U.S. Citizenship and Immigration Services

Non-Precedent Decision of the Administrative Appeals Office

MATTER OF W-S-S- INC.

DATE: OCT. 27, 2017

APPEAL OF NEBRASKA SERVICE CENTER DECISION

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

The Petitioner, a provider of nursing staff, seeks to employ the Beneficiary as a registered nurse. It requests her classification as a skilled worker under the third-preference immigrant category. *See* Immigration and Nationality Act (the Act) section 203(b)(3)(A)(i), 8 U.S.C. § 1153(b)(3)(A)(i). This employment-based, "EB-3" category allows a U.S. business to sponsor a foreign national with at least two years of training or experience for lawful permanent resident status.

The Director of the Nebraska Service Center denied the petition. The Director concluded that the record did not establish the Petitioner's required ability to pay the proffered wage.

On appeal, the Petitioner submits additional evidence and asserts that the Director erred in finding it unable to pay the proffered wage of this and other petitions.

Upon *de novo* review, we will withdraw the Director's decision and remand this matter for further proceedings consistent with the following opinion.

I. THE EMPLOYMENT-BASED IMMIGRATION PROCESS

Employment-based immigration usually follows a three-step process. First, an employer files an application for labor certification with the U.S. Department of Labor (DOL). *See* section 212(a)(5)(A)(i) of the Act, 8 U.S.C. § 1182(a)(5)(A)(i). If the DOL certifies a foreign national to permanently fill an offered position, the employer then submits the certification with an immigrant visa petition to U.S. Citizenship and Immigration Services (USCIS). *See* section 204 of the Act, 8 U.S.C. § 1154. If USCIS approves a 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.

For professional nursing positions, however, the DOL has determined that the United States lacks enough able, willing, qualified, and available workers. The DOL has also found that employment of foreign nationals in these "Schedule A" positions will not hurt the wages and working conditions of U.S. nurses. 20 C.F.R. § 656.5(a)(3)(ii). Because employers need not test U.S. labor markets for Schedule A positions, the DOL has authorized USCIS to adjudicate labor certification applications for

nurses during visa petition proceedings. 20 C.F.R. § 656.15(a). Thus, in this case, USCIS rules on both the petition and its accompanying labor certification application.

II. THE PETITIONER'S ABILITY TO PAY THE PROFFERED WAGE

A petitioner must demonstrate its continuing ability to pay a proffered wage, from a petition's priority date until a beneficiary obtains lawful permanent residence. 8 C.F.R. § 204.5(g)(2). Evidence of ability to pay must include copies of annual reports, federal income tax returns, or audited financial statements. *Id.*

In determining ability to pay, USCIS considers whether a petitioner paid a beneficiary the full proffered wage each year from a petition's priority date. If a petitioner did not annually pay the full proffered wage, USCIS examines whether it generated annual amounts of net income or net current assets sufficient to pay any difference between the proffered wage and actual wages paid. If net income and net current assets are insufficient, USCIS may consider other factors affecting a petitioner's ability to pay. *See Matter of Sonegawa*, 12 I&N Dec. 612, 614-15 (Reg'l Comm'r 1967).[1]

Here, the labor certification with a priority date of February 19, 2016,[2] states the proffered wage of the offered position of registered nurse as $63,400 a year. As of the Director's decision, however, required evidence of the Petitioner's ability to pay in 2016, the year of the petition's priority date, was not yet available. In determining the Petitioner's ability to pay, the Director considered the company's federal tax returns for 2015, the most recent returns available, and found that the Petitioner had not established its ability to pay the Beneficiary in this case and the beneficiaries of its other I-140 petitions.

Required evidence of the Petitioner's ability to pay in 2016 should now be available. We will therefore withdraw the Director's decision and remand this matter for further proceedings. On remand, the Director should ask the Petitioner to submit copies of its annual report, federal income tax returns, or audited financial statements for 2016. The Petitioner may also submit additional evidence of its ability to pay the Beneficiary in this case and its other sponsored I-140 beneficiaries, including evidence supporting the factors stated in *Sonegawa*.

We note that in response to the Director's request for evidence, the Petitioner asserted that the Director erred in requiring it to demonstrate an ability to pay combined proffered wages of this and other petitions it filed that remained pending or approved after this petition's priority date. The

[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); *Estrada-Hernandez v. Holder*, 108 F. Supp. 3d 936, 942-43 (S.D. Cal. 2015).

[2] *See* 8 C.F.R. § 204.5(d) (explaining how to determine a petition's priority date).

Petitioner argued that neither the Act nor the regulations require it to demonstrate an ability to pay combined proffered wages of multiple petitions.

The regulations do not specifically address petitioners with multiple petitions, but the regulations require a petitioner to demonstrate its ability to pay the proffered wage of each petition it files from the petition's priority date onward. 8 C.F.R. § 204.5(g)(2). The Petitioner here must therefore demonstrate its ability to pay the proffered wage of this and other petitions that were pending or filed after this petition's priority date. Otherwise, if the Petitioner's annual amounts of net income or net current assets meet or exceed each petition's proffered wage in isolation, the company could unrealistically demonstrate an ability to pay an unlimited number of beneficiaries. *See Matter of Great Wall*, 16 I&N Dec. 142, 144-45 (Acting Reg'l Comm'r 1977) (holding that the ability-to-pay requirement establishes a job offer as "realistic"). Thus, the Petitioner must establish its ability to pay this Beneficiary as well as the beneficiaries of the other I-140 petitions that were pending or filed after the priority date of the current petition.[3] *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, pending petitions).

The Director found that the Petitioner had 56 other petitions that were pending or filed after this petition's priority date. USCIS records, however, indicate the Petitioner's filing of at least 157 other petitions that were pending or filed after the priority date. On remand, the Director should therefore request the missing information including the receipt numbers, names of beneficiaries, priority dates, and proffered wages of these other petitions, and the status of each petition and the date of any change (i.e., pending, approved, withdrawn, revoked, denied, on appeal or motion, beneficiary obtained lawful permanent residence). The Director should also request evidence of any wages paid to these other beneficiaries in that year.

We also note that on appeal, the Petitioner's president/chief executive officer (CEO) asserts that its business model ensures its ability to pay the proffered wages of all its pending and approved beneficiaries because it charges customers more for its employees' services than it spends on the workers' compensation. As the president/CEO states in a letter: "With more nurses, we can bill more hours and thus generate greater profit." This argument, however, overlooks the financial effects of foreign nationals, like the Beneficiary, who do not (or cannot) work for the Petitioner during the immigration process. The Petitioner must demonstrate its ability to pay the proffered wages of these beneficiaries from the filing dates of their petitions. *See* 8 C.F.R. § 204.5(g)(2). The beneficiaries, however, often cannot generate income for the Petitioner until they obtain immigrant

[3] 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.

visas, which may occur months or even years after the filings of their petitions. Because many of the Petitioner's beneficiaries do not work for it while their petitions remain pending, the record does not support the company's assertion that its business model ensures its ability to pay the proffered wages of all its petitions from their priority date onward.

III. THE PETITIONER'S INTENTION TO EMPLOY THE BENEFICIARY IN THE OFFERED POSITION

Although unaddressed by the Director, the record also does not establish the Petitioner's intention to employ the Beneficiary in the offered position. A petitioner must intend to employ a beneficiary under the terms of an accompanying labor certification. *See, e.g., Matter of Sunoco Energy Dev. Co.*, 17 I&N Dec. 283, 284 (Reg'l Comm'r 1979) (affirming a petition's denial where a petitioner sought to employ a beneficiary in a geographical area unstated on the accompanying labor certification).

Here, the labor certification states the Petitioner's intention to employ the Beneficiary as a registered nurse at a client hospital in [redacted] California at a proffered wage of $63,400. While this appeal was pending, however, the Petitioner filed another petition for the Beneficiary. Although still seeking to employ the Beneficiary as a registered nurse, the new petition states the Petitioner's intention to employer her at a hospital in [redacted] New Mexico at a proffered wage of $61,402.

The Petitioner's most recent job offer to the Beneficiary - in a different location at a different proffered wage rate - casts doubt on its intention to employ her in the offered position. On remand, the Petitioner must therefore establish its intention to employ the Beneficiary in the offered position.

IV. CONCLUSION

The record lacks required evidence of the Petitioner's ability to pay the proffered wage in the year of the petition's priority date and evidence of the Petitioner's intent to employ the Beneficiary in the offered position. On remand, the Director should afford the Petitioner a reasonable amount of time to provide the evidence and information discussed above. Upon timely receipt of the Petitioner's 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 further proceedings consistent with the foregoing decision and for the entry of a new decision.

Cite as *Matter of W-S-S- Inc.*, ID# 385228 (AAO Oct. 27, 2017)