U.S. Citizenship and Immigration Services

Non-Precedent Decision of the Administrative Appeals Office

MATTER OF H-, INC.

DATE: DEC. 4, 2019

APPEAL OF VERMONT SERVICE CENTER DECISION

PETITION: FORM I-140, IMMIGRANT PETITION FOR ALIEN WORKER

The Petitioner, a provider of construction and excavation services, sought to employ the Beneficiary as a mechanic-welder. It requested his classification as a skilled worker under the third-preference, immigrant category. *See* Immigration and Nationality Act (the Act) section 203(b)(3)(A)(i), 8 U.S.C. § 1153(b)(3)(A)(i). This employment-based, "EB-3" 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.

After the filing's initial grant, the Acting Director of the Vermont Service Center revoked the petition's approval. The Acting Director concluded that, as of approval, the Petitioner did not demonstrate its required ability to pay the proffered wage.

On appeal, the Petitioner submits additional evidence and asserts its ability to pay at that time.[1]

Upon *de novo* review, we will dismiss the appeal.

I. THE EMPLOYMENT-BASED IMMIGRATION PROCESS

Employment-based immigration generally follows a three-step process. First, an employer seeking to permanently employ a foreign national in the United States must obtain U.S. Department of Labor (DOL) certification of the job opportunity. *See* section 212(a)(5)(A)(i) of the Act, 8 U.S.C. § 1182(a)(5)(A)(i). The DOL must determine whether the country has able, willing, qualified, and available workers for an offered position, and whether employment of a foreign national would hurt the wages and working conditions of U.S. workers with similar jobs. *Id.*

If the DOL certifies a position, an employer must next submit the certification with an immigrant visa petition to U.S. Citizenship and Immigration Services (USCIS). *See* section 204 of the Act, 8 U.S.C. § 1154. If USCIS approves a petition, a foreign national may finally apply for an

[1] About a month after the appeal's filing, Virginia terminated the Petitioner's corporate status. *See* Commonwealth of Va., State Corp. Comm'n, https://sccefile.scc.virginia.gov/Find.Business?Search Term (last visited May 26, 2015, but since "purged"). Because the Petitioner existed at the time, however, we consider the appeal to be properly filed.

immigrant visa abroad or, if eligible, adjustment of status in the United States. *See* section 245 of the Act, 8 U.S.C. § 1255.

At any time before a beneficiary obtains lawful permanent residence, however, USCIS may revoke a petition's approval for "good and sufficient cause." Section 205 of the Act, 8 U.S.C. § 1155. If supported by the record, a petition's erroneous approval may justify its revocation. *Matter of Ho*, 19 I&N Dec. 582, 590 (BIA 1988).

USCIS properly issues a notice of intent to revoke where the record as of the notice's issuance - if unexplained or unrebutted - would have warranted the petition's denial. *See Matter of Estime*, 19 I&N Dec. 450, 451 (BIA 1987). Similarly, revocation lies if the record - including any explanation or rebuttal evidence - would have warranted denial. *Id.* at 451-52.

II. ABILITY TO PAY THE PROFFERED WAGE

A petitioner must demonstrate its continuing ability to pay a proffered wage, from a petition's priority date until a beneficiary obtains lawful permanent residence.[2] 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.*

In determining ability to pay, USCIS examines whether a petitioner paid a beneficiary the full proffered wage each year from a petition's priority date. If a petitioner did not annually pay the full proffered wage, USCIS next examines whether it generated sufficient annual amounts of net income or net current assets to pay any difference 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 a proffered wage. *See Matter of Sonegawa,* 12 I&N Dec. 612, 614-15 (Reg'l Comm'r 1967).[3]

Here, the accompanying labor certification states the proffered wage of the offered position of mechanic-welder as $19.03 an hour, or $39,582.40 a year for a 40-hour work week.

The Acting Director issued the notice of intent to revoke (NOIR) for good and sufficient cause. Contrary to 8 C.F.R. § 204.5(g)(2), the record as of the petition's approval in 2004 lacked required copies of the Petitioner's annual report, federal income tax returns, or audited financial statements

[2] This petition's priority date is April 30, 2001, the date an office in the DOL's employment service system 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).

[3] Federal courts have upheld our 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); *Rivzi v. Dep't of Homeland Sec.*, 37 F. Supp. 3d 870, 883-84 (S.D. Tex. 2014), *aff'd*, 627 Fed. App'x. 292 (5th Cir. 2015).

from the petition's 2001 priority date onward. As of the NOIR's issuance, the record therefore did not establish the Petitioner's ability to pay the proffered wage and would have warranted its denial.

Although the Petitioner's NOIR response included copies of its tax returns for the relevant period, our notice of intent to dismiss (NOID) the appeal advised the company that evidence of its ability to pay remained insufficient. Copies of IRS Forms W-2, Wage and Tax Statements, indicated that the Petitioner paid the Beneficiary more than the annual proffered wage from 2001 through 2003. But the forms conflicted with other evidence of record. The Forms W-2 for 2001 through 2003 ascribed a different Social Security number (SSN) to the Beneficiary than those that the Petitioner issued him in 2005 through 2007. Also, the wage amount on an Internal Revenue Service (IRS) wage and tax transcript for 2004 differed from the amount on the Form W-2 that the Petitioner submitted for the same year. In addition, a copy of the Beneficiary's 2000 federal tax return ascribed a third SSN to him.

The multiple SSNs of the Beneficiary and the discrepancy in his 2004 wage amount cast doubts on the authenticity and reliability of the Forms W-2 of record and the wages the Petitioner claims to have paid him. *See Matter of Ho*, 19 I&N Dec. 582, 591 (BIA 1988) (requiring a petitioner to resolve inconsistencies of record by independent, objective evidence pointing to where the truth lies). The Petitioner's tax returns for 2001 through 2003 indicated negative annual amounts of net income and net current assets. Thus, as of the petition's approval, the record did not establish the Petitioner's continuing ability to pay the proffered wage.

In addition, USCIS records indicate the Petitioner's filing of an immigrant petition for another beneficiary that remained approved after this petition's priority date.[4] A petitioner must demonstrate its continuing 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 its other petition from this petition's priority date until its approval date, or until the other beneficiary previously obtained lawful permanent residence. *See Patel v. Johnson*, 2 F. Supp. 3d 108, 124 (D. Mass. 2014) (affirming our revocation of a petition's approval where, as of the filing's grant, the petitioner did not demonstrate its ability to pay the combined proffered wages of multiple beneficiaries).

In response to our NOID, the Petitioner did not submit additional evidence or an explanation of the inconsistencies of record. Thus, based on examinations of its payments to the Beneficiary, its net income, and its net current assets, the record as of the petition's approval did not establish its ability to pay the proffered wage.

As previously indicated, we may consider factors beyond a petitioner's net income and net current assets in determining its ability to pay. Under *Sonegawa*, we may consider: the number of years a petitioner conducted business; the growth of its business; its number of employees; its incurrence of uncharacteristic business expenses or losses; its reputation in its industry; whether a beneficiary will

[4] USCIS records identify the other petition's receipt number as [redacted]

replace a current employee or outsourced service; and other evidence of its ability to pay the proffered wage. *Matter of Sonegawa*, 12 I&N Dec. at 614-15.

Here, the record indicates that, as of the petition's approval, the Petitioner had conducted business for about 20 years and employed more than 100 people. Unlike the petitioner in *Sonegawa*, however, the record does not indicate the Petitioner's incurrence of uncharacteristic expenses or losses, or its possession of an outstanding reputation in its industry. The record also does not indicate the Beneficiary's replacement of an existing employee or outsourced service. Also unlike the petitioner in *Sonegawa*, the Petitioner here must establish its ability to pay the combined proffered wages of multiple petitions. Thus, under *Sonegawa*, a totality of the circumstances does not establish the Petitioner's ability to pay.

In response to the Acting Director's NOIR, the Petitioner asserted the Beneficiary's eligibility to apply for adjustment of status under the "portability" provision. *See* section 204(j) of the Act (requiring a petition to "remain valid" if a beneficiary's adjustment application is unadjudicated for at least 180 days, and he or she receives a new job offer in the same or similar occupation as the job listed on the petition). The Petitioner contended that the petition for the Beneficiary must "remain valid" under the portability statute and that USCIS' purported revocation of the petition's approval was ineffective.

As discussed above, however, the record establishes the petition's erroneous approval. Thus, the petition was never valid for portability purposes. *See Herrera v. USCIS*, 571 F.3d 881, 887 (9th Cir. 2009) (explaining that, "in order for a petition to 'remain' valid, it must have been valid from the start"); *see also Matter of Al Wazzan*, 25 I&N Dec. 359, 367 (AAO 2010) (holding that a beneficiary of a portable petition must have been "entitled" to the requested classification).

III. CONCLUSION

As of the petition's approval, the record did not establish the Petitioner's continuing ability to pay the proffered wage from the petition's priority date onward. We will therefore affirm the Acting Director's decision.

ORDER: The appeal is dismissed.

Cite as *Matter of H-, Inc.*, ID# 82713 (AAO Dec. 4, 2019)