U.S. Citizenship and Immigration Services

Non-Precedent Decision of the Administrative Appeals Office

MATTER OF AA-C-S-, INC.

DATE: JUNE 20, 2017

MOTION ON ADMINISTRATIVE APPEALS OFFICE DECISION

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

The Petitioner, a computer consulting business, seeks to employ the Beneficiary as a software developer. It requests classification of the Beneficiary as a professional under the third preference immigrant classification. *See* 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 Texas Service Center denied the petition, concluding that the Petitioner had not established its ability to pay the proffered wage in 2014. We dismissed a subsequent appeal.

On motion to reopen,[1] the Petitioner submits additional evidence and asserts that it has established its ability to pay the proffered wage based on wages paid to the Beneficiary and the totality of the circumstances.

Upon review, we will grant the motion to reopen and sustain the appeal.

I. LAW AND ANALYSIS

A. Employment-Based Immigration

Employment-based immigration generally follows a three-step process. First, an employer must obtain an approved ETA Form 9089, Application for Permanent Employment Certification (labor certification), from the U.S. Department of Labor (DOL).[2] *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 U.S. Citizenship and Immigration Services

[1] A motion to reopen must state new facts and be supported by documentary evidence. 8 C.F.R. § 103.5(a)(2).

[2] The date the labor certification is filed, in cases such as this one, is called the "priority date." *See* 8 C.F.R. § 204.5(d). In this case, the priority date is March 3, 2014. Therefore, the Petitioner must establish that all eligibility requirements for the petition have been satisfied from March 3, 2014, and continuing through the present.

(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.

B. Ability to Pay the Proffered Wage

The regulation at 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.

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); *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).

The proffered wage is $110,000 per year. The issue is whether the Petitioner has demonstrated its ability to pay the proffered wage as of the March 3, 2014, priority date onward. In determining a petitioner's ability to pay, we first examine whether it paid a beneficiary the full proffered wage each year from a petition's priority date. If a petitioner did not pay a beneficiary the full proffered wage, we next examine whether it generated sufficient annual amounts of net income or net current assets to pay the difference between the proffered wage and the wages paid, if any. If a petitioner's net income or net current assets are insufficient, we may also consider other evidence of its ability to pay the proffered wage.

In our prior decision we found that although the Petitioner established its ability to pay in 2015 and 2016, it did not, based on wages paid to the Beneficiary, net income, or net current assets, establish its ability to pay the proffered wage in 2014. We also declined to find that a totality of the circumstances analysis would establish the Petitioner's ability to pay. On motion, the Petitioner submits additional evidence and asserts that under *Sonegawa*, it has established its ability to pay the proffered wage for the year in question.

As previously indicated, pursuant to *Sonegawa*, we may consider evidence of a petitioner's ability to pay beyond its net income and net current assets. As in *Sonegawa*, we may consider such factors as: the number of years it has conducted business; the growth of its business; its number of employees; the occurrence of any uncharacteristic business expenditures or losses; its reputation in its industry;

whether a beneficiary will replace a current employee or outsourced service; or other evidence of its ability to pay a proffered wage.

In this case, the record indicates that the Petitioner was established in 1997. Its gross receipts increased from $5,297,490 in 2010 to $12,667,503 in 2016, and its total salaries and wages paid to employees increased from $2,079,785 in 2010 to $5,131,073 in 2016. Thus, the record establishes the Petitioner's long-standing operation, substantial gross receipts, historical growth, and employment of multiple employees.

Additionally, the record contains a letter from the Petitioner's certified public accountants, stating that the Petitioner had an uncharacteristically difficult year in 2014 within a framework of multiple profitable years. The letter notes that the Petitioner was able to pay down a significant portion of its current liabilities reflected in 2014 "due to the new contracts they acquired from product development."

Further, the record establishes the Petitioner's outstanding reputation in its industry, including a significant client list and the Petitioner's receipt of numerous awards and recognitions. Thus, assessing the totality of circumstances in this individual case, the record establishes the Petitioner's continuing ability to pay the proffered wage pursuant to *Sonegawa.*

For the foregoing reasons, the Petitioner established that it had the ability to pay the proffered wage in 2014, 2015, and 2016. We will therefore grant the motion and sustain the appeal.

II. CONCLUSION

The Petitioner has established that it had the continuing ability to pay the proffered wage.

ORDER: The motion to reopen is granted and the appeal is sustained.

Cite as *Matter of AA-C-S-, Inc.*, ID# 635633 (AAO June 20, 2017)