U.S. Citizenship and Immigration Services

Non-Precedent Decision of the Administrative Appeals Office

MATTER OF G-A-A- CORP

DATE: MAY 21, 2018

APPEAL OF NEBRASKA SERVICE CENTER DECISION

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

The Petitioner, an audiologist office, seeks to employ the Beneficiary as an operations manager. It requests classification of the Beneficiary as a professional under the third preference immigrant category. 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 on the ground that the Petitioner did not establish its continuing ability to pay the proffered wage from the priority date onward.

On appeal, the Petitioner submits additional documentation and asserts that the evidence establishes its ability to pay the proffered wage.

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

I. LAW

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). *See* section 212(a)(5)(A)(i) of the Act, 8 U.S.C. § 1182(a)(5)(A)(i). By approving the labor certification, 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 U.S. 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 may 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.

A petitioner must establish that it has the ability to pay the proffered wage stated on the labor certification. As provided in the regulation at 8 C.F.R. § 204.5(g)(2):

> The petitioner must demonstrate this ability at the time the priority date is established[1] 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.

II. ANALYSIS

At issue in this case is whether the Petitioner has established its continuing ability to pay the proffered wage from the priority date onward. The petition has a priority date of February 18, 2015. The labor certification states that the proffered wage for the job offered is $161,699 per year.

In determining a petitioner's ability to pay the proffered wage, USCIS first examines whether the beneficiary was employed and paid by the petitioner during the period following the priority date. If the petitioner establishes by documentary evidence that it employed the beneficiary at a salary equal to or greater than the proffered wage, the evidence is considered proof of the petitioner's ability to pay the proffered wage.

In this case, there is no evidence that the Petitioner has employed the Beneficiary at any time. Therefore, the Petitioner cannot establish its continuing ability to pay the proffered wage based on wages paid to the Beneficiary since the priority date of February 18, 2015.

If a petitioner has not paid the beneficiary an amount equal to or above the proffered wage from the priority date onward, USCIS will examine the net income and net current assets figures recorded on the petitioner's federal income tax return(s), annual report(s), or audited financial statements(s). If either of these figures, net income or net current assets, equals or exceeds the proffered wage or the difference between the proffered wage and the amount paid to the beneficiary in a given year, the petitioner would be considered able to pay the proffered wage during that year.

In this case, the Petitioner has submitted a copy of its federal income tax return, Form 1120S, for the year 2015. It shows that the company had net income of $104,022[2] and net current assets of $45,669[3] that year. Based on its 2015 tax return, therefore, the Petitioner has not established its ability to pay the proffered wage of $161,699 from the priority date of February 18, 2015, onward.

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[1] The "priority date" of a petition is the date the underlying labor certification is filed with the DOL. *See* 8 C.F.R. § 204.5(d). The Petitioner must establish that all eligibility requirements for the petition have been satisfied from the priority date onward.

[2] If an S corporation, like the Petitioner, has income exclusively from a trade or business, USCIS considers its net income (or loss) to be the figure for "Ordinary business income (loss)" on page 1, line 21, of the Form 1120S. However, if there are relevant entries for additional income, credits, deductions or other adjustments from sources other than a trade or business, they are reported on Schedule K of the Form 1120S, and the corporation's net income or loss will be found in line 18 ("Income/loss reconciliation") of Schedule K. In this case, the Petitioner's net income for 2015 is the amount recorded on line 18 of Schedule K.

[3] For a corporation net current assets (or liabilities) are the difference between its current assets, entered on lines 1-6 of Schedule L, and its current liabilities, entered on lines 16-18 of Schedule L.

On appeal the Petitioner asserts that it has "a large pool of accounts receivable" from a hearing aid services company, , with which the Petitioner has a profit sharing agreement. According to the Petitioner, is "temporarily withholding" the revenues earned by the Petitioner under the profit sharing agreement "and that fund is available to pay [the Beneficiary's] proffered wages on a monthly basis." A letter from the Petitioner's certified public accountant asserts that when considering the money being held by accounts receivable totaled $155,538.41 for the year 2015, and $167,996.33 for the first nine months of 2016, and that these figures would generate "accrual basis net profit" of $261,244.41 for the year 2015 and $267,067.57 for the first nine months of 2016. Based on these calculations the Petitioner concludes that it had the ability to pay the proffered wage of $161,699 in both 2015 and 2016.

The accountant's calculations, however, are not generated from, or supported by, an audited financial statement, as required by 8 C.F.R. § 204.5(g)(2). Moreover, the accounts receivable and "accrual basis net profit" figures for 2015, as calculated by the accountant in this appeal, conflict with the figures appearing in the Petitioner's 2015 federal income tax return, which was prepared by the same accounting firm. The Form 1120S Schedule L (Balance Sheets per Books) includes a line (2a) to enter an asset figure for trade notes and accounts receivable. That line is blank on the Petitioner's 2015 tax return, indicating no accounts receivable. On page 1, line 21, of the Petitioner's 2015 Form 1120S a figure of $105,706 is entered for "ordinary business income" and the "income/loss reconciliation" figure on line 18 of Schedule K is $104,022. While the Petitioner asserts that is "temporarily withholding" the revenues earned by the Petitioner under their profit sharing agreement, the "service agreement" in the record makes no such provision. Moreover, the Petitioner has not explained why revenues earned but not yet paid by were not entered as "accounts receivable" on line 2a of Schedule L, especially since the Petitioner selected the accrual method of accounting[4] in its 2015 Form 1120S. In a chart displaying the alleged profit sharing figures between the Petitioner and in 2015, the Petitioner asserts that the net profit of $105,706 entered in its 2015 tax return was based on the cash method of accounting. However, this claim is directly contradicted by the tax return itself which states that the accrual method of accounting was applied.

In addition, the Petitioner claims that it has a large inventory of hearing aid devices, "highly liquid[] assets" which could be sold to obtain cash for the Beneficiary's proffered wage. But it is noteworthy that the Petitioner, while claiming a large inventory of hearing aid devices which could be liquidated, made no dollar entry for "inventories" in Schedule L, line 3, of its 2015 Form 1120S. Had the Petitioner recorded this alleged inventory on its tax return, it would have been considered in our analysis of the Petitioner's net current assets.

[4] Under the accrual method of accounting revenue is reported in the tax year it was earned, regardless of when payment is received, and expenses are reported in the year they were incurred, regardless of when payment is made. *See* http://www.irs.gov/publications/p538 (last visited April 4, 2018).

In view of the evidentiary discrepancies discussed above, we are not persuaded that the Petitioner had $155,538.41 of additional funds in 2015, based on accounts receivable from which it could have utilized to pay the proffered wage. The Petitioner's claim to have had these additional assets is not reflected on its federal income tax return for 2015. As for 2016, the alleged net profit of $267,067.57 for the first nine months of the year, as calculated by the Petitioner's accountant, is not derived from an audited financial statement, as required by 8 C.F.R. § 204.5(g)(2). Nor has the Petitioner submitted a copy of its federal income tax return for 2016, from which its net income (or loss) and net current assets (or liabilities) could be discerned. We conclude, therefore, that the materials submitted on appeal do not establish the Petitioner's ability to pay the proffered wage in 2015 or 2016.[5]

USCIS may also consider the totality of the Petitioner's circumstances, including the overall magnitude of its business activities, in determining the Petitioner's ability to pay the proffered wage. *See Matter of Sonegawa,* 12 I&N Dec. 612. USCIS may, at its discretion, consider evidence relevant to the petitioner's financial ability that falls outside of its net income and net current assets. We 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 petitioner's reputation within its industry, the overall number of employees, whether the beneficiary is replacing a former employee or an outsourced service, the amount of compensation paid to officers, the occurrence of any uncharacteristic business expenditures or losses, and any other evidence that USCIS deems relevant to the petitioner's ability to pay the proffered wage.

The Petitioner states that it began operations in 2010 and had four employees at the time the petition was filed in 2015. The Petitioner indicates that the proffered position of operations manager is new. Therefore, the Beneficiary would not be replacing another employee who is already being paid by the Petitioner. The record includes two federal income tax returns, for 2014 and 2015, which show that the Petitioner's gross receipts declined from $786,093 in 2014 to $520,595 in 2015. The business figures for 2016 are incomplete and, as previously discussed, do not derive from an audited financial statement as required for reliability. Thus, the evidence does not show that the Petitioner has a record of extended growth or financial strength. We conclude, therefore, that the Petitioner has not established its continuing ability to pay the proffered wage from the priority date onward based on the totality of its circumstances, as in *Sonegawa*.

[5] On appeal the Petitioner also submits monthly bank account statements from for 2015. Bank statements are not among the three types of evidence, enumerated in 8 C.F.R. § 204.5(g)(2), required to illustrate a petitioner's ability to pay a proffered wage. While the regulation allows bank account records to be considered "in appropriate cases" the Petitioner has not explained why this is such a case. The funds reported on the Petitioner's bank statements would ordinarily be reflected on its tax return(s), and would thus not represent additional financial resources. Furthermore, bank statements show the amount in the account on a given date, and do not show the sustainable ability to pay a proffered wage. Accordingly, the Petitioner's account statements are not persuasive evidence of its continuing ability to pay the proffered wage from the priority date onward.

For all of the reasons discussed above, the Petitioner has not established its continuing ability to pay the proffered wage from the priority date of February 18, 2015, onward.

III. CONCLUSION

The Petitioner has not established its continuing ability to pay the proffered from the priority date up to the present.

ORDER: The appeal is dismissed.

Cite as *Matter of G-A-A- Corp*, ID# 1041616 (AAO May 21, 2018)