U.S. Citizenship and Immigration Services

Non-Precedent Decision of the Administrative Appeals Office

In Re: 30063545

Date: FEB. 26, 2024

Appeal of Nebraska Service Center Decision

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

The Petitioner, a restaurant, seeks to permanently employ the Beneficiary as a bookkeeper. It requests his classification under the employment-based, third-preference (EB-3) 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 noncitizens for U.S. permanent residence in this category to work in jobs requiring less than two years of training or experience. *Id.*

The Director of the Nebraska Service Center denied the petition. The Director concluded that the Petitioner did not demonstrate its required ability to pay the offered job's proffered wage. On appeal, the company contends that the Director overlooked evidence and did not properly consider the totality of the circumstances.[1]

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 not submitted required initial evidence of its ability to pay the proffered wage. 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 a noncitizen's permanent employment in the job 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 an approved labor certification with an immigrant visa petition to U.S. Citizenship and Immigration Services (USCIS). Section 204(a)(1)(F) of the Act, 8 U.S.C. § 1154(a)(1)(F). Among other things, USCIS determines whether a noncitizen beneficiary meets the

[1] On Form I-290B, Notice of Appeal or Motion, the Petitioner indicated that it would submit a brief, additional evidence, or both within 30 days of the appeal's filing. As of this date, we have not received any further materials from the company.

requirements of a DOL-certified position and a requested immigrant visa category. 8 C.F.R. § 204.5(l)(3)(ii)(D), (4).

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 permanent residence. 8 C.F.R. § 204.5(g)(2). Initial evidence must generally include copies of an annual report, federal tax return, or audited financial statements for each available year, from the year of the priority date onward. *Id.; see generally* 6 *USCIS Policy Manual* E.(4)(A), www.uscis.gov/policy-manual.

When determining ability to pay, USCIS examines whether a petitioner paid a beneficiary the full proffered wage, beginning with the year of a petition's priority date. *See generally* 6 *USCIS Policy Manual* E.(4)(C)(1). If a petitioner did not pay a beneficiary the full proffered wage or did not pay a beneficiary at all during the relevant period, USCIS considers whether the business generated annual amounts of net income or net current assets sufficient to pay any differences between the proffered wage and the wages paid. *See generally* 6 *USCIS Policy Manual* E.(4)(C)(2). If net income and net current assets are insufficient, the Agency may consider other factors potentially 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).[2]

The Petitioner's labor certification states the proffered wage of the offered job of bookkeeper as $34,882 a year. The petition's priority date is December 1, 2021, the date DOL accepted the company's 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 Petitioner's response to the Director's request for additional evidence, initial required evidence of the company's ability to pay the proffered wage in 2023 was not yet available. Thus, for purposes of this decision, the Petitioner need only demonstrate its ability to pay from 2021, the year of the petition's priority date, through 2022.

The record does not indicate that the Beneficiary has worked for the Petitioner, and the company did not submit any evidence of payments to him. Thus, based solely on wages paid, the company has not demonstrated its ability to pay the proffered wage.

The Petitioner provided a copy of its federal income tax return for 2022, reflecting negative amounts of net income and net current assets. In a letter, the company's managing partner stated that its 2021 tax return also indicates a loss. But the company did not submit a copy of the tax return or other initial required evidence of its ability to pay in 2021. *See* 8 C.F.R. § 204.5(g)(2) ("Evidence of this ability

[2] 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); *Estrada-Hernandez v. Holder*, 108 F. Supp. 3d 936, 942-44 (S.D. Cal. 2015).

[to pay] shall be either in the form of copies of annual reports, federal tax returns, or audited financial statements.")

On appeal, the Petitioner contends that, contrary to *Sonegawa*, the Director did not properly consider other factors affecting its ability to pay. But, because the company did not submit initial required evidence of its ability to pay in 2021, the Director did not need to apply *Sonegawa*. Even if *Sonegawa* factors favor the Petitioner, the company's omission of initial required evidence of its ability to pay would have warranted the petition's denial. Thus, a *Sonegawa* analysis would not establish the company's ability to pay the proffered wage.

The Petitioner also contends that the Director overlooked evidence of its ability to pay the proffered wage. The company submitted copies of bank account statements for 2022, asserting that they show sufficient funds to pay the proffered wage "each month from the . . . priority date."

Again, however, because the Petitioner omitted initial required evidence, the bank account statements would not have demonstrated the company's ability to pay the proffered wage. In the absence of initial required evidence, USCIS need not consider other potential proof.

Finally, the Petitioner contends that the Director incorrectly stated that an application for permission to reapply for U.S. admission after deportation or removal must be filed outside the United States. *See* 8 C.F.R. § 212.2. This contention appears to be erroneous, as the Director's decision does not discuss an application for permission to reapply for U.S. admission and USCIS records indicate that the Beneficiary has never made such a filing. Even if true, the contention would not establish the Petitioner's ability to pay the proffered wage.

III. CONCLUSION

The Petitioner has not demonstrated its ability to pay the offered job's proffered wage. We will therefore affirm the petition's denial.

ORDER: The appeal is dismissed.