U.S. Citizenship and Immigration Services

Non-Precedent Decision of the Administrative Appeals Office

In Re: 7235133

Date: DEC. 30, 2019

Appeal of Texas Service Center Decision

Form I-140, Immigrant Petition for Other Worker

The Petitioner seeks to employ the Beneficiary as director of staff development at its soccer academy. The company requests his classification under the third-preference, immigrant category for "other workers." *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 did not establish the Beneficiary's possession of the minimum education credentials required for the offered position. The Director also found that the company did not demonstrate its required ability to pay the job's proffered wage.

The Petitioner bears the burden of establishing eligibility for the requested benefit. *See* section 291 of the Act, 8 U.S.C. § 1361. Upon *de novo* review, we will dismiss the appeal.

I. EMPLOYMENT-BASED IMMIGRATION

Immigration as an unskilled worker 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)(A)(i) of the Act, 8 U.S.C. § 1182(a)(5)(A)(i). DOL approval signifies that insufficient U.S. workers are able, willing, qualified, and available for an offered position. *Id.* DOL certification also indicates that 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 labor 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. Among other things, USCIS determines whether a beneficiary meets the requirements of a DOL-certified position and a requested visa classification. If USCIS grants a 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. THE REQUIRED EDUCATION

A petition for an unskilled worker must include evidence that a beneficiary meets any educational, training, experience, or other requirements of an accompanying labor certification. 8 C.F.R. § 204.5(l)(3)(ii)(D). A petitioner must demonstrate a beneficiary's possession of a job's requirements by a petition's priority date.[1] *Matter of Wing's Tea House*, 16 I&N Dec. 158, 160 (Acting Reg'l Comm'r 1977). When evaluating a beneficiary's qualifications, USCIS must examine the job-offer portion of a labor certification. USCIS may neither ignore a certification term, nor impose additional requirements. *See, e.g., Madany v. Smith*, 696 F.3d 1008, 1015 (D.C. Cir. 1983) (holding that "DOL bears the authority for setting the *content* of the labor certification") (emphasis in original).

Here, the labor certification states the minimum education requirements of the offered position of director of staff development as a U.S. associate's degree, or a foreign equivalent degree, in sports science or a "closely related field." On the labor certification, the Beneficiary attested that, by the petition's priority date, a university in the United Kingdom (UK) awarded him an associate's degree in sports science.

The Petitioner submitted copies of the Beneficiary's post-secondary diploma and transcripts, indicating that the UK university granted him a bachelor of science degree in sports science. The Petitioner also submitted an independent evaluation of the Beneficiary's foreign educational credentials. The evaluation concludes that his UK bachelor's degree equates to at least a U.S. associate of science degree in sports science.

The Director, however, noted that part of the Beneficiary's university diploma was written in Latin. As stated in the Director's written request for additional evidence, an English translation must accompany documentary evidence containing foreign language. 8 C.F.R. § 103.2(b)(3). A translation must also include a translator's certification that he or she is competent to translate, and that the translation is complete and accurate. *Id.* Because the Beneficiary's diploma lacked a certified English translation, the Director concluded that the Petitioner did not establish the Beneficiary's qualifying education for the offered position.

On appeal, the Petitioner notes that the English language on the university diploma states the Beneficiary's receipt of a bachelor of science degree in sports science. The Petitioner therefore argues that the diploma "was never in need of a certified English translation." The regulation, however, requires "a full English translation" of "[a]ny document containing foreign language." 8 C.F.R. § 103.2(b)(3). The Beneficiary's diploma contains foreign language. Thus, in the absence of a certified English translation of the diploma's foreign language, the Director properly rejected the document as evidence. The Petitioner also argues that USCIS previously accepted the diploma as evidence of the Beneficiary's educational qualifications for employment-based, nonimmigrant visa classifications. We are not required, however, to accept evidence that does not meet regulatory requirements merely because of prior acceptances that may have been erroneous. *See Matter of*

[1] This petition's priority date is September 6, 2017, 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).

Church Scientology Int'l, 19 I&N Dec. 593, 597 (Comm'r 1988); *see also Sussex Eng'g, Ltd. v. Montgomery*, 825 F.2d 1084, 1090 (6th Cir. 1987). We are also not bound to follow contradictory decisions of service centers. *La. Philharmonic Orchestra v. INS*, No. 98-2855, 2000 WL 282785, at *3 (E.D. La. 2000), *aff'd*, 248 F.3d 1139 (5th Cir. 2001).

The record, however, contains other evidence of the Beneficiary's educational qualifications. The copy of his university transcript states - in English - that the school awarded him a bachelor of science degree in sports science in July 2000. *Cf.* 8 C.F.R. § 204.5(l)(3)(ii)(C) (for purposes of qualifying for the professional visa category, requiring evidence of a bachelor's degree "in the form of an official college or university record showing the date the baccalaureate degree was awarded and the area of concentration of study"). A preponderance of evidence therefore demonstrates the Beneficiary's possession of the foreign equivalent of a U.S. associate's degree in sports science.

For the foregoing reasons, the record on appeal establishes the Beneficiary's possession of the minimum education required for the offered position. We will therefore withdraw the Director's contrary finding.

III. ABILITY TO PAY THE PROFFERED WAGE

A petitioner must also 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). For a petitioner employing less than 100 people, as in this case, 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 examines whether it generated annual amounts of net income or net current assets sufficient 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 the proffered wage. *See Matter of Sonegawa,* 12 I&N Dec. 612, 614-15 (Reg'l Comm'r 1967).[2]

Here, the labor certification states the proffered wage of the offered position of director of staff development as $48,127 a year. As previously noted, the petition's priority date is September 6, 2017. As of the appeal's filing, the Petitioner was not yet required to submit its federal income tax return for 2018. We will therefore consider the company's ability to pay only in 2017, the year of the petition's priority date.

[2] Federal courts have upheld USCIS' 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); *Rahman v. Chertoff*, 641 F.Supp.2d 349, 351-52 (D. Del. 2009).

The Petitioner submitted a copy of an IRS Form W-2, Wage and Tax Statement, indicating that the Beneficiary received $26,455.20 in 2017. The Form W-2, however, indicates the Beneficiary's payment by a company other than the Petitioner. On appeal, the Petitioner also submits payroll records indicating that the other company paid the Beneficiary in 2017. The Petitioner identifies the other entity as its "sister company." Even if related to the Petitioner, however, the company listed on the Form W-2 and payroll records is a separate entity with its own federal employer identification number. The Form W-2 and payroll records therefore do not constitute evidence of the Petitioner's ability to pay in 2017. *See* 8 C.F.R. § 204.5(g)(2) (requiring "evidence that *the prospective United States employer* has the ability to pay the proffered wage") (emphasis added). Thus, based solely on wages paid, the record does not establish the Petitioner's ability to pay the proffered wage.

A copy of the Petitioner's federal income tax return for 2017 reflects net current assets of $8,551 and a negative amount of net income. Neither amount equals or exceeds the annual proffered wage of $48,127. Thus, based on examinations of wages paid, net income, and net current assets, the record does not establish the Petitioner's ability to pay the proffered wage in 2017.

On appeal, the Petitioner submits evidence that it has paid the Beneficiary as a nonimmigrant pursuant to U.S. immigration regulations since 2006. The Petitioner argues:

> This lengthy employment history between the petitioner and beneficiary as evidenced by the accumulation of pay stubs should serve as ongoing proof that the petitioner has already been remunerating the beneficiary at a rate equal to or greater than the proffered wage.

The Petitioner's evidence, however, does not indicate that it has ever paid the Beneficiary as much as $48,127 in a single year. Moreover, the Petitioner's payments to the Beneficiary in prior years does not demonstrate its ability to pay the proffered wage "at the time the priority date is established and continuing until the beneficiary obtains lawful permanent residence." *See* 8 C.F.R. § 204.5(g)(2).

The Petitioner also contends that USCIS "fixated" on the company's net income in 2017, disregarding its gross income that year of more than $1.8 million. USCIS, however, focuses on net income because gross income does not reflect costs of doing business, such as rent, salaries, wages, taxes, and licenses. If a company must spend nearly all of its gross income on business costs, the gross income constitutes little evidence of its ability to pay an additional proffered wage. Net income, which measures earnings after expense deductions, more meaningfully measures a company's ability to pay.

As previously indicated, however, we can consider factors beyond wages paid, net income, and net current assets in determining the Petitioner's ability to pay the proffered wage. Under *Sonegawa*, we may consider: how many years the Petitioner has conducted business; its number of employees; growth of its business; its incurrence of uncharacteristic losses or expenses; its reputation in its industry; the Beneficiary's replacement of a current employee or outsourced service; or other factors affecting its ability to pay the proffered wage. *See Matter of Sonegawa*, 12 I&N Dec. at 614-15.

Here, the record indicates the Petitioner's continuous business operations since 1991 and its employment of seven people. Copies of its tax returns, however, indicate that, from 2016 to 2017, its annual revenues decreased, and wages paid to its workers dropped $400,000. The record also does not establish that the Beneficiary would replace an existing employee or outsourced service. In addition, unlike the petitioner in *Sonegawa*, the Petitioner here has not demonstrated its incurrence of uncharacteristic losses or expenses, or its possession of an outstanding reputation in its industry. Thus, a totality of the circumstances under *Sonegawa* does not demonstrate the Petitioner's ability to pay the proffered wage.

IV. CONCLUSION

Contrary to Director's decision, the record on appeal establishes the Beneficiary's possession of the minimum education required for the offered position. The Petitioner, however, has not demonstrated its ability to pay the proffered wage from the petition's priority date onward.

ORDER: The appeal is dismissed.