



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

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

In Re: 27156714

Date: JULY 24, 2023

Appeal of Nebraska Service Center Decision

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

The Petitioner seeks an EB-2 immigrant visa to classify the Beneficiary, a physical therapist, as a member of the professions holding an advanced degree and who is employed in a Schedule A, Group I occupation. Immigration and Nationality Act (the Act) section 203(b)(2), 8 U.S.C. § 1153(b)(2); section 212(a)(5)(A)(i) of the Act, 8 U.S.C. § 1182(a)(5)(A)(i); 20 C.F.R. § 656.5(a). The U.S. Department of Labor (DOL) has determined that there are not sufficient U.S. professional nurses and physical therapists who are able, willing, qualified, and available for these occupations, and that the wages and working conditions of similarly employed U.S. workers will not be adversely affected by the employment of noncitizens. 20 C.F.R. § 656.5.

The Director of the Nebraska Service Center denied the petition, concluding that the record did not establish that the Petitioner had the continuing ability to pay the proffered wage from the priority date. 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 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. See *Matter of Sonogawa*, 12 I&N Dec. 612, 614-15 (Reg'l Comm'r 1967).¹

The priority date in this matter is June 24, 2020, the date on which the petition was filed. See 8 C.F.R. § 204.5(d). On the ETA Form 9089, Application for Permanent Employment Certification, the annual proffered wage is listed as \$82,000.

In a request for evidence (RFE), the Director informed the Petitioner that the record at that time, which in relevant part contained earnings statements for the Beneficiary for the periods of February 22, 2020, through March 20, 2020, did not establish the Petitioner's ability to pay the Beneficiary the proffered wage as of the priority date of June 24, 2020. Accordingly, the Director requested additional evidence of the Petitioner's ability to pay the Beneficiary the proffered wage.

The Petitioner's response to the Director's RFE contained, in relevant part, a photograph of an undated wage and tax statement, purporting that the Petitioner paid the Beneficiary \$50,636 during some unspecified period. In the decision, the Director noted that the wage and tax statement does not identify the period during which the Petitioner purported to pay the Beneficiary the referenced wage. The Director further noted that the amount the wage and tax statement purports the Petitioner paid the Beneficiary "is short of the wage" listed on the ETA Form 9089. The Director also noted that the Petitioner did not demonstrate why the types of evidence, enumerated at 8 C.F.R. § 204.5(g)(2), are inapplicable, inaccurate, or unavailable in this case. In light of the foregoing, the Director found that the record did not establish the Petitioner's continuing ability to pay the Beneficiary the proffered wage from the priority date.

On appeal, the Petitioner submits copies of IRS Forms 1120S, U.S. Income Tax Return for an S Corporation, for calendar years 2018 and 2019. The Petitioner also asserts on appeal that it is "more than able to pay the pre-offered [sic] salary."

First, the record does not establish that the Petitioner has paid the Beneficiary the full proffered wage each year from the priority date. Next, the record does not contain copies of the Petitioner's annual report, federal tax return, or audited financial statements for the year of the priority date in order to determine 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 that year. Instead, as noted, it contains copies of the Petitioner's federal tax returns for the two calendar years preceding the priority date. We note, however, that the Petitioner's 2020 federal tax return may yet to have been available at the time of adjudication of the petition in February 2021.

Therefore, 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

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).

continuing ability to pay the Beneficiary the proffered wage from the priority date in 2020 onward, 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.