U.S. Citizenship and Immigration Services

Non-Precedent Decision of the Administrative Appeals Office

In Re: 33564484

Date: OCT. 28, 2024

Appeal of Nebraska Service Center Decision

Form I-140, Immigrant Petition for Alien Workers (Professional)

The Petitioner, a nonprofit corporation that evangelizes Chinese restaurant workers, seeks to employ the Beneficiary as a graphic designer. The nonprofit requests her classification under the employment-based, third-preference immigrant visa category as a "professional." *See* Immigration and Nationality Act (the Act) section 203(b)(3)(A)(ii), 8 U.S.C. § 1153(b)(3)(A)(ii). Organizations may sponsor noncitizens for U.S. permanent residence in this category to work in jobs requiring at least bachelor's degrees.

After initially granting the filing, the Director of the Nebraska Service Center revoked the petition's approval. The Director concluded that U.S. Citizenship and Immigration Services (USCIS) mistakenly approved the petition. The Director found that, at the time of the filing's grant, the Petitioner had not demonstrated its required ability to pay the offered job's proffered wage. On appeal, the organization contends that, besides its net revenues, the Director should have considered additional factors affecting its ability to pay. The nonprofit also indicates that its officers would have foregone compensation to pay the Beneficiary's proffered wage.

The Petitioner bears the burden of demonstrating eligibility for the requested benefit by a preponderance of the evidence. *Matter of Chawathe*, 25 I&N Dec. 369, 375-76 (AAO 2010). Exercising de novo appellate review, *see Matter of Christo's, Inc.*, 26 I&N Dec. 537, 537 n.2 (AAO 2015), we conclude that the organization has neither identified additional factors that would have demonstrated its ability to pay nor established the abilities of its officers to have foregone compensation. We will therefore dismiss the appeal.

I. LAW

Immigration as a professional generally follows a three-step process. First, a prospective employer must apply for certification from the U.S. Department of Labor (DOL) that: there are insufficient U.S. workers able, willing, qualified, and available for an offered job; and a noncitizen's employment in the job would not harm wages and working conditions of U.S. workers with similar jobs. Section 212(a)(5)(A)(i) of the Act, 8 U.S.C. § 1182(a)(5)(A)(i).

Second, an employer must submit a DOL-approved labor certification with an immigrant visa petition to USCIS. Section 204(a)(1)(F) of the Act, 8 U.S.C. § 1154(a)(1)(F); 8 C.F.R. § 204.5(l)(3)(i). Among other things, USCIS determines whether a noncitizen beneficiary meets the requirements of a DOL-certified position and a requested immigrant visa category. 8 C.F.R. § 204.5(l)(3)(ii)(C).

Finally, if USCIS approves a petition, a beneficiary may 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.

II. ANALYSIS

A petitioner must demonstrate its continuing ability to pay an offered job's proffered wage, from a petition's priority date until a beneficiary obtains U.S. 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.*

When considering ability to pay, USCIS examines whether a petitioner paid a beneficiary the full proffered wage each year, beginning with the year of the petition's priority date. *See generally* 6 *USCIS Policy Manual* E.(4)(C)(1), www.uscis.gov/policy-manual. If a petitioner did not annually pay the full proffered wage or did not pay a beneficiary at all, USCIS considers whether the organization generated sufficient annual amounts of net income or net current assets to pay any differences between the 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. *See Matter of Sonegawa*, 12 I&N Dec. 612, 614-15 (Reg'l Comm'r 1967).[1]

The Petitioner's labor certification states the proffered wage of the offered position of graphic designer as $39,832 a year. The petition's priority date is July 10, 2016, the date DOL accepted the labor certification application for processing. *See* 8 C.F.R. § 204.5(d) (explaining how to determine a petition's priority date).

USCIS approved the petition in April 3, 2018. Thus, the Petitioner must demonstrate its ability to pay the proffered wage from July 10, 2016 through April 3, 2018.

The Petitioner did not submit evidence that it employed the Beneficiary during that time. Thus, based solely on wages paid, the record does not demonstrate the organization's ability to pay the proffered wage.

The Petitioner submitted copies of its federal tax returns from 2016 through 2018. The organization is exempt from federal income tax. But, like many nonprofits, it must annually provide financial information to the government on IRS Form 990, Return of Organization Exempt From Income Tax. *See* U.S. Internal Rev. Servs. (IRS), "Instructions for Form 990," www.irs.gov/ instructions/i990#en_ US_2023_ publink11283jd0e347.

[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).

Because the Petitioner lacks "income," we will not examine net income. Rather, we will look to the organization's "revenues less expenses" on lines 19, Parts I of its IRS Forms 990. Revenues less expenses indicate whether a nonprofit had annual surpluses or shortfalls. The Petitioner's annual revenues less expenses for 2016 (-$13,424), 2017 (-$16,026), and 2018 ($22,344) do not equal or exceed the annual proffered wage of $39,832. Thus, the organization's net revenues do not demonstrate its ability to pay the proffered wage during the relevant period.

In response to the Director's request for additional evidence, the Petitioner noted that, when determining ability to pay, USCIS also considers a petitioner's net current assets. The organization therefore argued that the Director should have considered the nonprofit's "net assets or fund balances" at lines 22, Parts I of its IRS Forms 990. But USCIS examines net *current* assets, which are not the same as "net assets." The Petitioner's IRS Forms 990 indicate that the organization's net assets reflect its total assets minus its total liabilities. Thus, the Petitioner's net assets include noncurrent assets – such as land – that the organization may not be able to convert into cash or its equivalent within a year. In contrast, net *current* assets are total *current* assets minus total *current* liabilities. *See, e.g.,* Nat'l Assoc. of Secs. Dealers Automated Quotations (NASDAQ), "Glossary," www.nasdaq.com/glossary/n/net-current-assets (defining the term "net current assets"). Thus, net *current* assets reflect cash and assets that the Petitioner could relatively quickly convert into cash or its equivalent to pay the Beneficiary's proffered wage.

The Petitioner's IRS Forms 990 do not specifically list the organization's annual net current asset amounts. Moreover, the organization's returns show that some of its assets are "restricted." Restricted assets have donor-imposed stipulations specifying the assets' uses. IRS, "Instructions for Form 990 Return of Organization Exempt from Income Tax," www.irs.gov/instructions/i990. Even if the Petitioner appeared to have sufficient annual net current asset amounts, the record does not detail how much unrestricted net current assets the organization could have used to pay the proffered wage. Thus, examinations of the Petitioner's wages paid, net income, and net current assets do not establish the organization's ability to pay the proffered wage in 2016, 2017, or 2018.

The Petitioner notes that certain prospective employers may demonstrate their abilities to pay proffered wages with funds that their officers would have foregone as part of their compensations. *See generally* 6 *USCIS Policy Manual* E.(4)(C)(3). The organization states that, to pay the Beneficiary's proffered wages in 2016, 2017, and 2018, its officers would have been willing to reduce their compensation.

As the Director found, however, the Petitioner has not demonstrated its officers' abilities to have foregone compensation in those years. The record lacks proof of the officers' agreements to forego compensation, or evidence that employment contracts did not otherwise require the organization to pay the officers annual salary amounts. Also, the Petitioner did not establish the officers' abilities to have financially supported themselves and any dependents on reduced compensation levels in the relevant years.

As the Petitioner argues, however, the Director should have considered other factors potentially affecting the organization's ability to pay the proffered wage. *See Matter of Sonegawa*, 12 I&N Dec. at 614-15. Under *Sonegawa*, we may consider: the number of years a petitioner has operated; its number of employees; growth of its operations; its reputation in its field; its incurrence of

uncharacteristic losses or expenses; or a beneficiary's replacement of a current employee or outsourced service. *Id.*

The record shows the Petitioner's continuous operations since 2010 and, as of 2021, its employment of four people. The organization's IRS Forms 990 indicate that its revenues have grown from $244,037 in 2015 to $381,058 in 2021. The record also shows that the organization paid the Beneficiary the annual proffered wage or more in 2021 and 2022.

But, unlike in *Sonegawa*, where the petitioner's tax returns reflected its ability to pay the proffered wage in all but one of ten consecutive years, the Petitioner's IRS Forms 990 do not establish its ability to pay in six consecutive years, from 2015 through 2020. Also, the organization has not established its possession of a good reputation in its field, its incurrence of uncharacteristic losses or expenses, or the Beneficiary's replacement of current employee or outsourced service.

The Petitioner argues that its proven ability to pay the Beneficiary's proffered wage, "longstanding mission," "highly educated team dedicated to service," and the "exceptional contributions" she could make in the offered job warrant the petition's approval. The organization, however, did not prove its ability to pay the proffered wage until years after the relevant period's start. *See* 8 C.F.R. § 204.5(g)(2) (requiring a petitioner to demonstrate its ability to pay "at the time the priority date is established and continuing until the beneficiary obtains lawful permanent residence"). The organization's remaining arguments are insufficient. Thus, a totality of the circumstances under *Sonegawa* does not demonstrate the Petitioner's ability to pay.

III. CONCLUSION

Contrary to regulations, the Petitioner did not demonstrate its continuing ability to pay the offered job's proffered wage from the petition's priority date until the filing's approval. We will therefore affirm the Director's revocation of the petition's approval.

ORDER: The appeal is dismissed.