U.S. Citizenship and Immigration Services

Non-Precedent Decision of the Administrative Appeals Office

In Re: 29078821

Date: NOV. 22, 2023

Appeal of Texas Service Center Decision

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

The Petitioner, a staffing company in the health care field, seeks to employ the Beneficiary as a nurse supervisor. It requests the Beneficiary's classification as a member of the professions holding an advanced degree under the second preference employment-based immigrant classification. *See* Immigration and Nationality Act (the Act) section 203(b)(2), 8 U.S.C. § 1153(b)(2).

The Director of the Texas Service Center denied the petition.[1] The Director, observing that the Petitioner had filed immigrant petitions on behalf of multiple beneficiaries, concluded that the record did not demonstrate its ability to pay the proffered wage for each beneficiary whose petition was pending or filed since the priority date of the instant petition. 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

A petition seeking to classify a noncitizen as a member of the professions holding an advanced degree under section 203(b)(2) of the Act must be accompanied by an official academic recording showing that the noncitizen has a U.S. advanced degree or foreign equivalent degree, or evidence showing that they have a U.S. baccalaureate degree or foreign equivalent degree followed by five years of progressive experience in the specialty. *See* 8 C.F.R. § 204.5(k)(3)(i).

A Schedule A occupation is an occupation codified at 20 C.F.R. § 656.5(a) for which the U.S. Department of Labor (DOL) has determined that there are not sufficient U.S. workers who are able, willing, qualified and available and that the wages and working conditions of similarly employed U.S.

[1] The Director initially denied the petition on the same grounds in a decision dated February 24, 2018. The Petitioner appealed that decision to our office and we remanded the matter to the Director with instructions to issue a request for evidence (RFE) in August 2018. On May 18, 2020, after issuing an RFE and reviewing the Petitioner's response, the Director issued the decision now before us on appeal.

workers will not be adversely affected by the employment of foreign nationals in such occupations. The current list of Schedule A occupations includes professional nurses and physical therapists. *Id.* Petitions for Schedule A occupations do not require a petitioner to test the labor market and obtain a certified labor certification from the DOL prior to filing the petition with U.S. Citizenship and Immigration Services (USCIS). Instead, the petition is filed directly with USCIS with a duplicate uncertified labor certification. *See* 8 C.F.R. § 204.5(a)(2); *see also* 20 C.F.R. § 656.15.

Any immigrant petition that requires an offer of employment must be accompanied by evidence that the prospective U.S. employer has the ability to pay the proffered wage at the time the priority date is established and continuing until the beneficiary obtains lawful permanent residence. 8 C.F.R. § 204.5(g)(2). Evidence of ability to pay must generally include annual reports, federal tax returns, or audited financial statements. *Id.* If a petitioner employs 100 or more workers, USCIS may accept a statement from a financial officer attesting to the petitioner'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. *Id.*

II. ANALYSIS

The sole issue addressed by the Director is whether the Petitioner submitted evidence of its ability to pay the proffered wage.

As indicated above, the Petitioner must establish its continuing ability to pay the proffered wage from the priority date[2] of the petition onward. The priority date in this case is April 17, 2017 and the proffered wage stated on the labor certification and Form I-140, Immigrant Petition for Alien Workers, is $81,500 per year.

In determining a petitioner's ability to pay, we first examine whether the petitioner paid the beneficiary the full proffered wage each year from a petition's priority date. Here, although the Petitioner stated that it has employed the Beneficiary, the record does not include any evidence of wages paid to her.[3] If a 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). If a petitioner's net income or net current assets are insufficient, we may also consider other evidence of its ability to pay the proffered wage. *See Matter of Sonegawa,* 12 I&N Dec. 612, 614-15 (Reg'l Comm'r 1967).[4]

The Director determined that the Petitioner's 2017 IRS Form 1120, U.S. Corporation Income Tax Return, demonstrated that it had sufficient net income and net current assets to pay the Beneficiary's

[2] The "priority date" of a petition filed for classification under section 203(b) of the Act which is accompanied by a request for Schedule A designation is the date the petition is accepted by USCIS as properly filed. *See* 8 C.F.R § 204.5(d).

[3] In a cover letter accompanying its June 2019 response to the Director's RFE, the Petitioner stated that it was submitting copies of the Beneficiary's pay statements, noting that she "stopped working for the petitioner after the petition was denied and her employment authorization document expired." However, no pay statements were provided.

[4] 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).

proffered wage in that year, and the record supports that conclusion. However, the Director advised the Petitioner that USCIS records indicated the company's filing of multiple immigrant petitions. Where a petitioner has filed Form I-140 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). Thus, the Petitioner must establish its ability to pay this Beneficiary as well as the beneficiaries of the other Form I-140 petitions that were pending or approved as of, or filed after, the priority date of the current petition.[5]

To demonstrate that it has the ability to pay the Beneficiary and the beneficiaries of the other immigrant petitions it filed, 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.

In the RFE issued in March 2019, the Director requested that the Petitioner document (1) the receipt numbers for all immigrant petitions it filed in 2017 and continuing through the present, as well as each beneficiary's priority date and proffered wage; (2) evidence of any wages paid to each beneficiary for each of the years in question; and (3) the current status of each petition (i.e., pending, approved, or denied) and whether any beneficiary has obtained lawful permanent residence.

In response, the Director's RFE, the Petitioner provided information for 84 petitions it had filed through December 2018, identifying the beneficiary, receipt number, priority date, offered wage and status for each petition. The list included three beneficiaries who held lawful permanent resident status and three whose petitions had been denied. The Petitioner's RFE response included the above-referenced copy of the company's 2017 federal tax return showing that it had paid a total of approximately $1.68 million in wages that year, with net income of $174,135 and net current assets of $320,585. The Petitioner indicated that it had requested an extension for filing of its 2018 federal tax return.

The Director concluded that, based on the information provided regarding the other petitions and the net income and net current assets reflected in the company's 2017 federal tax return, the Petitioner had not met its burden to establish its ability to pay all beneficiaries, whose combined proffered wages totaled well over $4.5 million. In reaching this conclusion, the Director also observed that the Petitioner did not submit evidence of wages it paid to other Form I-140 beneficiaries for 2017 or any period thereafter, and that, without this information, USCIS could not determine the Petitioner's ability to pay the combined proffered wages of all applicable beneficiaries. Finally, the Director emphasized that although requested in an RFE issued in March 2019, the Petitioner had not provided primary or secondary evidence of its ability to pay multiple beneficiaries for the years 2018 and 2019.

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[5] The Petitioner's ability to pay the proffered wage 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.

In a letter accompanying its appeal, the Petitioner makes several allegations of error in the Director's decision.[6] The Petitioner maintains that the Director "misapplied the doctrine laid down in the case of *Patel v. Johnson*, 2 F.Supp 3d 108 (D. Mass 2014) for the rule that the petitioner must demonstrate the ability to pay all the beneficiaries of its petitions." Specifically, the Petitioner contends "the decision in *Patel* only stated that the petitioner must demonstrate ability to pay all *employed* beneficiaries," and notes that "about half of the beneficiaries of the petitions are still abroad, to pursue consular processing" and are not employed by the company.

Here, the record does not establish who the Petitioner's employed beneficiaries are, their starting dates of employment, the wages paid to those beneficiaries, or the Petitioner's total proffered wage obligations to those beneficiaries. Moreover, the regulation at 8 C.F.R. § 204.5(g)(2) makes clear that the Petitioner's ability to pay the proffered wage for each of its Form I-140 beneficiaries begins when their respective labor certification applications or petitions are filed, not when they are employed by the Petitioner. A petitioner is only relieved of its obligation to demonstrate its ability to pay a given beneficiary in cases where it has withdrawn the beneficiary's petition, a petition has been denied or had its approval revoked by USCIS, or when a beneficiary obtains lawful permanent resident status.[7] Therefore, the Petitioner's claim that it is exempt from demonstrating its ability to pay those beneficiaries who are still abroad is not persuasive.

On appeal, the Petitioner also asserts that the Director did not take into account *Pooya Majdzadeh-Koohbanani v. Jaster-Quintanilla Dallas, LLP*, Civil Action No. 3:09-CV-1951-G-BK (N.D. Texas 2010), in which a federal district court held that a petitioner is not legally obligated to pay the prevailing wage until it actually employs the beneficiary. However, that holding is not relevant in this case since the issue on appeal is not the Petitioner's obligation to pay the prevailing (or proffered) wage when it actually employs its I-140 beneficiaries, but its *ability* to do so as of the priority date, as required in 8 C.F.R. § 204.5(g)(2). As previously noted, the priority date for every Schedule A petition is the date the Petitioner files the labor certification and the I-140 petition with USCIS.

Finally, the Petitioner cites *Rizvi v. Dep't of Homeland Sec.*, 37 F.Supp. 3d at 870, for the proposition that USCIS may consider the totality of the Petitioner's circumstances, including the overall magnitude of its business activities, in determining the Petitioner's ability to pay the proffered wage. *See also Matter of Sonegawa,* 12 I&N Dec. at 612. USCIS may, at its discretion, consider evidence relevant to the petitioner's financial ability that falls outside of its net income and net current assets. We may consider such factors as the number of years the petitioner has been doing business, the established historical growth of the petitioner's business, the petitioner's reputation within its industry, the overall number of employees, whether the beneficiary is replacing a former employee or an outsourced service, the occurrence of any uncharacteristic business expenditures or losses, and any other evidence that USCIS deems relevant to the petitioner's ability to pay the proffered wage.

In this case, the Petitioner was established in 2012 and indicated that it had 31 employees at the time the petition was filed in 2017. Evidence of the Petitioner's financial ability is limited to copies of its

[6] The Petitioner indicated in its letter and on the Form I-290B, Notice of Appeal or Motion, that it intended to submit a brief and/or additional evidence to the AAO within 30 days of filing the appeal. We have not received a supplemental brief or evidence as of this date.

[7] *See generally* 6 *USCIS Policy Manual* E.4(C)(2), https://www.uscis.gov/policy-manual (providing guidance for adjudicating immigrant petitions requiring an analysis of a petitioner's ability to pay multiple Form I-140 beneficiaries).

2016 and 2017 federal tax returns. The Petitioner has not established its growth since its incorporation. Moreover, 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 record also does not indicate the Beneficiary's replacement of a current employee or outsourced service. Further, as discussed above, the Petitioner must demonstrate its ability to pay the combined proffered wages of multiple petitions. While the Petitioner maintains that the Director erred by not performing a totality of the circumstances analysis, it does not explain how consideration of the limited evidence in the record would have resulted in a favorable determination of its ability to pay the Beneficiary and all the other Form I-140 beneficiaries whose petitions were pending on or filed after the April 2017 priority date.

III. CONCLUSION

For the foregoing reasons, the Petitioner has not demonstrated its continuing ability to pay the proffered wage from the petition's priority date in 2017 onward. Accordingly, the appeal will be dismissed, and the petition remains denied.

ORDER: The appeal is dismissed.