U.S. Citizenship and Immigration Services

Non-Precedent Decision of the Administrative Appeals Office

In Re: 33301927

Date: AUG. 13, 2024

Appeal of Nebraska Service Center Decision

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

The Petitioner, a provider of software development services, seeks to employ the Beneficiary as a senior systems analyst. The company requests her classification under the employment-based, third-preference (EB-3) immigrant visa category as a "skilled worker." *See* Immigration and Nationality Act (the Act) section 203(b)(3)(A)(i), 8 U.S.C. § 1153(b)(3)(A)(i). Businesses may sponsor noncitizens for U.S. permanent residence in this category to work in jobs requiring at least two years of training or experience. *Id.*

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 states that, despite reporting uncharacteristic financial liabilities after acquiring other firms, a "totality of the circumstances" establishes its ability to pay.

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 the company must establish its ability to pay the combined proffered wages of this and other petitions it filed, and that the Director must consider additional factors – including purported uncharacteristic acquisition-related liabilities – that may have affected its ability to pay. We will therefore withdraw the Director's decision and remand the matter for entry of a new decision consistent with the following analysis.

I. LAW

Immigration as a skilled 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 a noncitizen's permanent employment in the job 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. Among other

things, USCIS determines whether a noncitizen 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), (4).

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(a) of the Act, 8 U.S.C. § 1255(a).

II. ANALYSIS

A petitioner must demonstrate its continuing ability to pay an offered job's proffered wage, from a petition's priority date until a beneficiary obtains lawful permanent residence. 8 C.F.R. § 204.5(g)(2). Evidence of ability to pay must generally include copies of annual reports, federal tax returns, or audited financial statements. *Id.* If a petitioner employs at least 100 people, however, a statement from a financial officer may demonstrate its ability to pay. *Id.*

When determining ability to pay, USCIS examines whether a petitioner paid a beneficiary the full proffered wage each year, 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 the full proffered wage or did not pay a beneficiary at all, the Agency 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 a beneficiary. *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).[1]

The Petitioner's labor certification states the proffered wage of the offered job of senior systems analyst as $146,682 a year. The petition's priority date is October 26, 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).

At the time of the appeal's filing, regulatory required evidence of the Petitioner's ability to pay the proffered wage was not yet available for 2023. For the purposes of this decision, we will therefore consider the company's ability to pay only in 2022, the year of the petition's priority date.

The Beneficiary attested on the labor certification that she began working for the Petitioner in February 2022, before the labor certification application's filing in October 2022. The company, however, did not submit any evidence that it paid her. Thus, based solely on wages paid, the Petitioner has not demonstrated its ability to pay the proffered wage in 2022.

The Petitioner submitted copies of its audited financial statements for 2022. The statements reflect net income of -$32,168,994 and net current assets of -$309,271. These negative amounts do not equal or exceed the annual proffered wage of $146,682. They therefore do not demonstrate the company's

[1] Federal courts have upheld USCIS' method of determining a petitioner's ability to pay a proffered wage. *See, e.g., River St. Donuts, Inc. v. Napolitano*, 558 F.3d 111, 118 (1st Cir. 2009); *Décor Team LLC v. McAleenan*, 520 F.Supp.3d 1212, 1223-25 (D. Ariz. 2021).

ability to pay the proffered wage. Thus, examinations of the wages the Petitioner paid the Beneficiary, its net income, and its net current assets do not establish its ability to pay in 2022.

On appeal, the Petitioner notes that USCIS may consider other factors potentially affecting the company's ability to pay. *See Matter of Sonegawa*, 12 I&N Dec. at 614-15. The company's chief financial officer (CFO) argues that it incurred uncharacteristic liabilities in 2022 when it acquired other companies. She stated that, under generally accepted accounting principles, the Petitioner's financial statements for that year reflect estimates of the company's acquisition costs. The company also provided copies of its audited financial statements from 2015 through 2021, and the CFO argues that the company would have had sufficient annual amounts of net income, net current assets, or both to pay the proffered wage in those prior years. *See Taiyang Foods Inc. v. USCIS*, 444 Fed.Appx. 115, 115 (9th Cir. 2011) (stating that *Sonegawa* applies if a failure to demonstrate ability to pay a proffered wage "was an anomaly amongst profitable years"); *see also* 6 *USCIS Policy Manual* E.(4)(C)(3) ("In some cases, such as when a petitioner has one unprofitable year despite a history of profitability, . . . factors may establish a petitioner's ability to pay the proffered wage despite a shortfall in net income or net current assets.") Further, the record indicates the Petitioner's employment of about 200 people in the United States, and a letter from the CFO asserts the company's ability to pay the proffered wage. *See* 8 C.F.R. § 204.5(g)(2).

USCIS records, however, indicate that, based on the Petitioner's filing of immigrant visa petitions for other beneficiaries, it may need to establish its ability to pay additional proffered wages. A petitioner must demonstrate its ability to pay the proffered wage of each petition it files. 8 C.F.R. § 204.5(g)(2). The Petitioner therefore must establish its ability to pay the combined proffered wages of this and any other petitions that were pending or approved as of this petition's October 26, 2022 priority date, or filed thereafter. *See Patel v. Johnson*, 2 F.Supp.3d 108, 124 (D. Mass. 2014) (affirming our revocation of a petition's approval where a petitioner did not demonstrate its ability to pay the combined proffered wages of multiple petitions).[2]

USCIS records show the Petitioner's filing of at least seven other petitions that were pending or approved as of October 26, 2022, or filed thereafter.[3] The Director did not notify the company that it may need to demonstrate its ability to pay the combined proffered wages of this and these additional petitions. The Director also did not consider other factors that, under *Sonegawa*, may have affected the company's ability to pay. We will therefore withdraw the Director's decision and remand the matter.

On remand, the Director should ask the Petitioner for information about its other petitions, including their priority dates and the proffered wages of their offered jobs. The Director should also ask the company to submit a copy of its audited financial statements or other regulatory required proof of its ability to pay in 2023 and 2024, if available. The Petitioner may also submit additional evidence of its ability to pay. Under *Sonegawa*, the Director should consider factors that the company asserts affected its ability to pay.

[2] The Petitioner need not demonstrate its ability to pay the proffered wages of petitions that it withdrew or that USCIS rejected, denied, or revoked. *See* 6 *USCIS Policy Manual* E.(4)(D)(2). The Petitioner also need not demonstrate its ability to pay proffered wages before their petitions' priority dates or after their beneficiaries obtained permanent residence. *Id.*

[3] USCIS records identify the other petitions by the following receipt numbers:

If supported by the record, the Director may request additional evidence on remand regarding any other potential denial grounds. The Director, however, must afford the Petitioner a reasonable opportunity to respond to all issues raised on remand. Upon receipt of a timely response, the Director should review the entire record and enter a new decision.

III. CONCLUSION

The Petitioner may need to demonstrate its ability to pay the combined proffered wages of this and other immigrant visa petitions it filed for other beneficiaries. Also, under *Sonegawa*, the Director must consider additional factors that potentially affected the company's ability to pay.

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