U.S. Citizenship and Immigration Services

Non-Precedent Decision of the Administrative Appeals Office

In Re: 37050842

Date: FEB. 21, 2025

Appeal of Nebraska Service Center Decision

Form I-140, Immigrant Petition for Alien Workers (Other Worker)

The Petitioner, an assisted living facility, seeks to employ the Beneficiary as a caregiver. The company requests her classification under the employment-based, third-preference immigrant visa category as an "other worker." *See* Immigration and Nationality Act (the Act) section 203(b)(3)(A)(iii), 8 U.S.C. § 1153(b)(3)(A)(iii). Businesses may sponsor aliens for U.S. permanent residence in this category to work in jobs requiring less than two years of training or experience. *See* 8 C.F.R. § 204.5(l)(2) (defining the term "other worker").

The Director of the Nebraska Service Center denied the petition. The Director concluded that the Petitioner did not establish its required ability to pay the offered job's proffered wage. On appeal, the Petitioner contends that, contrary to U.S. Citizenship and Immigration Services (USCIS) policy, the Director did not consider that the company temporarily operated at a loss to improve its long-term business prospects.

The Petitioner bears the burden of demonstrating eligibility for the requested benefit by a preponderance of the evidence. *Matter of Chawathe*, 25 I&N Dec. 369, 375-76 (AAO 2010). Exercising de novo appellate review, *see Matter of Christo's, Inc.*, 26 I&N Dec. 537, 537 n.2 (AAO 2015), we conclude that the company has insufficiently explained its expected future revenue increases and its claimed ability to fund the job's proffered wage in 2022 and 2023. We will therefore dismiss the appeal.

I. LAW

Immigration as an other – or "unskilled" – worker generally follows a three-step process. First, a prospective employer must obtain certification from the U.S. Department of Labor (DOL) that: there are insufficient U.S. workers able, willing, qualified, and available for an offered job; and an alien's permanent employment in the position would not harm wages and working conditions of U.S. workers with similar jobs. Section 212(a)(5)(A)(i) of the Act, 8 U.S.C. § 1182(a)(5)(A)(i).

Second, an employer must submit a DOL-approved labor certification with an immigrant visa petition to USCIS. Section 204(a)(1)(F) of the Act, 8 U.S.C. § 1154(a)(1)(F). Among other things, USCIS

determines whether an alien beneficiary meets the requirements of a DOL-certified position and a requested immigrant visa category. 8 C.F.R. § 204.5(l)(3)(ii)(D).

Finally, if USCIS approves a petition, a beneficiary 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.

II. ANALYSIS

A petitioner must demonstrate its continuing ability to pay an offered job's proffered wage, from a petition's priority date until a beneficiary obtains U.S. permanent residence. 8 C.F.R. § 204.5(g)(2); *see also Matter of Great Wall*, 16 I&N Dec. 142, 145 (Acting Reg'l Comm'r 1977) (holding that, because a petitioner must make a "realistic" job offer, the business must demonstrate its ability to pay an offered job's proffered wage). Evidence of ability to pay must generally 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 in relevant years, beginning with the year of a petition's priority date. *See generally* 6 *USCIS Policy Manual* E.4(C)(1), www.uscis.gov/policy-manual. If a petitioner did not annually pay the full proffered wage or did not pay a beneficiary at all, USCIS considers whether the business generated annual amounts of net income or net current assets sufficient to pay any differences between the proffered wages and the wages paid. *See generally* 6 *USCIS Policy Manual* E.4(C)(2). If net income and net current assets are insufficient, USCIS may consider other factors potentially 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); *see generally* 6 *USCIS Policy Manual* E.4(C)(3).[1]

The Petitioner's labor certification states the proffered wage of the offered caregiver job as $26,936 a year. The petition's priority date is August 2, 2022, the date 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).

At the time of the appeal's filing in December 2024, regulatory required evidence of the Petitioner's ability to pay the proffered wage that year was not yet available. For purposes of this decision, we will therefore determine the company's ability to pay in only 2022, the year of the petition's priority date, and 2023.

The record indicates the Beneficiary's residence abroad and does not show that the Petitioner paid her wages in either 2022 or 2023. Thus, based solely on wages paid, the company has not demonstrated its ability to pay the proffered wage.

The Petitioner submitted copies of its federal income tax returns for 2022 and 2023. The 2022 tax return reflects net income of -$123,085 and net current assets of -$319,432. The 2023 return reports net income of -$112,685 and net current assets of -$425,665. None of these negative amounts of net income or net current assets equal or exceed the annual proffered wage of $26,936. Thus, based on

[1] Federal courts have upheld USCIS' method of determining a petitioner's ability to pay a proffered wage. *See, e.g., River St. Donuts, Inc. v. Napolitano*, 558 F.3d 111, 118 (1st Cir. 2009).

reviews of the Petitioner's wages paid, net income, and net current assets, the company has not demonstrated its ability to pay the proffered wage in 2022 or 2023.

The Director also considered other factors potentially affecting the Petitioner's ability to pay the proffered wage. Under *Sonegawa*, USCIS may consider: how many years the Petitioner has conducted business; its number of employees; growth of its business; its incurrence of uncharacteristic business expenses or losses; its reputation in its industry; the Beneficiary's replacement of a current employee or outsourced service; or other factors potentially affecting the company's ability to pay the proffered wage. *See Matter of Sonegawa*, 12 I&N Dec. at 614-15.

The record supports the Director's finding that, under *Sonegawa*, a totality of circumstances does not demonstrate the Petitioner's ability to pay the proffered wage. The record shows that the company has conducted business since only October 2020 and employs, with part-time workers included, more than 30 people. Also, the company's federal income tax returns show a slight increase in its gross annual sales from about $850,000 in 2022 to more than $900,000 in 2023. Unlike the petitioner in *Sonegawa*, however, the Petitioner has not demonstrated its incurrence of uncharacteristic business expenses or losses. The company argues that various media articles have mentioned it and that Internet sites list its services, including assisted living and memory care. But the Petitioner has not established its possession of a good reputation in its industry. The company also has not established the Beneficiary's replacement of a current employee or outsourced service.

Even considering additional cash flow, the Petitioner has not established its ability to pay. *See Constr. & Design v. USCIS*, 563 F.3d 593, 595 (7th Cir. 2009) (distinguishing between "accounting entities" and cash flow).[2] The company's tax returns reflect depreciation amounts of $19,752 in 2022 and $8,276 in 2023. Even if we could consider that these accounting entities minimized the company's tax liability and add the depreciation amounts to the Petitioner's net income, the record would indicate the company's adjusted net income of -$103,333 in 2022 and -$311,156 in 2023. Neither of these negative adjusted amounts equal or exceed the offered job's annual proffered wage of $26,936. Thus, on balance, the Petitioner has not demonstrated its ability to pay the proffered wage under *Sonegawa*.

On appeal, the Petitioner contends that it has temporarily operated at a loss to benefit its future financial position. The record indicates that, in December 2023, the limited liability company's (LLC's) owners secured a five-year, $1.965 million loan, which the company says it will use to fund "capital improvement and facility expansion."[3] The Petitioner states that it will add 31 beds to increase its facility's occupancy from 19 to 50 residents. The company said that its property will also add physical therapy rooms, dining areas, lounges, and laundry facilities. The Petitioner states that its owners "expect that this will result in an increase in revenue for [it]." The company notes that, because of the aging U.S. population, demand for its services should grow.

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[2] *But see, e.g., River St. Donuts,* 558 F.3d at 118 ("[T]he AAO has a rational explanation for its policy of not adding depreciation back to net income. Namely, the amount spent on a long term tangible asset is a 'real' expense."); *Econo Inn Corp. v. Rosenberg*, 145 F.Supp.3d 708, 717 (E.D. Mich. 2015) (citing *Taco Especiale v. Napolitano*, 696 F.Supp.2d 873, 877 (E.D. Mich. 2010)) ("USCIS does not act arbitrarily when it insists that depreciation and amortization expenses be factored into the ability-to-pay calculus.")

[3] The Petitioner's federal income tax returns and a letter from the company's purported owners identify them as a married couple. Some of the loan documentation, however, identifies one of the spouses as the petitioning LLC's sole member.

As the Petitioner argues, USCIS' ability-to-pay analysis "is more nuanced than simply reviewing wages paid, net income, and net current assets." 6 *USCIS Policy Manual* E.4(C)(3).

> Sometimes companies operate at a loss for a period to improve their business positions in the long run. For example, a company may not expect research and development costs on a product line to generate revenue for several years. In those instances, the documentation should fully explain the sources of funding for the entity (or unit) and the expected profit potential. Whether the petitioner can demonstrate it has the ability to pay the beneficiary the wages described in the petition depends on the specific facts presented and consideration of all of the circumstances.

Id.

Here, however, the Petitioner has not fully documented its expected future revenues. Contrary to USCIS policy, the company has not explained when it expects to generate more revenues or how much revenue it expects to receive. The record does not indicate that the Petitioner has ever turned a profit. The company has not sufficiently explained how and when it would become profitable.

Also, documentation regarding the loan of the Petitioner's owners indicates that its proceeds would not only benefit the Petitioner but also two other affiliated LLCs. The record does not indicate how much of the funding the owners would allot to the Petitioner. Further, while the loan might allow the Petitioner to temporarily pay the offered job's proffered wage until the company generates more sufficient income and assets, the company did not obtain the financing until the end of 2023. The record does not explain how the Petitioner would have paid the proffered wage from the petition's priority date in August 2022 until the company secured the loan.

We also disagree with the Petitioner's contention that its owners "have sufficient personal income and assets to assure that any employees hired are paid the wage offered, and in this case the proffered wage to [the Beneficiary]." A petition must show that "*the prospective United States employer*" can pay the proffered wage. 8 C.F.R. § 204.5(g)(2) (emphasis added). Here, the prospective U.S. employer is an LLC constituting a separate legal entity from its individual owners. *See* Wis. Stat. § 183.0108(1) ("A limited liability company is an entity distinct from its member or members.") Evidence of the owners' ability to pay therefore would not satisfy the regulation's evidentiary requirement. *See Sitar Rest. v. Ashcroft*, No. Civ.A.02-30197-MAP, 2003 WL 22203713, *2 (D. Mass. Sept. 18, 2003) (("[N]othing in the governing regulation, 8 C.F.R. § 204.5, permits the [immigration service] to consider the financial resources of individuals or entities who have no legal obligation to pay the wage."); *see generally* 6 *USCIS Policy Manual* E.4(B), Income and Assets of Others ("Generally, USCIS does not consider the financial resources of persons or entities that have no explicit legal obligation to pay the proffered wage, including . . . members or managers of a . . . LLC (even if the LLC is taxed as a partnership or disregarded entity."))

For the foregoing reasons, the Petitioner has not demonstrated its ability to pay the offered job's proffered wage.

ORDER: The appeal is dismissed.