U.S. Citizenship and Immigration Services

Non-Precedent Decision of the Administrative Appeals Office

In Re: 16792035

Date: Mar. 5, 2021

Appeal of Texas Service Center Decision

Form I-140, Immigrant Petition for Skilled Worker

The Petitioner, a staffing company, seeks to employ the Beneficiary as a registered nurse. It requests classification 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 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, concluding that the record did not establish that the Petitioner has the continuing ability to pay the proffered wage.

In these proceedings, it is the Petitioner's burden to establish eligibility for the requested benefit. Section 291 of the Act, 8 U.S.C. §1361. Upon *de novo* review, we will dismiss the appeal.

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 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.

[1] The priority date of the petition is June 15, 2018, the date the completed, signed petition was properly filed with USCIS. *See* 8 C.F.R. § 204.5(d).

II. ABILITY TO PAY

The Director concluded that the Petitioner did not establish its continuing ability to pay the proffered wage from the petition's priority date onward.[2] The proffered wage in this case is $56,971 per year.

The regulation at 8 C.F.R. § 204.5(g)(2) states in pertinent part:

> *Ability of prospective employer to pay wage.* Any petition filed by or for an employment-based immigrant which requires an offer of employment must be accompanied by evidence that the prospective United States employer has the ability to pay the proffered wage. 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 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. On appeal, the Petitioner submits the Beneficiary's check history report from October 9, 2018, through September 4, 2019, showing that it paid the Beneficiary $13,837.54 in gross wages in 2018, and $26,413.73 in 2019.[3] Thus, the Petitioner did not establish that it paid the Beneficiary the full proffered wage in either year.

On appeal, the Petitioner also provides a housing allowance report for the period from October 2018 to August 2019 demonstrating that it paid additional housing allowances of $5,646.80 in 2018 and $41,123.95 in 2019. The Petitioner asserts that these housing allowances should be considered in the calculation of its ability to pay because they are part of the Beneficiary's renumeration for her services. The Petitioner also states that it paid the housing allowances "directly to the landlord"[4] and that the amounts are not taxable. In a letter from its chief financial officer (CFO), the CFO states that for "nurses that are travelling away from their home for work, the IRS allows certain expenses to be paid on a non-taxable basis, including stipends, per diem and reimbursements or a combination of the aforementioned." The CFO states that this is an "acceptable method of payment according to IRS Publication 463, section 1." The CFO further states that if they qualify under the IRS guidelines, employees "can choose if they want to allocate a portion of their wages towards housing or to receive the complete amount of their wages directly."[5]

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[2] The Director examined the Petitioner's ability to pay in 2017. However, because the priority date is June 15, 2018, we will examine the Petitioner's ability to pay from 2018 onward.

[3] The record does not contain the Beneficiary's Internal Revenue Service (IRS) Forms W-2, Wage and Tax Statements. We note that in its May 2019 response to the Director's request for evidence (RFE), the Petitioner's counsel stated that "the Beneficiary is not in the U.S. and has not been working for the Petitioner." The 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).

[4] Although the Petitioner submitted computer printouts of its claimed housing payments to the Beneficiary, the record lacks evidence - such as copies of deposited checks - corroborating the company's payments of the listed amounts to the Beneficiary or her landlord on the referenced dates. The Petitioner must support its assertions with relevant, probative, and credible evidence. *See Matter of Chawathe*, 25 I&N Dec. 369, 376 (AAO 2010).

[5] This assertion is not supported by the record, as there is no evidence in the record demonstrating that the allocation of wages was voluntary. *Id.*

IRS Publication 463 discusses ordinary and necessary business-related expenses that an employee might have for travel, meals, gifts, or transportation. It explains what expenses are deductible, how to report them, what records are needed to prove expenses, and how to treat any expense reimbursements received. Specifically, Chapter 1 instructs how to determine if travel expenses such as lodging are deductible by the employee. Qualifying travel expenses are deductible if they are incurred for temporary travel on business away from the general area of the employee's tax home. IRS Publication 463 further indicates that a working condition fringe benefit is any property or service provided to an employee by an employer, the cost of which would be allowable as an employee business expense deduction if the employee had paid for it. The value of a working condition fringe benefit is excludable from an employee's income. 26 U.S.C. § 132(a)(3). Here, the record does not establish that the Beneficiary was eligible to deduct travel expenses paid or incurred in connection with a temporary work assignment away from home, such that they would be excludable from her income. *See* 26 U.S.C. § 162(a)(2).

Additionally, housing allowances are generally considered fringe benefits that are counted as taxable income to the employee and reported on IRS Form W-2. A fringe benefit is a form of pay for the performance of services and is taxable to the recipient employee unless the law specifically excludes it. IRS Pub. 15(b), Employer's Tax Guide to Fringe Benefits, https://www.irs.gov/publications/p15b (last visited Mar. 4, 2021). For lodging to be excludable from wages, it must be for the convenience of the employer, on the employer's premises, and furnished as a condition of employment. Treas. Reg. § 1.119-1(b). Here, the Petitioner has not established that its housing payments meet these requirements. Further, Pub. 15(b) states that if an employer allows its employee "to choose to receive additional pay instead of lodging, then the lodging, if chosen, isn't excluded." IRS Pub. 15(b), *supra*, at 17. The Petitioner's CFO stated that employees "can choose if they want to allocate a portion of their wages towards housing or to receive the complete amount of their wages directly." Thus, contrary to the Petitioner's assertions, the record does not establish that the housing payments were excludable from the Beneficiary's taxable income.

Therefore, we will not consider the claimed housing allowances as part of the Beneficiary's renumeration. In 2018, the Petitioner must establish that it can pay the difference between the proffered wage of $56,971 and the wages paid of $13,837.54, which is $43,133.46.[6] In 2019, it must establish that it can pay the difference between the proffered wage of $56,971 and the wages paid of $26,413.73, which is $30,557.27.

If, as here, 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 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.[7] On appeal, the Petitioner submits its 2018 IRS Form 1120S, U.S. Income Tax Return for an S Corporation, which shows net

[6] Even if the full amount of the purported housing allowance was added to the Beneficiary's wages in 2018, a shortfall would have remained.

[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); *Tongatapu Woodcraft Haw., Ltd. v. Feldman*, 736 F.2d 1305, 1309 (9th Cir. 1984); *Estrada-Hernandez v. Holder*, 108 F. Supp. 3d 936, 942-946 (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).

income of $932,350. Thus, the Petitioner has sufficient net income to pay the difference between the proffered wage and the wages paid to the Beneficiary in 2018. The record does not contain regulatory-prescribed evidence of the Petitioner's ability to pay in 2019; however, because the appeal was submitted in 2019, year-end financial documentation for 2019 would not have been available.

Where a petitioner has filed 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* 8 C.F.R. § 204.5(g)(2); *see also 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). In its May 2019 response to the Director's RFE, the Petitioner provided a chart listing information regarding other Form I-140 petitions filed by the Petitioner. USCIS records show that the Petitioner has filed hundreds of Form I-140 petitions for other beneficiaries. 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.[8] 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.

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 is 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.[9] In 2018, the record does not demonstrate that either the Petitioner's net income of $932,350 or its net current assets of $1,454,397 exceeded the total wage deficiency. Further, because the record does not contain regulatory-prescribed evidence of the Petitioner's ability to pay in 2019, we cannot determine whether it had sufficient net income or net current assets to cover the total wage deficiency that year. Thus, the Petitioner has not demonstrated its continuing ability to pay the proffered wage to the Beneficiary of this petition and to the beneficiaries of multiple other petitions that it has filed.

The Petitioner submitted a letter dated February 15, 2019, from its CFO in an attempt to demonstrate its ability to pay. The letter asserts the Petitioner's ability to pay and provides additional financial information about the company, which, as of 2019, employed more than 100 workers. The regulation at 8 C.F.R. § 204.5(g)(2) allows a statement from a financial officer of a petitioner with at least 100 employees to establish its ability to pay. The regulation, however, does not require USCIS to accept the letter as proof of the Petitioner's ability to pay. *See* 8 C.F.R. § 204.5(g)(2) (stating that we "may

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[8] 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:

- 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.

[9] 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).

accept a statement from a financial officer" to establish a petitioner's ability to pay). For the reasons discussed below, we decline to accept the CFO's letter as sufficient evidence of the Petitioner's ability to pay.

On appeal, the Petitioner asserts that it has established its ability to pay based on the totality of the circumstances. It cites a 2019 non-precedent[10] Administrative Appeals Office (AAO) decision for the proposition that we should analyze the totality of the Petitioner's circumstances in reviewing its ability to pay multiple beneficiaries. Consistent with that opinion, 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).

The Petitioner was incorporated in 1996 and asserts on appeal that it has approximately 1200 employees. On appeal, the Petitioner further asserts that we can judge the Petitioner's ability to pay by taking into consideration its "long history of meeting its obligations and paying its employees." It submits its IRS Forms 941, Employer's Quarterly Federal Tax Return, for the several quarters in 2018 and 2019. The Petitioner has established that it has a sizeable number of employees on its payroll, which is one of many factors under consideration in our review of the totality of the circumstances in this case.

However, the record does not show the Petitioner's growth since its incorporation, and the Petitioner has not provided credible evidence of its reputation in its industry. In her letter submitted to the record, the Petitioner's CFO detailed the Petitioner's selected financial information for 2015, 2016, and 2017 and asserted that the Petitioner has shown consistent growth. However, reviewing those figures in conjunction with the Petitioner's 2018 federal tax return, its gross sales and costs of goods sold decreased between 2017 and 2018; and its net income and net current assets decreased each year between 2016 and 2018.

Further, unlike in *Sonegawa*, the record does not indicate the Petitioner's incurrence of uncharacteristic losses or expenses. The record also does not indicate the Beneficiary's replacement of an employee or outsourced service. In addition, unlike in *Sonegawa*, the Petitioner must demonstrate its ability to pay the combined proffered wages of multiple petitions which represent a significant wage burden. Upon review of the totality of the circumstances in this case, the Petitioner has not established by a preponderance of the evidence that it has the continuing ability to pay the proffered wage to the Beneficiary of this petition and the proffered wages to the beneficiaries of the multiple other petitions that it has filed.

On appeal, the Petitioner, through counsel, asserts that we can judge the Petitioner's ability to pay by taking into consideration "the increased demand for nurses, the sustained profitability of the Petitioner's business, and the Petitioner's projected growth." However, the assertions of counsel do

[10] The AAO decision was not published as a precedent and therefore does not bind USCIS officers in future adjudications. *See* 8 C.F.R. § 103.3(c). Non-precedent decisions apply existing law and policy to the specific facts of an individual case, and may be distinguishable based on the evidence in the record of proceedings, the issues considered, and applicable law and policy

not constitute evidence. *Matter of Obaigbena*, 19 I&N Dec. 533, 534 n.2 (BIA 1988) (citing *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980)). Counsel's statements must be substantiated with independent evidence. The Petitioner submits no evidence on appeal to support its claims. For example, counsel highlights the Petitioner's "successful presence in the healthcare industry for the last 23 years," but the record does not support this historical claim.[11] Further, against the projection of future growth, *Matter of Great Wall*, 16 I&N Dec. 142, 144-145 (Acting Reg'l Comm'r 1977), states:

> I do not feel, nor do I believe the Congress intended, that the petitioner, who admittedly could not pay the offered wage at the time the petition was filed, should subsequently become eligible to have the petition approved under a new set of facts hinged upon probability and projections, even beyond the information presented on appeal.

The Petitioner also submits its bank statements and asserts that its sound financial situation is supported by "showing it deposits approximately $5.5 million each month in payments from its clients." However, bank statements are not among the three types of evidence, listed in 8 C.F.R. § 204.5(g)(2), required to illustrate a petitioner's ability to pay a proffered wage. While this regulation allows additional material "in appropriate cases," the Petitioner has not demonstrated why the documentation specified at 8 C.F.R. § 204.5(g)(2) is inapplicable or otherwise depicts an inaccurate financial picture of the Petitioner. Further, bank statements show the amount in an account on a given date, and cannot show the sustainable ability to pay a proffered wage. The Petitioner also has not established that the funds reported on its bank statements show additional available funds that were not reflected on its 2018 tax return, such as the Petitioner's taxable income (income minus deductions) or the cash specified on Schedule L. The Petitioner's deposits must be balanced by its withdrawals.

The Petitioner, though counsel and its CFO, also contends that the company's business model ensures its ability to pay all of its beneficiaries because the company generates profits with each additional nurse it hires. It asserts that it has "regular ongoing contracts with hundreds of healthcare facilities" and that its network continues to grow. However, the record does not contain evidence to support this claim. Further, the Petitioner must demonstrate its ability to pay the proffered wages of these beneficiaries from the filing dates of their petitions. *See* 8 C.F.R. § 204.5(g)(2). As detailed above, it has not done so here.

In sum, the record does not establish the Petitioner's continuing ability to pay the proffered wage to the Beneficiary of this petition and the proffered wages to the beneficiaries of the multiple other petitions that it has filed. The appeal will be dismissed for this reason.

We note that the petition and labor certification indicate that the Beneficiary will work at [redacted] Hospital in [redacted] New Mexico. However, the Petitioner filed a subsequent Form I-140 petition for the Beneficiary which indicates that the Beneficiary will work at [redacted] in [redacted] New Mexico. In any future filings, the Petitioner must provide credible evidence of the Beneficiary's proposed work location.

[11] Public records indicate that the Petitioner filed for Chapter 11 bankruptcy in California in 2011, which conflicts with counsel's claims of 23 years of success. [redacted] (Bankr. C.D. Cal. 2011).

ORDER: The appeal is dismissed.