



**U.S. Citizenship
and Immigration
Services**

**Non-Precedent Decision of the
Administrative Appeals Office**

In Re: 24443233

Date: AUG. 23, 2023

Appeal of Nebraska Service Center Decision

Form I-140, Immigrant Petition for Alien Workers (Advanced Degree)

The Petitioner seeks to employ the Beneficiary as a computer software engineer. It requests classification of the Beneficiary as a member of the professions holding an advanced degree under the second preference immigrant classification. 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 Nebraska Service Center denied the petition, concluding that the record did not establish that the Beneficiary sought employment by the Petitioner at the time of the decision. 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 withdraw the Director's decision and remand the matter for entry of a new decision consistent with the following analysis.

The Petitioner filed the Form I-140, Immigrant Petition for Alien Worker, in 2015. Thereafter, another employer filed a Form I-140 on behalf of the Beneficiary, which USCIS approved in 2019 while this petition was still pending. After sending the Petitioner a notice of intent to deny (NOID), the Director denied the petition, noting that USCIS approved a Form I-140 filed on behalf of the Beneficiary by another employer, and concluding that the "instant petition is considered contradictory and no longer endorsed." The Beneficiary has not yet obtained legal permanent residence.

On appeal, the Petitioner asserts that the Beneficiary may have more than one I-140 petition filed on their behalf. We agree that the approval of another employer's Form I-140 on behalf of the Beneficiary does not preclude consideration of eligibility in this case. Therefore, we will withdraw the Director's decision. However, because the record does not establish that the Petitioner had the continuing ability to pay the proffered wage from the priority date onward, we will remand the matter to the Director. See 8 C.F.R. § 204.5(g)(2).

The regulation at 8 C.F.R. § 204.5(g)(2) states in pertinent part:

Ability of prospective employer to pay wage. 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 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 determining a petitioner's ability to pay, we first examine whether it paid a beneficiary the full proffered wage each year from a petition's priority date. If a petitioner did not pay a beneficiary the full proffered wage, we next examine whether it had sufficient annual amounts of net income or net current assets to pay the difference between the proffered wage and the wages paid, if any. If a petitioner's net income or net current assets are insufficient, we may also consider other evidence of its ability to pay the proffered wage.¹

The priority date in this matter is December 1, 2015, the date on which the U.S. Department of Labor (DOL) received the DOL ETA Form 9089, Application for Permanent Employment Certification, for processing. On the ETA Form 9089, the annual proffered wage is listed as \$90,709.

In a NOID, the Director acknowledged that the record contains evidence that the Petitioner has paid employees; however, the Director found that the record does not establish that the Petitioner paid the Beneficiary any wages after the priority date. The Director did not address the Petitioner's net income, net current assets, or any other evidence of ability to pay in either the NOID or the decision. Additionally, the Director did not address the factors discussed in *Matter of Sonagawa*, 12 I&N Dec. 612, 614-15 (Reg'l Comm'r 1967), which permits U.S. Citizenship and Immigration Services (USCIS) to consider the totality of the circumstances affecting a petitioner's ability to pay the proffered wage. Furthermore, if the Petitioner has filed Form I-140 petitions for multiple beneficiaries that were pending or approved as of, or filed after, the priority date of the current petition, 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).²

The record does not contain copies of the Petitioner's annual tax returns for the year of the priority date or the years following the priority date. Instead, it contains copies of the Petitioner's quarterly

¹ 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); *Tongatapu Woodcraft Haw., Ltd. v. Feldman*, 736 F.2d 1305, 1309 (9th Cir. 1984); *Estrada-Hernandez v. Holder*, 108 F. Supp. 3d 936, 942-946 (S.D. Cal. 2015); *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, 294-295 (5th Cir. 2015).

² 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 or denied without a pending appeal or motion, or its approval has been revoked; or
- Before the priority date of the I-140 petition filed on behalf of the other beneficiary.

tax returns for the four quarters of 2016 and the first two quarters of 2017; however, the quarterly tax returns do not establish the Petitioner's net income or net current assets during the relevant periods. The record contains the Petitioner's unaudited financial statements prepared "for the ten months ending October 31, 2015" and for the periods of "Jan-Dec 2016" and "Jan-May 2017." However, the record does not establish the Petitioner's ability to pay the Beneficiary the proffered wage at the time the priority date is established, as required by 8 C.F.R. § 204.5(g)(2).

Based on the foregoing, we will withdraw the Director's conclusion that the petition was "no longer endorsed," and we will remand the matter for the entry of a new decision. The Director may request any additional evidence considered pertinent to the new determination regarding the Petitioner's ability to pay the Beneficiary the proffered wage from the priority date and continuing until the Beneficiary obtains lawful permanent residence, and any other issue. As such, we express no opinion regarding the ultimate resolution of this case on remand.

ORDER: The Director's decision is withdrawn. The matter is remanded for the entry of a new decision consistent with the foregoing analysis.