U.S. Citizenship and Immigration Services

Non-Precedent Decision of the Administrative Appeals Office

MATTER OF W-S-S-, INC.

DATE: OCT. 30, 2017

APPEAL OF NEBRASKA SERVICE CENTER DECISION

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

The Petitioner, a provider of healthcare personnel, 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)(i), 8 U.S.C. § 1153(b)(3)(i). This employment-based, "EB-3" category allows a U.S. employer 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 generally 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 must then 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 the petition, the 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(a)(3)(ii). The DOL has also found that employment of foreign nationals in these "Schedule A" jobs 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 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 sufficient annual amounts of net income or net current assets to pay any differences between the 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 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 priority date of January 25, 2016,[2] states the proffered wage of the offered position of registered nurse as $66,040 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 for consideration of evidence pertinent to the priority date year. 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 in support of its ability to pay the proffered wage to Beneficiary in this case and to its other sponsored I-140 beneficiaries, including evidence supporting the factors stated in *Sonegawa*.

On appeal, the Petitioner asserts that the Director erred in requiring it to demonstrate an ability to pay combined proffered wages of this and other petitions that were pending or filed after this petition's priority date. The Petitioner argues that it already established its ability to pay the

[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).

proffered wages of other approved petitions. However, 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). Otherwise, if the Petitioner's 2016 amounts of net income or net current assets equal or exceed each individual petition's proffered wage, the Petitioner 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 must 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]

The Petitioner also asserts that the Director erred by requiring it to demonstrate its ability to pay the combined proffered wages of petitions that were not "pending simultaneously." The Petitioner, however, appears to misunderstand USCIS' reference to a "pending" petition. For ability-to-pay purposes, a petition remains pending not just during its adjudication period. A petitioner must demonstrate its continuing ability to pay "until the beneficiary obtains lawful permanent residence." 8 C.F.R. § 204.5(g)(2). Thus, unless withdrawn or revoked, a petition also remains pending after its approval. A petitioner must therefore demonstrate its ability to pay combined proffered wages even if the adjudication periods of the petitions did not overlap.[4]

The Director cited 56 petitions of the Petitioner that were pending or filed in 2016 after this petition's priority date. Including this petition, however, USCIS records indicate the Petitioner's submission of at least 158 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.

---

[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.

[4] The Director stated that he did not require the Petitioner to demonstrate its ability to pay the proffered wages of petitions whose beneficiaries obtained lawful permanent residence. We agree that the Petitioner need not demonstrate its ability to pay beneficiaries who obtained lawful permanent residence before this petition's priority date. But it must establish its ability to pay the proffered wages of beneficiaries who obtained "green cards" after the priority date. Specifically, it must demonstrate its ability to pay such beneficiaries from the petition's priority date until the approval dates of their green cards.

On appeal, the Petitioner further states that it charges customers more for the services of its employees than it pays the workers. It contends that this business model ensures its ability to pay the combined proffered wages of its pending petitions. The record, however, does not support the Petitioner's contention because many of its new hires, including the Beneficiary, remain outside the United States during the immigration process. The Petitioner must demonstrate its ability to pay the proffered wages of these foreign nationals from the priority dates of their petitions. *See* 8 C.F.R. § 204.5(g)(2). The beneficiaries outside the United States, however, cannot generate income for the Petitioner for months or sometimes years after the priority dates, once they receive immigrant visas and enter the country. The record therefore does not support the Petitioner's contention that its business model ensures its ability to pay the combined proffered wages.

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 was not yet available. 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 record 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# 404233 (AAO Oct. 30, 2017)