U.S. Citizenship and Immigration Services

Non-Precedent Decision of the Administrative Appeals Office

In Re: 29127554

Date: DEC. 21, 2023

Appeal of Texas Service Center Decision

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

The Petitioner, a convenience store, seeks to employ the Beneficiary as a janitor. It requests classification of the Beneficiary as an unskilled worker under the third preference immigrant classification. See Immigration and Nationality Act (the Act) section 203(b)(3)(A)(iii), 8 U.S.C. § 1153(b)(3)(A)(iii). This employment-based immigrant classification allows a U.S. employer to sponsor a noncitizen for lawful permanent resident status to work in a position that requires less than two years of training or experience.

The Director of the Texas Service Center revoked the approval of the petition, concluding that the record did not establish that the Petitioner had made a bona fide job offer available to U.S. workers. In addition, the Director determined that the Petitioner had not established its ability to pay the proffered wage to the Beneficiary continuing from the priority date forward. The matter is now before us on appeal. 8 C.F.R. § 103.3.

The Petitioner bears the burden of proof to demonstrate eligibility by a preponderance of the evidence. *Matter of Chawathe*, 25 I&N Dec. 369, 375-76 (AAO 2010). We review the questions in this matter de novo. *Matter of Christo's, Inc.*, 26 I&N Dec. 537, 537 n.2 (AAO 2015). Upon de novo review, we will dismiss the appeal.

I. LAW

USCIS may revoke its approval of an immigrant visa petition "at any time" for "good and sufficient cause." Section 205 of the Act, 8 U.S.C. § 1155. Revocations that do not meet the definition of an automatic revocation under 8 C.F.R. § 205.1 may be made only after issuing a notice of intent to revoke (NOIR) the approval of the petition. The NOIR provides the opportunity to submit evidence in support of the petition and in opposition to the alleged grounds for revocation. 8 C.F.R. § 205.2(b). A NOIR is issued for "good and sufficient cause" if the record of proceeding at the time of issuance would warrant the denial of the petition. *Matter of Estime*, 19 I&N Dec. 450, 451 (BIA 1987). Similarly, the approval of the petition is properly revoked if the record (including any response to the NOIR) warrants the denial of the petition. *Id.* at 452; *see also Matter of Ho*, 19 I&N Dec. 582, 590 (BIA 1988) (the realization that a petition was approved in error may be good and sufficient cause for revoking its approval). If the approval of the petition is revoked, the director must provide the

petitioner with a written decision that explains the specific reasons for the revocation. 8 C.F.R. § 205.2(c). Petitioners may appeal revocations on notice to the AAO. *See* 8 C.F.R. § 205.2(c).

Immigration as an unskilled worker usually follows a three-step process. First, the prospective employer must obtain a labor certification approval from the U.S. Department of Labor (DOL) to demonstrate that there are not sufficient U.S. workers who are able, willing, qualified, and available for the offered position. Section 212(a)(5) of the Act, 8 U.S.C. § 1182(a)(5).

Second, the employer must submit the approved labor certification with an immigrant visa petition to U.S. Citizenship and Immigration Services (USCIS). Section 204 of the Act, 8 U.S.C. § 1154. The immigrant visa petition must establish that the foreign worker qualifies for the offered position, that the foreign worker and the offered position are eligible for the requested immigrant visa category, and that the employer has the ability to pay the proffered wage. *See* 8 C.F.R. § 204.5. These requirements must be satisfied by the priority date of the immigrant visa petition. *See* 8 C.F.R. § 204.5(g)(2); *Matter of Wing's Tea House*, 16 I&N Dec. 158, 159 (Act. Reg'l Comm'r 1977). For petitions that require a labor certification, the priority date is the date on which the DOL accepted the labor certification application for processing. 8 C.F.R. § 204.5(d). In this case, the priority date is February 21, 2018.

Finally, if USCIS approves the immigrant visa petition, the foreign worker may apply for an immigrant visa abroad or, if eligible, for adjustment of status in the United States. Section 245 of the Act, 8 U.S.C. § 1255.

II. ANALYSIS

The Director initially approved the petition on April 18, 2019. Following the Beneficiary's immigrant visa interview, the Director issued a notice of intent to revoke (NOIR), providing the Petitioner an opportunity to respond to derogatory information. After receipt and review of the Petitioner's response, the Director revoked the approval of the petition. For the reasons discussed below, we will withdraw the Director's conclusion in part but dismiss the appeal.

A. Bona Fide Job Offer

The first issue on appeal concerns whether the Director properly revoked the approval of the petition for lack of a bona fide job offer. The Director based this determination upon the Beneficiary's admission that his uncle, the Petitioner's owner, offered him the position prior to advertising for the position as part of the labor certification process. He concluded that because of this offer, he questioned whether the Petitioner "made a good faith effort to recruit a United States worker."

Part C.9 of ETA Form 9089, Application for Permanent Employment Certification, asks the following:

> Is the employer a closely held corporation, partnership, or sole proprietorship in which the alien has an ownership interest, or is there a familial relationship between the owners, stockholders, partners, corporate officers, or incorporators, and the alien?

Here, the Petitioner responded in the affirmative, and thus did not attempt to misrepresent the familial relationship between its owner and the Beneficiary to DOL. The Director's revocation was based

upon questions about whether the Petitioner made the position available to U.S. workers. USCIS, however, lacks authority to determine the bona fides of a job opportunity. Congress authorized DOL - not USCIS - to determine the availability of an offered position to U.S. workers. *See* section 212(a)(5)(A)(i)(I) of the Act. "[D]eterminations vested by statute with one agency are not normally subject to horizontal review by a sister entity, absent congressional authorization to that effect." *Madany v. Smith*, 696 F.2d 1008, 1012 (D.C. Cir. 1983). Thus, DOL - not USCIS - must determine the bona fides of the Petitioner's job opportunity. The Director's conclusions and the Petitioner's arguments regarding the bona fides of the job opportunity exceed the scope of these proceedings. If the Petitioner seeks a determination of the offered position's availability to U.S. workers on the true facts, the company must contact DOL. *See Matter of Gen. Elec. Co.*, 2011-PER- 01818, *3 (BALCA Apr. 15, 2014) (stating that DOL has discretion to retroactively amend the contents of an approved labor certification application to allow an error's correction) (citation omitted).

For this reason, we withdraw the Director's conclusion on this issue.

B. Ability to Pay

As a second basis for revocation, the Director concluded that the Petitioner had not established its ability to pay the proffered wage to the Beneficiary. A petitioner must establish its ability to pay the proffered wage from the priority date of the petition until the beneficiary obtains lawful permanent residence. 8 C.F.R. § 204.5(g)(2). Evidence of ability to pay must generally include annual reports, federal tax returns, or audited financial statements. *Id.* If a petitioner employs 100 or more workers, USCIS may accept a statement from a financial officer attesting to the petitioner's ability to pay the proffered wage. *Id.* 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. *Id.*

In determining ability to pay, USCIS first determines whether the petitioner paid the beneficiary the full proffered wage each year from the priority date. If the petitioner did not pay the proffered wage in any given year, USCIS next determines whether the petitioner had sufficient net income or net current assets to pay the proffered wage (reduced by any wages paid to the beneficiary).

If net income and net current assets are insufficient, USCIS may consider other relevant factors, such as the number of years the petitioner has been in business, the size of its operations, the growth of its business over time, its number of employees, the occurrence of any uncharacteristic business expenditures or losses, its reputation within its industry, or whether a beneficiary will replace a current employee or outsourced service. *See Matter of Sonegawa*, 12 I&N Dec. 612, 614-15 (Reg'l Comm'r 1967).

Here, although the Director recited part of the analytical framework described above, he did not apply the entire analysis to the financial evidence submitted by the Petitioner. Instead, he reviewed the total salaries paid by the Petitioner as stated on its 2017 tax return, and determined that because the average salary paid to its existing workers was below the offered wage of $17,326 per year, it did not have the ability to pay that wage. As the Director's analysis was based upon financial evidence from before the priority date and did not follow the established analytical framework, we will employ the framework below to determine de novo the Petitioner's ability to pay the offered wage.

The Petitioner submitted its federal tax returns (on Form 1120-S, U.S. Income Tax Return for an S Corporation) for the years 2018 through 2021 in response to the Director's NOIR, and included its 2022 return on appeal. Those returns reflect the following figures for net income and net current assets:

Year	Net Income	Net Current Assets
2018	-$4,354	$36,182
2019	-$1,867	$20,675
2020	-$8,801	$5859
2021	-$1,254	$31, 254
2022	$23,829	$29,501

These figures show that the Petitioner earned sufficient net income in 2022 to establish its ability to pay the Beneficiary's wages, and had sufficient net current assets in 2018, 2019, and 2021. As the Petitioner was not able to demonstrate sufficient net income or net current assets in 2020, these returns do not establish its ability to pay the proffered wage from the priority date to the present. In addition, the Petitioner does not claim to have employed the Beneficiary at any time during this period.

As stated above, when net income and net current assets are insufficient, we may consider other relevant factors. On appeal, the Petitioner presents evidence that it had obtained a loan of $10,000 in May 2020, and resubmits a letter from the lender confirming that the loan amount had been forgiven under the Small Business Association's Paycheck Protection Program. It argues that this loan, and $5,306 in unpaid rent, were uncharacteristic business losses due to the COVID-19 pandemic which began in 2020, and only appeared as liabilities in that year. It also argues that if these two liabilities had not appeared as liabilities on its 2020 federal tax return, it could have showed the ability to pay the Beneficiary's wage as it did in the rest of the relevant period. Further, the Petitioner refers to evidence that the business was established in 2009.

Regarding the Petitioner's assertion that it could have established its ability to pay the Beneficiary's proffered wage had those liabilities not appeared on its 2020 federal tax return, it has not explained why those items should not be considered in calculating its net income and net current assets in that year. Both represented debts that negatively affected the Petitioner's ability to pay, and the amount of the loan was presumably used to pay the wages of its other employees, with any remaining cash already considered in calculating its net current assets. While the loan was forgiven the following year, thus removing it is a current liability on the tax return for 2021, this did not affect the Petitioner's ability to pay the proffered wage in 2020.

As for other relevant factors, we acknowledge that the Petitioner appears to have been operating since 2009, and but for 2020 has shown sufficient net current assets to pay the wages offered to the Beneficiary. We also acknowledge that the COVID-19 pandemic had a detrimental effect on many businesses. As noted by the Petitioner, unlike many businesses it was allowed to remain in operation since it was providing essential services. However, other factors considered in *Sonegawa* are not favorable in this case. As noted by the Director, the Petitioner employed either four or six employees at the time of filing, as shown in its Form I-140, Immigrant Petition for Alien Worker, and ETA Form 9089, Application for Permanent Employment Certification, respectively. And its total payroll

reflected on its tax returns declined from $48,000 in the first three years to $42,000 or less in the most recent three years. These figures do not reflect a growing business.

Another negative growth indicator reflected on the Petitioner's tax returns is its declining sales. In 2017, the business had $617,058, but this figure had already begun to decline prior to the COVID-19 pandemic, down to $580,162 in 2019. This decline continued through 2022, with the most recent tax returns showing $338,428 in sales. While the Petitioner was unable to show its ability to pay in only one of these years, the trend shown by these figures does not demonstrate that it has rebounded from that one year or that it is on track to reverse its decline.

We also note that the Petitioner did not submit evidence of its reputation within the convenience store industry, a factor that was considered at length in *Sonegawa*. *Sonegawa*, 12 I&N Dec. at 614-15 (noting that the petitioner in that case, a fashion designer, had had her work displayed in major fashion magazines.) And the Petitioner does not indicate that the Beneficiary is being hired to replace another worker. After review of the totality of the evidence, we conclude that the Petitioner has not established that it has the ability to pay the wage proffered to the Beneficiary as of the priority date and going forward.

III. CONCLUSION

Because USCIS lacks the authority to determine whether the Petitioner made a bona fide job offer, we withdraw that portion of the Director's decision. However, as the Petitioner has not established its ability to pay the wage offered to the Beneficiary, and is therefore ineligible for the requested classification, the approval of the petition remains revoked.

ORDER: The appeal is dismissed.