U.S. Citizenship and Immigration Services

Non-Precedent Decision of the Administrative Appeals Office

In Re: 3625738

Date: OCT. 27, 2020

Appeal of Nebraska Service Center Decision

Form I-140, Immigrant Petition for Skilled Worker

The Petitioner, a provider of nursing personnel to hospitals, seeks to employ the Beneficiary as a registered nurse. It requests her classification under the third-preference, immigrant category as a skilled worker. *See* Immigration and Nationality Act (the Act) section 203(b)(3)(A)(i), 8 U.S.C. § 1153(b)(3)(A)(i).

The Director of the Nebraska Service Center denied the petition. The Director concluded that the Petitioner did not demonstrate its required ability to pay the combined proffered wages of positions described in this and other petitions.

The Petitioner bears the burden of establishing eligibility for the requested benefit. *See* section 291 of the Act, 8 U.S.C. § 1361. Upon *de novo* review, we will dismiss the appeal.

I. EMPLOYMENT-BASED IMMIGRATION

Immigration as a skilled worker typically follows a three-step process. First, to permanently fill a position in the United States with a foreign worker, a prospective employer must seek DOL certification. *See* section 212(a)(5) of the Act, 8 U.S.C. § 1182(a)(5). If DOL approves a position, an employer next submits the labor certification with an immigrant visa petition to USCIS. Section 204 of the Act, 8 U.S.C. § 1154. If USCIS grants a petition, a foreign national may finally apply abroad for an immigrant visa or, if eligible, for adjustment of status in the United States. *See* section 245 of the Act, 8 U.S.C. § 1255.

DOL, however, has already determined that the United States lacks sufficient nurses and that employment of foreign nationals in these "Schedule A" positions will not harm the wages or working conditions of U.S. nurses. 20 C.F.R. § 656.5. DOL therefore authorizes USCIS to adjudicate labor certification applications in petition proceedings for Schedule A nurses. 20 C.F.R. § 656.15(a). Thus, in this matter, USCIS rules not only on the petition, but also on its accompanying labor certification application. *See* 20 C.F.R. § 656.15(e) (describing USCIS's labor certification determination in Schedule A proceedings as "conclusive and final").

II. ABILITY TO PAY THE PROFFERED WAGE

A petitioner must demonstrate its continuing ability to pay the proffered wage of an offered position, 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 generally include copies of a petitioner's annual reports, federal tax returns, or audited financial statements. *Id.*

In determining ability to pay, USCIS examines 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 a 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 difference between a proffered wage and the actual wages paid. If net income and net current assets are insufficient, USCIS may consider other factors affecting a petitioner's ability to pay a proffered wage. *See Matter of Sonegawa,* 12 I&N Dec. 612 (Reg'l Comm'r 1967).[1]

Here, the labor certification application states the proffered wage of the offered position of registered nurse as $24.74 an hour, or $46,313.28 a year based on a 36-hour work week.[2] The petition's priority date is June 21, 2017, its filing date. *See* 8 C.F.R. § 204.5(d) (explaining how to determine a petition's priority date). As of the appeal's filing, required evidence of the Petitioner's ability to pay in 2018 was not yet available. We will therefore consider the Petitioner's ability to pay only in 2017, the year of the petition's priority date.

The Petitioner did not submit evidence that it employed the Beneficiary in 2017. Based solely on wages paid, the record therefore does not establish the Petitioner's ability to pay the proffered wage.

The Petitioner submitted copies of consolidated, audited financial statements of its parent company for 2017. A note to the financial statements indicates that they reflect accounts not only of the Petitioner, but also of three other wholly owned subsidiaries. The statements do not indicate the Petitioner's finances alone, but rather combine them with those of other subsidiaries. The financial statements therefore do not demonstrate the Petitioner's ability to pay the proffered wage.

Even if we accepted the financial statements as evidence, they would not demonstrate the Petitioner's ability to pay. The financial statements reflect a negative amount of net income. Net current assets total more than $8 million. While the net current assets would exceed the annual proffered wage of $46,313.28, the Director found that USCIS records indicate the Petitioner's filing of numerous immigrant petitions for other beneficiaries. A petitioner must demonstrate its ability to pay the proffered wage of each petition it files until a beneficiary obtains lawful permanent residence. 8 C.F.R. § 204.5(g)(2). The Petitioner here must therefore demonstrate its ability to pay the combined proffered wages of this and other petitions it filed that were approved or pending as of this petition's priority date of June 21, 2017, or filed thereafter in 2017. *See Patel v. Johnson*, 2 F.Supp.3d 108, 124 (D.

[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); *Taco Especial v. Napolitano*, 696 F. Supp. 2d 873, 879-82 (E.D. Mich. 2010), *aff'd*, No. 10-1517 (6th Cir. Nov. 10, 2011).

[2] Although not reflected in the Petitioner's notices of filing for the offered position, the company stated that its nursing employees generally work 36-hour weeks. *See* 20 C.F.R. § 656.15(b)(2) (requiring Schedule A employers to provide notices of job opportunities to bargaining representatives or the employer's employees).

Mass. 2014) (affirming revocation of a petition's approval where, as of its grant, a petitioner did not demonstrate its ability to pay the combined proffered wages of multiple petitions).[3]

In response to the Director's request for additional evidence, the Petitioner identified 555 petitions that it filed since 2016. After subtracting petitions that the Petitioner withdrew or filed after 2017, or that USCIS denied or rejected, however, the company need only demonstrate its ability to pay the combined proffered wages of 362 petitions, including this one. The Petitioner provided the petitions' proffered wages, ranging from $21.43 to $24.74 an hour. Based on 36-hour work weeks, the record indicates that the Petitioner must demonstrate its ability to pay total proffered wages in 2017 of $16,097,234.40. The Petitioner did not provide evidence that it paid wages to any applicable beneficiaries in 2017.

The total proffered wage amount of $16,097,234.40 is more than double the net current asset amount of $8,016,021 listed in the financial statements for 2017. Thus, the financial statements would not establish the Petitioner's ability to pay the proffered wage. Therefore, based on examinations of wages paid, net income, and net current assets, the record does not establish the Petitioner's ability to pay the combined proffered wages of all applicable petitions.

On appeal, the Petitioner, which documented its employment of more than 200 people, asserts that USCIS should have accepted the letter of its chief financial officer (CFO) as proof of its ability to pay the proffered wage. If a petitioner has at least 100 employees, USCIS may accept a letter from a financial officer as evidence of the business's ability to pay. 8 C.F.R. § 204.5(g)(2). Here, however, the Director did not abuse her discretion by requiring proof beyond the CFO's letter. The Petitioner must demonstrate its ability to pay the combined proffered wages of hundreds of petitions. The CFO's letter alone therefore did not establish the company's ability to pay.

The Petitioner also asserts that USCIS' methods of determining ability to pay are "fundamentally flawed and economically irrational." The Petitioner argues that net income and net current assets matter little in determining a business's ability to pay. Citing federal court cases, the Petitioner states that net income amounts are unreliable because businesses use accounting practices to reduce their reported incomes, thereby minimizing their tax liabilities. *See Constr. & Design Co. v USCIS*, 563 F.3d 593, 595-96 (7th Cir. 2009); *Taco Especial*, 696 F.Supp.2d at 879-80. The Petitioner also argues that net current assets measure a business's finances only at a given time. It contends that rational employers keep only enough current assets on hand to cover their operating expenses, reinvesting the remainder to grow their businesses or return profits to owners.

The cases cited by the Petitioner, however, do not bind us in this matter. *See Matter of K-S-*, 20 I&N Dec. 715, 718 (BIA 1993) (explaining that agencies must follow precedential U.S. circuit court decisions only within their individual circuits and need not defer at all to published U.S. district court decisions beyond the cases at issue). Other federal courts have upheld USCIS' reliance on net income

[3] The Petitioner need not demonstrate its ability to pay proffered wages of petitions that it withdrew, or, unless the petitions remain pending on appeal, that USCIS denied, revoked, or rejected. The Petitioner also need not demonstrate its ability to pay proffered wages before the priority dates of corresponding petitions, or after corresponding beneficiaries obtained lawful permanent residence.

and net current assets in determining ability to pay.[4] As the Petitioner argues, the court in *Taco Especial* stated that net income "is a poor indicator of ability to pay." *Taco Especial*, 696 F.Supp.2d at 880. But the court upheld USCIS' denial of a petition on ability-to-pay grounds. *Id.* The court stressed that a petitioner bears the burden of demonstrating its financial capabilities and that, as long as USCIS considers any other evidence or arguments offered by a petitioner, the Agency does not err by examining the petitioner's net income and net current assets. *Id.* Citing *Construction and Design*, the Petitioner contends that cash flow better measures a business's ability to pay a proffered wage. But the audited financial statements submitted by the Petitioner indicate that it had a negative, overall cash flow in 2017 and insufficient cash at year's end to pay the combined proffered wages of all applicable petitions. The Petitioner's argument therefore does not demonstrate its ability to pay the proffered wage.

The Petitioner also maintains that USCIS disregarded evidence of its ability to pay proffered wages. It contends that it had about $12 million in "working capital" in 2017: net current assets of about $8 million, as previously discussed, and a line of credit of up to $4 million. As previously indicated, however, the record indicates that the Petitioner must demonstrate its ability to pay combined proffered wages of more than $16 million in 2017. The $12 million amount would therefore be insufficient. Also, the record does not establish the availability of $4 million in funding to the Petitioner as of the petition's priority date under its line of credit. Credit lines are not binding loan agreements, but unenforceable commitments to loan. The record therefore does not demonstrate the availability of additional financing to the Petitioner under its credit line. *See Rahman v. Chertoff*, 641 F. Supp. 2d 349, 351-52 (D. Del. 2009) (affirming USCIS' finding that a line of credit does not demonstrate a petitioner's ability to pay a proffered wage because additional funding is not guaranteed). In addition, the audited financial statements show that the Petitioner's parent repaid $3.2 million on its credit line in 2017, suggesting that additional borrowing of less than $1 million was potentially available that year. Thus, even if we attributed the credit line to the Petitioner, the record would not establish the Petitioner's ability to pay the combined proffered wages.

The Petitioner also contends that its business model demonstrates its ability to pay the proffered wages. Because the Petitioner pays its nursing employees significantly less than the amounts it charges hospitals for their services, it states that "each new nurse it hires increases its net income." The Petitioner's business model would generate revenue, however, only once its employees begin working for it. For immigration purposes, the Petitioner must demonstrate its ability to pay from a petition's priority date, not from a foreign national's start date of employment. *See* 8 C.F.R. § 204.5(g)(2). The record indicates that most of the Petitioner's beneficiaries live overseas and may not legally work for it in the United States until USCIS approves petitions on their behalf and the U.S. Department of State issues immigrant visas to them. Reaching those milestones could take a year or more. Thus, the Petitioner must demonstrate its ability to pay multiple beneficiaries even before many of them begin generating income for it. The Petitioner's business model therefore does not establish its ability to pay the combined proffered wages.

The Petitioner further asserts that USCIS lacks statutory authority to require petitioners to demonstrate abilities to pay proffered wages. The Petitioner argues that the Act designates DOL, not the

[4] *See, e.g., River St. Donuts*, 558 F.3d at 118; *Estrada-Hernandez v. Holder*, 108 F. Supp. 3d 936, 942-43 (S.D. Cal. 2015); *Elatos Rest. Corp. v. Sava*, 632 F. Supp. 1049, 1053-54 (S.D.N.Y. 1986).

Department of Homeland Security or USCIS, to determine whether employment of foreign nationals will "adversely affect the wages and working conditions of workers in the United States similarly employed." Section 212(a)(5)(A)(i)(II) of the Act. The Petitioner asserts that an employer need not submit evidence of its ability to pay, but only attest to that ability on a labor certification application. *See* 20 C.F.R. § 656.10(c)(3) (requiring a labor certification employer to certify that it "has enough funds available to pay the wage or salary offered the alien").

As previously discussed, however, 8 C.F.R. § 204.5(g)(2) requires USCIS to evaluate petitioners' abilities to pay proffered wages. Moreover, case law has interpreted the Act to require petitioners to demonstrate their financial capabilities. Section 204(b) of the Act allows a petition's approval only "[a]fter an investigation of the facts in each case" and if USCIS "determines that the facts stated in the petition are true." An immigration officer therefore "must consider the merits of the petitioner's job offer, so that a determination can be made whether the job offer is realistic and whether the wage offer can be met." *Matter of Great Wall*, 16 I&N Dec. 142, 145 (Acting Reg'l Comm'r 1977). An officer must also determine a petitioner's ability to pay under section 204(a)(1)(F) of the Act, which allows a business to file a petition if it is "desiring and intending to employ [a foreign national] within the United States." *See Matter of Sonegawa*, 12 I&N Dec. at 614. "The term 'desiring and intending to employ' contemplates not only the physical facilities to utilize such services but the financial ability to meet the wage requirements of the certified job offer." *Id.* In addition, as the Petitioner acknowledges, federal courts that have considered the issue have ruled that USCIS has authority to determine a petitioner's ability to pay a proffered wage.[5] Thus, under applicable regulations and case law, USCIS must determine a petitioner's ability to pay.

As previously indicated, we may consider factors beyond a petitioner's wages paid, net income, and net current assets in determining the business's ability to pay. Under *Sonegawa*, we may consider: the number of years a petitioner has conducted business; its number of employees; the growth of its business; its incurrence of uncharacteristic losses or expenses; its reputation in its industry; a beneficiary's replacement of a current employee or outsourced service; or other factors affecting a petitioner's ability to pay a proffered wage. *Matter of Sonegawa*, at 12 I&N Dec. at 614-15.

Here, the record indicates the Petitioner's continuous business operations since 1973 and its employment of more than 200 people. Unlike the petitioner in *Sonegawa*, however, the record does not indicate the Petitioner's incurrence of uncharacteristic losses or expenses, or its possession of an outstanding reputation in its industry. The Petitioner argues that it has an outstanding reputation in obtaining petition approvals. But the record does not explain how its immigration reputation affects its business. The record does not indicate that the Beneficiary would replace another employee or outsourced service. And, most significantly, the Petitioner must demonstrate its ability to pay the combined proffered wages of hundreds of petitions. The combined proffered wages, as noted above,

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[5] *See Masonry Masters, Inc. v. Thornburgh*, 875 F. 2d 898, 901 (D.C. Cir. 1989); *Tongatapu Woodcraft Haw., Ltd. v. Feldman*, 736 F.2d 1305, 1309 (9th Cir. 1984); *Four Holes Land & Cattle, LLC v. Rodriguez*, Civil Action No. 5:15-cv-03858-JMC, 2016 WL 4708715 *4 (D.S.C. Sept. 9, 2016); *Econo Inn Corp. v. Rosenberg*, 145 F.Supp.3d 708, 714 (E.D. Mich. 2015); *Rizvi v. Dep't of Homeland Sec.*, 37 F.Supp.3d 870, 885 (S.D. Tex. 2014), *aff'd*, 627 Fed.App'x. 292 (5th Cir. 2015); *Woody's Oasis v. Rosenberg*, No. 1:13-cv-367, 2014 WL 413503 *3 (W.D. Mich. Feb. 4, 2014); *Chi-Feng Chang v. Thornburgh*, 719 F. Supp 532, 536 (N.D. Tex. 1989); *Elatos Rest.,* 632 F. Supp. at 1053-54; *Ubeda v. Palmer*, 539 F. Supp. 647, 649-50 (N.D. Ill. 1982), *aff'd*, 703 F.2d 571 (7th Cir. 1983).

are double the net current assets listed on the combined financial statement submitted. Thus, a totality of circumstances under *Sonegawa*, does not establish the Petitioner's ability to pay the proffered wage.

III. CONCLUSION

The record on appeal does not establish the Petitioner's continuing ability to pay the combined proffered wages of positions described in this and other petitions. We will therefore affirm the petition's denial.

ORDER: The appeal is dismissed.