U.S. Citizenship and Immigration Services

Non-Precedent Decision of the Administrative Appeals Office

MATTER OF U-C- INC.

DATE: JULY 20, 2018

APPEAL OF TEXAS SERVICE CENTER DECISION

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

The Petitioner, a provider of health care services, seeks to employ the Beneficiary as a registered nurse. It requests her classification 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 with at least two years of training or experience for lawful permanent resident status.

The Director of the Texas Service Center denied the petition. The Director concluded that the Petitioner did not demonstrate its required ability to pay the combined proffered wages of this and other petitions.

On appeal, the Petitioner submits additional evidence and asserts that the Director miscounted the number of proffered wages it must pay. It also contends that the Director disregarded evidence and factors supporting its ability to pay the combined proffered wages.

Upon *de novo* review, we will dismiss the appeal.

I. EMPLOYMENT-BASED IMMIGRATION

Employment-based immigration usually follows a three-step process. To permanently fill a job in the United States with a foreign national, an employer must first obtain 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). If the DOL certifies an offered position, an employer must then 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. If USCIS approves a petition, the 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.

The DOL has already determined that the United States lacks sufficient able, willing, qualified, and available nurses, and that employment of foreign nationals in this "Schedule A" occupation will not hurt the wages and working conditions of U.S. workers with similar jobs. 20 C.F.R. § 656.5. Thus, the DOL has authorized USCIS to adjudicate labor certification applications for nurses. 20 C.F.R.

§ 656.15(a). USCIS therefore not only rules on this petition, but also on its accompanying labor certification application.

II. ABILITY TO PAY THE PROFFERED WAGE

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.[1] 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.*

Here, the labor certification application states the proffered wage of the offered position of registered nurse as $50,918 a year. As of the appeal's filing, required evidence of the Petitioner's ability to pay the proffered wage in 2017 was not yet available.[2] For purposes of this decision, we will therefore consider the Petitioner's ability to pay only in 2016, the year of the petition's priority date.

In determining ability to pay, USCIS first examines whether a petitioner paid a beneficiary the full annual proffered wage. If a petitioner did not pay the full 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 wages paid. If net income and net current assets are insufficient, USCIS may consider other factors affecting a petitioner's ability to pay. *See Matter of Sonegawa*, 12 I&N Dec. 612, 614-15 (Reg'l Comm'r 1967).[3]

The Petitioner does not assert its employment of the Beneficiary, whom the record indicates lives in the Philippines. Based on payments to the Beneficiary, the record therefore does not establish the Petitioner's ability to pay the proffered wage.

Copies of the Petitioner's federal income tax returns for 2016 reflect net income of $185,868 and net current assets of $1,346,053.[4] Both of these amounts exceed the annual proffered wage of $50,918. As the Director noted, however, the Petitioner filed other petitions that were pending or approved as of this petition's priority date of December 20, 2016, or submitted thereafter. A petitioner must

---

[1] This petition's priority date is December 20, 2016, its filing date. *See* 8 C.F.R. § 204.5(d) (explaining how to determine a petition's priority date).

[2] The Petitioner submits financial statements for part of 2017. Contrary to 8 C.F.R. § 204.5(g)(2), however, the statements do not indicate that they were audited. They therefore do not constitute required evidence of the Petitioner's ability to pay that year.

[3] 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).

[4] The Petitioner files its federal income tax returns as an S corporation. Its tax returns for 2016 report deductions from sources outside its business on Schedule K to IRS Form 1120S, U.S. Income Tax Return for an S Corporation. *See* Internal Revenue Serv. (IRS), Instructions to Form 1120S, 18, https://www.irs.gov/pub/irs-pdf/i1120s.pdf (describing Schedule K as a summary of shareholders' shares of a corporation's income, losses, credits, and deductions) (last visited on July 13, 2018). We therefore consider Schedule K, line 18 of the Petitioner's 2016 tax returns to reflect its net income amount.

demonstrate its ability to pay the proffered wage of each petition it files until a beneficiary obtains lawful permanent residence. 8 C.F.R. § 204.5(g)(2). The Petitioner here must therefore demonstrate its ability to pay the combined proffered wages of this and its other pending or approved petitions in 2016. *See Patel v. Johnson*, 2 F. Supp. 3d 108, 124 (D. Mass. 2014) (affirming our revocation of a petition's approval where, as of the filing's grant, a petitioner did not demonstrate its ability to pay combined proffered wages of multiple petitions).

On appeal, the Petitioner submits a list of 60 petitions that it filed since 2012, including their receipt numbers, proffered wages, priority dates, and statuses.[5] The Petitioner, however, asserts that only 15 of these petitions were pending or approved as of December 20, 2016. It contends that the beneficiaries of the other 45 petitions obtained lawful permanent residence, relieving it of the obligation to demonstrate its ability to pay their combined proffered wages.

Of the 15 petitions specified by the Petitioner, it need not demonstrate its ability to pay the proffered wages of five of them in 2016. USCIS records indicate that the priority dates of these five petitions are in 2017. We do not require petitioners to demonstrate abilities to pay proffered wages before petitions' priority dates. *See* 8 C.F.R. § 204.5(g)(2) (requiring a petitioner to demonstrate its ability to pay *from* a petition's priority date). But the Petitioner must show its ability to pay the other 10 petitions it specified, because they have priority dates in 2016 or earlier.

Additionally, the record indicates that the Petitioner must demonstrate its ability to pay the proffered wages of 12 other petitions from its list of 60. As the Petitioner argues, the beneficiaries of these 12 petitions obtained lawful permanent resident status. USCIS records, however, indicate that they did not obtain that status until 2017. Thus, as of the end of 2016, their petitions remained pending or approved. The Petitioner must therefore demonstrate its ability to pay the combined proffered wages of these 12 additional petitions in 2016.

Thus, the record indicates that the Petitioner must demonstrate its ability to pay the combined proffered wages of this and 22 other petitions on its list in 2016. Based on the proffered wages provided by the Petitioner, the 23 petitions have combined proffered wages of $1,280,597. As previously indicated, the Petitioner reported net current assets in 2016 of more than $1.3 million. USCIS records, however, indicate that the Petitioner filed more than 60 other petitions that were pending or approved as of December 20, 2016. Many of the beneficiaries of these petitions obtained lawful permanent residence after 2016. These additional petitions are not on the Petitioner's list, and the company did not provide their proffered wages, priority dates, or other information about them. Absent this information, we cannot determine the Petitioner's wage burden for 2016. Thus, based on examinations of the Petitioner's wages paid, net income, and net current assets, the record does not establish its ability to pay in 2016.

The Petitioner asserts that USCIS should have considered bank account statements showing money

[5] In response to the Director's request for evidence, the Petitioner submitted a list of 51 other petitions. On appeal, however, it submitted an amended list with nine additional petitions.

available to pay proffered wages. The bank statements, however, cover June 1, 2017, through August 31, 2017. As previously discussed, because the record lacks required evidence for 2017, we are not considering the Petitioner's ability to pay the proffered wage that year. Also, three months is not a sufficient period to demonstrate an ability to pay an annual proffered wage. The short period does not account for temporary economic swings or the cyclical nature of some businesses. The bank statements therefore do not establish the Petitioner's ability to pay.

As the Petitioner argues, however, we may consider factors beyond its wages paid, net income, and net current assets. Under *Sonegawa*, we may consider: 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 evidence of its ability to pay. *See Matter of Sonegawa*, 12 I&N Dec. at 614-15.

However, the absence of information needed to determine the Petitioner's total wage obligation inhibits our ability to fully analyze whether the totality of the Petitioner's financial circumstances would be sufficient to establish its ability to pay. Moreover, when examining the financial history of the Petitioner, we note that the Petitioner's annual gross revenues declined from 2012 to 2016. Also, unlike in *Sonegawa*, the record does not establish the Petitioner's incurrence of uncharacteristic losses or expenses, or its possession of an outstanding reputation in its industry. A totality of the circumstances under *Sonegawa* therefore does not establish the Petitioner's ability to pay.

The Petitioner also asserts that its employees generate more revenues than it pays them. It therefore asserts that its business model establishes its ability to pay the Beneficiary's proffered wage. For immigration purposes, however, the Petitioner must demonstrate its ability to pay combined proffered wages from a petition's priority date. USCIS records indicate that, like the Beneficiary here, many of the Petitioner's beneficiaries remain outside the United States during their immigration processes and thus do not begin generating income for the company until months or years after the priority dates of their petitions. The Petitioner's business model therefore does not demonstrate its ability to pay combined proffered wages from petition priority dates.

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

III. THE NOTICE OF FILING

Although unaddressed by the Director, the record also does not establish the validity of the accompanying labor certification application. An employer seeking Schedule A designation must post a notice of filing at the proposed worksite. 20 C.F.R. § 656.15(b)(2). The notice must state its publication in connection with a labor certification application and the ability of anyone to provide documentary evidence on the application. 20 C.F.R. §§ 656.10(d)(3)(i), (ii). The notice must also provide the address of the DOL's Certifying Officer. 20 C.F.R. § 656.10(d)(3)(iii).

Here, the Petitioner's chief executive officer (CEO) certified that its filing notice complied with DOL regulations. But the copy of the notice submitted by the Petitioner states neither its publication in connection with a labor certification application, nor the ability of anyone to provide documentary evidence on the application. The notice also does not contain the required DOL address. The record therefore does not establish the Petitioner's compliance with DOL regulations. The labor certification application is therefore not approvable. *See* 20 C.F.R. § 656.15(e) (authorizing an immigration officer to determine whether a Schedule A application meets applicable DOL requirements).

Therefore, the Petitioner has not established its posting of the filing notice pursuant to DOL regulations.

IV. INTENT TO EMPLOY IN THE OFFERED POSITION

Also unaddressed by the Director, the record does not establish the Petitioner's intention to employ the Beneficiary in the offered position.

A business may file a petition if it is "desiring and intending to employ [a foreign national] within the United States." Section 204(a)(1)(F) of the Act. A petitioner must intend to employ a beneficiary under the terms of an accompanying labor certification application. *See Matter of Izdebska*, 12 I&N Dec. 54, 55 (Reg'l Comm'r 1966) (affirming a denial where, contrary to the statements on an accompanying certification, a petitioner did not intend to employ a beneficiary as a domestic worker on a full-time, live-in basis).

Here, the record indicates the Petitioner's intention to permanently employ the Beneficiary as a registered nurse. The labor certification application identifies the proposed worksite as another suite in the building where the Petitioner operates its business. The labor certification does not indicate performance of the position's duties at any other address. Also, in its request for a prevailing wage determination, the Petitioner indicated that the position's duties would not be performed at other locations.

The Petitioner provided a copy of a staffing agreement, contracting the Beneficiary to perform nursing services for another company in the Petitioner's building.[6] The agreement and the other company's website indicate that the company provides nursing and other services to people at their homes, and in assisted living or skilled nursing facilities. The materials do not indicate performance of nursing duties at the company's address. Thus, the record does not establish the Petitioner's intention to employ the Beneficiary in the offered position at the worksite stated on the labor certification application and the prevailing wage request. Rather, the record indicates that she would perform nursing services at the homes of clients and in facilities outside the Petitioner's building.

[6] Online public records indicate that the Petitioner and the other company share the same CEO. *See* Fla. Dep't of State, Div. of Corps., "Search Records," http://dos.myflorida.com/sunbiz/search/ (last visited July 17, 2018).

In addition, performance of the job's duties outside the stated worksite casts doubt on the sufficiency of the proffered wage. Depending on where the Beneficiary would work, the offered position might require a higher proffered wage. *See* 20 C.F.R. §§ 656.10(c)(1), 656.15(b)(1) (requiring a Schedule A application to include a prevailing wage determination for the area of intended employment, which the proffered wage must equal or exceed).

In any future filings in this matter, the Petitioner must explain the inconsistencies of record and establish where it intends to employ the Beneficiary.

V. CONCLUSION

The Petitioner has not demonstrated its ability to pay the combined proffered wages of this and other petitions. Nor has the Petitioner established its posting of the filing notice pursuant to DOL regulations. We will therefore affirm the Director's decision.

ORDER: The appeal is dismissed.

Cite as *Matter of U-C- Inc.*, ID# 1374036 (AAO July 20, 2018)