U.S. Citizenship and Immigration Services

Non-Precedent Decision of the Administrative Appeals Office

In Re: 34352920

Date: OCT. 2, 2024

Appeal of Texas Service Center Decision

Form I-140, Immigrant Petition for Alien Workers (Advanced Degree)

The Petitioner, a provider of information technology staff and services, seeks to employ the Beneficiary as a software engineer. The company requests his classification under the employment-based, third-preference (EB-3) immigrant visa category as a member of the professions holding an "advanced degree." *See* Immigration and Nationality Act (the Act) section 203(b)(2)(A), 8 U.S.C. § 1153(b)(2)(A). Businesses may sponsor noncitizens for U.S. permanent residence in this category to work in jobs requiring master's degrees or their equivalents. *Id.*

The Director of the Texas Service Center denied the petition. The Director concluded that the Petitioner did not demonstrate its required ability to pay the offered job's proffered wage. On appeal, the company contends that the Director overlooked evidence.

The Petitioner bears the burden of demonstrating eligibility for the requested benefit by a preponderance of the evidence. *Matter of Chawathe*, 25 I&N Dec. 369, 375-76 (AAO 2010). Exercising de novo appellate review, *see Matter of Christo's, Inc.*, 26 I&N Dec. 537, 537 n.2 (AAO 2015), we conclude that, by paying the Beneficiary more than the proffered wage and submitting regulatory required evidence, the company established its ability to pay. We will therefore sustain the appeal.

I. LAW

Immigration as an advanced degree professional 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) that: insufficient U.S. workers are able, willing, qualified, and available for an offered position; and a noncitizen's employment in the job would not harm wages and working conditions of U.S. workers with similar jobs. *See* section 212(a)(5)(D) of the Act, 8 U.S.C. § 1182(a)(5)(D).

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(a)(1)(F) of the Act, 8 U.S.C. § 1154(a)(1)(F). Among other things, USCIS determines whether a

beneficiary meets the requirements of the DOL-certified position and requested immigrant visa category. 8 C.F.R. § 204.5(k)(3)(i), (4)(i).

Finally, if USCIS approves a petition, a noncitizen may apply abroad for an immigrant visa or, if eligible, "adjustment of status" in the United States. *See* section 245(a) of the Act, 8 U.S.C. § 1255(a).

II. ANALYSIS

A petitioner must demonstrate its continuing ability to pay an offered job's proffered wage, 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. *Id.*[1]

When determining ability to pay, USCIS examines whether a petitioner paid a beneficiary the full proffered wage each year, 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 amounts of net income or net current assets sufficient to pay any differences between the proffered wage and wages paid. *Id.* at 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); 6 *USCIS Policy Manual* E.(4)(C)(3).[2]

The Petitioner's labor certification states the proffered wage of the offered job of software engineer as $85,842 a year. The petition's priority date is August 4, 2022, the date DOL accepted the labor certification application for processing. *See* 8 C.F.R. § 204.5(d) (explaining how to determine a petition's priority date).

At the time the Petitioner responded to the Director's request for additional evidence, required regulatory evidence of the company's ability to pay the proffered wage in 2023 was not yet available. For purposes of this decision, we will therefore consider the company's ability to pay only in 2022, the year of the petition's priority date.

The record indicates that the Petitioner has employed the Beneficiary since August 2017. The company submitted a copy of an IRS Form W-2, Wage and Tax Statement, it issued to the Beneficiary for 2022. The Form W-2 indicates that the company paid the Beneficiary $92,400 that year. That amount exceeds the annual proffered wage of $85,842.

Based on the wages the Petitioner paid the Beneficiary, the company appears to have demonstrated its ability to pay the proffered wage in 2022. The company, however, must also have submitted copies

[1] Petitioners that employ at least 100 people may submit letters from financial officers as proof of their abilities to pay. 8 C.F.R. § 204.5(g)(2). This record, however, does not establish – nor does the Petitioner claim – its employment of at least 100 people.

[2] Federal courts have upheld USCIS' 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); *Four Holes Land & Cattle, LLC v Rodriguez*, No. 5:15-cv-03858, 2016 WL 4708715, *X (D.S.C. Sept. 9, 2016).

of its annual report, federal tax return, or audited financial statements for that year. *See* 8 C.F.R. § 204.5(g)(2) ("Evidence of this ability [to pay] *shall be* either in the form of copies of annual reports, federal tax returns, or audited financial statements.") (emphasis added); *see also* 6 *USCIS Policy Manual* E.(4)(C)(1) ("Even if the petitioner establishes that it has paid the beneficiary a salary that meets or exceeds the proffered wage, the petition must still contain an annual report, federal tax return, or audited financial statements for each [relevant] year.")

The record shows the Petitioner's submission of a copy of its federal income tax return for 2022. The tax return, itself, does not demonstrate the company's ability to pay the proffered wage. The return reflects net income ($22,894) and net current asset (-$26,093) amounts below the annual proffered wage of $85,842. But that does not matter. The tax return satisfies the regulatory evidentiary requirement. *See* 8 C.F.R. § 204.5(g)(2). The Petitioner demonstrated its ability to pay in 2022 by paying the Beneficiary more than the proffered wage.

III. CONCLUSION

Contrary to the Director's decision, the Petitioner has demonstrated its ability to pay the offered job's proffered wage.

ORDER: The appeal is sustained.