U.S. Citizenship and Immigration Services

Non-Precedent Decision of the Administrative Appeals Office

MATTER OF G-C-, LLC

DATE: JULY 2, 2019

APPEAL OF TEXAS SERVICE CENTER DECISION

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

The Petitioner, a property management company, seeks to employ the Beneficiary as finance manager. It requests his classification under the second-preference immigrant category as a member of the professions holding an advanced degree. *See* Immigration and Nationality Act (the Act) section 203(b)(2)(A), 8 U.S.C. § 1153(b)(2)(A). This employment-based, "EB-2" category allows a U.S. business to sponsor a foreign national for lawful permanent resident status to work in a job requiring at least a master's degree, or a bachelor's degree and five years of experience.

The Director of the Texas Service Center denied the petition. The Director concluded that the Petitioner did not demonstrate its required ability to pay the proffered wage of the offered position.

On appeal, the Petitioner submits additional evidence and argues that its amended federal income tax returns establish its ability to pay.

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

I. EMPLOYMENT-BASED IMMIGRATION

Immigration as an advanced degree professional generally follows a three-step process. To permanently fill a position in the United States with a foreign worker, a prospective employer must first obtain certification from the U.S. Department of Labor (DOL). *See* section 212(a)(5)(A)(i) of the Act, 8 U.S.C. § 1182(a)(5)(A)(i). DOL approval signifies that insufficient U.S. workers are able, willing, qualified, and available for an offered position, and that employment of a foreign national will not harm wages and working conditions of U.S. workers with similar jobs. *Id.*

If DOL approves a position, an employer must next submit the labor certification with an immigrant visa petition to U.S. Citizenship and Immigration Services (USCIS). *See* section 204 of the Act, 8 U.S.C. § 1154. Among other things, USCIS determines whether a beneficiary meets the requirements of a DOL-certified position and the requested immigrant classification. If USCIS grants a petition, a foreign national may finally 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. ABILITY TO PAY THE PROFFERED WAGE

A petitioner must demonstrate its continuing ability to pay the proffered wage of an offered position, from a petition's priority date until a beneficiary obtains lawful permanent residence. 8 C.F.R. § 204.5(g)(2). For petitioners like the Petitioner, who employ less than 100 people, evidence of ability to pay must include copies of annual reports, federal 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 annual amounts of net income or net current assets sufficient to pay any difference between the proffered wage and the wages paid. If net income and net current assets are insufficient, USCIS may 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).[1]

Here, the accompanying labor certification states the proffered wage of the offered position of finance manager as $90,000 a year. The petition's priority date is March 3, 2017, the date DOL accepted the labor certification application for processing. *See* 8 C.F.R. § 204.5(d) (explaining how to determine a petition's priority date). As of the appeal's filing, required evidence of the Petitioner's ability to pay in 2018 was not yet available. We will therefore consider the Petitioner's ability to pay only in 2017, the year of the petition's priority date.[2]

The Petitioner did not submit evidence that it paid the Beneficiary in 2017. Based solely on wages paid, the record therefore did not establish the Petitioner's ability to pay the proffered wage.

A copy of the Petitioner's federal income tax return for 2017 reflected net income of $79,709 and net current assets of $51,612. Neither of these amounts equaled or exceeded the annual proffered wage of $90,000. Thus, based on examinations of the Petitioner's wages paid, net income, and net current assets, the record did not establish its ability to pay the proffered wage.

In response to the Director's written request for additional evidence (RFE), the Petitioner submitted an amended federal income tax return for 2017. The amended return reflected the same net income amount, but stated net current assets of $251,612, an amount exceeding the annual proffered wage. The amended return indicated that the Petitioner reclassified $200,000 originally listed as an "other investment" to an "allowance for bad debts."

---

[1] Federal courts have upheld USCIS' method of determining ability to pay a proffered wage. *See, e.g., River St. Donuts, LLC v. Napolitano*, 558 F.3d 111, 118 (1st Cir. 2009); *Z-Noorani, Inc. v. Richardson*, 950 F.Supp.2d 1330, 1345-46 (N.D. Ga. 2013).

[2] In any future filings in this matter, the Petitioner must submit copies of an annual report, federal tax return, or audited financial statements for 2018. The Petitioner may also submit additional evidence of its ability to pay the proffered wage, including materials in support of the factors stated in *Sonegawa*.

The Director found the amended tax return to be unreliable. The Director noted that the Petitioner did not submit documentary evidence that it filed the amended return with the U.S. Internal Revenue Service (IRS). Also, the date of the amended return indicated its preparation after the Director's issuance of the RFE. Thus, the date of the amended return suggests that the company changed its financial results of its return to establish its ability to pay the proffered wage.

On appeal, the Petitioner submits an affidavit from its accountant, who attests that he prepared and filed both the company's original and amended tax returns for 2017. The accountant states that he filed the amended return "because a balance sheet amount for $200,000.00 was originally recorded in error as an investment. This amount was a short-term receivable that was collected at the end of 2018." The accountant also states that he requested an IRS tax transcript of the Petitioner's amended return as proof of the return's filing. Because of the U.S. government shutdown that began in December 2018, however, he states that he did not receive the transcript before the appeal's filing.

However, the record lacks sufficient evidence to confirm the claimed filings of the amended tax return and the request for a tax transcript with the IRS. Also, both the Petitioner's original and amended returns included Forms 1065, U.S. Returns of Partnership Income. The IRS, however, instructs companies to amend items on previously filed Forms 1065 by filing Forms 1065X, Amended Return or Administrative Adjustment Request (AAR). *See* IRS, "Instructions for Form 1065X" 1, https://www.irs.gov/pub/irs-pdf/i1065x.pdf (last visited June 20, 2019). The record does not explain why the accountant did not submit the Petitioner's amended return on Form 1065X.

In addition, the accountant does not explain how the misclassification of the $200,000 amount occurred. A statement with the original tax return described the $200,000 "investment" as [redacted]" This appears to refer to [redacted], a limited liability company (LLC) that online, government records indicate shared a common manager with the Petitioner. *See* Fla. Dep't of State, Div. of Corps., "Search Records," https://dos.myflorida.com/sunbiz/search/ (last visited June 20, 2019). The original return therefore appeared to indicate the Petitioner's investment of $200,000 in the other LLC. The record does not explain how the accountant confused an "investment" with a "receivable" owed for goods or services. The record also does not explain what goods or services the Petitioner provided. The record therefore does not establish the reliability of the Petitioner's amended federal income tax return for 2017.

As previously indicated, we may consider factors beyond a petitioner's wages paid, net income, and net currents in determining its ability to pay a proffered wage. Under *Sonegawa*, we may consider: the number of years a petitioner has conducted business; its number of employees; the growth of its business; its incurrence of uncharacteristic losses or expenses; its reputation in its industry; a beneficiary's replacement of a current employee or outsourced service; or other factors affecting its ability to pay the proffered wage. *See Matter of Sonegawa*, 12 I&N Dec. at 614-15.

Here, the record indicates the Petitioner's continuous business operations since 2001 and its employment of 10 people. Because the Petitioner provided financial information for only one year, however, the record does indicate whether its business has grown. Unlike in *Sonegawa*, the record here does not demonstrate the Petitioner's incurrence of uncharacteristic losses or expenses, or its possession of an outstanding reputation in its industry. The record also does not establish the

Beneficiary's replacement of a current employee or outsourced service. Thus, a totality of circumstances under *Sonegawa* does not establish the Petitioner's ability to pay the proffered wage.

For the foregoing reasons, the record does not establish the reliability of the Petitioner's amended federal income tax return for 2017 or the company's ability to pay the position's proffered wage from the petition's priority date onward.

III. THE REQUIRED EXPERIENCE

Although unaddressed by the Director, the record also does not establish the Beneficiary's possession of the minimum experience required for the offered position. A petitioner must demonstrate that a Beneficiary met all DOL-certified job requirements of an offered position by a petition's priority date. *Matter of Wing's Tea House*, 16 I&N Dec. 158, 160 (Acting Reg'l Comm'r 1977). In evaluating a beneficiary's qualifications, USCIS must examine the job-offer portion of an accompanying labor certification to determine a position's minimum requirements. USCIS may neither ignore a certification term, nor impose additional requirements. *See, e.g., Madany v. Smith*, 696 F.2d 1008, 1015 (D.C. Cir. 1983) (holding that "DOL bears the authority for setting the *content* of the labor certification") (emphasis in original).

Here, the labor certification states the minimum requirements of the offered position of finance manager as a U.S. master's degree or a foreign equivalent degree in business administration, finance, or a related field, and two years of experience in the job offered or in a related occupation. As previously indicated, the petition's priority date is March 3, 2017.

On the labor certification, the Beneficiary attested that, by the priority date, he gained more than ten years of full-time, qualifying experience as a finance manager in the United States. He stated that a retail and investment company employed him from August 2012 until March 2017, and that he worked for a real estate investment firm from May 2005 to November 2010.

To support a beneficiary's claimed, qualifying experience, a petitioner must submit letters from former employers. 8 C.F.R. § 204.5(g)(1). Here, as evidence of the Beneficiary's claimed experience at the retail and investment company, the Petitioner submitted a letter from an accountant stating the company's employment of the Beneficiary from August 2012 to May 2017. The letter, however, identifies the company as a client of the accountant. Contrary to 8 C.F.R. § 204.5(g)(1), the letter is therefore not from the Beneficiary's former "employer." Also, although the letter describes the Beneficiary's experience, the document does not establish that the accountant was in a position to know the Beneficiary's duties. The accountant's letter therefore does not establish the Beneficiary's qualifying experience from August 2012 to March 2017.

The Petitioner also submitted letters from a purported director of the Beneficiary's other former employer. Online government records, however, do not list the letters' signatory as ever serving as a director of the employer. *See* Fla. Dep't of State, Div. of Corps., "Search Records," https://dos.myflorida.com/sunbiz/search/ (last visited June 20, 2019). The record also indicates that the corporation dissolved before the issuance dates of the letters. *Id.* The record therefore does not establish the letters' validity or accuracy. *See Matter of Ho*, 19 I&N Dec. 582, 591 (BIA 1988) (requiring an employer to resolve inconsistencies of record by independent, objective evidence

pointing to where the truth lies). Also, online government records indicate prior business relationships between the letters' signatory and the Beneficiary. The pair served together as officers of another corporation from 2001 to 2009. *See* Fla. Dep't of State, *supra*. From 2006 to 2011, they also owned property together. *See* Broward Cty. (Fla.) Property Appraiser, http://www.bcpa.net/RecMenu.asp (last visited June 20, 2019). These relationships between the men cast further doubt on the independence, objectivity, and reliability of the letters.

For the foregoing reasons, the record does not establish the Beneficiary's possession of the minimum experience required for the offered position. In any future filings in this matter, the Petitioner must submit additional evidence explaining the inconsistencies of record and establishing the Beneficiary's claimed qualifying experience.

IV. CONCLUSION

The Petitioner has not demonstrated its ability to pay the proffered wage of the offered position from the petition's priority date onward. We will therefore affirm the petition's denial. A petitioner bears the burden of establishing eligibility for the requested benefit. Section 291 of the Act; 8 U.S.C. § 1361. Here, the Petitioner did not meet that burden.

ORDER: The appeal is dismissed.

Cite as *Matter of G-C-, LLC*, ID# 4719708 (AAO July 2, 2019)