U.S. Citizenship and Immigration Services

Non-Precedent Decision of the Administrative Appeals Office

MATTER OF C-S-, INC.

DATE: MAR. 17, 2017

APPEAL OF TEXAS SERVICE CENTER DECISION

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

The Petitioner, a provider of custom software and information technology consulting services, seeks to employ the Beneficiary as a computer programmer. It requests classification of the Beneficiary as a professional under the third preference immigrant category. *See* Immigration and Nationality Act (the Act) section 203(b)(2)(A), 8 U.S.C. § 1153(b)(2)(A). This category allows a U.S. business to sponsor a professional with a U.S. bachelor's degree or its foreign equivalent for lawful permanent resident status.

The Director, Texas Service Center, denied the petition. The Director concluded that the record did not establish the Petitioner's ability to pay the proffered wage.

The matter is now before us on appeal. To demonstrate its ability to pay the proffered wage, the Petitioner submits amended federal income tax returns.

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

I. LAW AND ANALYSIS

A. Employment-Based Immigration Process

Employment-based immigration is generally a three-step process. First, a prospective U.S. employer must obtain an approved ETA Form 9089, Application for Permanent Employment Certification (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). Next, the employer must file a Form I-140, Immigrant Petition for Alien Worker, with U.S. Citizenship and Immigration Services (USCIS). *See* section 204(a) of the Act, 8 U.S.C. § 1154(a). Finally, if USCIS approves the petition, a 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.

By approving the labor certification in this case, the DOL certified that there are insufficient U.S. workers who are able, willing, qualified, and available for the offered position of computer programmer. *See* section 212(a)(5)(A)(i)(I) of the Act. The DOL also certified that the employment of 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)(II).

In visa petition proceedings, USCIS must determine whether the Beneficiary meets the requirements of the offered position certified by the DOL. We must also determine whether the Petitioner and the Beneficiary qualify for the requested benefit, including whether the Petitioner demonstrated its ability to pay the proffered wage. *See, e.g., Tongatapu Woodcraft Haw., Ltd. v Feldman*, 736 F.2d 1305, 1309 (9th Cir. 1984) (holding that the immigration service "makes its own determination of the alien's entitlement to [the requested] preference status").

B. The Petitioner's Ability to Pay the Proffered Wage

A petitioner must demonstrate its continuing ability to pay a proffered wage from a petition's priority date until a beneficiary obtains lawful permanent residence. 8 C.F.R. § 204.5(g)(2). Evidence of ability to pay must include copies of annual reports, federal income tax returns, or audited financial statements. *Id.*

In this case, the labor certification states the proffered wage of the offered position of computer programmer as $75,150 per year. The petition's priority date is October 1, 2014. This is the date the DOL received the labor certification application for processing. *See* 8 C.F.R. § 204.5(d) (explaining how to determine a petition's priority date).

In determining ability to pay, we first examine whether a petitioner paid a beneficiary the full proffered wage each year from a petition's priority date. If a petitioner did not pay the full proffered wage each year, we next consider whether it generated sufficient annual amounts of net income or net current assets to pay any differences between the wages paid and the proffered wage. If a petitioner's net income and net current assets are insufficient, we may also consider the overall magnitude of its business activities. *See Matter of Sonegawa,* 12 I&N Dec. 612, 614-15 (Reg'l Comm'r 1967).[1]

Here, the record indicates the Petitioner's employment of the Beneficiary since October 5, 2011. The Petitioner submitted a copy of an IRS Form W-2, Wage and Tax Statement, indicating its total payments to the Beneficiary in 2014 of $45,441.24. The amount on the Form W-2 does not equal or exceed the annual proffered wage of $75,150. The record therefore does not establish the

[1] 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); *Estrada-Hernandez v. Holder*, 108 F. Supp. 3d 936, 942-43 (S.D. Cal. 2015); *Rivzi v. Dep't of Homeland Sec.*, 37 F. Supp. 3d 870, 883-84 (S.D. Tex. 2014), *aff'd*, 627 Fed. App'x. 292 (5th Cir. 2015).

Petitioner's ability to pay the proffered wage in 2014 based on its payment to the Beneficiary. Nevertheless, we credit the Petitioner's payments. For 2014, it need only demonstrate its ability to pay the difference between the annual proffered wage and the amount it paid the Beneficiary, or $29,708.76.

A letter from the Petitioner's president/co-shareholder asserts that the company paid the Beneficiary $58,492.26 in 2015. But the Petitioner did not submit evidence to corroborate the claimed payments. The record therefore does not support the Petitioner's claimed payments to the Beneficiary in 2015 and does not establish its ability to pay in that year based on wages paid.

As the record does not establish that the Petitioner paid the Beneficiary the full proffered wage in either 2014 or 2015, we next turn to examine the Petitioner's income and net current assets. The Petitioner submitted copies of its initial federal income tax returns for 2015, and supplemented the record with "amended" returns for 2014 and 2015. The tax returns reflect negative annual amounts of net income for 2014 and 2015.[2] The record therefore does not establish the Petitioner's ability to pay the proffered wage in either year based on its net income.

The initial 2015 tax return also reflected negative net current assets and did not demonstrate that the Petitioner could pay the proffered wage on this basis. On appeal, the Petitioner asserts that the amended federal income tax returns for 2014 and 2015 now reflect annual net current asset amounts of $215,930 in 2014 and $206,112 in 2015. The Petitioner's president/co-shareholder states that the company's original tax returns for 2014 and 2015 overstated its annual amounts of current liabilities.[3] The president/co-shareholder states that the Petitioner mistakenly categorized a $281,002 note, an obligation to repay a loan from another company, as a current liability, rather than as a long-term liability.[4] The president/co-shareholder asserts that correction of the misclassified liability results in the Petitioner's generation of positive, rather than negative, annual amounts of net current assets for 2014 and 2015, thereby establishing its ability to pay. However, the record does not establish the reliability of these amounts.

The Petitioner asserts that the amended net current asset amounts stem from the misclassification of a $281,002 note. But the record lacks corroborating evidence of this debt repayment obligation. Copies of the Petitioner's federal income tax returns of record, from 2012 through 2015, do not indicate any interest deductions. Moreover, the record lacks a copy of the note. Thus, the record

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[2] The Petitioner did not submit a copy of its original federal income tax return for 2014. Rather, on appeal, it provides a copy of its amended tax return for that year. The Petitioner states that the amended return changed only the liabilities stated on the balance sheet of Schedule K to its IRS Form 1120S, U.S. Income Tax Return for an S Corporation. We will therefore refer to the amended return for the Petitioner's 2014 financial information.

[3] As the Petitioner states that the amended return changed only the liabilities stated on the balance sheet, it appears that the original 2014 tax return would have reflected negative net current assets.

[4] Online government records identify the Petitioner's president/co-shareholder as a director of the company that purportedly issued the loan to the Petitioner. *See* Fla. Dep't of State, Div. of Corps., at http://search.sunbiz.org/ Inquiry/ CorporationSearch/ByName (last visited Jan. 6, 2017).

does not document the note, its date of issuance, due date, payment schedule, or any related interest charges.

Also, the amended tax returns do not contain evidence of their submission to the Internal Revenue Service (IRS), such as IRS receipt stamps or courier tracking information. The record therefore does not establish the Petitioner's sworn declarations to the IRS of the truth, accuracy, and completeness of the amended tax returns. *See* 26 U.S.C. § 7206(1) (subjecting a taxpayer who willfully submits a false return to up to 3 years in prison). Absent proof of the submission of the amended returns under such sworn declarations, the net current assets amounts on the amended returns are not credible. In addition, corporations must file amended returns on IRS Forms 1120X, Amended U.S. Corporation Income Tax Returns.[5] The amended returns submitted by the Petitioner do not include IRS Forms 1120X, further suggesting that the Petitioner did not submit the amended returns to the IRS.

In visa petition proceedings, a petitioner bears the burden of establishing eligibility for a requested benefit. Section 291 of the Act, 8 U.S.C. § 1361. The Petitioner must therefore support the information on its amended tax returns with evidence of the $281,002 note and the company's submission of the amended returns to the IRS. *See Matter of Ho*, 19 I&N Dec. 582, 591 (BIA 1988) (requiring a petitioner to resolve inconsistencies of record by independent, objective evidence pointing to where the truth lies). Otherwise, the record suggests that the Petitioner altered the current liabilities on its tax returns solely to establish its ability to pay the Beneficiary's proffered wage. Because the record lacks evidence corroborating the net current asset amounts on the Petitioner's amended tax returns, the returns do not reliably establish the Petitioner's ability to pay the proffered wage.

As previously noted, we may also consider a petitioner's ability to pay a proffered wage beyond its amounts of net income and net current assets. Under *Sonegawa*, we may consider such factors as: the number of years a petitioner has conducted business; its number of employees; the growth of its business; the occurrence of uncharacteristic losses or expenses; its reputation in its industry; a beneficiary's replacement of a current employee or outsourced service; or other evidence of its ability to pay a proffered wage.

In this case, the record indicates the Petitioner's continuous business operations since 1989. But the record indicates a recent decrease in its number of employees. On the labor certification, which was filed on October 1, 2014, the Petitioner stated its employment of six people. About 8 months later, however, the Petitioner filed the Form I-140, indicating its employment of five people. In addition, the Petitioner's federal income tax returns indicate a decrease from 2014 to 2015 in its annual amounts of salaries and wages paid, as well as a significant drop in its annual gross revenues since 2013. Unlike in *Sonegawa*, the record does not indicate the Petitioner's incurrence of uncharacteristic losses or expenses, or its possession of an outstanding reputation in its industry. The record also does not indicate that the Beneficiary will replace a current employee or outsourced

[5] Internal Revenue Serv., IRS Form 1120x, at https://www.irs.gov/pub/irs.access/f1120x_accessible.pdf (last visited Jan. 20, 2017).

service. Thus, pursuant to *Sonegawa*, the record does not establish the Petitioner's ability to pay the proffered wage

For the foregoing reasons, the Petitioner has not demonstrated its continuing ability to pay the proffered wage from the petition's priority date onward. We will therefore affirm the Director's decision.

B. The Beneficiary's Possession of the Required Experience

Although unaddressed by the Director, the record also does not establish the Beneficiary's possession of the experience required for the offered position. A petitioner must establish a beneficiary's possession of all the education, training, and experience specified on an accompanying labor certification by a petition's priority date. 8 C.F.R. § 103.2(b)(l), (12); *see also Matter of Wing's Tea House,* 16 I&N Dec. 158, 159 (Acting Reg'l Comm'r 1977); *Matter of Katigbak,* 14 I&N Dec. 45, 49 (Reg'l Comm'r 1971).

In evaluating a beneficiary's qualifications, we must examine the job offer portion of a labor certification to determine the minimum requirements of an offered position. We may neither ignore a term of the labor certification, nor impose additional requirements. *See K.R.K. Irvine, Inc.* v. *Landon,* 699 F.2d 1006, 1009 (9th Cir. 1983); *Madany* v. *Smith,* 696 F.2d 1008, 1012-13 (D.C. Cir. 1983); *Stewart Infra-Red Commissary of Mass., Inc.* v. *Coomey,* 661 F.2d 1, 3 (1st Cir. 1981).

As previously noted, the petition's priority date is October 1, 2014. The labor certification states the minimum requirements of the offered position of computer programmer as a U.S. bachelor's degree or a foreign equivalent degree in systems engineering, computer engineering, or computer information systems, plus 36 months, or 3 years, of experience in the job offered.

Part H.14 of the labor certification also states that the offered position requires:

> [k]nowledge of programming in Java script, HTML, CSS and websites programming in PHP, ASP Classic and ASPX; Ability to design, planning and deploy software from general requirements; Knowledge of programming in Visual Basic 6.0 and Visual Basic .NET over Visual Studio 2005/2008 and 2010.

On the labor certification, the Beneficiary attested to his possession of more than 6 years of relevant experience before assuming the offered position with the Petitioner on October 5, 2011.[6] The Beneficiary stated the following experience:

- About 2 months as a computer systems analyst with [redacted] in the United States from April 5, 2011, to June 6, 2011;

[6] A labor certification employer cannot rely on experience gained by a foreign national in the offered position. 20 C.F.R. § 656.17(i)(3).

- About 1 year, 6 months as a computer system programmer with [redacted] in the United States from October 1, 2009, to April 4, 2011; and
- About 4 years, 11 months as a computer program director with [redacted] in Venezuela from October 1, 2004, to September 1, 2009.

A petitioner must support a beneficiary's claimed qualifying experience with letters from employers. 8 C.F.R. § 204.5(l)(3)(ii)(A). The letters must provide the names, addresses, and titles of the employers, and descriptions of a beneficiary's experiences. *Id.* If required evidence is unavailable, a petitioner must document that unavailability before we can consider secondary evidence. 8 C.F.R. § 103.2(b)(2).

Here, as proof of the Beneficiary's claimed qualifying experience with [redacted] the Petitioner submitted copies of two letters from purported, former employees of the company. The letters state the Beneficiary's employment by [redacted] as computer program director from October 1, 2004, to September 1, 2009, and describe his job duties. However, the letters are not "from" the Beneficiary's purported, former "employer," as instructed by 8 C.F.R. § 204.5(l)(3)(ii)(A), and contrary to 8 C.F.R. § 103.2(b)(2), the record does not document the unavailability of a letter from [redacted]

Also, the letters do not state their signatories' dates of employment with [redacted] nor did the Petitioner submit corroborating evidence that the signatories worked for [redacted] The record therefore does not establish the signatories' bases of personal knowledge of the Beneficiary's purported qualifying experience with the company. In addition, the letters are virtually identical in format and content, suggesting that they were written by the same person and casting doubt on their validity.

Further, the letters do not establish the Beneficiary's experience in the job offered or his knowledge of all the technologies specified on the labor certification. The job duties of the offered position include "[m]aintain[ing] and enhanc[ing] Visual Basic 6 programs." Part H.14 of the labor certification also states that the offered position requires "[k]nowledge of programming in Visual Basic 6.0 and Visual Basic .NET over Visual Studio 2005/2008 and 2010." Because the letters do not state the Beneficiary's knowledge of Visual programming, the letters do not establish the Beneficiary's possession of the required experience.

The Petitioner also submitted a copy of a letter from the president of [redacted] The letter, which [redacted] originally submitted to USCIS in support of a nonimmigrant work visa on behalf of the Beneficiary, is dated March 26, 2009, over 6 months before the Beneficiary claims to have been employed there. The letter therefore does not establish the Beneficiary's claimed qualifying experience with [redacted] Also, like the other letters submitted in support of the Beneficiary's qualifying experience, the [redacted] letter does not establish the Beneficiary's qualifying experience in the job duties of the offered position or his knowledge of all the technologies specified in part H.14 of the labor certification.

For the foregoing reasons, the record does not establish the Beneficiary's possession of the experience required for the offered position as specified by the labor certification.

II. CONCLUSION

The Petitioner has not demonstrated its continuing ability to pay the proffered wage from the petition's priority date onward. We will therefore affirm the Director's decision. The record also does not establish the Beneficiary's possession of the experience required for the offered position.

ORDER: The appeal is dismissed.

Cite as *Matter of C-S-, Inc.*, ID# 270032 (AAO Mar. 17, 2017)