U.S. Citizenship and Immigration Services

**Non-Precedent Decision of the Administrative Appeals Office**

MATTER OF I-B- CORP.

DATE: JUNE 15, 2018

APPEAL OF NEBRASKA SERVICE CENTER DECISION

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

The Petitioner, a construction company, seeks to employ the Beneficiary as a project electrical engineer. It requests classification of the Beneficiary as a professional under the third preference immigrant category. 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 Nebraska Service Center denied the petition on the ground that the evidence did not establish the Petitioner's ability to pay the proffered wage from the priority date onward.

On appeal, the Petitioner submits additional documentation and asserts that the evidence of record establishes its ability to pay the proffered wage. We also issued a request for evidence (RFE), to which the Petitioner responded with further materials.

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, 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 U.S. 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 be eligible for the classification requested, a petitioner must establish that it has the ability to pay the proffered wage stated on 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].

## II. ANALYSIS

At issue in this case is whether the Petitioner has established its continuing ability to pay the proffered wage from the priority date[1] onward. The petition has a priority date of February 2, 2016. The labor certification states that the offered wage for the proffered position is $47,008 per year.

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 regulatory required evidence, is considered proof of the petitioner's ability to pay the proffered wage.

In this case, the Petitioner indicates that it has employed the Beneficiary since early February 2017. It has submitted a copy of the Beneficiary's 2017 Form W-2 Wage and Tax Statement, showing that he received "wages, tips, other compensation" totaling $58,658.30. Thus, the Beneficiary's pay exceeded the proffered wage in 2017. However, the Petitioner has not submitted a form of regulatory required evidence of its ability to pay in 2017, despite our RFE requesting such evidence. Per 8 C.F.R. § 204.5(g)(2), evidence of ability to pay "shall be either in the form of copies of annual reports, federal tax returns, or audited financial statements." Although the Petitioner paid the Beneficiary is excess of the proffered wage in 2017, absent a form of regulatory evidence, we cannot affirmatively find that it had the ability to pay in that year. Further, as the Beneficiary was not employed by the Petitioner in 2016, the Petitioner has not established its ability to pay the proffered wage based on wages paid from the priority date of February 2, 2016, until the end of that year.

If a petitioner does not establish that it has paid the beneficiary an amount equal to or above the proffered wage 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 statements(s). If either of these figures, net income or net current assets, equals or exceeds

[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 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.

In this case, the Petitioner submitted a copy of its federal income tax return, Form 1120S, for the year 2016. It shows that the company recorded a net loss of $1,890,675 and net current liabilities of $460,367 that year.[2] Based on its 2016 tax return, therefore, the Petitioner has not established its ability to pay the proffered wage from the priority date of February 2, 2016, through the end of that year. Nor has the Petitioner established its ability to pay the proffered wage during that time period by means of an annual report or an audited financial statement for 2016, as no such documents have been submitted. As noted above, the record lacks a form of regulatory required evidence for 2017, so we are unable to assess the Petitioner's net income or net current assets in that year. Therefore, in examining the wages paid, net income, and net current assets, the Petitioner has not demonstrated its ability to pay the proffered wage in 2016 or 2017.

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 (Reg'l Comm'r 1967). 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.

On appeal the Petitioner reiterates that it has been in business since 1969 and submits a letter from Contractors License Board certifying that the Petitioner is one of the oldest construction companies in The Petitioner cites its federal income tax returns for the ten-year period of 2007-2016 as evidence that it has a history of financial success. In the first eight of those years, 2007-2014; the Petitioner had substantial net income or net current assets, or both. While it had net losses and net current liabilities in 2015 and 2016, the Petitioner points out that it still paid wages of more than $2.6 million to employees in 2016, paid close to $23 million in wages over the five years 2012-2016, and was paying the full proffered wage to the Beneficiary in 2017. The Petitioner states that it is currently a subcontractor on a contract worth over $5 million, and that its employee total rose from 54 to 88 between January and September 2017. According to the Petitioner, the net losses and net current liabilities in 2015 and 2016 were uncharacteristic considering the company's long history of business success in prior years, and the company has maintained its overall financial

[2] The net loss was recorded on page 1, line 21 of the Form 1120S ("Ordinary Business Income (Loss)"). The net current liabilities were the difference between the current assets and the current liabilities entered on lines 1-6, and 16-18, respectively, of Schedule L.

strength. The Petitioner claims that its job offer is realistic and that it has the continuing ability to pay the proffered wage.

While the record shows that the Petitioner did pay approximately $2.6 million in wages during 2016, that total was nearly $2 million below the wages paid the previous year, in 2015. The Petitioner's records show that its employee count declined steadily during the five-year period of 2012 to 2016, and that its wages paid fluctuated from $4.5 million to $5.7 million in the years 2012-2015, before declining sharply to $2.6 million in 2016. The Petitioner has submitted copies of recent business contracts as evidence of its ongoing construction activities, but the tax returns in the record show a steady decline in gross receipts since 2012. From a high of $18.2 million in 2012, gross receipts declined to $14.4 million in 2013, to $9.1 million in 2014, to $5.9 million in 2015, to a little over $3 million in 2016. Thus, gross income in 2016 was just one-sixth of the amount four years earlier in 2012. Despite the Petitioner's claim of continuing good health, therefore, its own records clearly show that 2016 was a low point in its fortunes after several years of declining income, employee totals, and wages paid.

The Petitioner also submitted a letter from a certified public accountant (CPA) who claims to have prepared its tax returns and audited its financial statements for many years. The CPA discusses various business losses and expenses that were reflected in the Petitioner's federal income tax returns for 2014, 2015, and 2016, and asserts that they were one-time events. The cumulation of these allegedly one-time events, however, raises questions as to whether the Petitioner may continue to incur sizeable business losses and expenses that lead to continuing net losses and net current liabilities on its income tax returns and diminish the financial condition of the company overall.

Furthermore, USCIS records indicate that the Petitioner has filed other Form I-140, Immigrant Petition for Alien Worker petitions. The Petitioner must establish that its job offer is realistic not only for the instant Beneficiary, but also for the beneficiaries of its other petitions. A petitioner's ability to pay the proffered wage is an essential element in evaluating whether a job offer is realistic. *See Matter of Great Wall*, 16 I&N Dec. 142 (Acting Reg'l Comm'r 1977). Accordingly, the Petitioner must demonstrate its ability to pay the combined proffered wages of the instant Beneficiary and the beneficiaries of every other I-140 petition from this petition's priority date of February 2, 2016, until the other beneficiaries obtained lawful permanent resident status. *See Patel v. Johnson*, 2 F.Supp. 3d 108, 124 (D.Mass. 2014) (upholding our denial of a petition where a petitioner did not demonstrate its ability to pay multiple beneficiaries).[3]

Because the record lacked information about the other Form I-140 beneficiaries, we sent an RFE requesting that the Petitioner submit a list of all the receipt numbers for its other I-140 petitions that

[3] The Petitioner's ability to pay the proffered wage of one of the other I-140 beneficiaries is not considered:

- After the other beneficiary obtains lawful permanent residence;
- If an I-140 petition filed on behalf of the other beneficiary has been withdrawn, revoked, or denied without a pending appeal or motion; or
- Before the priority date of the I-140 petition filed on behalf of the other beneficiary.

were pending or approved as of, or filed since, the priority date of this petition. The RFE also requested the name and proffered wage of each beneficiary, the priority date and status of each petition, the wages paid to every beneficiary from the priority date of this petition or their own priority dates, if later, as well as documentary evidence of the wages paid. The Petitioner did not provide any of this information or documentation in its response to the RFE. Instead, the Petitioner submitted a letter from its vice president and chief financial officer (CFO) stating that as of May 2018 it employs 115 workers and has the financial ability to pay the Beneficiary's proffered wage of $47,008 per year, supplemented by an employee roster listing the names, occupations, wage rates, and hiring dates of each employee. The regulation at 8 C.F.R. § 204.5(g)(2) allows USCIS the discretion to consider a statement from a financial officer; however, given the Petitioner's failure to provide any of the information and evidence we requested pertaining to its other I-140 beneficiaries, the CFO letter has little probative value concerning the Petitioner's ability to pay the combined proffered wages of all its I-140 beneficiaries. Moreover, the failure to submit requested evidence that precludes a material line of inquiry shall be grounds for denying the petition. *See* 8 C.F.R. § 103.2(b)(14).

For the reasons discussed above, we conclude that the Petitioner has not established, based on the totality of its circumstances, its continuing ability to pay the proffered wage of $47,008 per year from the priority date of February 2, 2016, onward.

## III. CONCLUSION

The Petitioner has not established its continuing ability to pay the proffered wage of the instant Beneficiary, as well as the applicable proffered wages of its other Form I-140 beneficiaries, from the priority date of February 2, 2016, onward.

**ORDER:** The appeal is dismissed.

Cite as *Matter of I-B- Corp.*, ID# 965535 (AAO June 15, 2018)