U.S. Citizenship and Immigration Services

Non-Precedent Decision of the Administrative Appeals Office

In Re: 11989294

Date: OCT. 1, 2020

Appeal of Nebraska Service Center Decision

Form I-140, Immigrant Petition for Other Worker

The Petitioner, an assisted living facility business, seeks to employ the Beneficiary as a caregiver. It requests classification of the Beneficiary as an unskilled worker under the third preference immigrant classification. Immigration and Nationality Act (the Act) section 203(b)(3)(A)(iii), 8 U.S.C. § 1153(b)(3)(A)(iii). This employment-based immigrant classification allows a U.S. employer to sponsor a foreign national for lawful permanent resident status to work in a position that requires less than two years of training or experience.

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

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

I. EMPLOYMENT-BASED IMMIGRATION

Immigration as an unskilled worker usually follows a three-step process. First, the prospective employer must obtain a labor certification approval from the U.S. Department of Labor (DOL) to establish that there are not sufficient U.S. workers who are available for the offered position. Section 212(a)(5) of the Act, 8 U.S.C. § 1182(a)(5). Second, the employer must submit the approved labor certification with an immigrant visa petition to U.S. Citizenship and Immigration Services (USCIS). Section 204 of the Act, 8 U.S.C. § 1154. The immigrant visa petition must establish that the foreign worker qualifies for the offered position, that the foreign worker and the offered position are eligible for the requested immigrant classification, and that the employer possesses the ability to pay the proffered wage. *See* 8 C.F.R. § 204.5.[1] Finally, if USCIS approves the immigrant visa petition, the foreign worker may apply for an immigrant visa abroad or, if eligible, for adjustment of status in the United States. Section 245 of the Act, 8 U.S.C. § 1255.

[1] These requirements must be satisfied by the priority date of the immigrant visa petition. *See* 8 C.F.R. § 204.5(g)(2), *Matter of Wing's Tea House*, 16 I&N Dec. 158, 159 (Act. Reg'l Comm'r 1977). For petitions that require a labor certification, the priority date is the date on which the DOL accepted the labor certification application for processing. *See* 8 C.F.R. § 204.5(d). In this case, the priority date is November 15, 2018.

II. ABILITY TO PAY THE PROFFERED WAGE

A petitioner must establish its ability to pay the proffered wage from the priority date of the petition until the beneficiary obtains lawful permanent residence. 8 C.F.R. § 204.5(g)(2). Evidence of ability to pay must generally include annual reports, federal tax returns, or audited financial statements. *Id.* If a petitioner employs 100 or more workers, USCIS may accept a statement from a financial officer attesting to the petitioner's ability to pay the proffered wage. *Id.* 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. *Id.*

In determining ability to pay, USCIS first determines whether the petitioner paid the beneficiary the full proffered wage each year from the priority date. If the petitioner did not pay the proffered wage in any given year, USCIS next determines whether the petitioner had sufficient net income or net current assets to pay the proffered wage (reduced by any wages paid to the beneficiary).[2] The Petitioner in this case has filed immigrant visa petitions on behalf of three other beneficiaries, two of which were also denied.

If net income and net current assets are insufficient, USCIS may consider other relevant factors, such as the number of years the petitioner has been in business, the size of its operations, the growth of its business over time, its number of employees, the occurrence of any uncharacteristic business expenditures or losses, its reputation within its industry, or whether a beneficiary will replace a current employee or outsourced service. *See Matter of Sonegawa*, 12 I&N Dec. 612, 614-15 (Reg'l Comm'r 1967).

In this case, the proffered wage is $21,570 per year and the priority date is November 15, 2018. On the petition, the Petitioner claims to have been established in 2015, employ 65 workers, and have gross annual income of over $5 million.[3] The Petitioner's website states that it has three assisted living facilities in California. The Petitioner does not claim to have employed the Beneficiary.

After reviewing the petition, the Director issued a request for evidence (RFE) instructing the Petitioner to provide a copy of its 2018 federal income tax return, audited financial statements, or annual report as required by 8 C.F.R. § 204.5(g)(2). In response, the Petitioner submitted a letter from its financial officer attesting to the fact that the Petitioner employs over 104 full- and part-time workers, that it had over $4 million in gross income and over $1 million in net operating income, and that it has the ability to pay the proffered wage.[4]

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[2] If a petitioner has filed immigrant visa petitions on behalf of multiple beneficiaries, the petitioner must establish that it has had 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 approval where the petitioner did not demonstrate its ability to pay the combined proffered wages of multiple beneficiaries). Petitions filed on behalf of other beneficiaries are considered from the priority date of each petition (not including any year prior to the priority date of the petition being reviewed on appeal) until the present or until the other beneficiary obtains lawful permanent residence. Petitions that have been withdrawn or denied are not considered in this analysis.

[3] The labor certification states that the Petitioner has 85 employees.

[4] USCIS has the discretion to accept a financial officer's letter as evidence of a petitioner's ability to pay the proffered wage if the petitioner employs 100 or more workers. *See* 8 C.F.R. § 204.5(g)(2). In this case, the Petitioner did not establish that it has 100 full-time (or full-time equivalent) employees and the Director declined to accept the letter as

The Petitioner's RFE response also included the following documents:

- "Annual Financial Report" for the calendar year ending December 31, 2018;
- Wage report for its quarterly federal tax return for the period from October 1, 2019 to December 31, 2019, showing wages paid of over $433,001.62 to 104 full- and part-time employees; and
- Bank account statements from August 31, 2019 to November 29, 2019, showing beginning and ending balances ranging from $1,500.00 to $255,003.26.

The Director denied the petition, concluding that the Petitioner did not submit an annual report, audited financial statement, or federal income tax return as required initial evidence of its ability to pay the proffered wage.[5]

On appeal, the Petitioner claims on Form I-290B, Notice of Appeal or Motion, that its "annual report is sufficient to demonstrate ability to pay." The cover letter accompanying the appeal states that the Petitioner will submit a brief and additional evidence within 30 days. However, there is no brief or additional evidence in the record.

As noted above, the regulation at 8 C.F.R. § 204.5(g)(2) requires petitioners to submit "annual reports, federal tax returns, or audited financial statements" to establish its ability to pay the proffered wage.[6] The Petitioner did not submit any of these documents with its petition, in response to the Director's RFE, or on appeal.[7] The Petitioner claims it submitted an annual report, but its "2018 Annual Financial Report" is solely a collection of unaudited financial statements, which would not meet the regulatory requirement of audited financial statements or an annual report.[8]

Since the Petitioner did not submit any of the required evidence for establishing ability to pay, the appeal must be dismissed. *See* 8 C.F.R. § 103.2(b)(8). Without the required initial evidence, we cannot consider the totality of the circumstances under *Matter of Sonegawa*.

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evidence of ability to pay. We note that both the Form I-140 and ETA Form 9089 list that the Petitioner has less than 100 employees. It is incumbent upon a petitioner to resolve any inconsistencies in the record by independent objective evidence. *See Matter of Ho*, 19 I&N Dec. 582, 591-92 (BIA 1988).

[5] The Director also applied the guidance in the Memorandum from William R. Yates, Associate Director for Operations, USCIS, HQOPRD 90/16.45, *Determination of Ability to Pay under 8 CFR 204.5(g)(2)* (May 4, 2004), http://www.uscis.gov/legal-resources/policy-memoranda.

[6] For annual reports, USCIS will accept a public corporation's annual report to shareholders or its 10-K filing with the Securities and Exchange Commission. Any financial statements submitted to satisfy the initial evidence requirement must be audited. USCIS also accepts annual federal income tax returns as initial evidence of ability to pay.

[7] Failure to submit material requested evidence is grounds for denial. *See* 8 C.F.R. § 103.2(b)(14).

[8] The Petitioner's bank account statements are also not among the three types of required initial evidence. While the regulation permits us to consider evidence such as bank account statements "in appropriate cases," the Petitioner has not demonstrated why the documents specified at 8 C.F.R. § 204.5(g)(2) would paint an inaccurate financial picture. The bank statements only show the amount in the Petitioner's bank account for a given period, but do not reflect any outstanding current liabilities. Further, without the Petitioner's tax returns, we cannot determine whether the bank statements reflect additional funds above the cash specified on Schedule L of the return when calculating the Petitioner's net current assets.

III. CONCLUSION

The Petitioner has not established its ability to pay the proffered wage because it has not submitted one of the three types of evidence required by 8 C.F.R. § 204.5(g)(2).

ORDER: The appeal is dismissed.