U.S. Citizenship and Immigration Services

Non-Precedent Decision of the Administrative Appeals Office

In Re: 37483715

Date: MAR. 19, 2025

Appeal of Nebraska Service Center Decision

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

The Petitioner, a designer and installer of security systems, seeks to employ the Beneficiary as a finish carpenter. The company requests his classification under the employment-based, third-preference (EB-3) immigrant visa category as an "other worker." *See* Immigration and Nationality Act (the Act) section 203(b)(3)(A)(iii), 8 U.S.C. § 1153(b)(3)(A)(iii). Businesses may sponsor aliens for U.S. permanent residence in this category to work in jobs requiring less than two years of training or experience. *See* 8 C.F.R. § 204.5(l)(2) (defining the term "other worker).

The Director of the Nebraska Service Center denied the petition. The Director concluded that the Petitioner did not demonstrate its required ability to pay the offered job's proffered wage. On appeal, the Petitioner contends that the Director should have "prorated" the proffered wage in the year of the petition's priority date and considered the effects of the COVID-19 pandemic on the company's finances.

The Petitioner bears the burden of demonstrating eligibility for the requested benefit by a preponderance of the evidence. *Matter of Chawathe*, 25 I&N Dec. 369, 375-76 (AAO 2010). Exercising de novo appellate review, *see Matter of Christo's, Inc.*, 26 I&N Dec. 537, 537 n.2 (AAO 2015), we conclude that, even considering its arguments, the company has not sufficiently demonstrated its ability to pay the proffered wage We will therefore dismiss the appeal.

I. LAW

Immigration as an other – or "unskilled" – worker generally follows a three-step process. First, a prospective employer must obtain certification from the U.S. Department of Labor (DOL) that: there are insufficient U.S. workers able, willing, qualified, and available for an offered job; and an alien's permanent employment in the position would not harm wages and working conditions of U.S. workers with similar jobs. Section 212(a)(5)(A)(i) of the Act, 8 U.S.C. § 1182(a)(5)(A)(i).

Second, an employer must submit a DOL-approved labor certification with an immigrant visa petition to U.S. Citizenship and Immigration Services (USCIS). Section 204(a)(1)(F) of the Act, 8 U.S.C. § 1154(a)(1)(F). Among other things, USCIS determines whether an alien beneficiary meets the

requirements of a DOL-certified position and a requested immigrant visa category. 8 C.F.R. § 204.5(l)(3)(ii)(D).

Finally, if USCIS approves a petition, a 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

A petitioner must demonstrate its continuing ability to pay an offered job's proffered wage, from a petitioner's priority date until a beneficiary obtains U.S. permanent residence. 8 C.F.R. § 204.5(g)(2). Evidence of ability to pay must generally include copies of a petitioner's annual reports, federal tax returns, or audited financial statements. *Id.*

When determining 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), www.uscis.gov/policy-manual. If a petitioner did not annually pay a beneficiary the full proffered wage or did not pay a beneficiary at all, USCIS considers whether the business generated annual amounts of net income or net current assets sufficient to pay any differences between the proffered wage and the wages paid. *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).[1]

The Petitioner's labor certification states the proffered wage of the offered job of finish carpenter as $71,802 a year. The petition's priority date is December 12, 2022, the date DOL accepted the company's labor certification application for processing. *See* 8 C.F.R. § 204.5(d) (explaining how to determine a petition's priority date).

In November 2024, the Director requested additional evidence of the Petitioner's ability to pay the proffered wage. At that time, regulatory required evidence of the company's ability to pay in 2024 was not yet available. We will therefore consider the company's ability to pay in only 2022, the year of the petition's priority date, and 2023.

The Petitioner submitted evidence that it paid the Beneficiary in both 2022 and 2023. Copies of IRS Forms 1099-NEC, Nonemployee Compensation, show that the company paid him $30,000 in 2022 and $65,000 in 2023. Neither amount equals or exceeds the job's $71,802 annual proffered wage. Thus, based solely on wages paid, the Petitioner has not demonstrated its ability to pay the proffered wage. Nevertheless, we credit the company's payments to the Beneficiary towards the annual proffered wage in each year. Thus, the company need only establish its ability to pay $41,802 ($71,802 - $30,000) in 2022 and $6,802 ($71,802-$65,000) in 2023.

[1] 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); *Just Bagels Mfg., Inc. v. Mayorkas*, 900 F. Supp. 2d 363, 373-76 (S.D.N.Y. 2012).

The Petitioner submitted copies of its federal income tax returns for 2022 and 2023. The 2023 tax return reflects net income of $119,571 and net current assets of $9,794. Both amounts exceed the $6,802 difference between the proffered wage and the wages paid in 2023. Thus, based on either net income or net current assets, the company has demonstrated its ability to pay the proffered wage in 2023.

The Petitioner's 2022 federal tax return reflects net income of -$96,398 and net current assets of -$37,766. Neither negative amount equals or exceeds the $41,802 difference between the proffered wage and the wages paid in 2022. Thus, the tax return does not demonstrate the company's ability to pay the proffered wage in 2022.

On appeal, the Petitioner notes that it need only demonstrate its ability to pay the proffered wage from the petition's December 12, 2022 priority date. *See* 8 C.F.R. § 204.5(g)(2) ("The petitioner must demonstrate this ability [to pay] *at the time the priority date is established.*") (emphasis added) The company argues that the $71,802 annual proffered wage equates to $34.54 an hour or, based on an eight-hour work day, $276.16 a day. Because only 15 work days remained in the year after December 12, 2022, the Petitioner contends that, in 2022, it only needed to demonstrate its ability to pay the Beneficiary $4,142.40 ($276.16 x 15). Because the Petitioner issued him $30,000 that year, the company claims that it paid him more than enough to demonstrate its ability to pay the proffered wage in 2022.

We disagree. The Petitioner correctly states that it need only demonstrate its ability to pay $4,142.40, the portion of the 2022 proffered wage that accrued after December 12. But to "prorate" the proffered wage like that, the company must also show that it paid or generated the income used to pay the prorated wage during the same period. *See* 6 *USCIS Policy Manual* E.4(D)(1) ("USCIS does not consider 12 months of net income towards [an] ability to pay the proffered wage for a period of less than 12 months."). The record does not establish that the Petitioner paid or generated income of at least $4,142.40 in 2022 after December 12. Thus, the company has not demonstrated that the wages it paid the Beneficiary in 2022 established its ability to pay the prorated proffered wage.

We agree with the Petitioner that the Director should have considered other factors affecting its ability to pay the proffered wage in 2022. *See Matter of Sonegawa*, 12 I&N Dec. at 614-15; *see generally* 6 *USCIS Policy Manual* E.(4)(C)(3) ("The ability to pay analysis is more nuanced than simply reviewing wages paid, net income, and net current assets.") Under *Sonegawa*, USCIS may consider: the number of years a petitioner has conducted business; its number of employees; growth of its business; its reputation in its industry; the occurrence of unexpected losses or expenses; a beneficiary's replacement of an existing employee or outsourced service; or other factors affecting a petitioner's ability to pay a proffered wage. *See Matter of Sonegawa*, 12 I&N Dec. at 614-15.

The record shows that the Petitioner has conducted business since 2007 and employs six people. Also, copies of its federal income tax returns show that its annual gross revenues jumped from $452,183 in 2022 to $881,264 in 2023. But, unlike the petitioner in *Sonegawa*, the company has not demonstrated its possession of an outstanding business reputation.

Citing non-precedent decisions of ours, counsel asserts that "the year 2022 was a difficult year for most employers given the lack of economic opportunity caused by the COVID pandemic." Counsel

states: "By the year 2023, the employer/petitioner had clearly recuperated from this abnormal situation."

Counsel's assertions, however, do not constitute evidence that the COVID-19 pandemic, which began in the United States in early 2020, caused or contributed to the company's lackluster financial performance in 2022. *See, e.g., Matter of S-M-*, 22 I&N Dec. 49, 51 (BIA 1998) ("[S]tatements in a brief, motion, or Notice of Appeal are not evidence and thus are not entitled to any evidentiary weight"). In one of our non-precedent decisions cited by the Petitioner, copies of a petitioner's federal income tax returns showed its profitable operation of a [redacted] hotel for three years before the September 11, 2001 terrorist attacks, and copies of published articles documented the attacks' devastating effects on the city's hospitality industry. *See* [redacted] 2009). In contrast, copies of the Petitioner's 2023 tax return reflect financial improvements compared to the company's filing for the prior year. But the record lacks sufficient evidence to demonstrate that the COVID-19 pandemic harmed the Petitioner's 2022 finances or that, before the virus's outbreak, the company reported profits and net current assets sufficient to pay the proffered wage. Thus, a totality of the circumstances does not establish the Petitioner's ability to pay the proffered wage in 2022.

III. CONCLUSION

The Petitioner has not demonstrated its continuing ability to pay the offered job's proffered wage. We will therefore affirm the petition's denial.

ORDER: The appeal is dismissed.