



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

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

In Re: 24227633

Date: FEB. 16, 2023

Appeal of Texas Service Center Decision

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

The Petitioner, an information technology consulting business, seeks to employ the Beneficiary as a 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 Texas Service Center denied the petition, concluding that the record did not establish that the Petitioner had maintained the continuing ability to pay the proffered wage. 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.

Employment-based immigration generally follows a three-step process. To permanently fill a position in the United States with a foreign worker, a prospective employer must first obtain certification from the U.S. Department of Labor (DOL). Section 212(a)(5)(A) of the Act, 8 U.S.C. § 1182(a)(5)(A). DOL approval signifies that insufficient U.S. workers are able, willing, qualified, and available for a position, and that the employment of a noncitizen will not harm wages and working conditions of U.S. workers with similar jobs. *Id.*

Second, an employer must submit the certified labor application 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). Third, if USCIS approves the petition, a foreign national may apply for an immigrant visa abroad or, if eligible, adjustment of status in the United States. Section 245 of the Act, 8 U.S.C. § 1255.

The sole issue on appeal is whether the Petitioner has established its continuing ability to pay the proffered wage. The regulation at 8 C.F.R. § 204.5(g)(2) states that a petitioner must establish that it

has the continuing ability to pay the proffered wage from the priority date<sup>1</sup> onward. Documentation of the ability to pay shall be in the form of copies of annual reports, federal tax returns, or audited financial statements, and in appropriate cases, additional financial evidence may be submitted. *Id.* If a petitioner has 100 or more employees, USCIS may accept a statement from a financial officer of the petitioner which establishes its ability to pay the proffered wage. *Id.* In the present case, the Petitioner submitted a labor certification stating it would pay the Beneficiary an annual wage of \$96,595 and must establish its continuing ability to pay this wage starting on the priority date of February 7, 2020.

Additionally, USCIS records indicate that the Petitioner has filed dozens of additional Form I-140 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* 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). The Petitioner here must therefore establish its ability to pay not only the Beneficiary, but also the beneficiaries of the other petitions that were pending or approved as of the Beneficiary's priority date, as well as those filed after the priority date.<sup>2</sup>

When determining ability to pay, USCIS first determines whether the petitioner paid the beneficiary the full proffered wage each year from the priority date. If the petitioner did not pay the proffered wage in any given year, USCIS next determines whether the petitioner had sufficient net income or net current assets to pay the proffered wage (reduced by any wages paid to the beneficiary).<sup>3</sup>

If a petitioner's net income and net current assets are insufficient, USCIS may, at its discretion, consider other relevant factors, such as the number of years the petitioner has been in business, the growth of its business over time, its number of employees, the occurrence of any uncharacteristic business expenditures or losses, its reputation within its industry, or whether a beneficiary will replace a current employee or outsourced service. *See Matter of Sonagawa*, 12 I&N Dec. 612, 614-15 (Reg'l Comm'r 1967).

In the present case, the Petitioner initially indicated that its 2020 financial documentation was not yet available and instead submitted its federal tax returns for 2017, 2018, and 2019, as well as unaudited financial statements from 2018. The Petitioner also submitted a copy of the Beneficiary's 2019 Form W-2, Wage and Tax Statement, and one of the Beneficiary's pay statements from 2020. The 2019

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<sup>1</sup> The "priority date" of a petition is the date the underlying labor certification is filed with DOL. 8 C.F.R. § 204.5(d). The Petitioner must establish that all eligibility requirements for the petition have been satisfied as of the priority date.

<sup>2</sup> 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, revoked, or denied without a pending appeal or motion;
- Before the priority date of the I-140 petition filed on behalf of the other beneficiary; or
- In any year when the Petitioner has paid the Beneficiary a salary equal to or greater than the proffered wage.

<sup>3</sup> 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); *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, 294-95 (5th Cir. 2015); *Estrada-Hernandez v. Holder*, 108 F. Supp. 3d 936, 942-46 (S.D. Cal. 2015).

Form W-2 showed that the Petitioner had paid the Beneficiary \$80,393.42, or \$16,201.58 less than the proffered wage (wage deficiency).

Because the Petitioner had not paid the Beneficiary the proffered wage, the Director turned to the Petitioner's net income and net current assets to determine whether either was sufficient to pay the wage deficiency. However, because the initial evidence did not address the Petitioner's other I-140 beneficiaries, there was insufficient information in the record to establish whether its net income or net current assets would satisfy all of the Petitioner's wage obligations, including the Beneficiary's wage deficiency. The Director issued a request for evidence (RFE) requesting the Petitioner's 2018 annual report, audited financial statements, or federal tax return, as well as documentation regarding the petition status and proffered wages of all of the Forms I-140 that the Petitioner filed in 2020.

In response, the Petitioner provided a list of Forms I-140 it had filed in 2020 and 2021, documentation of wages paid to those beneficiaries, unaudited financial statements for 2020 and 2021, and the Beneficiary's 2020 Form W-2. The Beneficiary's 2020 Form W-2 showed a wage of \$84,196.13, for a wage deficiency of \$12,398.87. The Director denied the petition, finding that the Petitioner had not paid the Beneficiary the full proffered wage and that neither its net income nor its net current assets were sufficient to pay its combined wage obligations for all of its Form I-140 beneficiaries.

On appeal, the Petitioner asserts that it does have the ability to pay all of its wage obligations and submits various forms of financial evidence in support of this claim, including its federal tax return for the priority date year of 2020, audited financial statements for part of 2021, and a letter from a financial officer regarding its ability to pay. Because the RFE did not request regulatory-required evidence of the Petitioner's ability to pay from 2020 onward, we will remand the matter so the Director can review this evidence in the first instance.

We note that the Director's 2021 RFE only requested wage evidence regarding beneficiaries from Forms I-140 that the Petitioner filed in 2020. USCIS records indicate, and the Petitioner's responses confirm, that as of the 2020 priority date it was also responsible for the wages attached to approved and pending petitions that had been filed in earlier years. Furthermore, because the Petitioner must establish its continuing ability to pay the proffered wage through the time of adjudication, the record should also include information about pertinent I-140 beneficiaries from petitions filed after the priority date. The Director did not request, and the Petitioner did not provide, a complete list of all the I-140 beneficiaries whose wages are pertinent to establishing the Petitioner's ability to pay.

USCIS may, at its discretion, accept a letter from a financial officer of a petitioner that employs at least 100 workers in lieu of the primary financial evidence listed at 8 CF.R. § 204.5(g)(2) if that letter establishes the petitioner's ability to pay. The letter provided by the Petitioner on appeal does not do so. The Petitioner's responses to the RFE and on appeal omit at least twenty I-140 beneficiaries who had a valid priority date and an approved I-140 as of the priority date year of 2020.<sup>4</sup> The Petitioner's list also does not account for at least ten beneficiaries whose Forms I-140 were filed between its prior

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<sup>4</sup> For example, USCIS records identify relevant petitions including but not limited to receipt numbers [REDACTED]

RFE response and the date it filed this appeal.<sup>5</sup> Furthermore, the Petitioner's calculations incorrectly include the wages of a beneficiary who was paid more than their proffered wage in 2020. Wages paid to one beneficiary cannot offset deficiencies in the pay of other beneficiaries.

In order to demonstrate its ability to pay the Beneficiary and the other beneficiaries, the Petitioner should perform the following calculation for each year at issue: (a) calculate any shortfall between the proffered wages and any actual wages paid to the Beneficiary and its other beneficiaries, (b) add these shortfall amounts together to calculate the total wage deficiency, and (c) demonstrate that its net income or net current assets exceed the total wage deficiency. *See Patel v. Johnson*, 2 F. Supp. 3d at 124.

On remand, the Director should issue a new RFE requesting a list of all of the Petitioner's Forms I-140 that were approved or pending as of February 7, 2020, as well as every I-140 it has filed since that date. The list should include the receipt numbers, beneficiary names, priority dates, and proffered wages for each petition. It should also indicate the status of each petition and the date of any status change (i.e., pending, approved, denied, withdrawn, revoked, on appeal or motion, beneficiary obtained legal permanent residence).

The RFE should also request evidence of wages paid to each beneficiary on the list, starting on that beneficiary's priority date or on February 7, 2020, whichever comes later, and continuing until that other beneficiary obtains legal permanent resident status. The Petitioner does not need to provide this information for any beneficiary whose petition has been denied, withdrawn, or revoked and does not have a pending appeal or motion. The Director may also request any additional documentation deemed relevant to determine the Petitioner's continuing ability to pay the proffered wage. *See* 8 C.F.R. § 204.5(g)(2); *Matter of Sonogawa*, 12 I&N Dec. 612.

Upon receiving a timely response, the Director should determine whether the Petitioner has maintained the continuing ability to pay the combined proffered wages of all of its applicable beneficiaries from the petition priority date onward.

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

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<sup>5</sup> For example, USCIS records identify relevant petitions including but not limited to receipt numbers [REDACTED] [REDACTED] USCIS records also identify a significant number of I-140s that were filed after the date of the current appeal, which the Petitioner must also account for on remand.