U.S. Citizenship and Immigration Services

**Non-Precedent Decision of the Administrative Appeals Office**

MATTER OF C-S-, INC.

DATE: SEPT. 1, 2017

MOTION ON ADMINISTRATIVE APPEALS OFFICE DECISION

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

The Petitioner, an information technology business, seeks to employ the Beneficiary as a computer programmer. It requests 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 Director of the Texas Service Center denied the petition, concluding that the Petitioner had not established that it had the ability to pay the proffered wage to the Beneficiary. On appeal, we affirmed the Director's decision while also holding that the Petitioner had not established that the Beneficiary met the experience requirements of the labor certification. The matter is now before us on a motion to reopen and reconsider.

On motion, the Petitioner submits additional evidence and asserts that its amended tax returns demonstrate that it has the ability to pay the proffered wage, and that the experience letters in the record demonstrate that the Beneficiary meets the experience requirements of the labor certification. Upon review of the record, we will deny both motions.

## I. REGULATORY REQUIREMENTS FOR MOTIONS

The requirements of a motion to reopen are located at 8 C.F.R. § 103.5(a)(2), and the requirements of a motion to reconsider are located at 8 C.F.R. § 103.5(a)(3). We may grant a motion that satisfies these requirements and demonstrates eligibility for the requested immigration benefit.

A motion to reopen must state new facts and be supported by documentary evidence. 8 C.F.R. § 103.5(a)(2). We interpret "new facts" to mean facts that are relevant to the issue(s) raised on motion and that have not been previously submitted in the proceeding, which includes the original petition. Reasserting previously stated facts or resubmitting previously provided evidence does not constitute "new facts."

A motion to reconsider must establish that our decision was based on an incorrect application of law or policy and that the decision was incorrect based on the evidence in the record of proceedings at

the time of the decision. 8 C.F.R. § 103.5(a)(3). We do not consider new facts or evidence in a motion to reconsider.

A motion to reconsider must be supported by a pertinent precedent or adopted decision, statutory or regulatory provision, or statement of U.S. Citizenship and Immigration Services (USCIS) or Department of Homeland Security policy.

## II. ANALYSIS

### A. Petitioner's Ability to Pay the Proffered Wage

A petitioner must establish that its job offer to the beneficiary is a realistic one. 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).

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 October 1, 2014, the priority date. The proffered wage as stated on the labor certification is $75,150 per year.

In determining the 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 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). USCIS will first examine 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.

The amount of wages the Petitioner paid the Beneficiary in 2014 and 2015 are summarized in the table below.

| Year | Wages Paid | Shortfall in Wages Paid Compared to the Proffered Wage |
|---|---|---|
| 2014 | $45,441 | $29,709 |
| 2015 | $58,492 | $16,658 |

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); *Taco Especial v. Napolitano*, 696 F. Supp. 2d 873 (E.D. Mich. 2010), *aff'd*, No. 10-1517 (6th Cir. filed Nov. 10, 2011).

For an S corporation like the Petitioner, USCIS considers net income to be the figure shown on Line 28 of the IRS Form 1120S, U.S. Income Tax Return for an S Corporation. Here, the Petitioner's tax returns demonstrate its net income for 2014 and 2015 as -$16,483 and -9,818, respectively. Therefore, the Petitioner did not have sufficient net income to pay the proffered wage in 2014 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.[1] 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.

The Petitioner's original 2014 and 2015 tax returns did not list sufficient net current assets to establish its ability to pay the proffered wage. The Petitioner claims to have amended Schedule L of its tax returns for 2014 and 2015 to fix a classification error of one of its liabilities. As a result of this amendment, the Petitioner claims that it had enough net current assets in 2014 and 2015 to pay the proffered wage. In our previous decision, we found that the record did not contain sufficient evidence demonstrating that these amended tax returns had been submitted to the IRS.

On motion, the Petitioner correctly states that an amendment to the IRS Form 1120S is made by checking box H(4) on page 1 and submitting an amended Form 1120S to the IRS. The IRS instructions for Form 1120S indicate that an amendment should include "a statement that identifies

[1] 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.

the line number of each amended item, the corrected amount or treatment of the item, and an explanation of the reasons for each change." *Instructions for Form 1120S*, https://www.irs.gov/pub/irs-pdf/i1120s.pdf (last visited on August 28, 2017). However, the Petitioner's amended tax returns do not contain the required explanation to the IRS for why the modification was made.

On appeal, the Petitioner stated that a long-term note payable to in the amount of $281,002 was mischaracterized under accounts payable rather than long-term liabilities. In our previous decision, we noted that the record did not contain corroborating evidence of this note, including the date of issuance, the due date, payment schedule, or any related interest charges.

The Petitioner has submitted a promissory note, dated December 28, 2008, between the Petitioner and stating that the Petitioner has received the cash amount of $281,002 as approved by the shareholders of each corporation, that there is no interest charged on the amount, that there is no timetable set for repayment of the note, and that the timetable for repayment will be discussed at future shareholder meetings.

We find certain factors call into question the validity of this note. The terms of the note are unusual (e.g., no interest charged and the timetable for repayment to be determined in the future). The amended tax returns do not contain the required explanation to the IRS for why the modification was made. The Petitioner's president is also a director for The date of this purported note fell on a Sunday, which is a day that corporate business is generally not conducted. There are no copies of the minutes of any shareholder meetings where the repayment timetable was discussed further as indicated in the promissory note.

When a Petitioner submits amended tax returns after the denial of its petition, and the amended tax returns only change the Petitioner's net current assets so that its ability to pay the proffered wage is established for the years in question, the Petitioner must submit objective, independent evidence to establish the valid business reason for this change and demonstrate that the amended returns were filed with the IRS.

Because the Petitioner has not established on motion that the tax returns were properly amended, we will not consider the amount of net current assets stated in the purportedly amended tax returns for 2014 and 2015. As indicated above, without additional verification of the purported amendments to the Petitioner's tax returns for 2014 and 2015, including confirmation that these returns were in fact filed with the IRS, the record does not establish that the Petitioner has sufficient net current assets to pay the shortfall in wages paid to the Beneficiary in these years.

Therefore, the Petitioner has not established that it has had the continuing ability to pay the proffered wage as of the priority date. Specifically, the Petitioner has not established that that our decision was based on an incorrect application of law or policy, nor has it submitted new facts establishing its ability to pay the proffered wage. Accordingly, we will deny the Petitioner's motion to reopen and motion to reconsider on this issue.

B. Beneficiary's Qualifications

The beneficiary must meet all of the requirements of the offered position set forth on the labor certification by the priority date of the petition. *See Matter of Wing's Tea House*, 16 I&N Dec. 158, 159 (Act. Reg. Comm. 1977. In this case, the labor certification requires a bachelor's degree and 36 months of experience in the job offered as a computer programmer. The Petitioner relies on the Beneficiary's experience as a computer program director for [redacted] in Venezuela from October 1, 2004 to September 1, 2009.

The beneficiary's claimed qualifying experience must be supported by letters from employers giving the name, address, and title of the employer, and a description of the beneficiary's experience. *See* 8 C.F.R. § 204.5(l)(3)(ii)(A). In our previous decision we noted multiple deficiencies in two letters from purported former employees of [redacted] attesting to the Beneficiary's employment there. On motion, the Petitioner has submitted a letter from these individuals providing additional details regarding the Beneficiary's employment experience. We find that these letters sufficiently establish that the Beneficiary possesses the required employment experience for the job offered. Therefore, we withdraw our prior finding on this issue.

## III. CONCLUSION

The Petitioner has established that the Beneficiary meets the experience requirements of the labor certification. However, the Petitioner not established its continuing ability to pay the proffered wage to the Beneficiary as of the priority date of the petition.

**ORDER:** The motion to reopen is denied.

**FURTHER ORDER:** The motion to reconsider is denied.

Cite as *Matter of C-S-, Inc.*, ID# 591950 (AAO Sept. 1, 2017)