U.S. Citizenship and Immigration Services

Non-Precedent Decision of the Administrative Appeals Office

MATTER OF E-, INC.

DATE: JULY 8, 2016

APPEAL OF NEBRASKA SERVICE CENTER DECISION

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

The Petitioner, an owner and operator of a restaurant, seeks to permanently employ the Beneficiary as a cook specializing in Chinese cuisine. It requests classification of the Beneficiary as a skilled worker under the third preference immigrant classification. *See* Immigration and Nationality Act (the Act), section 203(b)(3)(A)(ii), 8 U.S.C. § 1153(b)(3)(A)(ii). 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, Nebraska Service Center, denied the petition on June 22, 2015. The Director concluded that the record did not establish the Petitioner's continuing ability to pay the proffered wage from the petition's priority date onward.

The matter is now before us on appeal. The Petitioner asserts that the Director misconstrued the purpose of ability-to-pay regulations and erred in discounting the personal assets of its president/sole shareholder. Upon *de novo* review, we will dismiss the appeal.

I. WAGES, NET INCOME, AND NET CURRENT ASSETS

A petitioner must demonstrate its 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 petition's priority date is July 30, 2011, the date the U.S. Department of Labor (DOL) accepted for processing the accompanying ETA Form 9089, Application for Permanent Employment Certification (labor certification). *See* 8 C.F.R. § 204.5(d).[1]

[1] The record indicates the Petitioner's timely submission of the labor certification in support of a prior, unsuccessful petition on behalf of the Beneficiary. *See* 20 C.F.R. § 656.30(b)(1) (stating that an approved labor certification granted after July 16, 2007 expires if not filed in support of a petition within 180 calendar days of its certification date). The record indicates a change in the Petitioner's ownership in April 2013, after its filing of the labor certification application and the prior petition. However, copies of the Petitioner's federal and state income tax returns indicate its retention of the same federal employer identification number (FEIN) indicated on the labor certification. The labor certification

The accompanying labor certification states the proffered wage of the offered position of Chinese specialty cook as $26,000 per year.

In determining a petitioner's ability to pay, we 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 each year, we examine whether it possessed sufficient annual amounts of net income or net current assets to pay the differences between wages paid, if any, and the proffered wage. If a petitioner's amounts of net income or net current assets are insufficient to demonstrate its ability to pay the proffered wage, we may also consider the overall magnitude of its business activities. *See Matter of Sonegawa,* 12 I&N Dec. 612, 614-15 (Reg'l Comm'r 1967).[2]

In the instant case, the record does not indicate the Petitioner's employment of the Beneficiary. The record therefore does not demonstrate the Petitioner's ability to pay the proffered wage based on wages paid to the Beneficiary.

The record contains copies of the Petitioner's federal income tax returns from 2011 through 2014. The tax returns reflect the following annual amounts of net income and net current assets:

Year	Net Income[3]	Net Current Assets
2011	$23,237	-$15,078
2012	-$1700	-$21,040
2013	$2825	$15,685
2014	$12,104	-$13,564

None of the annual amounts of net income or net current assets equal or exceed the annual proffered wage of $26,000. Thus, based on examinations of the wages paid to the Beneficiary by the Petitioner and its annual amounts of net income and net current assets, the record does not establish its ability to pay the proffered wage from the petition's priority date onward.

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therefore remains valid for the Petitioner. *See* 20 C.F.R. §§ 656.3, 656.30(c)(2) (stating that an "employer" must possess a valid, distinct FEIN and that a labor certification remains valid only for the particular job opportunity stated on it).

[2] Federal courts have upheld our method of determining a petitioner's ability to pay. *See Tongatapu Woodcraft Haw., Ltd. v. Feldman*, 736 F.2d 1305, 1309 (9th Cir. 1984); *see also River St. Donuts, LLC v. Napolitano*, 558 F.3d 111, 118 (1st Cir. 2009); *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).

[3] The Petitioner files its federal income tax returns as an S corporation. S corporations with income adjustments from sources other than their trades or businesses report their reconciled income amounts on Schedules K of IRS Forms 1120S, U.S. Income Tax Returns for S Corporations. *See* U.S. Internal Revenue Serv., Instructions to Form 1120S, 22, at https://www.irs.gov/pub/irs-pdf/i1120s.pdf (accessed Dec. 24, 2015). Because the Petitioner reported income adjustments in 2011 and 2013, our annual net income amounts for 2011 and 2013 refer to the reconciled income amounts on lines 18 of the Schedules K of the Petitioner's tax returns for those years.

II. ANOTHER PENDING PETITION

Also, U.S. Citizenship and Immigration Services (USCIS) records indicate the Petitioner's filing of a Form I-140, Immigrant Petition for Alien Worker, on behalf of another beneficiary that remained pending after the instant petition's priority date.[4]

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

The proffered wage of the Petitioner's other pending petition is also $26,000 per year. USCIS records indicate that the Petitioner did not pay any wages to the other beneficiary. As previously discussed, the record does not demonstrate the Petitioner's ability to pay the proffered wages of the instant Beneficiary based on examinations of the wages it paid to the Beneficiary and its annual amounts of net income and net current assets. Therefore, based on the same analysis, the record also does not establish the Petitioner's ability to pay the combined proffered wages of the beneficiaries.

III. THE PETITIONER'S APPEAL

The Petitioner asserts that a demonstration of ability to pay is not intended to "guarantee" payment of a beneficiary's proffered wage, but rather "to provide some reasonable indicia of the good faith nature of the . . . employer's job offer." Citing *Construction & Design Co. v USCIS*, 563 F.3d 593 (7th Cir. 2009), the Petitioner argues that demonstration of ability to pay is designed to prevent employers from sponsoring foreign workers without intending to employ them.

The *Construction & Design* decision was not issued by a U.S. court of appeals with jurisdiction over the area of intended employment in this matter. It therefore does not bind us in this case. *See Matter of U. Singh*, 25 I&N Dec. 670, 672 (BIA 2012) (holding that an agency need not apply the law of a circuit in cases arising outside that jurisdiction).

Also, *Construction & Design* interprets the purpose of the ability-to-pay requirement based on statements from a U.S. Attorney's Office. *Constr. & Design*, at 594 (citing Dep't of Justice, U.S. Atty's Office for the S. Dist. of Iowa, "Media Release: 11 Arrested, Indicted in Multi-State

[4] USCIS records identify the receipt number of the other pending petition as

Operation in Targeting Visa and Mail Fraud," Feb. 12, 2009)). We do not find the statements of an official from another agency to be authoritative regarding the purpose of USCIS regulations.

A review of regulatory history shows that the ability-to-pay regulation at 8 C.F.R. § 204.5(g)(2) was intended to implement pre-existing case law. *See* Proposed Rule for Employment-Based Immigrants, 56 Fed. Reg. 30703, 30704 (July 5, 1991) (stating that the regulations will reflect the case-law requirement that a petitioner demonstrate its ability to pay as of a petition's priority date).

In *Matter of Great Wall*, 16 I&N Dec. 142 (Acting Reg'l Comm'r 1977), the petitioner lost money in a 12-month period before the petition's filing, but asserted its ability to pay the proffered wage in the future. *Id.* at 143-44. However, the Acting Regional Commissioner of the former Immigration and Naturalization Service held that a petitioner must demonstrate its ability to pay from a petition's priority date. *Id.* at 145. "The petitioner in the instant case cannot expect to establish a priority date for visa issuance for the beneficiary when at the time of making the job offer and the filing of the petition with this Service he could not, in all reality, pay the salary as stated in the job offer." *Id.* The decision also cited the purpose of the Act's labor certification requirement "to provide strong safeguards for American labor and to provide American labor protection against an influx of aliens entering the United States for the purpose of performing skilled or unskilled labor where the economy of individual localities is not capable of absorbing them at the time they desire to enter this country." *Id.* at 144 (quoting H.R. Rep. No. 1365 (1952), *reprinted in* 1952 U.S.C.C.A.N. 1705).

Thus, contrary to the Petitioner's assertion, we find *Great Wall* to govern the purpose of the ability-to-pay regulations in this matter. *Great Wall* indicates that the ability-to-pay requirement is intended not merely to confirm a petitioner's intention to employ a beneficiary, but its financial ability to pay a specified proffered wage from a petition's priority date onward.

The Petitioner also asserts that USCIS erred in refusing to consider the personal assets of its president/sole shareholder in determining its ability to pay. The Petitioner asserts that cases cited by USCIS in support of its refusal are distinguishable from the instant matter.

The Director's decision cited *Matter of Aphrodite Investments, Ltd.*, 17 I&N Dec. 530 (Comm'r 1980) and *Sitar Restaurant v. Ashcroft*, No. Civ. A. 02-30197-MAP, 2003 WL 22203713 (D. Mass. Sept. 18, 2003) for the proposition that USCIS cannot consider the assets of shareholders in determining a corporation's ability to pay a proffered wage. The Petitioner notes that ability to pay was not at issue in *Aphrodite*. It also argues that *Sitar* is distinguishable from the instant case because a corporate director in *Sitar* sought to guarantee a beneficiary's proffered wage "without any evidence that he or she had funded the applicant restaurant."

Although *Aphrodite* did not involve a petitioner's ability to pay, the Director appropriately cited the case. The Director cited the case's specific holding that a corporation is "a separate legal entity from its owners or even its sole owner." *Aphrodite*, 17 I&N Dec. at 531. *Aphrodite* in turn cited *Matter of M-*, 8 I&N Dec. 24 (BIA 1958; A.G. 1958), which stated:

> It is an elementary rule that a corporation is a legal entity entirely separate and distinct from its stockholders; and this is true even though one person may own all or nearly all of the capital stock. . . . The fact that one person owns a majority or all of the stock in a corporation does not, of itself, make him liable for the debts of the corporation, and this rule applies even where an individual incorporated his business for the sole purpose of escaping individual liability for corporation debts.

M-, 8 I&N Dec. at 50-51 (citations omitted).

Thus, *Aphrodite* supports the Director's finding that USCIS cannot consider the personal assets of the Petitioner's president/sole shareholder because he lacks any legal obligation to pay the proffered wage on behalf of the corporation.

Similarly, *Sitar* found that "[t]he regulation at 8 C.F.R. § 204.5(g)(2) does not permit the AAO to consider the financial resources of individuals or entities with no legal obligations to pay a proffered wage." *Sitar*, 2003 WL 22203713 at *3. Whether the corporate director who offered to pay the beneficiary's wage in *Sitar* had funded the restaurant was immaterial. The court ruled that, absent a legal obligation by the director to pay the proffered wage, USCIS "had no need to determine whether his income was sufficient to pay [the beneficiary's] salary." *Id.* Like the petitioner in *Sitar*, the instant Petitioner does not provide any authority to support its argument that we must consider the promise of its president/sole shareholder to pay the proffered wage.

IV. TOTALITY OF THE CIRCUMSTANCES

However, we agree with the Petitioner that we must consider factors beyond its net income and net current assets in determining its ability to pay to pay the proffered wage. As previously indicated, we may consider the overall magnitude of a petitioner's business activities in determining its ability to pay. *See Sonegawa,* 12 I&N Dec. at 614-15.

In *Sonegawa*, the petitioner conducted business for more than 11 years, routinely earning a gross annual income of about $100,000 and employing at least four full-time workers. *Id.* at 612. In the year of the petition's filing, however, the petitioner's financial documentation did not reflect its ability to pay the proffered wage. *Id.* at 614. During that year, it relocated its business, causing it to pay rent on two locations for a five-month period, to incur substantial moving costs, and to briefly suspend its business operations. *Id.* Despite these setbacks, the Regional Commissioner determined that the petitioner would likely resume successful business operations and had established its ability to pay the proffered wage. *Id.* at 615. The record established the petitioner as a fashion designer whose work had been featured in national magazines. *Id.* Her clients included the then Miss Universe, movie actresses, society matrons, and women on lists of the best-dressed in California. *Id.* The record also indicated the petitioner's frequent lectures at design and fashion shows throughout the United States and at California colleges and universities. *Id.*

As in *Sonegawa*, we may consider such factors as: the number of years a petitioner 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 the petitioner's ability to pay the proffered wage.

In the instant case, the record indicates the Petitioner's continuous business operations since 2006. The Petitioner employs 12 people, although its president/sole shareholder stated that most of them work on a part-time basis. Its tax returns from 2010 through 2014 reflect largely stable gross annual revenues and costs of labor.

The Petitioner's president/sole shareholder stated the Beneficiary's possible replacement of current part-time cooks. However, the proposed replacement was not definite. The Petitioner also did not provide evidence of the hours and wages of the cooks to be replaced. *See Matter of Soffici*, 22 I&N Dec. 358, 365 (Comm'r 1998) (citation omitted) (finding that unsupported assertions do not meet the burden of proof in visa petition proceedings).

Unlike in *Sonegawa*, financial documents do not reflect the instant Petitioner's ability to pay the proffered wage in any relevant year. The record also does not indicate any uncharacteristic business expenditures or losses. Also unlike in *Sonegawa*, the instant Petitioner must demonstrate its ability to pay the combined proffered wages of two beneficiaries. Thus, assessing the totality of the circumstances in this individual case, the record does not establish the Petitioner's continuing ability to pay the proffered wage pursuant to *Sonegawa*.

V. CONCLUSION

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. We will therefore affirm the Director's decision and dismiss the appeal.

In visa petition proceedings, a petitioner bears the burden of proving eligibility for the benefit sought. Section 291 of the Act; 8 U.S.C. § 1361. Here, that burden has not been met.

ORDER: The appeal is dismissed.

Cite as *Matter of E-, Inc.*, ID# 15678 (AAO July 8, 2016)