U.S. Citizenship and Immigration Services

Non-Precedent Decision of the Administrative Appeals Office

MATTER OF R-B-A-C-B-

DATE: MAR. 23, 2017

APPEAL OF TEXAS SERVICE CENTER DECISION

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

The Petitioner, a restaurant, seeks to employ the Beneficiary as a cook. It requests classification of the Beneficiary as a skilled worker under the third preference immigrant classification. *See* 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 Texas Service Center denied the petition, concluding that the Petitioner had not established its continuing ability to pay the proffered wage from the priority date onward.

On appeal, the Petitioner asserts that the Director did not consider the Petitioner's labor costs as itemized expenses on its tax returns. Upon *de novo* review, we will dismiss the appeal.

I. LAW AND ANALYSIS

A. The Employment-Based Immigration Process

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). 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 approves the petition, a 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).

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)(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). 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). The priority date in this case is July 20, 2001.

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 $9.00 per hour ($18,720 per year based on a 40-hour work week). The issue is whether the Petitioner has demonstrated its ability to pay the proffered wage as of the July 20, 2001, 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.[1] In this case, the Petitioner submitted copies of IRS Forms W-2, Wage and Tax Statements, demonstrating that it employed the Beneficiary from 2001 to 2007.

[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*, 736 F.2d at 1309; *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).

The Forms W-2 reflect that the Petitioner paid the Beneficiary as follows:

- $15,439.15 in 2001;
- $19,619.80 in 2002;
- $19,559.51 in 2003;
- $21,481.33 in 2004;
- $20,758.09 in 2005;
- $11,162.69 in 2006; and
- $25,470.70 in 2007.

The amounts on the Forms W-2 do not equal or exceed the annual proffered wage of $18,720 in 2001 and 2006. The record therefore does not establish the Petitioner's ability to pay the proffered wage based on the wages it paid the Beneficiary in those years. 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 amounts it paid the Beneficiary which is $3,280.85 in 2001 and $7,557.31 in 2006.

The record indicates that the Petitioner is a sole proprietorship, a business in which one person operates a business in his or her personal capacity. Unlike a corporation, a sole proprietorship does not exist as an entity apart from the individual owner. *See Matter of United Inv. Grp.*, 19 I&N Dec. 248, 250 (Comm'r 1984). Therefore the sole proprietor's adjusted gross income (AGI), assets, and personal liabilities are also considered as part of the Petitioner's ability to pay. Sole proprietors report income and expenses from their businesses on their individual federal tax return each year. The business-related income and expenses are reported on Schedule C and are carried forward to the first page of the tax return. Sole proprietors must show that they can cover their existing business expenses as well as pay the proffered wage out of their AGI or other available funds. In addition, sole proprietors must show that they can sustain themselves and their dependents. *See Ubeda v. Palmer*, 539 F. Supp. 647, 650 (N.D. Ill. 1982), *aff'd*, 703 F.2d 571 (7th Cir. 1983) (finding that a sole proprietor did not establish his ability to pay a proffered wage while supporting a spouse and five children).

In *Ubeda*, the court concluded that it was highly unlikely that a petitioner could support himself, his spouse and five dependents on a gross income of slightly more than $20,000 where the beneficiary's proposed salary was $6,000 or approximately thirty percent (30%) of the petitioner's gross income.

In this case, the sole proprietor's tax returns indicate that he supported a family of five in 2001 and 2002 (including himself, his spouse, and three children); himself in 2003 and 2004; and himself and his daughter in 2005 and 2006.

The sole proprietor's tax returns reflect the following information for the years in question:

	2001	2006
Sole proprietor's AGI [2]	$8,936	$47,420

In 2001 and 2006, the sole proprietor's AGI appears sufficient to cover the difference between the annual proffered wage and the wages paid to the Beneficiary; however, as noted above, we must also consider the Petitioner's personal expenses in determining its ability to pay. In a request for evidence (RFE), the Director requested a list of the expenses and assets of the sole proprietor, together with supporting documentation of those expenses and assets. The Petitioner did not submit the requested documentation with its response to the RFE.[3] In his decision, the Director stated that a favorable decision cannot be rendered in this case without the requested documentation of the sole proprietor's expenses and assets.

On appeal, the Petitioner again declined to submit documentation of the sole proprietor's expenses and assets, stating that the "request is onerous in the sense that it requires the employer to submit well over a thousand documents when the employer provided the Service with tax returns that established hundreds of thousands of income and detailed all the legally deductible expenses." However, the Petitioner's tax returns do not list all of the sole proprietor's personal expenses and assets.[4] Without the requested information, we cannot determine the Petitioner's ability to pay the proffered 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;

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[2] Line 33 of the sole proprietor's IRS Form 1040, U.S. Individual Income Tax Return, in 2001; and line 37 of his IRS Form 1040 in 2006.

[3] The failure to submit requested evidence that precludes a material line of inquiry shall be grounds for denying the petition. *See* 8 C.F.R. § 103.2(b)(14).

[4] If the Petitioner pursues this matter further, it must submit a statement listing the sole proprietor's monthly household living expenses and personal liquid assets, with supporting documentary evidence, for 2001 onward, as well as his personal tax returns with all supplements and attachments for 2007 onward. Expenses include, but are not limited to: housing (rent or mortgage); food; car payments (whether leased or owned); insurance (auto, homeowner, health, life); medical; utilities (electric, gas, cable, phone, internet); credit cards; student loans; clothing; school and daycare; gardener, house cleaner, and nanny; and any other recurring expenses. Assets include, but are not limited to: individual bank statements; individual checking or savings account statements; individual stock account statements; and any other personal assets of the sole proprietor. We note that the sole proprietor did not itemize his deductions on his 2001 tax return and instead took the standard deduction of $7,600. In 2006, he itemized certain expenses, including medical expenses, taxes, and gifts to charity, totaling $10,376.

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

On the petition, the Petitioner indicated that it has been in business since June 1996 and that it employed 14 employees. Its tax returns state gross receipts ranging from $522,684 in 2001 to $1,116,978 in 2006, and, as the Petitioner emphasizes on appeal, its itemized labor expenses have steadily increased from $197,815 in 2001 to $420,777 in 2006. Unlike in *Sonegawa*, however, the record here does not indicate the occurrence of any uncharacteristic business expenditures or losses, or the Petitioner's outstanding reputation in its industry. The record also does not indicate the Beneficiary's replacement of a current employee or outsourced service. Further, the Petitioner did not submit requested evidence of the sole proprietor's personal expenses and assets to establish the ability to pay the proffered wage. 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*.

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 mentioned by the Director, we further find that the record does not establish that the Beneficiary possesses the required experience for the position.

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 two years of experience in the job offered of cook.[5]

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 dated June 22, 2001, from the office manager of a restaurant in Texas. The letter states that the Beneficiary "has been employed at

[5] Part A.15 of the labor certification requires a letter of recommendation as a condition of employment. The letter from states that the Beneficiary "has been a very dependable employee and continues to do a good job." This letter is sufficient to satisfy the letter of recommendation requirement.

since 1/25/00" and that she "currently works in our kitchen preparing all of our desserts." However, the letter does not state the office manager's name; it does not indicate whether the Beneficiary worked full-time or part-time as a cook; and it does not indicate that the Beneficiary worked there for two years prior to the priority date of July 20, 2001.[6]

Accordingly, the submitted evidence does not establish that the Beneficiary possessed two years of experience as a cook as required by the labor certification.

II. CONCLUSION

The Petitioner has not established its continuing ability to pay the proffered wage from the priority date onward. The Petitioner has also not established that the Beneficiary possesses the required experience for the proffered job as of the priority date.

ORDER: The appeal is dismissed.

Cite as *Matter of R-B-A-C-B-*, ID# 290669 (AAO Mar. 23, 2017)

[6] The labor certification states that the Beneficiary worked 30 hours per week as a cook at from January 2000 to the date the Beneficiary signed the labor certification in November 2004.