U.S. Citizenship and Immigration Services

Non-Precedent Decision of the Administrative Appeals Office

In Re: 11009653

Date: NOV. 27, 2020

Appeal of Nebraska Service Center Decision

Form I-140, Immigrant Petition for Professional

The Petitioner seeks to employ the Beneficiary as a nursing aide/assistant. It requests classification of the Beneficiary under the third-preference, immigrant classification for professional workers. Immigration and Nationality Act (the Act) section 203(b)(3)(A)(ii), 8 U.S.C. § 1153(b)(3)(A)(ii). This employment-based, "EB-3" category allows a U.S. employer to sponsor a professional with a baccalaureate degree for lawful permanent resident status.

The Director of the Nebraska Service Center denied the petition, concluding that the record did not establish that the record did not establish that the Petitioner had the continuing ability to pay the proffered wage to the Beneficiary.

Upon de novo review, we will withdraw the Director's decision and remand the case for the entry of a new decision consistent with the foregoing analysis.

I. EMPLOYMENT-BASED IMMIGRATION

Employment-based immigration 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) of the Act, 8 U.S.C. § 1182(a)(5). DOL approval signifies that insufficient U.S. workers are able, willing, qualified, and available for a position. Id. Labor certification also indicates that the 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 considers whether a beneficiary meets the requirements of a certified position and a requested immigrant visa classification. If USCIS approves the 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

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. The priority date in this case is February 13, 2019. The labor certification states that the wage offered for the job of nursing aide/assistant is $95,806 per year.

In determining a petitioner's ability to pay, we first examine whether it paid a beneficiary the full proffered wage each year from a petition's priority date. If a petitioner did not pay a beneficiary the full proffered wage, we next examine whether it had sufficient annual amounts of net income or net current assets to pay the difference between the proffered wage and the wages paid, if any. If a petitioner's net income or net current assets are insufficient, we may also consider other evidence of its ability to pay the proffered wage.[1] USCIS may also consider the totality of the petitioner's circumstances, including the overall magnitude of its business activities, in determining the Petitioner's ability to pay the proffered wage. See Matter of Sonegawa, 12 I&N Dec. 612 (Reg'l Comm'r 1967).[2]

With the initial filing, the Petitioner submitted its 2016-2018 Internal Revenue Service (IRS) Forms 1120S, U.S. Income Tax Return for an S Corporation. The Director determined that the evidence was not sufficient to establish that the Petitioner had the ability to pay the proffered wage to the Beneficiary from the 2019 priority date. The Director issued a Notice of Intent to Deny (NOID) to allow the Petitioner the opportunity to provide additional evidence to establish its ability to pay the proffered wage.

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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); Tongatapu Woodcraft Haw., Ltd. v. Feldman, 736 F.2d 1305, 1309 (9th Cir. 1984); Estrada-Hernandez v. Holder, -- F. Supp. 3d --, 2015 WL 3634497, *5 (S.D. Cal. 2015); Rizvi v. Dep't of Homeland Sec., 37 F. Supp. 3d 870, 883-84 (S.D. Tex. 2014), aff'd, 627 Fed. App'x 292, 294-295 (5th Cir. 2015).

[2] USCIS may, at its discretion, consider evidence relevant to the petitioner's financial ability that falls outside of its net income and net current assets. We may consider such factors as the number of years the petitioner has been doing business, the established historical growth of the petitioner's business, the petitioner's reputation within its industry, the overall number of employees, whether the beneficiary is replacing a former employee or an outsourced service, the amount of compensation paid to officers, the occurrence of any uncharacteristic business expenditures or losses, and any other evidence that USCIS deems relevant to the petitioner's ability to pay the proffered wage.

In response to the NOID, the Petitioner asserted that the Beneficiary would replace a current employee,[3] and that the Petitioner had "reserve bank accounts that could be used ... for payroll." In support of this assertion the Petitioner provided a quarterly statement of an IRA account and a letter of verification of personal bank accounts, both in the name of '[redacted]'

The Director found that the record did not demonstrate the Petitioner's ability to pay the proffered wage because the Petitioner did not establish any relationship between itself and '[redacted]' and because "personal funds cannot be used to show ability to pay for an incorporated company."

On appeal, the Petitioner submits evidence to identify '[redacted]' as an officer, director and registered agent of the Petitioner.[4] The Petitioner again submits its 2018 federal tax return with a letter from its tax preparer. The tax preparer states that we should consider the Petitioner's net income only after adding back in the amount of rent owed to [redacted] and that we should consider a shareholder loan in calculating the Petitioner's net current assets.

We agree with the Director that, because a corporation is a separate and distinct legal entity from its owners and shareholders, the assets of its shareholders or of other enterprises or corporations cannot be considered in determining the petitioning corporation's ability to pay the proffered wage.[5] Further, we do not consider a petitioner to have established its ability to pay the proffered wage based on its income without deducting its expenses.[6]

The tax preparer's recommended calculations of the Petitioner's income require us to consider the personal assets of [redacted] which we would not do as the Petitioner files as an S Corporation. As noted above, the record does not establish that [redacted] is an owner or shareholder of the Petitioner, or that he is the individual to whom the rent noted on the tax return is actually owed. The Petitioner has not provided evidence establishing the ownership of the property.

Even if ownership of the Petitioner and the property were established, this calculation is essentially considering the Petitioner and owner as one and the same, which is not correct. The tax preparer wants us to take the net income figure from line 21 of page one of its Form 1120S and add back rents from

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[3] The Petitioner does not name the employee it will replace, state his or her wages, verify his or her full-time employment, or provide evidence that it has or will replace that employee with the beneficiary. In general, wages already paid to others are not available to establish the ability to pay the wage proffered to the beneficiary at the priority date of the petition and continuing to the present.

[4] The Petitioner's tax preparer and counsel for the Petitioner refer to [redacted] as the Petitioner's "owner," however this is not supported by the record. The tax returns in the record do not list the names of the Petitioner's shareholders, the Articles of Incorporation do not include any names, and the state corporate filings list [redacted] as "CEO" in 2015 but he is not listed in any position in 2019. Assertions of counsel do not constitute evidence. Matter of Obaigbena, 19 I&N Dec. 533, 534 n.2 (BIA 1988) (citing Matter of Ramirez-Sanchez, 17 I&N Dec. 503, 506 (BIA 1980)). Counsel's statements must be substantiated in the record with independent evidence, which may include affidavits and declarations.

[5] See Matter of Aphrodite Investments, Ltd., 17 I&N Dec. 530 (Comm'r 1980). In a similar case, the court in Sitar v. Ashcroft, No. Civ. A. 02-30197-MAP, 2003 WL 22203713 (D.Mass. Sept. 18, 2003) stated, "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."

[6] The court specifically rejected the argument that USCIS should have considered income before expenses were paid rather than net income. See Taco Especial v. Napolitano, 696 F. Supp. 2d at 881 (gross profits overstate an employer's ability to pay because it ignores other necessary expenses).

line 11. However, rents are already accounted for in the calculation of line 21 net income, and there is no evidence that the Petitioner could reduce the rent paid to the owner in order to pay the proffered wage.[7]

Similarly, we do not agree with the tax preparer's recommended calculation of the Petitioner's assets. A corporation's year-end current assets are shown on Schedule L, lines 1 through 6. Loans to shareholders are reflected on the petitioner's balance sheet (Schedule L) as non-current assets. While the tax preparer states that the shareholder loan is an asset, the shareholder is not identified in the record and the Petitioner does not provide a statement from the shareholder indicating his willingness to forego or reduce the loan amount. Nothing here shows that the payments were actual loans (such as a promissory note or loan agreement, and repayment to the Petitioner).

The Petitioner did not submit its 2019 federal tax return with the appeal. However, at the time the appeal was filed, the deadline to file 2019 tax returns had not yet passed. The Petitioner did not submit evidence that it paid wages to the Beneficiary at any time.

Therefore, in this case, the record reflects the following details:

	Net Income	Net Current Assets
2018	$54,006	$(10,502)
2019	Unavailable	Unavailable

In view of the unavailability of evidence of the Petitioner's net income and net current assets in the year of the priority date, specifically the Petitioner's 2019 tax return, we will remand this matter for further consideration as the Director was only able to review financial information before the priority date. The Director may request the Petitioner's 2019 tax return and any other documentation deemed relevant at his discretion in determining the Petitioner's ability to pay the proffered wage.

We note that where a petitioner has filed I-140 petitions for multiple beneficiaries, it must demonstrate that its job offer to each beneficiary is realistic, and that it has the ability to pay the proffered wage to each beneficiary. See Patel v. Johnson, 2 F.Supp.3d 108, 124 (D. Mass. 2014) (affirming our revocation of a petition's approval where, as of the filing's grant, a petitioner did not demonstrate its ability to pay the combined proffered wages of multiple petitions). USCIS records show that the Petitioner has filed five Form I-140 petitions for other beneficiaries. Thus, the Petitioner must establish its ability to pay this Beneficiary as well as the beneficiaries of the other Form I-140 petitions that were pending or approved as of, or filed after, the priority date of the current petition.

The Director should consider the amount of wages the Petitioner paid to the Beneficiary each year, if any; the Petitioner's net income and net current assets each year; and the proffered wages and wages the Petitioner paid to its other I-140 beneficiaries, if any, for the time period in question. At his discretion, in accord with Matter of Sonegawa 12 I&N Dec. 612 (Reg'l Comm'r 1967), the Director may consider evidence relevant to the petitioner's financial situation.

[7] The Petitioner must pay the fair rental value for the property. Rents below fair rental value may be adjusted by the IRS. See Internal Revenue Code section 482, 26 U.S.C. § 482.

II. BENEFICIARY'S QUALIFICATIONS

Although not mentioned in the NOID or the Director's decision, adverse information casts doubt on the Beneficiary's claimed education.

The accompanying labor certification states that the offered position requires a bachelor's, or foreign equivalent, degree in nursing. No alternate combination of education and experience is accepted. On the labor certification, the Petitioner asserts that the Beneficiary's highest level of education is a bachelor's degree in nursing earned in 2006 from [redacted].[8]

A review of a nonimmigrant visa application that the Beneficiary completed shows that the Beneficiary applied for and was refused a B-1/B-2 (Temporary Visitor) visa in 2016. On that nonimmigrant visa application, when asked whether he had attended any educational institutions at a secondary level or above, the Beneficiary answered "no."

The Petitioner must resolve these inconsistencies with independent, objective evidence pointing to where the truth lies. Matter of Ho, 19 I&N Dec. 582, 591-92 (BIA 1988). Unresolved material inconsistencies may lead us to reevaluate the reliability and sufficiency of other evidence submitted in support of the requested immigration benefit. Id.

III. CONCLUSION

The record does not contain priority date year documentation to determine whether the Petitioner has the ability to pay the proffered wage to the Beneficiary as required by 8 C.F.R. § 204.5(g)(2). Inconsistences also cast doubt on the Beneficiary's qualifications for the proffered position. Therefore, we will remand this case to the Director for further consideration of the Petitioner's ability to pay the proffered wage from the priority date onward, as well as the Beneficiary's qualifications.

ORDER: The Director's decision is withdrawn. The matter is remanded for the entry of a new decision consistent with the foregoing analysis.

[8] With the petition, the Petitioner submits a Bachelor of Science in Nursing diploma, purportedly issued to the Beneficiary from [redacted] in 2006.