U.S. Citizenship and Immigration Services

Non-Precedent Decision of the Administrative Appeals Office

In Re: 15296768

Date: FEB. 8, 2022

Appeal of Texas Service Center Decision

Form I-140, Immigrant Petition for Advanced Degree Professional

The Petitioner, a provider of health care personnel, seeks to employ the Beneficiary as a nurse supervisor. The company requests her classification under the second-preference, immigrant category for members of the professions holding advanced degrees or their equivalents. *See* Immigration and Nationality Act (the Act) section 203(b)(2)(A), 8 U.S.C. § 1153(b)(2)(A).

After the filing's initial grant, the Director of the Texas Service Center revoked the petition's approval and dismissed the Petitioner's following, combined motions to reopen and reconsider. The Director concluded that the Petitioner did not demonstrate: 1) the *bona fides* of the job offer; 2) the job's need for an advanced degree professional; or 3) the company's required ability to pay the proffered wage.

In revocation proceedings, the Petitioner bears the burden of establishing eligibility for the requested benefit by a preponderance of evidence. *See Matter of Ho*, 19 I&N Dec. 582, 589 (BIA 1988) (citation omitted) (discussing the burden of proof); *see also Matter of Chawathe*, 25 I&N Dec. 369, 375 (AAO 2010) (discussing the standard of proof). Upon *de novo* review, we will dismiss the appeal.

I. EMPLOYMENT-BASED IMMIGRATION

Immigration as an advanced degree professional usually follows a three-step process. First, to permanently fill a position in the United States with a foreign worker, a prospective employer must obtain certification from the U.S. Department of Labor (DOL). *See* section 212(a)(5) of the Act, 8 U.S.C. § 1182(a)(5). If DOL approves a position, an employer must next submit the certified labor application with an immigrant visa petition to U.S. Citizenship and Immigration Services (USCIS). Section 204 of the Act, 8 U.S.C. § 1154. Finally, if USCIS grants a petition, a designated noncitizen may apply abroad for an immigrant visa or, if eligible, for adjustment of status in the United States. *See* section 245 of the Act, 8 U.S.C. § 1255.

DOL, however, has already determined that the United States lacks sufficient nurses and that employment of noncitizens in these "Schedule A" positions will not harm the wages or working conditions of U.S. workers in similar positions. 20 C.F.R. § 656.5. Thus, DOL authorizes USCIS to adjudicate Schedule A labor certification applications for nurses in immigrant visa petition proceedings. 20 C.F.R. § 656.15(a). In this matter, USCIS therefore rules not only on the petition,

but also on its accompanying labor certification application. *See* 20 C.F.R. § 656.15(e) (describing USCIS's labor certification determinations in Schedule A proceedings as "conclusive and final").

Also, "at any time" before a beneficiary obtains lawful permanent residence, 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 a record, the erroneous nature of a petition's approval justifies its revocation. *Matter of Ho*, 19 I&N Dec. at 590.

USCIS properly issues a notice of intent to revoke (NOIR) a petition's approval if the unexplained and unrebutted record at the time of the NOIR's issuance would have warranted the petition's denial. *Matter of Estime*, 19 I&N Dec. 450, 451 (BIA 1987). If a petitioner's NOIR response doesn't resolve or rebut alleged revocation grounds, USCIS properly revokes a petition's approval. *Id.* at 451-52.

II. 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). Evidence of ability to pay must generally include copies of annual reports, federal tax returns, or audited financial statements. *Id.*

In determining ability to pay, USCIS examines whether a petitioner paid a beneficiary the full proffered wage each year beginning from the year of a petition's priority date. If a petitioner did not annually pay the full proffered wage or did not pay a beneficiary at all, USCIS considers whether the business generated sufficient annual amounts of net income or net current assets to pay any differences between the proffered wage and the wages paid. 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).[1]

The accompanying labor certification application states the proffered wage of the offered position of nurse supervisor as $96,500 a year. The petition's priority date is December 28, 2015, the petition's filing date. *See* 8 C.F.R. § 204.5(d) (explaining how to determine a petition's priority date).

USCIS approved the petition in February 2016. The Petitioner therefore had to demonstrate its ability to pay the proffered wage in 2015, the year of the petition's priority date, and 2016.

The Petitioner did not submit evidence that it paid the Beneficiary in 2015. But the Petitioner provided a copy of an IRS Form W-2, Wage and Tax Statement, indicating that the company paid her $24,152 in 2016. This amount does not equal or exceed the annual proffered wage of $96,500. Thus, based solely on wages paid, the Petitioner did not demonstrate its ability to pay the proffered wage in 2015 or 2016.

[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).

Nonetheless, we credit the Petitioner's payment to the Beneficiary in 2016. For that year, the company need only demonstrate its ability to pay the difference between the proffered wage and the wages paid - or $72,348.

The petition included copies of the Petitioner's federal income tax return for 2014 and financial statements for 2015. As the Director's NOIR notes, however, the record lacked regulatory required evidence of the company's ability to pay the proffered wage from the year of the petition's priority date onward. The 2014 tax return covers the year before the year of the petition's priority date. Also, contrary to 8 C.F.R. § 204.5(g)(2), the 2015 financial statements do not indicate that they were "audited." The record therefore did not demonstrate the Petitioner's ability to pay the proffered wage from the year of petition's priority date onward.

The Petitioner's NOIR response included copies of federal income tax returns for 2015 and 2016, as well as audited financial statements for 2016. The record, however, does not establish that these materials constitute regulatory required evidence of the company's ability to pay in 2015 and 2016. *See* 8 C.F.R. § 204.5(g)(2) (stating that evidence of ability to pay "*shall be* either in the form of copies of annual reports, federal tax returns, or audited financial statements") (emphasis added). The tax returns for 2014, 2015, and 2016 list a federal employer identification number (FEIN) different than the one the company stated on the Form I-140 and accompanying labor certification application. The inconsistent FEINs cast doubt on the authenticity and accuracy of the tax returns. *See Matter of Ho*, 19 I&N Dec. at 591 (requiring a petitioner to resolve inconsistencies of record with independent, objective evidence pointing to where the truth lies). Additionally, a petitioner must provide "evidence that *the prospective United States employer* has the ability to pay the proffered wage." 8 C.F.R. § 204.5(g)(2) (emphasis added). Because the tax returns reflect financial information of a company with a different FEIN than the Petitioner, the record does not establish the returns as those of the Petitioner. The tax returns therefore do not constitute regulatory required evidence of the Petitioner's ability to pay. Similarly, the FEIN discrepancies cast doubt on the accuracy and authenticity of the audited financial statements for 2016. The statements do not indicate to what FEIN their financial information corresponds. Thus, the statements also do not establish the Petitioner's ability to pay in 2016.

Even if we considered the tax returns submitted by the Petitioner as its own, they would not establish the company's ability to pay the proffered wage. The 2015 return reflects net income of $72,293 and net current assets of -$145,115. Neither of those amounts would equal or exceed the annual proffered wage of $96,500. The return therefore would not establish the Petitioner's ability to pay the proffered wage in 2015.

The 2016 tax return reflects $460,839 in net income and $434,467 in net current assets. Both those amounts would exceed the $72,348 difference between the annual proffered wage and the wages the Petitioner paid the Beneficiary that year. As noted, however, the FEIN discrepancies cast doubt on whether this return reflects the financial information of the Petitioner. Additionally, as the NOIR notes, the Petitioner filed Form I-140 petitions for other beneficiaries. A petitioner must demonstrate its ability to pay the proffered wage of each petition it files until a beneficiary obtains lawful permanent residence. 8 C.F.R. § 204.5(g)(2). This Petitioner must therefore demonstrate its ability to pay the combined proffered wages of this and any other petitions it filed that were pending or approved as of this petition's priority date of December 28, 2015 or filed thereafter in 2015 or 2016. *See Patel v.*

Johnson, 2 F.Supp.3d 108, 124 (D. Mass. 2014) (affirming our revocation of a petition's approval where, as of the filing's grant, a petitioner did not demonstrate its ability to pay the combined proffered wages of multiple petitions).[2]

Contrary to the NOIR's instructions, the Petitioner did not provide information about its other Form I-140 petitions. *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"). USCIS records indicate the Petitioner's filing of at least 30 Form I-140 petitions for other beneficiaries that were pending or approved as of December 28, 2015 or filed thereafter in 2015 or 2016.[3] The record lacks the proffered wages and priority dates of the other petitions. Thus, USCIS cannot calculate the total proffered wages that the Petitioner must demonstrate its ability to pay each year. For this additional reason, the record does not demonstrate the Petitioner's ability to pay the proffered wage in 2015 or 2016.

On appeal, the Petitioner argues that other factors demonstrate its ability to pay the proffered wage in the relevant years. *See Matter of Sonegawa*, 12 I&N Dec. at 614-15. But we need not consider *Sonegawa* factors because, as noted above, the record lacks regulatory required evidence of the Petitioner's ability to pay. The tax returns and audited financial statements submitted by the Petitioner do not identify the company by the same FEIN it listed on the Form I-140 and accompanying labor certification application. The Petitioner's NOIR response also omitted requested evidence needed to determine the company's total wage obligation to all applicable beneficiaries. Because of these evidentiary defects, regulations would not permit the Petitioner's demonstration of its ability to pay even if *Sonegawa* factors favored the company.

In the Petitioner's prior motions before the Director, the company asserted that the tax returns list its correct FEIN and that the 2016 financial statements reflect its financial data. The FEIN listed on the Beneficiary's IRS Forms W-2 for 2016, 2017, and 2018 match the FEIN on the tax returns. But the FEIN on the Forms W-2 and tax returns do not match the FEIN listed on the I-140 and labor certification filed with the instant petition, and USCIS records indicate the Petitioner's filing of multiple, Form I-140 petitions under both FEINs. The record therefore does not establish the company's true identification number. Also, if the tax returns, audited financial statements, and Forms W-2 reflect the Petitioner's true FEIN as the company asserts, the Petitioner has not explained why it listed the other FEIN on Forms I-140 and labor certification applications. *See Matter of Ho*, 19 I&N Dec. at 591 (requiring a petitioner to resolve inconsistencies of record with independent, objective evidence).

[2] The Petitioner need not demonstrate its ability to pay proffered wages of petitions that it withdrew or, unless the filings remain pending on appeal or motion, that USCIS rejected, denied, or revoked. The Petitioner also need not demonstrate its ability to pay proffered wages of petitions before their corresponding priority dates, or after the dates their corresponding beneficiaries obtained lawful permanent residence.

[3] USCIS records identify the Petitioner's other petitions by the following receipt numbers:

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 revocation.

III. THE BONA FIDES OF THE JOB OFFER

A business may file an immigrant visa petition if it is "desiring and intending to employ [a noncitizen] within the United States." Section 204(a)(1)(F) of the Act. A petitioner must intend to employ a beneficiary under the terms of an accompanying labor certification application. *See Matter of Izdebska*, 12 I&N Dec. 54, 55 (Reg'l Comm's 1966) (affirming a petition's denial where, contrary to the terms of a labor certification, a petitioner did not intend to employ a beneficiary as a domestic worker on a full-time, live-in basis). For labor certification purposes, the term "employment" means "[p]ermanent, full-time work." 20 C.F.R. § 656.3.

The Petitioner attested on the Form I-140 and accompanying labor certification application to its intent to employ the Beneficiary as a nurse supervisor on a permanent, full-time basis. The position involves supervising nurses. The Beneficiary would work at the site of the Petitioner's client, a nursing home in [redacted]

The Beneficiary's application for adjustment of status includes a copy of her employment agreement with the Petitioner. The Director's NOIR notes that the agreement states the Petitioner's intent to employ the Beneficiary as a "Registered Professional Nurse." The job title in the agreement conflicts with that of the offered position of "Nurse Supervisor" stated on the Form I-140 and labor certification application. Based on the inconsistent job titles, the Director concluded that the Petitioner did not demonstrate its intent to employ the Beneficiary in the offered position.

The Director also found insufficient evidence of the Petitioner's claimed intent to employ the Beneficiary on a permanent basis. The Director's NOIR and decision note that the initial, employment agreement between the Petitioner and Beneficiary states a term of only two years. The amended agreement in the company's NOIR response similarly has a three-year term.

As previously discussed, we will affirm the revocation of the petition's approval based on insufficient evidence of the Petitioner's ability to pay the proffered wage. We therefore need not decide the issues related to the *bona fides* of the company's job offer. *See INS v. Bagamasbad*, 429 U.S. 24, 25 (1976) (finding that administrative agencies need not make findings on issues "unnecessary to the results they reach"). We therefore hereby reserve the issues regarding the *bona fides* of the job offer for future consideration should their resolutions become necessary.

IV. THE JOB'S NEED FOR AN ADVANCED DEGREE PROFESSIONAL

If accompanying a petition for an advanced degree professional, the job-offer portion of a labor certification application "must demonstrate that the job requires a professional holding an advanced degree." 8 C.F.R. § 204.5(k)(4)(i). The term "advanced degree" means:

> a United States academic or professional degree or a foreign equivalent degree above that of baccalaureate. A United States baccalaureate or a foreign equivalent degree

followed by at least five years of progressive experience in the specialty shall be considered the equivalent of a master's degree.

8 C.F.R. § 204.5(k)(2).

The accompanying labor certification application states the primary requirements of the offered position of nurse supervisor as a U.S. bachelor's degree, or a foreign equivalent degree, in nursing and five years of experience in the job offered or in "nursing or [an]other allied medical field." The application also states the Petitioner's acceptance of an alternate combination of education and experience: a master's degree, with no training or experience required.[4]

Based on the job requirements listed on the labor certification application, the offered position appears to require an advanced degree. Consistent with the definition of "advanced degree" at 8 C.F.R. § 204.5(k)(2), the position requires at least a master's degree or a bachelor's degree followed by five years of experience.

The NOIR, however, questions the Petitioner's occupational classification of the offered position. The NOIR notes that, on the Form I-140, the Petitioner classified the position under the DOL occupational code (29-1141) of "registered nurse."[5] The DOL's occupational database indicates that most registered nurses in the United States do not require advanced degrees or their equivalents. Rather, the database states that "[m]ost occupations in this [group] require training in vocational schools, related on-the-job experience, or an associate's degree." O*NET Online, "Summary Report for: 29-1141.00-Registered Nurses," https://www.onetonline.org/link/summary/29-1141.00. The NOIR notes that another DOL publication also suggests that registered nurses in the United States need not have advanced degrees. The *Occupational Outlook Handbook* states that "[r]egistered nurses usually take one of three education paths: a bachelor's degree in nursing; an associate's degree in nursing; or a diploma from an approved nursing program." U.S. Bureau of Labor Statistics, *Occupational Outlook Handbook*, "Registered Nurses," https://www.bls.gov/ooh/healthcare/registered-nurses.htm#tab-4. Thus, based on the occupational code listed by the Petitioner, the Director concluded that the company did not demonstrate the offered position's need for an advanced degree professional.

As we will affirm the revocation of the petition's approval on another ground, we need not review the Director's finding of insufficient evidence of the offered position's need for an advanced degree professional. *See INS v. Bagamasbad*, 429 U.S. at 25. We therefore also hereby reserve this issue for future resolution, if needed.

V. CONCLUSION

The Petitioner did not demonstrate its required ability to pay the position's proffered wage from the petition's priority date onward. We will therefore affirm the revocation of the petition's approval.

[4] The application further states that the position requires passage of the NCLEX-RN, the National Council Licensure Examination for Registered Nurses, or a state license as a registered nurse. Satisfaction of this requirement is not at issue.
[5] The labor certification application and prevailing wage determination classify the position under the same occupational code.

ORDER: The appeal is dismissed.