U.S. Citizenship and Immigration Services

Non-Precedent Decision of the Administrative Appeals Office

In Re: 6942191

Date: JAN. 17, 2020

Appeal of Nebraska Service Center Decision

Form I-140, Immigrant Petition for Professional

The Petitioner seeks to employ the Beneficiary as an operations research analyst under the third-preference, immigrant visa classification for professionals. *See* Immigration and Nationality Act (the Act) section 203(b)(3)(A)(ii), 8 U.S.C. § 1153(b)(3)(A)(ii).

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 proffered wage of the offered position. Also, finding that the company willfully concealed the Beneficiary's ownership interest in it, the Director invalidated the accompanying certification from the U.S. Department of Labor (DOL).

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 a professional 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 DOL certification. *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 also found 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. ABILITY TO PAY THE PROFFERED WAGE

A petitioner must 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 petitioners with less than 100 employees, 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 proffered wage, USCIS considers whether it generated annual amounts of net income or net current assets sufficient to pay any difference between the proffered wage and the wages paid. If net income and net current assets are insufficient, USCIS may consider additional factors 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).[1]

Here, the labor certification states the proffered wage of the offered position of operations research analyst as $74,880 a year. The petition's priority date is September 21, 2017, the date DOL received 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 indicates the Petitioner's employment of the Beneficiary since October 2011. The company submitted copies of IRS Forms W-2, Wage and Tax Statements, for 2017, the year of the petition's priority date, and 2018. The Forms W-2 indicate that, in both years, the Petitioner paid the Beneficiary $70,000.08.[2] That amount does not equal or exceed the annual proffered wage of $74,880. Thus, based solely on wages paid to the Beneficiary, the record does not establish the Petitioner's ability to pay the proffered wage. Nevertheless, we credit the Petitioner's payments. The company need only demonstrate its ability to pay the differences between the annual proffered wage and the wages paid, or $4,879.92 in both 2017 and 2018.

The Petitioner submitted copies of federal income tax returns of its parent company for 2017 and 2018.[3] Both the net income and net current asset amounts reflected on the 2018 tax return exceed the $4,879.92 difference between the annual proffered wage and wages paid that year. The record therefore establishes the Petitioner's ability to pay in 2018. The 2017 return, however, reflects net income of $3,995 and a negative amount of net current assets. Neither amount equals or exceeds the difference between the proffered wage and the wages paid. The Petitioner also submitted unaudited financial statements for 2017 that list its finances separately from those of its parent company. The financial statements, however, report that the Petitioner generated negative amounts of net income

[1] 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); *Estrada-Hernandez v. Holder*, 108 F. Supp. 3d 936, 942-43 (S.D. Cal. 2015).

[2] The Forms W-2 indicate their issuance by a "PEO" (professional employer organization) that administrates the Petitioner's payroll. The forms therefore indicate that the Petitioner paid the Beneficiary's wages.

[3] The record indicates that, as a single-member limited liability company (LLC), the Petitioner need not file its own U.S. income tax returns. *See* 26 C.F.R. § 301.7701-2(c)(2)(ii) (requiring the Internal Revenue Service (IRS) to disregard a single-member LLC as an entity separate from its owner, unless the LLC chooses to be taxed as a corporation).

and net current assets that year. Thus, based on examinations of wages the Petitioner paid the Beneficiary, its net income, and its net current assets, the record does not establish its ability to pay the proffered wage in 2017, the year of the petition's priority date.

On appeal, the Petitioner argues that the Director disregarded evidence of its ability to pay in 2017. The Petitioner submitted a letter from a manager of its parent company. The letter indicates that the parent has a $1 million line of credit from which, as of March 2019, it had not drawn any funds. A copy of the November 2016 agreement under which the parent acquired the Petitioner also refers to the establishment of the $1 million credit line.

A credit line, however, does not legally obligate a party to provide funds to another. *See* John Downes & Jordan Elliot Goodman, *Barron's Dictionary of Finance and Investment Terms* 45 (5th ed. 1998). The Administrative Appeals Office has reasonably concluded that, "because lines of credit are only unenforceable commitments to loan (as opposed to an existent loan), such 'assets' cannot be used to establish the ability to pay." *Rahman v. Chertoff*, 641 F.Supp.2d 349, 351-52 (D. Del. 2009). Thus, contrary to the Petitioner's argument, we find that the credit line of its parent company does not establish its ability to pay the proffered wage in 2017.

As previously indicated, in determining the Petitioner's ability to pay the proffered wage, we may consider factors beyond the wages it paid the Beneficiary, its net income, and its net current assets. Under *Sonegawa*, we may examine such factors as: the number of years the Petitioner has conducted business; its number of employees; the 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 the Petitioner's ability to pay. *See Matter of Sonegawa*, 12 I&N Dec. at 614-15.

Here, the record indicates the Petitioner's continuous business operations since 2011 and its employment of three people. Copies of federal income tax returns of the Petitioner's parent company, however, indicate that, from 2016 through 2018, total annual revenues continuously decreased. The tax returns also show a drop, from 2017 to 2018, in the annual amounts of salaries and wages paid. Further, unlike the petitioner in *Sonegawa*, the record does not demonstrate this Petitioner's incurrence of uncharacteristic losses or expenses, or its possession of an outstanding reputation in its industry. The Petitioner also has not established the Beneficiary's prospective replacement of a current employee or outsourced service. The tax returns would demonstrate its ability to pay the proffered wage in 2016 and 2018, suggesting that the Petitioner and its parent company simply experienced a "down" year in 2017. But the copy of the 2016 "Foreclosure Sale Agreement" under which the Petitioner's parent acquired it indicates its default on a loan obtained in 2011. The loan default largely negates the positive tax returns. Thus, a totality of the circumstances under *Sonegawa* does not demonstrate the Petitioner's ability to pay.

For the foregoing reasons, the Petitioner has not demonstrated its continuing ability to pay the proffered wage of the offered position from the petition's priority date onward. We will therefore affirm the petition's denial.

III. THE VALIDITY OF THE LABOR CERTIFICATION

Unless accompanied by an application for Schedule A designation or documentation of a beneficiary's qualifications for a shortage occupation, a petition for a professional must include a valid, individual labor certification. 8 C.F.R. § 204.5(l)(3)(i). USCIS may invalidate a certification after its issuance upon a finding of "fraud or willful misrepresentation of a material fact involving the labor certification application." 20 C.F.R. § 656.30(d).

Misrepresentations are willful if "deliberately made with knowledge of their falsity." *Matters of Valdez*, 27 I&N Dec. 496, 498 (BIA 2018) (citations omitted). A misrepresentation is material when it has a "natural tendency to influence, or [be] capable of influencing, the decision of the decision-making body to which it was addressed." *Id.*

Here, asked on the labor certification application whether the Beneficiary "has an ownership interest" in it, the Petitioner indicated "No." Copies of the 2016 and 2017 federal income tax returns of the Petitioner's parent company, however, indicate the Beneficiary's ownership of about 5% of the parent company. The tax returns and the Foreclosure Sale Agreement also identify the parent as the Petitioner's sole owner. Thus, the record indicates the Beneficiary's indirect ownership of about 5% of the Petitioner. The record therefore demonstrates that, as of the September 21, 2017, filing of the labor certification application, the Petitioner misrepresented the Beneficiary's ownership interest in it.

"[O]fficers and principals of a [business] are presumed to be aware and informed of the organization and staff of their enterprise." *Matter of Silver Dragon Chinese Rest.*, 19 I&N Dec. 401, 404 (Comm'r 1986). The Petitioner's misrepresentation on the labor certification application therefore also appears to be willful.

On appeal, the Petitioner argues that the labor certification application did not misrepresent the Beneficiary's ownership interest in the company because she directly owns a share of the Petitioner's parent company, not the Petitioner. The question in part C.9 of the labor application, however, asked whether the Beneficiary "has an ownership interest" in the Petitioner, without distinguishing between a direct or indirect interest. The Petitioner therefore had to disclose *any* ownership interest of the Beneficiary in it. Moreover, case law confirms that DOL interprets the question in part C.9 as referring to either direct or indirect ownership interests. *See Matter of Modular Container Sys., Inc.*, 89-INA-228, slip op. at **5-6 (BALCA July 16, 1991) (*en banc*) (finding that a foreign national had an ownership interest in a labor certification employer where he held shares in the employer's parent company).

The Director invalidated the labor certification, finding that the Petitioner willfully misrepresented the Beneficiary's ownership interest in it. But the Director did not properly consider the required materiality of the misrepresentation. A foreign national's ownership interest in his or her labor certification employer is material if the relationship indicates the unlikelihood of the alien's replacement by a qualified U.S. applicant for the offered position. *Id.* at *7; *see also* 20 C.F.R. § 656.10(c)(8) (requiring a labor certification employer to certify that "[t]he job opportunity has been and is clearly open to any U.S. worker"). To determine the *bona fides* of a job opportunity, an

adjudicator must consider numerous factors under a totality-of-the-circumstances analysis. *Matter of Modular Container*, slip op. at **8-10.

The Director did not properly consider the materiality of the Petitioner's alleged misrepresentation or notify the company of the relevant *Modular Container* factors. We will therefore withdraw the Director's invalidation and reinstate the labor certification's validity. However, in any future filings in this matter, the Petitioner must fully and satisfactorily address these issues to demonstrate the validity of the labor certification. In the absence of such evidence, the labor certification may again be invalidated. The Petitioner would need to submit evidence in support of the *Modular Container* factors. Those factors include whether the Beneficiary: is in a position to control or influence hiring decisions for the offered position; has family relationships with the Petitioner's directors, officers, or employees; incorporated or founded the company; has an ownership interest in it; participates in its management; serves on its board of directors; is one of a small number of employees; and has qualifications identical to specialized or unusual job duties or requirements of the offered position. *Matter of Modular Container*, slip op. at **8-10. Additional factors include the likelihood that the Petitioner would cease operations in the Beneficiary's absence and its level of compliance and good faith in processing the labor certification application. *Id.*

In addition, the Petitioner should submit: a list of all officers and members of it and its parent company, describing their relationships to each other and the Beneficiary; a financial history of the companies, including the total investments in them and the amount of investment by each member and the Beneficiary; the names of the business official with primary responsibility for interviewing and hiring applicants for the offered position and the officials having control or influence over hiring for the offered position; and documentation of the Beneficiary's family relationship to any employees. *See* 20 C.F.R. § 656.17(l) (listing required evidence where a foreign national has an ownership interest in a labor certification employer).

IV. CONCLUSION

The record on appeal does not demonstrate the Petitioner's continuing ability to pay the proffered wage of the offered position. We will therefore affirm the petition's denial.

ORDER: The appeal is dismissed.