U.S. Citizenship and Immigration Services

Non-Precedent Decision of the Administrative Appeals Office

In Re: 37466991

Date: APR. 11, 2025

Appeal of Nebraska Service Center Decision

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

The Petitioner, a trucking company, seeks to employ the Beneficiary as a truck driver. The company requests his classification under the employment-based, third-preference (EB-3) immigrant visa category as an "other worker." *See* Immigration and Nationality Act (the Act) section 203(b)(3)(A)(iii), 8 U.S.C. § 1153(b)(3)(A)(iii). Businesses may sponsor aliens for U.S. permanent residence in this category to work in jobs requiring less than two years of training or experience. *See* 8 C.F.R. § 204.5(l)(2) (defining the term "other worker").

The Director of the Nebraska Service Center denied the petition. The Director concluded that the Petitioner did not demonstrate its required ability to pay the offered job's proffered wage. On appeal, the company submits additional evidence.

The Petitioner bears the burden of demonstrating eligibility for the requested benefit by a preponderance of the evidence. *Matter of Chawathe*, 25 I&N Dec. 369, 375-76 (AAO 2010). Exercising de novo appellate review, *see Matter of Christo's, Inc.*, 26 I&N Dec. 537, 537 n.2 (AAO 2015), we conclude that, before the decision's issuance, the company received notice of the required additional evidence and had a reasonable opportunity to submit it. We therefore decline to consider its appellate evidence and will dismiss the appeal.

I. LAW

Immigration as an other – or "unskilled" – worker generally follows a three-step process. First, a prospective employer must obtain certification from the U.S. Department of Labor (DOL) that: there are insufficient U.S. workers able, willing, qualified, and available for an offered job; and an alien's permanent employment in the position would not harm wages and working conditions of U.S. workers with similar jobs. Section 212(a)(5)(A)(i) of the Act, 8 U.S.C. § 1182(a)(5)(A)(i).

Second, an employer must submit a DOL-approved labor certification with an immigrant visa petition to U.S. Citizenship and Immigration Services (USCIS). Section 204(a)(1)(F) of the Act, 8 U.S.C. § 1154(a)(1)(F). Among other things, USCIS determines whether an alien beneficiary meets the requirements of a DOL-certified position and a requested immigrant visa category. 8 C.F.R. § 204.5(l)(3)(ii)(D).

Finally, if USCIS approves a petition, a beneficiary may apply 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.

II. ANALYSIS

A. Ability to Pay the Proffered Wage

A petitioner must demonstrate its continuing ability to pay an offered job's proffered wage, from a petitioner's priority date until a beneficiary obtains U.S. permanent residence. 8 C.F.R. § 204.5(g)(2). Evidence of ability to pay must generally include copies of a petitioner's annual reports, federal tax returns, or audited financial statements. *Id.*

When determining ability to pay, USCIS examines whether a petitioner paid a beneficiary the full proffered wage, beginning with the year of a petition's priority date. *See generally* 6 *USCIS Policy Manual* E.4(C)(1), www.uscis.gov/policy-manual. If a petitioner did not annually pay a beneficiary the full proffered wage or did not pay a beneficiary at all, USCIS considers whether the business generated annual amounts of net income or net current assets sufficient to pay any differences between the proffered wage and the wages paid. *See generally* 6 *USCIS Policy Manual* E.4(C)(2). If net income and net current assets are insufficient, USCIS may consider other factors potentially 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); *see generally* 6 *USCIS Policy Manual* E.4(C)(3).[1]

The Petitioner's labor certification states the proffered wage of the offered truck driver job as $54,288 a year. The petition's priority date is November 10, 2022, the date DOL accepted the labor certification application for processing. *See* 8 C.F.R. § 204.5(d) (explaining how to determine a petition's priority date).

When the Director issued a request for additional evidence (RFE) in November 2024, regulatory required evidence of the Petitioner's ability to pay the proffered wage in 2024 was not yet available. *See* 6 *USCIS Policy Manual* E.4(A) (requiring prospective employers to provide required ability-to-pay evidence "for each *available* year from the priority date") (emphasis added). We will therefore consider the company's ability to pay only in 2022, the year of the petition's priority date, and 2023.

The record does not indicate the Petitioner's employment of the Beneficiary, nor did the company submit any evidence that it paid him in 2022 or 2023. Thus, based solely on wages paid, the company has not demonstrated its ability to pay the proffered wage.

The petition's initial filing in March 2024 included a copy of the Petitioner's federal income tax return for 2022. The tax return reflects $303,556 in net income and $1,049,351 in net current assets. Both amounts exceed the $54,288 annual proffered wage. Thus, based on either net income or net current assets, the Petitioner demonstrated its ability to pay the proffered wage in 2022.

[1] Federal courts have upheld USCIS' method of determining a petitioner's ability to pay a proffered wage. *See, e.g., Constr. & Design Co. v. USCIS*, 563 F.3d 593, 596 (7th Cir. 2009) (stating that USCIS first examines a prospective employer's "income tax returns and balance sheet").

The Director's November 2024 RFE requested proof of the Petitioner's ability to pay in 2023 and additional evidence of the Beneficiary's possession of at least one year's experience in the offered job as required by the labor certification. The company's RFE response included evidence of the Beneficiary's experience. But the response did not address the company's ability to pay the proffered wage in 2023. *See* 8 C.F.R. § 103.2(b)(14) ("Failure to submit requested evidence which precludes a material line of inquiry shall be grounds for denying the benefit request.")

On appeal, the Petitioner submits a copy of its federal income tax return for 2023. The company states that its "2023 tax return was not available when the [Form] I-140[, Immigrant Petition for Alien Worker] was filed but it is available now and proves that the petitioner is able to pay the offered wage."

The 2023 tax return reflects net income of $201,873 and net current assets of -$256,969. The net income amount exceeds the $54,288 annual proffered wage. Thus, as the Petitioner argues, the tax return appears to demonstrate the company's ability to pay the proffered wage in 2023.

But we disregard evidence submitted on appeal "[w]here . . . the petitioner was put on notice of the required evidence and given a reasonable opportunity to provide it for the record before the denial." *Matter of Soriano*, 19 I&N Dec. 764, 766 (BIA 1988). The Director's RFE specifically asked the Petitioner to submit, within 88 days of the notice's date, a copy of its 2023 federal income tax return or other regulatory required evidence of its ability to pay the proffered wage that year. The company therefore received notice of the required evidence and a reasonable opportunity to submit it.

As the Petitioner argues, its 2023 federal tax return was unavailable at the time of the petition's March 2024 filing. But the record shows the company's extension of the return's filing deadline to October 15, 2024. *See* U.S. Internal Rev. Serv., Form 4868 (2023), Application for Automatic Extension of Time to File U.S. Individual Income Tax Return, www.irs.gov/forms-pubs. Thus, by the RFE's issuance in the following month of November 2024, a copy of the Petitioner's 2023 tax return should have been available. The company has not documented or even asserted the return's unavailability at that time. A preponderance of the evidence therefore establishes availability of the Petitioner's 2023 tax return at the time of the RFE's issuance. Thus, under *Soriano*, we decline to consider the Petitioner's evidence on appeal.

The Petitioner did not demonstrate its continuous ability to pay the offered job's proffered wage from the petition's priority date onward. We will therefore affirm the petition's denial.

B. The Validity of the Petitioner's Signature on the Appeal Notice

The Petitioner also has not established the validity of its appellate filing.

Petitioners must validly sign their benefit requests. 8 C.F.R. §§ 103.2(a)(2), (7)(ii)(A); *see* USCIS, "Instructions for Notice of Appeal or Motion," 2 ("You (or your signing authority) must properly complete your form."), www.uscis.gov/forms/all-forms; *see also* 8 C.F.R. § 103.2(a)(1)(i) (incorporating form instructions into the regulations). A benefit request filed by a company must include the signature of "a person with the authority to sign on behalf of the petitioning entity." 1 *USCIS Policy Manual* B.2(C)(3), www.uscis.gov/policy-manual. An authorized signatory may include an executive officer, human resources representative, or any company employee with "the

authority to legally bind and commit the entity to the terms and conditions attached to the specific request and attestations made in the request." *Id.*

The Petitioner's Form I-290B, Notice of Appeal or Motion, omits the name and title of the company's signatory. *See* 8 C.F.R. § 103.3(a)(2)(i) (requiring an affected party to "submit the complete appeal"). Also, the signature of the company's I-290B signatory clearly differs from the marks of the entity's authorized representatives on its Form I-140, accompanying labor certification, and Forms G-28, Notices of Entries of Appearance. Thus, contrary to regulations, the Petitioner has not demonstrated that it authorized its signatory on the Form I-290B.

In any future filings in this matter, the Petitioner must demonstrate that it authorized its I-290B signatory to sign the appeal notice on its behalf.

III. CONCLUSION

The Petitioner has not demonstrated its continuing ability to pay the offered job's proffered wage. We will therefore affirm the petition's denial.

ORDER: The appeal is dismissed.