U.S. Citizenship and Immigration Services

Non-Precedent Decision of the Administrative Appeals Office

MATTER OF B-S-C-, INC.

DATE: JUNE 19, 2017

APPEAL OF NEBRASKA SERVICE CENTER DECISION

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

The Petitioner, a residential care facility, seeks to employ the Beneficiary as a caregiver. It requests classification of the Beneficiary as an unskilled worker under the third preference immigrant classification. *See* Immigration and Nationality Act (the Act) section 203(b)(3)(A)(iii), 8 U.S.C. § 1153(b)(3)(A)(iii). This employment-based immigrant classification allows a U.S. employer to sponsor a foreign national for lawful permanent resident status to work in a position that requires less than two years of training or experience.

The Director of the Nebraska Service Center denied the petition. The Director concluded that the Petitioner had not established its ability to pay the proffered wage from the priority date onward.

On appeal, the Petitioner asserts that the Director erred in not considering the Petitioner's retained earnings and commercial line of credit and the financial assets of the company's majority owner as contributing toward its ability to pay the proffered wage. The Petitioner asserts that if we include these additional factors in addition to its net income and net current assets it has satisfied the burden of proof by a totality of the circumstances.

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

I. LAW

Employment-based immigration generally follows a three-step process. First, an employer must obtain 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, 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. Section 212(a)(5)(A)(i)(I)-(II) of the Act. Second, the employer may file an immigrant visa petition with

[1] The date the labor certification is filed is called the "priority date." *See* 8 C.F.R. § 204.5(d). A beneficiary must be eligible as of that date, and so in this case the Petitioner must establish its ability to pay the proffered wage to the Beneficiary by the date the labor certification was filed.

§ 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.

The issue before us is whether the Petitioner has established the ability to pay the proffered wage to the Beneficiary from the priority date onward. The regulation 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.

The 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); *see also* 8 C.F.R. § 204.5(g)(2). In evaluating whether a job offer is realistic, USCIS requires the petitioner to demonstrate financial resources sufficient to pay the beneficiary's proffered wages, although the totality of the circumstances affecting the petitioning business will be considered if the evidence warrants such consideration. *See Matter of Sonegawa*, 12 I&N Dec. 612 (Reg'l Comm'r 1967).

II. ANALYSIS

As required by statute, the I-140 petition filed in this matter is accompanied by an approved labor certification certified by the DOL.[2] The priority date in this matter is July 12, 2013. The proffered wage as stated on the labor certification is $23,546 per year. The Director determined that the Petitioner had established its ability to pay the proffered wage to the Beneficiary in 2013 and 2015, but not in 2014.

The Petitioner claimed to have employed the Beneficiary since July 12, 2007, but did not submit any evidence of wages paid to the Beneficiary in 2014. The Petitioner's IRS Forms 1120S, U.S. Income Tax Return for an S Corporation, did not reflect sufficient net income or net current assets to pay the proffered wage. However, on appeal, the Petitioner asserts that the Director erred in not considering the officer compensation paid to its majority owner as part of the totality of the circumstances analysis when determining whether the Petitioner established the ability to pay the proffered wage.

As noted, USCIS may consider the totality of the circumstances of a petitioner's business activities in its determination of the petitioner's ability to pay the proffered wage. *See Matter of Sonegawa,* 12 I&N Dec. at 612. We may consider such factors as the number of years the petitioner has been

[2] *See* Section 212(a)(5)(D) of the Act, 8 U.S.C. § 1182(a)(5)(D); *see also* 8 C.F.R. § 204.5(a)(2).

doing business, the established historical growth of the petitioner's business, the overall number of employees, the occurrence of any uncharacteristic business expenditures or losses, the petitioner's reputation within its industry, whether the beneficiary is replacing a former employee or an outsourced service, or any other evidence that we deem relevant to the petitioner's ability to pay the proffered wage. We may also consider, as the Petitioner urges, the compensation paid to officers.

The shareholders of a corporation have the authority to allocate expenses of the corporation for various legitimate business purposes, including for the purpose of reducing the corporation's taxable income. Compensation of officers is an expense category explicitly stated on the IRS Form 1120S. For this reason, the Petitioner's figures for compensation of officers may be considered as additional financial resources of the Petitioner.

In considering this matter under *Sonegawa*, we note the Petitioner's longevity in business and its majority shareholder's offer to forego officer compensation. Specifically, the documentation presented indicates that the majority shareholder/officer was willing and able to forego officer compensation that was paid to him in 2014. The amount of officer compensation was sufficient, when considered in light of the Petitioner's other financial resources, to establish the Petitioners ability to pay the proffered wage in 2014. As such, we find that the Petitioner can pay the proffered wage to the Beneficiary based on the totality of the circumstances.

III. CONCLUSION

Upon review of the entire record including the evidence submitted on appeal, we conclude that the Petitioner has established that it is more likely than not that it had the ability to pay the proffered wage from the priority date onward.

ORDER: The appeal is sustained.

Cite as *Matter of B-S-C-, Inc.*, ID# 270093 (AAO June 19, 2017)