U.S. Citizenship and Immigration Services

Non-Precedent Decision of the Administrative Appeals Office

In Re: 03933783

Date: AUG. 26, 2022

Appeal of Texas Service Center Decision

Form I-140, Petition for Multinational Managers or Executives

The Petitioner, a marketer and trader of toys, seeks to permanently employ the Beneficiary as "President and General and Operation Manager" under the first preference immigrant classification for multinational executives or managers. Immigration and Nationality Act (the Act) section 203(b)(1)(C), 8 U.S.C. § 1153(b)(1)(C). This classification allows a U.S. employer to permanently transfer a qualified foreign employee to the United States to work in a managerial or executive capacity.

The instant petition was initially approved. However, the Director of the Texas Service Center later revoked the petition's approval, concluding the Petitioner did not establish that it had the continuing ability to pay the proffered wage.

On appeal, the Petitioner asserts that the Director did not properly consider evidence indicating that its foreign affiliate in China has sufficient income and assets to pay the proffered wage and that it has been paying his wages abroad for several years.

In these proceedings, it is the Petitioner's burden to establish eligibility for the requested benefit. Section 291 of the Act, 8 U.S.C. §1361. Upon *de novo* review, we will dismiss the appeal.

I. LEGAL FRAMEWORK

An immigrant visa is available to a beneficiary who, in the three years preceding the filing of the petition, has been employed outside the United States for at least one year in a managerial or executive capacity, and seeks to enter the United States in order to continue to render managerial or executive services to the same employer or to its subsidiary or affiliate. Section 203(b)(1)(C) of the Act.

The Form I-140, Immigrant Petition for Alien Worker, must include a statement from an authorized official of the petitioning United States employer which demonstrates that the beneficiary has been employed abroad in a managerial or executive capacity for at least one year in the three years preceding the filing of the petition, that the beneficiary is coming to work in the United States for the same employer or a subsidiary or affiliate of the foreign employer, and that the prospective U.S. employer has been doing business for at least one year. *See* 8 C.F.R. § 204.5(j)(3).

After granting a petition, U.S. Citizenship and Immigration Services (USCIS) may revoke the petition's approval "at any time" for "good and sufficient cause." Section 205 of the Act, 8 U.S.C. § 1155. If supported by the record and substantial evidence, a director's realization that a petition was erroneously approved may justify revocation. *Matter of Ho*, 19 I&N Dec. 582, 590 (BIA 1988). By regulation, this revocation authority is delegated to any USCIS officer who is authorized to approve an immigrant visa petition "when the necessity for the revocation comes to the attention of [USCIS]." 8 C.F.R. § 205.2(a).[1]

II. ABILITY TO PAY

The sole issue to be addressed is whether the Petitioner established that it had the continuing ability to pay the annual proffered wage of $80,000 from the date the petition was filed on October 6, 2014, onward. The regulation at 8 C.F.R. § 204.5(g)(2) states in pertinent 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 the revocation decision, the Director reviewed the Petitioner's federal tax returns and concluded that neither its net income nor its net current assets exceeded the proffered wage in any relevant year.

On appeal, the Petitioner asserts that its foreign affiliate could have paid, and would pay, the proffered wage. The Petitioner submits financial statements specific to its foreign affiliate, a company it asserts manufactures toys it markets and trades in the United States. The Petitioner states that its foreign manufacturing affiliate has been paying the Beneficiary's wages for over ten years abroad and asserts that this evidence is sufficient to establish its ability to pay under an approved petition.

In determining a petitioner's ability to pay the proffered wage, 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]

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[1] A Form I-140 multinational executive or manager petition, filed on behalf of the Beneficiary on October 6, 2014, was approved by the Director of the Texas Service Center on March 26, 2016. The Director later revoked the approval of the petition on October 16, 2018, following the issuance of a notice of intent to revoke (NOIR) on August 13, 2018. The Director concluded that the petition had been approved in error and that the Beneficiary was not eligible for the benefit sought.

[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

The record does not demonstrate that the Petitioner, a New York corporation, has paid the Beneficiary any wages from the priority date onward.[3] Instead, the Petitioner submits evidence that its foreign affiliate has been paying the Beneficiary's wages for over ten years abroad and asserts, without legal basis, that this evidence is sufficient to establish its ability to pay. We disagree. The regulations are clear that ability to pay applies specifically to "the prospective United States employer." 8 C.F.R. § 204.5(g)(2). Thus, the Petitioner must demonstrate its ability to pay the proffered wage, independent of any foreign qualifying organizations or affiliates.[4] The Petitioner has not established that it paid the Beneficiary wages in any relevant year.

The Petitioner's statements indicate that it does not have the ability to pay the proffered wage, since it points exclusively to the foreign employer's financial status and statements. For instance, the Petitioner states the following on appeal:

> The record indicates, pursuant to the nature of the business agency activities and the customarily international trade practice, the trading agency [the Petitioner] do[es] not generate much business revenue and profit of their own as the business transactions and the resulting income though the export of products from China to the United States would be paid to the manufacturing base in China, [the Petitioner's foreign affiliate]. The business revenue would be required for the factory to cover the cost of production of the merchandizes.
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> The Service Approval correctly concluded the ability to pay must be assessed in the prism of the multi-national corporate formation, the international trade practice, and the financial resources and the arrangement of the entire international corporation.

There is no indication in the record that the Director previously considered the financials of the Petitioner's foreign affiliates or "the arrangement of the entire international corporation" when the petition was initially approved in March 2016. However, the revocation decision does reflect that the Director incorrectly analyzed financial statements of the Beneficiary's former foreign employer abroad when assessing ability to pay. As we have discussed, the ability of the Beneficiary's former foreign employer or other foreign affiliates to pay the proffered wage is not sufficient to establish ability to pay under 8 C.F.R. § 204.5(g)(2). The Petitioner as a *prospective United States employer* must demonstrate its continuing ability to pay the proffered wage as of the date the petition was filed, independent of his former foreign employer or any other foreign affiliates. *See* 8 C.F.R. § 204.5(g)(2).

1305, 1309 (9th Cir. 1984); *Estrada-Hernandez v. Holder*, 108 F. Supp. 3d 936, 942-946 (S.D. Cal. 2015); *Rizvi v. Dep't of Homeland Sec.*, 37 F. Supp. 3d 870, 883-84 (S.D. Tex. 2014), *aff'd*, 627 Fed. App'x 292, 294-295 (5th Cir. 2015).

[3] USCIS records indicate that the Beneficiary has not yet been employed in the United States by the Petitioner.

[4] Because a corporation is a separate and distinct legal entity from its shareholders, the assets of its shareholders or of other enterprises or corporations cannot be considered in determining the petitioning corporation's ability to pay the proffered wage. *See Matter of Aphrodite Investments, Ltd.*, 17 I&N Dec. 530 (Comm'r 1980). In a similar case, the court in *Sitar v. Ashcroft*, 2003 WL 22203713 (D.Mass. Sept. 18, 2003) stated, "nothing in the governing regulation, 8 C.F.R. § 204.5, permits [USCIS] to consider the financial resources of individuals or entities who have no legal obligation to pay the wage." *Id.* at *2.

In the revocation decision, the Director further concluded that the Petitioner did not have sufficient net income or net current assets to pay the proffered wage in any relevant year. The petition's priority date fell on October 6, 2014, and the most recent tax return provided in relation to that date was a submitted 2014 IRS Form 1120, U.S. Corporation Income Tax Return. The Petitioner's 2014 Form 1120 presents a net loss of -$2,602. Further, the Petitioner's 2015 Form 1120 reflects a net income of $5,055, and its 2016 Form 1120 shows a net income of $3,368.[5] As such, the Petitioner's relevant federal income tax returns demonstrate that it did not have sufficient net income to pay the proffered wage of $80,000 in any relevant year.

If a petitioner does not have sufficient net income to pay the proffered salary, we will next review its net current assets. Net current assets are the difference between a petitioner's current assets and current liabilities.[6] A corporation's year-end current assets are shown on Schedule L, lines 1 through 6. Its year-end current liabilities are shown on lines 16 through 18. If the total of a corporation's end-of-year net current assets are equal to or greater than the proffered wage, the petitioner is expected to be able to pay the proffered wage using those net current assets. Schedule L of the Petitioner's 2014 Form 1120 reflects that the Petitioner had net current assets of $3,971 that year. Likewise, the Petitioner's 2015 Form 1120 indicates that it had net current assets of $3,644, while its 2016 Form 1120 shows it had net current liabilities of -$891. As such, the Petitioner has not established that it had sufficient net current assets to pay the proffered wage of $80,000 in any relevant year.

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 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).

Unlike in *Sonegawa*, the record here does not establish the growth of the Petitioner's business; the occurrence of any uncharacteristic business expenditures or losses; or its reputation in its industry. Additionally, its number of employees is unclear. On the Form I-140, the Petitioner indicated that it had seven employees. However, the Petitioner's tax returns do not reflect that it paid wages to seven employees. For example, its 2014 federal tax return shows that it paid no salaries or wages, and its corresponding New York state tax return for 2014 indicates that it had no employees that year. Similarly, its 2015 and 2016 federal tax returns show that it paid no salaries or wages, and its corresponding New York state tax returns for 2015 and 2016 indicate that it had no employees.

Further, as discussed, the Petitioner's 2013 Form 1120 reflected that it had $0 net income and its 2014 Form 1120 corresponding with the date the petition was filed reflected it had net loss of -$2,602.

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[5] Net income is shown on Line 28 of the IRS Form 1120. The Petitioner's IRS Forms 1120 from the years prior to 2014 reflect the following net incomes/losses: -$13,753 (2010), -$13,988 (2011), $0 (2012), and $0 (2013). As such, the Petitioner's lack of net income over several years leaves further question as to whether the Petitioner was doing business as asserted and whether its operations were sufficient to support the Beneficiary in a managerial or executive capacity.

[6] Current assets consist of items having (in most cases) a life of one year or less, such as cash, marketable securities, inventory, and prepaid expenses. Joel G. Siegel & Jae K. Shim, *Barron's Dictionary of Accounting Terms* 117 (3d ed. 2000). Current liabilities are obligations payable (in most cases) within one year, such as accounts payable, short-term notes payable, and accrued expenses (such as taxes and salaries). *Id.* at 118.

However, in the Form I-140, the Petitioner stated that it earned net annual income of $119,545.50, an amount not reflected in any of its tax returns. Further, as noted, the Petitioner's net income in its Forms 1120 either reflected a loss, no income, or minimal income from 2010 through 2016, leaving substantial uncertainty as to its level of operations and whether it is doing business as defined by the regulations. The Petitioner must resolve discrepancies in the record with independent, objective evidence pointing to where the truth lies. *Matter of Ho*, 19 I&N Dec. 582, 591-92 (BIA 1988). 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 did not establish that it had the continuing ability to pay the proffered wage from the priority date onward. Therefore, we will not disturb the Director's decision, and the petition's approval will remain revoked.

ORDER: The appeal is dismissed.