U.S. Citizenship and Immigration Services

Non-Precedent Decision of the Administrative Appeals Office

In Re: 8137266

Date: MAY 18, 2020

Appeal of Texas Service Center Decision

Form I-140, Immigrant Petition for Professional

The Petitioner seeks to employ the Beneficiary as a systems accountant. It requests classification of the Beneficiary as a professional under the third preference immigrant classification. 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 Texas Service Center denied the petition and two subsequent motions, concluding that the record did not establish that the Petitioner had the continuing ability to pay the proffered wage. The matter is now before us on appeal.

In these proceedings, it is the Petitioner's burden to establish eligibility for the requested benefit. Section 291 of the Act, 8 U.S.C. § 1361. Upon *de novo* review, we will dismiss the appeal.

I. THE EMPLOYMENT-BASED IMMIGRATION PROCESS

Employment-based immigration generally follows a three-step process. First, an employer obtains an approved labor certification from the U.S. Department of Labor (DOL).[1] *See* section 212(a)(5)(A)(i) of the Act, 8 U.S.C. § 1182(a)(5)(A)(i). By approving the labor certification, the DOL certifies that there are insufficient U.S. workers who are able, willing, qualified, and available for the offered position and that employing 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)(I)-(II) of the Act. Second, the employer files an immigrant visa petition with U.S. Citizenship and Immigration Services (USCIS). *See* section 204 of the Act, 8 U.S.C. § 1154. Third, if USCIS approves the petition, the foreign national applies 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 regulation 8 C.F.R. § 204.5(g)(2) states in pertinent part:

[1] The priority date of a petition is the date the DOL accepted the labor certification for processing, which in this case is November 25, 2005. *See* 8 C.F.R. § 204.5(d).

> *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 this case, the proffered wage is $41,496 per year. 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 had 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.[2]

The Director determined in his initial decision that the Petitioner had not established that it had the continuing ability to pay the difference between the proffered wage and the wages paid to the Beneficiary in 2005, 2006, 2007, 2011, 2012, 2013, and 2014 through an examination of its net income or net current assets. In his decision on the second motion, the Director addressed the Petitioner's assertion that it has the ability to pay the proffered wage based on the totality of the circumstances.[3] He indicated that the petitioner in *Sonegawa* experienced only one unprofitable year, but that the Petitioner in this case has experienced multiple unprofitable years. On appeal, the Petitioner asserts that the Director's analysis of the totality of the circumstances was not broad enough. It states that it provided sufficient evidence of its expected increase in profits, as evidenced by its profitability in 2015 and 2016. The Petitioner also states on appeal that that the costs of expansion and relocation in previous years should be considered in the analysis of the totality of the circumstances.

The petitioner in *Sonegawa* was a well-recognized fashion designer whose designs had been published in *Time* and *Look* magazines. Her clients included Miss Universe, movie actresses, and society matrons. She lectured in fashion design at fashion shows and at colleges and universities. *Matter of Sonegawa*, 12 I&N Dec. at 614-15. The Regional Commissioner's determination in *Sonegawa* was

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[2] 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); *Rizvi v. Dep't of Homeland Sec.*, 37 F. Supp. 3d 870, 883-84 (S.D. Tex. 2014), *aff'd*, 627 Fed. App'x 292, 294-295 (5th Cir. 2015).

[3] USCIS also considers the overall magnitude of the petitioner's business activities in its determination of the petitioner's ability to pay the proffered wage. *See Matter of Sonegawa*, 12 I&N Dec. 612 (Reg'l Comm'r 1967). As in *Sonegawa*, USCIS may, at its discretion, consider evidence relevant to the petitioner's financial ability that falls outside of a petitioner's net income and net current assets. USCIS may consider such factors as the number of years the petitioner has been doing business, the established historical growth of the petitioner's business, the overall number of employees, the occurrence of any uncharacteristic business expenditures or losses, the petitioner's reputation within its industry, whether the beneficiary is replacing a former employee or an outsourced service, or any other evidence that USCIS deems relevant to the petitioner's ability to pay the proffered wage.

based in part on the petitioner's sound business status and outstanding reputation as a couturiere. *Id.* The Petitioner here has not demonstrated a similar magnitude of business activities. Unlike in *Sonegawa*, the Petitioner here has not established the occurrence of any uncharacteristic business expenditures or losses.[4] The costs of expansion and relocation of the Petitioner's business were stretched over many years and it is unclear as to the extent of these costs and what portion of these expenses were uncharacteristic costs or losses that resulted in setbacks to the Petitioner's financial outlook in any given year. The fact that the expenses stretch over almost a decade indicates that these are not uncharacteristic expenses, but rather normal costs of doing business. Further, the Petitioner here has not established its reputation in its industry or demonstrated that the Beneficiary will replace a current employee or outsourced service.

Also unlike in *Sonegawa*, the Petitioner in this case must demonstrate its ability to pay multiple beneficiaries. Where a petitioner has filed Form I-140 petitions for multiple beneficiaries, it must demonstrate that its job offer to each beneficiary is realistic, and that it has the ability to pay the proffered wage to each beneficiary. *See* 8 C.F.R. § 204.5(g)(2); *see also Patel v. Johnson*, 2 F. Supp. 3d 108, 124 (D. Mass. 2014) (upholding our denial of a petition where a petitioner did not demonstrate its ability to pay multiple beneficiaries). USCIS records show that the Petitioner has filed multiple Form I-140 petitions for other beneficiaries. Thus, the Petitioner must establish its ability to pay this Beneficiary as well as the beneficiaries of the other Form I-140 petitions that were pending or approved as of, or filed after, the priority date of the current petition.[5] We do not consider the other beneficiaries for any year that the Petitioner has paid the Beneficiary a salary equal to or greater than the proffered wage.

The Petitioner must document the receipt numbers, names of beneficiaries, priority dates, and proffered wages of these other petitions, and indicate the status of each petition and the date of any status change (i.e., pending, approved, withdrawn, revoked, denied, on appeal or motion, beneficiary obtained lawful permanent residence). To offset the total wage burden, the Petitioner may submit documentation showing that it paid wages to other beneficiaries. To demonstrate that it has the ability to pay the Beneficiary and the other beneficiaries, the Petitioner must, for each year at issue (a) calculate any shortfall between the proffered wages and any actual wages paid to the primary Beneficiary and its other beneficiaries, (b) add these amounts together to calculate the total wage deficiency, and (c) demonstrate that its net income or net current assets exceed the total wage deficiency.[6] Without this information, we cannot determine the Petitioner's ability to pay the combined proffered wages of all of its applicable beneficiaries. Therefore, we agree with the Director that the Petitioner has not demonstrated its ability to pay the proffered wage based on the totality of the circumstances.

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[4] The Petitioner previously asserted that the periods from 2005 to 2007, and 2011 to 2014, were uncharacteristically unprofitable.

[5] The Petitioner's ability to pay the proffered wage of one of the other I-140 beneficiaries is not considered:

- After the other beneficiary obtains lawful permanent residence;
- If an I-140 petition filed on behalf of the other beneficiary has been withdrawn, revoked, or denied without a pending appeal or motion; or
- Before the priority date of the I-140 petition filed on behalf of the other beneficiary.

[6] It is the Petitioner's burden to establish eligibility for the immigration benefit sought. Section 291 of the Act, 8 U.S.C. § 1361; *Matter of Skirball Cultural Ctr.*, 25 I&N Dec. 799, 806 (AAO 2012).

In both motion decisions, the Director also addressed the Petitioner's assertion that loans made by its shareholders were intended to cover its payroll, including the proffered wage. In his first motion decision, the Director determined that the loans from the shareholders do not establish the Petitioner's ability to pay the proffered wage. He addressed the Petitioner's assertions that the loans are both debt and equity. He indicated that the record contains no promissory notes or loan agreements reflecting the terms of the corporation's debt to the shareholders, including loan amount, terms of repayment, interest rates, consequences for default, and whether there are any restrictions on the use of the funds. The Director also noted that the Petitioner characterizes the loans as equity, but equity does not establish a petitioner's ability to pay the proffered wage. He further stated that the Petitioner has not established that the shareholders have any legal obligation to fund the Petitioner to cover its payroll. The Director reiterated in his decision on the second motion that the Petitioner cannot rely on shareholder loans to cover payroll.[7]

The Petitioner states on appeal that the funds represented by the shareholder loans are not personal assets of the shareholders, but instead are assets of the corporation. It asserts that it has established the shareholders' legal obligation to fund the Petitioner to cover its payroll needs, and that the shareholder loans to the Petitioner establish their intention to continue to cover the Petitioner's payroll obligations. We disagree. Although noted as a deficiency by the Director in an earlier decision, the Petitioner has not submitted promissory notes or loan agreements reflecting the terms of the loans. Thus, the Petitioner has not established by a preponderance of the evidence that the amounts represented by the loans are available to pay the combined proffered wages of all of its applicable beneficiaries.[8] We note that the record contains a combined unaudited financial statement for the Petitioner and two of its affiliates for the year ended December 31, 2017, which characterizes the loans payable from its shareholders as non-interest bearing, due in December 2024, with $855,000 of the total $900,256 in shareholder loans subordinated to the repayment of two mortgages totaling over $8,000,000. Based on this description, the amounts represented by the shareholder loans are not available to pay the combined proffered wages of all of its applicable beneficiaries.

The Petitioner has not established its continuing ability to pay. We note that in any future proceedings, the Petitioner must establish its ability to pay from the priority date in 2005 onward. The record currently contains regulatory-prescribed evidence for 2005 through 2016, but does not contain regulatory-prescribed evidence from 2017 onward.

ORDER: The appeal is dismissed.

[7] Because a corporation is a separate and distinct legal entity from its shareholders, the assets of its shareholders or of other enterprises cannot be considered in determining the Petitioner's ability to pay the proffered wage. *See Matter of Aphrodite Invs., Ltd.*, 17 I&N Dec. 530 (Comm'r 1980). In a similar case, the court in *Sitar v. Ashcroft*, No. Civ. A. 02-30197-MAP, 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."

[8] Except where a different standard is specified by law, a petitioner must prove eligibility for the requested immigration benefit by a preponderance of the evidence. *Matter of Chawathe*, 25 I&N Dec. 369, 375-76 (AAO 2010).