U.S. Citizenship and Immigration Services

Non-Precedent Decision of the Administrative Appeals Office

In Re: 10527889

Date: AUG. 3, 2020

Appeal of Nebraska Service Center Decision

Form I-140, Immigrant Petition for Other Worker

The Petitioner seeks to employ the Beneficiary as a caregiver at a residential home for elderly people. It requests his classification under the third-preference, immigrant category for "other workers." *See* Immigration and Nationality Act (the Act) section 203(b)(3)(A)(iii), 8 U.S.C. § 1153(b)(3)(A)(iii).

The Director of the Nebraska Service Center denied the petition. The Director concluded that the Petitioner did not establish its required ability to pay the proffered wage of the offered position.

The Petitioner bears the burden of establishing 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 entry of a new decision consistent with the following analysis.

I. EMPLOYMENT-BASED IMMIGRATION

Immigration as an unskilled worker generally follows a three-step process. To permanently fill a position in the United States with a foreign worker, a prospective employer must first obtain certification from the U.S. Department of Labor (DOL). *See* section 212(a)(5)(A)(i) of the Act, 8 U.S.C. § 1182(a)(5)(A)(i). DOL approval signifies that insufficient U.S. workers are able, willing, qualified, and available for an offered position. *Id.* Labor certification also indicates that employment of a foreign national will not harm wages and working conditions of U.S. workers with similar jobs. *Id.*

If DOL approves a position, an employer must next submit the certified labor application with an immigrant visa petition to U.S. Citizenship and Immigration Services (USCIS). *See* section 204 of the Act, 8 U.S.C. § 1154. Among other things, USCIS determines whether a beneficiary meets the requirements of a DOL-certified position and a requested visa classification. If USCIS grants a petition, a foreign national may finally 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. ABILITY TO PAY THE PROFFERED WAGE

A petitioner must demonstrate its continuing ability to pay the proffered wage of an offered position, from a petition's priority date until a beneficiary obtains lawful permanent residence. 8 C.F.R.

§ 204.5(g)(2). If a petitioner employs less than 100 workers, as in this case, evidence of ability to pay must include copies of annual reports, federal tax returns, or audited financial statements. *Id.*

In determining ability to pay, USCIS considers whether a petitioner paid a beneficiary the full proffered wage each year from a petition's priority date. If a petitioner did not pay a beneficiary at all or did not annually pay him or her the full proffered wage, USCIS examines whether the business generated enough annual amounts of net income or net current assets to pay any differences between an annual 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).[1]

Here, the accompanying labor certification states the proffered wage of the offered position of caregiver as $24,606 a year. The petition's priority date is April 29, 2019, 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).

The record indicates the Beneficiary's residency in the Philippines and lacks evidence of the Petitioner's employment of him. Based solely on wages paid, the Petitioner therefore has not demonstrated its ability to pay the proffered wage.

At the time of the Director's decision, required evidence of the Petitioner's ability to pay in 2019, the year of the petition's priority date, was not yet available. On appeal, however, the Petitioner submits a copy of its federal income tax return for 2019. The return reflects net income of $28,684 and net current assets of $41,358. Both amounts exceed the annual proffered wage of $24,606. The Petitioner therefore appears to have demonstrated its ability to pay the individual proffered wage of the offered position.

USCIS records, however, indicate the Petitioner's filing of a Form I-140 petition for another beneficiary after this petition's filing.[2] A petitioner must demonstrate its ability to pay the proffered wage of each petition it files until a beneficiary obtains lawful permanent residence. 8 C.F.R. § 204.5(g)(2). The Petitioner here must therefore demonstrate its ability to pay the combined proffered wages of this and the other petition if it was pending or approved as of this petition's priority date or filed thereafter. *See Patel v. Johnson*, 2 F.Supp.3d 108, 124 (D. Mass. 2014) (affirming 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).[3]

Because the Petitioner filed its other petition after this petition's priority date of April 29, 2019, it must demonstrate its ability to pay the combined proffered wages of both petitions. The record, however,

[1] Federal courts have upheld USCIS' 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).

[2] USCIS records identify the other petition by the receipt number [redacted]

[3] The Petitioner need not demonstrate its ability to pay proffered wages of petitions that it withdrew, or that USCIS rejected, denied, or revoked. The Petitioner also need not demonstrate its ability to pay proffered wages of petitions before their corresponding priority dates, or after the dates their corresponding beneficiaries obtained lawful permanent residence.

lacks the proffered wage or priority date of the Petitioner's other petition. Also, the Director did not request this information from the company. We will therefore remand the matter.

On remand, the Director should ask the Petitioner to provide the proffered wage and priority date of its other petition. The Petitioner may also submit additional evidence of its ability to pay the combined proffered wages in 2019, including evidence of any wages it paid the other beneficiary or materials supporting factors stated in *Sonegawa*.

III. CONCLUSION

The Petitioner has not demonstrated its ability to pay the combined proffered wages of all its applicable beneficiaries.

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