U.S. Citizenship and Immigration Services

Non-Precedent Decision of the Administrative Appeals Office

In Re: 38071556

Date: MAY 28, 2025

Appeal of Service Center Operations (SCOPS) Decision

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

The Petitioner, a restaurant, seeks to employ the Beneficiary as a cook. 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 an alien for lawful permanent resident status based on a job offer requiring at least two years of training or experience.

Service Center Operations (SCOPS) denied the petition, concluding that the Petitioner did not establish that it had the continuing ability to pay the proffered wage of the offered job, or that the Beneficiary possessed the minimum qualifying experience for the offered job. 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 a foreign worker 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 alien 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

The accompanying labor certification in this case was filed on January 24, 2023. The labor certification states that the offered position requires 24 months of experience in the offered job of cook, with no education or training required. The Petitioner stated that it will not accept experience in an alternate occupation. The petition and ETA Form 9089 state the proffered wage of cook as $42,000 per year.

A. The Beneficiary's Experience

A petitioner must establish a beneficiary's possession of all DOL-certified job requirements of an offered position by a petition's priority date.[1] *See Matter of Wing's Tea House*, 16 I&N Dec. 158, 160 (Acting Reg'l Comm'r 1977). Therefore, the Petitioner must establish by a preponderance of the evidence that the Beneficiary possessed 24 months of experience as a cook as of the January 24, 2023 priority date.

The regulation at 8 C.F.R. § 204.5(l)(3) provides:

> (ii) *Other documentation—*
>
> (A) *General.* Any requirements of training or experience for skilled workers, professionals, or other workers must be supported by letters from trainers or employers giving the name, address, and title of the trainer or employer, and a description of the training received or the experience of the alien.

The record includes an experience letter from the Beneficiary's claimed former employer, [redacted] restaurant in Turkey. The letter is signed by the restaurant's owner and states that the Beneficiary was employed full-time as a cook from March 1, 2011 to September 20, 2017.

SCOPS issued a notice of intent to deny (NOID) the petition, stating that the evidence submitted to demonstrate the Beneficiary's qualifying experience is inconsistent with information the Beneficiary previously provided in his nonimmigrant visa application submitted in 2011 to the U.S. Department of State (DOS). In his prior nonimmigrant visa application, submitted November 23, 2011, the Beneficiary listed his current employment as business manager of a beauty salon. The Beneficiary answered "No" when asked whether he was previously employed, despite his claim on the labor certification to have been working at [redacted] restaurant as of March 1, 2011, 8 months before the nonimmigrant visa application was submitted.

SCOPS noted that the Beneficiary's claimed employment with a beauty salon on his prior nonimmigrant visa application in November 2011 cast doubt on his claimed qualifying employment as a full-time cook on the labor certification and in the experience letter beginning in March 2011. The Petitioner must resolve inconsistencies with independent, objective evidence pointing to where the truth lies. *Matter of Ho*, 19 I&N Dec. 582, at 591-92. Unresolved material inconsistencies may

[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).

lead us to reevaluate the reliability and sufficiency of other evidence submitted in support of the requested immigration benefit. *Id.*

In response to the NOID, the Petitioner provided a sworn statement from the Beneficiary. The Beneficiary stated that he used the service of an agent to prepare his nonimmigrant visa application. He stated that the agent omitted his previous work experience as a cook with [redacted] restaurant and listed only his managerial employment at the beauty salon, a family business owned and operated by his spouse. He stated that he did not review the application and was unaware of the omission. He further stated that the experience letter in the record documents his qualifications for the offered job of cook.

SCOPS concluded that the Petitioner had not established that the Beneficiary possessed the required 24 months of experience for the offered position. On appeal, the Petitioner does not provide additional evidence documenting the Beneficiary's experience as a cook. The Petitioner relies on the experience letter already in the record and states that it meets the requirements at 8 C.F.R. § 204.5(l).[2]

In adjudicating immigration benefit requests, USCIS regularly reviews affidavits, testimonials, and letters from both laypersons and recognized experts. A petitioner may submit a letter or affidavit that contains hearsay or biased information, but such factors will affect the weight to be accorded the evidence in an administrative proceeding. *See Matter of D-R-*, 25 I&N Dec. 445, 461 (BIA 2011) (citations omitted). Probative evidence beyond a letter or affidavit may be required to resolve inconsistencies or discrepancies in the record. *See Matter of Ho*, 19 I&N Dec. 582, 591-92 (BIA 1988). Ultimately, to determine whether a petitioner has established eligibility for a requested benefit by a preponderance of the evidence, USCIS must examine each piece of evidence - both individually and within the context of the entire record - for relevance, probative value, and credibility. *Matter of Chawathe*, 25 I&N Dec. 369, 376 (AAO 2010).

Here, the Petitioner relies only on testimonial evidence from the Beneficiary's purported former employer in attempt to establish his claimed employment experience, without providing independent, objective evidence in support of this testimony. However, based on the conflicting information from the Beneficiary's prior nonimmigrant visa application, further independent evidence is required. The record does not include evidence of the Beneficiary's income tax or payroll records to corroborate his claimed full-time employment with [redacted] restaurant. He does not assert that these records are unavailable for any reason. In his statement, the Beneficiary does not explain how he was able to work full-time as a cook during the same period as his employment managing his spouse's beauty salon. It is the Petitioner's burden to establish eligibility for the immigration benefit sought. Section 291 of the Act, 8 U.S.C. § 1361; *Matter of Skirball Cultural Ctr.*, 25 I&N Dec. 799, 806 (AAO 2012).

As the inconsistencies in the record have not been resolved, the Petitioner has not established with independent, objective evidence that the Beneficiary possesses the required 24 months of experience in the offered position, as required by the labor certification. The Petitioner has not overcome this basis of the denial.

[2] Although mentioned by the Petitioner, SCOPS did not enter a finding of willful misrepresentation of a material fact against either the Petitioner or the Beneficiary.

B. The Petitioner's Ability to Pay the Proffered Wage

A petitioner must demonstrate its continuing ability to pay the proffered wage for the offered job, from a petition's priority date until a beneficiary obtains permanent residence. 8 C.F.R. § 204.5(g)(2). Evidence of ability to pay must generally include copies of annual reports, federal tax returns, or audited financial statements.[3] *Id.*

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), www.uscis.gov/policy-manual. 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).[4]

As noted above, the petition and ETA Form 9089 state the proffered wage of cook as $42,000 per year. The petition's priority date is January 24, 2023.

The Petitioner has not submitted evidence that it employed the Beneficiary at any time. Thus, based solely on wages paid, the Petitioner has not demonstrated its ability to pay the proffered wage.[5]

The record demonstrates that the Petitioner is an S Corporation, established in 2004 with two to three employees. 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 Internal Revenue Service (IRS) 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 IRS Form 1120S, and the corporation's net income or loss will be found in line 18 of Schedule K ("Income/loss reconciliation"). Net current assets are the difference between a petitioner's current assets and current liabilities.

The Petitioner provided copies of its federal income tax return, IRS Form 1120S, for 2023. The 2023 return reflects net income of -$26,290 and net current assets of $15,335. Neither amount meets nor exceeds the annual proffered wage of $42,000. The tax return therefore does not establish the Petitioner's ability to pay the proffered wage in 2023.

[3] Although inapplicable here, petitioners that employ at least 100 people may submit statements from financial officers to demonstrate the businesses' ability to pay proffered wages. *See* 8 C.F.R. § 204.5(g)(2).

[4] 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).

[5] The Petitioner states on appeal that SCOPS "demanded wage statements." However, we note that in the NOID, SCOPS stated that the Petitioner "may submit" evidence of wages paid to the Beneficiary but did not require such evidence.

With the initial filing and in response to the NOID, the Petitioner asserted that it has established its ability to pay the proffered wage based on the "significant liquid assets" of its shareholders, including proceeds from the sale of the shareholders' home. The Petitioner acknowledged that its restaurant has suffered financial loss as a result of COVID-19, but stated that it expects to profit as a result of the employment of the Beneficiary.

SCOPS concluded that the Petitioner had not established its continuing ability to pay the proffered wage from the priority date. On appeal, the Petitioner does not provide additional evidence. It again relies on the personal assets of its shareholders. The Petitioner asserts that "*Matter of Great Wall* (16 I&N Dec. 142) permits the use of the personal assets of a business owner to demonstrate the company's ability to pay." However, it does not reference specific language in that decision to support this position.[6]

S corporations allow shareholders to report company incomes on their individual tax returns, thereby avoiding "double taxation" on profits. 26 U.S.C. § 1366. But, unlike sole proprietors, S corporations remain separate entities from their shareholders. *Matter of Aphrodite Invs., Ltd.*, 17 I&N Dec. 530, 531 (Comm'r 1980). Thus, shareholders of S corporations have no personal obligations to pay proffered wages of the companies they own. *See Sitar Rest. v. Ashcroft*, No. Civ.A.02-30197-MAP, 2003 WL 22203713, *2 (D. Mass. Sept. 18, 2003) (holding that "nothing in the governing regulation, 8 C.F.R. § 204.5, permits [USCIS] to consider the financial resources of individuals or entities who have no legal obligation to pay the wage"). We therefore will not consider the personal assets of the Petitioner's shareholders in determining its ability to pay.

As the Petitioner notes, USCIS may consider other factors potentially affecting a petitioner'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 Matter of Sonegawa*, 12 I&N Dec. at 614-15; *see also* 6 *USCIS Policy Manual* E.(4)(C)(3).

The record indicates that the Petitioner began operations in 2004 and, at the time of the petition's filing in July 2024, employed three people. Unlike the petitioner in *Sonegawa*, the company has not established its possession of a good business reputation. Although it asserts that it incurred uncharacteristic loss as a result of COVID-19, the record does not include tax returns for any year outside of 2023 demonstrating stability or growth in years unaffected by the pandemic. The Petitioner also has not established the Beneficiary's replacement of an employee or outsourced service. While we acknowledge the Petitioner's statement that it expects to profit once the Beneficiary is employed, the Petitioner does not support this statement with documentary evidence or explain how the Beneficiary will generate income.

Upon assessment of the totality of the circumstances in this individual case, the record does not establish the Petitioner's continuing ability to pay the proffered wage pursuant to *Sonegawa*. The Petitioner has not overcome this basis of the denial.

---

[6] *Matter of Great Wall*, 16 I&N Dec. 142 (Acting Reg'l Comm'r 1977) is commonly cited for the proposition that the job offer must be realistic.

III. CONCLUSION

The Petitioner has not demonstrated the Beneficiary's possession of the minimum experience required for the offered position or requested visa classification. Further, the Petitioner has not established its required ability to pay the offered job's proffered wage pursuant to 8 C.F.R. § 204.5(g)(2). In visa petition proceedings it is the petitioner's burden to establish eligibility for the immigration benefit sought. Section 291 of the Act, 8 U.S.C. § 1361. The Petitioner has not met that burden.

ORDER: The appeal is dismissed.