U.S. Citizenship and Immigration Services

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

MATTER OF S-T- INC.

DATE: MAY 31, 2016

APPEAL OF TEXAS SERVICE CENTER DECISION

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

The Petitioner, a provider of information technology and development services, seeks to permanently employ the Beneficiary as a software engineer. It requests classification of the Beneficiary as a member of the professions holding an advanced degree under the second preference immigrant category. *See* Immigration and Nationality Act (the Act) section 203(b)(2)(A), 8 U.S.C. § 1153(b)(2)(A). This classification allows a U.S. employer to sponsor a professional with an advanced degree for lawful permanent resident status.

The Director, Texas Service Center, denied the petition on July 9, 2015. The Director concluded that the record did not establish the *bona fides* of the job offer or the Petitioner's ability to pay the proffered wage.

The matter is now before us on appeal. The Petitioner asserts that the Director erred in his conclusions. Upon *de novo* review, the appeal will be dismissed.

## I. LAW AND ANALYSIS

### A. The Bona Fides of the Job Offer

An employer "desiring and intending" to employ a foreign national in the United States may file an immigrant petition on his or her behalf. Section 204(a)(1)(F) of the Act, 8 U.S.C. § 1154(a)(1)(F). A petitioner must intend to employ a beneficiary pursuant to the terms and conditions of an accompanying labor certification. *See Matter of Izdebska*, 12 I&N Dec. 54, 55 (Reg'l Comm'r 1966) (upholding a petition denial where a petitioner did not intend to employ a beneficiary as a live-in domestic worker pursuant to the accompanying labor certification).

For labor certification purposes, the term "employment" means "[p]ermanent, full-time work by an employee for an employer other than oneself." 20 C.F.R. § 656.3. The filing of a labor certification application establishes a priority date for an immigrant visa petition. 8 C.F.R. § 204.5(d). A petitioner must therefore establish that a job offer was realistic as of a petition's priority date and remained realistic until the beneficiary obtains lawful permanent residence. *Matter of Great Wall*, 16 I&N Dec. 142, 144 (Acting Reg'l Comm'r 1977) (holding that a petition "seeks to establish that the employer is making a realistic job offer . . . at the time the petition is filed").

The instant petition is accompanied by an ETA Form 9089, Application for Permanent Employment Certification (labor certification), filed on August 7, 2012 and approved by the U.S. Department of Labor (DOL). The labor certification states the area of intended employment of the offered position of software engineer as Florida, the Petitioner's headquarters. The labor certification also states that the offered position involves "travel to various unanticipated locations throughout the U.S. for different short & long term assignments."

1. The Purported Discrepancy between the Petitioner's Numbers of Employees and Visa Petitions

The Director's request for evidence (RFE) of December 3, 2014 requested additional evidence of the Petitioner's intention to employ the Beneficiary in the offered position. The RFE states the Petitioner's filing of 129 petitions for immigrant and nonimmigrant workers with USCIS since December 5, 2011. But on the Form I-140, Immigrant Petition for Alien Worker, which was filed on October 9, 2013, the Petitioner stated its employment of only 17 employees.[1]

The Director found that the difference between the Petitioner's numbers of visa petitions and employees cast doubt on its intention to employ its beneficiaries. *See Matter of Ho*, 19 I&N Dec. 582, 591 (BIA 1988) (requiring a petitioner to resolve inconsistencies of record by independent, objective evidence). The Director apparently suspected that the offered positions stated in the petitions did not exist, or that the beneficiaries would be employed in the offered positions by businesses other than the Petitioner.

In a February 18, 2015, letter, the Petitioner stated that the beneficiaries of about 65 approved H-1B nonimmigrant petitions "never joined the petitioner due to employee/consulate issues (subsequently withdrawn)." USCIS records do not support the Petitioner's statement. But USCIS records also do not support the Director's finding that the amount of visa petitions filed by the Petitioner indicates a lack of intention to employ the Beneficiary in the offered position.

USCIS records indicate the Petitioner's filing of 127 nonimmigrant and immigrant visa petitions from December 5, 2011 until the issuance of the Director's RFE on December 3, 2014.[2] USCIS records identify 98 of the 127 petitions as petitions for H-1B nonimmigrant workers. Like the instant petition, the remaining 29 petitions are I-140 petitions for H-1B workers of the Petitioner.

USCIS records also indicate that 39 of the Petitioner's 98 H-1B petitions were denied, revoked, or rejected. The Petitioner filed the remaining 59 H-1B petitions on behalf of 39 people, as 20 petitions sought extensions of status for existing employees. In addition, the Petitioner submitted evidence of its withdrawal of five H-1B petitions between 2012 and 2014.

[1] The Petitioner's number of employees varies in the record. The Form I-140 and accompanying labor certification state the Petitioner's employment of 17 workers. But, in a February 18, 2015, letter in response to the Director's RFE, the Petitioner stated its employment of 25 people.

[2] The Director's petition count of 129 appears to have included two Form I-290Bs, Notices of Appeals or Motions.

The record does not indicate that the volume of the Petitioner's filings reflects a lack of intention to employ the filings' beneficiaries. The Petitioner's IRS Forms W-2, Wage and Tax Statements, for 2013 and 2014 indicate payments in one or both years to 37 of its 39 H-1B beneficiaries and to 26 of its 29 I-140 beneficiaries.

2. The Permanent, Full-Time Nature of the Offered Position

The Director's RFE sought: the address of the Beneficiary's intended worksite; copies of contracts under which he would be employed; and identification of the entities that would pay him and control his work.

In response to the RFE, the Petitioner submitted the February 18, 2015, letter from its former president/sole shareholder.[3] The letter states the company's intention to permanently employ the Beneficiary in the offered position on a full-time basis. The letter also states the Petitioner's intention to pay his proffered wage and control his work while he performs the job duties of the offered position at contracted client sites. The letter states: "Once a particular software development consulting project is completed, the contract is effectively over and the Software Engineer is then assigned to another project at another site or our development projects."

The Petitioner also submitted a sample copy of a client contract for its services, effective January 2, 2015. But the Director faulted the contract and other documentation submitted by the Petitioner for failing to identify the Beneficiary as a worker on the project or to specify: his rate of pay; his hours; the length of his employment; the worksite address; and which entity would pay him. Noting that the sample contract became effective after the petition's priority date, the Director also found that the document did not evidence "a job offer available to the beneficiary at the time this petition was submitted to USCIS."

In *Matters of Amsol, Inc.*, 2008-INA-00112, 2009 WL 2869970 (BALCA Sept. 3, 2009), the Board of Alien Labor Certification Appeals (BALCA) considered the *bona fides* of job offers similar to the instant position. As in the instant case, the employer in *Amsol* sought to employ software engineers from its headquarters and at other "unanticipated" client sites in the United States. *Amsol*, 2009 WL 2869970 at *3.

The DOL in *Amsol* stated its initial inability to determine whether the offered positions constituted full-time, permanent jobs because the record lacked evidence regarding: specific clients for whom the beneficiaries would work; their proposed lengths of employment; and the effect of terminations of client contracts on their status and compensation if no imminent re-assignments existed. *Id.* The DOL

[3] Online government records indicate removal of the letter's signatory as the Petitioner's president and corporate secretary on July 27, 2015, shortly before the filing of the instant appeal. *See* at (accessed Apr. 27, 2016). A copy of the Petitioner's 2013 federal income tax return, the most recent return of record, identifies the letter's signatory as the corporation's sole shareholder. The record does not indicate whether the signatory remains the Petitioner's sole shareholder.

requested additional evidence from the employer, including copies of contracts under which the foreign nationals would be employed. *Id.*

The employer in *Amsol* provided copies of client contracts under which the foreign nationals worked. *Id.* at *9. But the DOL denied the labor certification applications, finding that the contracts did not provide addresses, job duties, or work schedules as requested. *Id.* In vacating the DOL's decisions, BALCA stated: "While the Employer has the burden of proving that the job opportunity is permanent and full-time, requiring an employer to change the nature of its contracts and how it does business in order to meet a specific demand is not realistic." *Id.*

The DOL also found that the employer in *Amsol* did not address the effect of client contract terminations on the status and compensation of the foreign nationals. *Id.* But BALCA found that tax documentation and copies of numerous client contracts submitted by the employer demonstrated its generation of ongoing business sufficient to continually employ the foreign nationals. *Id.*

In the instant case, the Director need not have required the Petitioner to submit evidence of the Beneficiary's intended worksite address and contracts under which he would work in the offered position from the petition's priority date. As BALCA stated in *Amsol*, "requiring an employer to change the nature of its contracts and how it does business in order to meet a specific demand is not realistic." *Amsol*, 2009 WL 2869970 at *9.

Moreover, as the Petitioner asserts, an immigrant visa petition represents an offer of future employment. USCIS regulations do not require the Beneficiary to currently work for the Petitioner in the offered position, or even his current physical presence in the United States. The Petitioner's inability to produce contracts and details of the Beneficiary's future work assignments does not preclude the Petitioner's intention to employ him in the offer position.

While the Petitioner need not provide contracts and proposed work assignments specific to the Beneficiary, as previously indicated, it must establish that the job offer was realistic as of the petition's priority date of August 7, 2012. *Great Wall*, 16 I&N Dec. at 144. It is therefore reasonable to expect evidence of prior and ongoing development projects on which the Beneficiary could have worked in the offered position. But, unlike the employer in *Amsol*, the Petitioner submitted a copy of only one client contract dated more than 2 years after the petition's priority date. The record therefore does not establish the Petitioner's intention to permanently employ the Beneficiary in the full-time offered position from the petition's priority date onward.

The Petitioner submitted tax documentation indicating its generation of substantial business and copies of payroll records indicating regular monthly payments to the Beneficiary and other employees for full-time services rendered in 2013 and 2014. These materials demonstrate the Petitioner's general business activities. But the materials do not establish its intent to employ the Beneficiary in the specific offered position of software engineer as of the petition's priority date.

The Petitioner did not submit sufficient evidence to establish its intention to employ the Beneficiary in the offered position on a permanent, full-time basis. We will therefore affirm the Director's finding that the record does not establish the *bona fides* of the job offer.

B. Ability to Pay the Proffered Wage

A petitioner must demonstrate its continuing ability to pay a proffered wage from a petition's priority date until a beneficiary obtains lawful permanent residence. 8 C.F.R. § 204.5(g)(2). Evidence of ability to pay must include copies of annual reports, federal income tax returns, or audited financial statements. *Id.*

In the instant case, the accompanying labor certification states the proffered wage of the offered position of software engineer as $87,600 per year. As previously indicated, the petition's priority date is August 7, 2012.

The record before the Director closed on February 20, 2015, with his receipt of the Petitioner's response to his RFE. At that time, required evidence of the Petitioner's ability to pay the proffered wage in 2014 was not yet available. We will therefore consider the Petitioner's ability to pay only through 2013.

In determining a petitioner's ability to pay, we first examine whether it paid a beneficiary the full proffered wage each year from a petition's priority date. If a petitioner did not pay a beneficiary the full proffered wage, we next examine whether it generated sufficient annual amounts of net income or net current assets to pay the difference between the proffered wage and the wages paid, if any. If a petitioner's net income or net current assets are insufficient, we may also consider other evidence of its ability to pay the proffered wage. *See Matter of Sonegawa,* 12 I&N Dec. 612, 614-15 (Reg'l Comm'r 1967).[4]

In the instant case, the Petitioner submitted copies of IRS Forms W-2 demonstrating that it employed the Beneficiary in 2012 and 2013. The Forms W-2 indicate the Petitioner paid the Beneficiary $29,366.91 in 2012 and $53,628.40 in 2013.

The amounts on the Forms W-2 do not equal or exceed the annual proffered wage of $87,600. The record therefore does not establish the Petitioner's ability to pay the proffered wage based on the wages it paid the Beneficiary.

But we credit the Petitioner's payments to the Beneficiary. The Petitioner need only demonstrate its ability to pay the difference between the annual proffered wage and the amounts it paid the Beneficiary in 2012 and 2013, or $58,233.09 and $33,971.60, respectively.

[4] Federal courts have upheld our method of determining a petitioner's ability to pay a proffered wage. *See, e.g., River St. Donuts, LLC v. Napolitano*, 558 F.3d 111, 118 (1st Cir. 2009); *Tongatapu Woodcraft Haw., Ltd. v. Feldman*, 736 F.2d 1305, 1309 (9th Cir. 1984); *Estrada-Hernandez v. Holder*, -- F. Supp. 3d --, 2015 WL 3634497, *5 (S.D. Cal. 2015); *Rivzi v. Dep't of Homeland Sec.*, 37 F. Supp. 3d 870, 883-84 (S.D. Tex. 2014), *aff'd*, -- Fed. Appx. --, 2015 WL 5711445, *1 (5th Cir. Sept. 30, 2015).

The Petitioner's federal income tax returns reflect annual net income amounts of $240,589 in 2012 and $103,478 in 2013.[5] Both of these amounts exceed the differences between the annual proffered wage and the Petitioner's payments to the Beneficiary in 2012 and 2013.

But, as stated in the Director's RFE, USCIS records show the Petitioner's filing of multiple I-140 petitions. USCIS records indicate the Petitioner's filing of at least 26 petitions for other beneficiaries from the instant petition's priority date of August 7, 2012 to the RFE's issuance on December 3, 2014.[6] USCIS records also indicate the Petitioner's filing of three other petitions before the instant petition's priority date that remained pending after that date.[7]

A petitioner must demonstrate its continuing ability to pay the proffered wage of each petition it files. 8 C.F.R. § 204.5(g)(2). Therefore, the instant Petitioner must demonstrate its continuing ability to pay the combined proffered wages of the instant Beneficiary and the beneficiaries of its other petitions that remained pending after the instant petition's priority date. The Petitioner must establish its ability to pay the combined proffered wages from the instant petition's priority date until the other beneficiaries obtained lawful permanent residence, or until the petitions were denied, withdrawn, or revoked. *See Patel v. Johnson*, 2 F. Supp. 3d 108, 124 (D. Mass. 2014) (upholding our denial of a petition where a petitioner did not demonstrate its ability to pay multiple beneficiaries).

In response to the Director's RFE, the Petitioner submitted a chart identifying eight other I-140 petitions that it filed after the instant petition's priority date. As previously indicated, the Petitioner also submitted copies of IRS Forms W-2 indicating its payments to the beneficiaries of the petitions in 2013.

But the Petitioner did not provide information about the 18 other petitions that it filed from the instant petition's priority date until the issuance of the Director's RFE, or the three petitions that it filed before the instant petition's priority date but that remained pending after that date. The record does not document the priority dates or proffered wages of these other petitions, or whether the Petitioner paid wages to their beneficiaries. The record also does not indicate whether any of these other petitions were withdrawn, revoked, or denied, or whether any of the other beneficiaries obtained lawful permanent

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[5] The record indicates the Petitioner's filing of its federal income tax returns as an S corporation. S corporations with adjustments to incomes from sources other than their trades or businesses report reconciled, annual net income amounts on Schedules K to their IRS Forms 1120S, U.S. Income Tax Returns for S Corporations. *See* Internal Revenue Serv., Instructions to Form 1120S, 22, at https://www.irs.gov/pub/irs-pdf/i1120s.pdf (accessed Apr. 27, 2016). Because the Petitioner reported adjustments to its income from outside sources in 2012, we consider the reconciled amount of $240,589 on line 18, Schedule K of its 2012 IRS Form 1120S to reflect its annual net income amount for that year.

[6] USCIS records identify the other petitions by the following receipt numbers: [redacted] and

[7] USCIS records identify these three additional petitions by the following receipt numbers: [redacted] and [redacted]

residence. Without this information, we cannot determine the Petitioner's ability to pay the combined proffered wages of all of its applicable beneficiaries.

As previously indicated, pursuant to *Sonegawa*, we may consider evidence of a petitioner's ability to pay beyond its net income and net current assets. As in *Sonegawa*, we may consider such factors as: the number of years it has conducted business; the growth of its business; its number of employees; the occurrence of any uncharacteristic business expenditures or losses; its reputation in its industry; whether a beneficiary will replace a current employee or outsourced service; or other evidence of its ability to pay a proffered wage.

In the instant case, the record indicates the Petitioner's continuous business operations since 2011. The Form I-140 and accompanying labor certification state the Petitioner's employment of 17 people. But, as previously indicated, the February 18, 2015, letter of the Petitioner's former president/sole shareholder states its employment of 25 workers. Copies of the Petitioner's 2012 and 2013 federal income tax returns reflect increasing gross annual revenues, and amounts of salaries and wages paid.

Unlike in *Sonegawa*, however, the instant record does not indicate the occurrence of any uncharacteristic business expenditures or losses, or the Petitioner's outstanding reputation in its industry. The record also does not indicate the Beneficiary's replacement of a current employee or outsourced service.

Also unlike in *Sonegawa*, the instant Petitioner must demonstrate its ability to pay multiple beneficiaries and did not provide requested information about all of its pending petitions. *See* 8 C.F.R. § 103.2(b)(14) (stating that "[f]ailure to submit requested evidence which precludes a material line of inquiry shall be grounds for denying the benefit request"). Thus, assessing the totality of circumstances in this individual case, the record does not establish the Petitioner's continuing ability to pay the proffered wage pursuant to *Sonegawa*.

For the foregoing reasons, the record does not establish the Petitioner's continuing ability to pay the proffered wage from the petition's priority date onward. For this additional reason, we will therefore affirm the Director's decision and dismiss the appeal.

## II. CONCLUSION

The record does not establish the *bona fides* of the offered position or the Petitioner's ability to pay the proffered wage. We will therefore affirm the Director's decision and dismiss the appeal.

The petition will be denied for the above stated reasons, with each considered an independent and alternate ground of denial. In visa petition proceedings, a petitioner bears the burden of establishing eligibility for the requested beneficiary. Section 291 of the Act, 8 U.S.C. § 1361; *Matter of Otiende*, 26 I&N Dec. 127, 128 (BIA 2013). Here, the instant Petitioner did not meet that burden.

**ORDER:** The appeal is dismissed.

Cite as *Matter of S-T- Inc.*, ID# 17047 (AAO May 31, 2016)