MATTER OF Y-D-, LLC

DATE: SEPT. 29, 2017

MOTION ON ADMINISTRATIVE APPEALS OFFICE DECISION

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

The Petitioner, a construction and roofing business, seeks to employ the Beneficiary as a slate/clapboard roofer. It requests classification of the Beneficiary as a skilled worker under the third preference immigrant classification. *See* Immigration and Nationality 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 Texas Service Center denied the petition, concluding that the record did not establish, as required, that the Petitioner has the ability to pay the proffered wage to the Beneficiary. The Petitioner subsequently filed an appeal, which we dismissed affirming the Director's decision.

Now on motion to reopen and reconsider, the Petitioner submits additional evidence and asserts that it has the ability to pay the proffered wage based on a totality of the circumstances.

Upon review, we will deny the motion to reopen and motion to reconsider.

I. MOTION REQUIREMENTS

A motion to reopen is based on documentary evidence of *new facts*, and a motion to reconsider is based on an *incorrect application of law or policy*. 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.

II. ANALYSIS

A. Motion to Reconsider

On motion, the Petitioner urges reconsideration of its claimed ability to pay the proffered wage; however, the Petitioner does not assert that our decision was based on an incorrect application of law or policy. We will therefore deny the motion to reconsider.

B. Motion to Reopen

On motion to reopen, the Petitioner asserts that it has the ability to pay the proffered wage to the Beneficiary, and submits new evidence in support of this claim; however, for the reasons discussed below, the record does not demonstrate eligibility for the requested immigration benefit. We will therefore deny the motion to reopen on the merits.

The regulation at 8 C.F.R. § 204.5(g)(2) states that a petitioning U.S. employer must submit evidence establishing its ability to pay the proffered wage. The Petitioner must demonstrate this ability from the priority date of the petition and continuing until the Beneficiary obtains lawful permanent residence. *Id.* 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 Petitioner in this case must demonstrate its continuing ability to pay the proffered wage of $64,334 from the priority date of December 4, 2013, onward. In evaluating a petitioner's ability to pay the proffered wage, U.S. Citizenship and Immigration Services (USCIS) requires the petitioner to demonstrate financial resources sufficient to pay the beneficiary's proffered wage, 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).

In our prior decision, we found that although the Petitioner established its ability to pay in 2013 and 2015, it did not demonstrate its ability to pay in 2014. Specifically, we found that the Petitioner did not pay any wages to the Beneficiary in 2014, and neither its net income of $40,331 nor its net current assets of $7,795 were sufficient to pay the proffered wage of $64,334. We also found that an analysis of the totality of the Petitioner's circumstances did not establish its ability to pay.

On motion, the Petitioner seeks to renew its assertion that it had the ability to pay the Beneficiary's proffered wage based on a totality of the circumstances. USCIS may consider 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. at 612. 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. Accordingly, 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.

As we explained in prior our decision, the Petitioner had consistent growth in its gross receipts and gross profit from 2012 through 2015, but its net income decreased significantly from 2012 through 2014, and its net current assets decreased from 2012 through 2015.[1] Moreover, the Petitioner's cost of goods sold for 2014 was higher than previous years in relation to its gross receipt, and the Petitioner did not submit evidence to show that it incurred any unexpected expenses in that year.

On appeal, the Petitioner provided a letter from its accountant who stated the Petitioner had been growing rapidly since it was established in February 2010,[2] and had made additional investments into new equipment and other capital expenditures; however, the Petitioner did not include documentation to substantiate these investments. The Petitioner's accountant also stated that in 2014, the Petitioner could have used $40,457 that was paid to one of its owners as "guaranteed payments to partners," as indicated on Line 10 of its tax return, toward the Beneficiary's proffered wage. However, the Petitioner did not show that it had any guaranteed payments to partners in 2014 because it submitted two different versions of its 2014 tax returns: (1) one with the initial petition, reflecting no guaranteed payment to partners; and (2) a second version in response to the Director's request for evidence showing $40,457 in guaranteed payments to partners.

Although the Petitioner sought to rely on the second version of its tax return on appeal, as it included claims of guaranteed payments to partners, the Petitioner did not explain why it submitted two different versions of its 2014 tax return, nor did it establish which version was correct. *See, e.g.*, *Matter of Ho*, 19 I&N Dec. 582, 591-92 (BIA 1988). Accordingly, we concluded that the Petitioner could not rely on its claimed payments to partners to establish its ability to pay in 2014. Consequently, we found that the Petitioner had not established its ability to pay the proffered wage in the totality of the circumstances, and dismissed the appeal.

On motion, the Petitioner submits evidence addressing the inconsistencies in the 2014 tax returns. However, even if we were to consider the inconsistencies resolved, the Petitioner may not establish its ability to pay with the consideration of "guaranteed payments to partners" because this payment was already considered in our analysis of its net income. The record indicates the Petitioner is structured as a limited liability company (LLC) and filed its tax returns on IRS Form 1065, U.S. Return of Partnership Income.[3] For an LLC taxed as a partnership, where the petitioner's income is

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[1] In our prior decision, we advised that the Petitioner's tax returns state that it was established on January 1, 2010, the petition states that it was established on April 3, 2009, and the labor certification states that it commenced in 2007; however, the Petitioner has not resolved these inconsistent claim on motion.

[2] As discussed, based on the Petitioner's contradictory evidence, it has not established the year in which it was established; therefore, it is not possible to accurately assess its claimed history of doing business.

[3] An LLC is an entity formed under state law by filing articles of organization. An LLC may be classified for federal income tax purposes as if it were a sole proprietorship, a partnership, or a corporation. If the LLC has only one owner, it will automatically be treated as a sole proprietorship unless an election is made to be treated as a corporation. If the LLC has two or more owners, it will automatically be considered to be a partnership unless an election is made to be treated as a corporation. If the LLC does not elect its classification, a default classification of partnership (multi-member LLC) or disregarded entity (taxed as if it were a sole proprietorship) will apply. *See* 26 C.F.R. § 301.7701-3. The election

exclusively from a trade or business, USCIS considers net income to be the figure shown on Line 22 of page one of the petitioner's Form 1065. However, where the petitioner 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 or additional credits, deductions or other adjustments, net income is found on page 5 (2012-2015) of Form 1065 at line 1 of the Analysis of Net Income (Loss) of Schedule K. *See* Instructions for Form 1065, at http://www.irs.gov/pub/irs-pdf/i1065.pdf (last visited Aug. 28, 2017) (indicating that Schedule K is a summary schedule of all owners' shares of the entity's income, deductions, credits, etc.). In this case, the Petitioner's Schedule K for 2014 has relevant entries for additional income and deductions, including an entry for $40,457 in "guaranteed payments to partners" and, therefore, its net income is found on line 1 of the Analysis of Net Income (Loss) of Schedule K of its tax returns for this year. As noted in our prior decision, we used the net income figure from Schedule K in our analysis of the Petitioner's net income, rather than the lower net income figure found on page one of the tax return. In using the Schedule K net income figure, we already considered the "guaranteed payments to partners" in our ability to pay analysis. If we were to consider the "guaranteed payments to partners" amount again as the Petitioner suggests, we would be counting this amount twice. As the "guaranteed payments to partners" was already included in our consideration of the Petitioner's net income, we decline to consider the payments as additional funds available to pay the proffered wage. Thus, assessing the totality of the circumstances in this individual case, the Petitioner has not established that it had the continuing ability to pay the proffered wage from the priority date onward

III. CONCLUSION

The Petitioner has not established its continuing ability to pay the proffered wage from the priority date onward.

ORDER: The motion to reopen is denied.

FURTHER ORDER: The motion to reconsider is denied.

Cite as *Matter of Y-D-, LLC*, ID# 717589 (AAO Sept. 29, 2017)

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referred to is made using IRS Form 8832, Entity Classification Election. In this case, the Petitioner, a multi-member LLC, is considered to be a partnership for federal tax purposes.