U.S. Citizenship and Immigration Services

Non-Precedent Decision of the Administrative Appeals Office

MATTER OF S-S-N-, INC.

DATE: FEB. 8, 2017

APPEAL OF NEBRASKA SERVICE CENTER DECISION

PETITION: FORM I-140, IMMIGRANT PETITION FOR ALIEN WORKER

The Petitioner, an IT consulting, staffing, and software development business, seeks to permanently employ the Beneficiary in the United States as a datastage developer. It requests classification of the Beneficiary as a member of the professions holding an advanced degree under the second preference immigrant classification. *See* Immigration and Nationality Act (the Act) section 203(b)(2), 8 U.S.C. § 1153(b)(2). This employment-based immigrant classification allows a U.S. employer to sponsor a professional with an advanced degree for lawful permanent resident status.

The Director, Nebraska Service Center, denied the petition. The Director found that the job offer detailed on the labor certification was significantly different than the job being offered. Specifically, the location of the I-140 job offer and the location of the job offered on the labor certification were in different states. Therefore, the Director concluded that the petition was not supported by a valid labor certification and denied the petition. The Director dismissed the Petitioner's motion to reopen the petition and affirmed his previous decision.

The matter is now before us on appeal. Counsel asserts on appeal that the Director "mischaracterized the [P]etitioner's position," and that the current job offer is consistent with the initial job offer. Upon *de novo* review, we will dismiss the appeal.

I. BACKGROUND AND LAW

Employment-based immigration is generally a three-step process. First, an employer must obtain an approved labor certification from the U.S. Department of Labor (DOL). *See* section 212(a)(5)(A)(i) of the Act, 8 U.S.C. § 1182(a)(5)(A)(i). By approving the labor certification in this case, DOL certified that there are insufficient U.S. workers who are able, willing, qualified, and available for the offered position. Section 212(a)(5)(A)(i)(I) of the Act. The DOL also certified that the employment of a foreign national in the position will not adversely affect the wages and working conditions of domestic workers similarly employed. Section 212(a)(5)(A)(i)(II) of the Act. Next, the employer may file an immigrant visa petition with U.S. Citizenship and Immigration Services (USCIS). *See* section 204 of the Act, 8 U.S.C. § 1154. Finally, if USCIS approves the immigrant visa petition, the foreign national 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.

As required by statute, the I-140 petition filed in this matter is accompanied by an approved labor certification certified by the DOL.[1] The priority date of the petition based on the date that the labor certification was filed in this matter is June 25, 2015.[2]

The Department of Labor (DOL) regulation at 20 C.F.R. § 656.3 states:

> *Employer* means a person, association, firm, or a corporation which currently has a location within the United States to which U.S. workers may be referred for employment, and which proposes to employ a full-time worker at a place within the United States or the authorized representative of such a person, association, firm, or corporation.

At Part C of the labor certification, the Petitioner lists its headquarters as being in , Texas. The description of the offered position is set forth at Part H of the labor certification. In the instant case, the labor certification states that the primary worksite is the Petitioner's headquarters' address in , Texas, and "various unanticipated client locations in US [*sic*] which may require relocation." On the Form I-140 petition, the Petitioner listed its address as Ohio, and indicated that the Beneficiary would work in Ohio, and "various unanticipated client locations in US [*sic*] as assigned."

A labor certification for a specific job offer is valid only for the particular job opportunity, the alien for whom the certification was granted, and for the area of intended employment stated on the ETA Form 9089. 20 C.F.R. § 656.30(c)(2).[3]

The Director denied the petition as the Director noted that the labor certification had been certified for a job based out of , Texas, while the petition was filed to fill a job based out of , Ohio. Therefore, the Director concluded that the petition was not supported by a valid labor certification. The Director subsequently reopened the petition on the Petitioner's motion and again denied the petition, affirming his previous decision.

II. ANALYSIS

A. Labor Certification

On appeal, the Petitioner again asserts that the labor certification allows for the Beneficiary to work at multiple locations and that the labor certification would still allow for this even if the company moved to Ohio. While it is true that the Petitioner has consistently stated that the offered job may require the

[1] *See* Section 212(a)(5)(D) of the Act, 8 U.S.C. § 1182(a)(5)(D); *see also* 8 C.F.R. § 204.5(a)(2).

[2] The priority date is the date the DOL accepted the labor certification for processing. *See* 8 C.F.R. § 204.5(d).

[3] *See also Sunoco Energy Development Company*, 17 I&N Dec. 283 (Reg'l Comm'r 1979). In *Sunoco*, the Regional Commissioner stressed that Section. 212(a)(14), in part, requires a finding that there are not sufficient workers available "at the place where the alien is to perform such skilled or unskilled labor." The petitioner in *Sunoco* argued that the job description on the labor certification "did not specify that the employee would work exclusively on this project." *Id.*, at 284.

Beneficiary to relocate, or to work at unanticipated locations, at issue in this matter is the relocation of the company headquarters. In April and May of 2015 the Petitioner advertised a vacancy for a job based out of [redacted] Texas. Specifically, the advertisements state, "work location is [redacted] TX and various unanticipated locations in U.S. which may require relocation." The Petitioner filed the labor certification on June 25, 2015, for a job with the headquarters or main office and the primary worksite listed as [redacted] Texas. The Petitioner filed the Form I-140 petition on January 26, 2016, listing the Petitioner's address and the primary worksite for the Beneficiary as [redacted] Ohio. A January 21, 2016, letter from the company president accompanied the petition, explaining that the company's office had moved to [redacted] Ohio. A second May 5, 2016, letter from the Petitioner stated, "We moved our office to [redacted], Ohio . . . . This is now our Primary/Main office with any subsequent locations becoming secondary/Branch offices."

We issued a notice of intent to dismiss (NOID). We noted that the Petitioner claimed on the petition to employ 22 workers and that the lease for the company's office in Ohio reflected 276 square feet of space as of November 17, 2015. We requested that the Petitioner submit documentation regarding its Texas office, specifically, its current lease, and any other evidence to establish the location of the job offer, as well as evidence establishing the location and details concerning its remote work sites and establishing who would be the Beneficiary's actual employer at those sites. We further requested copies of state quarterly forms 941 listing the number of employees and employee names for individuals employed in both Texas and Ohio, for all quarters in 2015 and onward.

In response to our NOID, the Petitioner submitted a copy of the lease for its office in [redacted] Texas, that expired on December 15, 2015, prior to the January 2016 filing of the I-140 petition, and stated that it no longer maintains an office in [redacted] Texas. The Petitioner stated that "[n]one of the Petitioner's employees work at Petitioner's office location. All of the Petitioner's employees work at different client locations in US [*sic*] as assigned by [redacted]." The Petitioner submitted copies of its state quarterly forms 941 listing from 18-22 employees in [redacted] Texas, during the first three quarters of 2015, and from 23-26 employees in [redacted] Ohio, from the fourth quarter of 2015 through the second quarter of 2016.

The Petitioner asserts that the Field Memorandum No. 48-94 from Barbara Ann Farmer, Adm'r for Reg'l Mgmt., U.S. Dep't of Labor, to Reg'l Adm'rs, *Policy Guidance on Alien Labor Certification Issues* (May 16, 1994) (on file with the U.S. Dep't of Labor), is relevant to the issue of how to state the work location where there is more than one location. The Farmer memo suggests that the employer should indicate "that the alien will be working at various unanticipated locations throughout the U.S.,"[4] if all the work locations cannot be anticipated, but that the application should be filed with the "local Employment Service office having jurisdiction over the area in which the employer's main or

[4] Counsel also suggests that a recent Board of Alien Labor Certification Appeals (BALCA) case would lend persuasive guidance, while admitting that the case is not binding. He cites to in *Matter of Infosys, Ltd.*, 2016-PER-00074, 2016 WL 2851425 (BALCA May 12, 2016). In that case, BALCA considers the question of "relocation" and if it must be disclosed as it relates to the employee potentially having to relocate. It does not, however, discuss or consider the relocation of the employer's headquarters. Pertinently, BALCA notes that, "the employer is precluded from changing the application in any way . . . If the application is wrong, the employer must start over." *Id.*

headquarters office is located."[5] The Petitioner asserts that it followed the Farmer Memorandum, and, therefore, the labor certification would be valid.

Here, although the labor certification indicates that the Beneficiary would work at "various unanticipated client locations in US [*sic*] which may require relocation," the labor certification lists a Texas headquarters, was certified for a position in Texas, and advertised to the public as "will work at TX" and various other unanticipated locations and the Prevailing Wage Determination was calculated for the Texas, Metropolitan Area. DOL certified the position in consideration of the Petitioner's Texas labor market test that there were insufficient U.S. workers for that location based on the advertisements placed at, and wage obtained for, its headquarters location. By counsel's own admission, the Petitioner no longer maintains a Texas office to which the Beneficiary can report. Nothing in the labor certification or the Farmer Memorandum allows for a change or relocation of the headquarters location, which the Petitioner suggests should be accepted here. Requests for modification of labor certifications will not be accepted after filing. *See* 20 C.F.R. § 656.11. Therefore, the current job offer is not in compliance with the terms of the labor certification and the petition is not supported by a labor certification valid for the current job offer.

B. Ability to Pay the Proffered Wage

Beyond the decision of the Director, the Petitioner has also not established its continuing ability to pay the proffered wage as of the priority date based on the evidence in the record. *See* 8 C.F.R. § 204.5(g)(2).

According to USCIS records, the Petitioner has filed I-140 petitions on behalf of 27 other beneficiaries. Some of these petitions were filed since the priority date of the current petition, and a number were filed before the priority date, but remained pending as those beneficiaries had not yet adjusted status.

When a petitioner has filed immigrant petitions for multiple beneficiaries, USCIS will consider the petitioner's overall financial ability to pay the proffered wages of all its I-140 beneficiaries who have not yet adjusted to lawful permanent resident status because these other filings may have an impact on the petitioner's continuing ability to pay the instant beneficiary. If USCIS were to focus exclusively on individual cases without regard to petitions for other I-140 beneficiaries, it is possible that the petitioner's yearly net income or net current assets could exceed the proffered wage, or the shortfall in wages paid, of that individual beneficiary; however, the net income and net current assets may be insufficient to cover the proffered wages, or shortfall in wages paid, of all the Petitioner's sponsored I-140 beneficiaries.[6] Thus, comparing figures of net income and net current assets with

[5] The current DOL regulations concerning labor certifications went into effect on March 28, 2005. The new regulations are referred to by the DOL by the acronym PERM. *See* 69 Fed. Reg. 77325, 77326 (Dec. 27, 2004). With the PERM system, filing is consolidated at a National Processing Center rather than with local Employment Service offices. *See* 20 C.F.R. §656.

[6] Allowing a petitioner to utilize its net income or net current figures in isolation for each sponsored beneficiary could also negatively affect U.S. workers. Although arising in a different jurisdiction, we find a decision from the U.S. Federal Court of Appeals for the Fifth Circuit to be instructive where it held that the purpose of the ability to pay regulation of 8 C.F.R. § 204.5(g)(2) is consistent with the labor certification process under section 212(a)(5)(A)(i) of the Act to ensure

the proffered wage of the instant Beneficiary alone may present an inaccurate view of the Petitioner's overall ability to pay that wage when other I-140 beneficiaries have also been sponsored. Accordingly, USCIS may consider a petitioner's ability to pay the proffered wages of all its I-140 beneficiaries as of the instant priority date and continuing onward until the beneficiary or other I-140 beneficiaries obtain lawful permanent resident status.[7]

In our NOID, we requested evidence as to whether any of the Petitioner's other petitions have been withdrawn, revoked, or denied, and information as to whether any of the other beneficiaries have obtained lawful permanent residence by or before the June 25, 2015, priority date of the current petition. For any of these other petitions that were still pending on the priority date in this case, or any petitions that had been approved but where the beneficiary had not yet adjusted to permanent resident status by June 25, 2015, we requested evidence to document the priority date, proffered wage, and wages paid to each beneficiary since the priority date in this matter of June 25, 2015.

In response to the NOID, the Petitioner submits copies of labor certifications relating to nine of the beneficiaries on whose behalf it had filed immigrant petitions. The Petitioner also submits copies of IRS Form W-2 Wage and Tax Statements for eight of those beneficiaries. The Petitioner submits a chart showing three beneficiaries (including the current Beneficiary) who it identifies as the I-140 Beneficiaries "who were paid less salary than the offered wages." However, the labor certifications and Forms W-2 that the Petitioner provided reveal that it paid three of the beneficiaries at least their full proffered wage in 2015, and that the Petitioner did not pay the full proffered wage to the other five beneficiaries, as reflected below:

Beneficiary	Proffered wage	2015 wages paid	2015 difference
C. K. P.	$ 105,000.00	$ 61,973.00	$ 13,027.00
S. R.	$ 110,406.00	$ 102,015.00	$ 8,391.00
V. B.	$ 85,426.00	$ 8,800.00	$ 76,626.00
L. N.	$ 100,000.00	Not submitted	$ 100,000.00
A. K. S.	$ 102,794.00	$ 9,105.20	$ 93,688.80

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that U.S. workers will not be harmed. *Rizvi v. Dep't of Homeland Sec. ex rel. Johnson*, No. 14-20569, 2015 WL 5711445, at *2 (5th Cir. Sept. 30, 2015). Specifically, in upholding the ability to pay regulation of 8 C.F.R. § 204.5(g)(2), the Fifth Circuit stated:

> Viewed in the proper context, [the ability to pay regulation at 8 C.F.R. § 204.5(g)(2)] serves purposes in accord with the statutory duty to grant immigrant status only where the interests of American workers will not be harmed; showing the employer's ongoing ability to pay the prevailing wage is one reasonable way to fulfill this goal.

2015 WL 5711445, at *2. Similarly, the ability of USCIS to consider a petitioner's ability to pay the proffered wages of its other I-140 beneficiaries is a reasonable way to determine that it has the continuing ability to pay the beneficiary's proffered wage which inherently protects U.S. workers.

[7] *See also Patel v. Johnson*, 2 F.Supp.3d 108, 124 (D. Mass. 2014) (affirming our revocation of a petition's approval where the record did not establish the petitioner's ability to pay the beneficiaries of multiple, pending petitions).

Regarding the petitions filed on behalf of the other 18 beneficiaries, the Petitioner did not submit documentation regarding the priority date, proffered wage or wages paid to each beneficiary, whether any of the other petitions have been withdrawn, revoked, or denied, or whether any of the other beneficiaries have obtained lawful permanent.[8] Regardless, the differences between proffered wages and wages paid to these five beneficiaries alone totals $291,732.80 in 2015. In addition, the Petitioner has not established that it paid the current Beneficiary the full proffered wage. The difference between the $95,077 wage proffered to the current Beneficiary and the $91,510.67 she was paid in 2015 is $3,566.33. The Petitioner's 2015 federal income tax return reflects net income of $62,515 and net current assets of $157,656, which would not cover the deficit in the Petitioner's total proffered wages due to all the beneficiaries of its petitions. As the Petitioner cannot establish that it can pay all of its sponsored workers, we are unable to conclude that the Petitioner can pay the proffered wage to the instant beneficiary.

USCIS may also consider the overall magnitude of a petitioner's business activities in its determination of the petitioner's ability to pay the proffered wage. *See Matter of Sonegawa*, 12 I&N Dec. 612 (Reg'l Comm'r 1967). USCIS may consider such factors as the petitioner's number of years in business, the petitioner's business established historical growth, the overall number of employees, the occurrence of any uncharacteristic business expenditures or losses, the petitioner's reputation within its industry, whether the beneficiary is replacing a former employee or an outsourced service, or any other evidence that USCIS deems relevant to the petitioner's ability to pay the proffered wage.

Here, unlike the petitioner in *Sonegawa*, the Petitioner has not established its reputation within its industry, nor has it claimed the occurrence of any uncharacteristic business expenditures or losses during the years in question. While the petitioner in *Sonegawa* established the historical growth of its business, the current Petitioner has submitted tax records for only 2 years from which we are unable to determine any historical patterns of growth. In consideration of all of its sponsored workers, the Petitioner would not be able to demonstrate its ability to pay the difference between the proffered wage and the wages actually paid to the Beneficiary by means of its net income or net current assets from the priority date. Thus, assessing the totality of the circumstances in this individual case, we conclude that the Petitioner has not established that it had the continuing ability to pay the proffered wages to the Beneficiary and all of its sponsored beneficiaries.

[8] The Petitioner submitted an IRS Form W-2 showing that beneficiary T.B. was paid $90,069 in 2015. However, the Petitioner did not submit any other evidence to establish wage proffered to this beneficiary or to establish the status of the petition.

III. CONCLUSION

The appeal will be dismissed for the above stated reasons. In visa petition proceedings, it is the petitioner's burden to establish eligibility for the immigration benefit sought. Section 291 of the Act, 8 U.S.C. § 1361. The Petitioner has not met that burden.

ORDER: The appeal is dismissed.

Cite as *Matter of S-S-N-, Inc.*, ID#11968 (AAO Feb. 8, 2017)