MATTER OF R-E-S-R- LLC

DATE: MAY 26, 2017

APPEAL OF NEBRASKA SERVICE CENTER DECISION

PETITION: FORM I-140, IMMIGRANT PETITION FOR ALIEN WORKER

The Petitioner, a medical staffing company, seeks to employ the Beneficiary as a registered nurse. It requests her classification as a skilled worker under the third-preference, immigrant category. *See* Immigration and Nationality Act (the Act) section 203(b)(3)(A)(i), 8 U.S.C. § 1153(b)(3)(A)(i). This employment-based immigrant classification 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 Nebraska Service Center denied the petition. The Director concluded that the record did not establish the Petitioner's required ability to pay the combined proffered wages of this and other pending and approved petitions.

On appeal, the Petitioner submits additional evidence and asserts its ability to pay the proffered wage.

Upon *de novo* review, we will dismiss the appeal.

I. LAW

Employment-based immigration usually follows a three-step process. First, an employer files a labor certification application with 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). If the DOL approves the application, the employer then files an immigrant visa petition with U.S. Citizenship and Immigration Services (USCIS). *See* section 204 of the Act, 8 U.S.C. § 1154. Finally, 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.

The occupations of nurse and physical therapist, however, are listed on Schedule A. The DOL has determined that the United States lacks able, willing, qualified, and available nurses and physical therapists, and that employment of foreign nationals in these occupations will not hurt the wages and working conditions of U.S. workers with similar jobs. 20 C.F.R. § 656.5. With testing of U.S. labor markets unnecessary, the DOL has authorized USCIS to adjudicate labor certification applications accompanying petitions for nurses and physical therapists. 20 C.F.R. § 656.15(a). Therefore, in this Schedule A case, USCIS rules on both the petition and the labor certification application.

While exempt from advertising an offered position, a Schedule A petitioner must still demonstrate its continuing ability to pay a proffered wage, from a petition's priority date until a beneficiary obtains lawful permanent residence. 8 C.F.R. § 204.5(g)(2). Evidence of ability to pay must include copies of annual reports, federal income tax returns, or audited financial statements. *Id.*

II. ANALYSIS

In this case, the labor certification application states the proffered wage of the offered position of registered nurse as $60,798 a year. The petition's priority date is January 12, 2016, the date USCIS received the petition. *See* 8 C.F.R. § 204.5(d) (explaining how to determine a petition's priority date).

In determining ability to pay, we first examine whether a petitioner paid a beneficiary the full proffered wage each year from a petition's priority date. If a petitioner did not pay the full proffered wage, we examine whether it generated annual amounts of net income or net current assets sufficient to pay the difference between the proffered wage and any actual wages paid. If net income and net current assets are insufficient, we may consider other factors affecting a petitioner's ability to pay. *See Matter of Sonegawa*, 12 I&N Dec. 612, 614-15 (Reg'l Comm'r 1967).[1]

The record lacks evidence of the Petitioner's employment of the Beneficiary. Thus, based on actual wages paid, the record does not establish the Petitioner's ability to pay the proffered wage.

On appeal, the Petitioner submits copies of audited financial statements for 2016.[2] The statements indicate the Petitioner's generation of $256,026 in net income and $699,294 in net current assets. Both amounts exceed the annual proffered wage of $60,798. The Petitioner therefore appears able to pay the Beneficiary's proffered wage in 2016; however, as the Director's request for additional evidence (RFE) indicated, the Petitioner has filed multiple, employment-based, immigrant petitions. USCIS records indicate the Petitioner's filing of at least 28 other petitions that remained pending or approved after this petition's priority date of January 12, 2016.[3]

A petitioner must demonstrate its ability to pay the proffered wage of each petition it files from that petition's priority date onward. 8 C.F.R. § 204.5(g)(2). The Petitioner here must therefore

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

[2] Because the appeal was filed before the end of 2016, the statements reflect the Petitioner's finances that year as of October 31.

[3] USCIS records identify the other 28 petitions by the following receipt numbers: [redacted] and [redacted]

demonstrate its ability to pay the combined proffered wages of this and other petitions that remained pending or approved after its priority date. The Petitioner must demonstrate its ability to pay the combined proffered wages until the other beneficiaries obtained lawful permanent resident status, or until their petitions were denied, withdrawn, or revoked. *See Patel v. Johnson*, 2 F. Supp. 3d 108, 124 (D. Mass. 2014) (affirming a petition's revocation where, as of its approval, the petitioner did not establish its ability to pay the combined proffered wages of multiple petitions).

Contrary to the RFE's request, the Petitioner has not provided information about its other petitions. *See* 8 C.F.R. § 103.2(b)(14) (providing for a petition's denial if a petitioner does not submit requested evidence that precludes a material line of inquiry). The record does not indicate the proffered wages of the petitions, or whether the Petitioner paid wages to their beneficiaries. The record also does not indicate whether the beneficiaries obtained lawful permanent residence, or whether their petitions were denied, withdrawn, or revoked. Without this information, the record does not establish the Petitioner's ability to pay the proffered wage.

On appeal, the Petitioner asserts that it demonstrated its ability to pay when the record established its net income as exceeding the proffered wage. As previously indicated, however, the Petitioner must demonstrate its ability to pay the combined proffered wages of this and other petitions that remained pending or approved after its priority date. Otherwise, as long as the Petitioner's annual amounts of net income and net current assets exceed each individual proffered wage, the Petitioner could unrealistically demonstrate its ability to pay an unlimited number of beneficiaries. *See Matter of Great Wall*, 16 I&N Dec. 142, 144-45 (Acting Reg'l Comm'r 1977) (holding that the ability-to-pay requirement establishes a job offer as "realistic").

In response to the RFE, the Petitioner asserted that its business model ensures its ability to pay all of its nurses. It contended that the more nurses it employs, the more profits it generates. For example, the Petitioner stated that the Beneficiary here will work at the site of a client that will pay the Petitioner at least $87,750 a year for her services, about 44 percent more than her annual proffered wage from the Petitioner.

Despite the Petitioner's profitable business model, the record does not establish the company's ability to pay the combined proffered wages of this and its other petitions. For immigration purposes, the Petitioner must demonstrate its ability to pay proffered wages from the filing dates of its petitions. USCIS records, however, indicate that many of the Petitioner's beneficiaries cannot begin working, and thus generating profits, for it until months, or even years, after their petitions' filings. Some beneficiaries must remain outside the United States until they receive immigrant visas. Others, like the Beneficiary here, are in the country but lack immediate authorization to work for the Petitioner.

Thus, because many beneficiaries do not generate income for the Petitioner for lengthy periods after the filings of their petitions, the Petitioner's business model does not establish its ability to pay the combined proffered wages of all of its pending beneficiaries.

On appeal, the Petitioner also asserts that its bank accounts contain additional funds available to pay proffered wages. It submits copies of 2016 statements from three different accounts, indicating combined, month-end balances of more than $100,000. The Petitioner notes that, "[i]n appropriate cases, . . . bank account records . . . may be submitted by the petitioner or requested by the Service" as evidence of ability to pay a proffered wage. 8 C.F.R. § 204.5(g)(2).

Here, however, the Petitioner's bank account records do not establish its ability to pay the proffered wage. We already considered the Petitioner's bank funds when we examined the net current assets stated in its 2016 audited financial statements. Under "Current Assets," the balance sheet lists "Cash and Cash Equivalents" of $252,136. The statements' notes indicate that "[t]he Company maintains its cash balances in various banks." The record therefore indicates that the current assets listed on the balance sheet include the funds reflected in the bank account records. Because we have already considered the bank funds as part of the Petitioner's net current assets, the funds do not represent additional money available to pay proffered wages.

As previously indicated, in determining a petitioner's ability to pay a proffered wage, we may consider factors beyond net income and net current assets. Under *Sonegawa*, we may consider such factors as: the number of years a petitioner has conducted business; its number of employees; the growth of its business; its reputation in its industry; the occurrence of uncharacteristic expenses or losses; a beneficiary's replacement of a current employee or outsourced service; or other evidence of its ability to pay. *See Matter of Sonegawa*, 16 I&N Dec. at 614-15.

Here, the record indicates the Petitioner's continuous business operations since 2009 and its current employment of 75 people. As the Petitioner argues, copies of its federal income tax returns also show that its annual revenues increased almost 66 percent from 2013 to 2015. Unlike the petitioner in *Sonegawa*, however, the Petitioner has not established its possession of an outstanding reputation in its industry or its incurrence of uncharacteristic expenses or losses. The record also does not indicate the Beneficiary's replacement of an existing employee or outsourced service. Also unlike the petitioner in *Sonegawa*, the Petitioner must demonstrate its ability to pay the combined proffered wages of multiple beneficiaries. Thus, the totality of the circumstances under *Sonegawa* does not establish the Petitioner's ability to pay the proffered wage.

III. CONCLUSION

The record does not establish the Petitioner's continuing ability to pay the proffered wage from the petition's priority date onward. We will therefore affirm the Director's decision.

ORDER: The appeal is dismissed.

Cite as *Matter of R-E-S-R- LLC*, ID# 419155 (AAO May 26, 2017)