U.S. Citizenship and Immigration Services

Non-Precedent Decision of the Administrative Appeals Office

In Re: 37246402

Date: MAR. 17, 2025

Appeal of Nebraska Service Center Decision

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

The Petitioner, a massage center and spa with one employee, sought to employ the Beneficiary as a manager. It requested classification of the Beneficiary under the third-preference, immigrant classification for other workers. 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 less than two years of training or experience.

The Director of the Nebraska Service Center denied the petition, concluding that the Petitioner did not establish its 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 dismiss the appeal.

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 an alien 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 beneficiary 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

To be eligible for the classification it requests for the beneficiary, a petitioner must establish that it has the ability to pay the proffered wage stated on the labor certification. 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 from the priority date of the petition onward.[1] In this case the proffered wage is $15 to $30 per hour (or $31,200 to $62,400 per year) and the priority date is March 5, 2023.

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 March 5, 2023, onward based on wages paid to the Beneficiary.

The initial filing included a copy of the Petitioner's federal income tax return, Internal Revenue Service (IRS) Form 1120S, for 2023. If a multi-member limited liability company-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

[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).

[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).

reconciliation"). In this case, a figure of $,5191 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 income of $5,191 in 2023.

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 Schedule L of the Petitioner's 2023 Form 1120S is blank. Accordingly, the Petitioner did not establish that it had net income or net current assets greater than the bottom of the proffered wage range of $31,200 in 2023.

The record also includes the Petitioner's credit card and bank statements from March 2024 to October 2024, and the Petitioner's IRS Form 941, Quarterly Federal Tax Return, for the fourth quarter of 2023 and the first three quarters of 2024. However, this evidence does not cover the priority date of March 5, 2023, and does not establish the Petitioner's ability to pay the proffered wage in that year. We also note that in the second and third quarters of 2024, the Petitioner's Form 941 lists no employees, with no wages paid.

On appeal, the Petitioner submits an audited income statement reflecting its profits and losses for January through November 2024. However, this evidence does not cover the year of the 2023 priority date. We also note that the independent auditor's report does not identify the auditor by name, or as a certified public accountant. The report, which is not on any letterhead, states only the name of a business ( ) and a location (CA"). Because the auditor is not identified, we are precluded from determining that the Petitioner's profit and loss statement for January through November 2024 is "audited," meeting the regulatory requirement at 8 C.F.R. § 204.5(g)(2). 6 *USCIS Policy Manual* E.(4)(A)(3) ("Audited financial statements are financial statements that have been examined under an acceptable standard by an accountant authorized by the jurisdiction to perform the audit; for example, by a certified public accountant in accordance with generally accepted accounting principles.") This issue must be addressed in any further filing if the Petitioner relies on its audited financial statement to demonstrate the continuing ability to pay the proffered wage.

As previously indicated, we may consider other factors affecting the Petitioner's ability to pay the proffered wage under *Sonegawa*. We may consider: the number of years the company has been doing business; its number of employees; growth of its business; its reputation in its industry; the occurrence of uncharacteristic expenses or losses; or other factors affecting the Petitioner's ability to pay. *See Matter of Sonegawa*, 12 I&N Dec. at 614-15.

The record indicates that the Petitioner was established in 2020 and employs one individual. The Petitioner's Form 1120S lists no payment of salaries or wages in 2023. The record does not include the Petitioner's tax returns or other financial information prior to 2023. Nor does the record demonstrate the Petitioner's possession of an outstanding business reputation in its industry or its incurrence of uncharacteristic expenses or losses that prevented its ability to pay the proffered wage in 2023. Thus, based on a totality of the circumstances under *Sonegawa*, the Petitioner has not demonstrated its continuing ability to pay the proffered wage from the petition's priority date onward.

III. CONCLUSION

The Petitioner has not demonstrated its ability to pay the proffered wage from the priority date onward, as required by 8 C.F.R. § 204.5(g)(2). Therefore, we will dismiss the appeal.

ORDER: The appeal is dismissed.