U.S. Citizenship and Immigration Services

Non-Precedent Decision of the Administrative Appeals Office

In Re: 19805182

Date: MAR. 10, 2022

Appeal of Texas Service Center Decision

Form I-140, Immigrant Petition for Skilled Worker

The Petitioner, a nursing services provider, seeks to employ the Beneficiary as a registered nurse. 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.

After initially approving the petition, the Director of the Texas Service Center notified the Petitioner that the petition had been approved in error, as it had not established its continuing ability to pay the proffered wage in accordance with the requirements in 8 C.F.R. § 204.5(g)(2), that the position offered to the Beneficiary was permanent, or that the Petitioner intended to employ the Beneficiary in the offered position. The Petitioner submitted additional evidence, and, after review, the Director found that the Petitioner had established the permanency of the position and its intent to employ the Beneficiary in the offered position. However, he revoked the petition's approval, concluding that the Petitioner had not established its continuing ability to pay the proffered wage to the Beneficiary, as well as to the beneficiaries of its other petitions, from the filing date of this petition.

On appeal, the Petitioner submits a brief and additional evidence, asserting that the Director did not consider all relevant evidence of its ability to pay the proffered wages to all beneficiaries in the totality of the circumstances.

In these proceedings, it is the Petitioner's burden to establish eligibility for the requested benefit by a preponderance of the evidence. Section 291 of the Act, 8 U.S.C. § 1361; *Matter of Chawathe*, 25 I&N Dec. 369, 375 (AAO 2010). The Administrative Appeals Office (AAO) reviews the questions in this matter *de novo*. *See Matter of Christo's Inc.*, 26 I&N Dec. 537, 537 n.2 (AAO 2015). Upon *de novo* review, we will dismiss the appeal.

I. EMPLOYMENT-BASED PETITIONS FOR SCHEDULE A OCCUPATIONS

This petition is for a Schedule A occupation. A Schedule A occupation is one codified at 20 C.F.R. § 656.5(a) for which the U.S. Department of Labor (DOL) has determined that there are not sufficient

U.S. workers who are able, willing, qualified and available and that the wages and working conditions of similarly employed U.S. workers will not be adversely affected by the employment of aliens in such occupations. The current list of Schedule A occupations includes registered nurses. *Id.* Petitions for Schedule A occupations do not require the petitioner to test the labor market and obtain a certified ETA Form 9089, Application for Permanent Employment Certification, from DOL prior to filing the petition with U.S. Citizenship and Immigration Services (USCIS). Instead, the petition is filed directly with USCIS with an uncertified ETA 9089 in duplicate. *See* 8 C.F.R. § 204.5(a)(2); *see also* 20 C.F.R. § 656.15.

At any time before a beneficiary obtains lawful permanent residence, however, USCIS may revoke a petition's approval for "good and sufficient cause." Section 205 of the Act, 8 U.S.C. § 1155. If supported by the record, a petition's erroneous approval may justify its revocation. *Matter of Ho*, 19 I&N Dec. 582, 590 (BIA 1988).

II. ABILITY TO PAY

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].

We note that where a petitioner has filed I-140 petitions for multiple beneficiaries, it must demonstrate that its job offer to each beneficiary is realistic, and that it has the ability to pay the proffered wage to each beneficiary. *See Patel v. Johnson*, 2 F.Supp.3d 108, 124 (D. Mass. 2014) (affirming our revocation of a petition's approval where, as of the filing's grant, a petitioner did not demonstrate its ability to pay the combined proffered wages of multiple petitions).

As indicated in the above regulation, the Petitioner must establish its continuing ability to pay the proffered wage as of the petition's priority date,[1] which in this case is November 21, 2018. The proffered wage as stated on the ETA 9089 is $59,000 per year.

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

[1] The "priority date" of an employment-based immigrant petition is ordinarily the date the underlying ETA 9089 is filed with the DOL. *See* 8 C.F.R. § 204.5(d). Since this petition is for a Schedule A occupation, however, the ETA 9089 is not certified by the DOL and the priority date of the petition is the date the Form I-140 along with the uncertified ETA 9089 is filed with USCIS.

proffered wage, USCIS next examines whether it generated sufficient annual amounts of net income or net current assets to pay any difference between the proffered wage and 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).[2]

The record indicates that the Beneficiary began working for the Petitioner in February 2019. The Petitioner submitted a copy of the Internal Revenue Service (IRS) Form W-2, Wage and Tax Statement, it issued to the Beneficiary in 2019, demonstrating that it paid the Beneficiary $42,630. The Petitioner also submitted pay records for the Beneficiary for 2020, demonstrating that the Beneficiary's year-to-date earnings with the Petitioner totaled $25,310.32 as of December 20, 2020.[3] As the Petitioner did not submit evidence of any wages paid to the Beneficiary in 2018, the year of the priority date, and the amounts paid in 2019 and 2020[4] are below the proffered wage of $59,000 per year, the Petitioner has not established its continuing ability to pay the Beneficiary's proffered wage from the priority date of November 21, 2018, onward based on the wages it actually paid.

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 in 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 generally be considered able to pay the proffered wage during that year. The record includes copies of the Petitioner's federal income tax returns, IRS Forms 1120S, U.S. Income Tax Return for an S Corporation, for the years 2018 and 2019, which show that in 2018 it had net income of $932,350[5] and net current assets of $1,350,683,[6] and in 2019 it had net income of $943,312 and net current assets of $1,377,578. Each of these figures exceeded the proffered wage to the Beneficiary.

However, when a petitioner has filed multiple I-140 petitions, it must establish that its job offer is realistic not only for the instant beneficiary, but also for the beneficiaries of its other petitions. A petitioner's ability to pay the proffered wage is an essential element in evaluating whether a job offer

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[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); *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 (5th Cir. 2015).

[3] USCIS records show that, following the filing of this appeal, another employer obtained an approved immigrant visa on behalf of the Beneficiary. The record does not include evidence that the Petitioner employed the Beneficiary beyond December 2020 or that the Beneficiary intends to accept employment with the Petitioner upon approval of her lawful permanent residence.

[4] The Petitioner asserts that it paid the Beneficiary $33,314.36 in wages in 2020, which is not supported by the paystubs in the record. Further, the Beneficiary's paystubs show a varying hourly rate, ranging from $15.00 to $30.00. As the Petitioner did not submit a Form W-2 issued to the Beneficiary in 2020, the total wages paid in 2020 cannot be confirmed.

[5] If an S corporation, like the Petitioner, has income exclusively from a trade or business, USCIS considers its net income (or loss) to be the figure for "Ordinary business income (loss)" on page 1, line 21, of the Form 1120S. However, if there are relevant entries for additional income, credits, deductions or other adjustments from sources other than a trade or business, they are reported on Schedule K of the Form 1120S, and the corporation's net income or loss will be found in line 18 of Schedule K ("Income/loss reconciliation").

[6] 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.

is realistic. *See Matter of Great Wall*, 16 I&N Dec. 142 (Acting Reg'l Comm'r 1977). As noted above, a petitioner must demonstrate its ability to pay the combined proffered wages of the instant beneficiary and every other I-140 beneficiary, for each year the petitioner does not pay the instant beneficiary's full proffered wage, from the priority date of the instant petition until each I-140 beneficiary obtains lawful permanent resident status.[7] *See Patel v. Johnson*, 2 F. Supp. 3d at 124.

In the notice of intent to revoke (NOIR) the petition's approval the Director requested that the Petitioner submit evidence of its ability to pay the proffered wage to each of the beneficiaries of its I-140 petitions that were pending or approved as of, or filed after, the priority date of the instant petition. In response to the NOIR the Petitioner submitted a list of more than 600 I-140 petitions filed, adjudicated and pending since 2018; copies of Forms W-2 it issued to employed I-140 beneficiaries in 2019; and 2019 IRS Forms 941, Employer's Quarterly Federal Tax Return. It also submitted unaudited financial statements for 2020, a letter from its chief financial officer (CFO), and a loan and security agreement dated October 9, 2017, demonstrating that it secured a line of credit in the amount of $9 million dollars.

In its NOIR response the Petitioner also asserted that it paid the Beneficiary other income in 2019 (totaling $31,651.98) and 2020 (totaling $53,039.93), in the form of housing benefits that should be considered to demonstrate that it paid her above the proffered wage in both years. In support of these payments, the Petitioner submitted a rent payment ledger for 2019 and individual rent payment records for the Beneficiary in 2020.

In his decision revoking the petition's approval the Director discussed the evidentiary deficiencies of the Petitioner's response to the NOIR and concluded that the Petitioner did not establish its ability to pay the proffered wages of every beneficiary of a pending (or approved) petition from the priority date onward. Specifically, the Director noted that the Petitioner's list of petitions filed, adjudicated and pending since 2018 was not accurate, as several entries for pending petitions on the list were not updated when adjudication was complete. The Director further noted that the Petitioner had not established that its rent payments for the Beneficiary constituted wages that were part of her salary.

On appeal the Petitioner asserts that the Director did not consider all evidence that it submitted in response to the NOIR, including its unaudited financial statements, the letter from its CFO, its line of credit, the housing benefits it paid for the Beneficiary, and the evidence of wages it paid to other beneficiaries in 2019.

In its brief, the Petitioner asserts that the Director misstated the total wages paid to the Beneficiary. In excluding the housing payments, it claims that "the Director mischaracterized the remuneration received by the Beneficiary as not salary." It cites to IRS Publication 15-B, Employer's Tax Guide to Fringe Benefits, in support of its claim that the housing payments are considered compensation equivalent to salary.

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[7] The Petitioner's ability to pay the proffered wage of one of the other I-140 beneficiaries is not considered:

- After the other beneficiary obtains lawful permanent residence;
- If an I-140 petition filed on behalf of the other beneficiary has been withdrawn, revoked, or denied without a pending appeal or motion; or
- Before the priority date of the I-140 petition filed on behalf of the other beneficiary.

Housing allowances are generally considered fringe benefits that are counted as taxable income to the employee and reported on Form W-2. A fringe benefit is a form of pay for the performance of services and is taxable to the recipient employee unless the law specifically excludes it. IRS Pub. 15-B, Employer's Tax Guide to Fringe Benefits, https://www.irs.gov/publications/p15b (last visited Feb. 24, 2022). For lodging to be excludable from wages, it must be for the convenience of the employer, on the employer's premises, and furnished as a condition of employment. Treas. Reg. § 1.119-1(b); *see also* IRS Pub. 15-B. Here, the Petitioner has not established that its housing payments meet these requirements. Further, the additional housing payments claimed by the Petitioner in 2019 are not included on the Beneficiary's Form W-2. Therefore, we will not consider the claimed housing allowances as part of the Beneficiary's renumeration.

USCIS records show that the Petitioner has filed more than 900 Form I-140 petitions for other beneficiaries in the last 36 months. The Petitioner did not provide a total of its proffered wage obligations on its list. In reviewing the list, we note that the Beneficiary's proffered wage of $59,000 per year is roughly average among the wages listed. Applying this amount to the vast majority of pending and approved I-140 petitions whose beneficiaries do not have LPR status results in a total proffered wage obligation of more than $50 million, which is above the Petitioner's net income and net current assets figures on its 2018 and 2019 federal income tax returns. The record includes copies of the Petitioner's 2018-2020 Forms 941, which the Petitioner cites as evidence of its payment of wages to the Beneficiaries. However, as noted by the Director, the Forms 941 apply to all of the Petitioner's employees, and the Petitioner has not distinguished which of the listed employees are I-140 beneficiaries and which are not. Moreover, the record does not include Forms 941 for all quarters of each year, and the total wages and salaries as recorded on the Petitioner's 2018 and 2019 Form 1120S corporate tax returns ($2.9 million in 2018, and $3.5 million in 2019) are below the estimated $50 million in wages owed to all beneficiaries. We also note that most of the 2019 Forms W-2 list wages paid to each beneficiary that were significantly below the proffered wages claimed on the submitted list. Therefore, the Petitioner has not established that it has the continuing ability to pay the proffered wage to each beneficiary in every year since the November 21, 2018 priority date based on wages it already paid to its beneficiaries.

The Petitioner asserts that it has a credit line exceeding $9 million and submits its loan and security agreement with California Bank of Commerce, dated October 9, 2017, and valid for a term of three years. Since the line of credit is a "commitment to loan" and not an existent loan, the Petitioner has not established that the unused funds from the line of credit are available at the time of filing the petition. Moreover, an existent loan would be reflected in the balance sheet provided in a petitioner's tax return or audited financial statement and is fully considered in the evaluation of the net current assets. Comparable to the limit on a credit card, the line of credit cannot be treated as cash or as a cash asset. However, if a petitioner wishes to rely on a line of credit as evidence of ability to pay, it must submit documentary evidence, such as a detailed business plan and audited cash flow statements, to demonstrate that the line of credit will augment and not weaken its overall financial position. Finally, USCIS will give less weight to loans and debt as a means of paying salary since the debts will increase a petitioner's liabilities and will not improve its overall financial position. Although lines of credit and debt are an integral part of any business operation, USCIS must evaluate the overall financial position of a petitioner to determine whether the employer is making a realistic job offer and has the overall financial ability to satisfy the proffered wage. *See Great Wall*, 16 I&N Dec. at 142. Here, the Petitioner does not assert that the line of credit was not already considered in an analysis of

its net current assets. Nor did it submit a detailed business plan or cash flow statements for the term of the loan (2017 to 2020), or evidence that the loan was extended beyond its three-year term and remains available as evidence of its continuing ability to pay proffered wages.[8] Therefore, we decline to accept the Petitioner's line of credit as evidence of its ability to pay the proffered wages to the beneficiaries of all of its petitions.

The Petitioner also submits its financial statements for 2020. However, these statements are not audited and have limited evidentiary weight, as they do not meet the regulatory requirement of an "audited financial statement." *See* 8 C.F.R. § 204.5(g)(2). Unaudited financial statements are the representations of management. The unsupported representations of management are not reliable evidence and are insufficient to demonstrate the ability to pay the proffered wage.

The statement from the Petitioner's CFO asserts that it paid salaries and housing allowances to its nurse employees totaling more than $43 million in 2017 and $39 million in 2018. The regulation at 8 C.F.R. § 204.5(g)(2) allows a statement from a financial officer of a petitioner with at least 100 employees to establish its ability to pay. The regulation, however, does not require USCIS to accept the letter as proof of the Petitioner's ability to pay. *See* 8 C.F.R. § 204.5(g)(2) (stating that we "may accept a statement from a financial officer" to establish a petitioner's ability to pay). For the reasons discussed below, we decline to accept the CFO's letter as sufficient evidence of the Petitioner's ability to pay.

As the Petitioner notes, we may consider the totality of its circumstances, consistent with *Matter of Sonegawa*, in determining its ability to pay the proffered wages of all its I-140 beneficiaries. The Petitioner submits additional materials as evidence that it has a sizeable number of employees on its payroll and that it is well respected within the industry. While these are some of many factors under consideration in our review of the totality of the circumstances, and we do not discount these materials entirely, they do not overcome the evidentiary deficiencies we have discussed concerning the Petitioner's proffered wage obligations overall.

The Petitioner was incorporated in 1996 and asserts on appeal that it has paid over $3.5 million in salaries and claims $60 million in costs of goods sold for its staff of nurses and other healthcare workers. In a statement from the Petitioner's president and chief executive officer, he states that the Petitioner has "an unblemished track record of providing much needed professional nurses to the U.S. healthcare industry for three decades." However, the record does not support this historical claim and does not show the Petitioner's growth since its incorporation.[9] In her letter submitted to the record, the Petitioner's CFO detailed the Petitioner's selected financial information for 2015, 2016, 2017, and 2018, and asserted that the Petitioner has shown consistent growth. However, reviewing those figures in conjunction with the Petitioner's 2019 federal tax return, its gross sales and costs of goods sold decreased between 2017 and 2018; and its net income and net current assets show little fluctuation from 2017 to 2019.

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[8] The Petitioner's "Balance Sheet As Of December 31, 2020" lists, among its current liabilities, a "California Bank of Commerce Line" in the amount of $13,069,801.56, suggesting that the cash flow from the loan has exceeded the initial line of credit.

[9] Public records indicate that the Petitioner filed for Chapter 11 bankruptcy in California in 2011, which conflicts with its claim of three decades of success. *In re Westways Staffing Services, Inc.*, 8:11-bk-26052 (Bankr. C.D. Cal. 2011).

Further, unlike in *Sonegawa*, the record does not indicate the Petitioner's incurrence of uncharacteristic losses or expenses. The record also does not indicate the Beneficiary's replacement of an employee or outsourced service. In addition, unlike in *Sonegawa*, the Petitioner must demonstrate its ability to pay the combined proffered wages of multiple petitions which represent a significant wage burden. Upon review of the totality of the circumstances in this case, the Petitioner has not established by a preponderance of the evidence that it has the continuing ability to pay the proffered wage to the Beneficiary of this petition and the proffered wages to the beneficiaries of the multiple other petitions that it has filed.

III. CONCLUSION

In accord with the analysis above, the Petitioner has not established its ability to pay the proffered wage to the beneficiaries of each of its petitions from the priority date as required by 8 C.F.R. § 204.5(g)(2). 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. Therefore, the appeal will be dismissed.

ORDER: The appeal is dismissed.