U.S. Citizenship and Immigration Services

Non-Precedent Decision of the Administrative Appeals Office

MATTER OF W-K-

DATE: SEPT. 20, 2017

APPEAL OF NEBRASKA SERVICE CENTER DECISION

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

The Petitioner, a restaurant, seeks to employ the Beneficiary as a chef. The Petitioner requests classification of the Beneficiary as a skilled worker under the third preference immigrant classification. *See* 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. The Director concluded that the record did not establish, as required, that the Petitioner had the continuing ability to pay the proffered wage from the priority date up to the present.

On appeal, the Petitioner submits copies of documentation already in the record and asserts that he has possessed the 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).[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. *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.

[1] The date the labor certification is filed is called the "priority date." *See* 8 C.F.R. § 204.5(d). The Petitioner must establish that all eligibility requirements for the petition have been satisfied from the priority date onward.

A petitioner must establish 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.

II. ANALYSIS

The priority date of this petition is January 4, 2012.[2] As stated on the certified ETA Form 9089, Application for Permanent Employment Certification (labor certification), the proffered wage for the chef position is $47,382.40 per year. The labor certification did not state that the Beneficiary had ever been employed by the Petitioner up to 2012, and there is no evidence in the record that the Beneficiary has been employed by the Petitioner in the years since the priority date. Accordingly, the Petitioner has not established its ability to pay the proffered wage based on wages paid to the Beneficiary.

The Petitioner is a sole proprietorship, a business in which one person operates the business in his or her personal capacity, *Black's Law Dictionary* 1398 (7th Ed. 1999). Unlike a corporation, a sole proprietorship does not exist as an entity apart from the individual owner. *See Matter of United Investment Group*, 19 I&N Dec. 248, 250 (Comm'r 1984). Therefore the sole proprietor's adjusted gross income, assets and personal liabilities are also considered as part of the petitioner's ability to pay. Sole proprietors report income and expenses from their businesses on their individual federal tax return (Form 1040) each year. The business-related income and expenses are reported on Schedule C and are carried forward to the first page of the tax return. Sole proprietors must show that they can cover their existing business expenses as well as pay the proffered wage out of their adjusted gross income or other available funds. In addition, sole proprietors must show that they can sustain themselves and their dependents. *See Ubeda v. Palmer*, 539 F. Supp. 647 (N.D. Ill. 1982), *aff'd*, 703 F.2d 571 (7th Cir. 1983).

The record includes copies of the federal income tax returns of the Petitioner's sole proprietor for the years 2011-2013. They show that his adjusted gross income (AGI) amounted to $165,949 in 2011, $201,347 in 2012, and $193,630 in 2013. In a letter that was submitted in support of the Form I-140

[2] The Petitioner requested an earlier priority date of February 2, 2010, based on another Form I-140, Immigrant Petition for Alien Worker, filed on behalf of the Beneficiary by another employer [redacted] Since this earlier petition was filed by another employer, and there is no evidence that the Petitioner is a successor-in-interest to that employer, the correct priority date for this petition is January 4, 2012.

petition filed in 2012 the Petitioner listed yearly living expenses which amounted to $156,340.92. Subtracting this figure from the Petitioner's AGI in the years 2011-2013 leaves a balance of $9,608 in 2011, $45,006 in 2012, and $37,289 in 2013. These balances were below the proffered wage in all three years (by $33,864 in 2011, $2,776 in 2012, and $10,093 in 2013). Based on its adjusted gross income and annual living expenses, therefore, the Petitioner has not established its continuing ability to pay the full proffered wage of $47,382.40 from the priority date of January 4, 2012, onward.

On appeal the Petitioner asserts that the Director erroneously concluded that its real property was not a liquid asset that could be utilized to pay the proffered wage. In particular, the Petitioner claims that its real property (a single-family residence and lot) has an estimated value of $902,000 (based on the sale prices of allegedly comparable properties), a mortgage of $606,989 (as recorded in a monthly mortgage statement), and a line of credit in the amount of $295,010. While the line of credit figure represents the difference between the estimated value and the outstanding mortgage, there is no evidence in the record that any line of credit has been opened by the Petitioner. Thus, no liquid asset can be ascribed to the difference between the property value and the mortgage balance.

Even if the Petitioner did have a line of credit based on the equity in its real property, we would not add it to the Petitioner's available funds for purposes of calculating its ability to pay the proffered wage. A "bank line" or "line of credit" is a bank's unenforceable commitment to make loans to a particular borrower up to a specified maximum during a specified time period. A line of credit is not a contractual or legal obligation on the part of the bank. *See* John Downes and Jordan Elliot Goodman, *Barron's Dictionary of Finance and Investment Terms* 45 (5th ed. 1998).

The Petitioner asserts that USCIS must evaluate its overall financial position to determine whether it has the ability to pay the proffered wage, citing *Matter of Great Wall*, 16 I&N Dec. 142 (Acting Reg'l Comm'r 1977). We agree. 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 its 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. *See Matter of Sonegawa*, 12 I&N Dec. 612 (Reg'l Comm'r 1967).

In this case the Petitioner states that its restaurant opened in October 2010 and had 12 employees as of 2013. The income tax returns in the record show that its gross receipts from the business were $1,162,358 in 2011, $1,226,924 in 2012, and $1,261,743 in 2013. Thus, gross income was roughly the same in the restaurant's first three years of operation. The Petitioner has not submitted any further tax returns for subsequent years. Therefore, the record does not show a historical pattern of growth for the restaurant. The Petitioner has submitted a copy of its menu, but no documentary evidence of its reputation within the restaurant industry. There is no evidence or claim of unusual expenditures or losses during the restaurant's years of operation.

Further, as previously stated, the record does not contain the required evidence of the Petitioner's ability to pay the proffered wage from 2014 up to the present in the form of annual reports, tax returns, or audited financial statements. *See* 8 C.F.R. § 204.5(g)(2).

Therefore, the Petitioner has not established its continuing ability to pay the full proffered wage of the job offered from the priority date to the present based on the totality of its circumstances.

III. CONCLUSION

We will dismiss the appeal because the Petitioner has not established its continuing ability to pay the proffered wage from the priority date to the present.

ORDER: The appeal is dismissed.

Cite as *Matter of W-K-*, ID# 583041 (AAO Sept. 20, 2017)