U.S. Citizenship and Immigration Services

Non-Precedent Decision of the Administrative Appeals Office

MATTER OF X-T-, INC.

DATE: MAY 25, 2017

APPEAL OF NEBRASKA SERVICE CENTER DECISION

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

The Petitioner, a computer consulting and development business, seeks to permanently employ the Beneficiary in the United States as a senior programmer analyst. It requests classification of the Beneficiary as a member of the professions holding an advanced degree under the second preference immigrant classification. *See* Immigration and Nationality Act (the Act) section 203(b)(2), 8 U.S.C. § 1153(b)(2). This employment-based immigrant classification allows a U.S. employer to sponsor a professional with an advanced degree for lawful permanent resident status.

The Director of the Nebraska Service Center denied the petition after determining that the Petitioner had not established its ability to pay the proffered wage as of the priority date. The matter is now before us on appeal. The Petitioner submits financial documentation regarding related companies and asserts that it has submitted sufficient evidence to establish that it has the ability to pay the proffered wage to the Beneficiary. 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 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). 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. Section 212(a)(5)(A)(i)(I)-(II) of the Act. Second, the employer may file 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.

II. THE PETITIONER AND RELATED COMPANIES

The labor certification was filed by [redacted] it states an IRS Federal Employer Identification Number (FEIN) of [redacted] it states that its main office is at [redacted] New Jersey, it states that it employs 49 workers, and it states that the

Beneficiary's primary worksite would be ' in Maryland." The I-140 petition was filed by it similarly states an FEIN of and that its main office is at New Jersey. However, in contrast to the labor certification, Form I-140 states that the Beneficiary's primary worksite would be at its main office in New Jersey. Also in contrast to the labor certification, the I-140 petition states that it employs five workers and not 49 workers. The record additionally contains references to numerous other companies and we will examine their varying relationships to the Petitioner.

According to the website maintained by the Maryland Department of Assessments & Taxation, the location of the primary worksite on the labor certification, was originally formed in Maine,[1] and registered to do business in Maryland on August 11, 2005; however, the company is no longer in good standing and it forfeited its right to conduct business in Maryland.[2] It appears that is actively engaged in business in New Jersey, the site of its headquarters.

The Petitioner has submitted tax documents and pay records from several different companies, all claiming to use the same New Jersey address as the Petitioner. The Petitioner submitted copies of paystubs and IRS Forms W-2 issued to the Beneficiary in 2014 and 2015 by with FEIN The Petitioner also submitted copies of IRS Forms 1120-F, U.S. Income Tax Return of a Foreign Corporation, from 2014 and 2015 for with FEIN Schedule O of the tax return indicates that it was in a "Brother-sister" controlled group with ' with FEIN

The Petitioner has further submitted a sales agreement showing that on April 1, 2009, ' a Maine corporation having an address at in Maryland," sold its "complete software consulting business unit" to an Indian company with an overseas branch in Georgia.[4] The Petitioner

[1] The website maintained by Maine's Department of the Secretary of State reveals that filed articles of incorporation on 2004, and legally changed its name to on August 5, 2005. That company was administratively dissolved in Maine on 2016, for failure to file an annual report. Corporate Name Search, https: (last visited May 2, 2017).

[2] Maryland Business Express, https:/ (last visited May 2, 2017).

[3] "A corporation that is a component member . . . of a controlled group must use Schedule O to report the apportionment of taxable income, income tax, and certain tax benefits between all component members of the group." Instructions for Schedule O (Form 1120), https://www.irs.gov/pub/irs-pdf/i1120so.pdf (Last visited May 23, 2017).

[4] We note that the DOL requires employers to conduct recruitment using their legal name at the time of the recruitment and also requires employers to file labor certifications in their legal name at the time of submission. OFLC Frequently Asked Questions and Answers. https://www.foreignlaborcert.doleta.gov/faqsanswers.cfm#q!195 (Last visited May 23, 2017). As the evidence shows that the Petitioner was purchased by in 2009, and since the Petitioner has submitted documentation from numerous independent companies with similar names and identical addresses and referred to these companies interchangeably and the distinctions between these companies have

submitted a letter from its CPA in New Jersey, who stated that [5] had filed a consolidated tax return with since April 2009. The CPA did not explain why was not named on Form 1120-F, Schedule O, as a member of a controlled group with nor did the CPA explain why would file its own quarterly wage reports under its own tax identification number if it consolidated its finances into its parent company's annual tax returns.

Thus, the evidence shows that the Petitioner, with FEIN is legally distinct from with FEIN , from with FEIN and from with FEIN [6]

III. LAW AND ANALYSIS

As required by statute, the I-140 petition filed in this matter is accompanied by an approved ETA Form 9089, labor certification, certified by the DOL. The date the labor certification is filed is the "priority date." *See* 8 C.F.R. § 204.5(d). The priority date of the petition is July 29, 2014, and the Beneficiary must be eligible as of that date.

A. The Ability to Pay the Proffered Wage

The Petitioner must establish that it has the ability to pay the proffered wage to the Beneficiary from the priority date onward. The regulation 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.

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not been clarified, it is not clear that the recruitment was conducted under the actual employer's legal name or that the labor certification was filed under the legal name of the actual employer.

[5] Evidence submitted by the Petitioner from the Georgia Secretary of State shows that (India) legally changed its name to on 2011.

[6] A labor certification for a specific job offer is valid only for the particular job opportunity, the alien for whom the certification was granted, and for the area of intended employment stated on the ETA Form 9089. 20 C.F.R. § 656.30(c)(2). As the record contains contradictory information about the intended place of employment, it is not clear that the labor market in that area was tested. Furthermore, it is not clear from the evidence that the labor certification was filed by the company that would actually employ the Beneficiary. Thus, in any further proceedings, the Petitioner must establish that the petitioning entity will be the Beneficiary's actual employer.

The 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).

In the instant case, the Petitioner proffered a wage of $131,331 to the Benficiary. In determining a petitioner's ability to pay the proffered wage during a given period, USCIS will first examine whether the petitioner employed and paid the beneficiary during that period. The Petitioner signed the labor certification on December 18, 2015, and indicated in Part K of the labor certification that the Beneficiary had worked for since December 1, 2013. The Petitioner provided a copy of an IRS Form W-2, Wage and Tax Statement, reflecting that with FEIN paid the Beneficiary $108,402 in 2014. The Petitioner also submitted copies of paystubs showing payments from to the Beneficiary in 2015. We note that the company's address on the paystubs matches the address claimed by the Petitioner, however, the W-2s reflect a different FEIN than that stated by the Petitioner on the labor certification and the Form I-140 petition.

In response to the Director's request for evidence (RFE) the Petitioner stated on August 3, 2016, that the beneficiary "is not currently employed with the Petitioner, the proffered position offered is for a future employment." The Petitioner, with FEIN provided copies of its IRS Forms 941 for the first and second quarters of 2016; these records show that the Petitioner paid a total of $295,876.13 in wages, tips, and other compensation in the first half of 2016, and employed between six and nine workers. The Petitioner also submitted a payroll report for the pay period ending June 30, 2016, from the company that processes its payroll. This report does not identify the Beneficiary among the Petitioner's eight named payroll employees.

The Director found that the Petitioner did not submit evidence of any wages it paid to the Beneficiary since the priority date and concluded that the evidence submitted by the Petitioner did not establish its ability to pay the proffered wage as of the priority date. Accordingly, the Director denied the petition. On appeal, the Petitioner submits a copy of a 2015 IRS Form W-2 issued to the Beneficiary by with FEIN The Petitioner further provides copies of paystubs showing payments from this company to the Beneficiary in 2016. The Petitioner cites the paystubs and the IRS Forms W-2 issued by in 2014 and 2015 as evidence of its own ability to pay the proffered wage to the Beneficiary; however, the Petitioner did not address the fact that these documents reflect wages paid to the Beneficiary by not wages paid by the Petitioner, itself.

The Petitioner asserts on appeal that its finances had been reported on the tax returns of its parent company, ' since that company purchased the Petitioner in 2009. In support of this assertion, the Petitioner submits a letter from its CPA at The CPA states that they had filed "consolidated tax returns for

for the period from April 2009 which includes all the income received and expenses incurred from the Operations [*sic*] of [the Petitioner]." The Petitioner submits copies of IRS Forms 1120-F, U.S. Income Tax Return of a Foreign Corporation, from 2014 and 2015 for with FEIN We note that the company's address on the returns matches the address claimed by the Petitioner.

The Petitioner refers to the CPA letter and states that the tax returns submitted on appeal are sufficient to establish its ability to pay the proffered wage. However, we note several discrepancies and inconsistencies in the evidence submitted on appeal:

- The name on the 2014 and 2015 tax returns does not match the name cited by the Petitioner on appeal and by the CPA in its April 2016 letter, and the FEIN listed on these tax returns does not match the FEIN of the Petitioner or of the company that paid the Beneficiary. The Petitioner submits a certificate from the Georgia Secretary of State reflecting that (India) changed its name to on 2011. The Petitioner does not explain why both it and its CPA were still using the parent company's former name in 2016.
- While the Petitioner asserts that its financial information was consolidated into the tax returns filed by its parent company since 2009, we note that the Petitioner submitted copies of its own Quarterly Federal Tax Returns from the first two quarters of 2016. The Petitioner did not explain why it would file its own quarterly wage reports under its own tax identification number, and consolidate its finances into its parent company's annual tax returns.
- While the Petitioner asserts on appeal that it had employed the Beneficiary since before the July 29, 2014, priority date,[7] the Forms W-2 submitted by the Petitioner reflect that in 2014 and 2015 the Beneficiary was paid by This company claims FEIN which is different than FEIN of the Petitioner and that of the Petitioner's claimed parent company.
- While the IRS Form W-2 issued by shows that it paid the Beneficiary $117,124 in 2015 and the Petitioner asserts that this and its own financial information was consolidated into the tax returns filed by its claimed parent company, we note that in 2015 the claimed parent company stated on its Form 1120-F tax return that it paid total salaries and wages of $138,713.
- While the Petitioner asserts that its financial information was consolidated into the tax returns filed by its parent company since 2009, the Form 1120-F, Schedule O, does not identify the Petitioner as being part of a controlled group of companies with the company that filed the return.
- While the Petitioner asserts that its financial information was consolidated into the tax returns filed by its parent company since 2009, the instructions to IRS Form 1120-F state that

[7] The labor certification states that the beneficiary has been employed with Inc. since December 1, 2013.

> "[a] foreign corporation, regardless of whether it files a special return, may not belong to an affiliated group of corporations that files a consolidated return."[8] The forms submitted on appeal indicate that the filing company, [redacted] with FEIN [redacted] is incorporated in India.

It is incumbent upon the petitioner to resolve any inconsistencies in the record by independent objective evidence. Any attempt to explain or reconcile such inconsistencies will not suffice unless the petitioner submits competent objective evidence pointing to where the truth lies. *Matter of Ho*, 19 I&N Dec. 582, 591-92 (BIA 1988).

Because a corporation is a separate and distinct legal entity, the assets of its shareholders or of other enterprises or corporations cannot be considered in determining the petitioning corporation's ability to pay the proffered wage. *See Matter of Aphrodite Investments, Ltd.*, 17 I&N Dec. 530 (Comm'r 1980). In a similar case, the court in *Sitar v. Ashcroft*, 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."

Accordingly, since [redacted] (FEIN [redacted]) and [redacted] (FEIN [redacted]) appear legally distinct from the Petitioner (FEIN [redacted]) despite the submitted assignment, the submitted financial documentation regarding these companies cannot serve to establish the Petitioner's ability to pay the proffered wage to the Beneficiary. The Petitioner has not submitted copies of its own annual reports, federal tax returns, or audited financial statements as is required by regulation and as was expressly requested by the Director in the May 16, 2016, request for evidence.

In addition, where a petitioner has filed multiple petitions, we will also consider the petitioner's ability to pay the combined wages of each beneficiary. *See Patel v. Johnson*, 2 F.Supp.3d 108 (D. Mass. 2014); *see also Matter of Great Wall*, 16 I&N Dec. at 144-145. USCIS records indicate that the Petitioner has filed employment-based petitions on behalf of 792 workers since 2007, including 158 Form I-140 immigrant petitions.[9] The Petitioner would need to demonstrate its ability to pay the wage proffered to each of these 158 sponsored workers from the priority date of the current petition until each beneficiary obtains permanent residence. *See* 8 C.F.R. § 204.5(g)(2).[10]

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[8] Instructions for Form 1120-F, https://www.irs.gov/pub/irs-pdf/i1120f.pdf (last accessed May 3, 2017).

[9] We note that the Petitioner stated on the Form I-140 that it employed five workers, the Petitioner's payroll report from 2016 names eight workers, and the Petitioner's IRS Forms 941 reflect that it claimed six workers in the first quarter of 2016 and nine workers in the second quarter of 2016. The Petitioner has not explained the disparity between the number of claimed employees and the number of employment-based petitions it has filed.

[10] In addition to the employment-based petitions filed by the Petitioner, USCIS records also show 417 employment-based petitions filed by the companies discussed above with whom the Petitioner claimed to have been related. Specifically, since 2007 ' [redacted] filed 269 petitions, ' [redacted] filed 3 petitions, " [redacted] filed 5 petitions, ' [redacted] filed 4 petitions, ' [redacted] [*sic*] filed 15 petitions, and " [redacted] filed 117 petitions. If the Petitioner could establish, as it suggests on appeal, that these companies are the same legal entity with shared finances, the Petitioner would then also have to establish its ability to pay the wages to the beneficiaries of the employment-based

USCIS may consider the overall magnitude of a 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. at 612. Here, the Petitioner's payroll record does not name the Beneficiary among its paid workers in its own payroll records and the Petitioner has not submitted copies of its own annual reports, federal tax returns, or audited financial statements; instead, the Petitioner submitted tax records from two other separate companies. The evidence submitted by the Petitioner does not demonstrate that it had the continuing ability to pay the proffered wage to the Beneficiary from the priority date onward.

B. Qualification for Classification as a Professional holding an Advanced Degree

Section 203(b)(2) of the Act, 8 U.S.C. § 1153(b)(2), provides immigrant classification to members of the professions holding advanced degrees. *See also* 8 C.F.R. § 204.5(k)(1). The regulation at 8 C.F.R. § 204.5(k)(2) defines an advanced degree as "any United States academic or professional degree or a foreign equivalent degree above that of baccalaureate. A United States baccalaureate degree or a foreign equivalent degree followed by at least five years of progressive experience in the specialty shall be considered the equivalent of a master's degree."

While Line H.4 of the labor certification indicates that the offered job requires candidates to possess a minimum of a bachelor's degree, Line H.14 states that a candidate can qualify for the offered job with "[a]ny combination of education equivalent to a Bachelors [*sic*] Degree." There is no provision in the statute or the regulations that would allow a beneficiary to qualify under section 203(b)(2) of the Act as a member of the professions holding an advanced degree with anything less than a full bachelor's degree. Since the labor certification allows candidates to qualify for the offered job with a combination of education equivalent to a bachelor's degree, it would appear to allow something less than a full bachelor's degree. Therefore, the offered job does not qualify for classification of a beneficiary as a professional holding an advanced degree. The petition must also be dismissed for this reason.

IV. CONCLUSION

The Petitioner has not established its ability to pay the proffered wage to the Beneficiary from the priority date onward. In addition, offered job does not require the minimum education required for classification of a beneficiary as a professional holding an advanced degree. Accordingly, the Petitioner has not established the Beneficiary's eligibility for the immigration benefit sought.

ORDER: The appeal is dismissed.

Cite as *Matter of X-T-, Inc.*, ID# 390194 (AAO May 25, 2017)

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immigrant petitions filed under other these other names, which overlap in terms of priority date with the relevant time period of this filing.