U.S. Citizenship and Immigration Services

Non-Precedent Decision of the Administrative Appeals Office

In Re: 15346246

Date: JUL. 15, 2021

Appeal of Nebraska Service Center Decision

Form I-140, Immigrant Petition for Skilled Worker

The Petitioner seeks to employ the Beneficiary as a staff nurse. It requests classification of the Beneficiary under the third-preference, immigrant category as a skilled worker. Immigration and Nationality Act (the Act) section 203(b)(3)(A)(i), 8 U.S.C. § 1153(b)(3)(A)(i). This employment-based, "EB-3" category allows a U.S. business to sponsor a foreign national for lawful permanent resident status based on a job offer requiring at least two years of training or experience.

The Director of the Nebraska Service Center denied the petition, concluding that the Petitioner did not establish that it had the continuing ability to pay the proffered wage to the Beneficiary.

In these proceedings, it is the Petitioner's burden to establish eligibility for the requested benefit by a preponderance of the evidence. Section 291 of the Act, 8 U.S.C. § 1361; *Matter of Chawathe*, 25 I&N Dec. 369, 375 (AAO 2010). The Administrative Appeals Office (AAO) reviews the questions in this matter *de novo*. *See Matter of Christo's Inc.*, 26 I&N Dec. 537, 537 n.2 (AAO 2015). Upon *de novo* review, we will dismiss the appeal.

I. EMPLOYMENT-BASED IMMIGRATION

This petition is for a Schedule A occupation. A Schedule A occupation is one codified at 20 C.F.R. § 656.5(a) for which the Department of Labor (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. *Id*. Petitions for Schedule A occupations do not require the petitioner to test the labor market and obtain a certified ETA Form 9089, Application for Permanent Employment Certification, from the DOL prior to filing the petition with U.S. Citizenship and Immigration Services (USCIS). Instead, the petition is filed directly with USCIS with an uncertified ETA 9089 in duplicate. *See* 8 C.F.R. § 204.5(a)(2); *see also* 20 C.F.R. § 656.15.

Here, the petition was submitted on July 29, 2019, with an uncertified ETA 9089 describing the Petitioner's job opportunity of staff nurse. The ETA 9089 lists the minimum requirements for a staff nurse as an associate's or foreign equivalent degree in nursing and a New York State registered nursing

license. The Petitioner also submitted evidence of the Beneficiary's qualifications for the offered position.

II. ANALYSIS

A petitioner must establish that it has the ability to pay the beneficiary the proffered wage, as stated on the labor certification, from the priority date[1] onward. *See* 8 C.F.R. § 204.5(g)(2). To show that the job offer to a beneficiary is realistic the petitioner must also establish its ability to pay the proffered wages of its other I-140 beneficiaries.[2]

As indicated in the above regulation, the Petitioner must establish its continuing ability to pay the proffered wage from the priority date of the petition onward. The priority date in this case is July 29, 2019. The labor certification states that the wage offered for the job of staff nurse is $68,640 per year.

In determining a petitioner's ability to pay, we first examine whether it paid a beneficiary the full proffered wage each year from a petition's priority date. If it paid a beneficiary less than the full proffered wage in any year, we may consider the amount of partial wages paid and examine its ability to pay the remaining balance of the proffered wage. We next examine whether it had sufficient annual amounts of net income or net current assets to pay the proffered wage. If a petitioner's net income or net current assets are insufficient, we may also consider other evidence of its ability to pay the proffered wage.[3] USCIS may consider the totality of the petitioner's circumstances, including the overall magnitude of its business activities, in determining the Petitioner's ability to pay the proffered wage. *See Matter of Sonegawa,* 12 I&N Dec. 612 (Reg'l Comm'r 1967).[4]

The Petitioner is a healthcare staffing provider with 85 employees. With the initial filing, the Petitioner submitted its Internal Revenue Service (IRS) Form 1120S, U.S. Income Tax Return for an S Corporation, for 2017. The Petitioner also submitted its 2019 bank statements. Because the record lacked regulatory prescribed evidence of the Petitioner's ability to pay the proffered wage from the 2019 priority date, the Director issued a request for evidence (RFE). In the RFE, the Director informed the Petitioner of its need to establish its ability to pay the proffered wage to this Beneficiary, as well as the beneficiaries of its other petitions. The Director specifically requested a list of all petitions the Petitioner filed "that were pending or approved as of, or filed after, the priority date of the current petition," as well as evidence of wages the Petitioner paid to each beneficiary.

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[1] The "priority date" of a Schedule A petition is the date the petition was filed with USCIS. *See* 8 C.F.R. § 204.5(d). The Petitioner must establish that all eligibility requirements for the petition have been satisfied as of the priority date.

[2] *See Patel v. Johnson*, 2 F.Supp. 3d 108, 124, upholding our denial of a petition when the petitioner did not demonstrate its ability to pay multiple beneficiaries.

[3] 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); *Tongatapu Woodcraft Haw., Ltd. v. Feldman*, 736 F.2d 1305, 1309 (9th Cir. 1984); *Estrada-Hernandez v. Holder*, -- F. Supp. 3d --, 2015 WL 3634497, *5 (S.D. Cal. 2015); *Rizvi v. Dep't of Homeland Sec.*, 37 F. Supp. 3d 870, 883-84 (S.D. Tex. 2014), *aff'd*, 627 Fed. App'x 292, 294-295 (5th Cir. 2015).

[4] USCIS may, at its discretion, consider evidence relevant to the petitioner's financial ability that falls outside of its net income and net current assets. We may consider such factors as the number of years the petitioner has been doing business, the established historical growth of the petitioner's business, the petitioner's reputation within its industry, the overall number of employees, whether the beneficiary is replacing a former employee or an outsourced service, the amount of compensation paid to officers, the occurrence of any uncharacteristic business expenditures or losses, and any other evidence that USCIS deems relevant to the petitioner's ability to pay the proffered wage.

In response to the RFE, the Petitioner stated that its 2019 tax return had not yet been filed, but provided its 2018 tax return and pay stubs it issued to the Beneficiary from December 2019 to April 2020.[5] The Petitioner also provided its unaudited 2018 balance sheet and additional bank statements, as well as evidence regarding beneficiaries and wages of 24 other petitions that it filed since 2016.

The Director noted that, although the Petitioner's 2019 tax return was unavailable, the net income and net current assets in its 2018 tax return were greater than the proffered wage owed to the Beneficiary. However, he determined that the record did not demonstrate that the Petitioner had the ability to pay the combined proffered wages of all its beneficiaries from the July 29, 2019 priority date. The Director also found that the Petitioner's list of beneficiaries of its other petitions was incomplete, as USCIS records indicated that the Petitioner filed 67 petitions in the previous 36 months.

On appeal, the Petitioner asserts that the Director erred in requiring evidence of wages it paid to other beneficiaries when it submitted evidence that it paid the Beneficiary more than the proffered wage. It explains that it did not submit a complete list of its other petitions because the Director's RFE did not specify the years or positions for which this information was required, therefore its list included only nurse positions for which it filed since 2016. The Petitioner also submits its 2019 tax return and its 2020 first quarterly tax return on appeal, as well as additional weekly pay stubs it issued to the Beneficiary through June 13, 2020.

USCIS generally does not require evidence of a petitioner's ability to pay the proffered wage to multiple beneficiaries in cases where the petitioner employs the beneficiary and has already established that it is paying the beneficiary at a rate equal to or greater than the proffered wage. Here, the record demonstrates that the Petitioner began employing the Beneficiary on December 22, 2019. The two pay stubs it issued to the Beneficiary in 2019 reflect less than 40 hours of work per week. Therefore, the Petitioner did not demonstrate that it paid the Beneficiary at a rate equal to or greater than the proffered wage in 2019.

Although the Petitioner appears to have paid the Beneficiary above the hourly proffered wage for some periods in 2020, the pay stubs reflect that the Beneficiary worked less than 40 hours in some weeks, including one week of no hours worked.[6] Therefore, the record does not demonstrate that the Petitioner paid the full annual wage in either calendar year 2019 or calendar year 2020. Rather, the year-to-date amount on the pay stubs reflect that the Petitioner paid the Beneficiary approximately $2,805 in 2019, and $39,294.76 in 2020. Accordingly, the Petitioner has not established its continuing ability to pay the proffered wage based on wages paid to the Beneficiary from the 2019 priority date onward.

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[5] Based on a 40-hour work week, the hourly proffered wage is $33.00. The pay stubs reflect that the Beneficiary was paid weekly at a rate of $33.00 per hour from December 22, 2019 to January 18, 2020, and $35.00 per hour since January 19, 2020. The pay stubs also reflect that the Beneficiary worked less than 40 hours from December 22 to 28, 2019, and from March 29 to April 4, 2020. Additionally, the Beneficiary worked no hours from April 5 to 11, 2020.

[6] Because the pay stubs do not demonstrate the Petitioner's payment of wages for a full 40 hours of work in each week, we cannot determine that its payment of wages at a rate of $35.00 per hour is equal to or greater than the proffered wage. The record does not include IRS Form W-2, Wage and Tax Statements, issued to the Beneficiary to demonstrate the total amount of wages paid in any year.

The Petitioner's 2019 tax return reflects net income of $121,007 and net current assets of $1.2 million. Although the Petitioner's net income and net current assets are greater than the difference between the Beneficiary's individual proffered wage and the wages it paid him in 2019, the Petitioner must also establish its ability to pay the proffered wages of its other I-140 beneficiaries. The Petitioner's list of 24 other beneficiaries indicates that the combined proffered wages of these beneficiaries is approximately $1.6 million. Considering only these beneficiaries, which the Petitioner concedes is a list of petitions filed only since 2016 and only for nurse positions, the Petitioner has not established its continuing ability to pay the proffered wage to each of its beneficiaries from the priority date.[7]

In accord with the analysis above, the Petitioner has not established its ability to pay the proffered wage from the priority date as required by 8 C.F.R. § 204.5(g)(2). Therefore, the appeal will be dismissed.

ORDER: The appeal is dismissed.

[7] With the appeal, the Petitioner provided payroll records for 34 individuals for a one-month period from May 17 to June 13, 2020. However, this information does not demonstrate the proffered wage for each beneficiary or that each beneficiary was paid the full proffered wage in any year. Further, the Petitioner has not provided the details for all of its petitions, as noted in the Director's decision.