U.S. Citizenship and Immigration Services

Non-Precedent Decision of the Administrative Appeals Office

MATTER OF O-, INC.

DATE: NOV. 28, 2017

APPEAL OF TEXAS SERVICE CENTER DECISION

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

The Petitioner, an insurance technology business, seeks to employ the Beneficiary as an application architect. 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 on the ground that the evidence in the record did not establish that the Petitioner has had the continuing ability to pay the proffered wage from the priority date onward.

On appeal the Petitioner asserts that it has submitted ample evidence of its ability to pay the proffered wage which was not addressed by the Director, and that the Director erred in not analyzing the Petitioner's ability to pay in accordance with the factors applied in *Matter of Sonegawa*, 12 I&N Dec. 612 (BIA 1967).

Upon *de novo* review, we will withdraw the Director's decision and remand the case for further consideration and the issuance of a new decision.

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.

[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.

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.

II. ANALYSIS

A. Petitioner's Ability to Pay the Proffered Wage

A petitioner must establish that it has the ability to pay the proffered wage, as stated on the labor certification, from the priority date until the beneficiary obtains lawful permanent residence. *See* 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 determining ability to pay, USCIS examines whether a petitioner paid a beneficiary the full proffered wage each year from a petition's priority date. If a petitioner did not annually pay the full proffered wage, USCIS considers whether it generated sufficient annual amounts of net income or net current assets to pay any difference between the proffered wage and the wages paid. If net income and net current assets are insufficient, USCIS may also consider other factors affecting a petitioner's ability to pay a proffered wage. *See Matter of Sonegawa*, 12 I&N Dec. 612, 614-15 (Reg'l Comm'r 1967).[2]

The Petitioner's Form I-140, Immigrant Petition for Alien Worker, was accompanied by a labor certification with a priority date of June 15, 2016. As stated on the labor certification, the proffered wage of the job offered is $125,000 per year.

In denying the petition, the Director first noted that there was no evidence the Petitioner already employed the Beneficiary, and thus no evidence that the Petitioner was paying the Beneficiary at a rate that was at or above the proffered wage. Next, the Director reviewed the Petitioner's federal income tax return (Form 1120) for 2015 (the only annual return in the record), which showed that its net income that year was -$2,306,095 and that its net current assets were -$13,187,299. Since the Petitioner had no net income or net current assets in 2015, and in fact had a net loss and net current liabilities that year, the Director found that the Petitioner had not established its ability to pay the proffered wage based on its net income or net current assets. The Director also reviewed bank statements submitted by the Petitioner, but concluded that could not be used to establish the Petitioner's ability to pay the proffered wage because the bank balances did not represent a steady asset over time or additional funds not already reflected in the Petitioner's tax return. Based on the foregoing evidence of the Petitioner's financial position in 2015, the year before the priority date, the Director denied the petition.

[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); *Estrada-Hernandez v. Holder*, 108 F. Supp. 3d 936, 942-43 (S.D. Cal. 2015); *Rivzi v. Dep't of Homeland Sec.*, 37 F. Supp. 3d 870, 883-84 (S.D. Tex. 2014), *aff'd*, 627 Fed. App'x 292 (5th Cir. 2015).

On appeal the Petitioner asserts that the Director neglected to consider other evidence it submitted – including letters from its corporate officers describing how the Petitioner was able to pay the proffered wage as well as quarterly federal tax returns for 2015 and 2016 and Form W-2s (Wage and Tax Statements) for all its employees in 2016 – showing that it had a sizable employee roster and payroll. The Petitioner also asserts on appeal that its financial information for 2016 should be considered and submits an audited financial statement for 2016 and another letter from a corporate officer describing its ability to pay the proffered wage. The Petitioner further points out that it has been in business since 1999 and had gross revenues of more than $24 million in both 2015 and 2016.

USCIS may 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. at 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. We 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 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. Here, the Director did not analyze the totality of the Petitioner's circumstances or address the other evidence that was submitted. We agree with the Petitioner's contention on appeal that a "*Songegawa* analysis" should be applied to the evidence in this case.

Accordingly, we will remand the case to the Director for further consideration of the Petitioner's continuing ability to pay the proffered wage from the priority date of June 15, 2016, onward. The Director should consider the 2016 evidence now in the record, as well as analyze the Petitioner's ability to pay under *Sonegawa*.

B. Beneficiary's Educational Qualifications

A petitioner must also establish that a beneficiary meets all of the education, training, experience, and other requirements of the labor certification as of the priority date. *See Matter of Wing's Tea House*, 16 I&N Dec. 158 (Acting Reg'l Comm'r 1977).

In this case, the labor certification specifies that the minimum educational requirement for the job offered is a master's degree in the field of information systems, computer science, or engineering, or a foreign educational equivalent. The labor certification specifies that no other field of study is acceptable.

The record indicates that the Beneficiary has a degree from the in Ukraine, which is the foreign equivalent of a master of science in applied mathematics. On remand the Director shall determine whether "applied mathematics" is an acceptable field of study, according to the terms of the labor certification.

III. CONCLUSION

We will remand this case to the Director for further consideration of the Petitioner's ability to pay the proffered wage and whether the Beneficiary meets the minimum educational requirements of the labor certification.

ORDER: The decision of the Director is withdrawn. The matter is remanded for further proceedings consistent with the foregoing opinion and for the entry of a new decision.

Cite as *Matter of O-, Inc.*, ID# 698927 (AAO Nov. 28, 2017)