U.S. Citizenship and Immigration Services

Non-Precedent Decision of the Administrative Appeals Office

In Re: 28102963

Date: DEC. 8, 2023

Appeal of Texas Service Center Decision

Form I-140, Immigrant Petition for Alien Workers (Other Worker)

The Petitioner, an oil and gas exploration company, sought to permanently employ the Beneficiary as an executive assistant. The company requested her classification under the employment-based, third-preference (EB-3) immigrant visa category as an "other worker." *See* Immigration and Nationality Act (the Act) section 203(b)(3)(A)(iii), 8 U.S.C. § 1153(b)(3)(A)(iii). U.S. businesses may sponsor noncitizens for permanent residence in this category to work in jobs requiring less than two years of training or experience. *See* 8 C.F.R. § 204.5(l)(2) (defining the term "other worker").

The Acting Director of the Texas Service Center denied the petition. The Director concluded that the Petitioner did not demonstrate its required ability to pay the offered job's proffered wage or the continuing validity of the accompanying certification from the U.S. Department of Labor (DOL). On appeal, the Petitioner contends that: the Director misanalysed its ability to pay; the labor certification remains valid for the company's "successor in interest;" and, under the Act's "portability" provision, the Beneficiary may work for a new employer.

The Petitioner bears the burden of demonstrating eligibility for the requested benefit by a preponderance of the evidence. *Matter of Chawathe*, 25 I&N Dec. 369, 375-76 (AAO 2010). Exercising de novo appellate review, *see Matter of Christo's, Inc.*, 26 I&N Dec. 537, 537 n.2 (AAO 2015), we conclude that the company has established neither its ability to pay the proffered wage nor the labor certification's continuing validity. We will therefore dismiss the appeal.[1]

I. LAW

Immigration as an "other," or unskilled, worker generally follows a three-step process. First, a prospective employer must obtain DOL certification that: there are insufficient U.S. workers able, willing, qualified, and available for an offered job; and a noncitizen's permanent employment in the job

[1] Online government information indicates that, in February 2020, almost three years before the petition's denial, the Petitioner forfeited its right to transact business in its home state. *See* Tex. Sec'y of State, "SOSDirect," www.sos.state.tx.us/corp/sosda/index.shtml; Tex. Comptroller of Pub. Accounts, "Taxable Entity Search," https://mycpa.cpa.state.tx.us/coa/. Thus, in any future filings in this matter, the company must submit additional evidence of its continued existence. *See* 8 C.F.R. § 103.3(a)(2)(i) (requiring an appeal to be filed by the "affected party").

would 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. 8 C.F.R. § 204.5(l)(3)(ii)(D), (4).

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 an offered job's proffered wage, from a petition's priority date until a beneficiary obtains permanent residence. 8 C.F.R. § 204.5(g)(2). Evidence of ability to pay generally must include copies of annual reports, federal tax returns, or audited financial statements. *Id.*

When determining ability to pay, USCIS examines whether a petitioner paid a beneficiary the full proffered wage each year, beginning with the year of a petition's priority date. If a petitioner did not annually pay a beneficiary the full proffered wage or did not pay them at all, USCIS considers whether the business's annual amounts of net income or net current assets met or exceeded any differences between the annual proffered wage and the wages the business paid the beneficiary. 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, 614-15 (Reg'l Comm'r 1967).[2]

The Petitioner's labor certification states the proffered wage of the offered job of executive assistant as $50,000 a year. The petition's priority date is September 19, 2017, the date DOL accepted the labor certification application for processing. *See* 8 C.F.R. § 204.5(d) (explaining how to determine a petition's priority date). Consistent with 8 C.F.R. § 204.5(g)(2), the Director considered the Petitioner's ability to pay the proffered wage from 2017, the year of the petition's priority date, through 2021, the last full year before the Director's 2022 issuance of a request for additional evidence (RFE) in this matter.

The labor certification states the Petitioner's employment of the Beneficiary in the offered job from May 2016 until at least the filing of the labor certification application in September 2017. But the company did not provide any evidence that it paid wages to her. Thus, based solely on wages paid, the company has not established its ability to pay the proffered wage.

[2] Federal courts have upheld USCIS' method of determining a petitioner's ability to pay a proffered wage. *See, e.g., River St. Donuts, Inc. v. Napolitano*, 558 F.3d 111, 118 (1st Cir. 2009); *Rizvi 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).

The Petitioner submitted copies of its president/sole member's federal income tax returns for 2017 and 2018. Because the Petitioner is a single-member limited liability company (LLC), its owner reported the company's income on his individual income tax return. *See* U.S. Internal Revenue Serv. (IRS), "Single Member Limited Liability Companies," www.irs.gov/businesses/small-businesses-self-employed/single-member-limited-liability-companies ("If a single-member LLC does not elect to be treated as a corporation, the LLC is a 'disregarded entity,' and the LLC's activities should be reflected on its owner's federal tax return"). Schedule C, Profit or Loss from Business, to the sole member's IRS Form 1040, U.S. Individual Income Tax Return, states the Petitioner's generation of $73,340 in net income in 2017. The amount exceeds the offered job's annual proffered wage of $50,000. Thus, the Petitioner has demonstrated its ability to pay the proffered wage in 2017, the year of the petition's priority date.

For 2018, the Petitioner initially submitted a copy of its sole member's federal income tax return for that year, which did not report any income. On appeal, the company provides an amended version of the sole member's return, dated October 2022, after the company's RFE response in August 2022. The Petitioner asserts that its amended 2018 tax return demonstrates its ability to pay that year, as the sole member's reported adjusted gross income of $69,253 exceeds the annual proffered wage of $50,000.

But, if a petitioner received prior notice and a reasonable opportunity to submit requested documentation, we do not accept the evidence on appeal. *Matter of Soriano*, 19 I&N Dec. 764, 766 (BIA 1988). The Director's RFE asked the Petitioner to submit additional evidence of its ability to pay in 2018 and provided the company with a reasonable opportunity to respond. We therefore decline to consider the additional evidence on appeal.

Also, even if we considered the appellate evidence, the sole member's amended tax return would not reliably demonstrate the Petitioner's ability to pay the proffered wage in 2018. The return neither indicates that the company - as opposed to the sole member - generated the purported income, nor explains why the original tax return omitted the income. The record also lacks evidence that the IRS received the amended return or payment from the sole member or the Petitioner for the purported corresponding tax liability. Also, the Petitioner has not explained the delay in filing the amended return until after the company's receipt of the Director's RFE, giving the appearance of the return's submission solely for immigration reasons. Thus, the amended tax return is unreliable and would not demonstrate the company's ability to pay in 2018.

1. The Tax Returns of the Purported Successor in Interest

As proof of its ability to pay from 2019 through 2021, the Petitioner submitted copies of federal income tax returns of its purported successor in interest. A company may continue another business's immigration sponsorship of a noncitizen if the company establishes itself as the business's successor. *Matter of Dial Auto Repair Shop, Inc.*, 19 I&N Dec. 481, 482-83 (Comm'r 1986). A successor in interest must have acquired the rights and obligations needed to carry on the predecessor's business - or a discreet part of it - in the same manner as the predecessor. *See generally* 6 *USCIS Policy Manual* E.(3)(F)(3), www.uscis.gov/policy-manual. For immigration purposes, a successor must:

- Demonstrate that, except for its substitution for the predecessor, it offers the same job as described on the labor certification;
- Establish that it qualifies for the requested benefit, including the ability of it and the predecessor to have continuously paid the offered job's proffered wage; and
- Fully describe and document its assumption of the predecessor's business or a discreet part of it.

Matter of Dial Auto, 19 I&N Dec. at 482-83; *see generally* 6 *USCIS Policy Manual* E.(3)(F).

The Petitioner submitted evidence that, in December 2019, about 18 months after the petition's filing, it sold oil and gas leases and wells covering about 2,800 acres in Texas to its purported successor in interest.

The Petitioner, however, has not sufficiently demonstrated the claimed successorship. A copy of the December 2019 assignment agreement between the entities states that the Petitioner transferred to its purported successor only 39.375% of the working interest and 29.53125% of the net revenue interest in the assets. The agreement suggests that the Petitioner retained majority interests in the leases and wells, and, thus, that the successor did not obtain all the assets and liabilities needed to continue the Petitioner's oil and gas business in the same manner. *See* 6 *USCIS Policy Manual* E.(3)(F)(3) ("For successor-in-interest petition purposes, the operational division or unit of the business entity that is being transferred to the successor must be a clearly defined unit within the predecessor entity, and that unit must be transferred as a whole to the successor, with the exception of certain unrelated liabilities.")

Also, the Petitioner submitted a 2022 quarterly report of a publicly traded corporation of which the Petitioner's sole member became president. The report indicates that the Petitioner had oil and gas leases in Colorado, Alaska, and, possibly, Colombia, South America. Thus, the record does not demonstrate that the Petitioner's purported successor acquired all the assets needed to carry on the Petitioner's oil and gas business in the same manner as the Petitioner. *See* 6 *USCIS Policy Manual* E.(3)(F)(3) ("The evidence provided must show that the successor not only acquired the predecessor's assets but also that the successor acquired the essential rights and obligations of the predecessor necessary to carry on the business in the same manner as the predecessor.") The record therefore does not sufficiently demonstrate the Petitioner's claimed successorship.

Moreover, even if the Petitioner had demonstrated the claimed successorship, the record would not establish the purported successor's ability to pay the offered job's proffered wage from 2019 through 2021. The Petitioner did not submit any evidence that, during that period, the purported successor paid the Beneficiary wages, and the tax returns for the period reflect negative amounts of net income and net current assets.

For the foregoing reasons, the Petitioner has not demonstrated that its purported successor's tax returns demonstrate its ability to pay the proffered wage from 2019 through 2021. The Petitioner has not otherwise submitted copies of its annual reports, federal tax returns, or audited financial statements for the period. *See* 8 C.F.R. § 204.5(g)(2). As omission of regulatory required evidence mandates the petition's denial, we need not consider the Petitioner's ability to pay under *Sonegawa*.

2. The Beneficiary's Purported Portability Qualifications

As previously indicated, the Petitioner also asserts the Beneficiary's qualifications to transfer to a new employer under the Act's portability provision. Under that statute, a qualifying beneficiary's petition - including its labor certification - remains valid for new employment. Section 204(j) of the Act. To qualify, a beneficiary must have an adjustment application that has remained unadjudicated for at least 180 days, and their new job must be in the same or similar occupational classification as the job listed in their petition. *Id.* If a beneficiary with a pending petition qualifies to port, the original petitioner need only demonstrate its ability to pay for a lesser period. *See* 8 C.F.R. 245.25(a)(2)(ii)(B) (requiring demonstration of an ability to pay only "until the alien's adjustment of status application has been pending for 180 days.").

The Petitioner contends that, after allocating its 2017 net income of $73,340 to pay the Beneficiary's $50,000 proffered wage that year, it could have used the remaining $23,340 to pay her wage during the 180-day period her labor certification application remained pending after the petition's June 18, 2018 filing.

The Petitioner, however, has not demonstrated the Beneficiary's qualifications to port. As required, the record shows that her adjustment application has remained unadjudicated for more than 180 days, since its concurrent filing with the petition on June 18, 2018. On appeal, the Petitioner states that, the month before the petition's January 2023 denial, the Beneficiary received a new job offer in the offered position from another company. But the record lacks corroborating evidence of the job offer. *See, e.g., Matter of S-M-*, 22 I&N Dec. 49, 51 (BIA 1998) ("statements in a brief, motion, or Notice of Appeal are not evidence and thus are not entitled to any evidentiary weight").

Further, adjustment applicants seeking to port to new employers must complete and file Forms I-485 Supplement J. 8 C.F.R. § 245.25(a); *see also* USCIS, "Instructions for Supplement J," www.uscis.gov/sites/default/files/document/forms/i-485supjinstr. pdf. USCIS records do not indicate the Beneficiary's submission of a Form I-485 Supplement J. Thus, the record does not establish her eligibility to port or the Petitioner's need to demonstrate its ability to pay the proffered wage for any reduced time period.

For the foregoing reasons, the Petitioner has not established its ability to pay the offered job's proffered wage. We will therefore dismiss the appeal.

B. Validity of the Accompanying Labor Certification

Unless accompanied by an application for Schedule A designation, a petition for an unskilled worker must include a valid, individual labor certification. 8 C.F.R. § 204.5(l)(3)(1). A labor certification generally remains valid only for the particular job opportunity, noncitizen, and geographical area of intended employment stated on it. 20 C.F.R. § 656.30(c)(2).

The Petitioner filed its petition and accompanying labor certification in 2018, stating that it would permanently employ the Beneficiary as an executive assistant. But, in its response to the Director's RFE in August 2022, the company stated that its purported successor in interest would employ her in

the offered job. As the particular job opportunity listed on the labor certification no longer exists, the record does not demonstrate the certification's continued validity.

As previously indicated, the Petitioner asserts that the labor certification remains valid because the Beneficiary's new employer is the Petitioner's successor, *see Matter of Dial Auto*, 19 I&N Dec. at 482-83, and because she qualifies to transfer to a new employer under the portability provision. *See* section 204(j) of the Act. But, as previously discussed, the Petitioner has demonstrated neither the claimed successorship nor the Beneficiary's eligibility to port. Thus, the record does not establish the labor certification's continued validity.

III. CONCLUSION

The Petitioner has demonstrated neither its ability to pay the offered job's proffered wage nor the labor certification's continued validity.

ORDER: The appeal is dismissed.