U.S. Citizenship and Immigration Services

Non-Precedent Decision of the Administrative Appeals Office

In Re: 20435424

Date: JUL. 12, 2022

Appeal of Nebraska Service Center Decision

Form I-140, Immigrant Petition for Professional

The Petitioner, an information technology consulting company, seeks to employ the Beneficiary as a computer software engineer. The company requests his classification under the third-preference, immigrant category as a professional. Immigration and Nationality Act (the Act) section 203(b)(3)(A)(ii), 8 U.S.C. § 1153(b)(3)(A)(ii). This employment-based immigrant classification allows a U.S. employer to sponsor a professional with a baccalaureate degree for lawful permanent resident status.

The Director of the Nebraska Service Center denied the petition, concluding that the Petitioner did not demonstrate its required ability to pay the position's proffered wage. The matter is now before us on appeal.

The Petitioner bears the burden of establishing eligibility for the requested benefit by a preponderance of evidence. *See* section 291 of the Act, 8 U.S.C. § 1361 (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 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: (1) there are insufficient U.S. workers able, willing, qualified, and available for an offered position; and (2) the employment of a noncitizen in the position will not harm wages and working conditions of U.S. workers with similar jobs. *See* section 212(a)(5) of the Act, 8 U.S.C. § 1182(a)(5).

Second, an employer must submit an approved labor certification with an immigrant visa petition to U.S. Citizenship and Immigration Services (USCIS). *See* section 204 of the Act, 8 U.S.C. § 1154. Among other things, USCIS determines whether a noncitizen beneficiary meets the requirements of a certified position and a requested immigrant visa category. 8 C.F.R. § 204.5(l).

Finally, if USCIS approves a petition, a designated noncitizen 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. ABILITY TO PAY THE PROFFERED WAGE

A petitioner must establish that it has the ability to pay the proffered wage stated on the labor certification. As provided in the regulation at 8 C.F.R. § 204.5(g)(2):

> The petitioner must demonstrate this ability at the time the priority date is established and continuing until the beneficiary obtains lawful permanent residence. Evidence of this ability shall be either in the form of copies of annual reports, federal tax returns, or audited financial statements. In a case where the prospective United States employer employs 100 or more workers, the director may accept a statement from a financial officer of the organization which establishes the prospective employer'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].

As indicated in the above regulation, the Petitioner must establish its continuing ability to pay the proffered wage from the priority date of the petition onward. The priority date in this case is August 8, 2011.[1] The labor certification states that the wage offered for the job of computer software engineer is $90,000 per year.

In determining a petitioner's ability to pay, we first examine whether it paid a beneficiary the full proffered wage each year from a petition's priority date. If a petitioner did not pay a beneficiary the full proffered wage, we next examine whether it had sufficient annual amounts of net income or net current assets to pay the difference between the proffered wage and the wages paid, if any. 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. USCIS may also 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 Matter of Sonegawa*, 12 I&N Dec. 612 (Reg'l Comm'r 1967).

With the initial filing, the Petitioner submitted copies of four earnings statements, which demonstrated the wages it paid to the Beneficiary for the period from August 16, 2020, to October 15, 2020. Although these statements demonstrate that the Petitioner was compensating the Beneficiary at a rate in excess of the proffered wage, the Director determined that the evidence was not sufficient to establish that the Petitioner had the ability to pay the proffered wage to the Beneficiary from the 2011 priority date onward. The Director issued a request for evidence (RFE) to allow the Petitioner the opportunity to provide additional evidence to establish its ability to pay the proffered wage. In response, the Petitioner submitted copies of Internal Revenue Service (IRS) transcripts for the Beneficiary's IRS Forms W-2, Wage and Tax Statements, for the tax years 2011-2019.

In denying the petition, the Director concluded that the record did not include any regulatory-prescribed evidence of the Petitioner's ability to pay the proffered wage. On appeal, the Petitioner asserts that the previously submitted initial evidence and evidence submitted in response to

[1] The priority date of a petition is the date DOL accepted the labor certification for processing. *See* 8 C.F.R. § 204.5(d).

the RFE demonstrates by a preponderance of the evidence that the Petitioner has the ability to pay the proffered wage.[2] No new evidence is submitted on appeal.

As noted by the Director, the regulation at 8 C.F.R. § 204.5(g)(2) requires evidence of ability to pay to include "annual reports, federal tax returns, or audited financial statements," and the Petitioner was afforded the opportunity to supplement the record with such regulatory-required evidence in response to the RFE.[3] The Petitioner, however, declined to provide its annual reports, federal tax returns, or audited financial statements for any year. Further, it did not explain why this evidence was unavailable. Moreover, the Petitioner has not remedied this evidentiary deficiency on appeal by submitting any regulatory-required evidence for the post-priority date period after August 8, 2011.[4]

As previously indicated, when determining a petitioner's ability to pay, we may consider factors other than wages paid, net income, and net current assets. *See Matter of Sonegawa*, 12 I&N Dec. at 614-15. However, even if the *Sonegawa* factors indicated the company's ability to pay in the relevant years, which they do not, its omission of regulatory-required evidence for the period from 2011 onward precludes a favorable determination on appeal. *See* 8 C.F.R. § 204.5(g)(2).

III. CONCLUSION

The Petitioner has not submitted regulatory-prescribed evidence of its continuing ability to pay the proffered wage, and it has not explained why such evidence is unavailable. Thus, we find that the Petitioner has not established its ability to pay the proffered wage from the priority date onward, and we will dismiss the appeal.

ORDER: The appeal is dismissed.

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[2] The Petitioner also notes that in denying the petition, the Director erroneously referred to the IRS Wage and Income Transcripts as documentation relating to the "Employer/Petitioner" when in fact this documentation related to the Beneficiary. We acknowledge the Director's erroneous observation regarding this documentation; however, the decision otherwise references and discusses the lack of regulatory-required evidence as the basis for the denial and, accordingly, we view this error as harmless. Moreover, we exercise *de novo* review of all issues of fact, law, policy, and discretion. *See Matter of Dhanasar*, 26 I&N Dec. 884 (AAO 2016). This means that we look at the record anew and are not required to defer to findings made in the initial decision.

[3] In a case where the prospective United States employer employs 100 or more workers, the Director may accept a statement from a financial officer of the organization which establishes the prospective employer's ability to pay the proffered wage. Here, the Director advised the Petitioner that it could submit this document in the RFE if applicable, but the Petitioner declined to do so.

[4] The failure to submit requested evidence that precludes a material line of inquiry shall be grounds for denying the petition. *See* 8 C.F.R. § 103.2(b)(14).