U.S. Citizenship and Immigration Services

Non-Precedent Decision of the Administrative Appeals Office

In Re: 37097832

Date: MAR. 6, 2025

Appeal of Texas Service Center Decision

Form I-140, Immigrant Petition for Alien Workers (Skilled Worker)

The Petitioner, a retail business, seeks to employ the Beneficiary as a sales associate/business assistant. It requests classification of the Beneficiary 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 category allows a U.S. business to sponsor a foreign national for lawful permanent resident status based on a job offer requiring at least two years of training or experience.

The Director of the Texas Service Center denied the petition, concluding that the Petitioner did not establish that the Beneficiary possessed the minimum education required for the offered position, or that it had the continuing ability to pay the proffered wage. The matter is now before us on appeal pursuant to 8 C.F.R. § 103.3.

The Petitioner bears the burden of proof to demonstrate eligibility by a preponderance of the evidence. *Matter of Chawathe*, 25 I&N Dec. 369, 375-76 (AAO 2010). We review the questions in this matter de novo. *Matter of Christo's, Inc.*, 26 I&N Dec. 537, 537 n.2 (AAO 2015). Upon de novo review, we will withdraw the Director's decision and remand the matter for entry of a new decision consistent with the following analysis.

I. LAW

Employment-based immigration generally follows a three-step process. First, an employer obtains an approved labor certification (ETA Form 9089) from the U.S. Department of Labor (DOL). *See* section 212(a)(5) of the Act, 8 U.S.C. § 1182(a)(5). By approving the labor certification, the DOL certifies that there are insufficient U.S. workers who are able, willing, qualified, and available for the offered position and that employing a foreign national in the position will not adversely affect the wages and working conditions of domestic workers similarly employed. *See* section 212(a)(5)(A)(i)(I)-(II) of the Act. Second, the employer files an immigrant visa petition with U.S. Citizenship and Immigration Services (USCIS). *See* section 204 of the Act, 8 U.S.C. § 1154. Third, if USCIS approves the petition, the foreign national may 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

A petitioner must establish a beneficiary's possession of all the education, training, and experience specified on an accompanying labor certification by a petition's priority date.[1] 8 C.F.R. §§ 103.2(b)(l), (12); *see also Matter of Wing's Tea House,* 16 I&N Dec. 158, 159 (Acting Reg'l Comm'r 1977); *Matter of Katigbak,* 14 I&N Dec. 45, 49 (Reg'l Comm'r 1971). Additionally, a petitioner must establish that it has the ability to pay the proffered wage stated on the labor certification. 8 C.F.R. § 204.5(g)(2).

With the initial filing, the Petitioner submitted evidence of the Beneficiary's education and experience. In an attempt to establish its ability to pay the proffered wage, the Petitioner also submitted its Internal Revenue Service (IRS) Form 1120S, U.S. Income Tax Return for an S Corporation, for 2022, the year of the priority date.

The Director determined that the record did not include a complete copy of the Beneficiary's academic record or an evaluation of his foreign academic credentials stating the U.S. education equivalency. Additionally, the Director determined that the Petitioner's tax return did not establish the continuing ability to pay the proffered wage.

On appeal, the Petitioner asserts that the Director violated USCIS policy in not issuing a request for evidence (RFE) or notice of intent to deny (NOID) the petition to allow an opportunity to submit additional evidence. The Petitioner submits the Beneficiary's academic records and an evaluation report stating the U.S. equivalency of the Beneficiary's foreign education. The Petitioner also submits additional tax returns.

Upon review of the record, including evidence submitted on appeal, we conclude that the Petitioner has established that the Beneficiary meets the minimum requirements for the offered position as set forth on the labor certification.

The petitioner bears the burden of proof to establish eligibility by a preponderance of the evidence. Section 291 of the Act, 8 U.S.C. § 1361. *Matter of Chawathe,* 25 I&N Dec. at 375. Pursuant to 8 C.F.R. § 103.2(b)(8), USCIS has the discretion to issue RFEs. If the petitioner has not established eligibility, USCIS should issue an RFE or NOID "unless the officer determines that there is no legal basis for the benefit request and no possibility that additional information or explanation will establish a legal basis for approval." 1 *USCIS Policy Manual* E.(6)(F)(3), www.uscis.gov/policy-manual. Here, the Petitioner was not given an opportunity to provide an explanation or additional evidence establishing eligibility, contrary to USCIS policy. Therefore, we will withdraw the decision and remand for further review and entry of a new decision, consistent with our discussion below

As indicated in the above regulation, the Petitioner must establish its continuing ability to pay the proffered wage from the priority date of the petition onward. In this case the proffered wage is $33,820.80 per year and the priority date is September 30, 2022.

[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).

When assessing ability to pay, USCIS examines whether a petitioner paid a beneficiary the full proffered wage, beginning with the year of a petition's priority date. *See generally* 6 *USCIS Policy Manual* E.(4)(C)(1), *supra*. If a petitioner did not annually pay the full proffered wage or did not pay a beneficiary at all, USCIS considers whether the business generated annual net income or net current assets sufficient to pay any differences between the proffered wage and the wages paid to a beneficiary. *See generally* 6 *USCIS Policy Manual* E.(4)(C)(2). If net income and net current assets are insufficient, USCIS may consider other factors potentially 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); *see generally* 6 *USCIS Policy Manual* E.(4)(C)(3).[2]

In this case the labor certification states that the Beneficiary has never worked for the Petitioner. Therefore, the Petitioner has not established its continuing ability to pay the proffered wage from the priority date of September 30, 2022, onward based on wages paid to the Beneficiary.

The initial filing included a copy of the Petitioner's federal income tax return, IRS Form 1120S, for 2022. If an S corporation, like the Petitioner, has income exclusively from a trade or business, USCIS considers its net income (or loss) to be the figure for "Ordinary business income (loss)" on page 1, line 21, of the Form 1120S. However, if there are relevant entries for additional income, credits, deductions or other adjustments from sources other than a trade or business, they are reported on Schedule K of the Form 1120S, and the corporation's net income or loss will be found in line 18 of Schedule K ("Income/loss reconciliation"). In this case, a figure of -$57,940 is entered on page 1, line 21, and the same figure is entered on line 18 of Schedule K. Thus, the Petitioner had a net loss of $57,940 in 2022.

Net current assets (or liabilities) are determined by calculating the difference between current assets and current liabilities, as recorded in lines 1-6 and lines 16-18, respectively, of Schedule L. In this case the Petitioner's current assets were $199,149 and its current liabilities were $216,192 in 2022, resulting in net current assets of -$17,043. Accordingly, the Petitioner did not have net income or net current assets greater than the proffered wage of $33,820.80 in 2022.

On appeal, the Petitioner submits additional tax returns reflecting the following net income and net current assets:

YEAR	NET CURRENT INCOME	NET CURRENT ASSETS
2020	$179,167	$20,938
2021	$6,244	$243,508
2023	$6,897	$100,128

The Petitioner requests on appeal that USCIS prorate the proffered wage for the portion of the year that occurred after the priority date in 2022. We will not, however, consider 12 months of income towards an ability to pay a lesser period of the proffered wage any more than we would consider 24 months of income towards paying the annual proffered wage. While USCIS will prorate the proffered

[2] 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); *Four Holes Land & Cattle, LLC v. Rodriguez*, No. 5:15-cv-03858, 2016 WL 4708715, **4-5 (D.S.C. Sep. 9, 2016).

wage if the record contains evidence of net income or payment of the beneficiary's wages specifically covering the portion of the year that occurred after the priority date (and only that period), such as monthly income statements or pay stubs, the petitioner has not submitted such evidence.

The Petitioner also requests consideration of the totality of the circumstances pursuant to *Matter of Sonegawa*, 12 I&N Dec. 612 (Reg'l Comm'r 1967). The Petitioner notes that the tax returns immediately preceding the year of the priority date reflect significant gross revenues and net current income or net current assets above the proffered wage.

We agree with the Petitioner that the Director should have considered other factors potentially affecting the company's ability to pay the proffered wage. Under *Sonegawa*, USCIS may consider factors such as: the number of years the Petitioner has conducted business; its number of employees; any business growth; its business reputation; its incurrence of any uncharacteristic losses or expenses; the Beneficiary's replacement of another employee or outsourced service; or other potential factors. *See Id.* at 614-15; *see also* 6 *USCIS Policy Manual* E.(4)(C)(3).

The record indicates that the Petitioner began operations in 2018 and, at the time of the petition's filing in September 2022, employed 18 people. Unlike the petitioner in *Sonegawa*, the company has not established its possession of a good business reputation or its incurrence of uncharacteristic losses or expenses during the relevant years. The company also has not established the Beneficiary's replacement of an employee or outsourced service.

The Petitioner notes its revenue of more than $3 million in the two years preceding the priority date in 2022. The tax returns show that the Petitioner's gross annual sales decreased slightly from $3,210,795 in 2020, to $3,031,114 in 2021. However, the Petitioner does not explain the significant decrease (more than 40%) in gross annual sales in 2022, to $1,794,420. The Petitioner does not explain this as an anomaly or describe the occurrence of any uncharacteristic business loss or expense, as in *Sonegawa*. Thus, the Petitioner's revenue from 2020 through 2021 does not demonstrate its ability to pay the proffered wage in 2022.

The record demonstrates that the Petitioner's revenues have increased in 2023 to $1,836,708. However, reliance on gross annual sales is misplaced because this figure does not account for expenses. *See Taco Especial v. Napolitano*, 696 F. Supp. 2d 873, 881 (E.D. Mich. 2010), *aff'd*, No. 10-1517 (6th Cir. Nov. 10, 2011) (gross profits overstate an employer's ability to pay because it ignores other necessary expenses). *See also K.C.P. Food Co., Inc. v. Sava*, 623 F. Supp. 1080 (S.D.N.Y. 1985).

As noted above, the Director did not issue an RFE allowing the Petitioner an opportunity to provide an explanation or additional evidence establishing eligibility. Additionally, the Director's decision does not mention *Matter of Sonegawa* or discuss the types of evidence that may be considered in the totality of the circumstances, precluding the Petitioner from preparing a meaningful appeal. An officer's written decision must fully explain the specific reasons for denying a visa petition. *See* 8 C.F.R. 103.3(a)(1)(i). Absent such an explanation, a petitioner is not provided a fair opportunity to contest the decision. *See, e.g. Matter of M-P-*, 20 I&N Dec. 786 (BIA 1994) (finding that a decision must fully explain the reasons for denying a motion to allow the respondent a meaningful opportunity to challenge the determination on appeal). Here, because the Director's decision does not provide a

complete analysis of the totality of the circumstances, we will withdraw the decision and remand for further review and entry of a new decision. On remand, the Director may wish to issue an RFE to allow the Petitioner an opportunity to submit any additional evidence related to its ability to pay in the totality.

III. CONCLUSION

The Director did not fully consider and analyze evidence in the record to determine the Petitioner's ability to pay the proffered wage as required by 8 C.F.R. § 204.5(g)(2), and in the totality of the circumstances. As such, we will remand the matter for further consideration of the record, including claims and evidence submitted on appeal, and entry of a new decision.

ORDER: The Director's decision is withdrawn. The matter is remanded for the entry of a new decision consistent with the foregoing analysis.