U.S. Citizenship and Immigration Services

Non-Precedent Decision of the Administrative Appeals Office

In Re: 28457224

Date: OCT. 4, 2023

Appeal of Texas Service Center Decision

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

The Petitioner, a construction company, seeks to permanently employ the Beneficiary as a construction manager. The company requests his classification under the employment-based, third-preference (EB-3) immigrant visa category as a "professional." *See* Immigration and Nationality Act (the Act) section 203(b)(3)(A)(ii), 8 U.S.C. § 1153(b)(3)(A)(ii). U.S. businesses may sponsor noncitizens for permanent residence in this category to work in jobs requiring at least bachelor's degrees. *Id.*

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. On appeal, the company contends that the Director overlooked proof of its ability to pay.

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 materials overlooked by the Director do not establish the company's ability to pay the offered job's proffered wage. We will therefore dismiss the appeal.

I. LAW

Immigration as a professional generally follows a three-step process. First, a prospective employer must apply to the U.S. Department of Labor (DOL) for certification that: there are insufficient U.S. workers able, willing, qualified, and available for an offered position; and a noncitizen's employment in the position 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); 8 C.F.R. § 204.5(l)(3)(i). 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)(C).

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 establish its continuing ability to pay a 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 must generally 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 the beneficiary at all, USCIS considers whether the business generated annual amounts of net income or net current assets sufficient to pay any differences between the proffered wage and wages paid to the beneficiary. *See generally* 6 *USCIS Policy Manual* E.(4)(B), www.uscis.gov/policy-manual. If net income and net current assets are insufficient, USCIS may consider other factors potentially 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).[1]

The Petitioner's labor certification states the proffered wage of the offered position of construction manager as $95,680 a year. The petition's priority date is February 16, 2022, 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).

At the time of the appeal's filing, regulatory required evidence of the Petitioner's ability to pay the proffered wage in 2023 was not yet available. Thus, for purposes of this decision, we will consider the company's ability to pay only in 2022, the year of the petition's priority date.

The Petitioner submitted a copy of an IRS Form W-2, Wage and Tax Statement. The form indicates that, in 2022, the company paid the Beneficiary total wages of $51,680. This amount does not meet or exceed the annual proffered wage of $95,680. Thus, based solely on wages paid to the Beneficiary, the company has not demonstrated its ability to pay the proffered wage. Nevertheless, we credit the Petitioner's payment to the Beneficiary. For 2022, the company need only demonstrate its ability to pay the difference between the proffered wage and the Beneficiary's wage, or $44,000.

The record contains a copy of the Petitioner's federal income tax return for 2022. The return reflects net income of $13,344 and net current assets of -$122,078.[2] Neither of these amounts meets or exceeds

[1] 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); *Rahman v. Chertoff*, 641 F. Supp. 2d 349, 351-52 (D. Del. 2009).

[2] The Petitioner chose to file its 2022 federal income tax returns as an "S" corporation and reported income, deductions, credits, etc. beyond the scope of its ordinary business on Schedule K to IRS Form 1120S, U.S. Income Tax Return for an S Corporation. *See* IRS, "2022 Instructions for Form 1120-S," www.irs.gov/pub/irs-pdf/i1120s.pdf. We therefore consider Line 18, Income (Loss) Reconciliation, of Schedule K to reflect the business's net income in 2022 most accurately.

the $44,000 difference between the proffered wage and the Beneficiary's 2022 wage. Thus, based on examinations of the Petitioner's net income, net current assets, and wages paid to the Beneficiary, the company has not demonstrated its ability to pay the proffered wage.

As previously indicated, we may consider evidence of a petitioner's ability to pay beyond its wages paid, net income, and net current assets. *See Matter of Sonegawa*, 12 I&N Dec. at 614-615. Under *Sonegawa*, we may consider such factors as: the number of years a petitioner has conducted business; its number of employees; growth of its business; the occurrence of any uncharacteristic business expenditures or losses; its reputation in its industry; whether a beneficiary will replace a current employee or outsourced service; or other evidence of its ability to pay a proffered wage.

The record indicates that the Petitioner has continuously conducted business since 2009 and employs three people. The Petitioner's 2022 federal income tax return also shows that the company's revenues nearly doubled from the prior year. But the record does not indicate that the Beneficiary would replace a current employee or outsourced service. Also, unlike the petitioner in *Sonegawa*, the Petitioner has not demonstrated that it has an outstanding reputation in its industry. Thus, these *Sonegawa* factors do not sufficiently establish the company's ability to pay the proffered wage.

On appeal, the Petitioner contends that the Director overlooked various pieces of evidence, which it asserts demonstrate its ability to pay the proffered wage in 2022. We agree that the Director did not sufficiently address some evidence. But we need not remand the matter as the overlooked materials do not sufficiently demonstrate the Petitioner's ability to pay the proffered wage in 2022. *See SEC v. Chenery*, 318 U.S. 80, 88 (1943) (citation omitted) (holding that, even if an opinion relies upon an incorrect ground or reason, the decision must be affirmed if it reaches the correct result).

1. The Petitioner's Loan to Its President

The Petitioner points to documentation indicating that, in 2022, the company loaned its president/sole shareholder an amount exceeding the annual proffered wage. The company describes the loan as "entirely discretionary," and the company's president stated that it could have used the funds to pay the proffered wage. A copy of the loan agreement indicates that he can prepay the loan, in whole or in part, at any time without penalty.

The record, however, contains conflicting information about the loan. The loan agreement indicates - and the Petitioner's president initially stated - that the advance totaled $141,850. But the company's 2022 tax return and a later letter from the president state the loan amount as $136,500. Moreover, while the tax return and the Petitioner's president indicate his receipt of the advance in 2022, the agreement states the loan's effective date as January 1, 2023. *See Matter of Ho*, 19 I&N Dec. 582, 591 (BIA 1988) (requiring petitioners to resolve inconsistencies with independent, objective evidence pointing to where the truth lies). If the loan did not occur until 2023, it would not demonstrate the Petitioner's ability to pay in 2022. Inconsistent information therefore prevents the loan from establishing the company's ability to pay the proffered wage.

2. The Credit Line

The Petitioner also argues that the Director disregarded a copy of a statement regarding the company's line of credit. The company contends that it could have used the $76,100 credit line to pay the proffered wage in 2022. The January 2023 statement, however, shows that the company exhausted most of the credit line, listing available credit of only $9,791. The evidence therefore does not establish that the Petitioner had sufficient credit available in 2022 with which to pay the proffered wage. Also, the company has not submitted sufficient evidence that its credit line's use to pay the proffered wage would have enhanced - rather than weakened - its financial position. *See* 6 *USCIS Policy Manual* E.(4)(A)(5). The Petitioner's credit line evidence therefore does not demonstrate the company's ability to pay the proffered wage.

3. The Tax Professional's Letter

The Petitioner also notes that the Director did not consider a letter submitted by the company from a tax professional. The letter contends that, in 2022, the Petitioner had available funds exceeding the annual proffered wage of $95,680, including: the Beneficiary's wages of $51,680; the company's net income of $13,344; a forgiven federal loan of $27,847; and a nontaxable state grant of $3,000. The tax professional, however, stated the company's receipt of the federal loan and state grant in 2021. The Petitioner has not established that the funds remained available to pay the proffered wage in 2022 or that the company's 2022 tax return does not otherwise reflect the funds as part of net income or net current assets. The tax professional's letter therefore does not sufficiently demonstrate the company's ability to pay.

4. The Prorated Proffered Wage

The Petitioner contends that it need not demonstrate its ability to pay the entire proffered wage in 2022. A petitioner must demonstrate its ability to pay "*at the time the priority date is established.*" 8 C.F.R. § 204.5(g)(2) (emphasis added). Thus, the company argues that it need only demonstrate its ability to pay $85,981, the proffered wage portion in 2022 accruing after the petition's priority date of February 16, 2022.

We agree that the Petitioner may prorate the proffered wage for the year of the petition's priority date. But the company must also demonstrate that it generated the corresponding funds available to pay the prorated amount that year after the priority date. *See* 6 *USCIS Policy Manual* E.(4)(C)(1). "USCIS does not consider 12 months of net income towards [a petitioner's] ability to pay the proffered wage for a period of less than 12 months." *Id.* The Petitioner has not established that it generated its net income after the 2022 priority date or that the government loan and grant upon which it relies to pay the proffered wage continued to exist after the priority date. Thus, the company has not demonstrated that prorating the proffered wage establishes its ability to pay.

5. The President's Personal Finances

The Petitioner notes that, to help pay the proffered wage, the company's president stated his willingness to have foregone the $25,000 in officer compensation he received in 2022. The company also submitted evidence of his possession of almost $40,000 in a retirement savings account.

The record, however, does not establish that the Director's forbearance of the $25,000 in officer compensation in 2022 would have provided enough money to pay the proffered wage. Also, regarding the $40,000 in retirement savings, the Director correctly concluded that USCIS cannot accept ability-to-pay evidence from an entity other than the petitioning corporation. *See* 8 C.F.R. § 204.5(g)(2) (requiring "evidence that *the prospective United States employer* has the ability to pay the proffered wage") (emphasis added); *see also Matter of Aphrodite Invs. Ltd.*, 17 I&N Dec. 530, 531 (Comm'r 1980) (holding that a corporation is "a separate legal entity from its owners or even its sole owner"). Thus, evidence of the president's personal finances would not demonstrate the Petitioner's ability to pay the proffered wage. *See Sitar Rest. v. Ashcroft*, No. CIV.A.02-30197-MAP, 2003 WL 22203713, *2 (D. Mass. Sept. 18, 2003) (holding that "nothing in the governing regulation, 8 C.F.R. § 204.5, permits the [immigration service] to consider the financial resources of individuals or entities who have no legal obligation to pay the wage"); *see generally* 6 *USCIS Policy Manual* E.(4)(A)(5).

6. Effect of the COVID-19 Pandemic

Finally, the Petitioner contends that the Director overlooked the effect of the COVID-19 pandemic on the company's ability to pay the proffered wage. The Petitioner submits copies of its federal income tax returns showing that, in 2018 and 2019, before the pandemic hit, the company each year had gross revenues of more than $1 million and positive net income amounts. In contrast, the company's tax returns for 2020 and 2021 show gross revenues each year of only about $500,000 and negative net income amounts.

In *Sonegawa*, the petitioner did not demonstrate its ability to pay the proffered wage during a year in which the business's relocation caused it to temporarily close its operations, pay two rents for a five-month period, and accrue moving costs. *Matter of Sonegawa*, 12 I&N Dec. at 614. The Regional Commissioner, however, found that the petitioner demonstrated that its financial results that year were aberrational and determined that, despite the poor financial year, the business had the ability to pay the proffered wage. *Id.* at 615. Thus, similar to how the Regional Commissioner considered the business relocation in *Sonegawa*, the Director should have considered the pandemic's effect on the Petitioner's ability to pay the proffered wage. The company, however, has not established that the pandemic affected it in 2022, the year of the petition's priority date. A copy of the company's 2022 federal income tax return shows that the business had gross revenues of more than $900,000, close to its pre-pandemic levels. Also, the Petitioner's president indicated that the business's finances had returned to normal in 2022. He stated:

> Yes, it is true that in the year 2020 and 2021 our volume of business fell drastically because of the general business paralysis, however, I believe we have provided more than sufficient information to show that, with the assistance of grants, the corporation has bounced back and that our business prospect is excellent as show by the doubling up of the gross receipts for 2022.

Thus, the record does not establish that the COVID-19 pandemic hindered the Petitioner in its attempt to demonstrate its ability to pay in 2022.

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

B. The Offered Job's Required Experience

Although unaddressed by the Director, the Petitioner also has not demonstrated the Beneficiary's qualifying experience for the offered job.

A petitioner must demonstrate a beneficiary's possession of all DOL-certified job requirements of an offered 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). As previously indicated, this petition's priority date is February 16, 2022.

When assessing a Beneficiary's qualifications, USCIS must examine the job-offer portion of an accompanying labor certification to determine the job's minimum requirements. USCIS may neither disregard certification terms nor impose unstated requirements. *See, e.g., Madany v. Smith*, 696 F.2d 1008, 1015 (D.C. Cir. 1983) (holding that "DOL bears the authority 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 construction manager as a U.S. bachelor's degree in construction engineering technology and six months of experience "in the job offered." The labor certification states that the company will not accept experience in an alternate occupation.

On the labor certification, the Beneficiary attested that, by the petition's priority date, he received a U.S. bachelor's degree in construction engineering technology and had more than nine months of full-time experience in the offered job. He stated that a U.S. general contractor employed him as a project manager from January 2020 through October 2020.

To demonstrate claimed qualifying experience, a petitioner must submit a letter from a beneficiary's former employer. 8 C.F.R. § 204.5(l)(3)(ii)(A). The letter must include the employer's name, title, and address, and describe the beneficiary's experience. *Id.*

Contrary to 8 C.F.R. § 204.5(l)(3)(ii)(A), the Petitioner did not submit a letter from the Beneficiary's purported former employer. The record therefore lacks required evidence of his qualifying experience for the offered job.

The Director did not notify the Petitioner of this evidentiary deficiency or afford the company an opportunity to respond. Thus, in any future filings in this matter, the company must also submit required evidence of the Beneficiary's claimed qualifying experience.

III. CONCLUSION

Although the Director improperly disregarded evidence, the overlooked materials do not demonstrate the Petitioner's ability to pay the offered job's proffered wage.

ORDER: The appeal is dismissed.