns indicate that the couple must not only support themselves, but also two dependents. Thus, neither the personal income of the Petitioner's sole shareholder, nor a totality of the circumstances under *Sonegawa*, establishes the company's ability to pay the proffered wage.