U.S. Citizenship and Immigration Services

Non-Precedent Decision of the Administrative Appeals Office

In Re: 26399921

Date: MAY 16, 2023

Appeal of Texas Service Center Decision

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

The Petitioner, the operator of a gelato and coffee bar franchise, seeks to permanently employ the Beneficiary as store manager. The company requests his 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). This category allows a prospective U.S. employer to sponsor a noncitizen for lawful permanent residence to work in a position requiring at least two years of training or experience. *Id.*

The Director of the Texas Service Center denied the petition. The Director concluded that the Petitioner did not demonstrate its required ability to pay the offered position's proffered wage and willfully misrepresented the Beneficiary's alleged ownership interest in the company. On appeal, the Petitioner contends that the Director mistakenly identified the Beneficiary as a company owner and that the record establishes its ability to pay the proffered wage.

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 record does not support the willful misrepresentation finding. But the Petitioner has not demonstrated its ability to pay the offered position's proffered wage. We will therefore dismiss the appeal.

I. LAW

Immigration as a skilled worker generally follows a three-step process. First, a prospective employer must obtain certification from the U.S. Department of Labor (DOL) that: a) there are insufficient U.S. workers able, willing, qualified, and available for an offered position; and b) 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)(B).

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. Willful Misrepresentation of a Material Fact

Misrepresentations are willful if they are "deliberately made with knowledge of their falsity." *Matters of Valdez*, 27 I&N Dec. 496, 498 (BIA 2018) (citations omitted). A misrepresentation is material when it has a "natural tendency to influence, or [be] capable of influencing, the decision of the decision-making body to which it was addressed." *Id.*

A willful misrepresentation of a material fact on an accompanying labor certification warrants a petition's denial. USCIS may approve a filing if "the facts stated in the petition are true." Section 204(b) of the Act. A petition includes any supporting evidence - including a labor certification. 8 C.F.R. § 103.2(b)(1). Thus, USCIS cannot approve a petition if the facts stated on an accompanying labor certification are untrue.

The Director issued a request for additional evidence (RFE), asking the Petitioner for - among other things - a copy of the Beneficiary's IRS Form W-2, Wage and Tax Statement, for 2021. In the Petitioner's RFE response, the company's president stated that the Beneficiary "is not able to receive a W2 from his business, as he is the member of the Limited Liability Company [LLC]." Under Texas law, "[t]he owners of an LLC are called 'members.'" Tex. Sec'y of State, "Selecting a Business Structure," www.sos.state.tx.us/corp/businessstructure.shtml.

The Director interpreted the RFE response to indicate the Beneficiary's membership in the *petitioning* LLC. On the labor certification, the Petitioner did not disclose any ownership interest of the Beneficiary in the company. Part C.9 of the labor certification asked the Petitioner: "Is the employer a closely held corporation, partnership, or sole proprietorship in which the alien has an ownership interest . . . ?" The company checked the box marked "No." A noncitizen's ownership interest in a closely held employer creates a presumption of an offered position's unavailability to U.S. workers. 20 C.F.R. § 656.17(l). Also, a business's officers and principals are presumed to be aware and informed of the organization and staff of their enterprise. *Matter of Silver Dragon Chinese Rest.*, 19 I&N Dec. 401, 404 (Comm'r 1986). Thus, the Director concluded that the Petitioner concealed the Beneficiary's alleged ownership interest in the company, willfully misrepresenting a material fact.

As the Petitioner contends, however, the record does not support the company's employment of the Beneficiary, his purported ownership interest in the company, or its willful misrepresentation of a material fact. As previously indicated, the Petitioner's RFE response stated that the Beneficiary "is not able to receive a W2 from *his* business, as he is the member of the Limited Liability Company" (emphasis added). By "his business," the Petitioner states that it meant the LLC that the Beneficiary owns and began operating in 2011, a separate business from the Petitioner. The Petitioner notes that online state government records identify the Beneficiary as the "Registered Agent" of the other LLC.

See Tex. Comptroller of Pub. Accts., "Taxable Entity Search," mycpa.cpa.state.tx.us/coa/. Additional evidence also indicates that the Beneficiary owns and works for the other LLC, including:

- The Beneficiary listed the other LLC as his current employer on the labor certification;
- A copy of his resume identifies him as the "Owner" of the other LLC;
- Copies of the Petitioner's federal income tax returns for 2020 and 2021 omit him as an owner of the Petitioner;
- When applying for a nonimmigrant treaty investor visa under section 101(a)(15)(E) of the Act, 8 U.S.C. § 1101(a)(15)(E), in 2011, the Beneficiary was buying a Texas LLC and planned to operate it; and
- USCIS has approved multiple nonimmigrant treaty investor visas by the other LLC for the Beneficiary, allowing him to manage and work for the LLC. *See, e.g.*, WAC 20 199 51137.

Thus, the record indicates that the Beneficiary does not work for the Petitioner or have an ownership interest in it, and that it did not willfully misrepresent his alleged ownership on the labor certification. We will therefore withdraw the Director's contrary findings.

B. Ability to Pay the Proffered Wage

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 lawful permanent residence. 8 C.F.R. § 204.5(g)(2). Evidence of ability to pay must generally include copies of a business's 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 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. If net income and net current assets are insufficient, USCIS may consider other factors affecting a petitioner's ability to pay a proffered wage. *Matter of Sonegawa,* 12 I&N Dec. 612, 614-15 (Reg'l Comm'r 1967).[1]

The Petitioner's labor certification states the proffered wage of the offered position of store manager as $69,000 a year. The petition's priority date is September 20, 2021, 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 did not submit evidence that it paid the Beneficiary wages. Thus, based solely on wages paid, the record does not establish the company's ability to pay the proffered wage.

[1] 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); *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 (5th Cir. 2015).

As previously indicated, the record contains a copy of the Petitioner's federal income tax return for 2021, the year of the petition's priority date. The return reflects net income of $5,476[2] and net current assets of $6,754. Neither amount equals nor exceeds the annual proffered wage of $69,000. Thus, as the Director's found, the Petitioner's federal income tax return does not demonstrate its ability to pay in 2021.

The Petitioner claimed its submission of a profit and loss statement listing the company's 2021 profits as $95,494, more than the annual proffered wage. But the record contained only a profit and loss statement for January 2022 through June of 2022, listing a profit of $55,604. The record therefore does not establish the Petitioner's ability to pay the proffered wage in 2021 based on its profits.

An affidavit from the Petitioner's president asserts that the company had $74,973.80 available to pay the proffered wage in 2021. He said that amount includes a "non-cash" equipment depreciation expense of $36,875 and his 2021 salary of $38,098.80, which he stated he would not have received had the Beneficiary begun working for the company that year.

USCIS, however, does not generally consider a depreciation expense to reflect available funding for a proffered wage. Rather, a depreciation expense represents a legitimate cost of doing business. *See, e.g., Rizvi*, 37 F. Supp. 3d at 880, *aff'd*, 627 Fed. App'x 292, (citations omitted) (finding USCIS' method of calculating net income "without consideration of depreciation" to be "well-established by judicial precedent"). Also, the record does not support the claimed $38,098.80 salary of the Petitioner's president in 2021. The company's tax return states that, as LLC members, the president and his spouse received guaranteed payments of $33,000 that year. *See Matter of Ho*, 19 I&N Dec. 582, 591 (BIA 1988) (requiring a petitioner to resolve inconsistencies with independent, objective evidence pointing to where the truth lies). Moreover, neither 2021 salary amount ($33,000 or $38,098.80) would equal or exceed the annual proffered wage of $69,000.

On appeal, the Petitioner submits claimed, audited profit and loss statements for 2021 and 2022. The statements reflect annual net income amounts exceeding the annual proffered wage in both years: $85,030 in 2021; and $71,309 in 2022.

The record, however, shows that the Director's 2022 RFE provided the Petitioner with sufficient notice and opportunity to submit the 2021 statement before the petition's denial. We therefore decline to accept the 2021 statement on appeal. *See Matter of Soriano*, 19 I&N Dec. 764, 766 (BIA 1988) (refusing to consider evidence on appeal where a petitioner received notice of the required evidence and a reasonable opportunity to provide it before a petition's denial).

Also, the Petitioner and the company that prepared the 2021 and 2022 profit and loss statements claim that it "audited" the statements "in accordance with Statements on Standards for Accounting and Audit

[2] The Director found that the Petitioner reported net income of -$27,524 in 2021. But Schedule K of Form 1065, U.S. Return of Partnership Income, indicates the company's receipt of additional income that year. *See* Internal Revenue Serv. (IRS), 2021 Instructions for Form 1065, 28, www.irs.gov/pub/irs-prior/i1065--2021.pdf (describing Schedule K as "a summary schedule of all the partners' shares of the partnership's income, credits, deductions, etc."). We therefore consider the net income amount listed on Schedule K to reflect the company's 2021 income more accurately. "Entities formed as LLCs that are classified as partnerships for federal income tax purposes have the same filing requirements as domestic partnerships." *Id.* at 4.

Services issued by the American Institute of Certified Public Accountants." But, according to the institute's guide to financial statement services, an audit report must "express[] an opinion on whether the financial statements are presented fairly, in all material aspects, in accordance with the applicable financial reporting framework." Am. Inst. of Certified Pub. Accountants, "Guide to Financial Statement Services: Compilation, Review and Audit," 7, us.aicpa.org/content/dam/aicpa/interestareas/privatecompaniespracticesection/qualityservicesdelivery/keepingup/downloadabledocuments/financial-statement-services-guide.pdf. The report on the Petitioner's finances in 2021 and 2022 does not expressly state an opinion on whether the financial statements are presented fairly, in all material aspects. Further, at one point, the report states that "we have *compiled* Profit and Loss statement for year ended December 21, 2021 and December 15, 2022." (emphasis added). Unlike for an audit, an accountant "does not obtain any assurance for a compilation because she is not required to verify the accuracy or completeness of the information provided or otherwise gather evidence for the purposes of expressing an audit opinion." Am. Inst. of Certified Pub. Accountants, "Guide to Financial Statement Services: Compilation, Review and Audit," *supra*, at 5. Thus, the record does not establish that the Petitioner's 2021 and 2022 financial statements are "audited," meeting the regulatory requirement. *See* 8 C.F.R. § 204.5(g)(2) (listing "audited" financial statements as acceptable evidence of ability to pay); *see generally* 6 *USCIS Policy Manual* E.(4)(A)(3) ("Audited financial statements are financial statements that have been examined under an acceptable standard by an accountant authorized by the jurisdiction to perform the audit.")

As previously indicated, we may consider other factors affecting the Petitioner's ability to pay the proffered wage under *Sonegawa*. We may consider: the number of years the company has been doing business; its number of employees; growth of its business; its reputation in its industry; the occurrence of uncharacteristic expenses or losses; or other factors affecting the Petitioner's ability to pay. *See Matter of Sonegawa*, 12 I&N Dec. at 614-15.

The record indicates the Petitioner's continuous business operations since 2015 and its employment of eight people. Copies of the company's federal income tax returns show that, from 2020 to 2021, its revenues nearly doubled, although the Petitioner admits that the COVID-19 pandemic especially hurt business in 2020. Unlike the petitioner in *Sonegawa*, however, the record does not demonstrate the Petitioner's possession of an outstanding business reputation in its industry or its incurrence of uncharacteristic expenses or losses that prevented its ability to pay the proffered wage in 2021. Thus, based on a totality of circumstances under *Sonegawa*, the Petitioner has not demonstrated its continuing ability to pay the proffered wage from the petition's priority date onward.

III. CONCLUSION

The record does not support the Petitioner's willful misrepresentation of the Beneficiary's alleged ownership interest in the company on the accompanying labor certification. The company, however, has not demonstrated its ability to pay the offered position's proffered wage.

ORDER: The appeal is dismissed.