U.S. Citizenship and Immigration Services

Non-Precedent Decision of the Administrative Appeals Office

In Re: 12312102

Date: FEB. 05, 2021

Appeal of Nebraska Service Center Decision

Form I-140, Immigrant Petition for Skilled Worker

The Petitioner, a staffing agency, seeks to employ the Beneficiary as a registered nurse. It requests her classification as a skilled worker under the third-preference immigrant category. Immigration and Nationality Act (the Act) section 203(b)(3)(A)(i), 8 U.S.C. § 1153(b)(3)(A)(i). This 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.

The Director of the Nebraska Service Center denied the petition, concluding that the record did not establish that (a) the Petitioner provided proper notice of the filing of a labor certification; and (b) the job opportunity is bona fide.

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 dismiss the appeal.

I. EMPLOYMENT-BASED PETITIONS FOR SCHEDULE A OCCUPATIONS

A Schedule A occupation is an occupation codified at 20 C.F.R. § 656.5(a) for which the U.S. Department of Labor (DOL) has determined that there are not sufficient U.S. workers who are able, willing, qualified and available and that the wages and working conditions of similarly employed U.S. workers will not be adversely affected by the employment of foreign nationals in such occupations. The current list of Schedule A occupations includes professional nurses and physical therapists. Id.

Petitions for Schedule A occupations do not require a petitioner to test the labor market and obtain a certified labor certification from the DOL prior to filing the petition with U.S. Citizenship and Immigration Services (USCIS). Instead, the petition is filed directly with USCIS with a duplicate uncertified labor certification. See 8 C.F.R. § 204.5(a)(2); see also 20 C.F.R. § 656.15.[1] If USCIS approves the petition, the foreign national applies 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.

[1] The priority date of the petition is August 1, 2019, the date the completed, signed petition was properly filed with USCIS. See 8 C.F.R. § 204.5(d).

II. NOTICE OF FILING

The Director concluded, in part, that the record did not establish that the Petitioner provided proper notice of the filing of a labor certification (Notice). Petitions for Schedule A occupations must contain evidence establishing that the petitioner provided its U.S. workers with Notice prescribed by 20 C.F.R. § 656.10(d). A petitioner must provide Notice to any bargaining representative for the occupation, or, if there is no bargaining representative, by posted Notice to its employees at the location of the intended employment. See 20 C.F.R. § 656.10(d)(1).[2] In cases where there is no bargaining representative, the Notice must be posted for at least 10 consecutive business days, and it must be clearly visible and unobstructed while posted. 20 C.F.R. § 656.10(d)(1)(ii). The Notice must be posted in a conspicuous place where the petitioner's U.S. workers can readily read it on their way to or from their place of employment. Id. In addition, the Notice must be published "in any and all in-house media, whether electronic or printed, in accordance with the normal procedures used for the recruitment of similar positions in the employer's organization." Id. The satisfaction of the Notice requirement may be documented by "providing a copy of the posted notice and stating where it was posted, and by providing copies of all the in-house media" used to distribute the Notice. Id.

The DOL has stated:

> If the employer knows where the Schedule A employee will be placed, the employer must post the notice at that work-site(s) where the employee will perform the work and publish the notice internally using in-house media--whether electronic or print--in accordance with the normal internal procedures used by the employer to notify its employees of employment opportunities in the occupation in question. The prevailing wage indicated in the notice will be the wage applicable to the area of intended employment where the worksite is located.
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> If the employer does not know where the Schedule A employee will be placed, the employer must post the notice at that work-site(s) of all of its current clients, and publish the notice of filing internally using electronic and print media according to the normal internal procedures used by the employer to notify its employees of employment opportunities in the occupation in question. The prevailing wage will be derived from the area of the staffing agencies' headquarters.

U.S. DOL, OFLC Frequently Asked Questions and Answers, Notice of Filing, Question 12, https://www.foreignlaborcert.doleta.gov/faqsanswers.cfm#q!176 (last visited Feb. 1, 2021); see also 6 USCIS Policy Manual E.7(D)(4), https://www.uscis.gov/policymanual.[3]

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[2] In this case, there is no evidence in the record of a bargaining representative for the occupation.

[3] As set forth in the USCIS Policy Manual regarding posting locations of Schedule A Notices:

> If the employer currently employs relevant workers at multiple locations and does not know where the beneficiary will be placed, then the employer must post the notice at the worksite(s) of all of its locations or clients where relevant workers currently are placed… The situation of multiple work locations may arise in, but is not limited to, a scenario when the employer is a staffing agency which has clients under contract at the time that the employer seeks to post a timely notice of filing. In support of the petition,

Here, the petition and the labor certification state that the primary worksite location is [redacted] located at [redacted] NV [redacted] The DOL ETA Form 9141, Application for Prevailing Wage Determination (PWD), also lists the worksite address as [redacted] and it indicates that the work will not be performed in multiple worksites or at another location. The prevailing wage was derived from the [redacted], Nevada worksite location.[4] The Petitioner posted the Notice at [redacted] and at its headquarters in California, and it provided a copy of the Notice with the petition.

However, with the petition, the Petitioner submitted an employment agreement between it and the Beneficiary dated July 18, 2019, stating that the Beneficiary's job location would be at [redacted] Medical Center, [redacted] AZ [redacted] and to such health care facilities or organizations ("Client Facility") as Employer shall from time to time designate." The employment agreement further states that "Employee may be required to work in different Client Facilities within a thirty-five (35) mile radius from the Employee's assigned branch office." With the petition, it also submitted a copy of an addendum to a supplier agreement dated July 31, 2011, between it and [redacted] pursuant to which the Petitioner agreed to provide staffing services to [redacted]'s client, [redacted] which includes several hospitals in Nevada.

In a notice of intent to deny (NOID) dated January 21, 2020, the Director noted the inconsistencies in the record regarding the proposed work location, and stated that "it appears that the notice of filing was not posted at all the applicable locations." The Petitioner must resolve inconsistencies with independent, objective evidence pointing to where the truth lies. Matter of Ho, 19 I&N Dec. 582, 591-92 (BIA 1988). Doubt cast on any aspect of a petitioner's proof may, of course, lead to a reevaluation of the reliability and sufficiency of the remaining evidence offered in support of the visa petition. Id. at 591.

In response to the NOID, the Petitioner submitted an amended employment agreement between it and the Beneficiary stating that the job location will be [redacted] located at [redacted] NV [redacted] and to such health care facilities or organizations ("Client Facility") as Employer shall from time to time designate." Similar to the initial agreement, the amended employment agreement further states that "Employee may be required to work in different Client Facilities within a thirty-five (35) mile radius from the Employee's assigned branch office." The employment agreement states that it was amended on February 19, 2020, to correct the hospital assignment information from [redacted] Medical Center to [redacted].[5] The

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the employer may provide a copy of one posting notice supported by a list of all locations where the notice was posted and dates of posting in each location. The employer does not have to submit a copy of each notice.

Id.

[4] As noted, "in situations where there are multiple worksites (for example, the employer is a staffing agency), if the employer knows where they will place the beneficiary, the prevailing wage is the wage applicable to the area of intended employment where the worksite is located. If an employer with multiple clients does not know where they will place the beneficiary among its multiple clients, the prevailing wage is derived from the area of its headquarters." 6 USCIS Policy Manual, supra, at E.7(D)(1). Based on the record before us, and as further detailed herein, the prevailing wage appears to be properly based in Nevada where the Petitioner's clients within the 35-mile radius of [redacted] Hospital are located.

[5] We note that the provisions regarding the transfer of the Beneficiary to other client sites were not changed.

Petitioner asserted that the Arizona work location listed in the prior agreement was a "typographical error" and that the intended work location is [redacted].[6]

In response to the NOID, the Petitioner also submitted a supplier agreement between it and [redacted] regarding the Petitioner's provision of staffing to [redacted]'s clients; nurse staffing reports for various medical facilities in [redacted] including [redacted] Hospital Medical Center in [redacted] NV; [redacted] Hospital in [redacted] NV; [redacted] Hospital in [redacted], NV;[7] [redacted] Medical Center in [redacted], NV; and invoices from the Petitioner to [redacted].[8] These documents establish that the Petitioner has been providing nurse staffing services to [redacted] in Nevada pursuant to its contract with [redacted].

In his decision, the Director concluded that the Notice was not properly posted. On appeal, the Petitioner asserts that it knows where the Beneficiary will work and that it was only required to post the Notice at [redacted] We agree with the Director and conclude that the Notice was not properly posted. The preponderance of the evidence shows that Petitioner will place the Beneficiary at [redacted] and/or at its other client sites that are located within a thirty-five (35) mile radius from [redacted], including the other facilities that are part of [redacted] While it may intend to initially place the Beneficiary at [redacted] the Beneficiary might also contractually be placed at other nearby locations where the Petitioner employs other workers. Thus, as further detailed below, the record shows that the Petitioner has several other client locations within a 35-mile radius where the Beneficiary might work, and her employment contract provides that she may be required to work at any of them. The Petitioner was required to post the notice at the worksites of all of its locations or clients where relevant workers currently are placed. The Petitioner did not post the Notice at all of the required worksites. See 20 C.F.R. § 656.10(d)(1).

Specifically, as previously highlighted, the Petitioner's amended employment agreement with the Beneficiary provides that her proposed work locations include [redacted] and "such health care facilities or organizations" as it may designate that are located "within a thirty-five (35) mile radius" from [redacted] in [redacted] Nevada, is part of [redacted], which includes seven other medical facilities within a 35-mile radius of [redacted]

[6] When responding to a NOID, a petitioner cannot materially change a position's work location. A petitioner may not make material changes to a petition in an effort to make a deficient petition conform to USCIS requirements. See Matter of Izummi, 22 I&N Dec. 169, 176 (Assoc. Comm'r 1998). A petitioner must establish eligibility as of the priority date. See 8 C.F.R. § 103.2(b)(1); Matter of Wing's Tea House, 16 I&N Dec. 158, 160 (Acting Reg'l Comm'r 1977). Here, the preponderance of the evidence supports the Petitioner's assertion that it does not intend to employ the Beneficiary in Arizona.

[7] [redacted] invoices show that the Petitioner provided one registered nurse for the emergency room for two day shifts and several night shifts in January and February of 2020.

[8] The invoices corroborate the Petitioner's shifting of its employees at various locations within [redacted] For example, the invoices show that two registered nurses employed by the Petitioner, H.Y.W. and I.B-M., worked at [redacted] Hospital and [redacted] Medical Center during the approximately 6-month timeframe represented by the invoices.

[redacted].[9] Thus, according to her employment agreement with the Petitioner, the [redacted] is not the only worksite where the Beneficiary might work.[10]

Further, the Petitioner's supplier agreement with [redacted] includes an addendum reflecting the terms of its provision of staffing services to the [redacted] Specifically, the addendum states that [redacted] may reassign the Petitioner's employees within "like areas and locations" and that the employees are "required to float to like areas and locations" within [redacted] at its request. Thus, [redacted] has the contractual right to transfer the Beneficiary to any of its facilities in like areas and locations.

In sum, the Petitioner asserts on appeal that it knows where the Schedule A employee will be placed - at [redacted] However, as set forth in its contractual agreements related to the Beneficiary's employment, the record establishes a clearly defined area where the Beneficiary will work, and the Petitioner has multiple client locations within that defined area, including [redacted].[11] Therefore, the Notice should have been posted at all of the Petitioner's applicable client facilities within a 35-mile radius of [redacted], including the other applicable facilities within [redacted] Instead, it posted Notice only at [redacted] in [redacted] NV and at its headquarters in [redacted] CA. Thus, the Petitioner has not demonstrated that it posted Notice in the proper locations as required by 20 C.F.R. § 656.10(d)(1). The appeal will be dismissed for this reason.

III. RESERVED ISSUE

As noted, the Director also determined that the record did not establish that the job opportunity is bona fide. However, because the Petitioner's defective Notice is dispositive in this case, we decline to reach and hereby reserve the appellate arguments regarding the remaining issue. See INS v. Bagamasbad, 429 U.S. 24, 25 (1976) ("courts and agencies are not required to make findings on issues the decision of which is unnecessary to the results they reach"); see also Matter of L-A-C-, 26 I&N Dec. 516, 526 n.7 (BIA 2015) (declining to reach alternative issues on appeal where an applicant is otherwise ineligible).

IV. THE PETITIONER'S ABILITY TO PAY THE PROFFERED WAGE

Although not addressed by the Director in his decision, the record does not establish the Petitioner's continuing 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. The proffered wage in this case is $69,472 per year.

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[9] [redacted] Our Facilities, https://www.[redacted] (last visited Feb. 1, 2021).

[10] Where there are multiple possible worksite locations, the Petitioner must describe the requirement on the labor certification, notice of filing, and PWD. The Petitioner did not do so here.

[11] We note that in a letter submitted with the petition, the Petitioner asserted that it has "current contracts for the placement of nurses with 780 medical facilities," but the record is not clear as to how many of the Petitioner's clients in addition to [redacted] are within the applicable 35-mile radius of [redacted] In any future filings, the Petitioner must clarify its applicable clientele.

In determining a petitioner's ability to pay, we first examine whether it paid a beneficiary the full proffered wage each year from a petition's priority date. Here, the record does not establish that the Petitioner paid the Beneficiary wages in any relevant year. If, as here, a petitioner did not pay a beneficiary the full proffered wage, we next examine whether it had sufficient annual amounts of net income or net current assets to pay the difference between the proffered wage and the wages paid, if any. If a petitioner's net income or net current assets are insufficient, we may also consider other evidence of its ability to pay the proffered wage.[12] Here, the record does not contain the Petitioner's federal tax return, audited financial statement, or annual reports for 2019, the year of the priority date. Without this regulatory-prescribed evidence, we cannot affirmatively find that the Petitioner had the continuing ability to pay the proffered wage from the priority date.

The Petitioner submitted a letter dated July 25, 2019, from its chief financial officer (CFO) in an attempt to demonstrate its ability to pay. The letter asserts the Petitioner's ability to pay and provides additional financial information about the company, which, as of 2019, employed more than 100 workers. The regulation at 8 C.F.R. § 204.5(g)(2) allows a statement from a financial officer of a petitioner with at least 100 employees to establish its ability to pay. The regulation, however, does not require USCIS to accept the letter as proof of the Petitioner's ability to pay. See 8 C.F.R. § 204.5(g)(2) (stating that we "may accept a statement from a financial officer" to establish a petitioner's ability to pay). For the reasons discussed below, we decline to accept the CFO's letter as sufficient evidence of the Petitioner's ability to pay.

The Petitioner's CFO contends that the company's business model ensures its ability to pay all of its beneficiaries. Because the Petitioner charges customers more for its employees' services than it spends on their compensation, it states that the company generates more profits with each additional nurse it hires. This contention, however, overlooks the financial effect of foreign nationals who remain outside the United States during the immigration process. The Petitioner must demonstrate its ability to pay the proffered wages of these beneficiaries from the filing dates of their petitions. See 8 C.F.R. § 204.5(g)(2). The foreign nationals, however, do not generate income for the Petitioner until they obtain immigrant visas and enter the United States, which may take months or even years after the filings of their petitions. Because many of the Petitioner's beneficiaries do not work for it while their petitions remain pending, the record does not establish its ability to pay based on its business model.

We may consider evidence of a petitioner's ability to pay beyond its net income and net current assets, including such factors as: the number of years it has conducted business; the growth of its business; its number of employees; the occurrence of any uncharacteristic business expenditures or losses; its reputation in its industry; whether a beneficiary will replace a current employee or outsourced service; or other evidence of its ability to pay a proffered wage. See Matter of Sonegawa, 12 I&N Dec. 612, 614-615 (Reg'l Comm'r 1967). The Petitioner's CFO asserts that the Petitioner has been in business since 1996 and has shown consistent growth from 2015 to 2018. However, its gross sales and costs of goods sold decreased between 2017 and 2018; and its net income and net current assets decreased

[12] 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); Tongatapu Woodcraft Haw., Ltd. v. Feldman, 736 F.2d 1305, 1309 (9th Cir. 1984); Estrada-Hernandez v. Holder, 108 F. Supp. 3d 936, 942-946 (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, 294-295 (5th Cir. 2015).

each year between 2016 and 2018. Also, as noted above, the record does not contain regulatory-prescribed evidence of the Petitioner's ability to pay from the 2019 priority date onward.

Further, USCIS records show that the Petitioner has filed dozens of other 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.[13] For each year at issue, the determination of the Petitioner's ability to pay the wages of beneficiaries of Forms I-140 that were pending or approved as of, or filed after, the priority date of the current petition should be made as follows: (a) calculate any shortfall between the proffered wages and any actual wages paid to the primary Beneficiary and the Petitioner's other beneficiaries, (b) add these amounts together to calculate the total wage deficiency, and (c) demonstrate that its net income or net current assets exceed the total wage deficiency.[14] The record does not establish the Petitioner's ability to pay all of the relevant beneficiaries in this case.

As detailed above, in any future filings, the Petitioner must submit additional evidence to establish its continuing ability to pay the proffered wage from the priority date onward.

ORDER: The appeal is dismissed.

[13] We do not consider the other beneficiaries for any year that the Petitioner has paid the Beneficiary a salary equal to or greater than the proffered wage. Further, the Petitioner's ability to pay the proffered wage of one of the other I-140 beneficiaries is not considered:

- After the other beneficiary obtains lawful permanent residence;
- If an I-140 petition filed on behalf of the other beneficiary has been withdrawn, revoked, or denied without a pending appeal or motion; or
- Before the priority date of the I-140 petition filed on behalf of the other beneficiary.

[14] It is the Petitioner's burden to establish eligibility for the immigration benefit sought. Section 291 of the Act, 8 U.S.C. § 1361; Matter of Skirball Cultural Ctr., 25 I&N Dec. 799, 806 (AAO 2012).