U.S. Citizenship and Immigration Services

Non-Precedent Decision of the Administrative Appeals Office

In Re: 33384020

Date: AUG. 21, 2024

Appeal of Texas Service Center Decision

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

The Petitioner – a provider of software development, testing, and support services – seeks to permanently employ the Beneficiary as a lead software engineer. The company requests his 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 Texas 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 contends that the Director misinterpreted law and misapplied facts to law.

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 has established its ability to pay offered job's proffered wage. We will therefore sustain the appeal.

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 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 position of lead software engineer as at least $124,883 a year. The petition's priority date is December 20, 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).

With the petition's filing in January 2024, the Petitioner – a publicly traded company – submitted a copy of its annual report for 2022, the year of the petition's priority date. The annual report reflects annual net income of more than $419 million. That amount obviously exceeds the annual proffered wage of $124,883.

In a request for additional evidence (RFE), however, the Director found the annual report insufficient because the Petitioner had filed immigrant visa petitions for other beneficiaries. A petitioner must demonstrate its ability to pay the proffered wage of each petition it files until a beneficiary obtains permanent residence. 8 C.F.R. § 204.5(g)(2). The Petitioner must therefore establish its ability to pay the combined proffered wages of this and petitions for other beneficiaries that were pending or approved as of this petition's December 20, 2022 priority date, or filed thereafter. *See Patel v. Johnson*, 3 F.Supp.3d 108, 124 (D. Mass. 2014) (affirming our revocation of a petition where the petitioner did not demonstrate its ability to pay combined proffered wages of multiple petitions); *see generally* 6 *USCIS Policy Manual* E.(4)(D)(2).

[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); *Rahman v. Chertoff*, 641 F.Supp.2d 349, 351-52 (D. Del. 2009).

The RFE did not ask the company to provide additional information or evidence regarding its other petitions. Rather, the RFE asked the Petitioner to submit evidence of its ability to pay the proffered wage in 2023.

The Petitioner's RFE response explained that its annual report for 2023 was not then available. The company submitted copies of its IRS Forms W-3, Transmittal of Wage and Tax Statements, showing that it paid annual total wages exceeding $600 million in both 2022 and 2023. Also, a copy of a report the company filed with the U.S. Securities and Exchange Commission states the company's 2023 revenues as exceeding $4.6 billion. Further, the company submitted copies of the Beneficiary's payroll records from December 2022 through January 2024.

The Petitioner has demonstrated its continuing ability to pay the offered job's proffered wage from the petition's priority date onward. USCIS records confirm the company's filing of immigrant visa petitions for other beneficiaries. But the Beneficiary's paystubs show that the company paid him more than the annual proffered wage in 2022 and 2023. Thus, the Petitioner need not demonstrate its ability to pay combined proffered wages of multiple petitions in those years. *See* 6 *USCIS Policy Manual* E.(4)(D)(2).

Moreover, the Petitioner's 2022 annual report reflects sufficient net income to pay the combined proffered wages of its applicable petitions. On appeal, the company submits a copy of its 2023 annual report, which also reflects sufficient net income to pay the combined proffered wages.

III. CONCLUSION

The Petitioner has demonstrated its continuous ability to pay the offered job's proffered wage, from the petition's priority date onward.

ORDER: The appeal is sustained.