U.S. Citizenship and Immigration Services

Non-Precedent Decision of the Administrative Appeals Office

MATTER OF T-&C-L-, INC.

DATE: MAY 11, 2018

APPEAL OF TEXAS SERVICE CENTER DECISION

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

The Petitioner, a provider of grounds maintenance and landscaping services, seeks to employ the Beneficiary as a tree surgeon. It requests his classification under the third-preference, immigrant category as a skilled worker. Immigration and Nationality Act (the Act) section 203(b)(3)(A)(i), 8 U.S.C. § 1153(b)(3)(A)(i). This employment-based, "EB-3" category allows a U.S. business to sponsor a foreign national with at least two years of training or experience for lawful permanent resident status.

The Director of the Texas Service Center denied the petition. The Director concluded that the Petitioner did not demonstrate its required ability to pay the proffered wage.

On appeal, the Petitioner submits additional evidence and asserts that the Director did not properly consider its net income.

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

I. EMPLOYMENT-BASED IMMIGRATION

Employment-based immigration generally follows a three-step process. To permanently fill a position in the United States with a foreign worker, an employer must first obtain 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). DOL approval signifies that insufficient U.S. workers are able, willing, qualified, and available for a position, and that employment of a foreign national will not harm wages and working conditions of U.S. workers with similar jobs. *Id.*

If the DOL certifies a position, an employer must next submit the certification with an immigrant visa petition to U.S. Citizenship and Immigration Services (USCIS). *See* section 204 of the Act, 8 U.S.C. § 1154. Among other things, USCIS considers whether a beneficiary meets the minimum requirements of a certified position and whether a petitioner can pay a proffered wage. If USCIS approves a petition, a foreign national may finally 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.

II. 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.[1] 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.*

Here, the accompanying labor certification states the proffered wage of the offered position of tree surgeon as $42,266 a year. As of the appeal's filing, required evidence of the Petitioner's ability to pay in 2017 was not yet available. We therefore consider the company's ability to pay in only 2015 and 2016.

In determining ability to pay, USCIS examines whether a petitioner paid a beneficiary a full proffered wage each year from a petition's priority date. If a petitioner did not annually pay a full wage, USCIS considers whether it generated annual amounts of net income or net current assets sufficient to pay any difference between a proffered wage and wages paid. If net income and net current assets are insufficient, USCIS may consider other factors affecting a petitioner's ability to pay a proffered wage. *See Matter of Sonegawa*, 12 I&N Dec. 612 (Reg'l Comm'r 1967).[2]

The Petitioner provided copies of IRS Forms W-2, Wage and Tax Statements, indicating that it paid the Beneficiary $28,938.23 in 2015 and $34,031.63 in 2016. Neither of these amounts equals or exceeds the annual proffered wage of $42,266. Based solely on the Petitioner's payments to the Beneficiary, the record therefore does not establish its ability to pay. Nevertheless, we credit the Petitioner's payments to the Beneficiary. It need only establish its ability to pay the annual differences between the proffered wages and the wages paid, or $13,327.77 in 2015 and $8,234.37 in 2016.

As of the Director's decision, the record contained copies of the Petitioner's federal income tax return for only 2015. The Director found that the tax return for that year reflects negative amounts of net income and net current assets. Negative amounts are obviously insufficient to cover the annual difference between the proffered wage and wages paid. The Director therefore concluded that the Petitioner did not establish its ability to pay the proffered wage in 2015.

On appeal, the Petitioner contends that the Director erred in identifying its net income as the "income/loss reconciliation" figure on Schedule K of its IRS Form 1120S, U.S. Income Tax Return for an S Corporation. Rather, the Petitioner asserts that the Director should have considered the "ordinary business income" figure on line 21 of the return. The ordinary income figure reflects a

[1] This petition's priority date is September 30, 2015, the date the DOL accepted the accompanying labor certification application for processing. *See* 8 C.F.R. § 204.5(d) (explaining how to determine a petition's priority date).

[2] Federal courts have upheld USCIS' 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).

profit of $125,743, which exceeds the $13,327.77 difference between the proffered wage and wages paid in 2015.

In determining net incomes of S corporations, ordinary incomes listed on IRS Forms 1120S are not always accurate figures. An ordinary income amount reflects only profits or losses from an S corporation's trade or business. IRS, "Instructions for Form 1120S" 11, https://www.irs.gov/pub/irs-pdf/i1120s.pdf (last visited Apr. 30, 2018). If an S corporation had additional sources of income, or other deductions or credits, it must report them on Schedule K, which summarizes shareholders' portions of the company's income, deductions, and credits. *Id.* at 18. Thus, income/loss reconciliation figures on Schedules K more accurately reflect net incomes of some S corporations.

The Petitioner asserts that USCIS' use of its reconciled amount on Schedule K violates Agency policy. The Petitioner notes that USCIS has stated that a petitioner demonstrates its ability to pay if its "net income" equals or exceeds a proffered wage. Memorandum from William R. Yates, Assoc. Dir. of Ops., USCIS, HQOPRD 90/16.45, *Determination of Ability to Pay under 8 C.F.R. 204.5(g)(2)* 2 (May 4, 2004), https://www.uscis.gov/ sites/default/files/files/nativedocuments/abilitytopay_4may04.pdf (last visited Apr. 30, 2018) By referencing the Petitioner's reconciled income figure on Schedule K, however, USCIS does not abandon the net income test. Rather, as discussed above, USCIS merely refers to a figure that more accurately reflects the Petitioner's net income.

The Petitioner's 2015 tax returns reflect ordinary business income of more than $125,000. But its Schedule K includes a depreciation deduction of more than $126,000. The deduction allows the Petitioner to subtract the cost of certain vehicles and equipment it bought for use in its business. *See* 26 U.S.C. § 179. Because wear and tear will decrease the equipment's value over time, the depreciation deduction represents real business costs that we must consider in determining the Petitioner's ability to pay. *See, e.g., River St. Donuts*, 558 F.3d at 118 (holding that USCIS rationally explained its policy of excluding depreciation from net income). We therefore reject the Petitioner's argument that use of its reconciled income figure on Schedule K violates USCIS policy.

On appeal, the Petitioner also submits copies of its federal income tax returns for 2016. These returns reflect a negative amount of net current assets that does not establish its ability to pay. The returns also reflect ordinary business income of $71,503. But, like the 2015 returns, the 2016 returns indicate a large depreciation deduction. The resulting, reconciled income amount is less than the difference between the proffered wage and wages paid. Thus, based on examinations of the Petitioner's wage payments and amounts of net income and net current assets, the record does not establish its ability to pay the proffered wage in 2015 or 2016.

As previously indicated, in determining a petitioner's ability to pay, we may consider factors other than the amounts of its wage payments, net income, and net current assets. Under *Sonegawa*, we may consider: the number of years a petitioner has conducted business; its number of employees; the growth of its business; its incurrence 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 a petitioner's ability to pay a proffered wage. *Matter of Sonegawa*, 12 I&N Dec. at 614-15.

Here, the record indicates the Petitioner's continuous business operations since 1989 and its employment of 56 people. Its tax returns for 2015 and 2016 reflect growing annual amounts of revenues and wages paid, but do not demonstrate its ability to pay the proffered wage in either 2015 or 2016. Moreover, unlike the petitioner is *Sonegawa*, the Petitioner here has not submitted financial documentation to establish a historical pattern of growth, nor has the Petitioner demonstrated its incurrence of uncharacteristic losses or expenses. In addition, the record does not indicate the Beneficiary's replacement of a current employee or outsourced service. Thus, a totality of circumstances under *Sonegawa* does not establish the Petitioner's ability to pay the proffered wage.

III. CONCLUSION

The record on appeal does not establish the Petitioner's continuing ability to pay the proffered wage from the petition's priority date onward. We will therefore affirm the Director's decision.

ORDER: The appeal is dismissed.

Cite as *Matter of T-&C-L-, Inc.*, ID# 1287737 (AAO May 11, 2018)