U.S. Citizenship and Immigration Services

**Non-Precedent Decision of the Administrative Appeals Office**

In Re: 11271282

Date: DEC. 21, 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. It requests classification of the Beneficiary as an unskilled worker under the third preference employment-based immigrant visa category. Immigration and Nationality Act (the Act) section 203(b)(3)(A)(iii), 8 U.S.C. § 1153(b)(3)(A)(iii). This immigrant visa category allows a U.S. employer to sponsor a foreign national for lawful permanent resident status to work in a position that requires less than two years of training or experience.

The Director of the Nebraska Service Center denied the petition, concluding that the record did not establish that the Petitioner had the ability to pay the proffered wage at the time the priority date was established and continuing to the present.

In these proceedings, it is the Petitioner's burden to establish eligibility for the requested benefit. Section 291 of the Act, 8 U.S.C. § 1361. Upon *de novo* review, we will withdraw the decision of the Director. The matter is remanded for the entry of a new decision consistent with the foregoing analysis.

## I. EMPLOYMENT-BASED IMMIGRATION

Employment-based immigration 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) of the Act, 8 U.S.C. § 1182(a)(5). DOL approval signifies that insufficient U.S. workers are able, willing, qualified, and available for a position. *Id*. Labor certification also indicates that the 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 considers whether a beneficiary meets the requirements of a certified position and a requested immigrant visa classification. If USCIS approves the 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 a 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 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).[1]

The accompanying labor certification has a priority date of May 9, 2019.[2] The record reflects that the Petitioner is a residential care home facility, established in 2001 and employing 25 individuals. The labor certification states the annual proffered wage of the offered position of caregiver as $22,984.

The Petitioner does not assert that it has employed the Beneficiary and the record does not contain evidence that it paid him any wages at any time.

If a petitioner does not establish that it has paid the beneficiary an amount equal to or above the proffered wage from the priority date onward, USCIS will examine the net income and net current assets figures recorded on the petitioner's federal income tax return(s), annual report(s), or audited financial statements(s). If either of these figures, net income or net current assets, equals or exceeds the proffered wage or the difference between the proffered wage and the amount paid to the beneficiary in a given year, the petitioner would ordinarily be considered able to pay the proffered wage that year.

If an S corporation, like the Petitioner, has income exclusively from a trade or business, USCIS considers its net income (or loss) to be the figure for "Ordinary business income (loss)" on page 1, line 21, of the Form 1120S. However, if there are relevant entries for additional income, credits, deductions or other adjustments from sources other than a trade or business, they are reported on Schedule K of the Form 1120S, and the corporation's net income or loss will be found in line 18 of Schedule K ("Income/loss reconciliation").

The petition was filed on September 12, 2019 and included a copy of the Petitioner's federal income tax return, Form 1120S, for 2018. In this case, a figure of -$20,511 is entered on page 1, line 21, and -$21,650 is entered on line 18 of Schedule K. Thus, the Petitioner had a net loss in 2018. As for net current assets (or liabilities), they are determined by calculating the difference between current assets and current liabilities, as recorded in lines 1-6 and lines 16-18, respectively, of Schedule L. In this

[1] 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); *Rizvi 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).

[2] The petition's priority date is the date the 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).

case the Petitioner listed no current assets or current liabilities. Accordingly, the Petitioner had not established its ability to pay the proffered wage from the 2019 priority date and the Director issued a request for evidence (RFE).

In the RFE, the Director advised the Petitioner that additional evidence of its ability to pay the proffered wage may include, but is not limited to, audited financial statements, profit/loss statements, bank account records, and personnel records. In response to the RFE, the Petitioner submitted its bank statements for January to November 2019.

The Director denied the petition, noting that bank statements are not among the three types of evidence enumerated in 8 C.F.R. § 204.5(g)(2) required to demonstrate a petitioner's ability to pay a proffered wage, and that the Petitioner had not demonstrated that regulatory prescribed evidence is inapplicable, inaccurate, or unavailable. The Director further noted that bank statements only show the amount in an account on a given date, and cannot show the sustainable ability to pay an annual proffered wage, and that the Petitioner did not submit evidence to demonstrate that the funds reported on the bank statements somehow reflect additional available funds that were not reflected on its tax returns, such as cash on Schedule L.[3]

On appeal the Petitioner submits its 2019 tax return and asserts that, because its tax return for the year of the priority date was not available at the time of the RFE, the Director should have considered other evidence in determining the Petitioner's ability to pay the proffered wage.

USCIS may also consider the totality of the Petitioner's circumstances, including the overall magnitude of its business activities, in determining the Petitioner's ability to pay the proffered wage. *See Matter of Sonegawa,* 12 I&N Dec. 612 (Reg'l Comm'r 1967). USCIS may, at its discretion, consider evidence relevant to the petitioner's financial ability that falls outside of its net income and net current assets. We may consider such factors as the number of years the petitioner has been doing business, the established historical growth of the petitioner's business, the petitioner's reputation within its industry, the overall number of employees, whether the beneficiary is replacing a former employee or an outsourced service, the amount of compensation paid to officers, the occurrence of any uncharacteristic business expenditures or losses, and any other evidence that USCIS deems relevant to the petitioner's ability to pay the proffered wage.

In view of the unavailability of evidence of the Petitioner's net income and net current assets in the year of the priority date, specifically the Petitioner's 2019 tax return, we will remand this matter for further consideration as the Director was only able to review financial information before the priority date. The Director may request any other documentation deemed relevant at his discretion in determining the Petitioner's ability to pay the proffered wage.

We note that where a petitioner has filed I-140 petitions for multiple beneficiaries, it must demonstrate that its job offer to each beneficiary is realistic, and that it has the ability to pay the proffered wage to each beneficiary. *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, a petitioner did not demonstrate its ability to pay the combined proffered wages of multiple petitions). USCIS records show that the

[3] We note that the Petitioner lists no cash on Schedule L in its 2018 tax return, however the bank statements submitted in response to the RFE cover a period of time before the 2018 tax return.

Petitioner has filed three Form I-140 petitions for other beneficiaries. Thus, the Petitioner must establish its ability to pay this Beneficiary as well as the beneficiaries of the other Form I-140 petitions that were pending or approved as of, or filed after, the priority date of the current petition.

The Director should consider the amount of wages the Petitioner paid to the Beneficiary each year, if any; the Petitioner's net income and net current assets each year; and the proffered wages and wages the Petitioner paid to its other I-140 beneficiaries, if any, for the time period in question. At his discretion, in accord with *Matter of Sonegawa* 12 I&N Dec. 612 (Reg'l Comm'r 1967), the Director may consider evidence relevant to the petitioner's financial situation.

## III. CONCLUSION

The record before the Director did not contain priority date year documentation to determine whether the Petitioner has the ability to pay the proffered wage to the Beneficiary as required by 8 C.F.R. § 204.5(g)(2). Therefore, we will remand this case to the Director for further consideration of the Petitioner's ability to pay the proffered wage from the priority date and continuing to the present.

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