U.S. Citizenship and Immigration Services

Non-Precedent Decision of the Administrative Appeals Office

MATTER OF K-R- LLC

DATE: NOV. 14, 2017

APPEAL OF TEXAS SERVICE CENTER DECISION

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

The Petitioner, an oil and gas consulting firm, seeks to employ the Beneficiary as a software developer. The Petitioner 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 Texas Service Center denied the petition, concluding that the record did not establish, as required, that the Petitioner had the continuing ability to pay the proffered wage from the petition's priority date onward.

On appeal, the Petitioner asserts that the Petitioner is a disregarded entity for tax purposes and does not file its own tax return; that it paid the Beneficiary in excess of the prorated proffered wage in 2016; that its net assets exceed the difference between the wage paid to the Beneficiary and the proffered wage in 2016; and that it is currently paying the Beneficiary an amount that exceeds 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, the 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

[1] The priority date of a petition is the date the DOL accepted the labor certification for processing. *See* 8 C.F.R. § 204.5(d).

Immigration Services (USCIS). *See* section 204 of the Act, 8 U.S.C. § 1154. Third, if USCIS approves the petition, the foreign national applies 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.

II. ABILITY TO PAY THE PROFFERED WAGE

The Director denied the petition concluding that the Petitioner did not establish its continuing ability to pay the proffered wage from the petition's priority date of September 13, 2016, onward. The proffered wage is $85,862 per year.

The regulation at 8 C.F.R. § 204.5(g)(2) states in 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 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 had 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.[2]

In this case, the Petitioner submitted a copy of IRS Form W-2, Wage and Tax Statement, demonstrating that it paid the Beneficiary $83,102.02 in gross wages in 2016. The amount on the Form W-2 does not equal or exceed the annual proffered wage of $85,862. The record therefore does not establish the Petitioner's ability to pay the proffered wage based on the wages it paid to 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 amount it paid to the Beneficiary, which is $2,759.98 in 2016.[3]

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[2] 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); *Rizvi 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).

[3] The Petitioner requests that we prorate the wage paid and the proffered wage in 2016. The regulation at 8 C.F.R. § 204.5(g)(2) requires the submission of a petitioner's annual reports, federal tax returns, or audited financial statements to establish ability to pay. These documents generally present a petitioner's financial results over an entire year. We cannot effectively measure a petitioner's ability to pay less than a year's proffered wage with documents that represent

The Petitioner asserts that it is a disregarded entity for tax purposes under 26 C.F.R. § 301.7701-3; that it does not file its own tax return; and that its financial results are included on the tax returns of its parent entity, The Director stated in his decision that the tax return submitted by the Petitioner does not list the Petitioner on it, and that the Petitioner failed to provide one of the three forms of initial evidence required to establish ability to pay the proffered wage.

With the petition, the Petitioner submitted a letter from its chief financial officer (CFO) stating that it had net income of over $943,657 in 2015 and that it had the ability to pay the proffered wage. The Petitioner submits the same CFO letter on appeal. In a case where the Petitioner employs 100 or more workers, the Director may accept a statement from a financial officer of the organization which establishes the prospective employer's ability to pay the proffered wage. 8 C.F.R. § 204.5(g)(2). In this case, the Petitioner stated on the petition that it employs eight U.S. employees. The Petitioner does not have 100 or more workers and, therefore, we decline to accept the CFO's letter as evidence of the Petitioner's ability to pay the proffered wage. Thus, the Petitioner must submit its tax return, audited financial statements, or annual report for 2016 to establish its ability to pay the proffered wage from the 2016 priority date. *Id.*

With the petition, the Petitioner submitted the 2015 IRS Form 1120-F, U.S. Income Tax Return of a Foreign Corporation, for The Petitioner submits the same tax return on appeal. The tax return does not cover the 2016 priority date and, therefore, it does not establish the Petitioner's ability to pay the proffered wage from the priority date as required by 8 C.F.R. § 204.5(g)(2).

Further, tax return does not list the Petitioner on it. The tax return indicates that is a member of a controlled group.[4] Schedule O to the Form 1120-F lists the seven members of the controlled group, including and The Petitioner is not listed among the entities in the group. The tax return does not indicate that the Petitioner is a wholly-owned subsidiary of

Further, at page 2, part X, the Form 1120-F asks whether, during the tax year, owned "any entity that was disregarded as an entity separate from its owner under Regulations sections 301.7701-2 and 301.7701-3?" answered

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an entire year's income, expenses, assets, and liabilities. Although we will not permit proration, we will consider the effect of a short period between the priority date and the end of the priority date year in the context of our totality of the circumstances analysis. *See Matter of Sonegawa*, 12 I&N Dec. 612, 614-615 (Reg'l Comm'r 1967).

[4] Corporations are classified as members of a controlled group if they are connected through certain stock ownership. See Internal Revenue Serv., Instructions for Schedule O, at https://www.irs.gov/pub/irs-pdf/i1120so.pdf (last visited Nov. 6, 2017).

that question in the negative, contradicting the Petitioner's assertion that it is a disregarded entity under 26 C.F.R. § 301.7701-3. The Petitioner must resolve these inconsistencies with independent, objective evidence pointing to where the truth lies. *Matter of Ho*, 19 I&N Dec. 582, 591-92 (BIA 1988). Unresolved material inconsistencies may lead us to reevaluate the reliability and sufficiency of other evidence submitted in support of the requested immigration benefit. *Id.* The record does not contain independent, objective evidence supporting the Petitioner's assertion that it is a wholly-owned subsidiary of such as its Articles of Organization, operating agreement, and/or membership certificate(s). The Petitioner has not established that its financial results are included on the tax return of

In response to the Director's request for evidence, the Petitioner submitted an unaudited balance sheet and income statement for the for the year ending December 31, 2016. The Petitioner submits the same unaudited balance sheet and income statement on appeal. The financial statements have entries for , and The abbreviations do not match the names of the entities listed on Schedule O to the 2015 Form 1120-F of The Petitioner must resolve this inconsistency in the record with independent, objective evidence pointing to where the truth lies. *Matter of Ho*, 19 I&N Dec. at 591-92. The record does not establish that the financial statements include the income, expenses, assets, and liabilities of the Petitioner.

Further, the regulation at 8 C.F.R. § 204.5(g)(2) requires the Petitioner to submit audited financial statements if it wishes to rely on them to establish its ability to pay the proffered wage. As there is no accountant's report accompanying the statements submitted by the Petitioner for the we cannot conclude that they are audited statements. Unaudited financial statements are the representations of management. The unsupported representations of management are not reliable evidence and are insufficient to demonstrate the ability to pay the proffered wage.

The Petitioner has not submitted regulatory-prescribed evidence of its ability to pay the difference between the annual proffered wage and the amount it paid to the Beneficiary in 2016. The petition cannot be approved for this reason.

On appeal, the Petitioner asserts that it is currently paying the Beneficiary the proffered wage and that, pursuant to a memorandum dated May 4, 2004, from William R. Yates, Associate Director of Operations, USCIS, regarding the determination of ability to pay, it has established its continuing ability to pay the proffered wage beginning on the priority date. *See* Memorandum from William R. Yates, Associate Director for Operations, USCIS, HQOPRD 90/16.45, *Determination of Ability to Pay under 8 CFR 204.5(g)(2)* 2 (May 4, 2004), http://www.uscis.gov/laws/policy-memoranda. The Petitioner urges us to consider the wage rate it paid in 2017 as satisfying the ability to pay requirement.

The Yates Memorandum provides guidance to adjudicators to review a record of proceedings and make a positive determination of a petitioner's ability to pay if, in the context of the beneficiary's

employment, "[t]he record contains credible verifiable evidence that the petitioner not only is employing the beneficiary but also has paid or currently is paying the proffered wage." *Id.* The regulation at 8 C.F.R. § 204.5(g)(2) requires that a petitioner demonstrate its *continuing* ability to pay the proffered wage beginning on the priority date. Thus, in this case, the Petitioner must show its ability to pay the proffered wage not only in 2017, when the Petitioner claims it actually began paying the proffered wage rate, but it must also show its ability to pay the proffered wage in 2016.

Further, although not mentioned by the Director, USCIS records show that the Petitioner has filed multiple Form I-140 petitions for other beneficiaries since 2007.[5] Where a petitioner has filed I-140 petitions for multiple beneficiaries, it must demonstrate that its job offer to each beneficiary is realistic, and that it has the ability to pay the proffered wage to each beneficiary. *See* 8 C.F.R. § 204.5(g)(2); *see also 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). Thus, the Petitioner must establish its ability to pay this Beneficiary as well as the beneficiaries of the other Form I-140 petitions that were pending or filed after the priority date of the current petition.[6]

The Petitioner must document the receipt numbers, names of beneficiaries, priority dates, and proffered wages of these other petitions, and indicate the status of each petition and the date of any status change (i.e., pending, approved, withdrawn, revoked, denied, on appeal or motion, beneficiary obtained lawful permanent residence). To offset the total wage burden, the Petitioner may submit documentation showing that it paid wages to other beneficiaries. To demonstrate that it has the ability to pay the Beneficiary and the other beneficiaries, the Petitioner must, for each year at issue (a) calculate any shortfall between the proffered wages and any actual wages paid to the primary Beneficiary and its other beneficiaries, (b) add these amounts together to calculate the total wage deficiency, and (c) demonstrate that its net income or net current assets exceed the total wage deficiency.[7] Without this information, we cannot determine the Petitioner's ability to pay the combined proffered wages of all of its applicable beneficiaries.

Finally, we may consider evidence of a petitioner's ability to pay beyond its net income and net current assets, including 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

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[5] For example, the Petitioner filed a Form I-140 petition, [redacted] on May 11, 2015, with a priority date of October 24, 2014. That petition was approved on August 4, 2015, and the beneficiary of that petition has not yet obtained lawful permanent residence.

[6] The Petitioner's ability to pay the proffered wage of one of the other I-140 beneficiaries is not considered:

- After the other beneficiary obtains lawful permanent residence;
- If an I-140 petition filed on behalf of the other beneficiary has been withdrawn, revoked, or denied without a pending appeal or motion; or
- Before the priority date of the I-140 petition filed on behalf of the other beneficiary.

[7] It is the Petitioner's burden to establish eligibility for the immigration benefit sought. Section 291 of the Act, 8 U.S.C. § 1361; *Matter of Skirball Cultural Ctr.*, 25 I&N Dec. 799, 806 (AAO 2012).

employee or outsourced service; or other evidence of its ability to pay a proffered wage. *See Matter of Sonegawa*, 12 I&N Dec. 612, 614-615 (Reg'l Comm'r 1967). Although the Petitioner has not submitted regulatory-prescribed evidence of its ability to pay the difference between the annual proffered wage and the amount it paid to the Beneficiary in 2016, we will review the *Sonegawa* factors in this case.

The Petitioner stated on the petition that it was organized in 1999. However, online records show that the Petitioner registered with the Texas Secretary of State in 2008,[8] and that its right to transact business in Texas has ended.[9] The record does not establish that the Petitioner was organized in 1999, and it does not establish that the Petitioner is currently conducting business in Texas.[10] Further, the Petitioner asserts that it conducts business under the assumed name but that assumed name is not registered in Texas, as required under Chapter 71 of the Texas Business and Commerce Code.[11] In any future proceeding, the Petitioner must resolve these inconsistencies in the record with independent, objective evidence pointing to where the truth lies. *Matter of Ho*, 19 I&N at 591-92.

Unlike in *Sonegawa*, the record here does not establish the Petitioner's growth since its organization, its employment of many workers, the occurrence of any uncharacteristic business expenditures or losses, or its reputation in its industry. Also, since the Beneficiary is already employed by the Petitioner as a software engineer, it does not appear that the Beneficiary will replace a current employee or outsourced service.

Also unlike in *Sonegawa*, the Petitioner in this case must demonstrate its ability to pay multiple beneficiaries. 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*.

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

III. THE BENEFICIARY'S EXPERIENCE

Although not mentioned by the Director, the Petitioner has not established that the Beneficiary possessed the experience required by the labor certification as of the priority date.

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[8] Tex. Comptroller of Pub. Accounts, ttps://mycpa.cpa.state.tx.us/coa/coaSearchBtn (last visited Nov. 6, 2017). Texas online records also indicate that the Petitioner is a Delaware limited liability company. *Id.* Delaware online records show that the Petitioner was organized in Delaware on April 18, 2007. Del. Dep't of State, Div. of Corps., https://icis.corp.delaware.gov/Ecorp/EntitySearch/NameSearch.aspx (last visited Nov. 6, 2017).

[9] Tex. Comptroller of Pub. Accounts, https://mycpa.cpa.state.tx.us/coa/coaSearchBtn (last visited Nov. 6, 2017).

[10] If the Petitioner is no longer in business in Texas, then no *bona fide* job offer exists to support the petition.

[11] *See* Clerk's Office, http://www.cclerk net/applications/websearch/AN.aspx (last visited Nov. 6, 2017).

A beneficiary must meet all of the requirements of the offered position set forth on the labor certification by the priority date of the petition. 8 C.F.R. § 103.2(b)(1), (12); *Matter of Wing's Tea House*, 16 I&N Dec. 158, 159 (Acting Reg'l Comm'r 1977). In this case, in addition to the required education, the labor certification requires six months of experience in the job offered, or as a programmer analyst or related occupation.

Evidence relating to qualifying experience must be in the form of a letter from a current or former employer and must include the name, address, and title of the writer, and a specific description of the duties performed by the beneficiary. *See* 8 C.F.R. § 204.5(g)(1).

The record contains a photocopy of an experience letter from Operations Manager of stating that it employed the Beneficiary as a programmer analyst from February 2011 until January 2012. The photocopy does not include the address of the employer as required by 8 C.F.R. § 204.5(g)(1). Therefore, the letter does not establish that the Beneficiary has the experience required for the offered position.

Further, the typeface of ' under the signature on the letter is different from the typeface of the rest of the letter. In any future proceeding, the Petitioner must submit independent, objective evidence of the Beneficiary's employment with Amensys Inc., including IRS Forms W-2 and/or IRS Forms 1099 issued to the Beneficiary by in 2011 and 2012. *See Matter of Ho*, 19 I&N at 591-92 (stating that doubt cast on any aspect of a petitioner's proof may lead to a reevaluation of the reliability and sufficiency of the remaining evidence offered in support of the visa petition).

The Petitioner has not established that the Beneficiary possessed the experience required by the labor certification as of the priority date.

IV. CONCLUSION

The Petitioner did not establish its continuing ability to pay the proffered wage because it did not submit regulatory-prescribed evidence of its ability to pay the difference between the annual proffered wage and the amount it paid to the Beneficiary in 2016. Further, the Petitioner did not establish that the Beneficiary possesses the required six months of experience for the offered job.

ORDER: The appeal is dismissed.

Cite as *Matter of K-R- LLC*, ID# 691569 (AAO Nov. 14, 2017)