U.S. Citizenship and Immigration Services

Non-Precedent Decision of the Administrative Appeals Office

In Re: 26053923

Date: APR. 05, 2023

Motion on Administrative Appeals Office Decision

Form I-140, Immigrant Petition for Alien Workers (Skilled Worker)

The Petitioner, a real estate and property management business, seeks to employ the Beneficiary as an administrative assistant. It requests classification of the Beneficiary under the third-preference, immigrant category as a skilled worker. Immigration and Nationality Act (the Act) section 203(b)(3)(A)(i), 8 U.S.C. § 1153(b)(3)(A)(i). This employment-based category allows a U.S. business to sponsor a foreign national for lawful permanent resident status based on a job offer requiring at least two years of training or experience.

The Director of the Texas Service Center denied the petition, concluding that the Petitioner did not establish that it had the continuing ability to pay the Beneficiary the proffered wage from the priority date. The Petitioner filed a subsequent appeal which we dismissed. The matter is now before us on a combined motion to reopen and reconsider. 8 C.F.R. § 103.5.

The Petitioner bears the burden of proof to demonstrate eligibility by a preponderance of the evidence. *Matter of Chawathe*, 25 I&N Dec. 369, 375-76 (AAO 2010). Upon review, we will dismiss the combined motions.

I. LAW

To be eligible for the classification it requests for the beneficiary, a petitioner must establish that it has the ability to pay the proffered wage stated on the labor certification. As provided in the regulation at 8 C.F.R. § 204.5(g)(2):

> 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 a case where the prospective United States employer 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. In appropriate cases, additional evidence, such as profit/loss statements, bank account records, or personnel records may be submitted by the petitioner or requested by [USCIS].

A motion to reopen must state new facts and be supported by documentary evidence. 8 C.F.R. § 103.5(a)(2). We do not require the evidence of a "new fact" to have been previously unavailable or undiscoverable. Instead, "new facts" are facts that are relevant to the issue(s) raised on motion and that have not been previously submitted in the proceeding, which includes the original petition. Reasserting previously stated facts or resubmitting previously provided evidence does not constitute "new facts."

A motion to reconsider must establish that our decision was based on an incorrect application of law or policy and that the decision was incorrect based on the evidence in the record of proceedings at the time of the decision. 8 C.F.R. § 103.5(a)(3). We do not consider new facts or evidence in a motion to reconsider.

II. ANALYSIS

As indicated in the above regulation, the Petitioner must establish its continuing ability to pay the proffered wage from the priority date[1] of the petition onward. In this case the proffered wage is $36,000 per year and the priority date is January 20, 2020.

In determining a petitioner's ability to pay the proffered wage, USCIS first examines whether the beneficiary was employed and paid by the petitioner during the period following the priority date. A petitioner's submission of documentary evidence that it employed the beneficiary at a salary equal to or greater than the proffered wage for the time period in question, when accompanied by a form of evidence required in the regulation at 8 C.F.R. § 204.5(g)(2), may be considered proof of the petitioner's ability to pay the proffered wage.

If a petitioner does not establish that it has paid the beneficiary an amount equal to or above the proffered wage from the priority date onward, USCIS will examine the net income and net current assets figures recorded on the petitioner's federal income tax return(s), annual report(s), or audited financial statements(s). If either of these figures, net income or net current assets, equals or exceeds the proffered wage or the difference between the proffered wage and the amount paid to the beneficiary in a given year, the petitioner would ordinarily be considered able to pay the proffered wage that year.

The record before the Director included the Petitioner's 2020 federal income tax return, Form 1120, a 2021 Form W-2, Wage and Tax Statement, and pay stubs it issued to the Beneficiary, bank statements, and unaudited 2021 profit and loss statements. The Director determined that the Petitioner had not established its continuing ability to pay the proffered wage from the priority date of January 20, 2020 onward, as the Petitioner did not pay the Beneficiary wages in 2020 and its 2020 tax return reflected negative net income and negative net current assets.

On appeal, the Petitioner stated that it requested an extension to file its 2021 federal income tax return and it was not available at the time of appeal. The Petitioner asserted that, although its 2020 revenue was negatively impacted by COVID-19, it continued to operate and pay employee salaries and it has a continued need to employ the Beneficiary as an administrative assistant. The Petitioner submitted

[1] The "priority date" of a petition is the date the underlying labor certification application is filed with the U.S. Department of Labor. *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.

evidence that it began to employ the Beneficiary in October 2021 and paid her wages totaling $9,000 in 2021. The Petitioner also submitted its bank statements from November 2021 to February 2022, and its final 2021 profit and loss statement in support of its continued operation during the pandemic.

In our appeal decision, we determined that the Petitioner must establish its ability to pay the full proffered wage of $36,000 in 2020, and $27,000 in 2021, having already paid the Beneficiary $9,000. We declined to accept the Petitioner's unaudited profit and loss statement, as this is the representations of management and, without audit, is unreliable evidence of the Petitioner's ability to pay the proffered wage. We also declined to consider the Petitioner's bank statements, noting that the statements do not cover a full year and that the amounts reflect an account balance on a given date rather than a sustained ability to pay a proffered wage. Additionally, cash from the Petitioner's bank statements would be considered in a net current assets calculation in examination of any 2022 tax return.

On appeal we also considered the totality of the circumstances, including the overall magnitude of the Petitioner's business activities, in determining its ability to pay the proffered wage. *See Matter of Sonegawa,* 12 I&N Dec. 612 (Reg'l Comm'r 1967). We noted that the Petitioner was established in 2016 and claims eight employees. We also noted that the record did not include sufficient evidence to determine that the Petitioner's losses in 2020 were uncharacteristic, as the record did not include evidence of the Petitioner's historical growth or its reputation within its industry.

The Petitioner asserts that our previous appeal decision was based on an incorrect application of law and/or policy. The Petitioner cites to 8 C.F.R. § 204.5(g)(2), as well as the USCIS Policy Manual. However, the Petitioner does not explain how our prior appeal decision did not follow the regulations and policy guidance. Upon review, we do not find any error or incorrect application of law or policy. The Petitioner has not met the requirements of a motion to reconsider.

The Petitioner provides new facts and documentary evidence, specifically its 2021 tax return, its 2022 quarterly tax returns, additional paystubs it issued to the Beneficiary in 2022, additional bank statements, and other tax and property records. Therefore, the filing meets the requirements of a motion to reopen.

The record includes the Petitioner's tax and payroll records reflecting the following figures:

Year	Net Income	Net Current Assets	Wages Paid
2020	-$89,652	-$431,192	$0
2021	-$23,600	-$496,873	$9,000
2022	Not available[2]	Not available	$37,354.69[3]

On motion the Petitioner asserts that its tax returns in 2020 and 2021 include errors on the balance sheet. Specifically, the Petitioner states that Line 18 of Schedule L, other current liabilities, includes a long term liability in the amount of $424,571 in 2020 and $392,6298 in 2021. The Petitioner claims

[2] The Petitioner's 2022 federal tax return is not in the record. The motion was filed on December 30, 2022, which may be prior to the filing deadline for the Petitioner's 2022 federal tax return.

[3] This figure is reflected on the paystub the Petitioner issued to the Beneficiary as her year-to-date gross earnings as of November 13, 2022. The record does not include a Form W-2 for 2022, as it may not have been available at the time the motion was filed on December 30, 2022.

that these figures are related to shareholder accounts where there is no obligation to pay the debt in the short term. However, the record does not contain amended tax returns as evidence that the Petitioner requested correction of this claimed error, or other evidence to support the Petitioner's assertions. Further, even if we accepted the Petitioner's explanation and removed these amounts in calculating the net current assets,[4] the Petitioner's net current assets remain negative in each year, with -$6,621 in 2020 and -$104,244 in 2021, and would not demonstrate its ability to pay the proffered wage.

The Petitioner also asserts that depreciation of a building it purchased in 2019 for short term resale should be classified as a current asset as an "Asset Held for Sale" on its 2020 and 2021 tax returns. The Petitioner states that these depreciation expenses should be added back to the calculation of its net income, resulting in an additional $19,000 in 2020 and $15,000 in 2021.

First, as noted above, in determining a petitioner's ability to pay, we examine a petitioner's net income figure as reflected on the federal income tax return, without consideration of depreciation or other expenses. Reliance on federal income tax returns as a basis for determining a petitioner's ability to pay the proffered wage is well established by judicial precedent. *Elatos Rest. Corp. v. Sava*, 632 F. Supp. 1049, 1054 (S.D.N.Y. 1986) (citing *Tongatapu Woodcraft Haw., Ltd. v. Feldman*, 736 F.2d 1305 (9th Cir. 1984)); *Chi-Feng Chang v. Thornburgh*, 719 F. Supp. 532 (N.D. Texas 1989); *K.C.P. Food Co., Inc. v. Sava*, 623 F. Supp. 1080 (S.D.N.Y. 1985); *Ubeda v. Palmer*, 539 F. Supp. 647 (N.D. Ill. 1982), *aff'd*, 703 F.2d 571 (7th Cir. 1983). In *K.C.P. Food Co., Inc. v. Sava*, 623 F. Supp. at 1084, the court held that former Immigration and Naturalization Service (INS) properly relied on the petitioner's net income figure reflected on its corporate income tax returns rather than gross income. The court rejected the argument that INS should have considered income before expenses were paid rather than net income. There is no precedent that would allow the Petitioner to "add back to net cash the depreciation expense charged for the year." *See, e.g.*, *Chi-Feng Chang*, 719 F. Supp. at 537; *see also Elatos Rest. Corp.*, 632 F. Supp. at 1054.

Further, even if we accepted the Petitioner's calculation, which we do not, the depreciation amount as noted on the Federal Asset Report attached to the Petitioner's tax returns for the specific property and associated loan fees was $9,779 in each year, and not $19,000 in 2020 and $15,000 in 2021 as the Petitioner claims.[5] Additionally, the record does not contain amended tax returns as evidence that the Petitioner requested correction of this claimed error, or other evidence to support the Petitioner's assertions that this property was intended for resale. Although the record includes property records for the claimed building, these records do not state the Petitioner's intention to resell the property in the short term. Rather, we note that the 2021 and 2022 profit and loss statements include rental income from this property which is included in the Petitioner's net income.

The Petitioner, through counsel, asserts that its payroll expenses increased in 2020 and 2021, but that a normalized payroll would result in $76,000 less in payroll expenses in 2020 and $59,000 less in 2021. However, the record does not include evidence to support this assertion, such as the Petitioner's 2018 or 2019 records to reflect the claimed percentage increase in payroll expenses in subsequent

[4] For a corporation net current assets (or liabilities) are the difference between its current assets, entered on lines 1-6 of Schedule L, and its current liabilities, entered on lines 16-18 of Schedule L.

[5] The Petitioner appears to be including in its calculation the depreciation amount for a vehicle that is listed on its Federal Asset Report in 2020 and 2021.

years. Assertions of counsel do not constitute evidence. *Matter of Obaigbena*, 19 I&N Dec. 533, 534 n.2 (BIA 1988) (citing *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980)).

The Petitioner also asserts that its Paycheck Protection Program (PPP) and Small Business Assistance (SBA) loans in 2020 were forgiven under the Coronavirus Aid, Relief, and Economic Security Act (CARES) Act and that these funds could be used to pay the proffered wage. The Petitioner's tax returns reflect a PPP loan of $32,500 and SBA disaster loan of $10,100 in 2020. However, the record does not include evidence that the Petitioner applied for and was granted loan forgiveness. Further, the CARES Act was signed into law on March 27, 2020, which is three months after the January 20, 2020 priority date. A petitioner must establish eligibility at the time of filing. 8 C.F.R. §§ 103.2(b)(1), (12); *Matter of Katigbak*, 14 I&N Dec. 45, 49 (Reg'l Comm'r 1971). Even if we considered these loan amounts as available funds, which we do not, the amounts are not sufficient to pay the proffered wage in both 2020 and 2021.

The Petitioner asserts that its bank statements and unaudited profit and loss statements should be considered as evidence of its ability to pay the proffered wage. As we stated in our previous appeal decision, unaudited financial statements are representations of management and are unreliable evidence of the Petitioner's ability to pay the proffered wage. The Petitioner does not explain the significant discrepancy in the net income reflected on its tax return in 2021 (-$23,600) and the net income claimed on its 2021 profit and loss statement ($37,456), casting further doubt on the reliability of this evidence. The Petitioner must resolve these inconsistencies with independent, objective evidence pointing to where the truth lies. *Matter of Ho*, 19 I&N Dec. 582, at 591-92.

With respect to the bank statements, the policy manual states, "the petitioner must establish that the amounts reported on the bank statements have not already been considered elsewhere, such as in a calculation of the petitioner's net current assets, and must establish that such amounts reported on the bank statements reflect sufficient cash to establish ability to pay under the totality of the circumstances." 6 *USCIS Policy Manual* E.4, https://www.uscis.gov/policy-manual/volume-6-part-e-chapter-4. Here, the Petitioner does not submit such evidence.

As noted above, on appeal we considered the totality of the circumstances in determining the Petitioner's ability to pay the proffered wage, in accordance with the USCIS policy manual. Although the Petitioner provides additional information regarding its business losses in 2020, it still does not provide sufficient evidence to determine that these losses were uncharacteristic. The record lacks evidence of the Petitioner's reputation or of its historical growth over its now seven years in business. The two tax returns in the record both show losses which are not reconciled with the minimal net income claimed on the profit and loss statements. We conclude that the Petitioner has not established its ability to pay the annual proffered wage from the priority date based on the totality of the circumstances.[6]

[6] Although not addressed by the Director, the Petitioner should have an opportunity to address information that casts doubt on the Beneficiary's claimed employment experience and specific skills. On the labor certification, the Beneficiary claims to have been employed as an administrative assistant with [redacted] from February 1, 2012 until December 3, 2018. In support of this experience, the Petitioner submitted a letter dated January 10, 2022 on [redacted] letterhead. The letter is signed by [redacted], General Manager. The record demonstrates that [redacted] is the Beneficiary's spouse. While a petitioner may submit a letter or affidavit that contains hearsay or biased

Upon review, the Petitioner has not established its continuing ability to pay the proffered wage from the priority date. 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). The Petitioner has not met that burden.

ORDER: The motion to reopen is dismissed.

FURTHER ORDER: The motion to reconsider is dismissed.

information, as may be the case here, such factors will affect the weight to be accorded the evidence in an administrative proceeding. *See Matter of D-R-*, 25 I&N Dec. 445, 461 (BIA 2011) (citations omitted). Further, the information in the letter is inconsistent with a nonimmigrant visa application that the Beneficiary submitted in June 2012 where she claimed her primary occupation as "homemaker." Inconsistencies must be resolved 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.*