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 combined proffered wages 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 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, 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 the 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 Schedule A positions do not require tests of U.S. labor markets, the DOL has authorized USCIS to adjudicate labor certification applications for professional nurses during visa petition proceedings. 20 C.F.R. § 656.15(a). Thus, in this case, USCIS rules on both the labor certification application and the petition.

## 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 differences between the annual proffered wage and actual wages paid. If net income and net current assets are insufficient, we may consider other factors 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).[1]

Here, the labor certification with a priority date of February 22, 2016,[2] states the proffered wage of the offered position of registered nurse as $63,398 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 assessing the Petitioner's ability to pay, the Director considered the Petitioner's federal income tax returns for 2015, the most recent available, and found that the Petitioner did not establish its ability to pay this Beneficiary and its other I-140 beneficiaries.

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 for 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 that year, including evidence supporting the factors stated in *Sonegawa*.

On appeal, the Petitioner asserts that the Director erred in finding it unable to pay combined proffered wages of this petition and others that were pending or filed after this petition's priority date. Where a petitioner has filed 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). Thus, the Petitioner must establish its ability to pay this Beneficiary as well

[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). The petition's approval, however, would entitle the Beneficiary to use the priority date of a prior petition on her behalf. *See* 8 C.F.R. § 204.5(e) (allowing beneficiaries of multiple, employment-based petitions to retain the earliest priority date).

as the beneficiaries of the other I-140 petitions that were pending or filed after the priority date of the current petition.[3]

The Director cited 56 other petitions from the Petitioner that were pending or filed in 2016 after this petition's priority date. USCIS records, however, indicate the Petitioner's filing of at least 158 petitions (including this one) 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 note that on appeal, the Petitioner's accounting manager contends that, because the company charges more for its employees' services than it compensates them, it can pay the combined proffered wages of all its petitions. The Petitioner's argument, however, overlooks the financial effects of foreign nationals, like the Beneficiary, who remain outside the United States 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, cannot generate income for the Petitioner until they obtain immigrant visas to enter the United States, which may not occur until months or even years after the filings of their petitions. Many of the Petitioner's beneficiaries do not work for it during the immigration process. The record therefore does not support the Petitioner's ability to pay the combined proffered wages of its multiple petitions based on its business model.

## III. CONCLUSION

As of the Director's decision, required evidence of the Petitioner's ability to pay the proffered wage from the petition's priority date onward was unavailable. 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.

[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.

**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# 385228 (AAO Oct. 27, 2017)