U.S. Citizenship and Immigration Services

Non-Precedent Decision of the Administrative Appeals Office

In Re: 9502551

Date: OCT. 1, 2020

Appeal of Nebraska Service Center Decision

Form I-140, Immigrant Petition for Skilled Worker

The Petitioner seeks to employ the Beneficiary as a registered nurse. It requests classification of the Beneficiary as a skilled worker under the third preference immigrant classification. 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. employer to sponsor a foreign national for lawful permanent resident status to work in a position that requires at least 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 withdraw the Director's decision and remand the appeal for the issuance of a new decision.

I. SCHEDULE A OCCUPATIONS

The offered position of registered nurse is a Schedule A occupation.[1] A Schedule A occupation is an occupation for which the U.S. Department of Labor (DOL) has determined that: (1) there are not sufficient U.S. workers who are able, willing, qualified, and available; and (2) the wages and working conditions of similarly employed U.S. workers will not be adversely affected by the employment of foreign workers in that occupation. Petitions involving Schedule A occupations do not require the petitioner to test the labor market and obtain a labor certification approval from the DOL prior to filing an immigrant visa petition with U.S. Citizenship and Immigration Services (USCIS). Instead, the petitioner files a petition directly with USCIS together with a Schedule A application.[2] *See* 8 C.F.R. § 204.5(a)(2); *see also* 20 C.F.R. § 656.15.

If USCIS approves the petition, the foreign national may apply abroad for an immigrant visa or, if eligible, for adjustment of status in the United States. *See* section 245 of the Act, 8 U.S.C. § 1255.

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[1] Schedule A occupations are codified at 20 C.F.R. § 656.5(a). The two Schedule A occupations are professional nurses and physical therapists.

[2] Schedule A applications are filed on ETA Form 9089, Application for Permanent Employment Certification.

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.* 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).[3]

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 $33.00 per hour and the priority date is November 27, 2019.[4] On the petition, the Petitioner claims to have been established in 2014, employ 70 workers, and have gross annual income of over $8 million. The Petitioner does not claim to have employed the Beneficiary.

The record contains the Petitioner's 2017 and 2018 IRS Form 1120S, U.S. Income Tax Return for an S Corporation. At the time of filing, the Petitioner's 2019 tax returns were not yet available. The 2018 tax return lists the Petitioner's net income as $202,458 and its net current assets as $764.

In addition to the Beneficiary's proffered wage, the Director also reviewed the proffered wages for 27 of the Petitioner's active beneficiaries and determined that the combined proffered wage totaled $1,877,907. The Director then compared the wages to the Petitioner's 2018 net income. The Director concluded that the Petitioner's net income and net current assets were not sufficient to establish its ability to pay the proffered wage to the Beneficiary as well as well as its other active beneficiaries. The Director also considered factors under *Matter of Sonegawa*, 12 I&N Dec. 612, 614-15 (Reg'l Comm'r 1967) in concluding that the Petitioner did not establish ability to pay.

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[3] 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.

[4] For Schedule A cases, the priority date is the date that the immigrant visa petition is properly filed with USCIS. 8 C.F.R. § 204.5(d). Although the Petitioner requested the retention of an earlier priority date under 8 C.F.R. § 204.5(e) based on the approval of an immigrant visa petition filed by another employer, that petition's approval was revoked and therefore the earlier priority date cannot be preserved for this matter.

On appeal, the Petitioner submits financial statements[5] for the calendar year ending December 31, 2019. As the Director did not have the opportunity to review this in the first instance, we will remand the petition for further consideration. Since the priority date in this matter is 2019, the Director should compare the Petitioner's I-140 filings pending after November 27, 2019 to the Petitioner's 2019 financial information. On remand, the Director may request additional information related to the Petitioner's ability to pay, including documentation related to 2020, as well as additional information related to proffered wages on the Petitioner's other I-140s petitions. The Director should also consider any updated evidence of the size of the Petitioner's operations, including any additional sponsored foreign workers, the growth of its business over time, its number of employees, its reputation within its industry, and any other relevant factors under *Matter of Sonegawa*.

The Director should also ask the Petitioner to resolve an inconsistency in the record concerning the hours per week that the Beneficiary will work in the offered position. On appeal, the Petitioner claims that the total proffered wage for each of its beneficiaries should be lower than what the Director calculated (using each beneficiary's hourly wage rate) because its nurses work 37.5 hours per week instead of 40 hours per week. In support of this claim, the record contains a contract between the Petitioner and a staffing services client which states that "[a]ny schedules in excess of 37.5 hours per week will be considered overtime and paid at time and one-half." However, the Petitioner's November 21, 2019 letter in support of the petition states that the Beneficiary will work 40 hours a week.[6] The submitted Notice of Filing also states that the offered position is for 40 hours per week, as does the employment contact between the Petitioner and the Beneficiary. Therefore, on remand, the Director should provide the Petitioner with the opportunity to address this inconsistency.[7]

Finally, on remand, the Director may request that the Petitioner explain the different addresses it has used on documentation submitted to various state and federal government agencies. The street address on this petition, Schedule A application, and the Petitioner's website is [redacted].[8] However, this is also the same address as another company, [redacted][9] Corporate filings with the New York State Division of Corporations (NYSDOC) use the street address of [redacted] which appears to be a shared office space.[10] In addition, the Petitioner's 2017 and 2018 tax

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[5] A note to the accountant's report states that the financial statements were prepared using a "special purpose framework and not U.S. generally accepted accounting principles (U.S. GAAP)." Specifically, the submitted financial statement uses the American Institute of Certified Public Accountants' (AICPA) Financial Reporting Framework for Small- and Medium-Sized Entities (FRF for SMEs). The AICPA represents the CPA profession nationally and develops standards for audits of private companies by CPAs. *See* https://www.aicpa.org. Issued in June 2013, this special purpose framework is for privately held owner-managed businesses and is more streamlined than the GAAP framework. Although the FRF for SMEs framework was developed by AICPA, it has not been acted upon by an AICPA senior technical committee or the Financial Accounting Standards Board. As a result, the FRF for SMEs framework currently has no official or authoritative status. *See* https://www.aicpa.org/interestareas/frc/accountingfinancialreporting/pcfr/frf-smes-faq.html. Because the submitted financial statements have not been prepared in accordance with GAAP, they would not appear to meet the requirements of financial statements under 8 C.F.R. § 204.5(g)(2).

[6] It appears that this document originally stated that the offered position was 37.5 hours per week and was changed at some point using correction fluid to state 40 hours per week.

[7] The Petitioner must resolve this inconsistency in the record with independent, objective evidence pointing to where the truth lies. *See Matter of Ho*, 19 I&N Dec. 582, 591-92 (BIA 1988).

[8] The Petitioner's website is https:[redacted] Although the company is named [redacted] the website states the company's name as [redacted]

[9] The website for this company is https:[redacted]

[10] NYSDOC business information is available at https://www.dos.ny.gov/corps/busentitysearch.html.

returns use [redacted] for the Petitioner's address, which appears to be the residential address of the Petitioner's owner, and the address that [redacted] used on its NYSDOC filings. On remand, the Director may obtain an explanation from the Petitioner about these different addresses, why [redacted] uses the same addresses, and provide evidence that it has an actual business location, including photographs of its office space.

III. CONCLUSION

We are remanding the appeal. On remand, the Director should allow the Petitioner a reasonable period to provide evidence relating to the Petitioner's ability to pay the proffered wage, resolve inconsistencies in the stated hours per week that the Beneficiary and its other immigrant visa petition beneficiaries will work, and explain the multiple addresses used by the Petitioner. Upon receipt of the Petitioner's timely response, the Director should review the entire record and enter a new decision.

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