U.S. Citizenship and Immigration Services

Non-Precedent Decision of the Administrative Appeals Office

MATTER OF Q-D-, LLC

DATE: SEPT. 20, 2017

APPEAL OF NEBRASKA SERVICE CENTER DECISION

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

The Petitioner, a telecommunications business, seeks to employ the beneficiary as a chief operations officer. 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 resident status.

The Director of the Nebraska Service Center denied the petition. The Director found that the Petitioner did not establish its continuing ability to pay the proffered wage in 2014 and 2015.

On appeal the Petitioner submits a brief and supporting documentation, and asserts that the evidence of record establishes its continuing ability to pay the proffered wage.

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

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.

The Petitioner's Form I-140, Immigrant Petition for Alien Worker, was accompanied by an ETA Form 9089, Application for Permanent Employment Certification (labor certification), with a priority date of

September 17, 2014.[1] As stated on both documents, the proffered wage of the job offered is $187,200 per year. The Petitioner's ability to pay the proffered wage is the only issue on appeal.

In determining a petitioner's ability to pay the proffered wage, USCIS first examines whether the beneficiary was employed and paid by the petitioner during the period following the priority date. 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 is considered *prima facie* proof of the petitioner's ability to pay the proffered wage. If the petitioner does not establish that it has paid the beneficiary an amount at least equal to the proffered wage from the priority date onward, USCIS will examine the net income and net current assets figures entered on the petitioner's federal income tax return(s). If either of these figures equals or exceeds the proffered wage or the difference between the proffered wage and the amount paid to the beneficiary in a given year, the petitioner would be considered able to pay the proffered wage during that year.

In this case, the Beneficiary has been employed by the Petitioner since 2012, when he was hired as the Director of Technical Operations. The record includes copies of the Beneficiary's Forms W-2, Wage and Tax Statements, for 2014 and 2015, as well as selected pay statements and the Beneficiary's total pay record for 2016. The Beneficiary was not paid the full proffered wage in 2014, 2015, or 2016.

We next examine the Petitioner's net income and net current assets, as reflected on its Form 1065, U.S. Return of Partnership Income for 2014, 2015, and 2016. The Petitioner's net income in 2016 exceeded the difference between the proffered wage and the wages paid to the Beneficiary that year. Therefore, the Petitioner has established its ability to pay the proffered wage in 2016. In 2014 and 2015, however, the Beneficiary did not have sufficient net income or net current assets to cover the difference between the proffered wage and the wages actually paid to the Beneficiary. Therefore, the Director correctly concluded that the Petitioner has not established its ability to pay the proffered wage for each year from the priority date, based on wages paid to the Beneficiary, its net income, or its net current assets.

USCIS may also consider the totality of the Petitioner's circumstances, including the overall magnitude of its business activities, in determining the Petitioner's ability to pay the proffered wage. *See Matter of Sonegawa*, 12 I&N Dec. 612. At its discretion, USCIS may consider evidence relevant to the petitioner's financial ability that falls outside of its net income and net current assets. USCIS may consider such factors as the number of years the petitioner has been doing business, the historical growth of the petitioner's business, the petitioner's reputation within its industry, the overall number of employees, whether the beneficiary is replacing a former employee or an outsourced service, the amount of compensation paid to officers, the occurrence of any uncharacteristic business expenditures or losses, and any other evidence that USCIS deems relevant to the petitioner's ability to pay the proffered wage.

[1] The "priority date" is the date the labor certification was filed with the Department of Labor.

The three federal tax returns submitted by the Petitioner recorded gross receipts ranging from $13 million to $20 million, and salaries and wages of approximately $1 million each year. During that time period the Beneficiary's salary remained steady in 2014 and 2015 and rose in August 2016 to the approximate level of the proffered wage. Based on the magnitude of the Petitioner's operations, we conclude that it possessed the ability to pay the difference between the wages paid to the Beneficiary and the full proffered wage in 2014 and 2015.

In summary, considering the totality of the circumstances, we conclude that the Petitioner has established, by a preponderance of the evidence, its ability to pay the proffered wage from the priority date of September 17, 2014, up to the present.

III. CONCLUSION

The Petitioner has established its continuing ability to pay the proffered wage from the priority date onward. Accordingly, the appeal will be sustained.

ORDER: The appeal is sustained.

Cite as *Matter of Q-D-, LLC,* ID# 687792 (AAO Sept. 20, 2017)