U.S. Citizenship and Immigration Services

Non-Precedent Decision of the Administrative Appeals Office

MATTER OF W-S-S-[redacted]

DATE: JUNE 6, 2019

APPEAL OF NEBRASKA SERVICE CENTER DECISION

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

The Petitioner, a [redacted] staffing service, seeks to employ the Beneficiary as a [redacted]. It requests his classification as a skilled worker under the third-preference immigrant category. *See* Immigration and Nationality Act (the Act) section 203(b)(3)(A)(i), 8 U.S.C. § 1153(b)(3)(A)(i). This 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 Nebraska Service Center denied the petition and a subsequent motion to reopen. The Director concluded that the record did not establish the Petitioner's required ability to pay the proffered wages of multiple petitions.

On appeal, the Petitioner submits additional evidence and asserts that it has the ability to pay the combined proffered wages of this and other petitions.

Upon *de novo* review, we will withdraw the Director's decision and remand this matter for further proceedings consistent with the following opinion.

I. EMPLOYMENT-BASED PETITIONS FOR SCHEDULE A OCCUPATIONS

A Schedule A occupation is an occupation codified at 20 C.F.R. § 656.5(a) for which the U.S. 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 foreign nationals 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 labor 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 a duplicate uncertified labor certification. *See* 8 C.F.R. § 204.5(a)(2); *see also* 20 C.F.R. § 656.15.[1] If USCIS

[1] The priority date of the petition is February 20, 2018, the date the completed, signed petition was properly filed with

approves the petition, the foreign national applies 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. THE PETITIONER'S 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.* The proffered wage in this case is $59,405 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. Here, according to the Beneficiary's 2018 paystubs, the Petitioner paid the Beneficiary $28,037.16 in wages through December 23, 2018, which is less than the proffered wage.

If a petitioner did not pay a beneficiary the full proffered wage, we next examine whether it had sufficient annual amounts of net income or net current assets to pay the difference between the proffered wage and the wages paid, if any. 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.[2]

Here, the Petitioner provided copies of its federal income tax returns for 2015, 2016, and 2017. The Director found that based on the evidence for 2017, the Petitioner had established its ability to pay the proffered wage of this petition, but that it had not established its ability to pay the beneficiaries of its other Form I-140 petitions. However, the priority date of the petition is February 20, 2018, and the Petitioner's federal tax return was not yet due as of the date of filing the petition. On remand, the Director should request the Petitioner's 2018 annual report, federal tax return, or audited financial statements, and the Director should analyze the Petitioner's continuing ability to pay from the priority date onward.

Further, USCIS records show that the Petitioner has filed multiple Form I-140 petitions for other beneficiaries. Thus, 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.[3]

USCIS. *See* 8 C.F.R. § 204.5(d).

[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); *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 F. App'x 292, 294-295 (5th Cir. 2015).

[3] We do not consider the other beneficiaries for any year that the Petitioner has paid the Beneficiary a salary equal to or greater than the proffered wage. Further, the Petitioner's ability to pay the proffered wage of one of the other I-140 beneficiaries is not considered:

In his initial decision, the Director cited 150 other petitions filed by the Petitioner in 2017 and 2018, and more than "350 petitions in the previous three years." However, the Director did not correctly analyze the Petitioner's ability to pay the wages of its other Form I-140 beneficiaries. Specifically, he calculated the Petitioner's total wage deficiency by multiplying the "lowest proffered wage" of the 150 other petitions ($53,581) by the number of pending petitions (150). Because neither the Petitioner's net income nor its net current assets exceeded $8,037,150 in 2017, the Director found that the Petitioner did not have the ability to pay the wages of all of its relevant Form I-140 beneficiaries.

However, the Director's calculation is incorrect. First, he did not analyze the Petitioner's ability to pay in 2018, the year of the priority date. Second, for each year at issue, the determination of the Petitioner's ability to pay the wages of beneficiaries of Forms I-140 that were pending or approved as of, or filed after, the priority date of the current petition should be made as follows: (a) calculate any shortfall between the proffered wages and any actual wages paid to the primary Beneficiary and the Petitioner's other beneficiaries, (b) add these amounts together to calculate the total wage deficiency, and (c) demonstrate that its net income or net current assets exceed the total wage deficiency.[4] The Director's calculation used the lowest proffered wage for the other beneficiaries instead of the actual proffered wage for each other beneficiary, and he failed to consider the wages paid by the Petitioner to the other beneficiaries as reflected on their IRS Forms W-2, Wage and Tax Statements.

Further, although the Director analyzed the totality of the Petitioner's circumstances in reviewing its ability to pay multiple beneficiaries in his initial decision,[5] he did so for the year "2015 onward." The Petitioner must demonstrate its continuing ability to pay a proffered wage from the priority date in 2018 onward, not 2015 onward. 8 C.F.R. § 204.5(g)(2). On remand, the Director should properly analyze the Petitioner's ability to pay the beneficiaries of its Form I-140 petitions that were pending or approved as of, or filed after, February 20, 2018, and the Director should properly evaluate the totality of the Petitioner's circumstances.

- After the other beneficiary obtains lawful permanent residence;
- If an I-140 petition filed on behalf of the other beneficiary has been withdrawn, revoked, or denied without a pending appeal or motion; or
- Before the priority date of the I-140 petition filed on behalf of the other beneficiary.

[4] 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).

[5] We may consider evidence of a petitioner's ability to pay beyond its net income and net current assets, including such factors as: the number of years it 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 a current employee or outsourced service; or other evidence of its ability to pay a proffered wage. *See Matter of Sonegawa*, 12 I&N Dec. 612, 614-615 (Reg'l Comm'r 1967).

III. CONCLUSION

The decision of the Director will be withdrawn. The matter is remanded to the Director for proper consideration of the Petitioner's ability to pay. The Director may request any additional evidence considered pertinent. Similarly, the Petitioner may provide additional evidence within a reasonable period of time to be determined by the Director. Upon receipt of all the evidence, the Director will review the entire record and enter a new decision.

ORDER: The decision of the Director is withdrawn. The matter is remanded for further proceedings consistent with the foregoing opinion and for the entry of a new decision.

Cite as *Matter of W-S-S-*, ID# 4691434 (AAO June 6, 2019)