U.S. Citizenship and Immigration Services

Non-Precedent Decision of the Administrative Appeals Office

In Re: 01520588

Date: DEC. 13, 2022

Appeal of Nebraska Service Center Decision

Form I-140, Immigrant Petition for a Skilled Worker

The Petitioner operates a construction business and seeks to permanently employ the Beneficiary as an "interior decoration worker." The company requests his classification under the third-preference, immigrant visa category as a "skilled worker." *See* Immigration and Nationality Act (the Act) section 203(b)(3)(A)(i), 8 U.S.C. § 1153(b)(3)(A)(i).

The Director of the Nebraska Service Center denied the petition and the Petitioner's following combined motions to reopen and reconsider. The Director concluded that the company did not demonstrate its required ability to pay the proffered wage of the offered position. On appeal, the Petitioner submits additional evidence and asserts that its compensation to the Beneficiary establishes its ability to pay.

The Petitioner bears the burden of establishing eligibility for the requested benefit by a preponderance of evidence. *See Matter of Chawathe*, 25 I&N Dec. 369, 375 (AAO 2010). On appeal, we exercise de novo review. *Matter of Christo's*, 26 I&N Dec. 537, 537 n.2 (AAO 2015). Upon de novo review, we conclude that the evidence does not demonstrate the Petitioner's ability to pay the proffered wage. We will therefore dismiss the appeal.

I. LAW

Immigration as a skilled worker generally follows a three-step process. First, a prospective employer must obtain U.S. Department of Labor (DOL) certification that: 1) there are insufficient U.S. workers able, willing, qualified, and available for an offered position; and 2) permanent employment of a noncitizen in the position will 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 an approved labor certification with an immigrant visa petition to U.S. Citizenship and Immigration Services (USCIS). Section 204(a)(1)(F) of the Act, 8 U.S.C. § 1154(a)(1)(F). Among other things, USCIS determines whether a noncitizen beneficiary meets the requirements of a DOL-certified position and a requested immigrant visa category. Section 204(b) of the Act.

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. Ability to Pay the Proffered Wage

A petitioner must demonstrate its continuing ability to pay the proffered wage of an offered position, from a petition's priority date until a beneficiary obtains lawful permanent residence. 8 C.F.R. § 204.5(g)(2). This petition's priority date is May 26, 2015, the date DOL accepted the Petitioner's labor certification application for processing. *See* 8 C.F.R. § 204.5(d) (explaining how to determine a petition's priority date).

Evidence of ability to pay a proffered wage must generally include copies of annual reports, federal tax returns, or audited financial statements. 8 C.F.R. § 204.5(g)(2). In determining 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. If a petitioner did not annually pay a beneficiary the full proffered wage or did not pay the noncitizen at all, USCIS considers whether the business generated sufficient annual amounts of net income or net current assets to cover any shortfalls between the proffered wage and the amounts a beneficiary received. If net income and net current assets are insufficient, USCIS may consider other factors affecting a petitioner's ability to pay a proffered wage. *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 interior decoration worker as $35,901 a year. As of the appeal's filing in April 2017, required evidence of the company's ability to pay the proffered wage was unavailable beyond its 2015-16 fiscal year, which ran from July 1, 2015 through June 30, 2016. Thus, for purposes of this review, the Petitioner need only demonstrate its ability to pay from 2015 - the year of the petition's priority date - through June 30, 2016, the end of the company's last fiscal year at the time of the appeal's filing.[2]

The Petitioner contends that it demonstrated its ability to pay the proffered wage by paying the Beneficiary more than that amount. Section J.23 of the Petitioner's labor certification application indicates the company's employment of the Beneficiary at the time of the application's filing. But, contrary to the instructions to section K on the application form, the filing omits information about his purported work for the company - including his start date - during the three years before the filing's submission. *See* DOL, "ETA Form 9089 - Instructions," Sect. K, 9, https://www.dol.gov/sites/dolgov/files/ETA/oflc/pdfs/9089inst.pdf (requiring a listing of "all jobs held by the alien in the past three years whether or not the job is related to the job opportunity for which the employer is seeking certification").

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[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); *Just Bagels Mfg., Inc. v. Mayorkas*, 900 F. Supp. 2d 363, 373-76 (S.D.N.Y. 2012).

[2] In any future filings in this matter, the Petitioner must submit additional, required evidence of its ability to pay the proffered wage from July 1, 2016 through June 30, 2022, the end of its most recent fiscal year. *See* 8 C.F.R. § 204.5(g)(2) (requiring a petitioner to demonstrate its ability to pay "continuing until the beneficiary obtains lawful permanent residence").

As proof of the Petitioner's payments to the Beneficiary from 2015 through June 2016, the company submitted copies of IRS Forms 1099-MISC, Miscellaneous Income for calendar years 2015 and 2016, and two company checks written to him in January 2016. The Forms 1099 indicate the Petitioner's total payments to the Beneficiary of $21,000 in 2015 and $36,000 in 2016.

The 2015 Form 1099 does not demonstrate that the Petitioner paid the Beneficiary the proffered wage. The total payment amount of $21,000 stated on the form does not equal or exceed the annual proffered wage of $35,901. Counsel asserted that the form reflects the Petitioner's payments to the Beneficiary during the last seven months of 2015, from June through December. But counsel's assertions do not constitute evidence and thus do not establish the purported payment period. *See Matter of Obaigbena*, 19 I&N Dec. 533, 534 n.2 (BIA 1988) (citing *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980)). Rather, the Petitioner must substantiate the claimed payment period with evidence, such as payroll records, affidavits, or declarations. *Id.*

Also, the labor certification application indicates the Petitioner's employment of the Beneficiary in May 2015, the month before counsel claims the payments on the 2015 Form 1099 began. The Petitioner has not explained why the form excludes the company's payments to the Beneficiary before June 2015. *See Matter of Ho*, 19 I&N Dec. 582, 591 (BIA 1988) (requiring a petitioner to resolve inconsistencies with independent, objective evidence pointing to where the truth lies).

The 2016 Form 1099 also does not establish the Petitioner's ability to pay based on its compensation to the Beneficiary. The form's total payment amount of $36,000 exceeds the annual proffered wage of $35,901. But the form does not specifically establish that - from January 2016 through June 2016, the second half of the Petitioner's 2015-16 fiscal year - the company paid the Beneficiary the proffered wage or more. Also, the 2016 Form 1099 lists a different identification number for the Beneficiary than the one stated on the 2015 form. The discrepancy casts doubt on the authenticity and accuracy of the Forms 1099. *See Matter of Ho*, 19 I&N Dec. at 591.

Counsel asserted that a $37,100 "subcontract" cost on the Petitioner's 2015-16 federal income tax return reflects the company's payments that fiscal year to the Beneficiary. Again, however, counsel's assertions do not constitute evidence. *See Matter of Obaigbena*, 19 I&N Dec. at 534 n.2 (citing *Matter of Ramirez-Sanchez*, 17 I&N Dec. at 506). Also, if the Petitioner paid the Beneficiary $3,000 a month as counsel asserts, the record does not explain why 12 months of work warranted pay of $37,100, rather than $36,000 (12 x $3,000 = $36,000). Further, if the Petitioner contracted the Beneficiary's services before July 2015, the record does not explain why, unlike the company's 2015-16 tax return, its 2014-15 federal tax return omits a "subcontract" cost reflecting his pay. *See Matter of Ho*, 19 I&N Dec. at 591 (requiring petitioners to resolve inconsistencies with independent, objective evidence).

Evidence of the Petitioner's payments to the Beneficiary in January 2016 is also unavailing. Consistent with counsel's assertions, the copies of two company checks - each for $1,500 - appear to show the Petitioner's total payments of $3,000 to the Beneficiary for his work in January 2016. But the checks do not demonstrate their deposit or cashing by the Beneficiary. The checks are therefore unreliable evidence of the Beneficiary's payment. Also, even if the Petitioner established the checks' validity, compensation for a single month would not alone demonstrate the company's payment of the proffered wage from the 2015 priority date through the end of the company's fiscal year in June 2016.

On appeal, the Petitioner submits evidence regarding the Beneficiary's inconsistent identification numbers on the Forms 1099. The Director did not notify the company of the inconsistent numbers until dismissing its motions. We will therefore accept the evidence on appeal. The materials show that the Beneficiary's identification number on the 2015 Form 1099 reflects his U.S. taxpayer identification number, which the Internal Revenue Service (IRS) issued to him in 1997 solely for income tax purposes. In contrast, the number on the 2016 Form 1099 reflects the Beneficiary's U.S. Social Security number, which he later received after obtaining legal authority to work in the country. *See* Social Sec. Admin., "Original Card for a Noncitizen Adult," https://www.ssa.gov/ssnumber/ss5doc.htm ("In general, only noncitizens who have permission to work . . . can apply for a Social Security number"). The new evidence therefore demonstrates that both the 2015 and 2016 Forms 1099 relate to the Beneficiary.

The forms, however, still do not establish the Petitioner's purported payment of the proffered wage to the Beneficiary. As discussed above, the record lacks sufficient evidence corroborating counsel's assertions that the Petitioner paid him $3,000 a month from June 2015 through June 2016, and, as purportedly indicated on the company's 2015-16 federal tax return, $37,100 from July 2015 through June 2016.

The Petitioner's appeal includes statements from its president and accountant that it employed the Beneficiary from June 2015 to June 2016 at the monthly $3,000 wage. The accountant also stated that the $37,100 "subcontract" cost on the tax return includes the Beneficiary's annual wages of $36,000 for that fiscal year. The Petitioner, however, had opportunities to address these issues before the Director. We therefore decline to accept the evidence on appeal. *See Matter of Soriano*, 19 I&N Dec. 764, 766 (BIA 1988) (barring consideration of appellate evidence if petitioners previously received notices and reasonable opportunities to submit the proof). Thus, based on the wages the Petitioner paid the Beneficiary, the record does not establish the company's ability to pay the proffered wage.

The Petitioner's net income and net current assets also do not establish its ability to pay the proffered wage. The company's 2014-15 tax return reflects annual net income of - $2,517 and annual net current assets of $2,332. The 2015-16 return reports net income of $2,947 and net current assets of $5,279. All these amounts fall below the annual proffered wage of $35,901. Thus, net income and net current assets do not demonstrate the company's ability to pay.

As indicated above, we may examine additional factors affecting the Petitioner's ability to pay the proffered wage. *See Matter of Sonegawa*, 12 I&N Dec. at 614-15. We may consider: the number of years the Petitioner has operated; growth of its business; its number of employees; its incurrence of uncharacteristic business costs or losses; its reputation in its industry; the Beneficiary's replacement of a former employee or outsourced service; or other relevant evidence. *Id.*

The record indicates the Petitioner's continuous business operations since 2010 and its employment of six people. Copies of its federal income tax returns indicate that, from fiscal year 2014-15 to 2015-16, its revenues and profits rose significantly. Unlike the prospective employer in *Sonegawa*, however, the Petitioner has not demonstrated its incurrence of uncharacteristic costs or losses, a good business reputation, the Beneficiary's replacement of a former employee or outsourced service, or other factors affecting its ability to pay. Thus, a totality of circumstances under *Sonegawa* does not demonstrate the Petitioner's ability to pay the proffered wage.

For the foregoing reasons, the Petitioner has not demonstrated its ability to pay the proffered wage of the offered position. We will therefore affirm the petition's denial.

B. The Beneficiary's Experience

Although unaddressed by the Director, the record also does not establish the Beneficiary's qualifying employment experience for the offered position. A petitioner must demonstrate a beneficiary's possession of all DOL-certified job requirements of a position by a petition's priority date. *Matter of Wing's Tea House*, 16 I&N Dec. 158, 160 (Acting Reg'l Comm'r 1977).

In assessing a beneficiary's qualifications, USCIS must examine the job-offer portion of an accompanying labor certification to determine the minimum requirements of an offered position. 8 C.F.R. § 204.5(l)(3)(ii)(B). USCIS may neither disregard a certification term nor impose unstated requirements. *E.g., Madany v. Smith*, 696 F.2d 1008, 1015 (D.C. Cir. 1983) ("DOL bears the burden of setting the *content* of the labor certification") (emphasis in original).

The Petitioner's labor certification states the minimum requirements of the offered position of interior decoration worker as two years of experience in the job offered. The certification states that: the job requires no education or training; and the company will not accept experience in a related occupation.

On the labor certification, the Beneficiary attested that, by the petition's priority date of May 26, 2015, he gained more than three years of full-time experience as an interior decoration worker with two companies in the United States. He stated that one company employed him for two years, from January 2008 through December 2009, while he worked for the other for 13 months, from January 2010 through February 2011.

Consistent with 8 C.F.R. § 204.5(l)(3)(ii)(A), the Petitioner submitted letters from the Beneficiary's purported former employers supporting his claimed, qualifying experience. The letters, however, are unreliable. Both identically describe the Beneficiary's job duties at the companies. Also, the job descriptions in the letters match the duties of the offered position listed on the labor certification verbatim. The letters' identical duties indicate that the documents do not reflect the personal knowledge of their signatories or company records. Rather, the identical duties suggest that the same person drafted both letters to ensure that their listed duties match those on the labor certification.

The record casts further doubts on the Beneficiary's claimed employment with the first company from January 2008 to December 2009. In support of an application for adjustment of status, the Beneficiary previously submitted a March 2009 letter from the company stating its employment of him since *August 2007* as a "*Manager*." (emphasis added). The discrepancies in his start date and position title cast doubts on his claimed, qualifying experience with the company. *See Matter of Ho*, 19 I&N Dec. at 591 (requiring petitioners to resolve inconsistencies of record).

In response to the Director's request for additional evidence, counsel asserted the Beneficiary's work for the former employer from August 2007 to December 2009 as both an interior decoration worker and manager. Counsel's assertions, however, are not evidence and do not demonstrate the Beneficiary's claimed qualifying experience with the company. *See Matter of Obaigbena*, 19 I&N Dec. at 534 n.2 (citing *Matter of Ramirez-Sanchez*, 17 I&N Dec. at 506). Also, even if evidence

supported counsel's assertions, the record would not explain the omission of the Beneficiary's managerial position from the labor certification and the former employer's most recent letter. The record also would not establish how much time the Beneficiary worked for the former employer in the qualifying position of interior decoration worker. His purported employment both in the offered position and as a manager suggests that he worked part-time in both positions, and, for labor certification purposes, part-time experience does not equate to full-time experience. *See Matter of 1 Grand Express*, 2014-PER-00783, *4 (BALCA Jan. 26, 2018) (affirming a finding that 29.5 months of part-time, 25-hour-a-week experience equates to 18.43 months of full-time, 40-hour-a-week qualifying experience (29.5 x 0.625 = 18.43)).

Further, USCIS records show that the name of the purported supervisor who signed the former employer's letters matches the name of the spouse of the Petitioner's president. Also, according to local government records, the Petitioner's president and their spouse owned the residential property where the former employer operated. *See* NYC [New York City] Dep't of Finance, "ACRIS [Automated City Register Information System]," https://www.nyc.gov/site/finance/taxes/acris.page. These relationships between the Petitioner's president and the Beneficiary's former employer cast doubts on the letters' credibility and accuracy. Further, although state government records indicate the corporate dissolution of the purported former employer in 2012, its most recent letter bears a 2015 date. Neither the purported former employer nor the Petitioner have explained this letter's issuance on the company's stationery after the termination of its legal existence. *See Matter of Ho*, 19 I&N Dec. at 591 (requiring petitioners to resolve inconsistencies).

For the foregoing reasons, the Petitioner has not demonstrated the Beneficiary's qualifying experience for the offered position. In any future filings in this matter, the company must explain the similar job duties, the inconsistent start dates and positions, the relationships between its president and the Beneficiary's purported former employer, and the issuance of the employer's letter after the company's dissolution. The Petitioner must submit independent, objective evidence of the Beneficiary's claimed, qualifying experience. *Id.*

III. CONCLUSION

The Petitioner has not demonstrated its required ability to pay the proffered wage of the offered position. We will therefore affirm the petition's denial.

ORDER: The appeal is dismissed.