U.S. Citizenship and Immigration Services

Non-Precedent Decision of the Administrative Appeals Office

MATTER OF C-&P-F-A-P-, INC.

DATE: OCT. 17, 2017

APPEAL OF TEXAS SERVICE CENTER DECISION

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

The Petitioner, a fragrance blending and contract manufacturing business, sought to employ the Beneficiary as a systems accountant. It requested classification of the Beneficiary as a professional under the third preference immigrant category. *See* 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 U.S. bachelor's degree or its foreign equivalent for lawful permanent resident status.

The petition was initially approved. The Director of the Texas Service Center subsequently revoked the approval of the petition, concluding that the record did not establish, as required, that the Petitioner had the ability to pay the proffered wage. The Petitioner then filed a motion to reopen and reconsider, and the Director denied the motions.

On appeal, the Petitioner submits additional evidence and asserts that it does have the ability to pay the proffered wage.

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

I. LAW

Employment-based immigration is generally a three-step process. First, an employer obtains an approved ETA Form 9089, Application for Permanent Employment Certification (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 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

[1] The date the labor certification is filed, in cases such as this one, is called the "priority date."

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.

Section 205 of the Act, 8 U.S.C. § 1155, provides that "[t]he Attorney General [now Secretary, Department of Homeland Security], may, at any time, for what he deems to be good and sufficient cause, revoke the approval of any petition approved by him under section 204." The realization by the director that the petition was approved in error may be good and sufficient cause for revoking the approval. *Matter of Ho,* 19 I&N Dec. 582, 590 (BIA 1988).

II. ANALYSIS

After providing notice[2] to the Petitioner, the Director revoked the petition's approval, finding that the record did not establish the Petitioner's ability to pay the proffered wage. 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.

In this case, the labor certification was accepted on November 25, 2005, the priority date. The proffered wage stated on the labor certification is $41,496 per year.

In determining a petitioner's ability to pay the proffered wage during a given period, USCIS requires the petitioner to demonstrate financial resources sufficient to pay the beneficiary's proffered wage. USCIS first examines whether the petitioner employed and paid the beneficiary during that period. 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 will be considered as proof of the petitioner's ability to pay the proffered wage.

Here, the following chart demonstrates the wages the Petitioner paid to the Beneficiary compared to the proffered wage of $41,496.

Year	Wages Paid	Shortfall in Wages Paid
2005	$16,856.12	$24,639.88

[2] The notice of intent to revoke (NOIR) was properly issued pursuant to *Matter of Arias*, 19 I&N Dec. 568 (BIA 1988) and *Matter of Estime*, 19 I&N Dec. 450 (BIA 1987). Both cases held that a NOIR is properly issued for "good and sufficient cause" when the evidence of record at the time of issuance, if unexplained and unrebutted, would warrant a denial of the visa petition based upon the petitioner's failure to meet his burden of proof.

2006	$16,852.49	$24,643.51
2007	$18,001.20	$23,494.80
2008	$20,234.06	$21,261.94
2009	$24,558.00	$16,938.00
2010	$23,721.00	$17,775.00
2011	$24,205.50	$17,290.50
2012	$23,235.00	$18,261.00
2013	$23,750.00	$17,746.00
2014	$23,058.00	$18,438.00
2015	$23,727.25	$17,768.75

Therefore, the Petitioner must establish its ability to pay the shortfall in wages paid from 2005 through 2015.

If the petitioner does not establish that it employed and paid the beneficiary an amount at least equal to the proffered wage during that period, USCIS will next examine the net income figure reflected on the petitioner's federal income tax return, without consideration of depreciation or other expenses. *River Street Donuts, LLC v. Napolitano*, 558 F.3d 111 (1st Cir. 2009).

The record reflects that the Petitioner is structured as an S corporation. The record contains a copy of the Petitioner's tax returns that were submitted to the Internal Revenue Service (IRS) from 2005 through 2015, which state the following amounts of net income in relation to the shortfall in wages paid to the Beneficiary.[3]

Year	**Net Income**	**Shortfall in Wages Paid**	**Years in which the Net Income Exceeds the Shortfall in Wages Paid**
2005	$3,190.00	$24,639.88	
2006	$3,659.00	$24,643.51	
2007	-$168,280.00	$23,494.80	
2008	$371,694.00	$21,261.94	X
2009	$170,676.00	$16,938.00	X
2010	-$195.00	$17,775.00	

[3] For an S corporation, 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. If the Schedule K has relevant entries for additional income, credits, deductions or other adjustments, net income is found on Schedule K, line 17e for 2005 and line 18 for 2006-2014. *See* Instructions for Form 1120S, at http://www.irs.gov/pub/irs-pdf/i1120s.pdf (last visited October 10, 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 income, credits, deductions, or other adjustments shown on its Schedule K for 2005 through 2015, the Petitioner's net income is found on Schedule K of its tax returns for these years.

2011	-$25,939.00	$17,290.50	
2012	-$314,579.00	$18,261.00	
2013	-$169,245.00	$17,746.00	
2014	-$208,425.00	$18,438.00	
2015	$215,038.00	$17,768.75	X

This demonstrates that the Petitioner's net income was only sufficient to cover the shortfall in wages paid for 2008, 2009, and 2015.

As an alternate means of determining the petitioner's ability to pay the proffered wage, USCIS may review the petitioner's net current assets. Net current assets are the difference between the petitioner's current assets and current liabilities.[4] A corporation's year-end current assets are shown on Schedule L, lines 1 through 6. Its year-end current liabilities are shown on lines 16 through 18. If the total of a corporation's end-of-year net current assets and the wages paid to the beneficiary (if any) are equal to or greater than the proffered wage, the petitioner is expected to be able to pay the proffered wage using those net current assets. Here, the Petitioner's tax returns for 2005 through 2015 state the following amounts of net current assets in relation to the shortfall in wages paid to the Beneficiary.

Year	**Net Current Assets**	**Shortfall in Wages Paid**	**Years in Which the Net Income Exceeds the Shortfall in Wages Paid**
2005	-$70,491.00	$24,639.88	
2006	$17,146.00	$24,643.51	
2007	-$51,960.00	$23,494.80	
2008	$30,499.00	$21,261.94	X
2009	$45,709.00	$16,938.00	X
2010	$28,811.00	$17,775.00	X
2011	-$1,278,262.00	$17,290.50	
2012	-$890,109.00	$18,261.00	
2013	-$1,240,887.00	$17,746.00	
2014	-$475,316.00	$18,438.00	
2015	-$341,475.00	$17,768.75	

This demonstrates that the Petitioner's net current assets were only sufficient to cover the shortfall in wages paid in 2008, 2009, and 2010 but not for 2005 through 2007 and 2011 through 2015, although the Petitioner's net income was sufficient to cover the shortfall in 2015.

[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 accounts payable, short-term notes payable, and accrued expenses (such as taxes and salaries). *Id.* at 118.

Therefore, the Petitioner has not established that it had the continuing ability to pay the difference between the proffered wage and the wages paid to the Beneficiary in 2005, 2006, 2007, 2011, 2012, 2013, and 2014 through an examination of its net income or net current assets.

USCIS also considers the overall magnitude of the 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. 612 (Reg'l Comm'r 1967). As in *Sonegawa*, USCIS may, at its discretion, consider evidence relevant to the petitioner's financial ability that falls outside of a petitioner's net income and net current assets. USCIS 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 overall number of employees, the occurrence of any uncharacteristic business expenditures or losses, the petitioner's reputation within its industry, whether the beneficiary is replacing a former employee or an outsourced service, or any other evidence that USCIS deems relevant to the petitioner's ability to pay the proffered wage.

On appeal, the Petitioner states that it has the ability to pay the proffered wage when considered in the totality of the circumstances. Specifically, the Petitioner states that the following facts should be taken into account with respect to the totality of the circumstances: that it has been doing business for over 25 years since 1991, that it has more than 150 employees[5], that it has experienced historical growth from 2005 to 2015, that it incurred unexpected costs related to business expansion and relocation in 2005, 2006, 2007, 2011, 2012, 2013, and 2014, that depreciation stated on its tax returns should be added back into net income, and that officer compensation could have been reallocated to pay the shortfall in wages paid to the Beneficiary.

While the Petitioner has demonstrated growth in its gross receipts from 2005 through 2015, the record reflects that the Petitioner had very low or negative net income in 2005, 2006, 2007, 2010, 2011, 2012, 2013, and 2014 with negative net current assets in 2005, 2007, 2011, 2012, 2013, 2014, and 2015. We will address depreciation here as the Petitioner states this contributed to low amounts of net income on its tax returns. The Petitioner states that depreciation amounts should be added back to net income because the depreciation method used the by IRS results in higher deductions being taken on its tax returns and thus a lower amount of net income.

As stated above, USCIS considers net income as shown on the Form 1120S without consideration of depreciation or other expenses. *River Street Donuts, LLC v. Napolitano*, 558 F.3d 111 (1st Cir. 2009). With respect to depreciation, the court noted:

> The AAO recognized that a depreciation deduction is a systematic allocation of the cost of a tangible long-term asset and does not represent a specific cash expenditure

[5] The Petitioner's Quarterly Federal Tax Returns (Form 941) for the first quarter of 2016 state that it has 17 employees, whereas the record reflects that the other 135 workers are provided through a company which provides temporary staffing services to the Petitioner. It is unclear whether these other workers are full-time employees, and whether they are permanently employed or contracted on a more temporary basis.

> during the year claimed. Furthermore, the AAO indicated that the allocation of the depreciation of a long-term asset could be spread out over the years or concentrated into a few depending on the petitioner's choice of accounting and depreciation methods. Nonetheless, the AAO explained that depreciation represents an actual cost of doing business, which could represent either the diminution in value of buildings and equipment or the accumulation of funds necessary to replace perishable equipment and buildings. Accordingly, the AAO stressed that even though amounts deducted for depreciation do not represent current use of cash, neither does it represent amounts available to pay wages.
>
> We find that the AAO has a rational explanation for its policy of not adding depreciation back to net income. Namely, that the amount spent on a long term tangible asset is a "real" expense.

River St. Donuts, 558 F.3d at 118. "[USCIS] and judicial precedent support the use of tax returns and the *net income figures* in determining petitioner's ability to pay. Plaintiffs' argument that these figures should be revised by the court by adding back depreciation is without support." *Chi-Feng Chang*, 719 F. Supp. at 537 (emphasis added). While the Petitioner states that the IRS income tax (cash) method of accounting allows for greater depreciation than the accrual method it uses and asserts that this results in a lower amount of net income, USCIS would have accepted tax returns prepared pursuant to the accrual method of accounting if those were the tax returns the Petitioner had actually submitted to the IRS. Here, the Petitioner's tax returns were prepared pursuant to the cash method of accounting in which revenue is recognized when it is received and expenses are recognized when they are paid. *See* http://www.irs.gov/publications/p538/ar02.html#d0e1136 (last visited October 10, 2017). We are not persuaded by an analysis in which the Petitioner seeks to rely on tax returns prepared pursuant to one method but then seeks to shift revenue or expenses from one year to another as convenient to the Petitioner's present purpose.[6] Therefore, the amounts shown on the Petitioner's tax returns shall be considered as they were submitted to the IRS.

The Petitioner also states that the amounts paid in officer compensation as stated on the tax returns could have been reallocated to pay the shortfall in wages paid to the Beneficiary. Shareholders of an S corporation have the authority to allocate the expenses of that corporation for various legitimate business purposes where the record reflects that the shareholder is willing and able to forgo that income. Of the years at issue, 2005 through 2007 and 2011 through 2014, the following chart shows the amount of officer compensation and the number of shareholders listed on the Form 1120S.

Year	Amount of Officer Compensation	Number of Shareholders
2005	$100,000	2
2006	$46,180	3

[6] Once a taxpayer has set up its accounting method and filed its first return, it must receive approval from the IRS before it changes from the cash method to an accrual method or vice versa. *See* http://www.irs.gov/publications/p538/ar02.html#d0e2874 (last visited October 10, 2017).

2007	$117,100	3
2011	$30,000	10
2012	$116,000	9
2013	None	N/A
2014	None	N/A

Here, the record does not contain evidence showing that payments were actually made, evidence to indicate that these shareholders were personally willing to forgo any portion of officer compensation or their financial ability to do so. Additionally, in two of the years at issue no compensation was paid and therefore cannot be reallocated. As such, the Petitioner has not established that officer compensation could have been reallocated to pay the shortfall in wages paid to the Beneficiary.

The Petitioner states that that the costs of expansion and relocation should be considered in the analysis of the totality of the circumstances in 2005, 2006, 2007, 2011, 2012, 2013, and 2014. Here, the costs of expansion and relocation of the Petitioner's business have been stretched over many years and it is unclear as to the extent of these costs and what portion of these expenses were uncharacteristic costs or losses that resulted in setbacks to the Petitioner's financial outlook in any given year. The fact that the expenses stretch over almost a decade indicates that these are not uncharacteristic expenses, but rather normal costs of doing business. Therefore, we find that the Petitioner has not demonstrated its ability to pay the proffered wage in the totality of the circumstances.

III. CONCLUSION

The Petitioner has not established that it has had the ability to pay the proffered wage to the Beneficiary from the priority date onward through an examination of wages paid to the Beneficiary, net income, net current assets, or the totality of the circumstances.

ORDER: The appeal is dismissed.

Cite as *Matter of C-&P-F-A-P-, Inc.*, ID# 591939 (AAO Oct. 17, 2017)