U.S. Citizenship and Immigration Services

Non-Precedent Decision of the Administrative Appeals Office

In Re: 24400871

Date: JAN. 20, 2023

Motion on Administrative Appeals Office Decision

Form I-140, Immigrant Petition for Skilled Worker

The Petitioner, a sole proprietor who operates packing and shipping franchises in California, seeks to permanently employ the Beneficiary as an administrative assistant. The proprietor requests the Beneficiary's classification under the third-preference, immigrant visa category for "skilled workers." *See* Immigration and Nationality Act (the Act) section 203(b)(3)(A)(i), 8 U.S.C. § 1153(b)(3)(A)(i).

The Director of the Nebraska Service Center denied the petition and dismissed the Petitioner's following two motions. The Director concluded that the proprietor did not demonstrate his required ability to pay the proffered wage of the offered position. On the same ground, we dismissed his appeal and his following 17 individual or combined motions to reopen or reconsider. *See In re: 18712508* (AAO Jul. 25, 2022).[1]

In this motion to reconsider, the Petitioner asserts that we:

- Engaged in "affirmative misconduct," entitling him to equitable estoppel;
- Erred by not considering Federal Poverty Guideline amounts;
- Improperly rejected evidence; and
- Disregarded factors demonstrating his ability to pay the proffered wage.

The Petitioner bears the burden of demonstrating eligibility for the requested benefit by a preponderance of evidence. *See Matter of Chawathe*, 25 I&N Dec. 369, 375 (AAO 2010). Upon review, we conclude that the Petitioner's arguments do not demonstrate his required continuous ability to pay the offered position's proffered wage. We will therefore dismiss the motion.

I. LAW

A motion to reconsider must establish that our most recent decision misapplied law or U.S. Citizenship and Immigration Services (USCIS) policy based on the record at the time of the decision's issuance.

[1] "Motions for reopening immigration proceedings are disfavored for the same reasons as are petitions for rehearing and motions for a new trial on the basis of newly discovered evidence." *INS v. Doherty*, 502 U.S. 314, 323 (1992) (citing *INS v. Abudu*, 485 U.S. 94 (1988)).

8 C.F.R. § 103.5(a)(3). We may grant a motion that meets these requirements and demonstrates eligibility for the requested benefit. 8 C.F.R. § 103.5(a)(4).

The Petitioner's motion includes evidence. On the Form I-290B, Notice of Appeal or Motion, however, the proprietor identified his filing as a "motion to reconsider." As we must decide a motion to reconsider based on the prior record, we will not consider the Petitioner's additional evidence.[2]

II. ANALYSIS

A petitioner must demonstrate their ability to pay a proffered wage, 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 with the year of a petition's priority date. If a petitioner did not annually pay a beneficiary the full proffered wage or did not pay the 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 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).[3]

The accompanying certification from the U.S. Department of Labor (DOL) states the proffered wage of the offered position of administrative assistant as $17.16 an hour, or $35,692.80 a year based on a 40-hour work week. The petition's priority date is December 8, 2006, 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).

We previously found sufficient evidence of the Petitioner's ability to pay the proffered wage from 2006 - the year of the petition's priority date - through 2009, and from 2013 through 2019. The Petitioner, however, has not demonstrated his continuing ability to pay from 2010 through 2012. As a sole proprietor, he must establish that his annual personal income or net current assets in 2010, 2011, and 2012 equal or exceed corresponding annual amounts combining the proffered wage and living expenses of him and his dependents. *E.g., Estrada-Hernandez v. Holder*, 108 F. Supp. 3d at 945.

A. Estoppel

The Petitioner asserts that, because we raised new issues in these proceedings, we improperly prevented him from addressing issues beyond those in our most recent decisions. Citing a precedent decision of the U.S. Circuit Court of Appeals for the Ninth Circuit, the Petitioner states: "Given its

[2] While a motion to reconsider must demonstrate that our most recent decision misapplied law or policy based on the record at the time of the decision, a motion to reopen must state new facts, supported by documentary evidence. 8 C.F.R. § 103.5(a)(2).

[3] 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); *Estrada-Hernandez v Holder*, 108 F. Supp. 3d 936, 945 (S.D. Cal. 2015).

affirmative misconduct and arbitrariness in raising novel issues, the AAO is equitably estopped from restricting the Petitioner from making arguments outside the scope of the 'prior decision.'" *See Villena v. INS*, 622 F.2d 1352, 1361 (9th Cir. 1980) (*en banc*) (estopping the immigration service from claiming that a noncitizen inadequately pursued an immigrant visa petition where the agency did not respond to the submission for nearly four years).

As our most recent decision indicates, however, a regulation limits a motion's scope to "the prior decision." 8 C.F.R. § 103.5(a)(1)(i). By restricting the Petitioner's arguments to the issues in our prior decisions, we merely followed the regulation. Contrary to the Petitioner's argument, complying with a regulation does not constitute affirmative misconduct. We may deny a petition that does not follow specific, legal requirements even if a service center did not identify all the grounds for denial. *Spencer Enterprises, Inc. v. United States*, 229 F. Supp. 2d 1025, 1043 (E.D. Cal. 2001), *aff'd*, 345 F.3d 683 (9th Cir. 1983). Thus, we may raise previously unaddressed issues.

Further, estoppel is an equitable form of relief that only courts may grant. *Chang v. United States*, 327 F.3d 911, 924 (9th Cir. 2003); *Matter of Hernandez-Puente*, 20 I&N Dec. 335, 338-39 (BIA 1991). As an administrative agency, we lack equitable powers. *Id.* Thus, the Petitioner cannot rely on estoppel in these proceedings.

B. The Federal Poverty Guideline

The Petitioner renews his argument that, in determining his ability to pay, we erred by not using Federal Poverty Guideline amounts. He notes that, rather than a sole proprietor's own estimates of their annual living expenses, USCIS' National SOP (Standards of Procedure) for Form I-140 petitions discuss using relevant amounts from the Federal Poverty Guideline.[4] He asserts that we must explain why we did not use poverty guideline amounts, which are less than his expense estimates for the relevant years.

The USCIS Policy Manual contains the Agency's "official policies." *USCIS Policy Manual*, "About the Policy Manual," https://www.uscis.gov/policy-manual. In contrast, the National SOP cited by the Petitioner is an older document that does not constitute official USCIS policy.[5] The policy manual does not require use of poverty guideline amounts when determining ability to pay. *See* 6 *USCIS Policy Manual* E(4)(A) (discussing "ability to pay the proffered wage"). Thus, contrary to the regulatory requirement for a motion to reconsider, the Petitioner cites no law or policy - nor are we

[4] The Federal Poverty Guideline is a simplified version of federal poverty thresholds used for determining financial eligibility for certain federal programs. Because the guideline does not reflect regional differences in costs of living, comparisons across the country may be misleading. U.S. Dep't of Housing & Human Servs., ASPE (Office of the Asst. Sec'y for Planning & Evaluation), "Frequently Asked Questions," https://aspe.hhs.gov/topics/poverty-economic-mobility/poverty-guidelines/frequently-asked-questions-related-poverty-guidelines-poverty.

[5] The USCIS website does not contain the SOP. An online copy of the document states: "Important: This SOP is not intended to be, and should not be taken as, an authoritative statement of the rules of decision for Form I-140 visa petition cases . . . Thus, nothing in this SOP creates any substantive or procedural right or benefit that is legally enforceable by any party against the United States or its agencies or officers or any other person."

aware of any - requiring us to determine a sole proprietor's ability to pay by using poverty guideline amounts.[6]

The Petitioner notes that an ability-to-pay finding is an essential part of USCIS' role in determining whether a job offer is "realistic." *See Matter of Great Wall*, 16 I&N Dec. 142, 145 (Reg'l Comm'r 1977). He therefore asserts that we should focus on his job offer rather than on the accuracy of his expense estimates.

But the accuracy of the Petitioner's expenses affects whether his job offer is realistic. The more accurate his expense estimates, the better the indication of whether he can realistically afford to permanently employ the Beneficiary in the offered position. In our experience, most petitioning sole proprietors can live above the Federal Poverty Guideline and choose to do so. Thus, petitioners' own estimates of their annual living expenses are usually more accurate than poverty guideline amounts and better indicators of whether job offers are realistic. Thus, the Petitioner has not demonstrated that our omission of Federal Poverty Guideline amounts from our ability-to-pay analysis misapplies law or policy.

C. Disregarded Evidence

The Petitioner contends that we improperly disregarded evidence of funds in an individual retirement account (IRA) that he could have used to pay the Beneficiary's proffered wage in 2010 and 2012. The record, however, shows that we applied the funds when finding sufficient evidence of his ability to pay in prior years.

The funds stem from the Petitioner's "401(k)" retirement account with a prior employer. *See* 26 U.S.C. § 401(k). He submitted evidence that he "rolled over" the 401(k) funds into an IRA in June 2008 and, about two years later, transferred the IRA to another financial manager.[7] In our June 8, 2015 decision on the Petitioner's combined motions to reopen and reconsider, we accepted the funds as part of the evidence of his ability to pay in 2007 and 2008. Thus, we considered the funds. But their payment towards the Beneficiary's wages in 2007 and 2008 would have exhausted them, barring their demonstration of the Petitioner's ability to pay in 2010 or 2012.

D. Sonegawa

The Petitioner contends that consideration of other factors demonstrates his continuous ability to pay the proffered wage. *See Matter of Sonegawa*, 12 I&N Dec. at 614-15. He states that he began his business in 2005 with one store and one employee, and now has three stores and 13 workers. Also, the record contains evidence that he has a good reputation with the franchiser of his stores.

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[6] As our prior decision states, the National SOP does not *require* USCIS to use Federal Poverty Guideline amounts when determining a sole proprietor's ability to pay a proffered wage. Rather, guideline amounts "*may be used* as a reference point for evaluating ability to pay." I-140 National SOP, 124, https://www.olender.pro/sites/default/files/Standard%20Operating%20Procedures%20%28SOP%29%20I-140%20-%20USCIS%20-%202007.pdf (emphasis added).

[7] Copies of statements submitted by the Petitioner show that, despite their management by different financial companies, his IRAs shared the same account number from 2008 through 2012.

But, unlike the store owner in *Sonegawa*, who initially could not demonstrate her ability to pay a proffered wage in one of 10 years, the Petitioner has not established his ability to pay for three, consecutive years - 2010, 2011, and 2012. The insufficient evidence of his ability to pay over multiple, consecutive years distinguishes his case from *Sonegawa*. *See Taiyang Foods Inc. v USCIS*, 444 Fed.Appx. 115, 115 (9th Cir. 2011) ("*Sonegawa* is applicable to this case only if failure . . . to pay the proffered wage was an anomaly amongst profitable years.") Thus, a totality of the circumstances under *Sonegawa* does not establish the Petitioner's continuous ability to pay the proffered wage.[8]

III. CONCLUSION

The motion does not demonstrate our misapplication of law or policy in finding insufficient evidence of the Petitioner's required continuous ability to pay the proffered wage. We will therefore affirm the appeal's dismissal.

ORDER: The motion to reconsider is dismissed.

[8] Our prior decisions have sufficiently addressed the motion's remaining claims about credit lines. The Petitioner does not advance any new arguments as to why those decisions misapplied law or policy. *See* 8 C.F.R. § 103.5(a)(3). We therefore decline to reconsider the motion's remaining arguments.