U.S. Citizenship and Immigration Services

Non-Precedent Decision of the Administrative Appeals Office

In Re: 28184622

Date: AUG. 24, 2023

Appeal of Texas Service Center Decision

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

The Petitioner, a cleaning company, seeks to permanently employ the Beneficiary as a window washer. The company requests his 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). Petitioners may sponsor noncitizens for permanent residence in this category to work in jobs requiring less than two years of training or experience. *Id.*

The Acting Director of the Texas Service Center denied the petition and dismissed the Petitioner's following combined motions to reopen and reconsider. The Director concluded that the company did not demonstrate its required ability to pay the offered position's proffered wage.[1] On appeal, the Petitioner contends that: its total annual wages paid demonstrate its ability to pay the proffered wage; it could not find any U.S. workers to fill the job; and the Beneficiary and his dependents want to become U.S. permanent residents and "productive, tax-paying members of society."

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 not demonstrated its ability to pay the offered position's proffered wage. We will therefore dismiss the appeal.

I. LAW

Immigration as an "other," or unskilled, worker generally follows a three-step process. First, a prospective employer must obtain certification from the U.S. Department of Labor (DOL) that: there

[1] The Director also initially found insufficient evidence of the Beneficiary's qualifying education for the offered position. The job requires a U.S. high school diploma or a foreign equivalent. The Petitioner submitted a copy of the Beneficiary's three-year *Ensido Medio* certificate from Brazil. But the Director found insufficient evidence of the credential's equivalency to a U.S. high school diploma. The Director's decision on the Petitioner's combined motions does not address the educational denial ground. The Petitioner's appeal also omits the issue. But information and samples in the Electronic Database for Global Education (EDGE), an online database that federal judges have found to be a reliable source of foreign education equivalencies, indicate that the Beneficiary's credential equates to a U.S. high school diploma. *See* Am. Ass'n of Collegiate Registrars & Admissions Officers (AACRAO), "About AACRAO EDGE," www.aacrao.org/edge/about-edge. We therefore consider the Beneficiary to meet the offered job's educational requirements.

are insufficient U.S. workers able, willing, qualified, and available for an offered position; and permanent employment of a noncitizen 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). 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 petitioner must demonstrate its continuing ability to pay an offered position's proffered wage, from a petition's priority date until a beneficiary obtains permanent residence. 8 C.F.R. § 204.5(g)(2). This petition's priority date is January 21, 2020, 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). The Petitioner's labor certification states the proffered wage of the offered position of window washer as $27,914 a year.

At the time the company filed its combined motions in 2022, regulatory required evidence of its ability to pay that year was not yet available. Thus, for purposes of this decision, we will consider the Petitioner's ability to pay the proffered wage only in 2020, the year of the petition's priority date, and 2021.

Evidence of a petitioner's ability to pay must generally include copies of annual reports, federal tax returns, or audited financial statements. 8 C.F.R. § 204.5(g)(2). But, if a petitioner employs at least 100 workers, USCIS has discretion to accept a statement from a financial officer of the business as proof of its ability to pay. *Id.*

On its labor certification, the Petitioner stated its employment of 50 workers. But, on the Form I-140, Petition for Alien Worker - which the company filed about 11 months after the labor certification application - the business indicated its employment of 200 people. After the Director's request for additional evidence (RFE) noted the differing employee numbers, the Petitioner provided a copy of its IRS Form W-3, Transmittal of Wage and Tax Statements, for 2020. The form indicates that, that year, the company issued 225 IRS Forms W-2, Wage and Tax Statements, to employees and paid wages totaling more than $5 million. Thus, a preponderance of the evidence demonstrates the company's employment of more than 100 people. Under 8 C.F.R. § 204.5(g)(2), we can therefore consider a financial officer's statement as proof of the Petitioner's ability to pay the proffered wage.

The Petitioner submitted a letter from its chief operating officer, confirming the company's job offer to the Beneficiary. But the document does not assert or discuss the business's ability to pay the proffered wage. The letter therefore does not establish the company's ability to pay the proffered wage.

The Petitioner submitted other letters asserting its ability to pay the proffered wage. But these letters identify their signatory as a co-founder and chairman of a separate company that owns the Petitioner, and thus are not from the Petitioner. A petitioner with at least 100 employees may demonstrate its ability to pay with a statement from one of its financial officers. *See* 8 C.F.R. § 204.5(g)(2) ("In the 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") (emphasis added). The record identifies the Petitioner and its purported owner as separate companies with different federal employer identification numbers. Thus, the record does not establish the signatory of the additional letters as a financial officer of the Petitioner. The letters therefore do not establish the company's ability to pay the proffered wage.

As the Petitioner has not provided a financial officer's statement regarding its ability to pay, the company must submit copies of annual reports, federal tax returns, or audited financial statements to demonstrate its ability to pay. *See* 8 C.F.R. § 204.5(g)(2). 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. 6 *USCIS Policy Manual* E.(4)(B)(1), www.uscis.gov/policy-manual. 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 annual amounts of net income or net current assets sufficient to pay any differences between the proffered wage and wages paid. *Id.* at E.(4)(B)(2). 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); 6 *USCIS Policy Manual* E.(4)(B)(3).[2]

The Petitioner stated that it did not begin employing the Beneficiary until 2022 and therefore did not submit any evidence of payments to him in 2020 or 2021. Thus, based solely on wages paid, the company has not demonstrated its ability to pay the proffered wage.

The Petitioner submitted copies of its IRS Forms 940, Employer's Annual Federal Unemployment (FUTA) Tax Returns, for 2020 and 2021. These tax returns indicate the company's total wage payments of $5,197,048.12 in 2020 and $5,678,462.79 in 2021. In determining ability to pay, USCIS may consider a petitioner's total wages paid as a factor. 6 *USCIS Policy Manual* E.(4)(B)(3). But the Petitioner's unemployment tax returns do not report the company's net income or net current asset amounts for the corresponding years. Thus, the returns do not constitute an acceptable form of required evidence under 8 C.F.R. § 204.5(g)(2) and - on their own - do not demonstrate the company's ability to pay the proffered wage in 2020 and 2021.

The Petitioner also submitted copies of its monthly bank statements for 2020. USCIS may consider bank account records "[i]n appropriate cases." 8 C.F.R. § 204.5(g)(2). But bank statements do not constitute an acceptable form of required evidence. *See id.* (requiring petitioners who are not relying on a financial officer's statement to submit "copies of annual reports, federal tax returns, or audited financial statements"). The bank records, alone, therefore do not demonstrate the company's ability to pay in 2020. Because the Petitioner has not provided regulatory required evidence, the company has not demonstrated its ability to pay the proffered wage in 2020 or 2021.

[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).

Also, as the Director found, USCIS records indicate the Petitioner's filing of 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 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 its other petitions that were pending or approved at the time of this petition's January 21, 2020 priority date. *See Patel v. Johnson*, 2 F. Supp. 3d 108, 124 (D. Mass. 2014) (upholding 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).[3]

The Director's RFE asked the Petitioner to provide information about the Form I-140 petitions it filed from 2020 to the RFE's February 3, 2022 issuance date. During that period, USCIS records show the company's filing of 15 Form I-140 petitions that the Agency approved.[4] The Petitioner did not provide the requested proffered wage of one of the 15 petitions.[5] But the company submitted copies of IRS Forms W-2 indicating that it paid three of the applicable beneficiaries a total of $23,949.98 in 2021. Subtracting that amount and including this petition's proffered wage, the record shows that the Petitioner has to demonstrate its ability to pay total combined proffered wages of at least $79,436 in 2020 and $362,540.02 in 2021. Because the company omitted regulatory required evidence for the applicable years, we cannot determine whether the company's ability to pay the amounts. The Petitioner therefore has not demonstrated its ability to pay the combined proffered wages.

As previously indicated, USCIS may consider other factors affecting a petitioner's ability to pay a proffered wage. *See Matter of Sonegawa*, 12 I&N Dec. at 615-15; 6 *USCIS Policy Manual* E.(4)(b)(3). But, because the Petitioner omitted regulatory required evidence of its ability to pay in 2020 and 2021, we need not consider additional factors. Even if other factors warranted a favorable ability-to-pay determination, the company's omission of regulatory required evidence would preclude such a conclusion. Except for a financial officer's statement from an employer of at least 100 workers, "to establish ability to pay, the petition must include copies of the petitioner's annual reports, federal tax returns, or audited financial statements for each available year from the priority date." 6 *USCIS Policy Manual* E.(4)(A).

On appeal, the Petitioner asserts that its total wage payments of more than $5 million in both 2020 and 2021 demonstrate its ability to pay the proffered wage. As previously indicated, USCIS usually can consider a petitioner's total wages paid as a factor in determining its ability to pay the proffered wage. But, because this Petitioner omitted regulatory required evidence for 2020 and 2021, we will not consider its total wages paid.

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[3] The Petitioner need not demonstrate its ability to pay the proffered wages of petitions that it withdrew or that USCIS rejected, denied, or revoked. *See generally* 6 *USCIS Policy Manual* E.(4)(C)(2). The company also need not demonstrate its ability to pay proffered wages before their petitions' corresponding priority dates or after the dates their corresponding beneficiaries became permanent residents. *Id.*

[4] USCIS records identify the 15 petitions by the following receipt numbers:

[5] USCIS records identify that petition by the receipt number

The Petitioner also states its inability to find a U.S. worker to fill the offered position and the wishes of the Beneficiary and his dependents to become permanent residents. But, despite these considerations, Department of Homeland Security regulations require petitioners to demonstrate their abilities to pay proffered wages. *See* 8 C.F.R. § 204.5(g)(2). Because the Petitioner did not demonstrate its ability to pay consistent with the regulation, we must affirm the petition's denial.

ORDER: The appeal is dismissed.