U.S. Citizenship and Immigration Services

Non-Precedent Decision of the Administrative Appeals Office

In Re: 17253860

DATE: June 21, 2021

Motion on Administrative Appeals Office Decision

Form I-140, Immigrant Petition for a Skilled Worker

The Petitioner, a nursing registry 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 category. 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" 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 two years of training or experience.

The Director of the Texas Service Center denied the petition on the ground that the Petitioner failed to establish that the Beneficiary has the requisite educational credential to meet the minimum educational requirement stated on the ETA Form 9089, Application for Permanent Employment Certification (ETA 9089).[1] The Petitioner filed an appeal, which we dismissed on the same ground and on the additional ground that the Petitioner did not establish its continuing ability to pay the proffered wage of the instant Beneficiary and the proffered wages of numerous other beneficiaries of Form I-140 petitions filed by the Petitioner from the priority date of this petition onward. The Petitioner then filed a motion to reopen and a motion to reconsider, which we dismissed on the single ground that the Petitioner did not establish its ability to pay the proffered wages of the instant Beneficiary and numerous other I-140 beneficiaries from the priority date of this petition onward, while reserving the issue of whether the Beneficiary met the minimum educational requirement on the ETA 9089. The Petitioner filed a second motion to reopen and reconsider, which we dismissed on the ground that it was untimely filed.

The matter is now before us on a third motion to reopen and reconsider in which the Petitioner asserts that its second motion was timely filed, and reiterates its claims (in a brief virtually identical to that submitted with the second motion) that it has the ability to pay the proffered wages of the instant Beneficiary and its other I-140 beneficiaries, and that the Beneficiary meets the minimum educational requirement on the ETA 9089.

[1] As indicated in previous decisions, because this petition is for a registered nurse, a Schedule A occupation under 20 C.F.R. § 656.5(a), it did not require the Petitioner to test the labor market and obtain a certified ETA Form 9089 from the Department of Labor (DOL) prior to filing the petition with U.S. Citizenship and Immigration Services (USCIS). Instead, the petition was 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.

In visa petition proceedings it is the petitioner's burden to establish eligibility for the requested benefit. *See* section 291 of the Act, 8 U.S.C. § 1361. Upon *de novo* review, we will withdraw our previous decision that the Petitioner's second motion to reopen and reconsider was untimely filed. Based on our review of the other issues addressed in the motion, however, we will dismiss the motion on the grounds that the Petitioner still has not established its ability to meet all of its proffered wage obligations or that the Beneficiary meets the minimum educational requirement on the ETA 9089.

I. MOTION REQUIREMENTS

A motion to reopen must state new facts to be provided in the reopened proceeding and be supported by documentary evidence. *See* 8 C.F.R. § 103.5(a)(2). A motion to reconsider must demonstrate that our previous decision was based on an incorrect application of law or policy and that the decision was incorrect based on the evidence in the record of proceedings at the time of the decision. *See* 8 C.F.R. § 103.5(a)(3). We may grant a motion that satisfies these requirements and demonstrates eligibility for the requested immigration benefit.

II. ANALYSIS

A. Timeliness of the Second Motion to Reopen and Reconsider

The first issue before us is whether the Petitioner's second motion to reopen and reconsider was timely filed. Our decision dismissing the first motion to reopen and reconsider was issued on April 29, 2020. The Petitioner filed its motion to reopen and reconsider that decision 62 days later, on June 30, 2020. We dismissed the motion as untimely filed on November 18, 2020.

The applicable regulations state that a motion on an unfavorable decision must be filed within 33 days of the date USCIS mails the decision. *See* 8 C.F.R. §§ 103.5(a)(1), 103.8(b). During the coronavirus (COVID-19) pandemic USCIS issued guidance that a Form I-290B, Notice of Appeal or Motion, would be accepted if it was filed within 60 days of the unfavorable decision. In this case we dismissed the Petitioner's second motion to reopen and reconsider as untimely, in accordance with the regulation at 8 C.F.R. § 103.2(a)(2)(v)(B)(*1*), because it was not filed within 60 days of the date our decision on the first motion was issued, as indicated above.

In its third motion to reopen and reconsider the Petitioner asserts that since our decision dismissing the second motion was served by mail, the deadline for filing the third motion should have included three additional days beyond the 60 calendar day deadline set forth in the USCIS guidance, in accordance with the regulation at 8 C.F.R. § 103.8(b). The Petitioner maintains that its second motion to reopen and reconsider, which was filed 62 days after we issued our decision on the first such motion, should be treated as timely filed.

The Petitioner's assertions regarding the timeliness of the second motion to reopen and reconsider are persuasive. Accordingly, the Petitioner has met the requirements of a motion and we will adjudicate the underlying motion on the merits. For the reasons discussed hereinafter, we will dismiss the motion.

B. Substantive Grounds for the AAO's Previous Decisions

With its third motion to reopen and reconsider the Petitioner submits a brief which, aside from the timeliness argument relating to the second motion, is virtually identical to the brief submitted with that motion, along with copies of previously submitted documentation. Thus, the third motion to reopen and reconsider does not add to the substantive record already before us with the second motion in regard to the Beneficiary's educational qualifications and the Petitioner's ability to pay the proffered wages of the instant Beneficiary and its other I-140 beneficiaries.

1. Petitioner's Ability to Pay the Proffered Wage

To be eligible for the classification it requests for a beneficiary, a petitioner must establish that it has the ability to pay the proffered wage stated on the ETA 9089. As provided in the regulation at 8 C.F.R. § 204.5(g)(2):

> The petitioner must demonstrate this ability at the time the priority date is established and continuing until the beneficiary obtains lawful permanent residence. Evidence of this ability shall be either in the form of copies of annual reports, federal tax returns, or audited financial statements. In a case where the prospective United States employer employs 100 or more workers, the director may accept a statement from a financial officer of the organization which establishes the prospective employer's ability to pay the proffered wage. In appropriate cases, additional evidence, such as profit/loss statements, bank account records, or personnel records may be submitted by the petitioner or requested by [USCIS].

As indicated in the above regulation, the Petitioner must establish its continuing ability to pay the proffered wage as of the petition's priority date,[2] which in this case is March 2, 2018. The proffered wage as stated on the ETA 9089 is $56,971 per year.

In determining a petitioner's ability to pay the proffered wage, USCIS first examines whether the beneficiary was employed and paid by the petitioner during the period following the priority date. A petitioner's submission of documentary evidence that it employed the beneficiary at a salary equal to or greater than the proffered wage for the time period in question, when accompanied by a form of evidence required in the regulation at 8 C.F.R. § 204.5(g)(2), may be considered proof of the petitioner's ability to pay the proffered wage.

The record indicates that the Beneficiary began working for the Petitioner in early 2018, though the exact date is unstated. The Petitioner has submitted copies of the Form W-2, Wage and Tax Statement, and the Form 1099-MISC, Miscellaneous Income, it issued to the Beneficiary for each of the years 2018 and 2019, which show that the Beneficiary's total pay exceeded the proffered wage of $56,971

[2] The "priority date" of an employment-based immigrant petition is ordinarily the date the underlying ETA 9089 is filed with the DOL. *See* 8 C.F.R. § 204.5(d). Since this petition is for a Schedule A occupation, however, the ETA 9089 is not certified by the DOL and the priority date of the petition is the date that it along with the uncertified ETA 9089 is filed with USCIS.

per year in 2019, but not in 2018. Thus, the Petitioner has not established its continuing ability to pay the Beneficiary's proffered wage from the priority date of March 2, 2018, onward based on the wages it actually paid.

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 in 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 generally be considered able to pay the proffered wage during that year. However, when a petitioner has filed multiple Form I-140 petitions, it must establish that its job offer is realistic not only for the instant beneficiary, but also for the beneficiaries of its other petitions. A petitioner's ability to pay the proffered wage is an essential element in evaluating whether a job offer is realistic. *See Matter of Great Wall*, 16 I&N Dec. 142 (Acting Reg'l Comm'r 1977). Accordingly, a petitioner must demonstrate its ability to pay the combined proffered wages of the instant beneficiary and every other I-140 beneficiary, for each year the Petitioner does not pay the instant beneficiary's full proffered wage, from the priority date of the instant petition until each I-140 beneficiary obtains lawful permanent resident status. *See Patel v. Johnson*, 2 F.Supp. 3d 108, 124 (D.Mass. 2014) (upholding our denial of a petition where a petitioner did not demonstrate its ability to pay multiple beneficiaries).[3]

USCIS records show that the Petitioner has filed hundreds of additional Form I-140 petitions. In our decision dismissing the first motion to reopen and reconsider we indicated that the Petitioner had submitted a chart listing some of its other I-140 petitions, according to which there was a deficit between the proffered wages and the wages paid to those I-140 beneficiaries which exceeded the Petitioner's net income as well as its net current assets in 2018, as recorded on its federal income tax return for that year. We also noted that the Petitioner provided no information about numerous other I-140 petitions which USCIS records showed were pending, approved, or filed after the priority date of the instant petition. Due to this evidentiary deficiency we concluded that the Petitioner had not demonstrated its continuing ability to pay the proffered wages of the instant Beneficiary and numerous other I-140 beneficiaries.

In the second motion to reopen and reconsider (as well as the third) counsel for the Petitioner claimed that the Petitioner was able to pay all of its proffered wage obligations based on its business model by which it charges its client hospitals and healthcare facilities sufficient amounts to cover the wages of the registered nurses it supplies plus a "comfortable" profit. However, no documentary evidence of that model was submitted with respect to any of the I-140 beneficiaries assigned to hospitals and healthcare facilities. The assertions of counsel do not constitute evidence. *See Matter of Obaigbena*, 19 I&N Dec. 533, 534 (BIA 1988); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980). Moreover, the Petitioner must demonstrate its ability to pay the proffered wages of many I-140

[3] The Petitioner's ability to pay the proffered wage of one of the other I-140 beneficiaries is not considered:

- 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.

beneficiaries of pending or approved petitions who are not yet assigned to hospitals or healthcare facilities, for whom no documentation would be available that accorded with with the Petitioner's business model. In short, the Petitioner's business model argument has no evidentiary support in the record.

Furthermore, the Petitioner did not remedy the specific evidentiary shortcoming discussed in our dismissal of the first motion to reopen and reconsider by submitting any additional information or documentation about its proffered wage obligations to the I-140 beneficiaries not identified in the previously submitted chart. The regulation at 8 C.F.R. § 103.2(b)(14) provides that the failure to submit requested evidence that precludes a material line of inquiry shall be grounds for denying the petition.

Since the Petitioner has submitted no new documentary evidence demonstrating its ability to meet all of its proffered wage obligations in 2018, to the instant Beneficiary as well as numerous other I-140 beneficiaries, there is no basis to reopen the proceeding on the issue of the Petitioner's continuing ability to meet its proffered wage obligations from the priority date of March 2, 2018, onward.

Nor has the Petitioner identified any incorrect application of law or policy in our previous decision with regard to the Beneficiary's continuing ability to pay the proffered wages of the instant Beneficiary and numerous other I-140 beneficiaries from the priority date of this petition onward, as required for us to reconsider our previous decision on this issue.

2. Beneficiary's Educational Qualifications

To qualify for classification as a skilled worker a beneficiary must have at least two years of training or experience. *See* 8 C.F.R. § 204.5(l)(3)(ii)(B). Relevant post-secondary education may be considered as training for the purpose of qualifying for skilled worker classification. *See* 8 C.F.R. § 204.5(l)(2). A beneficiary must also meet the specific educational, training, experience, or other requirements of the ETA 9089. *See* 8 C.F.R. § 204.5(l)(3)(ii)(B). All requirements must be met by the petition's priority date, which in this case is March 2, 2018. *See Matter of Wing's Tea House*, 16 I&N Dec. 158, 159 (Acting Reg'l Comm'r 1977).

The ETA 9089 indicates that the minimum requirements to qualify for the position of registered nurse are an associate's degree in nursing, or a foreign educational equivalent, and either a registered nurse license in any U.S. state, or documented passage of the NCLEX-RN[4] in any U.S. state, or a CGFNS[5] certificate. The ETA 9089 does not require any experience.

The documentation of record shows that the Beneficiary completed a three-year registered general nurse program at [redacted] College in [redacted] Jamaica, from 2001 to 2004, received a "Certificate of Graduation" in December 2004, passed the NCLEX-RN in Texas in September 2017, and that same month was licensed by the Texas Board of Nursing as a registered nurse in Texas. The record also includes a series of educational equivalency evaluations by [redacted] asserting that

[4] National Council Licensure Examination for Registered Nurses.
[5] Commission on Graduates of Foreign Nursing Schools.

the Beneficiary's credential from [redacted] College was equivalent to a three-year associate's degree in nursing from an accredited college or university in the United States.

In our decision dismissing the appeal in August 2019 we stated that the Beneficiary's certificate of graduation from [redacted] College's registered general nurse program was not an associate's degree in nursing. We noted that [redacted] College's website indicated that several associate's degree programs were offered by the college, but that the Beneficiary's nursing program was not one of them. We also noted that [redacted] College did not currently have institutional accreditation from the [redacted] of Jamaica [redacted], a statutory body tasked with ensuring the quality of tertiary education in Jamaica. We referred to a letter from [redacted] College in August 2018 stating that the Beneficiary's registered general nursing program was approved by Jamaica's Ministry of Education, Ministry of Health, and the Nursing Council of Jamaica (NCJ), but noted it was unclear how these approvals related to accreditation. As far as the record showed, [redacted] College was not accredited by the [redacted] at the time the Beneficiary earned her registered general nurse certificate in 2004. Addressing the Petitioner's claim that the Beneficiary's nursing license in the Texas shows that her graduation certificate from [redacted] College was regarded as equivalent to an associate's degree in nursing by the Texas Board of Nursing, we stated that there was no evidence in the record that Texas required an associate's degree in nursing to be licensed as a nurse in the state. Furthermore, we indicated that irrespective of the licensing requirements in Texas the issue in this proceeding is whether the Beneficiary meets the requirements of the ETA 9089 accompanying the instant petition, which requires an associate's degree in nursing, whether U.S. or a foreign equivalent. We concluded that the Petitioner did not establish that the Beneficiary's certificate of graduation from the registered general nurse program at [redacted] College in Jamaica was equivalent to a U.S. associate's degree in nursing.

In its second motion to reopen and reconsider (which mirrored its first), the Petitioner contended that we placed too much emphasis on [redacted] College's lack of accreditation by the [redacted] and not enough on the approval of its registered general nurse program by the NCJ, the statutory body that regulates the nursing profession in Jamaica. Regardless of the relative weight of [redacted] accreditation and NCJ approval, the Petitioner did not submit any new documentation or legal rationale to refute our previous determination that the Beneficiary's certificate of graduation from [redacted] College's registered general nurse program is not equivalent to an associate's degree in nursing from a U.S. college or university. The registered general nurse program the Beneficiary attended at [redacted] College was not a degree granting program. The credential the Beneficiary earned upon completion of the program was a certificate of graduation, not an associate's degree. Though many, or most, of the courses in the registered general nurse program may correspond to courses in an associate's degree program, the fact remains that the Beneficiary was awarded a certificate of graduation from [redacted] College, not an associate's degree in nursing. Therefore, the Beneficiary's credential from [redacted] College does not meet the minimum educational requirement of the ETA 9089, which is an associate's degree in nursing, whether U.S. or a foreign equivalent.

Since the Petitioner has not submitted any new facts or documentary evidence to show that the Beneficiary meets the minimum educational requirement of the ETA 9089, there is no basis to reopen the proceeding on this issue.

Furthermore, the Petitioner has not shown that our previous determination that the Beneficiary does not meet the minimum educational requirement of the ETA 9089 was based on an incorrect application of law or policy, as required for us to reconsider our decision on this issue.

III. CONCLUSION

As previously stated, it is the petitioner's burden in visa petition proceedings to establish eligibility for the immigration benefit sought. *See* Section 291 of the Act. 8 U.S.C. § 1361. For the reasons discussed in this decision, the Petitioner has not met that burden in this case.

ORDER: The motion to reopen is dismissed.

FURTHER ORDER: The motion to reconsider is dismissed.