U.S. Citizenship and Immigration Services

Non-Precedent Decision of the Administrative Appeals Office

MATTER OF A-H-P-, LLC

DATE: JAN. 30, 2017

APPEAL OF TEXAS SERVICE CENTER DECISION

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

The Petitioner, a healthcare business, seeks to employ the Beneficiary as a registered nurse. It requests classification of the Beneficiary as a skilled worker under the third preference immigrant classification. *See* Immigration and Nationality Act (the Act) § 203(b)(3)(A)(i), 8 U.S.C. § 1153(b)(3)(A)(i). This employment-based immigrant classification allows a U.S. employer to sponsor a foreign national for lawful permanent resident status to work in a position that requires at least 2 years of training or experience.

The Director, Texas Service Center, denied the petition. The Director determined that the Petitioner had not established its ability to pay the proffered wage from the priority date onward. The matter is now before us on appeal. The Petitioner asserts that it has the ability to pay the proffered wage to all beneficiaries on whose behalf it has filed an immigrant petition because each worker generates more than the proffered wage in net profit for the company. Upon *de novo* review, we will dismiss the appeal.

I. LAW AND ANALYSIS

A. Schedule A Petitions

Employment-based immigration is generally a three-step process. First, an employer must obtain an approved labor certification from 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, U.S. Citizenship and Immigration Services (USCIS) must approve an immigrant visa petition. *See* section 204 of the Act, 8 U.S.C. § 1154. Finally, the foreign national must 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.

The instant petition is for a Schedule A occupation. A Schedule A occupation is an occupation codified at 20 § C.F.R. 656.5(a) for which the 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 aliens 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 ETA Form 9089, Application for Permanent Employment Certification, (labor certification) from the DOL prior to filing the petition with USCIS. Instead, the petition is filed directly with USCIS with a duplicate uncertified ETA Form 9089. *See* 8 C.F.R. §§ 204.5(a)(2) and (l)(3)(i); *see also* 20 C.F.R. § 656.15.

Petitions for Schedule A occupations must also contain evidence establishing that the Petitioner provided its U.S. workers with notice of the filing of an ETA Form 9089 (Notice) as prescribed by 20 C.F.R. § 656.10(d), and a valid prevailing wage determination (PWD) obtained in accordance with 20 C.F.R. § 656.40 and 20 C.F.R. § 656.41. *See* 20 C.F.R. § 656.15(b)(1).

For the Notice requirement, the Petitioner must provide notice of the filing of an ETA Form 9089 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).

If the Schedule A occupation is a professional nurse, a petitioner must establish that the beneficiary has a Certificate from the Commission on Graduates of Foreign Nursing Schools (CGFNS); a permanent, full and unrestricted license to practice professional nursing in the state of intended employment; or passed the National Council Licensure Examination for Registered Nurses (NCLEX-RN). *See* 20 C.F.R. § 656.5(a)(2).

In these visa petition proceedings, USCIS determines whether a foreign national meets the job requirements specified on a labor certification and the requirements of the requested immigrant classification. *See* section 204(b) of the Act (stating that USCIS must approve a petition if the facts stated in it are true and the foreign national is eligible for the requested preference classification); *see also, e.g., Tongatapu Woodcraft Haw., Ltd. v. Feldman*, 736 F. 2d 1305, 1309 (9th Cir. 1984); *Madany v. Smith*, 696 F.2d 1008, 1012-13 (D.C. Cir. 1983) (both holding that USCIS has authority to make preference classification decisions).

The priority date of a Schedule A petition is the date the completed, signed petition (including all initial evidence and the correct fee) is properly filed with USCIS. *See* 8 C.F.R. § 204.5(d). The priority date is used to calculate when the beneficiary of the visa petition is eligible to adjust his or her status to that of a lawful permanent resident. *See* 8 C.F.R. § 245.1(g). A petitioner must establish the elements for the approval of the petition at the time the priority date is established and continuing until the beneficiary obtains lawful permanent residence. *See* 8 C.F.R. §§ 204.5(g)(2), 103.2(b)(l), (12); *see also Matter of Wing's Tea House*, 16 I&N Dec. 158, 159 (Acting Reg'l Comm'r 1977); *Matter of Katigbak*, 14 I&N Dec. 45, 49 (Reg'l Comm'r 1971).

In the instant case, the priority date is December 29, 2015. Therefore, the Petitioner must establish that all eligibility requirements for the petition have been satisfied from December 29, 2015, onward.

B. Ability to Pay the Proffered Wage

Like all petitioners, a Schedule 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 income tax returns, or audited financial statements. *Id.*

The proffered wage of the offered position of registered nurse is $48,526 per year.

The record before the Director closed on February 1, 2016, with his receipt of the Petitioner's response to his request for evidence (RFE). Because required evidence of the Petitioner's ability to pay the proffered wage in 2015 was not then available, the Director considered the Petitioner's ability to pay in 2014.[1]

In determining ability to pay, we first examine whether a petitioner paid a beneficiary the full proffered wage each year from a petition's priority date. If a record lacks evidence of a petitioner's annual payment of a full proffered wage to a beneficiary, we examine whether a petitioner generated sufficient annual amounts of net income or net current assets to pay the difference between any wages paid and the annual proffered wage. If a petitioner's net income and 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).[2]

The evidence in the record of proceedings shows that the Petitioner is structured as a domestic limited liability company (LLC) and taxed as a partnership. On the petition, the Petitioner claimed to have been established in 2003, to have $19.6 million in gross annual income and $123,000 in net annual income, and to currently employ 205 workers.

The Petitioner did not submit any evidence of payments to the Beneficiary. The record therefore does not establish its ability to pay the proffered wage on this basis.

On appeal, the Petitioner did not submit its 2015 tax return, annual report, or audited financial statements. Accordingly, the Petitioner did not submit evidence that it had sufficient net income or net current assets to pay the proffered wage as of the priority date in 2015.

Instead, the Petitioner relies on an affidavit from the Petitioner's chief financial officer stating that it has over 300 employees, and that it has the ability to pay the proffered wage to the instant Beneficiary.

---

[1] The record contains the Petitioner's tax returns and audited financial statements for 2013 and 2014.

[2] 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); *Rizvi v. Dep't of Homeland Sec.*, 37 F. Supp. 3d 870, 884-85 (S.D. Tex. 2014), *aff'd*, 627 Fed. App'x. 292 (5th Cir. 2015).

The Petitioner asserts that the Director erred in rejecting a letter from its CFO as proof of its ability to pay the proffered wage. The Petitioner notes that regulations allow USCIS to accept a statement from a petitioner's financial officer "where the prospective United States employer employs 100 or more workers." 8 C.F.R. § 204.5(g)(2). The regulations state that a director "may accept a statement from a financial officer of the organization which establishes the prospective employer's ability to pay the proffered wage." *Id.*

The Petitioner asserts that the Director did not explain his rejection of the CFO's letter. It cites a 2004 non-precedent decision of ours in which we held that a director abused his discretion by disregarding a financial officer's letter without explanation. *See* 2004 WL 3457071, *3 (AAO Oct. 26, 2004). In that case, we found that a financial officer's statement, supported by a copy of a federal income tax return, demonstrated a petitioner's ability to pay. *Id.*

Contrary to the Petitioner's assertion, we interpret the Director's instant decision as rejecting the CFO's letter because of the Petitioner's obligation to pay the proffered wages of multiple pending petitions. Immediately after mentioning the CFO's letter, the decision discusses the Petitioner's other pending petitions. Considered in context, the decision indicates that the Petitioner's obligation to pay multiple proffered wages renders the letter insufficient evidence of the Petitioner's ability to pay.

Even if the basis of the Director's rejection of the CFO's letter is unclear, our *de novo* review finds the letter to be insufficient evidence of the Petitioner's ability to pay the proffered wage. Considering the hundreds of additional proffered wages for which the Petitioner remains responsible, as detailed below, the statement from its financial officer does not demonstrate its ability to pay.

The Petitioner's citation to our 2004, non-precedent decision is not persuasive. We are not bound by our non-precedent decisions. *See* 8 C.F.R. § 103.3(c) (stating that USCIS employees need only follow precedent USCIS decisions). Also, unlike the instant Petitioner, the petitioner in the 2004 case was not obliged to pay multiple proffered wages.

As stated in the Director's decision, USCIS records indicate the Petitioner's filing of more than 400 Forms I-140, Immigrant Petitions for Alien Worker, in 2015. USCIS records show the Petitioner has filed several hundred more Form I-140 petitions since January 1, 2016.

A petitioner must demonstrate its ability to pay the proffered wage of each petition it files from the petition's priority date. 8 C.F.R. § 204.5(g)(2). The instant Petitioner must therefore demonstrate its ability to pay the combined proffered wages of the instant Beneficiary and the beneficiaries of its other petitions that remained pending after the instant petition's priority date. The Petitioner must demonstrate its ability to pay the combined proffered wages from the instant petition's priority date until the other beneficiaries obtained lawful permanent residence, or until their petitions were denied, withdrawn, or revoked. *See Patel v. Johnson*, 2 F. Supp. 3d 108, 124 (D. Mass. 2014) (affirming our denial of a petition where a petitioner did not demonstrate its ability to pay multiple beneficiaries).

In the RFE, the Director requested the Petitioner to provide the receipt numbers, priority dates, and proffered wages of all petitions it filed in 2015. The RFE also requested evidence of: wages paid to any of the beneficiaries; the withdrawals, revocations, or denials of any of the petitions; and the lawful permanent residence status of any of the beneficiaries. Although the Director afforded the Petitioner a reasonable opportunity to do so, the Petitioner did not provide the requested information. *See* 8 C.F.R. § 103.2(b)(14) (allowing USCIS to deny a petition if a petitioner does not submit requested evidence that precludes a material line of inquiry). Without the requested evidence regarding the other pending petitions, the record did not establish the Petitioner's ability to pay the proffered wage.

On appeal, the Petitioner did not provide information regarding its other Form I-140 immigrant petitions. Without this information, the record does not establish the Petitioner's ability to pay the proffered wage.

The Petitioner also asserts that the Director did not consider the ability of its nurse employees to generate income exceeding their salaries and employment-related expenses. The Petitioner's CFO stated that the Petitioner receives a net profit of more than $20,000 for each nurse that it annually employs. Citing *Masonry Masters, Inc. v. Thornburgh*, 875 F.2d 898 (D.C. Cir. 1989) and *Construction and Design Co. v. USCIS*, 563 F.3d 593 (7th Cir. 2009), the Petitioner states that we must consider the additional net income generated by the beneficiaries in determining its ability to pay.

Although the Petitioner's income may rise with each additional nurse, there are additional costs associated with the employment of each nurse, as well.[3] The Petitioner asserts that it incurs an average of approximately $10,000 per year on administrative, tax, and healthcare expenses per employee. However, it provides no support for that assertion. The Petitioner cannot meet the burden of proof simply by claiming a fact to be true, without supporting documentary evidence. *Matter of Soffici*, 22 I&N Dec. 158, 165 (Comm'r 1998) (citing *Matter of Treasure Craft of Cal.*, 14 I&N Dec. 190 (Reg'l Comm'r 1972)); *see also Matter of Chawathe*, 25 I&N Dec. 369, 376 (AAO 2010). The Petitioner must support assertions with relevant, probative, and credible evidence. *See Matter of Chawathe*, 25 I&N Dec. at 376.

Like the instant Beneficiary, USCIS records indicate that most of the Petitioner's pending beneficiaries live outside the United States. They therefore cannot work and generate net income for the Petitioner immediately upon the filing of their petitions. Rather, they must wait for approvals of their petitions and their subsequent immigrant visa applications before they can legally enter the United States and earn net income for the Petitioner. The record does not establish that the Petitioner's current employees generate sufficient amounts of net income to fund the proffered wages of all its pending beneficiaries,

[3] Although the decision in *Construction and Design* is not binding in this case, that court noted the costs (in addition to salary) to the employer in hiring an employee, including "employment taxes (plus employee benefits, if any)." *Constr. & Design Co.*, 563 F.3d at 596. It is unclear if the Petitioner's analysis includes compensation expenses for the employee which may include legally required benefits (social security, Medicare, federal and state unemployment insurance, and worker's compensation), employer costs for providing insurance benefits (life, health, disability), paid leave benefits (vacations, holidays, sick, and personal leave), retirement and savings (defined benefit and defined contribution), and supplemental pay (overtime and premium, shift differentials, and nonproduction bonuses).

many of whom have not been earning net income for the Petitioner from the petition's priority date while waiting for approvals to enter the United States.

In *dicta*, the decisions in *Construction and Design* and *Masonry Masters* state that a petitioner would not likely seek to employ a foreign national unless the employment would increase its net income. *Constr. & Design Co.*, 563 F.3d at 597; *Masonry Masters*, 875 F.2d at 903. But unlike the instant case, neither of those cases involved petitioners responsible for paying proffered wages to multiple beneficiaries who lived outside the United States. The facts of those cases therefore distinguish them from the instant matter and render them unpersuasive authority.

As previously indicated, we may also consider evidence of a petitioner's ability to pay a proffered wage beyond its net income and net current assets. *See Sonegawa*, 12 I&N Dec. at 614-15. As in *Sonegawa*, we may consider such factors as: the number of years a petitioner 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 an employee or outsourced service; or other evidence of its ability to pay the proffered wage.

In the instant case, the record indicates the Petitioner's continuous business operations since 2003. Unlike in *Sonegawa*, however, the record does not indicate the Petitioner's incurrence of uncharacteristic business expenditures or losses, its reputation in its industry, or its growth since its incorporation in 2003. The record also does not indicate that the Beneficiary will replace an employee or outsourced service. Also unlike the petitioner in *Sonegawa*, the instant Petitioner must demonstrate its ability to pay the proffered wages of multiple beneficiaries.

Thus, considering the totality of the circumstances in the instant case pursuant to *Sonegawa*, the record does not establish the Petitioner's ability to pay the proffered wage.

C. Prevailing Wage Determination

Although not addressed by the Director, we independently note that, even if the Petitioner had established that it had the ability to pay the proffered wage, the record does not establish that the PWD is valid for the job offered. Petitions for Schedule A occupations must contain a valid PWD obtained in accordance with 20 C.F.R. § 656.40 and 20 C.F.R. § 656.41. *See* 20 C.F.R. § 656.15(b)(1). The Petitioner must attest that the offered wage equals or exceeds the prevailing wage. *See* 20 C.F.R. § 656.10(c).

The record of proceedings contains a PWD valid from October 20, 2015, to June 30, 2016, with a prevailing wage of $48,526. The PWD is certified for a single job location at [redacted] Florida, and states that the work will *not* be performed in other locations.[4] It specifically states that the Beneficiary "will be assigned to one permanent

[4] The Petitioner did not submit a Notice for the [redacted] Florida address. Petitions for Schedule A occupations must contain evidence that a valid Notice was provided to the bargaining representative or the employer's

employment location." However, the primary worksite provided at Part H. of the ETA Form 9089 refers to an attached addendum of worksites that does not include the Florida address. Further, Part 6. of the Form I-140 relating to the Beneficiary's proposed work address refers to an attached addendum of worksites that does not include the , Florida address. Further, none of the various worksites listed on either addendum are located in Florida. Accordingly, the PWD is not valid for the job offered.

The record does not establish that the PWD is valid for the job offered.

II. CONCLUSION

The record does not establish the Petitioner's ability to pay the proffered wage from the petition's priority date onward. The record also does not establish that the PWD is valid for the job offered. We will therefore affirm the Director's decision and dismiss the appeal.

In visa petition proceedings, a petitioner bears the burden of establishing its eligibility for a requested benefit. Section 291 of the Act, 8 U.S.C. § 1361; *Matter of Otiende*, 26 I&N Dec. 127, 128 (BIA 2013). Here, the instant Petitioner did not meet that burden.

ORDER: The appeal is dismissed.

Cite as *Matter of A-H-P-, LLC*, ID# 111673 (AAO Jan. 30, 2017)

---

employees at the location of employment in accordance with 20 C.F.R. § 656.10(d). The record of proceedings contains multiple notices posted in the locations listed on the addendums of worksites provided with the labor certification and the Form I-140. However, the addendums do not include the Florida address, and a Notice was not provided for that location.