U.S. Citizenship and Immigration Services

Non-Precedent Decision of the Administrative Appeals Office

MATTER OF G-S- INC.

DATE: SEPT. 25, 2018

APPEAL OF TEXAS SERVICE CENTER DECISION

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

The Petitioner, an operator of a convenience store/gasoline station, seeks to employ the Beneficiary as a manager. It requests her classification under the third-preference, immigrant category as a skilled worker. Immigration and Nationality Act (the Act) section 203(b)(3)(A)(i), 8 U.S.C. § 1153(b)(3)(A)(i). This category allows a U.S. business to sponsor a foreign national for lawful permanent resident status to work in a position requiring at least two years of training or experience.

The Director of the Texas Service Center denied the petition. The Director concluded that the Petitioner did not demonstrate its required ability to pay the position's proffered wage.

On appeal, the Petitioner asserts that the Director erred by not prorating the proffered wage amount for the year of the petition's priority date.

Upon *de novo* review, we will dismiss the appeal.

I. EMPLOYMENT-BASED IMMIGRATION

Employment-based immigration generally follows a three-step process. To permanently fill a position in the United States with a foreign worker, an employer must first obtain certification from 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). DOL approval signifies that insufficient U.S. workers are able, willing, qualified, and available for a position, and that employment of a foreign national will not harm wages and working conditions of U.S. workers with similar jobs. *Id.*

If the DOL approves a position, a prospective employer must next submit the labor 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. Among other things, USCIS considers whether a beneficiary meets the requirements of a certified position and can pay the certified proffered wage. 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.

II. 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.*

To determine ability to pay, USCIS first 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 the full proffered wage, USCIS considers whether it generated annual amounts of net income or net current assets sufficient to fund any differences between the proffered wage and the 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 states the proffered wage of the offered position of manager as $56,139 a year. The petition's priority date is October 21, 2016, the date the DOL accepted the accompanying labor certification application for processing. *See* 8 C.F.R. § 204.5(d) (explaining how to determine a petition's priority date). The Petitioner did not submit evidence that it paid the Beneficiary. Based on wages paid, the record therefore does not establish the Petitioner's ability to pay the proffered wage.

Copies of the Petitioner's federal income tax returns for 2017 reflect net income of $24,172 and net current assets of $71,264. The amount of net current assets exceeds the annual proffered wage of $56,139. The record therefore establishes the Petitioner's ability to pay the proffered wage in 2017.

The Petitioner's federal tax returns for 2016 reflect net income of $9,233 and net current assets of $45,130. Neither of these amounts equals or exceeds the annual proffered wage. The record therefore does not establish the Petitioner's ability to pay in 2016, the year of the petition's priority date. Thus, based on examinations of the wages paid by the Petitioner, its net income, and its net current assets, the record does not establish its continuing ability to pay the proffered wage from the petition's priority date onward.

On appeal, the Petitioner asserts that it need only pay the portion of the proffered wage that accrued after the petition's October 21 priority date in 2016. The Petitioner argues that its net current asset amount of $45,130 in 2016 exceeded the prorated proffered wage of $11,074. USCIS policy, however, does not allow a petitioner to prorate a proffered wage. As previously discussed, required evidence of ability to pay must include copies of an annual report, federal tax returns, or audited financial statements. 8 C.F.R. § 204.5(g)(2). These required materials typically cover one-year periods. USCIS therefore interprets the regulations as requiring a petitioner to demonstrate its

[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).

ability to pay a proffered wage over the full year of a petition's priority date. Although we will not prorate the proffered wage, we will consider the effect of a short period between a priority date and the end of a priority-date year in the context of our totality of the circumstances analysis under *Sonegawa.*

Under *Sonegawa*, we may consider: how long the 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; the Beneficiary's replacement of a current employee or outsourced service; or other factors affecting the Petitioner's ability to pay the proffered wage. *See Matter of Sonegawa*, 12 I&N Dec. at 614-15. Here, the record indicates the Petitioner's continuous business operations since 2007 and its employment of three people. Its tax returns also indicate increases in its annual amounts of revenue and wages paid from 2016 to 2017.

Despite the increase in wages paid, however, the tax returns indicate that the position's proffered wage exceeded the Petitioner's total annual payments to employees in both 2016 and 2017. Also, the record lacks financial documentation of the Petitioner's finances before 2016 and therefore does not establish a substantial pattern of revenue growth. In addition, unlike in *Sonegawa*, the record does not establish the Petitioner's incurrence of uncharacteristic losses or expenses, or its possession of an outstanding reputation in its industry. The record also does not indicate the Beneficiary's replacement of a current employee or outsourced service. Finally, although the Petitioner urges proration of the proffered wage in 2016, the period between the petition's October 21 priority date and the year's end is significant. Thus, considering the timing of the priority date with the negative factors discussed above, a totality of the circumstances under *Sonegawa* does not establish the Petitioner's ability to pay the proffered wage. The record therefore does not establish the Petitioner's continuing ability to pay the proffered wage from the petition's priority date onward.

III. BONA FIDES OF THE JOB OPPORTUNITY

Although unaddressed by the Director, the record also does not establish the *bona fides* of the job opportunity. On the labor certification, the Petitioner attested that the offered position "has been and is clearly open to any U.S. worker." *See* 20 C.F.R. § 656.10(c)(8) (requiring a labor certification employer to so certify). A special relationship between an employer and a foreign national, however, casts doubt on the availability of a position to U.S. workers. *See, e.g., Matter of Sunmart 374*, 2000-INA-093, 2000 WL 707942 *3 (BALCA May 15, 2000) (holding that such a relationship "is not only of the blood; it may also be financial, by marriage, or through friendship"). USCIS may invalidate a labor certification after its issuance upon finding "fraud or willful misrepresentation of a material fact involving the labor certification application." 20 C.F.R. § 656.30(d).

Here, USCIS and public records identify the Beneficiary as the sister-in-law of a business associate of the Petitioner's president/sole shareholder. USCIS approved a family-based immigrant petition by the associate for his brother, the Beneficiary's spouse, in 2013. Public records indicate that the Petitioner's president and the associate serve together as officers of another active corporation. *See* Tex. Comptroller of Pub. Accounts, Taxable Entity Search, https://mycpa.cpa.state.tx.us/coa (last

visited Aug. 13, 2018). They also served together as officers of a corporation that dissolved in 2016. *Id.*

The Beneficiary's ties to a business associate of the Petitioner's president/sole shareholder cast doubt on the availability of the offered position to U.S. workers. In any future filings in this matter, the Petitioner must therefore establish the *bona fides* of the job opportunity. *See Matter of Modular Container Sys., Inc.*, 1988-INA-228, 1991 WL 223955 *8 (BALCA July 16, 1991) (*en banc*) (listing factors to be considered in determining the *bona fides* of a job opportunity). The Petitioner should explain the Beneficiary's relationship to the business associate and any that exists between her and the Petitioner's president. The Petitioner should also submit its labor certification recruitment materials, including copies of: its notice of filing; request for prevailing wage determination; newspaper advertisements; job order; recruitment report; any resumes or applications received from U.S. workers; and correspondence with the DOL.

IV. CONCLUSION

The record on appeal does not establish the Petitioner's ability to pay the proffered wage from the petition's priority date onward. We will therefore affirm the Director's decision.

ORDER: The appeal is dismissed.

Cite as *Matter of G-S- Inc.*, ID# 1717445 (AAO Sept. 25, 2018)