U.S. Citizenship and Immigration Services

Non-Precedent Decision of the Administrative Appeals Office

MATTER OF R-D-B-D-, INC.

DATE: NOV. 29, 2017

APPEAL OF TEXAS SERVICE CENTER DECISION

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

The Petitioner, an upholstery company, seeks to employ the Beneficiary as an industrial engineer. 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 residence.

The Director of the Texas Service Center denied the petition on the ground that the evidence of record did not establish the Petitioner's continuing ability to pay the proffered wage from the priority date up to the present.

On appeal, the Petitioner submits a brief and additional documentation and asserts that it has established its continuing 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 must obtain 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, 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.

[1] The date the labor certification is filed is called the "priority date." 8 C.F.R. § 204.5(d).

A petitioner must establish, among other things, that it has the ability to pay the beneficiary the proffered wage, as stated on the labor certification, from the priority date onward. The regulation at 8 C.F.R. § 204.5(g)(2) provides, in pertinent part, as follows:

> *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 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 the Service.

II. ANALYSIS

The Petitioner's Form I-140, Immigrant Petition for Alien Worker, was accompanied by a labor certification. As stated in section G of the labor certification, as well as in part 6 of the petition, the proffered wage of the job offered is $75,608 per year. Thus, the Petitioner must demonstrate its continuing ability to pay the proffered wage beginning on the priority date, which is November 7, 2015. *See* 8 C.F.R. § 204.5(d).

In determining ability to pay, we first examine whether a petitioner paid a beneficiary the full proffered wage each year from a petition's priority date. If a petitioner did not pay the full proffered wage each year, we next consider whether it generated sufficient annual amounts of net income or net current assets to pay any differences between the wages paid and the proffered wage. If a petitioner's net income and net current assets are insufficient, we may also consider the overall magnitude of its business activities. *See Matter of Sonegawa*, 12 I&N Dec. 612, 614-15 (Reg'l Comm'r 1967).

As evidence of its ability to pay the proffered wage, the Petitioner submitted copies of the Beneficiary's bi-weekly pay statements since August 12, 2016. The Petitioner also provided a copy of its 2015 and 2016 Internal Revenue Service (IRS) Form 1120S, U.S. Income Tax Return for an S Corporation.[2]

The Petitioner did not employ the Beneficiary during 2015. For 2016, the Petitioner submitted bi-weekly pay stubs showing that it has paid the Beneficiary an hourly rate of $36.35 beginning on

[2] The Petitioner also submitted pay statements though February 2017 showing a bi-weekly salary of $2,908. However, because the required evidence for 2017 is not available, we restrict our analysis to 2015 and 2016.

August 12, 2016, for a total of $24,718 wages paid in 2016. In this case, the Petitioner has not established that it paid the Beneficiary the proffered wage of $75,608 in any year, but we may credit the wages paid in 2016.

As the record does not establish that the Petitioner paid the Beneficiary the full proffered wage in 2015 or 2016, we next examine the Petitioner's income and net current assets. The Petitioner's federal income tax returns for 2015 and 2016, in conjunction with the Petitioner's evidence of wages paid in 2016, reflect the following information:

Year	Wages Paid	Difference between Proffered Wage and Wages Paid	Net Income[3]	Net Current Assets[4]
2015	$0	$75,608	$30,010	-$99
2016	$24,718	$50,890	$47,057	-$3,623

In this case, neither the Petitioner's net income nor net current assets for 2015 and 2016 are sufficient to pay the difference between the proffered wage and the wages paid. The record therefore does not establish the Petitioner's ability to pay the proffered wage in either 2015 or 2016.

On appeal, the Petitioner contends that it has submitted sufficient evidence to establish its ability to pay the proffered wage, citing to a 2004 USCIS memorandum from William Yates (Yates Memorandum), which generally addresses a petitioner's ability to pay. The Petitioner refers to specific language from the Yates Memorandum which state that USCIS "should make a positive ability to pay determination . . . [when] the record contains credible verifiable evidence that the petitioner not only is employing the beneficiary but also has paid or currently is paying the proffered wage." Memorandum from William R. Yates, Associate Director for Operations, USCIS, HQOPRD 90/16.45, *Determination of Ability to Pay under 8 CFR 204.5(g)(2)* 2 (May 4, 2004), https://www.uscis.gov/laws/policy-memoranda. The Petitioner urges us to consider the hourly wage rate it paid in 2016 as satisfying the ability to pay requirement. Although the Petitioner has been paying the Beneficiary an hourly wage equal to the proffered wage rate since August 12, 2016, the Petitioner must establish that it had the ability to pay the full proffered wage as of the November 7,

[3] In 2015 and 2016, the Petitioner filed an IRS Form 1120S. Where an S corporation's income is exclusively from a trade or business, USCIS considers net income to be the figure for ordinary income, shown on line 21 of page one of the petitioner's IRS Form 1120S. However, where an S corporation has income, credits, deductions, or other adjustments from sources other than a trade or business, they are reported on Schedule K and the net income is found on line 18 (2006-2015) of Schedule K. *See* Instructions for IRS Form 1120S, at http://www.irs.gov/pub/irs-pdf/i1120s.pdf (last accessed August 4, 2017) (indicating that Schedule K is a summary schedule of all shareholders' shares of the corporation's income, deductions, credits, etc.). Because the Petitioner had additional deductions and other adjustments shown on its Schedule K for 2015 and 2016, its net income is found on Schedule K of its tax return.

[4] According to *Barron's Dictionary of Accounting Terms* 117 (3d ed. 2000), "current assets" consist of items having (in most cases) a life of one year or less, such as cash, marketable securities, inventory and prepaid expenses. "Current liabilities" are obligations payable (in most cases) within one year, such as accounts payable, short-term notes payable, and accrued expenses (such as taxes and salaries). *Id.* at 118.

2015, priority date. Importantly, the regulation at 8 C.F.R. § 204.5(g)(2) requires that a petitioner demonstrate its *continuing* ability to pay the proffered wage *beginning* on the priority date. Thus, in this case, the Petitioner must show its ability to pay the proffered wage not only in a portion of 2016, when the Petitioner claims it actually began paying the proffered wage rate, but it must also show its ability to pay the proffered wage from 2015 onward. Here, the Petitioner has not done so.

In cases where neither a petitioner's net income nor its net current assets establish its ability to pay the proffered wage during the required period, USCIS may also consider the overall magnitude of its business activities. *Matter of Sonegawa*, 12 I&N Dec. at 612. In *Sonegawa*, the petitioning entity had been in business for over 11 years but had changed locations in the year it filed the visa petition, resulting in unusual expenses and a temporary inability to conduct regular business operations. Nevertheless, the former U.S. Immigration and Naturalization Service (now USCIS) approved the visa petition, determining that the totality of the petitioner's circumstances established its ability to pay the proffered wage. That determination was, in part, based on the Petitioner's history of successful business operations and its outstanding reputation within its industry.

In assessing the totality of the petitioner's circumstances, USCIS may look at such factors as the number of years it has been in business, its record of growth, the number of individuals it employs, abnormal business expenditures or losses, its reputation within its industry, whether the beneficiary is replacing a former employee or an outsourced service, or any other evidence it deems relevant.

In considering whether the record establishes the Petitioner's ability to pay based on evidence that falls outside its net income and net current assets, we have reviewed the Petitioner's reconciliation summary for its checking account for the period ending on November 30, 2015, which claims an ending balance of $83,616.20. The Petitioner also provided a bank statement for the period beginning on December 1, 2015, which shows a beginning balance of $53,097.74. Regardless of the Petitioner's actual available bank balance as of December 1, 2015, its reliance on the surpluses reflected in its bank account statement or the surplus claimed on its reconciliation summary is misplaced. Bank statements reflect the amount in an account on a given date, not a sustained ability to pay a proffered wage. The Petitioner also has not established that the funds reported on its bank statements show additional available funds that were not reflected on its tax returns, such as the Petitioner's taxable income (income minus deductions) or the cash specified on Schedule L that was considered in determining the Petitioner's net current assets. In this case, the Petitioner's tax returns are not sufficient to establish its continuing ability to pay the proffered wage. We will not add the balances on the Petitioner's bank statements to its net income or net current assets. Therefore, the Petitioner's single monthly bank statement and reconciliation summary are not persuasive evidence of its ability to pay the proffered wages in 2015 and 2016.

The Petitioner further contends that is has the ability to pay based on a totality of the circumstances analysis because: (1) it has been a successful business since 2005; (2) it had gross revenue of $1,280,785 in 2015, and $1,212,864 in 2016; and (3) it paid employee wages of $329,582 in 2015, and $350,420 in 2016. However, the Petitioner has not submitted financial information to establish its success since 2005. The record contains financial information only for 2014, 2015, and 2016.

which was submitted to establish the Petitioner's ability to pay in 2015 and 2016, rather than to document sustained growth in its operations over several years. We also note that the Petitioner's net income and gross revenue were higher in 2014 than in the subsequent years, contrary to the Petitioner's claims of sustained growth. Further, the Petitioner has not claimed or established that it has experienced uncharacteristic losses or expenses in the period in question. Moreover, although the Petitioner provided photographs to show it has physical premises and employees, it has not included materials regarding its reputation such as, for example, letters from current or former clients or similar companies that could establish its reputation within its industry. As a result, we do not find the record to contain sufficient evidence to conclude that the totality of the Petitioner's circumstances establish its ability to pay the proffered wage from the priority date onward.

III. CONCLUSION

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

ORDER: The appeal is dismissed.

Cite as *Matter of R-D-B-D-, Inc.*, ID# 576136 (AAO Nov. 29, 2017)