U.S. Citizenship and Immigration Services

Non-Precedent Decision of the Administrative Appeals Office

In Re: 7629718

Date: MAY 16, 2022

Appeal of Texas Service Center Decision

Form I-140, Immigrant Petition for Other Worker

The Petitioner, a provider of maintenance and operations services, seeks to employ the Beneficiary as a packer.[1] The company requests her classification under the third-preference, immigrant visa category for "other workers." *See* Immigration and Nationality Act (the Act) section 203(b)(3)(A)(iii), 8 U.S.C. § 1153(b)(3)(A)(iii).

After initially granting the filing, 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 company did not demonstrate its required intent to employ the Beneficiary in the offered position or its required ability to pay the combined proffered wages of this and other Form I-140 petitions.

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 affirm the Director's decision that the Petitioner did not demonstrate its ability to pay the proffered wage. We will therefore dismiss the appeal.

I. EMPLOYMENT-BASED IMMIGRATION

Immigration as an "other," or "unskilled," worker 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) 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 DOL-certified position and a requested immigrant visa category. 8 C.F.R. § 204.5(l).

[1] The record indicates that the position involves packing and packaging a variety of products and materials by hand.

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.

"[A]t any time" before a beneficiary obtains lawful permanent residence, however, 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). USCIS properly revokes a petition's approval if a petitioner's NOIR response does not rebut or resolve all alleged revocation grounds. *Id.* at 451-52.

II. THE PETITIONER'S 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 income taxes, 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 with 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 examines whether the business generated annual amounts of net income or net current assets sufficient 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).[2]

The accompanying labor certification states the proffered wage of the offered position of packer as $8.20 an hour, or - based on a 40-hour, work week - $17,056 a year. The petition's priority date is June 24, 2016, the date DOL accepted the labor certification application for processing. *See* 8 C.F.R. § 204.5(d) (explaining how determine a petition's priority date).

USCIS approved the petition in April 2017. Thus, at the time of the petition's approval, the Petitioner had to demonstrate its ability to pay the proffered wage in 2016, the year of the petition's priority date, and 2017, the year of the petition's approval.

The record indicates the Beneficiary's residence in Hong Kong. The Petitioner neither claims to have employed her nor submits evidence of payments to her. Thus, based solely on wages paid, the company has not demonstrated 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, LLC v. Napolitano*, 558 F.3d 111, 118 1st Cir. 2009).

If a petitioner employs at least 100 people, USCIS has discretion to accept a statement from a financial officer as proof of the business's ability to pay a proffered wage. 8 C.F.R. § 204.5(g)(2). The Petitioner submitted letters from its chief financial officer (CFO). The letters state the company's employment of about 5,000 people and assert its ability to pay the proffered wage. But - citing the Petitioner's filing of hundreds of Form I-140 petitions for other beneficiaries - the Director declined to accept the CFO's letter as evidence of the company's ability to pay. The Director provided a valid rationale and therefore did not abuse his discretion in discounting the CFO's letter.

Beyond the letter, the Director found that the Petitioner did not submit regulatory required evidence of its ability to pay the proffered wage in 2016, the year of the petition's priority date. *See* 8 C.F.R. § 204.5(g)(2) (generally requiring a petitioner to submit "copies of annual reports, federal tax returns, or audited financial statements"). In response to the Director's NOIR, however, the record indicates the Petitioner's submission of audited financial statements for the fiscal years 2015-16 and 2016-17.[3] We will therefore withdraw the Director's contrary finding.[4]

The Petitioner's audited statements reflect net income amounts of $2,845,967 in 2015-16 and $2,060,491 in 2016-17 and, for the same corresponding periods, net current asset amounts of $9,137,500 and $7,525,347. All these amounts exceed the annual proffered wage of $17,056. The record therefore appears to establish the Petitioner's ability to pay the Beneficiary's individual proffered wage in 2016 and 2017.

As the NOIR notes, however, the Petitioner filed multiple, 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). The Petitioner must therefore demonstrate its ability to pay the combined proffered wages of this petition and any of its others that were pending or approved as of this petition's priority date of June 24, 2016 or filed thereafter in 2016 or 2017. *See Patel v. Johnson*, 2 Fed.Supp.3d 108, 124 (D. Mass. 2014) (affirming our revocation of a petition's approval where, as of the filing's grant, the petitioner did not demonstrate its ability to pay the combined proffered wages of multiple petitions).[5]

The Petitioner's NOIR response included information about 861 Form I-140 petitions that it filed between 2016 and 2018. After subtracting petitions that USCIS denied, the Director found that the company had to demonstrate its ability to pay the combined proffered wages of 759 petitions totaling $12,995,504 in both 2016 and 2017. Because neither the company's net income or net current asset amounts for those years equaled or exceeded the total combined proffered wages, the Director properly concluded that the Petitioner did not demonstrate its ability to pay the proffered wage in either year.

As previously indicated, in determining the Petitioner's ability to pay the proffered wage, we can look beyond the company's wages paid, net income, and net current assets. *See Matter of Sonegawa*, 12 I&N Dec. at 614-15. We may consider: the number of years the Petitioner has been doing business;

[3] The statements indicate that the Petitioner's fiscal year runs from October 1 through September 30.
[4] The Petitioner's motion to reopen also included copies of its audited financial statements for 2015-16 and 2016-17.
[5] The Petitioner need not demonstrate its ability to pay proffered wages of petitions that it withdrew or - unless pending on appeal or motion - that USCIS rejected, denied, or revoked. The Petitioner also need not demonstrate its ability to pay proffered wages before their petitions' corresponding priority dates or after their corresponding beneficiaries obtain lawful permanent residence status.

the growth of its business; its number of employees; its incurrence of any uncharacteristic business costs or losses; its reputation in its industry; the Beneficiary's proposed replacement of a current employee or outsourced service; or other factors affecting the Petitioner's ability to pay the proffered wage. *Id.*

The record indicates the Petitioner's continuous business operations since 1958. A copy of the company's federal, payroll taxes for the fourth quarter of 2018, the most recent of record, indicates that the Petitioner paid wages to 2,771 employees. Copies of its audited financial statements also show that, from 2015-16 to 2017-18, its amount of annual net income increased.

Unlike the business in *Sonegawa*, however, the Petitioner has not demonstrated its incurrence of uncharacteristic losses or expenses, or its possession of an outstanding business reputation. The record also does not establish the Beneficiary's proposed replacement of an employee or outsourced service. Also unlike the business in *Sonegawa*, the Petitioner must establish its ability to pay combined proffered wages of multiple, Form I-140 petitions. A totality of circumstances therefore does not demonstrate the company's ability to pay the proffered wage.

On appeal, the Petitioner asserts that, under 8 C.F.R. § 204.5(g)(2), it need only demonstrate its ability to pay the Beneficiary's proffered wage. By expecting the company to show its ability to pay other Form I-140 beneficiaries, the Petitioner contends that USCIS violated the Administrative Procedures Act (APA), effectively creating a new rule without complying with the APA's notice-and-comment requirements. *See* 5 U.S.C. § 553.

We acknowledge that 8 C.F.R. § 204.5(g)(2) does not expressly require a petitioner to demonstrate its ability to pay proffered wages of multiple beneficiaries. But case law requires petitioners to establish that their job offers are "realistic." *Matter of Great Wall*, 16 I&N Dec. 142, 144 (Acting Reg'l Comm'r 1977). Under the Petitioner's assertion, an employer with $20,000 of annual net income or net current assets could demonstrate its ability to pay an unlimited number of Form I-140 beneficiaries if their proffered wages do not exceed $20,000. Realistically, however, without demonstrating corresponding increases in the employer's net income or net current assets, the business may not be able to simultaneously employ multiple beneficiaries. *See Patel*, 2 Fed.Supp.3d at 122 n.15 (stating: "It is not unreasonable to consider the employer's ability to pay its total wage obligations as part of an employee-specific inquiry"). The Petitioner therefore does not persuade us of its need to demonstrate its ability to pay only the Beneficiary's proffered wage.

The Petitioner further argues that it has a "reasonable expectation of future profits sufficient to pay the proffered wage." *See Matter of Sonegawa*, 12 I&N Dec. at 615 (considering "the petitioner's [reasonable] expectations of continued increase in business and increasing profits"). The Petitioner's CFO stated that the company has a "cost-plus," business model, whereby customers fund workers' wages and costs "plus an agreed amount," so that "each worker is profitable."

USCIS records, however, show that the Beneficiary and most of the Petitioner's other Form I-140 beneficiaries reside abroad. Thus, most of the Petitioner's beneficiaries will not likely be able to enter the United States and begin working and generating profits for the company until they receive immigrant visas abroad. The Petitioner, however, must demonstrate its ability to pay their proffered wages from the years of the priority dates of their corresponding petitions. *See* 8 C.F.R. § 204.5(g)(2).

Because the Petitioner must demonstrate its ability to pay corresponding beneficiaries before most of them will begin work, the company's "cost-plus" business model does not establish the business's ability to pay all applicable proffered wages.

For the foregoing reasons, the record at the time of the NOIR's issuance did not demonstrate the Petitioner's required ability to pay the combined proffered wages of its appliable beneficiaries. We will therefore affirm revocation of the petition's approval.

The petition's revocation also rested on the Director's finding of insufficient evidence of the Petitioner's intent to employ the Beneficiary in the offered position. Federal agencies, however, generally need not decide issues unnecessary to the results the agencies reach. *INS v. Bagamasbad*, 429 U.S. 24, 25-26 (1976) (citations omitted). We will therefore reserve consideration of the other revocation ground.

III. CONCLUSION

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

ORDER: The appeal is dismissed.