U.S. Citizenship and Immigration Services

Non-Precedent Decision of the Administrative Appeals Office

In Re: 23969308

Date: SEP. 25, 2023

Appeal of Nebraska Service Center Decision

Form I-140, Immigrant Petition for Skilled Worker

The Petitioner, a garment manufacturing business, seeks to employ the Beneficiary as an alteration tailor. It requests classification of the Beneficiary as a skilled worker under the third preference immigrant classification. 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" immigrant classification allows a U.S. employer to sponsor a foreign national for lawful permanent resident status to work in a position that requires at least two years of training or experience.

The Director of the Nebraska Service Center revoked the approval of the petition, concluding that the record did not establish that the Petitioner had sufficient ability to pay the proffered wage as of the priority date. The Director granted Petitioner's motion to reopen and reconsider the revocation but affirmed the revocation. The matter is now before us on appeal. 8 C.F.R. § 103.3.

The Petitioner bears the burden of proof to demonstrate eligibility by a preponderance of the evidence. Matter of Chawathe, 25 I&N Dec. 369, 375-76 (AAO 2010). We review the questions in this matter de novo. *Matter of Christo's*, Inc., 26 I&N Dec. 537, 537 n.2 (AAO 2015). Upon de novo review, we will dismiss the appeal.

I. LAW

Immigration as a skilled worker usually follows a three-step process. First, the prospective employer must obtain labor certification approval from the U.S. Department of Labor (DOL) to establish there are not sufficient U.S. workers who are available for the offered position. Section 212(a)(5) of the Act, 8 U.S.C. § 1182(a)(5). DOL approval signifies that insufficient U.S. workers are able, willing, qualified, and available for a position. Id. Labor certification also indicates that the employment of a foreign national will not harm wages and working conditions of U.S. workers with similar jobs. Id.

Second, the employer must submit the approved labor certification with an immigrant visa petition to U.S. Citizenship and Immigration Services (USCIS). Section 204 of the Act, 8 U.S.C. § 1154. The immigrant visa petition must establish that the foreign worker is eligible for the offered position and

the immigrant classification.[1] To be eligible for the skilled worker classification, a petitioner must establish, among other things, that it has the ability to pay the proffered wage stated in the labor certification. As provided in the regulation at 8 C.F.R. § 204.5(g)(2):

> The petitioner must demonstrate this ability at the time the priority date is established and continuing until the beneficiary obtains lawful permanent residence. Evidence of this ability shall be either in the form of copies of annual reports, federal tax returns, or audited financial statements. In a case where the prospective United States employer employs 100 or more workers, the director may accept a statement from a financial officer of the organization which establishes the prospective employer's ability to pay the proffered wage. In appropriate cases, additional evidence, such as profit/loss statements, bank account records, or personnel records, may be submitted by the petitioner or requested by [USCIS].

Finally, if USCIS approves the immigrant visa petition, the foreign worker may apply for an immigrant visa abroad or, if eligible, for adjustment of status in the United States. Section 245 of the Act, 8 U.S.C. § 1255.

At any time before a beneficiary obtains lawful permanent residence, however, USCIS may revoke a petition's approval for "good and sufficient cause." Section 205 of the Act, 8 U.S.C. § 1155. If supported by the record, a petition's erroneous approval may justify its revocation. See Matter of Ho, 19 I&N Dec. 582, 590 (BIA 1988). By regulation this revocation authority is delegated to any USCIS officer who is authorized to approve an immigrant visa petition "when the necessity for the revocation comes to the attention of [USCIS]." 8 C.F.R. § 205.2(a). USCIS must give the petitioner notice of its intent to revoke the prior approval of the petition and the opportunity to submit evidence in opposition thereto, before proceeding with written notice of revocation. See 8 C.F.R. § 205.2(b) and (c).

II. ANALYSIS

In determining ability to pay, USCIS first determines whether the petitioner paid the beneficiary the proffered wage each year from the priority date. If the petitioner did not pay the proffered wage in any given year, USCIS next determines whether the petitioner had sufficient net income or net current assets to pay the proffered wage (reduced by any wages paid to the beneficiary).[2] If net income and net current assets are insufficient, USCIS may consider other relevant factors, such as the number of years the petitioner has been in business, the size of its operations, the growth of its business over time, its number of employees, the occurrence of any uncharacteristic business expenditures or losses, its reputation within its industry, or whether a beneficiary will replace a current employee or outsourced service. See Matter of Sonegawa, 12 I&N Dec. 612, 614-615 (Reg'l Comm'r 1967).

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[1] These requirements must be satisfied by the priority date of the immigrant visa petition. See 8 C.F.R. § 204.5(g)(2), Matter of Wing's Tea House, 16 I&N Dec. 158, 159 (Act. Reg'l Comm'r 1977). For petitions that require a labor certification, the priority date is the date on which the DOL accepted the labor certification application for processing. See 8 C.F.R. § 204.5(d). In this case, the priority date is October 10, 2002.

[2] 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); Tongatapu Woodcraft Haw., Ltd. v. Feldman, 736 F.2d 1305, 1309 (9th Cir. 1984); Estrada-Hernandez v. Holder, 108 F. Supp. 3d 936, 942-946 (S.D. Cal. 2015); Rizvi v. Dep't of Homeland Sec., 37 F. Supp. 3d 870, 883-884 (S.D. Tex. 2014), aff'd, 627 Fed. App'x 292, 294-295 (5th Cir. 2015).

In this case, the proffered wage is $12.43 per hour, or $25,854 per year based on the labor certification indicating the job offer is full-time at 40 hours per week. With a priority date of October 10, 2002, the Petitioner must demonstrate its ability to pay the proffered wage from 2002 onward.

The Petitioner indicates it has employed the Beneficiary since November 1, 2007, submitting evidence of the Beneficiary's wages for 2007 through mid-2015. According to the record, the Beneficiary was paid less than the proffered wage for each year employed, 2007 through 2015. Therefore, the Petitioner must demonstrate its ability to pay the difference between the annual proffered wage and the amounts it paid to the Beneficiary each year from 2007 through 2015. For the time prior to the Beneficiary's employment, the Petitioner must demonstrate its ability to pay the full proffered wage from 2002 through 2006. The Petitioner submitted its income tax returns for 2002 through 2013, and the first page of its 2014 U.S. federal income tax return. The returns indicate the Petitioner's net income exceeds the Beneficiary's proffered wage for 2002 through 2014.

However, when a petitioner has filed I-140 petitions for multiple beneficiaries, as is the case here, it must demonstrate that its job offer to each beneficiary is realistic. A petitioner's ability to pay the proffered wage is an essential element in evaluating whether a job offer is realistic. See Matter of Great Wall, 16 I&N Dec. 142 (Acting Reg'l Comm'r 1977). Accordingly, a petitioner must demonstrate its ability to pay the combined proffered wages of the instant beneficiary and every other I-140 beneficiary from the priority date of the instant petition until the other I-140 beneficiaries obtain lawful permanent resident status. See 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).

To demonstrate that it has the ability to pay the Beneficiary and the other beneficiaries, the Petitioner must, for each year at issue: (a) calculate any shortfall between the proffered wages and any actual wages paid to the primary Beneficiary and its other beneficiaries, (b) add these amounts together to calculate the total wage deficiency, and (c) demonstrate that its net income or net current assets exceed the total wage deficiency. It is the Petitioner's burden to establish eligibility for the immigration benefit sought. Section 291 of the Act, 8 U.S.C. § 1361; Matter of Skirball Cultural Ctr., 25 I&N Dec. 799, 806 (AAO 2012).

The Director notified the Petitioner in 2015 in a notice of intent to revoke that USCIS records indicate the Petitioner has filed multiple I-140 petitions which have been pending simultaneously with the Beneficiary's petition.[3] The Director requested a list of all I-140 petition receipt numbers filed by the Petitioner since 2002, together with the beneficiaries' names, proffered wages, priority dates, and any change of status (e.g., pending, withdrawn, approved, revoked, denied, on appeal or motion, beneficiary obtained lawful permanent residence). In its reply, the Petitioner indicated it seeks to employ a total of 25 – 30 employees and currently had 15 employees. The Petitioner's evidence included a list of 23 I-140 beneficiaries from 2002 to 2015, and W-2 statements for its employees from 2002 through 2014. We agree with the Director's decision that the Petitioner's evidence was insufficient to demonstrate its ability to pay the proffered wage to the Beneficiary.

[3] USCIS records indicate that the Petitioner has filed more than 100 I-140 petitions for other beneficiaries since 2002.

USCIS records indicate the Petitioner filed many more than the 23 I-140 petitions between 2002 to 2015, and that the Petitioner did not submit all requested evidence needed to determine its ability to pay the proffered wages to its beneficiaries. See 8 C.F.R. § 103.2(b)(14) (stating that "[f]ailure to submit requested evidence which precludes a material line of inquiry shall be grounds for denying the benefit request"). As explained by the Director in its motion to reopen and reconsider decision, which upheld the revocation of this I-140 petition, USCIS records show that the Petitioner filed multiple I-140 petitions simultaneously, including, eight in 2001, seven in 2002, four in 2003, one in 2004, seven in 2005, 14 in 2006, and 30 in 2007. The Director pointed out that these filings do not include the Petitioner's filings after 2007. Therefore, the record indicates the Petitioner submitted an incomplete list of its filed I-140 petitions, as it has only submitted a list of 23 I-140 petitions since 2002. The Director correctly pointed out that a comparison of USCIS records with the Petitioner's submitted list casts doubt upon the completeness of the submitted evidence.

The Director also noted inconsistencies in the record relating to the Petitioner's intent to employ the Beneficiary on a full-time basis as indicated in the labor certification. The Director pointed out that the Beneficiary's W-2 statements show that the Petitioner has not paid the Beneficiary for full-time employment during any of his years of employment. We agree with the Director that the record reveals discrepancies relating to the Petitioner's assertions as to its intent to employ the Beneficiary on a full-time basis. It is incumbent upon the petitioner to resolve any inconsistencies in the record by independent objective evidence, and attempts to explain or reconcile such inconsistencies, absent competent objective evidence pointing to where the truth, in fact, lies, will not suffice. Doubt cast on any aspect of the petitioner's proof may lead to a reevaluation of the reliability and sufficiency of the remaining evidence offered in support of the visa petition. See Matter of Ho, 19 1&N Dec. 582 (BIA 1988).

The Petitioner argues on appeal that 8 C.F.R. § 204.5(g)(2) "must be construed according to its plain meaning" and "[t]here is no word to indicate accumulation of all the pending petitions." The Petitioner cites Connecticut Nat. Bank v. Germain, 503 U.S. 249 (1992), to argue Congress should have included in the C.F.R. the consideration of all I-140 petitions. The Petitioner also argues that the Form I-140 petition does not request information on other petitions filed by a petitioner, but instead only requests the "proffered wage, gross revenue and net revenue." However, the Petitioner's argument is misplaced and contrary to case law on this issue. See Patel v. Johnson, 2 F. Supp. 3d at 124. Without a complete list of the Petitioner's I-140 petitions, and specific information of the beneficiaries, the priority dates, proffered wages, employment periods, and evidence of wages paid to any beneficiaries, we are unable to determine that the Petitioner has the ability to pay the proffered wage to each beneficiary.

The Petitioner also argues on appeal that USCIS records are incorrect, and that the Petitioner did not file the number of I-140 petitions indicated by the Director in the motion to reopen and reconsider decision, namely 14 in 2006 and 30 in 2007. The Petitioner notes that it has never employed that many foreign workers at any given time. However, the Petitioner's I-140 filings do not necessarily mean that it employed the beneficiaries during 2006 and 2007. Instead, by filing the I-140 petitions, the Petitioner sought to employ the beneficiaries, and must therefore establish that its job offer to each beneficiary is realistic by demonstrating it has the ability to pay the proffered wage to each beneficiary.

The Petitioner further argues that it has been a profitable business for many years while maintaining approximately 32 – 35 employees during the years 2002 to 2010, and its profits yielded after paying the wages of its employees. The record includes the Petitioner's income tax returns for the years 2002 through 2013, as well as the first page of its income tax return for 2014. The returns indicate the Petitioner's net assets are a low of $40,926 in 2014 and a high of $109,670 in 2008. The Petitioner maintains its income tax returns are sufficient to demonstrate it has yielded profits while paying the Petitioner the proffered wage and while paying its other 32 – 35 employees each profitable year. As such, the Petitioner argues this is sufficient evidence of its ability to pay the proffered wages to its employees. The Petitioner notes it is unable to provide specific information regarding its filed I-140 petitions because it only has a duty to keep financial records for at least five years and provided the information it has in its records.

However, the regulation at 8 C.F.R. § 204.5(g)(2) requires that a petitioner demonstrate its continuing ability to pay the proffered wage beginning on the priority date. Thus, the Petitioner must show its ability to pay the proffered wage from 2002 onward. The Petitioner has not established that it paid the Beneficiary more than the proffered wage in any year it employed the Beneficiary from 2007 through 2015. Also, the Petitioner did not provide complete information for all of its beneficiaries from 2002 onward. USCIS records indicate the Petitioner has filed more than 100 I-140 petitions since 2002. The record lacks the proffered wages and priority dates of the Petitioner's other petitions. Thus, USCIS cannot calculate the total proffered wages that the Petitioner must demonstrate its ability to pay each year.

The Petitioner also argues on appeal that the Petitioner's ability to pay should be assessed under the totality of circumstances set out in Sonegawa. The Petitioner explains that due to the nature of its business, it constantly has a shortage of workers, and it would be punishing to its business to maintain a higher net profit to maintain thirty employees when the annual gross revenue is much higher than its annual amounts of net income and net current assets. The Petitioner submitted a list of its annual wages for years 2002 through 2014 with the corresponding gross revenues for each year, showing that for each year, its gross revenue was higher than its yearly wages. The Petitioner explained that it has been a viable business for many years, therefore it is reasonable to assume it has the ability to pay the proffered wage based on its annual gross revenue.

If a petitioner cannot establish the ability to pay the proffered wage at all times since the priority date, a petitioner can still gain approval by establishing a reasonable expectation of future profits sufficient to pay the proffered wage based on a totality of the circumstances. See Matter of Sonegawa, 12 I&N Dec. at 612. In this case, the Petitioner indicates it was established in 1993 and has been a profitable business employing between 32 – 35 employees. However, online records show that the Petitioner was incorporated in Virginia on August 22, 2006, after the labor certification was filed.[4] Online records also indicate that the Petitioner's corporate status has been "inactive" since December 31, 2021 for failure to submit its annual report due August 31, 2021.[5] The Petitioner must resolve any inconsistencies with independent, objective evidence pointing to where the truth lies. Matter of Ho, 19 I&N Dec. at 591-592.

[4] Commonwealth of Virginia State Corp. Commission, https://cis.scc.virginia.gov/EntitySearch/Index.
[5] Id.

The Petitioner's tax returns indicate that its sales fluctuated between 2002 and 2013, with sales declining steadily each year from 2009 to 2013. Its payroll also declined each year from 2009 to 2013. The record does not demonstrate the occurrence of any uncharacteristic business expenditures or losses or the Petitioner's reputation in its industry. Also, unlike in Matter of Sonegawa, the Petitioner in this case must demonstrate its ability to pay multiple beneficiaries, and the record lacks the proffered wages and priority dates of other petitions. Thus, USCIS cannot calculate the total, combined proffered wages that the Petitioner must demonstrate its ability to pay. Since we lack information regarding the Petitioner's total wage obligation, we also cannot properly and fully assess the Petitioner's totality of the circumstances. See Matter of Sonegawa, 12 I&N Dec. at 614-615.

Where a petitioner is notified it has filed multiple petitions for multiple beneficiaries which are pending simultaneously, as is the case here, the petitioner must produce evidence establishing that all job opportunities are realistic. Without a complete list of the Petitioner's I-140 petitions, and specific information of the beneficiaries, the priority dates, proffered wages, employment periods, and evidence of wages paid to any beneficiaries, we are unable to consider whether the Petitioner has the ability to pay the proffered wage to the Beneficiary. We agree with the Director that the evidence on the record is insufficient to establish that the Petitioner has the ability to pay the proffered wage of the Beneficiary and the beneficiaries of the Petitioner's other I-140 filings as of the Beneficiary's priority date onward.

III. CONCLUSION

In accord with the analysis above, the Petitioner has not established its ability to pay the proffered wage of the offered position as required by 8 C.F.R. § 204.5(g)(2). It is the Petitioner's burden to establish eligibility for the immigration benefit sought. Section 291 of the Act, 8 U.S.C. § 1361; Matter of Skirball Cultural Ctr., 25 I&N Dec. at 806. Therefore, the appeal will be dismissed.

ORDER: The appeal is dismissed.