U.S. Citizenship and Immigration Services

Non-Precedent Decision of the Administrative Appeals Office

In Re: 7824582

Date: MAR. 24, 2020

Appeal of Texas Service Center Decision

Form I-140, Immigrant Petition for Skilled Worker

The Petitioner operates a Brazilian-style steakhouse and seeks to employ the Beneficiary as a *churrasqueiro*, or barbecue cook. The company requests his classification under the third-preference immigrant classification for skilled workers. *See* Immigration and Nationality Act (the Act) section 203(b)(3)(A)(i), 8 U.S.C. § 1153(b)(3)(A)(i).

The Director of the Texas Service Center denied the petition. The Director concluded that the Petitioner did not demonstrate its required ability to pay the proffered wage of the offered position.

The Petitioner bears the burden of establishing eligibility for the requested benefit. *See* section 291 of the Act, 8 U.S.C. § 1361. Upon *de novo* review, we will dismiss the appeal.[1]

I. EMPLOYMENT-BASED IMMIGRATION

Immigration as a skilled worker generally follows a three-step process. To permanently fill a position in the United States with a foreign worker, a prospective employer must first obtain certification from the U.S. Department of Labor (DOL). *See* section 212(a)(5)(A)(i) of the Act, 8 U.S.C. § 1182(a)(5)(A)(i). DOL approval signifies that insufficient U.S. workers are able, willing, qualified, and available for an offered position. *Id.* Labor certification also indicates that employment of a foreign national will not harm wages and working conditions of U.S. workers with similar jobs. *Id.*

If DOL approves a position, an employer must next submit the certified labor application with an immigrant visa petition to U.S. Citizenship and Immigration Services (USCIS). *See* section 204 of the Act, 8 U.S.C. § 1154. Among other things, USCIS determines whether a beneficiary meets the

[1] After filing this appeal, the Petitioner submitted, and USCIS approved, another Form I-140 petition for the Beneficiary. The second petition offered him the same position as in this petition and requested the same visa classification. As a matter of prudence, we may dismiss appeals lacking practical significance as moot. *See, e.g., Matter of Luis*, 22 I&N Dec. 747, 753 (BIA 1999). The Petitioner's second petition, however, contains a certified labor application filed after the labor application in this petition. The second petition therefore has a later priority date than this petition, and, thus, this appeal's approval could result in an earlier grant of lawful permanent residence to the Beneficiary. Because this appeal retains practical significance, we will not dismiss it as moot.

requirements of a DOL-certified position and a requested visa classification. If USCIS grants a petition, a foreign national may finally 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. ABILITY TO PAY THE PROFFERED WAGE

A petitioner must demonstrate its continuing ability to pay the proffered wage of an offered position, from a petition's priority date until a beneficiary obtains lawful permanent residence. 8 C.F.R. § 204.5(g)(2). The record indicates that the petitioner employs less than 100 people. Evidence of its ability to pay must therefore include copies of annual reports, federal tax returns, or audited financial statements. *Id.*

In determining ability to pay, USCIS examines whether a petitioner paid a beneficiary the full proffered wage each year from a petition's priority date. If a petitioner did not annually pay a beneficiary the full proffered wage, USCIS considers whether the business generated annual amounts of net income and net current assets sufficient to pay any differences between a proffered wage and the wages paid. If net income and net current assets are insufficient, USCIS may consider other factors 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).[2]

Here, the accompanying labor certification states the proffered wage of the offered position of *churrasqueiro* as $32,500 a year. The petition's priority date is October 27, 2017, the date DOL accepted the labor certification application for processing. *See* 8 C.F.R. § 204.5(d) (explaining how to determine a petition's priority date).

As of this appeal's filing, required evidence of the Petitioner's ability to pay the proffered wage in 2019 was not yet available. Therefore, for purposes of this decision, we will consider the company's ability to pay only in 2017, the year of the petition's priority date, and 2018.[3]

The Petitioner did not submit evidence that it paid the Beneficiary wages in 2017. But copies of payroll records and an IRS Form W-2, Wage and Tax Statement, indicate that the Beneficiary began working for the Petition in October 2018 and that the company paid him $6,094.27 that year. That amount does not equal or exceed the annual proffered wage of $32,500. Thus, based solely on wages paid, the record does not establish the Petitioner's ability to pay the proffered wage in 2017 or 2018. Nevertheless, we credit the wages the Petitioner paid the Beneficiary in 2018 and subtract them from the annual proffered wage. Thus, for 2018, the company need only demonstrate its ability to pay $26,405.73.

The Petitioner submitted copies of its federal income tax return for 2017 and unaudited financial statements for the same year. The tax return and financial statements, however, reflect negative

[2] Federal courts have upheld USCIS' 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); *Rivzi v. Dep't of Homeland Sec.*, 37 F.Supp.3d 870, 883-84 (S.D. Tex. 2014), *aff'd*, 627 Fed. App'x. 292 (5th Cir. 2015).

[3] In any future filings in this matter, pursuant to 8 C.F.R. § 204.5(g)(2), the Petitioner must submit copies of an annual report, federal tax return, or audited financial statements for 2019.

annual amounts of both net income and net current assets. Thus, the Petitioner has not demonstrated its possession of net income or net current assets sufficient to pay the proffered wage in 2017.

The Petitioner also submitted copies of its federal income tax return for 2018. The return reflects net income of $137,239. This amount exceeds the difference between the wages paid to the Beneficiary that year and the annual proffered wage. The Petitioner therefore has demonstrated its ability to pay the proffered wage in 2018.

Thus, based on examinations of wages paid, net income, and net current assets, the record establishes the Petitioner's ability to pay the proffered wage in 2018, but not in 2017, the year of the petition's priority date.

On appeal, the Petitioner asserts that its profit and loss statement for the fourth quarter of 2017 demonstrates its ability to pay the proffered wage that year. The statement indicates that, from October 1, 2017, through December 31, 2017, the Petitioner generated net income of $77,669.78. That amount exceeds the annual proffered wage of $32,500. The Petitioner thus argues that, from the petition's priority date of October 27, 2017, it has demonstrated its ability to pay the proffered wage in 2017.

USCIS policy, however, does not allow a petitioner to prorate its ability to pay a proffered wage in the year of a petition's priority date. Rather, a petitioner must demonstrate its ability to pay the full proffered wage over a full year in all relevant years. As this case illustrates, a petitioner's net income can vary dramatically over short periods. Factors like economic downturns or the seasonal nature of businesses can greatly affect short-term profits. To minimize income fluctuations that can distort a business's ability to pay a proffered wage, USCIS examines net incomes generated over at least one-year periods. Here, despite the Petitioner's claimed fourth-quarter profit, the company's financial records indicate a 2017 annual loss of more than $70,000. Also, the Petitioner has not demonstrated that its fourth-quarter statement was independently audited. The record therefore does not demonstrate the statement's reliability and accuracy.

As previously indicated, in determining the Petitioner's ability to pay, we may consider factors beyond its wages paid, net income, and net current assets. Under *Sonegawa*, we may consider: the number of years the Petitioner has conducted business; its number of employees; growth of its business; its incurrence of uncharacteristic losses or expenses; its reputation in its industry; the Beneficiary's replacement of an existing employee or outsourced service; or other factors affecting its ability to pay the proffered wage. *See Matter of Sonegawa*, 12 I&N Dec. at 614-15.

The record indicates the Petitioner's continuous business operations since 2006[4] and, as of the first quarter of 2019, its employment of 35 people. The Petitioner's tax returns also reflect an increase in annual revenues from 2017 to 2018. Unlike the petitioner in *Sonegawa*, however, the Petitioner here has not demonstrated its incurrence of uncharacteristic losses or expenses, or its possession of an

[4] The Petitioner asserts that it has conducted business since 2000. USCIS and online government records, however, indicate that a separate company operated the restaurant from 2000 until the Petitioner's formation in 2006. *See* Tex. Comptroller of Pub. Accounts, "Taxable Entity Search," https://mycpa.cpa.state.tx.us/coa/ (last visited Mar. 19, 2020).

outstanding reputation in its industry. The record also does not establish the Beneficiary's replacement of an existing employee or an outsourced service. Thus, a totality of circumstances under *Sonegawa* does not demonstrate the Petitioner's ability to pay the proffered wage.

III. CONCLUSION

The record on appeal does not establish the Petitioner's continuing ability to pay the proffered wage of the offered position from the petition's priority date onward. We will therefore affirm the petition's denial.

ORDER: The appeal is dismissed.