U.S. Citizenship and Immigration Services

Non-Precedent Decision of the Administrative Appeals Office

In Re: 8099020

Date: APR. 1, 2020

Appeal of Texas Service Center Decision

Form I-140, Immigrant Petition for Other Worker

The Petitioner seeks to employ the Beneficiary as a home health aide. It requests classification of the Beneficiary as an unskilled worker under the third preference immigrant classification. Immigration and Nationality Act (the Act) section 203(b)(3)(A)(iii), 8 U.S.C. § 1153(b)(3)(A)(iii). 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 less than 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 proffered wage.

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 withdraw the Director's decision and remand the matter for further proceedings consistent with our opinion and for the entry of a new decision.

I. THE EMPLOYMENT-BASED IMMIGRATION PROCESS

Employment-based immigration generally follows a three-step process. First, an employer obtains an approved labor certification from the U.S. Department of Labor (DOL).[1] *See* section 212(a)(5)(A)(i) of the Act, 8 U.S.C. § 1182(a)(5)(A)(i). By approving the labor certification, the DOL certifies that there are insufficient U.S. workers who are able, willing, qualified, and available for the offered position and that employing a foreign national in the position will not adversely affect the wages and working conditions of domestic workers similarly employed. *See* section 212(a)(5)(A)(i)(I)-(II) of the Act. Second, the employer files an immigrant visa petition with U.S. Citizenship and Immigration Services (USCIS). *See* section 204 of the Act, 8 U.S.C. § 1154. Third, if USCIS approves the petition, the foreign national applies 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.

[1] The priority date of a petition is the date the DOL accepted the labor certification for processing, which in this case is May 31, 2018. *See* 8 C.F.R. § 204.5(d).

II. ABILITY TO PAY THE PROFFERED WAGE

The Director concluded that the Petitioner did not establish its continuing ability to pay the proffered wage. The proffered wage is $10.41 per hour ($21,652.80 per year based on a 40-hour work week).

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 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 determining a petitioner's ability to pay, we first examine whether it paid a beneficiary the full proffered wage each year from a petition's priority date. The record here does not demonstrate that the Petitioner has paid the Beneficiary any wages from the priority date onward. Since the Petitioner did not pay the Beneficiary any wages, we next examine whether it had sufficient annual amounts of net income or net current assets to pay the proffered wage.[2] As noted by the Petitioner in its response to the Director's request for evidence (RFE) and on appeal, we may also 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).

The Petitioner is a limited liability company (LLC) taxed as a sole proprietorship. It stated on the petition that it employs 130 workers. With the petition, the Petitioner submitted a letter from [redacted] stating that the Petitioner had the ability to pay the proffered wage. However, as noted by the Director in his decision, the letter did not indicate that it was from a financial officer of the organization pursuant to 8 C.F.R. § 204.5(g)(2). In response to the Director's RFE, the Petitioner submitted its member's 2017 IRS Form 1040, Schedule C, and IRS Forms W-2 for the Petitioner's employees for 2018. The 2017 Schedule C states net income[3] of $73,153 in 2017, which is sufficient to pay the proffered wage. However, the Schedule C did not indicate a business name or business address; it

[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 1305, 1309 (9th Cir. 1984); *Estrada-Hernandez v. Holder*, -- F. Supp. 3d --, 2015 WL 3634497, *5 (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] For an LLC taxed as a sole proprietorship, net income is reported on its member's IRS Form 1040, Schedule C, at line 31.

indicated that its principal business was a "nursing home;" it stated a business code of 62300 which relates to nursing and residential care facilities; and it did not list the Petitioner's employer identification number (EIN).[4] Thus, the Director determined that the 2017 tax return did not relate to the Petitioner and found that the Petitioner did not establish its ability to pay the proffered wage.

On appeal, the Petitioner submits a letter from its certified public accountant (CPA) stating that he inaccurately described the Petitioner's business on the 2017 Schedule C as a nursing home, when it should have been described as a "non-medical home health care agency." He stated that he should have used code 621610 relating to nursing and residential home care to describe the Petitioner's business. He also stated that he neglected to include the Petitioner's business name and business address on Schedule C, but that his oversights do not affect the materiality of the Schedule C and are not sufficient grounds for filing an amended tax return. However, as further detailed below, the Petitioner did not establish that it has the ability to pay the proffered wage from the priority date in 2018 onward. Because the Director did not examine the Petitioner's ability to pay from 2018 onward, we will remand the matter to the Director for further consideration.

On appeal, the Petitioner submits a letter from its bookkeeper and asserts that the letter "demonstrates the Petitioner's ability to pay based on its net current assets." The letter states that the Petitioner does not have a chief financial officer and that the bookkeeper has prepared monthly financial statements for the Petitioner since 2016. The letter confirms the Petitioner's net assets since 2016,[5] its total current assets in May 2019,[6] and its net profit in May 2019. The letter also confirms the Petitioner's operating account balance in its bank account as of May 31, 2019. However, the letter does not confirm that the Petitioner had the ability to pay the proffered wage from the priority date in 2018 onward.

The bookkeeper's letter is supported by unaudited financial statements for the Petitioner for the five months ending May 2019.[7] However, where a petitioner relies on financial statements to demonstrate its ability to pay the proffered wage, the financial statements must be audited. 8 C.F.R. § 204.5(g)(2). As there is no accountant's report accompanying these statements, we cannot conclude that they are audited statements. Unaudited financial statements are the representations of the Petitioner's management and are insufficient to demonstrate the ability to pay the proffered wage. The bookkeeper's letter is also supported by the Petitioner's operating account bank statement for the month ending May 31, 2019.[8] However, bank statements are not among the three types of evidence listed in 8 C.F.R. § 204.5(g)(2) that are required to illustrate a petitioner's ability to pay a proffered wage. While this regulation allows additional material "in appropriate cases," the Petitioner has not demonstrated why the documentation specified at 8 C.F.R. § 204.5(g)(2) is inapplicable. Further, bank statements show the amount in an account on a given date and cannot show the continuing ability

[4] Instead, it listed the member's social security number.

[5] Net assets include non-current assets and liabilities and do not generally represent assets that can be liquidated during the course of normal business. As previously noted, the Petitioner must establish that it had sufficient net income or net current assets to pay the proffered wage.

[6] The Petitioner's total current assets must be balanced by its total current liabilities.

[7] The statements do not cover 2018 and cover only a portion of 2019.

[8] The statement does not cover 2018 and covers only one month in 2019.

to pay a proffered wage. The May 2019 bank statement is insufficient to demonstrate the Petitioner's continuing ability to pay the proffered wage.

The record does not contain regulatory required evidence of the Petitioner's ability to pay the proffered wage from the priority date in 2018 and continuing until the beneficiary obtains lawful permanent residence. As noted above, the regulation at 8 C.F.R. § 204.5(g)(2) requires that "[e]vidence of this ability shall be either in the form of copies of annual reports, federal tax returns, or audited financial statements." Without regulatory-prescribed evidence of its ability to pay for 2018 onward, we cannot affirmatively find that the Petitioner has the continuing ability to pay the proffered wage from the priority date. On remand, the Director should request such regulatory-required evidence and allow the Petitioner reasonable time to respond.[9]

Additionally, where a petitioner has filed Form 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* 8 C.F.R. § 204.5(g)(2); *see also Patel v. Johnson*, 2 F. Supp. 3d 108, 124 (D. Mass. 2014) (upholding our denial of a petition where a petitioner did not demonstrate its ability to pay multiple beneficiaries). USCIS records show that the Petitioner filed multiple Form I-140 petitions for other beneficiaries. Thus, the Petitioner must establish its ability to pay this Beneficiary as well as the beneficiaries of the other Form I-140 petitions that were pending or approved as of, or filed after, the priority date of the current petition.[10] We do not consider the other beneficiaries for any year that the Petitioner has paid the Beneficiary a salary equal to or greater than the proffered wage.

The Petitioner must document the receipt numbers, names of beneficiaries, priority dates, and proffered wages of these other petitions, and indicate the status of each petition and the date of any status change (i.e., pending, approved, withdrawn, revoked, denied, on appeal or motion, beneficiary obtained lawful permanent residence). To offset the total wage burden, the Petitioner may submit documentation showing that it paid wages to other beneficiaries. To demonstrate that it has the ability to pay the Beneficiary and the other beneficiaries, the Petitioner must, for each year at issue (a) calculate any shortfall between the proffered wages and any actual wages paid to the primary Beneficiary and its other beneficiaries, (b) add these amounts together to calculate the total wage deficiency, and (c) demonstrate that its net income or net current assets exceed the total wage deficiency.[11] Without this information, we cannot determine the Petitioner's ability to pay the combined proffered wages of all of its applicable beneficiaries. On remand, the Director should request such evidence and allow the Petitioner reasonable time to respond.

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[9] We note the letter from the Petitioner's CPA regarding the errors made on the Petitioner's 2017 tax return. If similar errors were made on the Petitioner's subsequent tax returns, and the Petitioner intends to rely on those returns to establish its ability to pay, the Director should request certified copies of the returns to establish that they were actually received and processed by the IRS.

[10] 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.

[11] 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).

ORDER: The decision of the Director is withdrawn. The matter is remanded for the entry of a new decision consistent with the foregoing analysis.