U.S. Citizenship and Immigration Services

Non-Precedent Decision of the Administrative Appeals Office

MATTER OF A-H-C-P-, INC.

DATE: FEB. 1, 2019

APPEAL OF TEXAS SERVICE CENTER DECISION

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

The Petitioner, a health care staffing business, seeks to employ the Beneficiary as a registered nurse. 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 of the Texas Service Center denied the petition on the ground that the Petitioner did not establish that it had the continuing ability to pay the proffered wage to this Beneficiary, as well as the proffered wages of the beneficiaries of all its other pending or approved Form I-140 petitions, from the priority date of this petition onward. The Petitioner filed a motion to reopen, which the Director denied.

On appeal the Petitioner asserts that the evidence of record establishes its ability to pay the proffered wage.

Upon *de novo* review, we will dismiss the appeal on the ability to pay grounds discussed by the Director, and on the additional ground that the Beneficiary does not meet the minimum requirements of the ETA Form 9089, Application for Permanent Employment Certification, to qualify for the job offered.

I. LAW

This petition is for a Schedule A occupation. A Schedule A occupation is one codified at 20 C.F.R. § 656.5(a) for which the DOL has determined that there are not sufficient U.S. workers who are able, willing, qualified and available and that the wages and working conditions of similarly employed U.S. workers will not be adversely affected by the employment of aliens in such occupations. The current list of Schedule A occupations includes professional nurses. *Id.* Petitions for Schedule A occupations do not require the petitioner to test the labor market and obtain a certified ETA Form 9089 from the DOL prior to filing the petition with USCIS. Instead, the petition is filed directly with USCIS with an uncertified ETA Form 9089 in duplicate. *See* 8 C.F.R. §§ 204.5(a)(2) and (k)(4); *see also* 20 C.F.R. § 656.15.

II. ANALYSIS

At issue on appeal is whether the Petitioner has established its ability to pay the proffered wages of this Beneficiary and the beneficiaries of all its other pending and approved Form I-140 petitions, and whether Petitioner has established that the Beneficiary meets the minimum requirements to qualify for the job offered.

A. Petitioner's Ability to Pay the Proffered Wage

The regulation at 8 C.F.R. § 204.5(g)(2) provides, in pertinent part, as follows:

> Any petition filed by or for an employment-based immigrant which requires an offer of employment must be accompanied by evidence that the prospective United States employer has the ability to pay the proffered wage. The petitioner must demonstrate this ability at the time the priority date[1] is established and continuing until the beneficiary obtains lawful permanent residence. Evidence of this ability shall be either in the form of copies of annual reports, federal tax returns, or audited financial statements.

In this case the proffered wage of the job offered is $73,000 per year. As of the appeal's filing, required evidence of the Petitioner's ability to pay in 2017 was not yet available. We therefore consider the Petitioner's ability to pay only in 2016, the year of the priority date.

In determining a petitioner's ability to pay the proffered wage, USCIS first examines whether the beneficiary was employed and paid by the petitioner during the period following the priority date. In this case, the record indicates that the Petitioner hired the Beneficiary sometime during 2016. An earnings statement from November 2016 shows that in the preceding two-week pay period the Beneficiary received gross pay of $2,954.97. Thus, the Petitioner has not established its continuing ability to pay the Beneficiary's proffered wage of $73,000 per year based on wages paid to the Beneficiary in 2016. Nevertheless, we credit the Petitioner's payments to the Beneficiary. Therefore, the Petitioner need only demonstrate its ability to pay the difference between the annual proffered wage and the documented amount it paid the Beneficiary in 2016, or $70,045.03.

If a petitioner has not employed the beneficiary and paid her (or him) a salary equal to or above the proffered wage from the priority date onward, USCIS will examine the net income and net current assets figures recorded on the petitioner's federal income tax return(s), annual report(s), or audited financial statements(s). If either of these figures, net income or net current assets, equals or exceeds

[1] The "priority date" of the petition is ordinarily the date the underlying labor certification application was filed with the DOL. *See* 8 C.F.R. § 204.5(d). In this case, since the petition did not require a certified ETA Form 9089, the" priority date" is the date the petition (with the completed but uncertified ETA Form 9089) was filed with USCIS. That date was April 11, 2016.

the proffered wage or the difference between the proffered wage and the amount paid to the beneficiary in a given year, the petitioner would be considered able to pay the proffered wage during that year.

The record includes a copy of the Petitioner's federal income tax return, Form 1120, U.S. Corporation Income Tax Return, for the year 2016.[2] As recorded on the return, the Petitioner had net income of $45,901 and net current assets of $266,579.[3] While the Petitioner's net current assets exceeded the Beneficiary's proffered wage in 2016, the Petitioner has filed multiple Form I-140, Immigrant Petition for Alien Worker, petitions. 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 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). Thus, the Petitioner must establish its ability to pay this Beneficiary as well as the beneficiaries of the other I-140 petitions that were pending or approved as of, or filed after, the priority date of the current petition.[4]

To determine whether a petitioner has established its ability to pay multiple I-140 beneficiaries, for each year at issue, we (a) calculate any shortfall between the proffered wage and any actual wage paid to the primary beneficiary and the other beneficiaries; (b) add these amounts together to calculate the total wage deficiency; and (c) review the petitioner's tax return, audited financial statement, or annual report to see whether its net income or net current assets exceed the total wage deficiency. In a request for evidence (RFE) issued to the Petitioner the Director requested the submission of (1) a list of all Form I-140 petitions filed since the priority date, the proffered wage of each beneficiary, and each beneficiary's priority date; (2) evidence of wages paid to each beneficiary; and (3) information on the status or each petition (pending, approved, or denied) and whether any beneficiary obtained lawful permanent residence (LPR). In response to the RFE the Petitioner submitted a list of 78 Form I-140 petitions that the Petitioner had filed through the date of the RFE response, identifying the beneficiary, priority date and offered wage of each petition. The list indicated that five beneficiaries had obtained LPR status, that one petition had been denied, and that one beneficiary had resigned.[5] No current status was indicated for the other 71 petitions, and the Petitioner did not indicate that wages had been paid to any of these 71 beneficiaries.[6]

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[2] The record also includes a copy of the Petitioner's Form 1120, U.S. Corporation Income Tax Return, for the year 2015, which preceded the priority date of April 11, 2016.

[3] Net income was the figure on page 1, line 28, of the Form 1120, while net current assets was the difference between of the current assets entered on lines 1-6 of Schedule L and the current liabilities entered on lines 16-18 of Schedule L.

[4] A 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; or
- before the priority date of the I-140 petition filed on behalf of the other beneficiary.

[5] The Petitioner must submit evidence that it withdrew this I-140 petition. In the absence of a withdrawal, the wages owed to this beneficiary will be considered as part of the Petitioner's overall wage burden.

[6] USCIS records show that the Petitioner has continued to file I-140 petitions since the date of the RFE response. In any future filings, the petitioner must submit the required information for each petition that was pending or approved as of

The Director found that the proffered wages for the 71 beneficiaries of pending and approved Form I-140 petitions averaged approximately $60,000, that their combined proffered wages totaled more than $4 million, and that the Petitioner had not established its ability to pay the combined proffered wages of these beneficiaries through its net income or net current assets.

On appeal the Petitioner has not supplemented the record with any additional evidence of wages paid to any of the 71 other beneficiaries of its pending or approved Form I-140 petitions. Rather, the Petitioner argues that it has shown growth and submits a compilation report from a certified public accountant (CPA) with financial statements consisting of a balance sheet as of June 30, 2017, and statements of income, changes in stockholders' equity, and cash flows for the six-month period of January 1 to June 30, 2017. As stated in the compilation report, however, the CPA did not audit the financial statements. The CPA further stated that "[m]anagement has elected to omit substantially all of the disclosure required by accounting principles generally accepted in the United States of America." Thus, the financial statements do not comply with regulation at 8 C.F.R. § 204.5(g)(2), which makes clear that when a petitioner relies on financial statements to demonstrate its ability to pay the proffered wage, those financial statements must be audited. An audit is conducted in accordance with generally accepted auditing standards to obtain a reasonable assurance that the financial statements of the business are free of material misstatements. The unaudited financial statements submitted by the Petitioner, therefore, do not meet this standard and are not persuasive evidence of the Petitioner's overall financial condition or its ability to pay the proffered wage(s) in this proceeding.

USCIS may also consider the totality of the Petitioner's circumstances, including the overall magnitude of its business activities, in determining the Petitioner's ability to pay the proffered wage. *See Matter of Sonegawa*, 12 I&N Dec. 612. USCIS may, at its discretion, consider evidence relevant to the petitioner's financial ability that falls outside of its net income and net current assets. We may consider such factors as the number of years the petitioner has been doing business, the established historical growth of the petitioner's business, the petitioner's reputation within its industry, the overall number of employees, whether the beneficiary is replacing a former employee or an outsourced service, the amount of compensation paid to officers, the occurrence of any uncharacteristic business expenditures or losses, and any other evidence that USCIS deems relevant to the petitioner's ability to pay the proffered wage.

The Petitioner states that it was incorporated in November 2012 and had 23 employees at the time the petition was filed in April 2016. The federal income tax returns in the record show that it had gross receipts of a little over $2 million in both 2015 and 2016, and expended a little over $1 million on salaries and wages in those two years. While the Petitioner's net current assets exceeded the Beneficiary's proffered wage in 2015 and 2016, as previously discussed, they were far less than needed to cover the Petitioner's total proffered wage obligations to its other beneficiaries of I-140 petitions in 2015 and 2016. According to its unaudited statement of income for the six months

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the priority date of this petition, or filed thereafter.

ending on June 30, 2017, the Petitioner had net income of $422,510 in the first half of 2017. As previously discussed, however, this financial statement has little probative value since it was not audited, as required by 8 C.F.R. § 204.5(g)(2). Even if it were audited, this half-year net income figure would be far short of the figure needed to cover the Petitioner's total proffered wage obligation of more than $4 million to all of its Form I-140 beneficiaries. Moreover, unlike the petitioner in *Sonegawa*, the record does not indicate this Petitioner's continuous operations for more than 10 years, its incurrence of uncharacteristic losses or expenses, or its possession of an outstanding reputation in its industry. The record also does not indicate the Beneficiary's replacement of a current employee or outsourced service. Also unlike *Sonegawa*, the Petitioner in this case must demonstrate its ability to pay combined proffered wages of multiple petitions. Thus, the totality of the Petitioner's circumstances does not establish its ability to pay the proffered wage.

For all of the reasons discussed above, the Petitioner has not established its continuing ability to pay the proffered wage of the instant Beneficiary and all the other beneficiaries of its Form I-140 petitions from the priority date of April 11, 2016, up to the present.

B. Minimum Requirements of the ETA Form 9089

A beneficiary must meet all of the education, training, experience, and other requirements of the ETA Form 9089 as of the petition's priority date. *See Matter of Wing's Tea House*, 16 I&N Dec. 158, 159 (Acting Reg'l Comm'r 1977).[7]

In this case the ETA Form 9089 states in section H (boxes H.4, H.4-B, H.6, H.6-A, H.8, H.8-A, H.8-C, and H.9) that the minimum educational and experience requirements for the proffered position of registered nurse are a bachelor's or foreign equivalent degree in nursing and five years of experience in the job offered or, alternatively, a master's or foreign equivalent degree in nursing with no experience required. The ETA Form 9089 does not indicate that experience in an alternate occupation is acceptable. (Box H.10, which asks that specific question, is blank.)

Section J of the of the ETA Form 9089 asserts that the Beneficiary meets the alternative minimum requirement by virtue of a master's equivalent degree in nursing from the [redacted] (*sic*) in [redacted] Philippines, completed in 2008. We do not agree. The record includes copies of the Beneficiary's diploma and transcripts showing that she earned a baccalaureate degree from [redacted] College of Nursing and Health Sciences, on April 12, 2008, after completing approximately five years of coursework, the first three semesters of which were at [redacted] The Petitioner has submitted an educational evaluation from [redacted] which concludes that the Beneficiary's Philippine degree is equivalent to a four-year bachelor's degree in nursing from an accredited U.S. college or university. The

[7] In order to determine what a job opportunity requires, we must examine "the language of the labor certification job requirements." *Madany v. Smith*, 696 F.2d 1008, 1015 (D.C. Cir. 1983). USCIS must examine the certified job offer exactly as it is completed by the prospective employer. *See Rosedale Linden Park Company v. Smith*, 595 F. Supp. 829, 833 (D.D.C. 1984). Our interpretation of the job's requirements must involve reading and applying the plain language of the alien employment certification application form. *Id.* at 834.

evaluation accords with the credential advice of the Educational Database for Global Education (EDGE), created by the American Association of Collegiate Registrars and Admissions Officers (AACRAO),[8] which states that a bachelor of science degree in the Philippines requires four to five years of post-secondary study and is comparable to a bachelor's degree in the United States. http://edge.aacrao.org/country/credential/bachelor-of-artssciencescommerce-etc?cid= (last visited January 28, 2019).[9] Accordingly, we find that the Beneficiary's degree from is equivalent to a U.S. bachelor's degree, not a U.S. master's degree. Therefore, the Beneficiary does not meet the ETA Form 9089's alternate requirement of a master's degree equivalent in nursing.

As for the primary requirement of a bachelor's degree and five years of qualifying experience, we find that the Beneficiary meets the educational component thereof by virtue of her baccalaureate degree in nursing from However, the record does not establish that she has five years of post-baccalaureate experience in the job offered, which is the other component of the ETA Form 9089's primary requirements. Although the job title of the proffered position, as entered at box H.3 of the ETA Form 9089, is registered nurse, the job duties are described as follows in box H.11:

> Supervise RNs, LPNs and CANs in the provision of general nursing care to patients. Set up work schedules for subordinates, to ensure quality of care, and ensure that nursing procedures are correctly conducted. Demonstrate correct use of medical equipment (monitoring equipment, EKG, IV-drip, etc.) to newly hired nursing staff. Serve as resource person to the nursing team, in the planning, evaluation, and execution of nursing care. Oversee the conduct of emergency nursing procedures as required by patient symptomology.
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> From time to time, assume floor duties to cover for absent nurses, in addition to overseeing the nursing team.

Thus, the duties of the proffered position are primarily supervisory. Only "from time to time" does the job entail the provision of direct nursing services, and only when other nurses are absent. Section K of the ETA Form 9089, which covers the Beneficiary's work experience, lists three prior jobs for the Beneficiary between 2008 and 2016 – with in Philippines (October 2008 to October 2011), with in Philippines

[8] AACRAO is described on its website as "a nonprofit, voluntary, professional association of more than 11,000 higher education admissions and registration professionals who represent more than 2,600 institutions and agencies in the United States and in over 40 countries." http://www.aacrao.org/who-we-are (last visited Jan. 28, 2019). According to its registration page, EDGE is "a valuable resource for evaluating educational credentials earned in foreign systems." http://edge.aacrao.org/resources/AACRAO-International/about-edge (last visited Jan. 28, 2019).

[9] Federal courts have found EDGE to be a reliable, peer-reviewed source of foreign educational equivalencies. *See, e.g., Viraj, LLC v. U.S. Att'y Gen.*, 578 Fed. Appx. 907, 910 (11th Cir. 2014) (holding that USCIS may discount submitted opinion letters and educational evaluations submitted if they differ from reports in EDGE, which is "a respected source of information"). In *Confluence Int'l, Inc. v. Holder*, No. 08-2665, 2009 WL 825793 (D. Minn. Mar. 27, 2009), the court determined that we provided a rational explanation for our reliance on information provided by AACRAO to support our decision.

(October 2011 to March 2015), and with [redacted] in [redacted] Guam (April 2015 to April 2016). The job title in each case was registered nurse, but unlike the proffered position in this proceeding, the job duties described in the employment verification letters from those three entities indicate that the jobs involved providing nursing services directly to patients and did not include any supervisory functions. While the proffered position in this case is also called a registered nurse, its duties differ considerably from the Beneficiary's previous jobs as a registered nurse. In determining whether employment experience meets the requirements of the ETA Form 9089, we look to the duties of the job, not its title. *See Matter of Symbioun Technologies, Inc.*, 2010-PER-01422 (BALCA 2011).[10]

As previously indicated, box H.10 of the ETA Form 9089 does not allow the experience requirement for the proffered position to be met by work in an alternate occupation. As specified in box H.6 and H.6-A, the experience requirement must be met with at least 60 months of experience in the job offered. As described in box H.11, the job offered has mostly supervisory duties. Since none of the Beneficiary's prior nursing positions involved any supervisory duties, we conclude that the Beneficiary does not have five years of qualifying experience under the terms of the ETA Form 9089. As such, the Beneficiary does not satisfy the experience component of the ETA Form 9089's primary requirement (a bachelor's degree and five years of qualifying experience) to qualify for the job offered.

Based on the foregoing analysis, we find that the Beneficiary does not meet the minimum requirements of the job offered.

III. CONCLUSION

The Petitioner has not established its continuing ability to pay the proffered wage from the priority date of April 11, 2016, up to the present. In addition, the Petitioner has not established that the Beneficiary meets the minimum requirements to qualify for the job offered.

ORDER: The appeal is dismissed.

Cite as *Matter of A-H-C-P-, Inc.*, ID# 1162305 (AAO Feb. 1, 2019)

[10] While we are not bound by decisions issued by the Board of Alien Labor Certification Appeals (BALCA), we may nonetheless take note of the reasoning in such decisions when considering issues that arise in the employment-based immigrant visa process.