U.S. Citizenship and Immigration Services

Non-Precedent Decision of the Administrative Appeals Office

MATTER OF A- CORP.

DATE: MAR. 16, 2018

APPEAL OF TEXAS SERVICE CENTER DECISION

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

The Petitioner, an online communication and collaboration service provider, seeks to employ the Beneficiary as a computer programmer. It requests classification of the Beneficiary as a professional under the third preference immigrant classification. 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 initially approved the petition. Subsequently, the Director revoked the petition's approval because the Petitioner did not establish that (a) the Beneficiary had the minimum education and experience required by the labor certification as of the petition's priority date; and (b) the Petitioner had the continuing ability to pay the proffered wage from the priority date onward.

On appeal, the Petitioner submits additional evidence and asserts that the Beneficiary had the minimum education required by the labor certification, as evidenced by the credentials evaluations and translations in the record. The Petitioner further asserts that it has established its continuing ability to pay the proffered wage based on wages it paid to the Beneficiary, its net income, replacement of a former employee by the Beneficiary, and the totality of the circumstances.

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).[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

[1] The priority date of a petition is the date the DOL accepted the labor certification for processing, which in this case is October 2, 2012. *See* 8 C.F.R. § 204.5(d).

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 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.

After granting a petition, USCIS may revoke the petition's approval "at any time" for "good and sufficient cause." Section 205 of the Act, 8 U.S.C. § 1155. If supported by the record, a director's realization that a petition was erroneously approved may justify revocation. *Matter of Ho*, 19 I&N Dec. 582, 590 (BIA 1988).

Good and sufficient cause exists to issue a notice of intent to revoke (NOIR) where the record at the time of the notice's issuance, if unexplained or unrebutted, would have warranted the petition's denial. *Matter of Estime*, 19 I&N Dec. 450, 451 (BIA 1987). Similarly, revocation is proper if the record at the time of the decision, including any explanation or rebuttal evidence provided by a petitioner, warranted a petition's denial. *Id.* at 452.

II. THE BENEFICIARY'S EDUCATION

The Director revoked the petition's approval, in part, because the Petitioner did not establish that the Beneficiary possessed the education 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 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 a bachelor's degree in computer science, engineering, or a related field. The Petitioner indicated that it will accept a foreign educational equivalent, but it will not accept an alternate combination of education and experience.

The labor certification states that the Beneficiary qualifies for the offered position based on his bachelor's degree in industrial engineering technology from [redacted] Iran, issued in 2009.

With the petition, the Petitioner submitted an "Interim Certificate of Bachelor's Degree Studies Completion" from [redacted] stating that the Beneficiary completed the undergraduate program in "Industrial Technology-Industrial Engineering" on August 22, 2009, along with the Beneficiary's transcripts. The Petitioner also submitted an educational evaluation from [redacted] The evaluation concluded that the Beneficiary's education at [redacted] is equivalent to a bachelor's degree in industrial engineering technology as awarded by a regionally accredited U.S. university or college. In his NOIR, the Director stated that the certificate

is a provisional degree, that the Petitioner had not provided the Beneficiary's final degree,[2] and that the translations of the Beneficiary's provisional certificate and transcript were not certified translations as required by 8 C.F.R. § 103.2(b)(3).[3] The Director further stated that he would not accept the evaluation because the record did not contain the Beneficiary's final degree and certified translations of his degree and transcript.

In response to the NOIR, the Petitioner submitted a second educational evaluation from which concludes that the Beneficiary's education at is equivalent to a bachelor's degree in industrial engineering from an accredited institution of higher education in the United States. The Petitioner also submitted the Beneficiary's "Diploma of Completion of Bachelor's Degree Course" from together with his transcript. The diploma and transcript were translated to English by the

In his notice of revocation (NOR), the Director indicated that the of the Beneficiary's diploma and transcript were not certified as accurate and complete, and that the translator did not certify that it was competent to translate from the foreign language into English. *See* 8 C.F.R. § 103.2(b)(3). He noted that the stamp on the translated documents states "[t]his certification does not include confirmation of the accuracy of the translation..." Thus, the Director declined to accept the diploma, transcripts, and the as credible evidence of the Beneficiary's education. Because the record was not accompanied by proper translations, the Director indicated that he could not determine the Beneficiary's eligibility.

On appeal, the Petitioner states that it is submitting "a second complete English translation with the interpreter's certification." It submits English translations prepared by of the Beneficiary's transcript and "Completion Certificate of Bachelor's Degree Studies" from together with a "Certification of Translation Accuracy" from However, the are not accompanied by copies of the original documents that were translated. It appears that the relate to the Beneficiary's diploma and transcript submitted in response to the NOIR, but the and the have several differences. For example, the of the diploma states that the degree was completed on August 22, 2009, while the states that it was completed on August 21, 2009. The of the diploma also states that it was verified by the central organization on January 3, 2010, while the states that it was verified by the central organization on October 3, 2009. The of the transcript states that graduation occurred on August 22, 2009, while the states that it occurred on

[2] A petitioner bears the burden to establish that a beneficiary's provisional certificate reflects that, at the time the certificate was issued, all of the substantive requirements for the degree were met and the degree was in fact approved by the responsible university body. *Matter of O-A-, Inc.*, Adopted Decision 2017-03 (AAO Apr. 17, 2017).

[3] Any document in a foreign language must be accompanied by a full English language translation. 8 C.F.R. § 103.2(b)(3). The translator must certify that the English language translation is complete and accurate, and that the translator is competent to translate from the foreign language into English. *Id.*

August 21, 2009. The Petitioner has not resolved the inconsistencies in the translations with independent, objective evidence pointing to where the truth lies. *Matter of Ho*, 19 I&N Dec. at 591-592. Because the Petitioner submitted conflicting English language translations of the Beneficiary's educational documents, we cannot meaningfully determine whether the translated materials are accurate and thus support the Petitioner's claims.

On appeal, the Petitioner states that the educational evaluations should be accepted based on a provision in the USCIS Adjudicator's Field Manual (AFM)[4] and a 1995 Immigration and Naturalization Service memo.[5] The AFM states that adjudicators may consider a credentials evaluation that is credible, logical, and well-documented. However, because the credentials evaluations in this case are based on translations of documents that are not credible, we cannot accept the conclusions of the evaluations. USCIS may reject or give lesser evidentiary weight to credential evaluations inconsistent with the record or "in any way questionable." *Matter of Caron Int'l, Inc.*, 19 I&N Dec. 791, 795 (Comm'r 1988).

Based on the foregoing, we find the Petitioner has not established that the Beneficiary possessed the education required by the labor certification as of the priority date.

III. THE BENEFICIARY'S EXPERIENCE

The Director revoked the petition's approval, in part, because the Petitioner did not establish that the Beneficiary possessed the experience required by the labor certification as of the priority date. 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).

In this case, the labor certification requires 12 months of experience in the job offered of computer programmer, or 12 months of experience as a software architect. Part H.14 of the labor certification states that the experience must include "Neo4J, Railo, ExtJS, Objective-C, ColdFusion, and chat gateway protocols. Employer will accept any combination of education, training, or experience."

The labor certification lists the Beneficiary's employment as a software architect with [redacted] in [redacted] Iran from August 1, 2009, until April 6, 2011; and with the Petitioner as a computer programmer from April 8, 2011, onward. The Petitioner asserts that the Beneficiary qualifies for the offered position based on his experience as a software architect with [redacted] The record contains an experience letter from [redacted] CEO of [redacted] stating that the company employed the Beneficiary as a software architect/technical

[4] USCIS Adj. Field Manual 22.2(j)(1)(C).

[5] The Petitioner did not submit a copy of the memo on appeal or provide a citation for it.

[6] The email address given for [redacted] is a [redacted] address, which is the fictitious name of the Petitioner. The relationship between [redacted] and the Petitioner, is not clear. This ambiguity must be resolved with independent, objective evidence of [redacted] authority to sign the experience letter on behalf of

leader from August 2009 until April 2011.

In the NOIR, the Director noted inconsistencies in the Beneficiary's experience listed on the labor certification and the information provided on his Form G-325A, Biographic Information form,[7] and his prior nonimmigrant visa application. Specifically, his Form G-325A signed on December 16, 2014, stated that he was employed as a software architect with [redacted] from January 2006 to April 2011, which conflicts with the start date of August 1, 2009, provided on the labor certification. He indicated on his nonimmigrant visa application in 2010 that he was currently employed with [redacted] and had not been previously employed, which conflicts with the information provided on the labor certification and Form G-325A. The labor certification does not list the Beneficiary's employment with [redacted] while the Form G-325 lists employment prior to his employment with [redacted] and indicates that his employment with [redacted] ended in December 2009. The Director stated in the NOIR that these discrepancies must be resolved with independent, objective evidence. *Matter of Ho*, 19 I&N Dec. at 591-592.

In response to the NOIR, the Petitioner asserted that the Beneficiary was only obligated to list his employment from October 2009 to October 2012 on the labor certification. The instructions at Part K of the Form ETA 9089, Application for Permanent Employment Certification, required the Beneficiary to list all jobs he had held during the past three years, and to list any other experience that qualified him for the offered job. Since his nonimmigrant visa application lists his employment with [redacted] in 2010, and his Form G-325A lists the same employment through December 2009, he was required to list it on the labor certification that was filed in October 2012.

In response to the NOIR, the Petitioner also submitted correspondence from the U.S. Embassy in [redacted] Turkey, regarding the Beneficiary's nonimmigrant visa application. However, as noted in the NOR, the correspondence does not indicate that the Embassy changed the Beneficiary's nonimmigrant visa application to reflect a different employment history. Instead, the correspondence simply indicates that the Embassy received information from the Beneficiary related to his application, but it does not indicate what information was provided, or whether any new information was accepted and acted upon by the Embassy.

On appeal, the Petitioner states that the start date provided on the Form G-325A was a typo and not material to his eligibility for the offered position. However, the Petitioner has not provided independent, objective evidence of his prior employment, such as paychecks and tax records, verifying his employment history. Further, the Petitioner has not explained the inconsistencies between the labor certification and the nonimmigrant visa application. Thus, The Petitioner has not resolved the discrepancies in the Beneficiary's employment history. *Id.*

[redacted] *Matter of Ho*, 19 I&N Dec. at 591-592.

[7] The Form G-325 lists employment with [redacted] from March 2004 to January 2006; [redacted] from November 2008 to December 2009; with [redacted] from January 2006 to April 2011; and with the Petitioner from April 2011 onward.

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

IV. ABILITY TO PAY THE PROFFERED WAGE

The Director revoked the petition's approval, in part, because the Petitioner did not establish its continuing ability to pay the proffered wage from the petition's priority date of October 2, 2012, onward. The proffered wage is $68,162 per year.

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. If a petitioner did not pay a beneficiary the full proffered wage, we next examine whether it had 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.[8]

In this case, the Petitioner submitted copies of IRS Forms W-2, Wage and Tax Statements, demonstrating that it paid the Beneficiary as follows:

- $54,999.96 in 2012;
- $54,999.96 in 2013;
- $54,999.96 in 2014; and
- $78,416.65 in 2015.

The amount on the 2015 Form W-2 exceeds the annual proffered wage. However, the amounts on the 2012, 2013, and 2014 Forms W-2 do not equal or exceed the annual proffered wage. The record

[8] 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); *Rivzi v. Dep't of Homeland Sec.*, 37 F. Supp. 3d 870, 883-84 (S.D. Tex. 2014), *aff'd*, -- Fed. Appx. --, 2015 WL 5711445, *1 (5th Cir. Sept. 30, 2015).

therefore does not establish the Petitioner's ability to pay the proffered wage based on the wages it paid to the Beneficiary. But we credit the Petitioner's payments to the Beneficiary. The Petitioner must demonstrate its ability to pay the difference between the annual proffered wage and the amounts it paid to the Beneficiary, which is $13,162.04 in 2012, 2013, and 2014.

The Petitioner's federal tax returns reflect net income[9] amounts as follows:

- -$78,600 in 2012;
- -$2,790 in 2013; and
- $24,827 in 2014.

Therefore, for the years 2012 and 2013, the Petitioner did not have sufficient net income to pay the difference between the annual proffered wage and the amounts it paid to the Beneficiary. For the year 2014, the Petitioner had sufficient net income to pay the difference between the annual proffered wage and the amounts it paid to the Beneficiary.[10]

As an alternate means of determining a petitioner's ability to pay the proffered wage, USCIS may review its net current assets. Net current assets are the difference between a petitioner's current assets and current liabilities.[11] A corporation's year-end current assets are shown on Schedule L, lines 1 through 6. Its year-end current liabilities are shown on lines 16 through 18. If the total of a corporation'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. The Petitioner's tax returns state end-of-year net current assets as follows:

- -$267,416 in 2012; and
- -$247,426 in 2013.

Therefore, for the years 2012 and 2013, the Petitioner did not have sufficient net current assets to pay the proffered wage.

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[9] The record indicates that the Petitioner is a C corporation. Net income is shown on Line 28 of the IRS Form 1120, U.S. Corporation Income Tax Return.

[10] Where a petitioner has filed Form I-140 petitions for multiple beneficiaries, it must demonstrate that its job offer to each beneficiary is realistic, and that it has the ability to pay the proffered wage to each beneficiary. *See* 8 C.F.R. § 204.5(g)(2); *see also 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). USCIS records show that the Petitioner filed Form I-140 petitions for other beneficiaries. Thus, the Petitioner must establish its ability to pay this Beneficiary as well as the beneficiaries of the other Form I-140 petitions that were pending or filed after the priority date of the current petition.

[11] 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.

On appeal, the Petitioner states that the Beneficiary will replace an employee, [redacted] who it employed as a computer programmer from April 1, 2012, to April 10, 2015. However, the Petitioner employed the Beneficiary concurrently with [redacted] as a computer programmer. The Beneficiary cannot replace an employee who concurrently performed the same job.

The Petitioner also asserts on appeal that it has established its ability to pay based on the totality of the circumstances. 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 incorporated in 2002. The Petitioner states on appeal that it "reported net losses in 2012 and 2013 due to increased spending in order to speed their growth and increase their revenue and thus, the value of their company." It states that it started exploring opportunities to merge with another company in 2012, and that due to financial issues with that company, the resulting delay in the merger caused net losses in 2012 and 2013. However, the Petitioner has provided no evidence of a delay in a merger due to financial issues with another company. Assertions of counsel do not constitute evidence. *Matter of Obaigbena*, 19 I&N Dec. 533, 534 n.2 (BIA 1988) (citing *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980)). Counsel's statements must be substantiated in the record with independent evidence.

The Petitioner further asserts that "based on its recent purchase and merger," it has a reasonable expectation of future profits.[12] It states that another entity organized under the laws of Japan now owns 25% of its stock and that the other entity plans to be listed on the Japanese financial markets. The Petitioner asserts that a planned initial public offering (IPO) will raise capital and help expand the Petitioner's business. The Petitioner cites *Construction and Design Co. v. USCIS*, 563 F.3d 593 (7th Cir. 2009), in support of its claim that its reasonable expectation of future profitability establishes its ability to pay the proffered wage. However, *Construction and Design* is not binding precedent in this matter because the Petitioner is located in Maryland, which is not within the jurisdiction of the 7th Circuit Court of Appeals.[13] Further, the Petitioner has provided no evidence to establish that an IPO will increase its profits.

The Petitioner also asserts that its gross sales have increased in 2016, based on an unaudited financial statement it provides on appeal. Thus, it asserts that it has "demonstrated an upward

[12] Against the projection of future earnings, *Matter of Great Wall*, 16 I&N Dec. 142, 144-145 (Acting Reg'l Comm'r 1977), states:

> I do not feel, nor do I believe the Congress intended, that the petitioner, who admittedly could not pay the offered wage at the time the petition was filed, should subsequently become eligible to have the petition approved under a new set of facts hinged upon probability and projections, even beyond the information presented on appeal.

[13] The U.S. Court of Appeals for the Seventh Circuit covers Illinois, Indiana, and Wisconsin.

trend." The Petitioner's reliance on unaudited financial records is misplaced. Where a petitioner relies on financial statements to demonstrate its ability to pay the proffered wage, those financial statements must be audited. 8 C.F.R. § 204.5(g)(2). The unsupported representations of management are not reliable evidence and are insufficient to demonstrate the ability to pay the proffered wage

The Petitioner also cites an unpublished AAO decision as support for its assertion that it has demonstrated its ability to pay the proffered wage based on its history of doing business. This decision was not published as a precedent and therefore does not bind USCIS officers in future adjudications. *See* 8 C.F.R. § 103.3(c). Non-precedent decisions apply existing law and policy to the specific facts of the individual case, and may be distinguishable based on the evidence in the record of proceedings, the issues considered, and applicable law and policy. Further, the Petitioner has not established its historical growth since its incorporation.

Unlike in *Sonegawa*, the Petitioner has not established its outstanding reputation in its industry. Also unlike in *Sonegawa*, the Petitioner in this case must demonstrate its ability to pay multiple beneficiaries. 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.

The Petitioner has not established its continuing ability to pay the proffered wage from the priority date onward.

V. CONCLUSION

In summary, the record does not establish that the Beneficiary possessed the required education and experience for the offered job as of the priority date and does not demonstrate that the Petitioner had the continuing ability to pay the proffered wage.

ORDER: The appeal is dismissed.

Cite as *Matter of A- Corp.*, ID# 477516 (AAO Mar. 16, 2018)