U.S. Citizenship and Immigration Services

Non-Precedent Decision of the Administrative Appeals Office

MATTER OF C-B-G-, INC.

DATE: MAY 29, 2019

APPEAL OF NEBRASKA SERVICE CENTER DECISION

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

The Petitioner, a general freight trucking company, seeks to employ the Beneficiary as a master mechanic. It requests classification of the Beneficiary as a skilled worker under the third preference immigrant category. 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" immigrant classification allows a U.S. employer to sponsor a foreign national for lawful permanent resident status to work in a position that requires at least two years of training or experience.

The Director of the Nebraska Service Center denied the petition on the ground that the Petitioner did not establish its ability to pay the proffered wage from the priority date of the petition onward. The Director found that the tax return of another corporation owned by the same individual who owns the Petitioner could not be considered in determining the Petitioner's ability to pay the proffered wage.

On appeal the Petitioner asserts that the tax returns it provided are for two inter-related entities wholly owned by the same individual, that each entity is involved in the business that employs the Beneficiary, and that the combined financial resources of the two companies should be considered in determining the Petitioner's 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, 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 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.

To be eligible for the classification requested for the beneficiary, a petitioner must establish that it has the ability to pay the proffered wage stated in 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 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 a case where the prospective United States employer employs 100 or more workers, the director may accept a statement from a financial officer of the organization which establishes the prospective employer's ability to pay the proffered wage. In appropriate cases, additional evidence, such as profit/loss statements, bank account records, or personnel records, may be submitted by the petitioner or requested by [USCIS].

II. ABILITY TO PAY

As indicated in the above regulation, the Petitioner must establish its continuing ability to pay the proffered wage from the priority date[1] of the petition onward. The priority date in this case is September 20, 2017. The labor certification states that the wage offered for the job of master mechanic is $54,579 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. A petitioner's submission of documentary evidence that it employed the beneficiary at a salary equal to or greater than the proffered wage for the time period in question, when accompanied by a form of evidence required in the regulation at 8 C.F.R. § 204.5(g)(2), may be considered proof of the petitioner's ability to pay the proffered wage. In this case, although the Petitioner claims to have employed the Beneficiary since September 2016, no evidence has been submitted of any wages paid since then. Therefore, the Petitioner has not established its continuing ability to pay the proffered wage from the priority date onward based on wages paid to the Beneficiary.

If a petitioner does not establish that it has 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 ordinarily be considered able to pay the proffered wage during that year.

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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). A petitioner must establish that it meets all the eligibility requirements for the immigration benefit it seeks by the priority date.

The record includes a copy of the Petitioner's federal income tax returns, Form 1120S for 2017. 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 of Schedule K ("Income/loss reconciliation"). In 2017 the Petitioner had a net loss of $32,899. Net current assets (or liabilities) are determined by calculating the difference between current assets and current liabilities, as recorded in lines 1-6 and lines 16-18 of Schedule K. In this case the Petitioner's current liabilities exceeded its current assets in 2017, resulting in net current liabilities of $166,778. Thus, the Petitioner has not established its ability to pay the proffered wage based on either net income or net current assets from the priority date onward.

On appeal the Petitioner asserts that the financial resources of a second trucking company which, like the Petitioner is wholly owned by [redacted] should be taken into consideration in determining the Petitioner's ability to pay the proffered wage. The record indicates that the Petitioner was incorporated in 2003 and was certified for the U.S. Department of Transportation (DOT)'s Disadvantaged Business Enterprise (DBE) program. The Petitioner states that "due to insurance requirements" it began in April 2017 a multi-year transition of its business and DBE certification to a new business entity, [redacted] which had been incorporated in [redacted] 2016. Documentation in the record shows that an application for "DBE Annual Update" was submitted by '[redacted] DBA [redacted] on [redacted] 2018, and approved the following day by the Colorado Department of Transportation. Further documentation from the Federal Motor Carrier Safety Administration (FMCSA), dated September 13, 2018, recorded the operating status of the Petitioner as "not authorized" and the operating status of [redacted] as "active." However, the Petitioner remains in existence as evidenced by a Certificate of Fact of Good Standing issued by the Secretary of State of the State of Colorado on October 1, 2018.

According to the Petitioner, the foregoing documentation shows that the Petitioner and [redacted] were in a "symbiotic relationship" during the transition period and that their combined financial resources should be considered in our ability to pay determination. The Petitioner submits a compilation report with combined financial statements from its certified public accountant (CPA) for the calendar year 2017, according to which the two companies together had a net income of $221,043.58.[2]

[2] Even if we accepted the premise that the combined financial resources of the two companies should be considered, the regulation at 8 C.F.R. § 204.5(g)(2) makes clear that when a petitioner relies on financial statements to demonstrate its ability to pay the proffered wage, those financial statements must be audited. An audit is conducted in accordance with generally accepted auditing standards to obtain a reasonable assurance that the financial statements of the business are free of material misstatements. The unaudited financial statements submitted on appeal are not persuasive evidence. The accountant's report that accompanied the financial statements clearly indicates that they were produced pursuant to a compilation rather than an audit. The accountant's report also states that the financial statements produced pursuant to the compilation are the representations of management, that they were prepared in accordance with the modified cash basis of accounting, and that management omitted substantially all of the disclosures ordinarily included in financial

In support of that argument, the Petitioner submitted the 2017 federal income tax return, Form 1120S, for [redacted]. It recorded net income of $228,271 in line 18 of Schedule K, and net current assets of $441 in lines 1-6 and 16-18 of Schedule L. The Director found that because [redacted] was a separate and distinct legal entity from the Petitioner, it had no legal obligation to utilize its own resources to pay the Petitioner's proffered wage obligation to the Beneficiary, citing *Matter of Aphrodite Investments, Ltd.*, 17 I&N Dec. 350 (Comm'r 1980); and *Sitar v. Ashcroft*, 2003 WL 22203713 (D.Mass. Sept. 18, 2003). The Petitioner contends on appeal that because both companies are wholly owned by [redacted] the owner's intention to employ the Beneficiary has not changed during the transition to [redacted], and the nature of the job offered has remained the same during the transition to [redacted], it is proper to consider the financial resources of both companies, in particular their tax returns, in our ability to pay determination.

As noted by the Director, the Petitioner is a separate and distinct legal entity from both its owner and the related company. The financial resources of those other companies or individuals will not be considered because "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." *Sitar v. Ashcroft*, 2003 WL 22203713. Accordingly, we will only consider the financial information of the Petitioner.

On appeal the Petitioner requests that we consider the totality of its circumstances, as set forth in *Matter of Sonegawa,* 12 I&N Dec. 612 (Reg'l Comm'r 1967), in determining its ability to pay the proffered wage. Per *Matter of Sonegawa* 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 has been in business since 2001 and had 28 employees at the time its petition was filed in 2018. The Petitioner indicates that the job offered is not a new position in the company, but has not explained whether that is because the Beneficiary has already been working in the job since September 2016 (though there is no documentary evidence of any wages paid to him) or because the Beneficiary is, or will be, replacing another employee. There is little evidence in the record of the Petitioner's business history, and none concerning its reputation within the trucking industry. According to its tax returns for 2016 and 2017, the Petitioner had gross receipts of just

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statements prepared in accordance with this basis of accounting. The unsupported representations of management are not reliable evidence and are insufficient to demonstrate the ability to pay the proffered wage.

over $1.5 million in 2016, and none in 2017. In short, the evidence does not support a finding that the totality of its circumstances shows the Petitioner's ability to pay the proffered wage.

III. SUCCESSOR-IN-INTEREST

With its appeal the Petitioner submits a new Form I-140 in the name of [redacted] "in the event that [we] determine that [this company] is a more suitable petitioner given the transition of [redacted] Inc. into [redacted] Inc. as the operating entity." If the Petitioner no longer intends to offer the Beneficiary the position described on the labor certification, it would need to demonstrate the existence of a successor entity. Otherwise, the labor certification would not be valid and that alone would be ground for denial. *See* 20 C.F.R. § 656.30(c).

Since [redacted] is a different entity than the labor certification employer, it must be established that it is a successor-in-interest to the Petitioner in order to make use of the labor certification. *See Matter of Dial Auto Repair Shop, Inc.*, 19 I&N Dec. 481 (Comm'r 1986). A valid successor relationship may be established for immigration purposes if it satisfies three conditions. First, the successor must fully describe and document the transaction transferring ownership of all, or a relevant part of, the predecessor. Second, the successor must demonstrate that the job opportunity is the same as originally offered on the labor certification. Third, the successor must prove by a preponderance of the evidence that it is eligible for the immigrant visa in all respects.

Here, the evidence in the record does not satisfy all three conditions described above. Specifically, the evidence does not satisfy the first condition because it does not fully describe and document the transaction transferring ownership of the predecessor to the successor. While the documentation of record does appear to indicate a merging of functions between the Petitioner and [redacted] it does not show the end result of this process or that [redacted] has taken over the Petitioner's operations. The Petitioner has not submitted any document between the Petitioner and [redacted] which describes what assets, operations, and obligations are being transferred from the Petitioner to [redacted] when that process will be complete, and what will remain of the Petitioner, if anything, when the process is complete. Furthermore, it is unclear as to which entity now intends to employ the Beneficiary.

Since the Petitioner has not fully described and documented the transaction transferring ownership of the Petitioner to [redacted] we cannot find that a successor-in-interest relationship exists between those two entities. If the Petitioner were to fully document the transaction transferring ownership and show that [redacted] acquired the essential rights and obligations of the Petitioner, we would then also evaluate the ability of [redacted] to pay the proffered wage. However, we would not combine the two entities' financial information. Rather we would examine each entity's ability to pay separately, the Petitioner's up to the point of the succession and [redacted]'s after the point of succession. In any future filing in this matter, the Petitioner must clarify whether it is claiming [redacted] as a successor-in-interest or whether the Petitioner continues to exist in its own right and continues to intend to employ the Beneficiary in the offered position.

IV. CONCLUSION

The Petitioner has not established its ability to pay the proffered wage from the priority date onward. The appeal will be dismissed for the above stated reason. In visa petition proceedings, it is the petitioner's burden to establish eligibility for the immigration benefit sought. Section 291 of the Act, 8 U.S.C. § 1361. The Petitioner has not met that burden.

ORDER: The appeal is dismissed.

Cite as *Matter of C-B-G-,* Inc., ID# 4250444 (AAO May 29, 2019)