U.S. Citizenship and Immigration Services

Non-Precedent Decision of the Administrative Appeals Office

MATTER OF C-H-H-S-, INC.

DATE: JAN. 2, 2019

MOTION ON ADMINISTRATIVE APPEALS OFFICE DECISION

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

The Petitioner, a home healthcare provider, seeks to employ the Beneficiary as an operations manager. It requests classification of the Beneficiary as a member of the professions holding an advanced degree under the second preference immigrant category. Immigration and Nationality Act (the Act) section 203(b)(2), 8 U.S.C. § 1153(b)(2). This employment-based "EB-2" 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 its ability to pay the proffered wage. A motion to reopen was denied by the Director. The Petitioner filed an appeal, which we dismissed. Like the Director, we found that the Petitioner did not establish its continuing ability to pay the proffered wage from the priority date onward. We denied six subsequent motions to reopen and reconsider on the same ground.

The case is now before us on the Petitioner's seventh motion to reopen and motion to reconsider. Upon review, we will deny the combined motion.

I. LAW

A motion to reopen must state new facts and be supported by documentary evidence. 8 C.F.R. § 103.5(a)(2). A motion to reconsider must establish that our decision was based on an incorrect application of law or policy and that the decision was incorrect based on the evidence in the record of proceedings at the time of the decision. 8 C.F.R. § 103.5(a)(3). A motion to reconsider must be supported by a pertinent precedent or adopted decision, a statutory or regulatory provision, or a statement of U.S. Citizenship and Immigration Services (USCIS) or Department of Homeland Security (DHS) policy. We may grant a motion that satisfies these requirements and demonstrates eligibility for the requested immigration benefit.

II. ANALYSIS

In order to be eligible for the benefit sought, a petitioner must establish that it has the ability to pay the proffered wage, as stated on the labor certification, from the priority date of the petition until the

beneficiary obtains lawful permanent residence. 8 C.F.R. § 204.5(g)(2). In this case, the proffered wage is $156,520 per year, and the priority date is September 22, 2010.

A petitioner may establish its ability to pay the proffered wage if it has employed the beneficiary at a salary equal to or greater than the proffered wage. A petitioner may also establish its ability to pay the proffered wage if it has net income or net current assets in a given year that equal or exceed the proffered wage or the difference between the proffered wage and wages paid to the beneficiary, provided it can pay the proffered wages of its other employment-based immigrant petitions as well. *See Patel v. Johnson*, 2 F. Supp. 3d 108, 124 (D. Mass. 2014). If the above factors are insufficient to establish a petitioner's ability to pay the proffered wage, USCIS may consider other factors in a "totality of the circumstances" analysis. *See Matter of Sonegawa*, 12 I&N Dec. 612, 614-15 (Reg'l Comm'r 1967).

In our previous decision we noted our prior findings that the wages paid to the Beneficiary were less than the proffered wage in each of the years 2010-2016, and that the Petitioner did not establish its continuing ability to pay the proffered wage of this Beneficiary and the proffered wages all of its other I-140 beneficiaries based on either its net income or its net current assets in any year from the priority date of September 22, 2010, onward. We found that the new facts alleged by the Petitioner and the supporting documentation did not overcome our prior findings, and did not establish the Petitioner's continuing ability to pay its proffered wage obligations to all of its I-140 beneficiaries based on the totality of its circumstances, as in *Matter of Sonegawa*, 12 I&N Dec. 612. We also found that the Petitioner presented no grounds for reconsideration of our previous decision.

A. Motion to Reopen

With its current motion the Petitioner submits a letter confirming its job offer to the Beneficiary, stating that the Beneficiary's salary is presently $72,800, and stating that it intends to pay the full proffered wage when the Beneficiary receives lawful permanent resident (LPR) status. The Petitioner points out that it is not required to pay the full proffered wage before LPR status is granted to the Beneficiary. While that statement is true, the Petitioner is required by the regulation at 8 C.F.R. § 204.5(g)(2) to establish its *ability* to pay the proffered wage as of the petition's priority date, which in this case is September 22, 2010, and continuing until the Beneficiary acquires LPR. The letter claims that the Petitioner is financially sound and capable of meeting its financial obligations, but it does not provide any new evidence of the Petitioner's ability to pay the proffered wages of the instant Beneficiary and all its other I-140 beneficiaries from the priority date of this petition onward.

The Petitioner also submits copies of a Kinnser Report for 2018, along with previously submitted Kinnser Reports for 2015-2017 listing net revenues. These documents do not appear to derive from audited financial statements, and thus are not one of the three types of evidence identified in the regulation at 8 C.F.R. § 204.5(g)(2) – annual reports, or federal tax returns, or audited financial statements – required to establish the Petitioner's ability to pay the proffered wage. Moreover, as discussed in our previous decision the net revenue figures have limited usefulness without evidence

of the Petitioner's total proffered wage obligation and total wages paid to its other I-140 beneficiaries in those years. Despite past requests, the Petitioner has not submitted complete information about its other I-140 beneficiaries. The regulation at 8 C.F.R. § 103.2(b)(14) states that the failure to submit requested evidence that precludes a material line of inquiry shall be grounds for denying a petition. In any event, the Kinnser reports are insufficient, either by themselves or in combination with the Petitioner's federal income tax returns, to establish the Petitioner's ability to pay all of its proffered wage obligations in the years 2015-2018.

Finally, the Petitioner submits an amended federal income tax return, Form 1120X, for 2010. The amended return, however, accompanies the same version of the Form 1120, U.S. Corporation Income Tax Return, that was submitted with one of the Petitioner's previous motions to reopen and reconsider. That tax return recorded a net loss of $6,801 and net current assets of $15,456 in 2010. The wages paid to the Beneficiary that year amounted to $48,305.50, as recorded on a previously submitted Form W-2, Wage and Tax Statement, for 2010. Thus, the amended return does not change our previous determination that the Petitioner has not established its ability to pay the full proffered wage of $156,520 in 2010 based on either net income or net current assets in combination with the wages paid to the Beneficiary that year.

For the reasons discussed above, the new evidence submitted in support of the current motion does not establish the Petitioner's continuing ability to pay the proffered wage from the priority date onward.

B. Motion to Reconsider

The Petitioner asserts that our previous decision was erroneous because an employer is not required to pay the proffered wage before LPR status is granted to the prospective employee, citing 20 C.F.R. § 656.20(c)(2). While the Petitioner is correct insofar as it is not required to pay the full proffered wage until the Beneficiary obtains LPR status, the regulation at 8 C.F.R. § 204.5(g)(2) requires the Petitioner to establish its *ability* to pay the proffered wage as of the petition's priority date, and continuing until the Beneficiary acquires LPR status. Therefore, we were not incorrect in denying the motion to reopen based on our finding that the Petitioner did not establish its continuing ability to pay the proffered wage from September 22, 2010, onward.

The Petitioner once again asserts that we should consider the totality of its circumstances in determining its ability to pay the proffered wage, citing *Matter of Sonegawa*, 12 I&N Dec. 612 (Reg'l Comm'r 1967). We have already applied *Sonegawa* criteria in analyzing the Petitioner's ability to pay in previous decisions. The Petitioner has not identified any erroneous application of the *Sonegawa* criteria in those decisions.

Thus, the Petitioner has not submitted any pertinent precedent decisions, statutes, regulations, or USCIS or DHS policy statements to show that our previous decision was based on an incorrect application of law or policy. Accordingly, the Petitioner has presented no basis for us to reconsider

our previous finding that the Petitioner has not established its continuing ability to pay the proffered wage from the priority date onward.

III. CONCLUSION

The Petitioner has not shown proper cause for reopening or reconsideration, nor established eligibility for the benefit sought.

ORDER: The motion to reopen is denied.

FURTHER ORDER: The motion to reconsider is denied.

Cite as *Matter of C-H-H-S-, Inc.*, ID# 2380437 (AAO Jan. 2, 2019)