U.S. Citizenship and Immigration Services

Non-Precedent Decision of the Administrative Appeals Office

In Re: 7858322

Date: MAR. 2, 2020

Appeal of Vermont Service Center Decision

Form I-140, Immigrant Petition for Skilled Worker

The Petitioner seeks to employ the Beneficiary as a cook. It requests classification of the Beneficiary as a skilled worker under the third preference immigrant category. Immigration and Nationality Act (the Act) section 203(b)(3)(A)(i), 8 U.S.C. § 1153(B)(3)(A)(i). 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 at least two years of training or experience.

The Director of the Vermont Service Center denied the petition, concluding that the Petitioner did not establish that it had the continuing ability to pay the proffered wage from the petition's priority date onward.

In these proceedings, it is the Petitioner's burden to establish eligibility for the requested benefit. Section 291 of the Act, 8 U.S.C. § 1361. Upon *de novo* review, we will dismiss the appeal.

I. THE EMPLOYMENT-BASED IMMIGRATION PROCESS

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).[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, the 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. *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 applies 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.

[1] The priority date of a petition is the date the DOL accepted the labor certification for processing, which in this case is November 13, 2001. *See* 8 C.F.R. § 204.5(d).

II. ABILITY TO PAY THE PROFFERED WAGE

The Director concluded that the Petitioner did not establish its continuing ability to pay the proffered wage from the petition's priority date onward. The proffered wage is $11.87 per hour ($24,689.60 per year based on a 40 hour work week).

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.

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. Here, the record does not demonstrate that the Petitioner has paid the Beneficiary any wages from the priority date onward. Thus, we next examine whether it had sufficient annual amounts of net income or net current assets to pay the proffered wage. 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.[2]

The record indicates that the Petitioner is a limited liability company (LLC)[3] taxed as a sole proprietorship. The Petitioner's federal tax returns state net income[4] amounts as follows:

- -$29,756 in 2001; and
- $14,892 in 2002;
- $62,013 in 2003; and
- $63,350 in 2004.

Therefore, for the years 2001 and 2002, the Petitioner did not have sufficient net income to pay the proffered wage. For the years 2003 and 2004, the Petitioner had sufficient net income to pay the proffered wage.

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[2] Federal courts have upheld our 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); *Tongatapu Woodcraft Haw., Ltd. v. Feldman*, 736 F.2d 1305, 1309 (9th Cir. 1984); *Estrada-Hernandez v. Holder*, -- F. Supp. 3d --, 2015 WL 3634497, *5 (S.D. Cal. 2015); *Rizvi v. Dep't of Homeland Sec.*, 37 F. Supp. 3d 870, 883-84 (S.D. Tex. 2014), *aff'd*, 627 Fed. App'x 292, 294-295 (5th Cir. 2015).

[3] The Petitioner's legal name is [redacted]. The record does not contain evidence of the assumed name [redacted] listed on the petition and labor certification. In any future filings, the Petitioner must submit evidence of its right to transact business under an assumed name in Maryland.

[4] The Petitioner's net income is reported on its member's IRS Form 1040, U.S. Individual Income Tax Return, Schedule C, at line 31.

As an alternate means of determining a petitioner's ability to pay the proffered wage, USCIS may review a petitioner's net current assets. Net current assets are the difference between a petitioner's current assets and current liabilities.[5] If the total of an LLC's end-of-year net current assets and the wages paid to the beneficiary (if any) are equal to or greater than the proffered wage, the petitioner is expected to be able to pay the proffered wage using those net current assets. On appeal, the Petitioner submits the Petitioner's unaudited financial statements for 2001, 2002, 2003, and 2004. Where a petitioner relies on financial statements to demonstrate its ability to pay the proffered wage, the financial statements must be audited. *See id.* Unaudited financial statements are the unsupported representations of management. The unsupported representations of management are not credible evidence and are insufficient to demonstrate the Petitioner's ability to pay the proffered wage.[6]

On appeal, the Petitioner also submits a letter from a certified public accountant (CPA) stating that the "quick assets" (cash in bank, savings, and investments) of the Petitioner at the end of 2001 totaled $39,460.92. However, the Petitioner's "quick assets" must be balanced by its liabilities. Otherwise, they cannot properly be considered in the determination of the Petitioner's ability to pay the proffered wage. Since the Petitioner did not submit audited financial statements or annual reports pursuant to the regulation at 8 C.F.R. § 204.5(g)(2), and current assets and current liabilities are not stated on the IRS Form 1040, Schedule C, submitted by the Petitioner, the Petitioner's net current assets cannot be ascertained for 2001 and 2002.

Similarly, the record contains bank statements for the Petitioner for November and December 2001. The Petitioner has not demonstrated why the documentation specified at 8 C.F.R. § 204.5(g)(2) is inapplicable. Further, bank statements show the amount in an account on a given date and cannot show the sustainable ability to pay a proffered wage.

On appeal, the Petitioner asserts that its member's salary that he earned as a computer engineer with another employer, and his savings, stocks, and 401K accounts, are available to pay the proffered wage.[7] We disagree. Because an LLC is a separate and distinct legal entity from its members, the assets of its members or of other entities cannot be considered in determining the Petitioner's ability to pay the proffered wage. *See Matter of Aphrodite Invs., Ltd.*, 17 I&N Dec. 530 (Comm'r 1980). In a similar case, the court in *Sitar v. Ashcroft*, No. Civ. A. 02-30197-MAP, 2003 WL 22203713 (D.Mass. Sept. 18, 2003) stated, "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." On appeal, the Petitioner states that the assets of the "general partners may be taken into account when evaluating the financial situation," but the Petitioner is not structured as a partnership.

On appeal, the Petitioner also asserts that its total assets should have been considered in the determination of its ability to pay the proffered wage. We disagree. The Petitioner's total assets include depreciable assets that the Petitioner uses in its business. Those depreciable assets will not be

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[5] Current assets consist of items having (in most cases) a life of one year or less, such as cash, marketable securities, inventory, and prepaid expenses. Joel G. Siegel & Jae K. Shim, *Barron's Dictionary of Accounting Terms* 117 (3d ed. 2000). Current liabilities are obligations payable (in most cases) within one year, such as accounts payable, short-term notes payable, and accrued expenses (such as taxes and salaries). *Id.* at 118.

[6] The Petitioner must support its assertions with relevant, probative, and credible evidence. *See Matter of Chawathe*, 25 I&N Dec. 369, 376 (AAO 2010).

[7] The Petitioner submits a letter from the member attesting to the same.

converted to cash during the ordinary course of business and will not, therefore, become funds available to pay the proffered wage. Further, the Petitioner's total assets must be balanced by its liabilities. Otherwise, they cannot properly be considered in the determination of the Petitioner's ability to pay the proffered wage.

As noted by the Petitioner on appeal, we may consider evidence of a petitioner's ability to pay beyond its net income and net current assets, including 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. *See Matter of Sonegawa*, 12 I&N Dec. 612, 614-615 (Reg'l Comm'r 1967).

In this case, the record indicates that the Petitioner was organized in Maryland in April 2001. Thus, it had been in business less than five years before filing the petition in October 2005. In contrast, the Petitioner in *Sonegawa* had been in business over 11 years at the time of filing the petition. *Id.* at 614. The Petitioner's gross income increased from $208,306 in 2001 to $360,558 in 2004, but it paid minimal wages each year between 2001 and 2004.[8] It stated on the petition that it had three employees, but it did not indicate whether they were full- or part-time employees. Given the nominal wages paid each year, it appears that at least one of them was a part-time employee. In contrast, the petitioner in *Sonegawa* paid wages to four regular employees and four part-time employees. *Id.* at 615. As noted above, the Petitioner here also experienced a net loss in 2001 and had nominal net income from 2002 to 2004. Further, unlike in *Sonegawa*, the Petitioner here has not established the occurrence of any uncharacteristic business expenditures or losses or established its reputation in its industry. The petitioner in *Sonegawa* was a well-recognized fashion designer whose designs had been published in *Time* and *Look* magazines. Her clients included Miss Universe, movie actresses, and society matrons. She lectured in fashion design at fashion shows and at colleges and universities. *Id.* The Regional Commissioner's determination in *Sonegawa* was based in part on the petitioner's sound business status and outstanding reputation as a couturiere. The Petitioner here has not demonstrated a similar magnitude of business activities. Further, the Petitioner here has not demonstrated that the Beneficiary will replace a current employee or outsourced service. Thus, assessing the totality of circumstances in this individual case, the record does not establish the Petitioner's continuing ability to pay the proffered wage pursuant to *Sonegawa*.

The Petitioner has not established its continuing ability to pay the proffered wage from the petition's priority date onward. In any future filings, the Petitioner must establish its ability to pay the proffered wage from the priority date and continuing until the Beneficiary obtains lawful permanent residence.

III. THE BENEFICIARY'S EXPERIENCE

Although not addressed by the Director, the Petitioner did not establish that the Beneficiary possessed the experience required by the labor certification as of the priority date.

A beneficiary must meet all of the requirements of the offered position set forth on the labor

[8] The Petitioner's tax returns indicate that it paid wages of $35,778 in 2001; $25,349 in 2002; $26,955 in 2003; and $34,400 in 2004.

certification by the priority date of the petition. 8 C.F.R. § 103.2(b)(l), (12); *Matter of Wing's Tea House*, 16 I&N Dec. 158, 159 (Acting Reg'l Comm'r 1977). In this case, the labor certification requires two years of experience as a cook. The labor certification states that the Beneficiary qualifies for the offered position based on experience as a cook with [redacted] in Vietnam from February 1994 until March 1996. It states that she was unemployed from March 1996 to December 2003.

Evidence relating to qualifying experience must be in the form of a letter from a current or former employer and must include the name, address, and title of the writer, and a specific description of the duties performed by the beneficiary. *See* 8 C.F.R. § 204.5(l)(3). The record contains an experience letter and English translation from [redacted] owner of [redacted] stating that it employed the Beneficiary as a chef from February 1994 until March 1996. However, the letter does not include the full address of the writer and it does not describe the Beneficiary's duties as required by the regulations. Additionally, a full English language translation must accompany any document containing foreign language. 8 C.F.R. § 103.2(b)(3). The translator must certify that the translation is complete and accurate, and that the translator is competent to translate from the foreign language into English. *Id.* Because the Petitioner did not submit a properly certified English language translation of the letter from [redacted] we cannot meaningfully determine whether the translated material is accurate and thus supports the Petitioner's claims.

Further, on a Form G-325, Biographic Information form, signed in October 2015 by the Beneficiary and submitted with her adjustment of status application, the Beneficiary left blank a section requiring her to list her last occupation abroad. She also left that section blank on another Form G-325 signed by her in November 2014 and submitted in connection with a visa application. Thus, her Forms G-325 conflict with her representation on the labor certification that she was employed in Vietnam from 1994 to 1996. In any future filings, the Petitioner must resolve these inconsistencies in the record with independent, objective evidence pointing to where the truth lies. *Matter of Ho*, 19 I&N Dec. 582, 591-92 (BIA 1988).[9]

The Petitioner has not established that the Beneficiary possessed the experience required by the labor certification as of the priority date.

ORDER: The appeal is dismissed.

[9] The record also contains a statement from the Beneficiary dated November 16, 2005, stating that she worked from April 2004 to the date of the letter as a "self-employer and a head cook." However, this experience was gained after the priority date in 2001.