U.S. Citizenship and Immigration Services

Non-Precedent Decision of the Administrative Appeals Office

In Re: 1386207

Date: DEC. 3, 2021

Appeal of Texas Service Center Decision

Form I-140, Immigrant Petition for Other Worker

The Petitioner - a provider of janitorial, building maintenance, and material handling services - seeks to employ the Beneficiary as a packer. The company requests her classification under the third-preference, immigrant visa category as an "other worker" who can perform labor requiring less than two years of training or experience. *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 Texas Service Center denied the petition. The Director concluded that the Petitioner didn't demonstrate its required ability to pay the combined proffered wages of this and other petitions.

The Petitioner bears the burden of establishing eligibility for the requested benefit by a preponderance of evidence. *See* section 291 of the Act, 8 U.S.C. § 1361 (discussing the burden of proof); *see also Matter of Chawathe*, 25 I&N Dec. 369, 375 (AAO 2010) (discussing the standard of proof). Upon *de novo* review, we will dismiss the appeal.

I. EMPLOYMENT-BASED IMMIGRATION

Immigration as an "other," or "unskilled," worker generally follows a three-step process. First, a prospective employer must apply to the U.S. Department of Labor (DOL) for certification that: (1) there are insufficient U.S. workers able, willing, qualified, and available for an offered position; and (2) the employment of a noncitizen in the position won't harm wages and working conditions of U.S. workers with similar jobs. *See* section 212(a)(5) of the Act, 8 U.S.C. § 1182(a)(5).

Second, a prospective employer must submit an approved labor certification with a Form I-140 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 noncitizen beneficiary meets the requirements of a certified position and a requested immigrant visa category. 8 C.F.R. § 204.5(l).

Finally, if USCIS approves a petition, a noncitizen 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. 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). This petition's priority date is June 15, 2016, the date DOL accepted the accompanying labor certification application for processing. *See* 8 C.F.R. § 204.5(d) (explaining how to determine a petition's priority date). Evidence of ability to pay must generally include copies of annual reports, federal income tax returns, or audited financial statements. 8 C.F.R. § 204.5(g)(2).

The accompanying labor certification states the proffered wage of the offered position of packer as $8.20 an hour, or - based on a 40-hour, work week - $17,056 a year. At the time of the appeal's filing, regulatory required evidence of the Petitioner's ability to pay the proffered wage in 2017 was not yet available. Thus, for purposes of this decision, we will consider the company's ability to pay only in 2016, the year of the petition's priority date.[1]

In determining ability to pay, USCIS examines whether a petitioner paid a beneficiary the full proffered wage each year from the year of a petition's priority date onward. If a petitioner didn't pay the full proffered wage or didn't pay a beneficiary at all, USCIS considers whether the business generated annual amounts of net income or net current assets sufficient to pay any annual differences between the 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. *See Matter of Sonegawa,* 12 I&N Dec. 612, 614-15 (Reg'l Comm'r 1967).[2]

The Petitioner doesn't assert its employment of the Beneficiary, whom the record indicates lives in Colombia. Thus, based solely on wages paid, the record doesn't establish the Petitioner's ability to pay the proffered wage.

The Petitioner submitted copies of audited financial statements for its 2015-16 fiscal year, which ran from October 1, 2015, through September 30, 2016. The statements reflect net income of $2,845,967 and net current assets of $9,137,500. Both amounts exceed the annual proffered wage of $17,056. Thus, based on net income and net current assets, the record appears to demonstrate the Petitioner's ability to pay the Beneficiary's individual, proffered wage.

As the Director noted in his request for additional evidence (RFE), however, the Petitioner filed Form I-140 petitions for other beneficiaries that were pending or approved as of this petition's priority date of June 15, 2016, or filed later that year. A prospective employer 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 must therefore demonstrate its ability to pay the combined proffered wages of this and its other pending or approved petitions in 2016. *See Patel v. Johnson*, 2 F. Supp. 3d 108, 124 (D. Mass. 2014) (affirming our revocation of a petition's approval where, as

[1] In any future filings in this matter, the Petitioner must submit additional evidence of its ability to pay the proffered wage since 2016. *See* 8 C.F.R. § 204.5(g)(2) (requiring a petitioner to demonstrate an ability to pay "continuing until the beneficiary obtains lawful permanent residence").

[2] 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).

of the filing's grant, a petitioner didn't demonstrate its ability to pay combined proffered wages of multiple petitions).[3]

The Petitioner's RFE response includes a list of 872 other Form I-140 petitions that the company filed between September 2015 and September 2017. The list details the petitions' proffered wages, priority dates, and statuses. Of the 872 petitions, 51 have priority dates in 2017. Because we have limited our inquiry to petitions pending in only 2016, the Petitioner needn't demonstrate its ability to pay the proffered wages of its petitions with 2017 priority dates. Also, the company needn't demonstrate its ability to pay the proffered wages of another 71 listed petitions that USCIS denied. Thus, the Petitioner need only demonstrate its ability to pay the combined proffered wages of the remaining 650 petitions.

The Petitioner stated the proffered wages of the remaining petitions as ranging from $8.05 to $8.27 an hour, or - based on a 40-hour, work week - from $16,744 to $17,201.60 a year. Conservatively using the low end of the wage range as the proffered wage of each remaining petition, the Petitioner must demonstrate its ability to pay combined proffered wages of at least $10,883,600 in 2016. Neither the Petitioner's net income ($2,845,967) nor net current asset amount ($9,137,500) for that year equals or exceeds $10,883,600. Thus, based on examinations of wages paid, net income, and net current assets, the record doesn't establish the Petitioner's ability to pay the proffered wage in 2016.

On appeal, the Petitioner argues that USCIS undervalued a letter from the company's chief financial officer (CFO), which stated the company's ability to pay the proffered wage. If a petitioner employs at least 100 people, a statement from a financial officer "may" establish a company's ability to pay. 8 C.F.R. § 204.5(g)(2). Quoting an unpublished decision of ours from 2003, the Petitioner argues that the record lacks evidence causing us to "doubt the credibility of the information contained in the letter from the financial officer or the supporting documentation."

As of the second quarter of 2017, the record establishes the Petitioner's employment of almost 3,000 people. The company may therefore submit the CFO's letter as evidence of its ability to pay. The Director, however, didn't abuse his discretion in finding the letter insufficient. Because the Petitioner has multiple Form I-140 petitions pending, the Director reasonably required additional evidence of the company's ability to pay the combined proffered wages of applicable petitions.

Also, our 2003 case is neither a precedent nor adopted decision. It therefore doesn't bind us in this matter. *See* 8 C.F.R. § 103.10(b) (stating that precedent cases of the U.S. Attorney General and Board of Immigration Appeals bind immigration officers in proceedings involving the same issues). Additionally, unlike the Petitioner here, the prospective employer in the 2003 decision didn't have to demonstrate its ability to pay the combined proffered wages of multiple petitions. Thus, the case quoted by the Petitioner is also distinguishable from this matter.

As the Petitioner argues, however, we may consider factors beyond its wages paid, net income, and net current assets. Under *Sonegawa*, we may consider: the number of years the Petitioner has conducted business; its number of employees; the growth of its business; its incurrence of

[3] The Petitioner needn't demonstrate its ability to pay proffered wages of petitions that it withdrew or, unless pending on appeal or motion, that USCIS rejected, denied, or revoked. The Petitioner also needn't demonstrate its ability to pay proffered wages before their corresponding priority dates or after their corresponding beneficiaries obtained lawful permanent residence.

uncharacteristic losses or expenses; its reputation in its industry; the Beneficiary's replacement of a current employee or outsourced service; or other evidence of the Petitioner's ability to pay. *See Matter of Sonegawa*, 12 I&N Dec. at 614-15.

The record indicates the Petitioner's continuous business operations since 1958. As previously indicated, the company also employs nearly 3,000 people. In addition, as the Petitioner notes, its audited financial statements indicate that, from fiscal years 2013-14 through 2015-16, its annual amounts of net income and net current assets increased.

Over the same period, however, the financial statements indicate a decrease in the Petitioner's annual revenues. Also, unlike the prospective employer in *Sonegawa*, the Petitioner hasn't demonstrated its incurrence of uncharacteristic losses or expenses, or its possession of an outstanding reputation in its industry. Additionally, unlike the employer in *Sonegawa,* the Petitioner must demonstrate its ability to pay the combined proffered wages of multiple petitions. As previously indicated, the record shows that the company's total wage obligation exceeds its net income by more than $8 million and exceeds its net current assets by more than $1.7 million. Thus, in the aggregate, a totality of circumstances doesn't establish the Petitioner's ability to pay the combined proffered wages.

III. CONCLUSION

The Petitioner hasn't demonstrated its required ability to pay the applicable proffered wages from the petition's priority date onward. We will therefore affirm the Director's decision.

ORDER: The appeal is dismissed.