MATTER OF S-, INC.

DATE: JULY 31, 2018

MOTION ON ADMINISTRATIVE APPEALS OFFICE DECISION

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

The Petitioner, a supplier of software products, seeks to employ the Beneficiary as a computer programmer. It requests her 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 Director of the Texas Service Center denied the petition, concluding that the Petitioner did not demonstrate its required ability to pay the proffered wage. On appeal, we affirmed the decision. *See Matter of S-, Inc.*, ID# 905871 (AAO Dec. 22, 2017).

The matter is now before us on the Petitioner's motions to reopen and reconsider. The Petitioner submits additional evidence and asserts that its wage payments to the Beneficiary establish its ability to pay the proffered wage.

Upon review, we will deny the motions.

I. MOTION REQUIREMENTS

A motion to reopen must state new facts, supported by documentary evidence. 8 C.F.R. § 103.5(a)(2). A motion to reconsider, on the other hand, must establish that the decision misapplied law or policy based on the record at that time. 8 C.F.R. § 103.5(a)(3). A petitioner must also support a motion to reconsider with 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. We may grant a motion that satisfies these requirements and demonstrates eligibility for the requested immigration benefit.

II. ABILITY TO PAY THE PROFFERED WAGE

We dismissed the Petitioner's appeal, in part, because the company did not submit required evidence of its ability to pay the proffered wage from the petition's priority date of October 15, 2015, onward. *See* 8 C.F.R. § 204.5(g)(2) (requiring a petitioner to submit copies of annual reports, federal income tax returns, or audited financial statements as evidence of its ability to pay). On motion, the

Petitioner submits copies of audited financial statements for 2015 and 2016. We may therefore consider the Petitioner's ability to pay the proffered wage in those years.

In determining ability to pay, USCIS first examines whether a petitioner paid a beneficiary the full proffered wage each year from a petition's priority date. If a petitioner did not annually pay the full proffered wage, USCIS next considers whether it generated annual amounts of net income or net current assets sufficient to pay any differences between the annual proffered wage and wages paid. If net income and net current assets are insufficient, USCIS may consider other factors affecting a petition's ability to pay a proffered wage. *See Matter of Sonegawa,* 12 I&N Dec. 612 (Reg'l Comm'r 1967).[1]

The record does not establish how much the Petitioner paid the Beneficiary in 2015 or 2016. For 2015, a copy of an IRS Form W-2, Wage and Tax Statement, states that the Petitioner paid her $53,460.88. But copies of payroll records for the same year indicate that she received $56,460.88 in "adj[usted] earnings" and $61,172.10 in "gross earnings."

The payroll records suggest that the adjusted earnings reflect the Beneficiary's pay after deductions used to fund medical benefits for her and her family. *See* Internal Revenue Code, 26 U.S.C. § 223 (allowing eligible employees to make tax-free contributions to health savings accounts). But the Form W-2 does not indicate such deductions from her pay, nor does the form's amount equal the adjusted earnings on the payroll records. Thus, the record does not explain the various annual pay amounts listed on the Beneficiary's Form W-2 and payroll records. *See Matter of Ho*, 19 I&N Dec. 582, 591 (BIA 1988) (requiring a petitioner to resolve inconsistencies of record by independent, objective evidence pointing to where the truth lies). In any event, none of the annual amounts for 2015 equal or exceed the annual proffered wage of $66,500. Based on the Petitioner's payments to the Beneficiary, the record therefore does not establish its ability to pay in 2015.

For 2016, a copy of an IRS Form W-2 states that the Petitioner paid the Beneficiary $63,466.05, less than the annual proffered wage of $66,500. Payroll records for that year, however, indicate that she received $69,795.30. The record does not explain the discrepancy in the amounts. Therefore, based on the Petitioner's payments to the Beneficiary, the record does not establish the Petitioner's ability to pay the proffered wage in 2016.

The Petitioner's audited financial statements reflect negative amounts of net income and net current assets for both 2015 and 2016. Thus, based on examinations of wages paid, net income, and net current assets, the record does not establish the Petitioner's ability to pay the proffered wage in 2015 or 2016.

On appeal, the Petitioner argues that from the petition's priority date of October 15, 2015, through the end of 2016, payroll records indicate that it paid the Beneficiary more than the proffered wage

[1] Federal courts have upheld USCIS' 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).

rate. The Petitioner therefore asserts that it established its ability to pay in both years. The Petitioner notes that it need only demonstrate its ability to pay "at the time the priority date is established and continuing until the beneficiary obtains lawful permanent residence." 8 C.F.R. § 204.5(g)(2).

USCIS policy, however, does not permit a petitioner to prorate a proffered wage. Rather, during the year of a petition's priority date, a petitioner must demonstrate its ability to pay a full proffered wage, not merely the portion accrued after the priority date in a given year. Although we will not prorate the proffered wage, we may consider the effect of a short time period between the priority date and the end of the priority date year in the context of our totality of the circumstances analysis.

Also, as previously discussed, the Petitioner has not explained why the amounts on the Beneficiary's Forms W-2 for 2015 and 2016 differ from the amounts on the payroll records for the same years. Thus, the record does not establish the accuracy of the payroll records. For this additional reason, the payroll records do not establish the Petitioner's ability to pay in 2015 and 2016.

In addition, the Petitioner has not demonstrated its ability to pay the proffered wages of multiple beneficiaries. As indicated in our notice of intent to deny (NOID), USCIS records indicate that the Petitioner filed immigrant petitions for other beneficiaries that were pending or approved as of this petition's priority date of October 15, 2015, or submitted thereafter. Until a beneficiary obtains lawful permanent residence, a petitioner must demonstrate its ability to pay the proffered wage of each petition it files. 8 C.F.R. § 204.5(g)(2). The Petitioner here must therefore demonstrate its ability to pay the combined proffered wages of this and its other applicable petitions. *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 combined proffered wages of multiple petitions).

Contrary to our NOID's request, the Petitioner did not provide information, including the proffered wages and priority dates, of its other petitions. *See* 8 C.F.R. § 103.2(b)(14) (requiring a petition's denial if a petitioner does not submit requested evidence that "precludes a material line of inquiry"). Because the record lacks requested information about the Petitioner's other petitions, the record also does not establish its ability to pay the proffered wage.

As previously indicated, we may consider factors beyond a petitioner's wages paid, net income, and net current assets. *See Matter of Sonegawa*, 12 I&N Dec. at 614-15. We may consider: how many years a petitioner has conducted business; its number of employees; the growth of its business; its incurrence of uncharacteristic losses or expenses; its reputation in its industry; a beneficiary's replacement of a current employee or outsourced service; or other evidence of its ability to pay a proffered wage. *Id.*

Absent information on the Petitioner's other sponsored beneficiaries, we cannot fully assess whether the totality of the Petitioner's circumstances are sufficient to pay the Petitioner's total wage burden from the priority date onward. Nonetheless, we note that the record indicates the Petitioner's

continuous business operations since 2000 and its employment of 50 people. Its financial documents also indicate recently growing revenues. In addition, a letter from the Petitioner's auditor states that, from 2015 through 2017, the company generated positive amounts of earnings before interest, taxes, depreciation, and amortization (EBITDA). Unlike in *Sonegawa*, however, the Petitioner here reported multiple losses over recent years. The record also does not establish the Petitioner's incurrence of uncharacteristic expenses, or the Beneficiary's replacement of a current employee or outsourced service. Although the Petitioner contends that we should prorate the proffered wage in 2015, the time period between the priority date and the end of the year represents a significant period of time over which the Petitioner must demonstrate its ability to pay. Considering the timing of the priority date with the negative factors discussed above, we do not find that the Petitioner has demonstrated its ability to pay the proffered wage. Thus, a totality of the circumstances under *Sonegawa* does not establish its ability to pay the proffered wage.

The record does not establish the Petitioner's continuing ability to pay the proffered wage from the petition's priority date onward. We will therefore deny the motions.

III. THE REQUIRED EXPERIENCE

Although unaddressed in our appellate decision, the record also does not establish the Beneficiary's possession of the minimum experience required for the offered position. As indicated in our NOID, a petitioner must establish a beneficiary's possession of all DOL-certified job requirements by a petition's priority date. *Matter of Wing's Tea House*, 16 I&N Dec. 158, 160 (Acting Reg'l Comm'r 1977).

Here, the labor certification states the minimum requirements of the offered position of computer programmer as a bachelor's degree in computer science or engineering, plus one year of experience as a computer programmer or quality assurance analyst. On the labor certification, the Beneficiary attested that she gained more than six years of full-time experience as a quality assurance analyst. She stated that she worked for the Petitioner from June 2009 to February 2010, and from March 2011 until the petition's priority date. From February 2010 to March 2011, she stated that worked for another U.S. company.

The Petitioner submitted a letter from the Beneficiary's other employer indicating its employment of her as a quality assurance engineer from February 2010 to March 2011. *See* 8 C.F.R. § 204.5(l)(3)(ii)(A) (requiring a petitioner to support a beneficiary's claimed qualifying experience with a letter from a former employer). Contrary to 8 C.F.R. § 204.5(l)(3)(ii)(A), however, the letter does not describe the Beneficiary's experience at the company. The letter therefore does not establish the Beneficiary's qualifying experience.

Also, the letter states that, when the other company employed the Beneficiary, she worked at the Petitioner's site. But, unless a foreign national gained experience in a substantially different position or a labor certification employer can demonstrate the impracticality of hiring a U.S. worker for the offered position, an employer cannot rely on experience that a foreign national gained with it.

20 C.F.R. § 656.17(i)(3). This bar applies to "experience possessed by the alien beneficiary at the time of hiring by the employer, *including as a contract employee*." *Id.* (emphasis added).

In response to the NOID, the Petitioner concedes that it contracted the Beneficiary's services from the other company from February 2010 to March 2011. Submitting copies of her employment agreements with it and the other company, however, the Petitioner argues that the positions differ substantially because she worked for different employers.

Contrary to the Petitioner's argument, however, a difference in employers does not demonstrate a substantial difference in positions. A position substantially differs from an offered one if it involves performance of the same job duties less than 50 percent of the time. 20 C.F.R. § 656.17(i)(5)(ii). The record does not establish that the Beneficiary performed the same job duties with her other employer less than half of the time. Rather, the labor certification indicates that the offered position and the Beneficiary's former position share many of the same job duties. Also, the Petitioner has not demonstrated the impracticality of hiring a U.S. worker for the offered position. The record therefore does not establish the Petitioner's ability to rely on the Beneficiary's experience with it as a contract employee.

IV. CONCLUSION

The evidence on motion does not demonstrate the Petitioner's ability to pay the proffered wage or the Beneficiary's possession of the minimum experience required for the offered position. The record also does not establish that our appellate decision misapplied law or policy.

ORDER: The motion to reopen is denied.

FURTHER ORDER: The motion to reconsider is denied.

Cite as *Matter of S-, Inc.*, ID# 1369539 (AAO July 31, 2018)