U.S. Citizenship and Immigration Services

Non-Precedent Decision of the Administrative Appeals Office

MATTER OF F-&F-, PLLC

DATE: MAR. 25, 2019

MOTION ON ADMINISTRATIVE APPEALS OFFICE DECISION

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

The Petitioner, a law firm, seeks to employ the Beneficiary as an immigration law clerk. It requests her classification under the third-preference, immigrant category as a professional. Immigration and Nationality Act (the Act) section 203(b)(3)(A)(ii), 8 U.S.C. § 1153(b)(3)(A)(ii). This employment-based, "EB-3" category allows a business to sponsor a foreign national for lawful permanent resident status to work in a job requiring at least a bachelor's degree.

The Director of the Texas Service Center denied the petition. We dismissed the Petitioner's appeal and denied its following motions to reopen and reconsider. *See, e.g., Matter of F-&F-, PLLC*, ID# 1794419 (AAO Sept. 18, 2018). Like the Director, we concluded that the Petitioner did not demonstrate its required ability to pay the position's proffered wage.

The matter is before us again on the Petitioner's motions to reopen and reconsider. The Petitioner submits updated evidence and asserts that we misapplied case law in denying its most recent motion to reconsider.

Upon review, we will deny the motions.

I. MOTION CRITERIA

A motion to reopen must state new facts, supported by documentary evidence. 8 C.F.R. § 103.5(a)(2). In contrast, a motion to reconsider must establish that, based on the evidence at that time, our decision misapplied law or policy. 8 C.F.R. § 103.5(a)(3). A motion to reconsider must also be supported by a pertinent precedent or adopted decision, statutory or regulatory provision, or statement of U.S. Citizenship and Immigration Services (USCIS) or Department of Homeland Security policy. *Id.* We may grant motions that meet these requirements and establish a petition's approvability.

II. ABILITY TO PAY THE PROFFERED WAGE

Our most recent decision concluded that the Petitioner did not demonstrate its ability to pay the position's annual proffered wage of $56,451 in 2014 and 2016. *See* 8 C.F.R. § 204.5(g)(2) (requiring a petitioner to establish its continuing ability to pay a proffered wage, from a petition's priority date

until a beneficiary obtains lawful permanent residence). This petition's priority date is September 26, 2013, the date the U.S. Department of Labor accepted the accompanying labor certification application for processing. *See* 8 C.F.R. § 204.5(d).

A. Motion to Reopen

On motion to reopen, the Petitioner submits copies of its federal income tax returns for 2016 and 2017, and of the Beneficiary's payroll records from December 2017 to October 2018. Evidence of ability to pay must include copies of annual reports, federal tax returns, or audited financial statements. 8 C.F.R. § 204.5(g)(2). As of the motions' filing, required evidence of the Petitioner's ability to pay in 2018 was not yet available. For purposes of this decision, we will therefore consider the Petitioner's ability to pay only through 2017.[1]

The Petitioner's 2017 tax returns reflect net income of $34,811. The Petitioner previously submitted a copy of an IRS Form W-2, Wage and Tax Statement, indicating that it paid the Beneficiary wages that year of $53,703.70. The net income amount exceeds the $2,747.30 difference between the annual proffered wage and the wages the Petitioner paid the Beneficiary. The record therefore establishes the Petitioner's ability to pay the proffered wage in 2017.

The Petitioner's 2016 tax returns reflect negative amounts of net income and net current assets. The returns therefore do not establish the Petitioner's ability to pay the $22,051 difference between the annual proffered wage and the amount the Petitioner documented it paid the Beneficiary that year.[2]

The Petitioner asserts that its 2016 tax returns list inflated current liabilities of $65,530. The Petitioner contends that only two to four percent of the listed credit card liabilities of $65,179 were current in nature. The Petitioner previously submitted evidence that its 2013 tax returns overstated the company's current liabilities. But the record lacks supporting evidence that its 2016 current liabilities are similarly inflated. The record therefore does not establish overstated current liabilities in 2016. Even if it did, the returns would not reflect sufficient net current assets to pay the $22,051 difference between the annual proffered wage and the amount the Petitioner paid the Beneficiary in 2016. Assuming current credit card liabilities of $1,303.58 (two percent of the listed amount of $65,179), the returns would still indicate a negative amount of net current assets. The record therefore does not establish the Petitioner's ability to pay the proffered wage in 2016.

The Petitioner's 2014 tax returns similarly reflect insufficient amounts of net income and net current assets to pay the $9,951 difference between the annual proffered wage and the amount the Petitioner documented it paid the Beneficiary that year.

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[1] In any future filings in this matter, the Petitioner must provide required evidence of its ability to pay in 2018, if available. It may also submit additional evidence of its ability to pay in that or other years.

[2] The record contains another Form W-2 indicating that the Beneficiary received an additional $17,200 in wages in 2016. Contrary to 8 C.F.R. § 204.5(g)(2), however, the Form W-2 reflects additional wages from a different employer than the Petitioner. For prior years, we credited the other employer's payments to the Beneficiary because the Petitioner documented its funding of the payments through bank account transfers to the other employer. The Petitioner, however, has not documented its funding of the other employer's payments to the Beneficiary in 2016. We therefore do not credit the Beneficiary's additional wages.

The Petitioner, however, asserts that we should excuse its inability to pay the proffered wage under *Matter of Sonegawa*, 12 I&N Dec. 612 (Reg'l Comm'r 1967). *Sonegawa* allows us to consider factors beyond wages paid, net income, and net currents assets in determining a petitioner's ability to pay a proffered wage. The Petitioner here asserts that, in 2014, it made uncharacteristic investments in new offices in [redacted] and [redacted], but has not documented this claim. We have addressed the Petitioner's claim that it may establish its ability to pay under *Sonegawa* in our numerous prior decisions. The additional undocumented claim made on motion concerning uncharacteristic expenses in 2014 is not sufficient to overcome the deficiencies previously cited. Based on the foregoing, we find that although the Petitioner submitted new facts supported by documentary evidence, it has not demonstrated its ability to pay through wages paid, net income, net current assets, or under *Sonegawa* for the years in question

B. Motion to Reconsider

On motion to reconsider, the Petitioner also renews its argument that we must revisit our *Sonegawa* analysis in light of the fact that it "is constantly increasing [the] Beneficiary's salary." Increasing the Beneficiary's salary after the issuances of our prior decisions, however, does not demonstrate our misapplications of law or policy based on the records at those times. Although the Petitioner again asserts that we "unfairly appl[y]" *Sonegawa*, the Petitioner has not cited to any pertinent precedent or adopted decision, statutory or regulatory provision, or statement of USCIS or Department of Homeland Security policy to substantiate this claim. Expressing disagreement with our prior analysis is not sufficient to demonstrate the Petitioner's ability to pay or that the prior decision was incorrect based on the record.

III. CONCLUSION

The Petitioner's evidence and arguments on motion do not establish the petition's approvability or our misapplication of law or policy. We will therefore deny the motions for the above stated reasons, with each considered an independent and alternative basis for denial. In visa petition proceedings, a petitioner bears the burden of establishing eligibility for the benefit sought. Section 291 of the Act, 8 U.S.C. § 1361. The Petitioner has not met that burden.

ORDER: The motion to reopen is denied.

FURTHER ORDER: The motion to reconsider is denied.

Cite as *Matter of F-&F-, PLLC*, ID# 2963657 (AAO Mar. 25, 2019)