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 his 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 combined proffered wages of this and other petitions.

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

I. THE EMPLOYMENT-BASED IMMIGRATION PROCESS

Employment-based immigration usually follows a three-step process. First, an employer files a labor certification application 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, an employer must next submit 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. 20 C.F.R. § 656.5. The DOL has also found that employment of foreign nationals in these "Schedule A" occupations will not hurt the wages and working conditions of U.S. nurses. *Id.* Because Schedule A positions do not require tests of U.S. labor markets, 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 a beneficiary the full proffered wage, USCIS examines whether the petitioner generated sufficient annual amounts of net income or net current assets to pay any difference between an annual proffered wage and actual wages paid. If net income and net current assets are insufficient, USCIS may also 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 January 11, 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 the proffered wage 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. 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 in support of the factors stated in *Sonegawa.*

On appeal, the Petitioner asserts that the Director erred in requiring it to demonstrate its 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 Petitioner argues that neither the Act nor the regulations require demonstration of 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 that

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[1] 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); *Estrada-Hernandez v. Holder*, 108 F. Supp. 3d 936, 942-43 (S.D. Cal. 2015); *Rivzi v. Dep't of Homeland Sec.*, 37 F. Supp. 3d 870, 883-84 (S.D. Tex. 2014), *aff'd*, 627 Fed. App'x. 292 (5th Cir. 2015).

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

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 its other petitions that remained pending or approved after January 11, 2016. Otherwise, if the Petitioner's 2016 amounts of net income or net current assets meet or exceed the proffered wage of each individual pending or approved petition, the company would 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) (stating that the purpose of the ability-to-pay requirement is to establish 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, by the filing's grant, a petitioner did not demonstrate its ability to pay the combined proffered wages of multiple, pending and approved petitions).

The Director cited 56 other petitions filed by the Petitioner that were pending or filed in 2016 after this petition's priority date. USCIS records, however, indicate at least 158 other petitions that were pending or filed after the priority date. Thus, the Petitioner must demonstrate its ability that year to pay the combined proffered wages of at least 159 petitions, including this one. On remand, the Director should therefore request missing information regarding these other beneficiaries, 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 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.

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[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.

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 described in the labor certification application. 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 different U.S. state than listed on a labor certification).

Here, the labor application states the Petitioner's intention to employ the Beneficiary at a client hospital in California at an annual proffered wage of $63,400. While this appeal was pending, however, the record indicates the Petitioner's filing of another petition for the Beneficiary.[4] Although still seeking to employ the Beneficiary as a registered nurse, the new petition states the Petitioner's intention to employ him at a client hospital in Texas at a proffered wage of $60,362.

The Petitioner's most recent job offer to the Beneficiary casts doubt on the company's intention to employ him in the offered position. *See Matter of Ho*, 19 I&N Dec. 582, 591 (BIA 1988) (requiring a petitioner to resolve inconsistencies of record by independent, objective evidence pointing to where the truth lies). On remand, the Director should therefore ask the Petitioner to 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 opinion and for the entry of a new decision.

Cite as *Matter of W-S-S-, Inc.*, ID# 481524 (AAO Oct. 27, 2017)

[4] USCIS records identify the petition by the receipt number