U.S. Citizenship and Immigration Services

Non-Precedent Decision of the Administrative Appeals Office

In Re: 14907020

Date: JUN. 02, 2021

Appeal of Texas Service Center Decision

Form I-140, Immigrant Petition for Other Worker

The Petitioner, a steel piping products business, seeks to employ the Beneficiary as a childcare worker. It requests classification of the Beneficiary as an unskilled worker under the third preference employment-based immigrant visa category. Immigration and Nationality Act (the Act) section 203(b)(3)(A)(iii), 8 U.S.C. § 1153(b) (3)(A)(iii). This immigrant visa category allows a U.S. employer to sponsor a foreign national for lawful permanent resident status to work in a position that requires less than two years of training or experience.

The Director of the Texas Service Center denied the petition, concluding that the Petitioner did not establish that it had the continuing ability to pay the proffered wage, or that the job opportunity was *bona fide* and open to qualified U.S. workers.

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 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

Employment-based immigration 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 certification from the U.S. Department of Labor (DOL). *See* section 212(a)(5) of the Act, 8 U.S.C. § 1182(a)(5). DOL approval signifies that insufficient U.S. workers are able, willing, qualified, and available for a position. *Id*. Labor certification also indicates that the 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 certified labor application 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 considers whether a beneficiary meets the requirements of a certified position and a requested immigrant visa classification. If USCIS approves the 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. ANALYSIS

The Petitioner in this matter is a seller and distributor of steel piping products, established in 1999 and employing 13 individuals. The accompanying labor certification was filed on July 20, 2018.[1]

In this case, the accompanying labor certification describes the full-time, permanent offered position as childcare worker at the Petitioner's business address in [redacted] Texas. The position does not require any education, training or experience. The labor certification states that the position requires a police background check upon employment, and two letters of reference. The proffered wage is listed as $17,306 per year, and the job duties of the position of childcare worker are described as: "Organize and monitor activities for children. Review and select food preparation. Entertain children by reading and playing games."

After the petition's initial filing, the Director issued a request for evidence (RFE), noting that the initial evidence did not establish the Petitioner's continuing ability to pay the proffered wage from the priority date onward. Following review of the Petitioner's response to the RFE, the Director issued a notice of intent to deny (NOID), informing the Petitioner that it still had not established its continuing ability to pay the proffered wage. In his NOID, the Director noted two additional points. First, he stated that the Petitioner had not established that the Beneficiary met the minimum requirements for the offered position because the record did not include evidence of a police background check completed for the Beneficiary upon employment. Second, he stated that the Petitioner had not established that the job opportunity was *bona fide* in that it was open and available to U.S. workers.

In the NOID, the Director outlined several factors that cast doubt that the Petitioner's job opportunity was *bona fide*. He noted that the requirement of a "police background check *upon employment*" indicated that the job offer was conditional, as the offer could be rescinded if a background check was not passed. He concluded that the Petitioner "created a condition where the Beneficiary is not capable, at the time of petitioning, of performing the unskilled labor listed on the labor certification." The Director further noted that a reference letter in the record demonstrated that the Beneficiary was a domestic employee providing childcare for children of the Petitioner's corporate officer, and that this preexisting relationship between the Petitioner and the Beneficiary cast doubt as to the Petitioner's intent to offer the position to a qualified U.S. worker. Finally, he noted that childcare services in Texas are regulated by Texas Health and Human Services and that the record did not demonstrate that the Petitioner met the licensing requirements to provide childcare services at its place of business.

The Petitioner responded to the NOID, submitting additional evidence of its continuing ability to pay the proffered wage in the totality of the circumstances, and addressing the Director's additional concerns. It asserted that the Director incorrectly interpreted the requirements of the position as listed on the labor certification and that a pre-employment background check for the Beneficiary was submitted and accepted with a prior filing.[2] It also asserted that the pre-existing employment

[1] The "priority date" of a petition is the date the underlying labor certification is filed with the DOL. *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] The Petitioner filed an earlier petition based on the same underlying labor certification. That petition was denied, in part

relationship between the Petitioner's officer and the Beneficiary did not affect the *bona fide* job opportunity in this matter. Finally, it asserted that it was not subject to Texas Health and Human Services licensing requirements for childcare providers because it "provides childcare services for four or fewer children at one time on an as-needed basis ... in short periods while the parents are working at the company's offices." It also provided evidence to establish the size of its office to demonstrate the availability of physical space for childcare on its premises.

The Director denied the petition, concluding that the Petitioner had not demonstrated the existence of a *bona fide* job opportunity at the offered location. The Director found that, in the totality of the circumstances, the Petitioner did not demonstrate that it would have hired a qualified U.S. worker for the offered position, or that it "has the space, facilities, means or resources" to employ the Beneficiary in the offered position. He also concluded that the Petitioner did not establish that it has the continuing ability to pay the proffered wage.

A. *Bona Fide* Job Opportunity

The petitioner has the burden of establishing that a *bona fide* job opportunity exists when it is asked to show that the job is clearly open to U.S. workers. *See Matter of Amger Corp.*, 87-INA-545 (BALCA 1987); *see also* 8 U.S.C. § 1361; 20 C.F.R. § 656.17(l).

In his decision the Director identifies two issues that led him to conclude that the Petitioner did not establish that a *bona fide* job opportunity exists. First, he states that the Petitioner "does not provide any meaningful discussion about the specific connection between the Beneficiary and ... President of the Petitioner, and the fact that the Beneficiary had been in the U.S. already working for the highest level manager of the Petitioner's business." Second, he states, "The Petitioner has not provided probative or relevant documentation establishing that it has the resources for the Beneficiary to provide childcare services at its ... location," or that "childcare services are required or necessary at its ... location."

The Director acknowledged that the Petitioner addressed each element discussed in *Matter of Modular Container System* to determine whether a *bona fide* job opportunity exists.[3] However, he stated that the Petitioner's small size and its officer's preexisting relationship with the Beneficiary demonstrate that "there would not reasonably be any process preventing [the Petitioner's officer] from giving the

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because the Petitioner did not submit evidence of the Beneficiary's police background check. The Petitioner filed a motion to reopen and reconsider and provided a "Letter of Good Conduct" to verify completion of a police background check for the Beneficiary. In denying the Petitioner's motion on other grounds, the Director stated that "USCIS acknowledges the fact that the requirements [*sic*] for the 'police background check upon employment' has been satisfied." In denying the instant petition, the Director does not contradict this statement.

[3] The factors to be examined in determining whether a *bona fide* job opportunity exists are set forth in a decision by the Board of Alien Labor Certification Appeals in *Matter of Modular Container Systems, Inc.* 89-INA-288 (BALCA 1991). Those factors include such items as whether the beneficiary (a) is in the position to control or influence hiring decisions regarding the job for which labor certification is sought; (b) is related to the corporate directors, officers, or employees; (c) was an incorporator or founder of the company; (d) has an ownership interest in the company; (e) is involved in the management of the company; (f) is on the board of directors; (g) is one of a small number of employees; (h) has qualifications for the job that are identical to specialized or unusual job duties and requirements stated in the application; and (i) is so inseparable from the sponsoring employer because of his or her persuasive presence and personal attributes that the employer would be unlikely to continue in operation without the beneficiary.

Beneficiary preferential treatment over a U.S. worker …, nor would there have been any other employee to challenge the decision to hire the Beneficiary."

On appeal, the Petitioner asserts that its small size and the identification of the Beneficiary before the DOL required recruitment does not indicate a lack of *bona fide* job opportunity. The Petitioner provides evidence of its recruitment for the offered position, which it states resulted in no qualified applicants. It further asserts that it has more than sufficient space to perform childcare duties.

Here, the Director's decision implies that, because the Petitioner identified the Beneficiary as a candidate for the offered position before beginning the recruitment phase of the labor certification process, the job offer was not *bona fide*. The Director specifically points to the previous employment relationship between the Petitioner and the Beneficiary. A labor certification employer must attest that "[t]he job opportunity has been and is clearly open to any U.S. worker." 20 C.F.R. § 626.10(c)(8). While the labor certification process requires a test of the labor market, the DOL regulations do not require an employer to establish how or why it selected the foreign national for the job opportunity. Rather, the employer must show that there "are not sufficient U.S. workers able, willing, qualified and available to accept the job opportunity in the area of intended employment and that employment of the foreign worker will not adversely affect the wages and working conditions of similarly employed U.S. workers." *See* https://www.dol.gov/agencies/eta/foreign-labor/programs/permanent. *See also* 20 C.F.R. § 656.1(a). Because of the design of the labor certification process, every petitioner who files a labor certification has already identified a foreign national that they wish to hire prior to the required recruitment. The Petitioner's officer's existing personal association with the Beneficiary does not indicate that the job was not open to U.S. workers. What is relevant, however, is that the Petitioner followed DOL regulations in advertising for the job opportunity after identifying a foreign national for the position. *See, e.g.,* 20 C.F.R. § 656.17.

Based on evidence in the record, including evidence submitted with the appeal, the Petitioner has documented that its efforts to recruit U.S. workers for its childcare worker position did not result in qualified applicants. It has further demonstrated that the Beneficiary is not in a position to control or influence hiring decisions, and that although she is one of a small number of employees, she is not so inseparable from the sponsoring employer that the employer would be unlikely to continue in operation without her. Thus, the Director erred in denying the petition for lack of a *bona fide* job opportunity due to the Petitioner's officer's employment of the Beneficiary as a domestic employee. We will therefore withdraw this portion of the Director's decision.

A petitioner must establish that a job offer was realistic as of the priority date and that the offer remained realistic for each year thereafter, until a beneficiary obtains lawful permanent residence. *See Matter of Great Wall*, 16 I&N Dec. 142 (Acting Reg'l Comm'r 1977). A labor certification employer must attest that "[t]he job opportunity's terms, conditions and occupational environment are not contrary to Federal, state or local law"). 20 C.F.R. § 656.10(c)(7); *see also Matter of I- Corp.*, Adopted Decision 2017-02 (AAO Apr. 12, 2017) (barring approvals of visa petitions based on illegal or otherwise invalid employment agreements). Additionally, the job offer must be for a permanent and full-time position. *See* 20 C.F.R. §§ 656.3; 656.10(c)(10). DOL precedent establishes that full-time means at least 35 hours or more per week. *See* Memo, Farmer, Admin. for Reg'l. Mngm't., Div. of Foreign Labor Certification, DOL Field Memo No. 48-94 (May 16, 1994).

As the Director noted in the NOID, childcare services in Texas are regulated by Texas Health and Human Services.[4] While certain programs and facilities are exempt from the licensing requirement under section 745.113 of the Texas Administrative Code, a request for exemption must be approved.[5] The record does not include evidence that the Petitioner has been approved by Texas Health and Human Services for a licensing exemption or that the Petitioner is not required to request the exemption. Therefore, we cannot affirmatively conclude that the job opportunity is *bona fide* and that the Petitioner is legally able to offer childcare services at its location.

The Petitioner states in the NOID response that it does not require a license because it is a program of limited duration under section 745.117 of the Texas Administrative Code. Specifically, the Petitioner points to section 42.041(b)(3) of the Texas Human Resources Code, which states that the licensing requirements do not apply to:

> a facility that is operated in connection with a shopping center, business, religious organization, or establishment where children are cared for during short periods while parents or persons responsible for the children are attending religious services, shopping, or engaging in other activities, including retreats or classes for religious instruction, on or near the premises, that does not advertise as a child-care facility or day-care center, and that informs parents that it is not licensed by the state.

However, the Texas Administrative Code requires that a licensing exemption be requested and granted. The criteria for licensing exemption for programs of limited duration is set forth in a table attached to section 745.117.[6] The criteria specifically state that, to qualify for this exemption "a child may only be in care for up to four and one half hours per day, and for up to 12 hours per week." The exemption criteria is inconsistent with the Petitioner's claim that the offered position is for full-time employment (at least 35 hours per week). A petitioner must resolve inconsistencies in the record with independent, objective evidence pointing to where the truth lies. *Matter of Ho*, 19 I&N Dec. 582, 591-92 (BIA 1988).

On appeal the Petitioner reiterates its assertion that it has sufficient space for the Beneficiary to perform the duties of childcare worker. The Petitioner provides copies of the amendments to its lease to demonstrate the square footage of leased office space. Although this evidence demonstrates the amount of physical space available, the Petitioner has not established its legal ability to offer childcare services at its location in Texas. The Director specifically noted in his decision that the Petitioner "does not actually provide any information about how many of [its] ... current staff members have children to care for ... as described by the labor certification." The Petitioner does not provide these details on appeal.

Here, the Petitioner has not established that it is licensed to provide childcare, or that it has been granted an exemption from state licensing requirements. Further, because the state regulation under

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[4] 26 Tex. Admin. Code §745.31; *see also Texas Health and Human Services, Child Care Licensing*, https://hhs.texas.gov/doing-business-hhs/provider-portals/protective-services-providers/child-care-.

[5] *See* 26 Tex. Admin. Code §745.131 (requiring a description of the program on an exemption form and additional documentation to verify the program meets the criteria for exemption).

[6] *See Texas Administrative Code, Which programs of limited duration are exempt from Licensing regulation?*, https://texreg.sos.state.tx.us/fids/201200484-2.html.

which the Petitioner claims to be exempt from a license limits the number of hours per week that childcare may be provided, and because the Petitioner states that childcare will be provided only on an "as-needed basis," we cannot affirmatively conclude that the offered position is a *bona fide* job opportunity for full-time employment. Therefore, we will dismiss the appeal on this basis.

B. 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. 8 C.F.R. § 204.5(g)(2). 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 full proffered wage, USCIS next examines whether it generated sufficient annual amounts of net income or net current assets 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 a proffered wage. *See Matter of Sonegawa,* 12 I&N Dec. 612, 614-15 (Reg'l Comm'r 1967).[7]

As noted above, the accompanying labor certification has a priority date of July 20, 2018 and the annual proffered wage of the offered position of childcare worker is $17,306. The Petitioner does not assert that it has employed the Beneficiary and the record does not contain evidence that it paid her any wages at any time.

If a petitioner does not establish that it has paid the beneficiary an amount equal to or above the proffered wage from the priority date onward, USCIS will examine the net income and net current assets figures recorded on the petitioner's federal income tax return(s), annual report(s), or audited financial statements(s). If either of these figures, net income or net current assets, equals or exceeds the proffered wage or the difference between the proffered wage and the amount paid to the beneficiary in a given year, the petitioner would ordinarily be considered able to pay the proffered wage that year.

For a C Corporation, like the Petitioner, net income (or loss) is recorded on page 1, line 28, of the Form 1120, and net current assets (or liabilities) are recorded in Schedule L as the difference between current assets listed on lines 1-6 and current liabilities listed on lines 16-18.

The record includes a copy of the Petitioner's 2018 Form 1120, U.S. Corporation Income Tax Return, reflecting a net income of -$157,970 and net current assets of -$2,931,569. Accordingly, the Petitioner had not established its ability to pay the proffered wage from the 2018 priority date based on its tax return.

The record includes additional evidence of the Petitioner's ability to pay the proffered wage, including 2018 audited financial statements for [redacted]; the Petitioner's bank statements for

[7] 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, 883-84 (S.D. Tex. 2014), *aff'd*, 627 Fed. App'x. 292 (5th Cir. 2015).

October 2019 to January 2020; the Petitioner's Forms 941, Quarter Federal Tax Return, for 2018 and 2019; and, a printout of the Petitioner's business information report from [redacted] showing 24 months of data from June 2018.

The financial statements include an organizational chart indicating that [redacted] controls 75.05% of the Petitioner. The statements do not provide a breakdown of the finances of the Petitioner individually or establish that [redacted] is willing or financially obligated to contribute to the Petitioner. Because a corporation is a separate and distinct legal entity from its owners and shareholders, the assets of its shareholders or of other enterprises or corporations cannot be considered in determining the petitioning corporation's ability to pay the proffered wage. *See Matter of Aphrodite Investments, Ltd.*, 17 I&N Dec. 530 (Comm'r 1980). In a similar case, the court in *Sitar v. Ashcroft*, 2003 WL 22203713 (D.Mass. Sept. 18, 2003) stated, "nothing in the governing regulation, 8 C.F.R. § 204.5, permits [USCIS] to consider the financial resources of individuals or entities who have no legal obligation to pay the wage."

Additionally, the Petitioner's monthly bank statements do not conclusively establish the Petitioner's continuing ability to pay. Bank statements show the amount in an account on a given date and cannot show the sustainable ability to pay an annual proffered wage. Moreover, the Petitioner has not shown that the money in its bank account constitutes a financial resource separate and apart from the current assets as recorded in Schedule L of its federal income tax return.

The Dun & Bradstreet report states that its assessment of the Petitioner is "stable," with "likelihood of continued operations," and "moderate potential for severely delinquent payments." The "maximum credit recommendation" shown on the report is $15,000. The Petitioner asserts that the report demonstrates payments of its business debts in excess of the proffered wage. However, the Petitioner does not explain how it could defer payment of these debts in favor of the proffered wage, or that these debts were not accounted for on its tax return. Assertions made without supporting documentation are of limited probative value and do not carry the weight to satisfy the Petitioner's burden of proof. *See Matter of Soffici*, 22 I&N Dec. 158, 165 (Comm'r 1998).

On appeal the Petitioner asserts that Schedule K of its 2018 tax return reflects a net operating loss (NOL) carryover of $712,894. The NOL deduction is an exception to the general income tax rule that a taxpayer's taxable income is determined on the basis of its current year's events. This deduction allows the taxpayer to offset one year's losses against another year's income. The NOL for a company can generally be used to recover past tax payments or reduce future tax payments. When carried back, the NOL reduces the taxable income of the relevant earlier year, resulting in a recomputation of the tax liability and a refund or credit of the excess amount paid. Carryovers produce a similar reduction in the taxable income of later years, and this reduces the tax payable when the return is filed. The primary purpose of the NOL deduction is to ameliorate the effect of the annual accounting period by treating businesses with widely fluctuating income more nearly in accord with steady-income businesses.

If a corporation carries forward its NOL, it enters the carryover on Schedule K, Form 1120, line 12. It also enters the deduction for the carryover on line 29(a) of Form 1120.[8] However, the carryover

[8] Line 29(a) of the Petitioner's tax return states, "Statement 5," and lists the amount "0." Statement 5 is not included in the record.

cannot be more than the corporation's taxable income after special deductions. *See* 26 C.F.R. §1.172-4 and 26 C.F.R. §1.172-5. *See also* Corporations, I.R.S. Pub. No. 542, at 15-16 (2019), http://www.irs.gov/pub/irs-pdf/p542.pdf. Because a petitioner's NOL is related to another year's outcome, it should be omitted from the analysis of the petitioner's "bottom line" ability to pay the proffered wage in a certain year. USCIS disregards NOL in C corporations by using Line 28 (taxable income before NOL deduction and special deductions) of the IRS Form 1120 in our computation of net income.

USCIS may also 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). 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.

The Petitioner asserts that its 2018 tax return reflects salaries and wages paid of more than $1.3 million and its quarterly tax returns reflect average wages per quarter of more than $250,000 to at least nine employees. While these are substantial amounts, the record does not include the Petitioner's tax returns outside of 2017 and 2018.[9] Although it claims over 20 years of successful business operations, the Petitioner's unsupported testimonial evidence does not establish its claims or overcome evidence of two years of net losses and negative assets. The record lacks corroborating documentation of the Petitioner's historical growth, such as financial reports or tax records beyond the two years of tax returns in the record showing only losses. Nor does the record include evidence of unusual or unexpected business expenses or losses in any year. The record therefore does not support the Petitioner's assertion and we cannot affirmatively conclude that, in the totality of the circumstances, the Petitioner has the continuing ability to pay the proffered wage.

We note that where a petitioner has filed I-140 petitions for multiple beneficiaries, it must demonstrate that its job offer to each beneficiary is realistic, and that it has the ability to pay the proffered wage to each beneficiary. *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 the combined proffered wages of multiple petitions). USCIS records show that the Petitioner has filed at least three Form I-140 petitions for other beneficiaries. Thus, in any further filings, the Petitioner must establish its ability to pay this Beneficiary as well as the beneficiaries of the other Form I-140 petitions that were pending or approved as of, or filed after, the priority date of the current petition.

[9] We note that the Petitioner's 2017 tax return reflects net loss of -$182,887 and net current assets of -$2,869,424.

III. CONCLUSION

It is the Petitioner's burden to establish eligibility for the immigration benefit sought. Section 291 of the Act, 8 U.S.C. § 1361; *Matter of Skirball Cultural Ctr.*, 25 I&N Dec. 799, 806 (AAO 2012). Here, the Petitioner has not established that the job opportunity is *bona fide* because it has not demonstrated that it is licensed to provide childcare services, or that it is exempt from any licensing requirement. The Petitioner has also not established that the offered position is for full-time employment or that it has the ability to pay the proffered wage to the Beneficiary as required by 8 C.F.R. § 204.5(g)(2), as well as to the beneficiaries of its other petitions.

ORDER: The appeal is dismissed.