U.S. Citizenship and Immigration Services

Non-Precedent Decision of the Administrative Appeals Office

MATTER OF O-, INC.

DATE: MAR. 21, 2017

APPEAL OF NEBRASKA SERVICE CENTER DECISION

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

The Petitioner, a high tech manufacturing company, seeks to employ the Beneficiary as a development engineer. 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 Nebraska Service Center denied the petition, concluding that the Petitioner had not established its ability to pay the proffered wage from the priority date.

The matter is now before us on appeal. The Petitioner asserts that it has the continuing ability to pay the proffered wage based on the totality of the circumstances. Upon *de novo* review, we will dismiss the appeal.

I. LAW AND ANALYSIS

A. Employment-Based Immigration

Employment-based immigration is generally a three-step process. First, an employer must obtain an approved 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). As required by statute, an ETA Form 9089, Application for Permanent Employment Certification (labor certification), approved by the DOL, accompanies the petition. By approving the labor certification, the DOL certified that there are insufficient U.S. workers who are able, willing, qualified, and available for the offered position. 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. Section 212(a)(5)(A)(i)(II) of the Act.

Next, the employer must file an immigrant visa petition with U.S. Citizenship and Immigration Services (USCIS). *See* section 204 of the Act, 8 U.S.C. § 1154. Finally, if USCIS approved the petition, the foreign national must 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.

In these visa petition proceedings, USCIS determines whether a foreign national meets the job requirements specified on a labor certification and the requirements of the requested immigrant classification. *See* section 204(b) of the Act (stating that USCIS must approve a petition if the facts stated in it are true and the foreign national is eligible for the requested preference classification); *see also, e.g., Tongatapu Woodcraft Haw., Ltd. v. Feldman*, 736 F.2d 1305, 1309 (9th Cir. 1984); *Madany v. Smith*, 696 F.2d 1008, 1012-13 (D.C. Cir. 1983) (both holding that USCIS has authority to make preference classification decisions).

The priority date of a petition is the date the DOL accepted the labor certification for processing. *See* 8 C.F.R. § 204.5(d). A petitioner must establish the elements for the approval of the petition at the time the priority date is established and continuing until the beneficiary obtains lawful permanent residence. *See* 8 C.F.R. §§ 204.5(g)(2), 103.2(b)(1), (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 this case, the priority date is January 12, 2015.

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. In a case where the prospective United States employer employs 100 or more workers, the director may accept a statement from a financial officer of the organization which establishes the prospective employer's ability to pay the proffered wage. In appropriate cases, additional evidence, such as profit/loss statements, bank account records, or personnel records, may be submitted by the petitioner or requested by the Service.

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 $62,795 per year. The issue is whether the Petitioner has demonstrated its ability to pay the proffered wage as of the January 12, 2015, 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.[1]

In this case, the Petitioner submitted the Beneficiary's IRS Form W-2, Wage and Tax Statement, demonstrating that it employed and paid the Beneficiary $36,112.51 in 2015.[2] The amount on the Form W-2 does not equal or exceed the annual proffered wage of $62,795. The record therefore does not establish the Petitioner's ability to pay the proffered wage based on the wages it paid the Beneficiary. But we credit the Petitioner's payments to the Beneficiary. The Petitioner need only demonstrate its ability to pay the difference between the annual proffered wage and the wages it paid the Beneficiary, which is $26,682.49 in 2015.

The record indicates that the Petitioner is structured as an S corporation. The Petitioner's 2015 federal income tax return reflects a net loss[3] of $123,594. Therefore, for the year 2015, the Petitioner did not have sufficient net income to pay the difference between the proffered wage and the wages paid to the Beneficiary.

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.[4] A corporation's year-end current assets are shown on Schedule

---

[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); *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).

[2] The Petitioner notes on appeal that it started paying the Beneficiary the proffered wage on November 1, 2016, and submits paystubs evidencing the payments. The Petitioner asserted when it filed the petition that since it has paid the Beneficiary at the proffered wage rate since November 1, 2016, according to the language in a memorandum dated May 4, 2004, from William R. Yates, Associate Director of Operations, USCIS, regarding the determination of ability to pay, it has established its continuing ability to pay the proffered wage beginning on the priority date. *See* Memorandum from William R. Yates, Associate Director for Operations, USCIS, HQOPRD 90/16.45, *Determination of Ability to Pay under 8 CFR 204.5(g)(2)* 2 (May 4, 2004), http://www.uscis.gov/laws/policy-memoranda. However, the regulation at 8 C.F.R. § 204.5(g)(2) requires that a petitioning entity demonstrate its *continuing* ability to pay the proffered wage beginning on the priority date. Thus, the Petitioner must still demonstrate its ability to pay the proffered wage from the priority date in 2015 onward.

[3] Where an S corporation's income is exclusively from a trade or business, USCIS considers net income to be the figure for ordinary income, shown on line 21 of page 1 of the petitioner's IRS Form 1120S, U.S. Income Tax Return for an S Corporation. However, where an S corporation has income, credits, deductions, or other adjustments from sources other than a trade or business, net income is found on line 18 of Schedule K to Form 1120S. *See* Internal Revenue Serv., Instructions to Form 1120S, 22, at https://www.irs.gov/pub/irs-pdf/i1120s.pdf (last visited Feb. 28, 2017). In this case, the Petitioner's net loss is found on line 21 of page 1 of its 2015 tax return.

[4] According to *Barron's Dictionary of Accounting Terms* 117 (3d ed. 2000), "current assets" consist of items having (in

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 federal tax return demonstrates end-of-year net current liabilities of $312,468 for 2015. Therefore, for the year 2015, the Petitioner did not have sufficient net current assets to pay the difference between the proffered wage and the wages paid to the Beneficiary.

The Petitioner submits combined reviewed financial statements for and the Petitioner, as well as 2015 tax return. However, because a corporation is a separate and distinct legal entity from its shareholders, the assets of its shareholders or of other corporations cannot be considered in determining the petitioning corporation's ability to pay the proffered wage. *See Matter of Aphrodite Investments, Ltd.*, 17 I&N Dec. 530 (Comm'r 1980). In a similar case, the court in *Sitar v. Ashcroft*, 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."

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 incorporated in 2001. The record does not establish the growth of its business, as it contains the Petitioner's tax return for 2015 only. The Petitioner indicated on the petition and labor certification that it employs only 4 employees.[5] The Beneficiary is already employed in the proffered position and, therefore, will not be replacing a current employee. Additionally, unlike in *Sonegawa*, the record does not establish the Petitioner's reputation in its industry.

The Petitioner states on appeal that it serves as the research and development division of and that the two companies share the same owners. It claims that since 2007, it has spent approximately $150,000 to $200,000 per year in payroll, material, testing, and patenting costs. However, the Petitioner has not submitted its own financial records for any year prior to 2015 to support its claims of past performance. This assertion, unsubstantiated by supporting evidence, is insufficient to satisfy the Petitioner's burden of proof. The Petitioner further states that its two shareholders personally fund the

---

most cases) a life of one year or less, such as cash, marketable securities, inventory and prepaid expenses. "Current liabilities" are obligations payable (in most cases) within one year, such accounts payable, short-term notes payable, and accrued expenses (such as taxes and salaries). *Id.* at 118.

[5] The Petitioner's 2015 tax return shows that it paid $39,594 in salaries and wages (the Beneficiary was paid $36,112.51 in 2015), and $0 in costs of labor.

company "in order to prevent any equity dilution from outside investments." The shareholders assert that they have been using shareholder distribution payments from [redacted] to make direct loans to the Petitioner in order to fund its operations. They assert that they loaned the Petitioner $574,847 in 2015.

The Petitioner's 2015 tax return shows $574,847 in loans from shareholders on its Schedule L.[6] However, the record contains no promissory notes or loan agreements reflecting the terms of the loans, including loan amounts, terms of repayment, interest rates, consequences for default, and whether there are restrictions on the use of the funds.[7] Further, the shareholders have not established any legal obligation to continue to fund the Petitioner to cover its payroll needs. Therefore, the loans from shareholders (the funds of which are derived from, and seemingly dependent on, the success of [redacted] do not establish the Petitioner's continuing ability to pay the proffered wage.

The Petitioner states on appeal that two DOL Board of Alien Labor Certification Appeals (BALCA) cases are applicable in this matter. Citing to *Ohsawa America*, 1988-INA-240 (BALCA 1988), the Petitioner states that the shareholder loans should have been considered in determining its ability to pay the proffered wage. However, DOL precedent is not binding in these proceedings. While 8 C.F.R. § 103.3(c) provides that precedent decisions of USCIS are binding on all its employees in the administration of the Act, BALCA decisions are not similarly binding. Precedent decisions must be designated and published in bound volumes or as interim decisions. 8 C.F.R. § 103.9(a).

Moreover, the BALCA panel in *Ohsawa America* also considered the fact that the petitioning entity showed increased revenue and decreased operating losses in addition to one of its shareholder's willingness to fund the company. In this case, the Petitioner had a net loss in 2015, and it did not show increased revenue or decreasing operating losses over a period of time. Thus, in addition to not being binding precedent, *Ohsawa America* is distinguishable from the facts of this petition.

The Petitioner also cites *Ranchito Coletero*, 2002-INA-104 (BALCA 2004), for the premise that certain entities regularly fail to show profits and typically rely upon individual or family assets. However, *Ranchito Coletero* deals with a sole proprietorship and is not directly applicable to this petition, which deals with a corporation. Our ability to pay review for sole proprietorships includes the individual assets and personal liabilities of the sole proprietor; however, as noted above, our ability to pay review for corporations does not include the individual assets of shareholders.

---

[6] The record contains transaction reports for the Petitioner showing various deposits made from the shareholders, as well as from [redacted] in 2015. The affidavits from the Petitioner's (and [redacted] two shareholders explain that [redacted] makes regular shareholder distributions to them, which are in turn loaned to the Petitioner. Although the transaction reports sometimes show payments directly from [redacted] the shareholders assert that adjusting journal entries are then made in both companies' books to reflect that the loans were actually made by the shareholders individually. The year-end journal entries show that a $113,216.85 loan from [redacted] was adjusted to a capital contribution, together with certain balancing activity relating to the shareholder and [redacted] loans.

[7] There is no evidence of repayment of any of the loans by the Petitioner, and the Petitioner's tax returns do not reflect any interest expense connected to repayment of the loans.

The Petitioner further cites the decisions in *Full Gospel Portland Church v. Thornburgh*, 730 F. Supp. 441 (D.D.C. 1988), and *Masonry Masters, Inc. v. Thornburgh*, 875 F.2d 898 (D.C. Cir. 1989), as well as an unpublished AAO decision.[8]

The decision in *Full Gospel* is not binding here. Although we may consider the reasoning of the decision, we are not bound to follow the published decision of a United States district court in cases arising within the same district. *See Matter of K-S-*, 20 I&N Dec. 715 (BIA 1993). Further, the decision in *Full Gospel* is distinguishable from this case. The court in *Full Gospel* ruled that USCIS should consider the documented pledges of parishioners to be paid over a 4-year period in determining a church's ability to pay the wages of a music teacher. However, pledges to give money do not create liabilities for a petitioner. In contrast, shareholder loans create liabilities for a petitioner. We give less weight to loans and debts as a means of paying salaries since debts will increase the petitioner's liabilities and will not improve its overall financial position. Although debt is an integral part of any business operation, USCIS must evaluate the overall financial position of a petitioner to determine whether the employer is making a realistic job offer and has the overall financial ability to satisfy the proffered wage. *See Great Wall*, 16 I&N Dec. at 142.

The Petitioner asserts that the Petitioner's income will increase as a result of the Beneficiary's employment, citing *Masonry Masters* in support of this assertion. Although part of this decision mentions the ability of the beneficiary to generate income, the holding is based on other grounds and is primarily a criticism of USCIS for failure to specify a formula used in determining the proffered wage.[9] Further, in this instance, no detail or documentation has been provided to explain how the Beneficiary's employment will significantly increase the Petitioner's income. The Beneficiary has been employed by the Petitioner since 2009, and there is no indication in the record that his employment has resulted in any increase in income during that time. The Petitioner also asserts on appeal that it will "continue to grow at a rate of approximately twenty percent per year." However, it has provided no support for that assertion. This assertion, unsubstantiated by supporting evidence, is insufficient to satisfy the Petitioner's burden of proof.

For the foregoing reasons, the record does not establish the Petitioner's continuing ability to pay the proffered wage from the petition's priority date onward.

C. The Beneficiary's Experience

Although not addressed by the Director, we independently find that, even if the Petitioner had established that it had the ability to pay the proffered wage, the record does not establish that the Beneficiary possesses the required experience for the position.

---

[8] Unpublished decisions are not binding in this matter.

[9] Subsequent to that decision, USCIS implemented a formula that involves assessing wages actually paid to the beneficiary, and the petitioner's net income and net current assets.

The 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); *Wing's Tea House,* 16 I&N at 159; *Katigbak,* 14 I&N at 49. In this case, the labor certification states the minimum requirements for the offered position are a U.S. bachelor's degree in engineering or foreign educational equivalent,[10] and 24 months of experience in the proffered job or in any engineering position. Specific required skills are listed at Part. H.14. of the labor certification.

The regulation at 8 C.F.R. § 204.5(l)(3) provides:

> (ii) *Other documentation—*
>
> > (A) *General.* Any requirements of training or experience for skilled workers, professionals, or other workers must be supported by letters from trainers or employers giving the name, address, and title of the trainer or employer, and a description of the training received or the experience of the alien.

The record contains a letter and translation from President and Director of in Indonesia, stating that the Beneficiary "cooperated with our company as 'business partner' to prepare service development and new manufacturing for components/parts of mechanical machines and electrical panels for more than 2 (two) years as of May 2, 2003 up to May 14, 2005." However, the letter does not indicate that the Beneficiary was employed full-time as a development engineer or in any engineering position. Instead, it states that for the first 6 months, the Beneficiary was trained to be a "machinist," and thereafter, he had "responsibility to handle production management." The record does not demonstrate that the vocation of machinist is a qualifying engineering position pursuant to the terms of the labor certification. Further, the record does not relate the handling of production management to the field of engineering.

Accordingly, the submitted evidence does not establish that the Beneficiary possesses 24 months of experience as a development engineer or in any engineering field as required by the labor certification.

II. CONCLUSION

In summary, the Petitioner has not established its continuing ability to pay the proffered wage from the priority date onward. Further, the Petitioner has not established that the Beneficiary possesses the required experience for the proffered position.

ORDER: The appeal is dismissed.

Cite as *Matter of O-, Inc.*, ID# 307995 (AAO Mar. 21, 2017)

[10] The Beneficiary holds the required foreign degree equivalent of a U.S. bachelor's degree in civil engineering.