U.S. Citizenship and Immigration Services

Non-Precedent Decision of the Administrative Appeals Office

In Re: 11105919

Date: OCT. 1, 2020

Appeal of Nebraska Service Center Decision

Form I-140, Immigrant Petition for Skilled Worker

The Petitioner seeks to employ the Beneficiary as a general and operations manager. It requests classification of the Beneficiary as a skilled worker under the third preference immigrant classification. Immigration and Nationality Act (the Act) section 203(b)(3)(A)(i), 8 U.S.C. § 1153(b)(3)(A)(i). This employment-based 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, concluding that the record did not establish the Petitioner's continuing ability to pay the proffered wage from the priority date onward.

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) of the Act, 8 U.S.C. § 1182(a)(5). 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 id*. 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.

[1] The priority date of a petition is the date the DOL accepted the labor certification for processing, which in this case is January 31, 2019. *See* 8 C.F.R. § 204.5(d).

II. ABILITY TO PAY THE PROFFERED WAGE

The Director concluded that the record did not establish the Petitioner's continuing ability to pay the proffered wage from the priority date onward. The proffered wage is $57,034 per year.

The regulation at 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.

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. Here, the record does not demonstrate that the Petitioner has paid the Beneficiary any wages from the priority date onward. Thus, we next examine whether it had sufficient annual amounts of net income or net current assets to pay the proffered wage. 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 Petitioner asserts that it is a "Service Operation Management Company" for other companies in its "consortium" and that it provides oversight, finance, human resources, branding, and company direction to these companies in return for management fees. It also asserts that it owns three rental properties and receives rental income from these properties. With the petition, the Petitioner submitted a letter dated September 30, 2019, from [redacted] CPA. [redacted] stated that the Petitioner is a single-member limited liability company (LLC) that is a disregarded entity for tax purposes,[3] and that its real estate holdings are reflected on Schedule E to the IRS Form 1040, U.S. Individual Income Tax Return, of [redacted][4] The Petitioner also submitted its unaudited financial statements for 2018; management agreements between the Petitioner and seven other limited liability companies;[5] its bank

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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*, 108 F. Supp. 3d 936, 942-946 (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] If a single-member LLC does not elect to be treated as a corporation, it is a disregarded entity and its activities are generally reflected on its owner's IRS Form 1040, Schedule C, E, or F. *See* 26 C.F.R. § 301.7701-3.

[4] The Petitioner's ownership is not clear. Corporate records available online indicate that [redacted] and [redacted] are both managing members of the LLC. Nev. Sec'y State, Silver Flume Business Portal, https://esos.nv.gov/EntitySearch/BusinessInformation (last visited Sept. 22, 2020). [redacted] signed the Form I-140 and labor certification as a managing member. Therefore, it appears that [redacted] and [redacted] are both members of the Petitioner, and their 2018 individual tax returns indicate that they are not married. It is not clear how the Petitioner can be a disregarded entity for tax purposes if it has more than one member. In any future filings, the Petitioner must resolve this discrepancy with independent, objective evidence pointing to where the trust lies. *Matter of Ho,* 19 I&N Dec. 582, 591-92 (BIA 1988).

[5] Three of the agreements are dated after the priority date of this petition. A petitioner must establish eligibility at the time of filing; a petition cannot be approved at a future date after the petitioner becomes eligible under a new set of facts. *See Matter of Katigbak*, 14 I&N Dec. 45, 49 (Reg'l Comm'r 1971).

statements for the period from January 1 through August 31, 2019; and unaudited financial statements for the Petitioner and affiliate entities for 2017, 2018, and the period from January 1 to September 30, 2019. In response to a subsequent request for evidence (RFE), the Petitioner submitted the 2018 individual income tax return of [redacted], the 2018 individual income tax return of [redacted] audited financial statements for the Petitioner and affiliate entities for 2018; its bank statements for the period from September 1 through December 31, 2019; and bank statements for other entities.

In his denial decision, the Director noted that the Petitioner's reliance on bank statements was misplaced, and he rejected the Petitioner's assertion that its total assets should be considered in the determination of the ability to pay the proffered wage. He reviewed [redacted]'s Schedule E to her 2018 individual income tax return and noted that it did not establish the Petitioner's ability to pay the proffered wage. The Director also noted discrepancies in the evidence regarding the Petitioner's ownership and entity status.

On appeal, the Petitioner asserts that the audited financial statements for the Petitioner and its affiliate entities for 2018 that were submitted in response to the RFE establish its ability to pay. It also submits revised audited financial statements for the Petitioner and its affiliate entities for 2018 on appeal[6] and asserts that the consolidated financials should be considered as evidence of the Petitioner's ability to pay. It asserts that its 2018 audited financial statements show sufficient net current assets to pay the proffered wage, and it submits an opinion letter from [redacted] CPA, supporting its assertion that its net current assets are sufficient to pay the proffered wage. The Petitioner further asserts that the Director erred in declining to consider the balances in its bank accounts as cash that is immediately available to pay the proffered wage. Further, it asserts on appeal that based on the totality of circumstances, the record establishes the Petitioner's continuing ability to pay the proffered wage. *See Matter of Sonegawa*, 12 I&N Dec. 612, 614-615 (Reg'l Comm'r 1967).

We conclude that the Petitioner has not established its continuing ability to pay the proffered wage from the petition's priority date in 2019 onward. The record does not contain regulatory-prescribed evidence of the Petitioner's ability to pay for 2019. Although it contains unaudited financial statements for the Petitioner and its affiliate entities for the period from January 1 to September 30, 2019, these unaudited statements do not establish the Petitioner's ability to pay the proffered wage. Where a petitioner relies on financial statements to demonstrate its ability to pay the proffered wage, the financial statements must be audited. 8 C.F.R. § 204.5(g)(2). Unaudited financial statements are the unsupported representations of management and are insufficient to demonstrate the Petitioner's ability to pay the proffered wage.[7]

[6] The revised audited financials contain a statement dated February 21, 2020, from the auditing firm indicating that "due to time pressure, we did not break our mortgage notes payable into current and long term portion. We are updating the financial statements to provide such information... We also updated the 'Aggregate scheduled annual maturities' table... to only include the principal portion of the notes payable. Our previous table included future interest which was not yet an obligation at December 31, 2018." The revision of the audited financial statements following the denial of the petition in this case reduces their reliability. A petitioner may not make material changes to a petition in an effort to make a deficient petition conform to USCIS requirements. *See Matter of Izummi*, 22 I&N Dec. 169, 176 (Assoc. Comm'r 1988).

[7] The Petitioner must support its assertions with relevant, probative, and credible evidence. *See Matter of Chawathe*, 25 I&N Dec. 369, 376 (AAO 2010).

Further, the unaudited statements include financial results for other entities. The Petitioner asserts on appeal that the consolidated financials of the "consortium of entities working together under the same brand name an ownership umbrella" should be considered as evidence of the Petitioner's ability to pay. We disagree. Because an LLC is a separate and distinct legal entity from its members, the assets of its members or of other entities 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]

Additionally, its 2019 bank statements do not establish its ability to pay. Bank statements show the amount in an account on a given date and cannot show the sustainable ability to pay a proffered wage. In addition, bank statements are not among the three types of evidence listed in 8 C.F.R. § 204.5(g)(2) that are required to illustrate a petitioner's ability to pay a proffered wage. While this regulation allows additional material "in appropriate cases," the Petitioner has not demonstrated why the documentation specified at 8 C.F.R. § 204.5(g)(2) is inapplicable. Without regulatory-required evidence of the Petitioner's ability to pay for 2019, we cannot affirmatively find that the Petitioner has the continuing ability to pay the proffered wage from the priority date.

Next, we will address the Petitioner's appellate arguments related to 2018. On appeal, the Petitioner asserts that the audited financial statements for the Petitioner and its affiliate entities for 2018 establish its ability to pay based on its net current assets. However, as noted above, the audited statements include financial results for other entities. Because an LLC is a separate and distinct legal entity, the assets of other entities cannot be considered in determining the Petitioner's ability to pay the proffered wage. The Petitioner submits an opinion letter dated March 7, 2020, from [redacted] CPA, supporting the conclusion that the Petitioner's net current assets are sufficient to pay the proffered wage.[9] [redacted] states that [redacted] had net current assets of $1,265,533 as of December 31, 2018, and that this amount is sufficient to pay the proffered wage. However, his review of the Petitioner's net current assets was based on the consolidated audited financial statements for the Petitioner and its affiliate entities and, as set forth above, the assets of other entities cannot be considered in determining the Petitioner's ability to pay the proffered wage. Where an opinion is not in accord with other information or is in any way questionable, we are not required to accept or may give less weight to that evidence. *Matter of Caron Int'l*, 19 I&N Dec. 791 (Comm'r 1988).

The Petitioner additionally asserts that the Director erred in declining to consider balances in its bank accounts as cash that is immediately available to pay the proffered wage. A petitioner's assets must be balanced by its liabilities; otherwise, they cannot properly be considered in the determination of the Petitioner's ability to pay the proffered wage. As noted above, bank statements do not show the sustainable ability to pay a proffered wage, and bank statements are not among the three types of evidence required by 8 C.F.R. § 204.5(g)(2). Also, as detailed above, the Petitioner did not submit audited financial statements detailing its own assets, liabilities, income, and expenses for 2018. Further, as previously noted, it is not clear if [redacted]s IRS Form 1040, Schedule E, represents

[8] The Petitioner notes in its supporting letter submitted with the petition that the entities were created to ensure "the protection of the overall assets for the enterprise."

[9] The letter from [redacted] references the Petitioner as [redacted]," while the Petitioner is [redacted] Thus, it is not clear that the letter references the proper entity.

the Petitioner's financial results, and Schedule E does not show the assets and liabilities of the entities listed.[10]

Finally, the Petitioner asserts on appeal that based on the totality of circumstances, the record establishes the Petitioner's continuing ability to pay the proffered wage. *See Matter of Sonegawa*, 12 I&N Dec. at 614-615. We may consider evidence of a petitioner's ability to pay beyond its net income and net current assets, including such factors as: the number of years it has conducted business; the growth of its business; its number of employees; the occurrence of any uncharacteristic business expenditures or losses; its reputation in its industry; whether a beneficiary will replace a current employee or outsourced service; or other evidence of its ability to pay a proffered wage. *See id.*

In this case, the record indicates that the Petitioner was organized in Nevada in 2012 and that it has seven employees. The Petitioner asserts that it "prides itself on being a leading entertainment real estate provider" in [redacted] and it claims to own three long-term rental properties there. However, unlike in *Sonegawa*, the record does not establish the Petitioner's growth since its organization. Further, unlike in *Sonegawa*, the Petitioner here has not established the occurrence of any uncharacteristic business expenditures or losses or established its reputation in its industry. 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. *Id.* The Regional Commissioner's determination in *Sonegawa* was based in part on the petitioner's sound business status and outstanding reputation as a couturiere. The Petitioner here has not demonstrated a similar magnitude of business activities. The petitioner's unsupported statements regarding its status as a "leading entertainment real estate provider" are insufficient to carry its burden of proof.[11] Further, the Petitioner here has not demonstrated that the Beneficiary will replace a current employee or outsourced service.[12] Thus, assessing the totality of circumstances in this individual case, the record does not establish the Petitioner's continuing ability to pay the proffered wage pursuant to *Sonegawa*.

The Petitioner has not established by a preponderance of the evidence that it has the continuing ability to pay the proffered wage from the petition's priority date onward.[13]

ORDER: The appeal is dismissed.

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[10] Her 2018 IRS Form 1040, Schedule E, shows a net income amount for the Petitioner's three properties that is significantly less than the proffered wage.

[11] The Petitioner must support its assertions with relevant, probative, and credible evidence. *See Matter of Chawathe*, 25 I&N Dec. at 376.

[12] The Petitioner indicated on the petition that this is a new position.

[13] We note that on the labor certification and petition, the Petitioner listed the Beneficiary's worksite as [redacted] Nevada. That address is a single-family home listed on [redacted]'s tax return as a long-term rental property owned by one of the Petitioner's affiliates. It is not clear how the Beneficiary will work at a residential rental property. In any future filings, the Petitioner must resolve this ambiguity with independent, objective evidence pointing to where the trust lies. *Matter of Ho,* 19 I&N Dec. at 591-92.