U.S. Citizenship and Immigration Services

Non-Precedent Decision of the Administrative Appeals Office

MATTER OF U-M-R-I-N-C-

DATE: OCT. 25, 2017

APPEAL OF NEBRASKA SERVICE CENTER DECISION

PETITION: FORM I-140, IMMIGRANT PETITION FOR ALIEN WORKER

The Petitioner, a healthcare agency and automated medicine business, seeks to employ the Beneficiary as a nurse supervisor. The Petitioner requests classification of the Beneficiary as a member of the professions holding an advanced degree under the second preference immigrant classification. *See* Immigration and Nationality Act (the Act) section 203(b)(2), 8 U.S.C. § 1153(b)(2). This employment-based immigrant classification allows a U.S. employer to sponsor a professional with an advanced degree for lawful permanent resident status.

The Director of the Nebraska Service Center denied the petition and a subsequent motion to reopen, concluding that the Petitioner had not established its ability to pay the proffered wage to the Beneficiary and its other sponsored workers.

On appeal, the Petitioner asserts that the record demonstrates its ability to pay the proffered wages of all of its pending petitions based on the totality of the circumstances. It asserts that it has a reasonable expectation of an increase in business; that multiple pending petitions do not weaken its business; and that its bank statements and line of credit establish its ability to pay the proffered wage.

However, it did not provide requested information regarding multiple other Forms I-140, Immigrant Petitions for Alien Workers, that it has filed. Without this information, we cannot determine the Petitioner's ability to pay the combined proffered wages of all of its Form I-140 beneficiaries or affirmatively establish its ability to pay in this case. Upon *de novo* review, we will dismiss the appeal.

I. LAW AND ANALYSIS

A. Employment-Based Petitions for Schedule A Occupations

A Schedule A occupation is an occupation codified at 20 C.F.R. § 656.5(a) for which the U.S. Department of Labor (DOL) has determined that there are not sufficient U.S. workers who are able, willing, qualified and available and that the wages and working conditions of similarly employed U.S. workers will not be adversely affected by the employment of foreign nationals in such occupations. The current list of Schedule A occupations includes professional nurses and physical therapists. *Id.*

Petitions for Schedule A occupations do not require a petitioner to test the labor market and obtain a certified labor certification from the DOL prior to filing the petition with U.S. Citizenship and Immigration Services (USCIS). Instead, the petition is filed directly with USCIS with a duplicate uncertified labor certification. *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 applies 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.

B. Ability to Pay the Proffered Wage

The Director denied the petition, concluding that the Petitioner did not establish its continuing ability to pay the proffered wage from the petition's priority date onward. The proffered wage is $71,053 per year. The priority date of the petition is April 15, 2016. *See* 8 C.F.R. § 204.5(d).

The regulation at 8 C.F.R. § 204.5(g)(2) states in pertinent part:

> *Ability of prospective employer to pay wage.* Any petition filed by or for an employment-based immigrant which requires an offer of employment must be accompanied by evidence that the prospective United States employer has the ability to pay the proffered wage. 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 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]

The record does not demonstrate that the Petitioner has paid the Beneficiary any wages from the priority date onward. The Petitioner's fiscal year 2015 federal tax return (which covers the priority date)[2] states net income[3] of $180,257. Therefore, for fiscal year 2015, it appears that the Petitioner

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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*, -- Fed. Appx. --, 2015 WL 5711445, *1 (5th Cir. Sept. 30, 2015).

[2] The record indicates that the Petitioner is a C corporation. The Petitioner's fiscal year runs from July 1 to June 30 of the following year.

[3] Net income is shown on Line 28 of the IRS Form 1120, U.S. Corporation Income Tax Return. The Petitioner's 2015 tax return covers the April 15, 2016, priority date.

had could have had sufficient net income to pay the proffered wage.[4] However, where a petitioner has filed Form 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* 8 C.F.R. § 204.5(g)(2); *see also Patel v. Johnson*, 2 F. Supp. 3d 108, 124 (D. Mass. 2014) (upholding our denial of a petition where a petitioner did not demonstrate its ability to pay multiple beneficiaries). USCIS records show that the Petitioner has filed over 125 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 filed after the priority date of the current petition.[5]

The Petitioner must document the receipt numbers, names of beneficiaries, priority dates, and proffered wages of these other petitions, and indicate the status of each petition and the date of any status change (i.e., pending, approved, withdrawn, revoked, denied, on appeal or motion, beneficiary obtained lawful permanent residence). To offset the total wage burden, the Petitioner may submit documentation showing that it paid wages to other beneficiaries. To demonstrate that it has the ability to pay the Beneficiary and the other beneficiaries, for each year at issue, the Petitioner must (a) calculate any shortfall between the proffered wages and any actual wages paid to the primary Beneficiary and its other beneficiaries, (b) add these amounts together to calculate the total wage deficiency, and (c) demonstrate that its net income or net current assets exceed the total wage deficiency.[6] In response to the Director's request for evidence, the Petitioner did not provide requested information about the other petitions that it has filed. On appeal, the Petitioner states that multiple pending petitions do not weaken its business. However, without information regarding the Petitioner's additional beneficiaries, we cannot determine the Petitioner's ability to pay the combined proffered wages of all of the applicable beneficiaries.

On appeal, the Petitioner states that it has a reasonable expectation of an increase in business and asserts that the Beneficiary's proposed employment will increase the Petitioner's income. Against the projection of future earnings, *Matter of Great Wall*, 16 I&N Dec. 142, 144-145 (Acting Reg'l Comm'r 1977), states:

> I do not feel, nor do I believe the Congress intended, that the petitioner, who admittedly could not pay the offered wage at the time the petition was filed, should subsequently become eligible to have the petition approved under a new set of facts

[4] Because the Petitioner's net income exceeds the annual proffered wage, we do not need to analyze the Petitioner's net current assets to determine if the Petitioner has the ability to pay the proffered wage to this Beneficiary.

[5] The Petitioner's ability to pay the proffered wage of one of the other I-140 beneficiaries is not considered:

- After the other beneficiary obtains lawful permanent residence;
- If an I-140 petition filed on behalf of the other beneficiary has been withdrawn, revoked, or denied without a pending appeal or motion; or
- Before the priority date of the I-140 petition filed on behalf of the other beneficiary.

[6] 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).

> hinged upon probability and projections, even beyond the information presented on appeal.

Further, in this case, the Petitioner has provided no evidence to show how the Beneficiary's employment as a nurse supervisor will significantly increase income for the Petitioner's business. The Petitioner asserts that "it stands to benefit no less than $10,847.00 annually from employment by the Beneficiary," which is the difference between the amount of annual reimbursement the Petitioner stands to receive from [redacted] where the Beneficiary will be working, and the proffered wage. However, the Petitioner has not calculated the additional costs (in addition to salary) in employing the Beneficiary, which may include legally required benefits (social security, Medicare, federal and state unemployment insurance, and worker's compensation), employer costs for providing insurance benefits (life, health, and disability), paid leave benefits (vacations, holidays, sick, and personal leave), retirement and savings, and supplemental pay.[7] Therefore, the Petitioner has not established that that the Beneficiary's proposed employment will increase the Petitioner's income. Furthermore, without information regarding the Petitioner's additional beneficiaries, we cannot determine the Petitioner's ability to pay the combined proffered wages of all of the applicable beneficiaries.

On appeal, the Petitioner also asserts that we should consider its line of credit with [redacted] in our determination of its ability to pay the proffered wage. In calculating the ability to pay the proffered wage, we will generally not augment the Petitioner's net income or net current assets by adding in its lines of credit. A line of credit is a bank's unenforceable commitment to make loans to a particular borrower up to a specified maximum during a specified time period. A line of credit is not a contractual or legal obligation on the part of the bank. *See* John Downes and Jordan Elliot Goodman, *Barron's Dictionary of Finance and Investment Terms* 45 (5th ed. 1998). Moreover, without information regarding the Petitioner's additional beneficiaries, we cannot determine whether the unused funds from the line of credit are sufficient to cover the Petitioner's wage obligations.

Further, the Petitioner asserts that the decision in *Full Gospel Portland Church v. Thornburgh*, 730 F. Supp. 441 (D.D.C. 1988), is binding here. We disagree. Although we may consider the reasoning of the decision, we are not bound to follow the published decision of a United States district court in cases arising within the same district. *See Matter of K-S-*, 20 I&N Dec. 715 (BIA 1993). In addition, the decision in *Full Gospel* is distinguishable from this case. The court in *Full Gospel* ruled that USCIS should consider the pledges of parishioners in determining a church's ability to pay the wages of a music teacher. Here, a line of credit is a debt and creates a liability on the Petitioner's balance sheet, whereas a parishioner's pledge is a promise to give money. The pledge does not create a liability. The Petitioner's line of credit does not establish its ability to pay the proffered wage.

[7] The record does not include an employment agreement between the Petitioner and the Beneficiary showing what benefits, if any, the Beneficiary will receive.

The Petitioner also asserts that its bank statements establish its ability to pay the proffered wage. However, bank statements are not among the three types of evidence, listed in 8 C.F.R. § 204.5(g)(2), required to illustrate a petitioner's ability to pay a proffered wage. While this regulation allows additional material "in appropriate cases," the Petitioner has not demonstrated why the documentation specified at 8 C.F.R. § 204.5(g)(2) is inapplicable or otherwise depicts an inaccurate financial picture of the Petitioner. The Petitioner also has not established that the funds reported on its bank statements show additional available funds that were not reflected on its tax returns, such as the Petitioner's taxable income (income minus deductions) or the cash specified on Schedule L. Moreover, without information regarding the Petitioner's additional beneficiaries, we cannot determine whether the funds in the Petitioner's bank account are sufficient to cover the Petitioner's wage obligations.

We may consider evidence of a petitioner's ability to pay beyond its net income and net current assets, including such factors as: the number of years it has conducted business; the growth of its business; its number of employees; the occurrence of any uncharacteristic business expenditures or losses; its reputation in its industry; whether a beneficiary will replace a current employee or outsourced service; or other evidence of its ability to pay a proffered wage. *See Matter of Sonegawa*, 12 I&N Dec. 612, 614-615 (Reg'l Comm'r 1967).

In this case, the record indicates that the Petitioner was incorporated in 2001. While its gross income increased between 2013 and 2015, the record does not show its historical growth since its incorporation. The Petitioner claimed to have only 10 employees on the petition,[8] and it has not indicated that it experienced any uncharacteristic business expenditures or losses. Further, the record does not establish the Petitioner's reputation in its industry, and it does not appear that the Beneficiary will be replacing a current employee or outsourced service.

Also, as discussed above, without information regarding all of its I-140 beneficiaries, we cannot determine the Petitioner's ability to pay the combined proffered wages of all of the applicable beneficiaries. Thus, assessing the totality of circumstances in this case, the record does not establish the Petitioner's continuing ability to pay the proffered wage.

The Petitioner has not established its continuing ability to pay the proffered wage from the petition's priority date onward.

C. Notice in In-House Media

Although not addressed by the Director, the record does not establish whether the Petitioner properly published notice of the filing of a labor certification (Notice) internally using in-house media.

Petitions for Schedule A occupations must contain evidence establishing that the petitioner provided

[8] The Petitioner's tax returns show that it paid $123,838 in salaries and wages in fiscal year 2013; $125,354 in fiscal year 2014; and $101,078 in fiscal year 2015.

its U.S. workers with Notice prescribed by 20 C.F.R. § 656.10(d). A petitioner must provide Notice to any bargaining representative for the occupation, or, if there is no bargaining representative, by posted Notice to its employees at the location of the intended employment. *See* 20 C.F.R. § 656.10(d)(1).[9] In cases where there is no bargaining representative, the Notice must be posted for at least 10 consecutive business days, and it must be clearly visible and unobstructed while posted. 20 C.F.R. § 656.10(d)(1)(ii). In addition, the Notice must be published "in any and all in-house media, whether electronic or printed, in accordance with the normal procedures used for the recruitment of similar positions in the employer's organization." *Id.* The satisfaction of the Notice requirement may be documented by "providing a copy of the posted notice and stating where it was posted, and by providing copies of all the in-house media" used to distribute the Notice. *Id.*

The regulation at 20 C.F.R. § 656.10(d) does not define "in-house media" or what sources in-house media would comprise. The DOL has stated that the "regulations require that the employer publish the notice internally using in-house media – whether electronic or print – in accordance with the normal internal procedures used by the employer to notify its employees of employment opportunities in the occupation in question." U.S. DOL, OFLC Frequently Asked Questions and Answers, Notice of Filing, Question #13, https://www.foreignlaborcert.doleta.gov/faqsanswers.cfm#q!177 (last visited Oct. 12, 2017). According to the DOL, the in-house posting contemplates internal notification of a petitioner's employees rather than external notification to the public at large. Further, the in-house posting requirement relates to the petitioner's "normal procedures used for the recruitment of similar positions in the employer's organization."[10] *Id.*

It is not clear whether the Petitioner complied with the in-house media requirement. The Petitioner's posted Notice has a place for the Petitioner to indicate its "MEANS OF IN-HOUSE NOTICE, if applicable" or its "EXPLANATION OF ANY LACK OF IN-HOUSE NOTICE." However, both of the entries were left blank on the posted Notice. The Petitioner has not established it properly published the Notice internally using in-house media as required by 20 C.F.R. § 656.10(d)(ii).

III. CONCLUSION

The Petitioner has not established its continuing ability to pay the Beneficiary because it has not demonstrated its ability to pay the proffered wages of all of its Form I-140 beneficiaries from the petition's priority date onward. It also has not established that it properly published the Notice internally using in-house media.

[9] In this case, there is no evidence in the record of a bargaining representative for the occupation.

[10] If a petitioner normally recruits for similar positions in its organization through in-house media, then it must publish the notice of filing in its in-house media in accordance with its normal procedures for recruitment of similar positions or for 10 consecutive business days, whichever is of longer duration. U.S. DOL, OFLC Frequently Asked Questions and Answers, Notice of Filing, Question #7, https://www.foreignlaborcert.doleta.gov/faqsanswers.cfm#q!171 (last visited Oct. 12, 2017).

ORDER: The appeal is dismissed.

Cite as *Matter of U-M-R-I-N-C-*, ID# 421856 (AAO Oct. 25, 2017)