U.S. Citizenship and Immigration Services

Non-Precedent Decision of the Administrative Appeals Office

In Re: 8076213

Date: APR. 29, 2020

Motion on Administrative Appeals Office Decision

Form I-140, Immigrant Petition for Skilled Worker

The Petitioner seeks to employ the Beneficiary as a registered nurse.[1] It requests her classification as a skilled worker under the third-preference immigrant category. Immigration and Nationality Act (the Act) section 203(b)(3)(A)(i), 8 U.S.C. § 1153(b)(3)(A)(i). This category allows a U.S. business to sponsor a foreign national with at least two years of training or experience for lawful permanent resident status.

The Director of the Texas Service Center denied the petition, concluding that the record did not establish that the Beneficiary's education meets the minimum requirements of the labor certification. We dismissed a subsequent appeal. We determined that the Petitioner has not established that the Beneficiary meets the requirements stated on the labor certification, and that the Petitioner has not demonstrated its continuing ability to pay the proffered wage to the Beneficiary of this petition and to the beneficiaries of multiple other petitions that it has filed. The matter is now before us on a motion to reopen and motion to reconsider.

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 review, we will dismiss the motion to reopen and the motion to reconsider.

I. MOTION REQUIREMENTS

A petitioner must meet the formal filing requirements of a motion and show proper cause for granting the motion. 8 C.F.R. § 103.5(a)(1). A motion to reopen must state new facts and be supported by documentary evidence. 8 C.F.R. § 103.5(a)(2). 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). A motion to reconsider must be supported by a pertinent precedent or adopted decision, statutory or

[1] A Schedule A occupation is an occupation 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 foreign nationals in such occupations. The current list of Schedule A occupations includes professional nurses and physical therapists. *Id.*

regulatory provision, or statement of U.S. Citizenship and Immigration Services (USCIS) or Department of Homeland Security policy. *Id.*

In addition, a petitioner must submit "a statement about whether or not the validity of the unfavorable decision has been or is the subject of any judicial proceeding and, if so, the court, nature, date, and status or result of the proceeding." 8 C.F.R. § 103.5(a)(1)(iii)(C). A motion that does not meet applicable requirements shall be dismissed. 8 C.F.R. § 103.5(a)(4).

II. ABILITY TO PAY

On motion, the Petitioner does not clearly differentiate between arguments for reopening and those for reconsideration. Attempting two separate discussions of the motion would further complicate matters. Considered in the aggregate, as discussed below, the Petitioner has not made a persuasive case in favor of granting either motion.

A petitioner must demonstrate its continuing ability to pay a proffered wage from a petition's priority date[2] until a beneficiary obtains lawful permanent residence. 8 C.F.R. § 204.5(g)(2). Evidence of ability to pay must include copies of annual reports, federal tax returns, or audited financial statements. *Id.* The proffered wage in this case is $56,971 per year.

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. On motion, the Petitioner submits the Beneficiary's 2018 IRS Form W-2, Wage and Tax Statement, showing that it paid the Beneficiary $23,521.45 in wages that year, which is less than the proffered wage. On motion, the Petitioner states that it paid the Beneficiary an additional $22,446.28 in housing allowances in 2018 and asserts that these housing allowances should be considered in the calculation of its ability to pay because they are part of the Beneficiary's renumeration for her services. The Petitioner states that it pays housing allowances directly to its employees and that its employees have "full control of how to allocate and spend their housing allowances, similar to their wages." Based on the Petitioner's description, it appears that the purported $22,446.28 in housing payments should have been included in the Beneficiary's compensation reported on her Form W-2. The record does not indicate why they were not.

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 Apr. 23, 2020). However, the Petitioner has not identified any exclusions that apply to the purported housing allowances.[3] The record does not indicate why the allowances were excluded from her Form W-2. On motion, the Petitioner cites a 2006 non-precedent[4] Administrative Appeals Office (AAO) decision

[2] The priority date of the petition is March 2, 2018, the date the completed, signed petition was properly filed with USCIS. *See* 8 C.F.R. § 204.5(d).

[3] 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).

[4] The AAO decision was not published as a precedent and therefore does not bind USCIS officers in future adjudications. *See*

for the proposition that we should include amounts shown on IRS Form 1099, Miscellaneous Income, as supporting evidence of wages paid to a Beneficiary. However, the record does not contain a 2018 Form 1099 for the Beneficiary.[5] Thus, we will not consider the claimed housing allowances as part of the Beneficiary's renumeration. In 2018, the Petitioner must establish that it can pay the difference between the proffered wage of $56,971 and the wages paid of $23,521.45, which is $33,449.55.[6]

If, as here, 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 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. On motion, the Petitioner submits its 2018 IRS Form 1120S, U.S. Income Tax Return for an S Corporation, which shows net income of $932,350. Thus, the Petitioner has sufficient net income to pay the difference between the proffered wage and the wages paid to the Beneficiary in 2018.

However, where a petitioner has filed 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). As noted in our prior decision, USCIS records show that the Petitioner has filed hundreds of Form I-140 petitions for other beneficiaries. We stated in our prior decision that 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.[7] 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 record contains a chart listing information regarding dozens of other Form I-140 petitions filed by the Petitioner between January 17, 2017, and March 27, 2018.[8] For each year at issue, the determination of the Petitioner's ability to pay the wages of beneficiaries of Forms I-140 that were

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8 C.F.R. § 103.3(c). Non-precedent decisions apply existing law and policy to the specific facts of an individual case, and may be distinguishable based on the evidence in the record of proceedings, the issues considered, and applicable law and policy

[5] Although the Petitioner submitted computer printouts of its claimed housing payments to the Beneficiary, the record lacks evidence - such as copies of deposited checks - corroborating the company's payments of the listed amounts to the Beneficiary on the referenced dates.

[6] Even if the full amount of the purported housing allowance was added to the W-2 wages, a shortfall would have remained. We note that on motion, the Petitioner submits the Beneficiary's paystubs through September 8, 2019, showing that she was paid $34,718 in gross wages, which is less than the proffered wage.

[7] 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. Further, 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.

[8] The chart only shows 2018 wages paid to certain beneficiaries through April 30, 2018. It also lists housing allowances paid to certain beneficiaries but, as detailed above, we will not consider housing allowances as part of a beneficiary's renumeration.

pending or approved as of, or filed after, the priority date of the current petition is made as follows: (a) calculate any shortfall between the proffered wages and any actual wages paid to the primary Beneficiary and the Petitioner's 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.[9] In 2018, based on the wage information listed on the chart, neither the Petitioner's net income of $932,350 nor its net current assets of $1,454,397 exceed the total wage deficiency.

Further, the record contains no information about dozens of other petitions that USCIS records show were pending or approved as of, or filed after, the priority date of the current petition. The Petitioner has not documented the receipt numbers, names of beneficiaries, priority dates, and proffered wages of these other petitions; indicated 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); or submitted documentation showing that it paid wages to these other beneficiaries. Thus, based on the deficiencies listed above, the Petitioner has not demonstrated its continuing ability to pay the proffered wage to the Beneficiary of this petition and to the beneficiaries of multiple other petitions that it has filed.

We will analyze the totality of the Petitioner's circumstances in reviewing its ability to pay multiple beneficiaries. 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).

The Petitioner was incorporated in 1996 and had approximately 1000 employees as of filing in March 2018. On motion, the Petitioner asserts that we can judge the Petitioner's ability to pay by taking into consideration its "track record of being able to actually meet its payroll and payroll tax obligations." It submits its IRS Form 941, Employer's Quarterly Federal Tax Return, for the several quarters in 2018 and 2019, and its corresponding California quarterly contribution returns and wage reports. The Petitioner has established that it has a sizeable number of employees on its payroll, which is one of many factors under consideration in our review of the totality of the circumstances in this case.

However, the record does not show the Petitioner's growth since its incorporation, and the Petitioner has not provided credible evidence of its reputation in its industry. 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 its 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.

[9] 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).

On motion, the Petitioner, through prior counsel, asserts that "[a]s opposed to judging [the Petitioner's] ability to pay the proffered wages of each of the beneficiaries of the multiple petitions it has filed based solely on its income tax returns," we can judge the Petitioner's ability to pay by taking into consideration its expectation of increased business; the increase in profits due to its expanding workforce the increasing demand of registered nurses due to the nursing shortage; its "well-founded business operations" for 20 years; and its "past and present financial standing and its viable financial projections." However, the 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)). Counsel's statements must be substantiated with independent evidence. The Petitioner submits no evidence on motion to support its prior counsel's claims.

In sum, the record does not establish the Petitioner's 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. The Petitioner has not overcome this ground for dismissal of the appeal. The motion to reopen and motion to reconsider will be dismissed for the above stated reason.

The Petitioner did not submit a statement indicating whether or not the validity of the unfavorable decision has been or is the subject of any judicial proceeding. The motion to reopen and motion to reconsider will be dismissed for this additional reason. *See* 8 C.F.R. § 103.5(a)(1)(iii)(C).

III. RESERVED ISSUE

We also determined that the Petitioner has not established that the Beneficiary meets the requirements stated on the labor certification. However, because the Petitioner's ability to pay is dispositive in this case, we need not reach the remaining issue and therefore reserve it.

ORDER: The motion to reopen is dismissed.

FURTHER ORDER: The motion to reconsider is dismissed.