U.S. Citizenship and Immigration Services

Non-Precedent Decision of the Administrative Appeals Office

In Re: 19978862

Date: JAN. 31, 2022

Appeal of Texas Service Center Decision

Form I-140, Immigrant Petition for Other Worker

The Petitioner, a janitorial service company, seeks to employ the Beneficiary as a cleaning specialist. It requests classification of the Beneficiary as an unskilled worker under the third preference immigrant classification. 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 denied the petition, concluding that the record did not establish the Petitioner's ability to pay the proffered wage. 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.

Employment-based immigration generally follows a three-step process. First, a prospective employer must obtain certification from the U.S. Department of Labor (DOL). Section 212(a)(5)(A) of the Act, 8 U.S.C. § 1182(a)(5)(A). DOL approval signifies that insufficient U.S. workers are able, willing, qualified, and available for a position and that the employment of a noncitizen will not harm wages and working conditions of U.S. workers with similar jobs. *Id*. Second, an employer must submit the certified labor application with an immigrant visa petition for approval from U.S. Citizenship and Immigration Services (USCIS). Section 204(a)(1)(F) of the Act, 8 U.S.C. § 1154(a)(1)(F). Third, a noncitizen may apply for an immigrant visa abroad or, if eligible, adjustment of status in the United States. Section 245 of the Act, 8 U.S.C. § 1255.

In the present case, the Petitioner submitted a labor certification stating it would pay the Beneficiary an annual wage of $21,362. The regulation at 8 C.F.R. § 204.5(g)(2) states that a petitioner must establish that it has the continuing ability to pay the beneficiary the proffered wage from the priority

date[1] onward. Documentation of the ability to pay shall be in the form of copies of annual reports, federal tax returns, or audited financial statements, and in appropriate cases, additional financial evidence may be submitted. *Id.* In the present case, the record must demonstrate the Petitioner's continuing ability to pay the proffered wage starting on the priority date of November 13, 2019.

When 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).[2]

If a petitioner's net income and net current assets are insufficient, USCIS may, at its discretion, 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).

Because the Petitioner has never employed the Beneficiary or paid him a wage, the Director turned to the Petitioner's net income and net current assets to determine whether it had the ability to pay. The Petitioner's 2019 federal tax return indicates that its net income that year was $1,787 and does not claim any assets. The Director found that this was insufficient to pay the proffered wage and issued a request for evidence (RFE) requesting further documentation of the Petitioner's ability to pay.

In response to the RFE, the Petitioner cited *Sonegawa* and claimed that the totality of its circumstances is sufficient to demonstrate eligibility, providing an attorney letter stating that it is "a business with an established track record of growth" which has high payroll expenses due to the nature of its industry. The Petitioner further pointed to its $1,042,784 in gross income and $793,576 in payroll expenses in 2019 as proof that it could pay the Beneficiary's salary and provided its 2020 payroll journal to support this claim. Finally, the Petitioner provided documentation regarding the high rate of personnel turnover in the janitorial service industry, stating that the Beneficiary "could easily be said to replacing a prior employee who left of their own volition." The Director found that this was insufficient to demonstrate eligibility and denied the petition.

On appeal, the Petitioner provides an attorney letter reiterating its claim about the totality of its circumstances, pointing out that it has been in business since 2003, employed 108 people in a calendar year, and had uncharacteristic losses from 2020 to 2021 due to the COVID-19 pandemic. It also reiterates the claim that due to high employee turnover, the Beneficiary "could easily be said" to be replacing another employee. Upon review, the record is insufficient to establish the Petitioner's eligibility for the reasons below.

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[1] The "priority date" of a petition is the date the underlying labor certification is filed with DOL. 8 C.F.R. § 204.5(d). The Petitioner must establish that all eligibility requirements for the petition have been satisfied as of the priority date.

[2] Federal courts have upheld our 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); *Rizvi v. Dep't of Homeland Sec.*, 37 F. Supp. 3d 870, 883-84 (S.D. Tex. 2014); *aff'd*, 627 Fed. App'x 292, 294-95 (5th Cir. 2015); *Estrada-Hernandez v. Holder*, 108 F. Supp. 3d 936, 942-46 (S.D. Cal. 2015).

First, while we acknowledge that the Petitioner had been in business for over 15 years as of the priority date, the 2019 federal tax return only establishes its financial position at that point. Without financial evidence from other years, the record does not support the Petitioner's claim that it has a history of growth. The assertions of counsel do not constitute evidence. *Matter of Obaigbena*, 19 I&N Dec. 533, 534 n.2 (BIA 1988) (citing *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980)). Counsel's statements must be substantiated in the record with independent evidence, and the Petitioner has not done so here. Similarly, the Petitioner did not provide any documentation to support its claim that it suffered uncharacteristic losses due to the COVID-19 pandemic, and such losses would not apply to the Petitioner's financial position in the priority date year of 2019.

The record also does not support the Petitioner's assertion that its high level of turnover makes the Beneficiary's hiring akin to him replacing another worker. The 2020 payroll journal indicates that while the Petitioner had 108 people on payroll in that year, most of them worked few hours and only five earned at least as much as the proffered wage, two of whom were in managerial positions.[3] This does not support the claim that the Petitioner's position "could be said" to replace that of a departed worker. Furthermore, the Petitioner indicated in its Form I-140, Part 6, Question 7 that the offered position is a new position, rather than one that replaces a current worker. We therefore decline to consider the Beneficiary a replacement for another worker for purposes of determining the Petitioner's ability to pay.

The petitioner in *Sonegawa* established that USCIS should look beyond its net income and net current assets to determine its ability to pay because it was a successful and reputable business with a history of growth that had suffered uncharacteristic losses the year of its priority date due to the expense of moving locations. *Matter of Sonegawa*, 12 I&N Dec. at 614. While the Petitioner here has been in business for some time, it has not provided sufficient documentation showing its financial history, uncharacteristic losses, or other reasons why its net income or net current assets do not reflect its actual ability to pay the Beneficiary's wage. The totality of the circumstances therefore does not demonstrate the Petitioner's eligibility in this case.

Furthermore, USCIS records indicate that the Petitioner has filed over 40 Form I-140 petitions in the last three years. Where a petitioner has filed Form I-140 petitions for multiple beneficiaries, it must demonstrate that its job offer to each beneficiary is realistic and that it has the ability to pay the proffered wage to each beneficiary. *See* 8 C.F.R. § 204.5(g)(2); *see also Patel v. Johnson*, 2 F. Supp 3d 108, 124 (D. Mass. 2014) (upholding our denial of a petition where a petitioner did not demonstrate its ability to pay multiple beneficiaries). The Petitioner here must therefore establish its ability to pay not only the Beneficiary, but also the beneficiaries of the other petitions that were pending or approved as of the Beneficiary's priority date, as well as those filed after the priority date.[4] It has not done so here.

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[3] If an employee performs other kinds of work, such as managerial duties, then the Beneficiary could not replace them.

[4] The Petitioner's ability to pay the proffered wage of one of the other I-140 beneficiaries is not considered:

- After the other beneficiary obtains lawful permanent residence;
- If an I-140 petition filed on behalf of the other beneficiary has been withdrawn, revoked, or denied without a pending appeal or motion;
- Before the priority date of the I-140 petition filed on behalf of the other beneficiary; or
- In any year when the Petitioner has paid the Beneficiary a salary equal to or greater than the proffered wage.

Finally, the Petitioner must establish its ability to pay the proffered wage each year from the priority date onward using the evidence listed at 8 C.F.R. § 204.5(g)(2). The Petitioner has not submitted regulatorily-prescribed evidence for any year except 2019. In any future filing in this matter, the Petitioner must submit regulatorily-prescribed evidence for every year from the priority date onward, as well as documentation of its ability to pay its other relevant I-140 beneficiaries.

The Petitioner has not established its continuing ability to pay the proffered wage from the priority date onward. We will therefore affirm the petition's denial.

ORDER: The appeal is dismissed.