U.S. Citizenship and Immigration Services

Non-Precedent Decision of the Administrative Appeals Office

MATTER OF WCF-L-, INC.

DATE: FEB. 17, 2017

APPEAL OF NEBRASKA SERVICE CENTER DECISION

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

The Petitioner, a distributor of desserts and food ingredients, seeks to employ the Beneficiary as a sales executive. It requests classification of the Beneficiary 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 category allows a U.S. business to sponsor a foreign national with at least 2 years of training or experience for lawful permanent resident status.

The Director, Nebraska Service Center, denied the petition. The Director concluded that the record did not establish the Petitioner's ability to pay the proffered wage.

The matter is now before us on appeal. The Petitioner asserts that the Director disregarded its payments to a part-time worker that could have funded a portion of the Beneficiary's proffered wage.

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

I. LAW AND ANALYSIS

A. The Employment-Based Immigration Process

Employment-based immigration is generally a three-step process. First, a U.S. employer must obtain an ETA Form 9089, Application for Permanent Employment Certification (labor certification), approved by 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). Next, the employer must file a Form I-140, Immigrant Petition for Alien Worker, with U.S. Citizenship and Immigration Services (USCIS). *See* section 204(a) of the Act, 8 U.S.C. § 1154(a). Finally, if USCIS approves the petition, a foreign national 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.

By approving the labor certification in this case, the DOL certified that there are insufficient U.S. workers who are able, willing, qualified, and available for the offered position of sales executive. *See* section 212(a)(5)(A)(i)(I) of the Act. The DOL also certified that the employment of a foreign national in the position will not adversely affect the wages and working conditions of domestic workers similarly employed. *See* section 212(a)(5)(A)(i)(II).

In visa petition proceedings, USCIS must determine whether the Beneficiary meets the requirements of the offered position certified by the DOL. USCIS must also determine whether the Petitioner and the Beneficiary qualify for the requested immigrant classification. *See, e.g., Tongatapu Woodcraft Haw., Ltd. v Feldman*, 736 F.2d 1305, 1309 (9th Cir. 1984) (holding that the immigration service "makes its own determination of the alien's entitlement to [the requested] preference status").

B. The Petitioner's 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). Initial evidence of ability to pay must include copies of annual reports, federal income tax returns, or audited financial statements. *Id.*

In this case, the labor certification states the proffered wage of the offered position of sales executive as $85,010 per year. The petition's priority date is June 4, 2014. This is the date the DOL accepted the labor certification application for processing. *See* 8 C.F.R. § 204.5(d) (explaining how to determine a petition's priority date).

The record before the Director closed on May 24, 2016, with his receipt of the Petitioner's response to his request for evidence (RFE). At that time, required evidence of the Petitioner's ability to pay the proffered wage in 2015 was unavailable. We will therefore consider the Petitioner's ability to pay only in 2014, the year of the petition's priority date.

In determining ability to pay, we examine whether a petitioner paid a beneficiary the full proffered wage each year from a petition's priority date. If a petitioner did not pay the full proffered wage each year, we consider whether it generated sufficient, annual amounts of net income or net current assets to pay any differences between the proffered wage and the wages paid. If a petitioner's net income or net current assets are insufficient, we may also consider the overall magnitude of its business activities. *See Matter of Sonegawa*, 12 I&N Dec. 612, 614-15 (Reg'l Comm'r 1967).[1]

[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); *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).

The Petitioner submitted a copy of an IRS Form 1099, Miscellaneous Income, indicating its payment to the Beneficiary in 2014 of $73,450. The amount on the Form 1099 does not equal or exceed the annual proffered wage of $85,010. The Form 1099 therefore does not establish the Petitioner's ability to pay the proffered wage in 2014 based on its payments to the Beneficiary.

The Form 1099 also conflicts with other evidence of record. A copy of the Petitioner's 2014 federal income tax return does not indicate the company's payments to any employees or contractors. Line 8 of the IRS Form 1120S, U.S. Income Tax Return for an S Corporation, does not reflect any salaries or wages paid by the Petitioner in 2014. The accompanying IRS Form 1125-A, Costs of Goods Sold, also states no labor costs that year.

The inconsistency between the information on the Form 1099 and the tax return casts doubt on the Petitioner's claimed payment to the Beneficiary in 2014. A petitioner bears the burden of establishing eligibility for a requested benefit. Section 291 of the Act, 8 U.S.C. § 1361. The Petitioner must therefore explain the inconsistency regarding its claimed 2014 payment to the Beneficiary. *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). Because of the unresolved inconsistency, the record does not establish the Petitioner's claimed payment to the Beneficiary in 2014.

The Petitioner's 2014 tax return also reflects negative amounts of net income and net current assets in 2014. Thus, based on examinations of the Petitioner's payments to the Beneficiary and its amounts of net income and net current assets, the record does not establish the Petitioner's ability to pay the proffered wage in 2014.

On appeal, the Petitioner asserts that, while the Beneficiary worked full-time in another position, it paid a part-time worker in 2014 in the offered position. A copy of another Form 1099 indicates the Petitioner's payment of $13,520 to an individual other than the Beneficiary. If the Beneficiary had replaced this part-time worker in the full-time, offered position in 2014, the Petitioner asserts that it could have applied the $13,520 payment to pay the $11,560 difference between the annual proffered wage and the wages it purportedly paid to the Beneficiary that year.

Like the Beneficiary's Form 1099, however, the part-time worker's Form 1099 conflicts with evidence of record. As previously discussed, the Petitioner's 2014 tax return does not reflect any wages paid to employees or contractors. The inconsistency between the information on the Form 1099 and the tax return casts doubt on the Petitioner's claimed payment of $13,520 to the part-time worker in 2014. The record therefore does not establish the availability of the claimed $13,520 payment to fund the proffered wage. *See Ho*, 19 I&N Dec. at 591 (requiring a petitioner to resolve inconsistencies of record by independent, objective evidence).

Also, the Beneficiary attested on the labor certification to her full-time employment by the Petitioner in 2014 as a marketing manager. If the Beneficiary had replaced the part-time worker in the offered position in 2014, the Petitioner presumably would have needed to replace the Beneficiary in her

full-time position of marketing manager. As noted, the Petitioner's 2014 tax return reflects negative amounts of net income and net current assets. The record therefore does not establish the Petitioner's ability to pay both a marketing manager and a sales executive on a full-time basis in 2014.

As previously indicated, we may consider a petitioner's ability to pay a proffered wage beyond its net income and net current assets. Under *Sonegawa*, we may consider such factors as: the number of years a petitioner has conducted business; its number of employees; growth in its business; the occurrence of uncharacteristic expenses or losses; its reputation in its industry; a beneficiary's replacement of a current employee or outsourced service; or other evidence of its ability to pay.

Here, the record indicates the Petitioner's continuous business operations since 2009. As previously discussed, the Petitioner asserts that the Beneficiary will replace a part-time worker in the offered position. But the record does not establish the availability of the purported part-time worker's wages to fund the proffered wage. Unlike in *Sonegawa*, the record also does not establish: the Petitioner's employment of any employees; the growth of its business; the occurrence of uncharacteristic expenses or losses; or its outstanding reputation in its industry. The totality of the circumstances in this case therefore does not establish the Petitioner's ability to pay the proffered wage under *Sonegawa*.

For the foregoing reasons, the record does not establish the Petitioner's continuing ability to pay the proffered wage from the petition's priority date onward. We will therefore affirm the Director's decision and dismiss the appeal.

C. The *Bona Fides* of the Job Opportunity

Although unaddressed by the Director, the record also does not establish the *bona fides* of the job opportunity. A labor certification employer must attest that "[t]he job opportunity has been and is clearly open to any U.S. worker." 20 C.F.R. § 656.10(c)(8). This attestation "infuses the recruitment process with the requirement of a *bona fide* job opportunity: not merely a test of the job market." *Matter of Modular Container Sys., Inc.*, 89-INA-228, 1991 WL 223955, *7 (BALCA 1991) (*en banc*) (referring to the former, identical regulation at 20 C.F.R. § 656.20(c)(8)).

> Where the alien for whom alien labor certification is sought is in a position to control hiring decisions or where the alien has such a dominant role in, or close personal relationship with, the sponsoring employer's business that it would be unlikely that the alien would be replaced by a qualified U.S. applicant, the question arises whether the employer has a *bona fide* job opportunity.

Id. A relationship between a petitioner and a beneficiary triggering concerns about the *bona fides* of a job opportunity "is not only of the blood; it may also be financial, by marriage, or through friendship." *Matter of Sunmart 374*, 2000-INA-93, 2000 WL 707942, *3 (BALCA May 15, 2000).

To determine the *bona fides* of a job opportunity, we must consider multiple factors, including but not limited to, whether a foreign national: is in a position to control or influence hiring decisions regarding an offered position; is related to corporate directors, officers, or employees; incorporated or founded the company; has an ownership interest it; is involved in its management; sits on its board of directors; is one of a small group of employees; and has qualifications matching specialized or unusual job duties or requirements stated on an accompanying labor certification. *Modular Container*, 1991 WL 223955 at *8. We must also consider whether a foreign national's pervasive presence and personal attributes would likely cause a petitioner to cease operations in the foreign national's absence, and whether the employer complied with DOL regulations and otherwise acted in good faith. *Id.*

By signing the labor certification in this case, the Petitioner attested to the clear availability of the offered position of sales executive to U.S. workers. The record, however, contains evidence that the job opportunity is not *bona fide*.

The letters submitted in support of the Beneficiary's claimed qualifying experience appear to bear the signature of the Petitioner's president and identify him as the president of both of the Beneficiary's former employers. On the labor certification, the Beneficiary also identified the Petitioner's president as her supervisor at the other companies. In addition, USCIS records indicate that, in a prior, unsuccessful immigrant visa petition on behalf of the Beneficiary, the Petitioner identified one of the companies - [redacted] - as its foreign affiliate.

Thus, the record indicates that business relationships between the Petitioner's president and the Beneficiary existed several years before this petition's priority date. Pursuant to *Modular Container*, the relationships cast doubt on the *bona fides* of the job opportunity.

The record also identifies the Beneficiary as one of a small group of employees. The Form I-140 states the Petitioner's employment of four people. As previously discussed, the Petitioner's 2014 tax return indicates that the company did not have any employees that year. The record therefore establishes the Beneficiary as one of a small group of employees, another *Modular Container* factor indicating that the job opportunity is not clearly available to U.S. workers. The record therefore does not establish the *bona fides* of the job opportunity.

E. The Petitioner's Intention to Employ the Beneficiary on a Full-Time Basis

The record also does not establish the Petitioner's intention to employ the Beneficiary in the offered position on a full-time basis.

A U.S. business may file an immigrant visa petition if it is "desiring and intending to employ" a foreign national. Section 204(a)(1)(F) of the Act, 8 U.S.C. § 1154(a)(1)(F). A petitioner must intend to employ a beneficiary pursuant to the terms and conditions of an accompanying labor certification. *See Matter of Izdebska*, 12 I&N Dec. 54, 55 (Reg'l Comm'r 1966) (affirming a petition's denial

where a petitioner did not intend to employ a beneficiary as a full-time, live-in domestic worker pursuant to the terms of an accompanying labor certification).

For labor certification purposes, a job opportunity must provide "[p]ermanent, full-time work by an employee for an employer other than oneself." 20 C.F.R. § 656.3 (defining the term "employment").

In this case, the Petitioner offered the Beneficiary the full-time, permanent position of sales executive. Evidence of record, however, casts doubt on the full-time nature of the job opportunity and the Petitioner's proposed employment. As previously discussed, the Petitioner submitted evidence that it paid a worker in the offered position in 2014 on a part-time basis. Because a worker performed the duties of the offered position on a part-time basis, the record does not establish that the job opportunity entails full-time employment.

II. CONCLUSION

The record does not establish the Petitioner's continuing ability to pay the proffered wage from the petition's priority date onward. We will therefore affirm the Director's decision and dismiss the appeal. In addition, the record does not establish the *bona fides* of the job opportunity, or the Petitioner's intention to employ the Beneficiary in the offered position on a full-time basis.

In visa petition proceedings, a petitioner bears the burden of establishing eligibility for a requested benefit. Section 291 of the Act, 8 U.S.C. § 1361. Here, the Petitioner did not meet that burden.

ORDER: The appeal is dismissed.

Cite as *Matter of WCF-L-, Inc.*, ID# 122884 (AAO Feb. 17, 2017)