



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

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

In Re: 19629841

Date: AUG. 1, 2022

Appeal of Texas Service Center Decision

Form I-140, Immigrant Petition for Professional

The Petitioner, an information technology consulting services provider, seeks to employ the Beneficiary as a technical architect. It requests classification of the Beneficiary as a professional under the third preference immigrant classification. Immigration and Nationality Act (the Act), section 203(b)(3)(A)(ii), 8 U.S.C. § 1153(b)(3)(A)(ii). This employment-based immigrant classification allows a U.S. employer to sponsor a professional with a baccalaureate degree for lawful permanent resident status.

The Director of the Texas Service Center denied the petition, concluding that the Petitioner did not establish its ability to pay the Beneficiary the proffered wage.

The Petitioner bears the burden of establishing eligibility for the requested benefit by a preponderance of evidence. *See* section 291 of the Act, 8 U.S.C. § 1361 (discussing the burden of proof); *see also* *Matter of Chawathe*, 25 I&N Dec. 169, 175 (AAO 2010) (discussing the standard of proof). 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.

I. EMPLOYMENT-BASED IMMIGRATION

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). *See* section 212(a)(5) of the Act, 8 U.S.C. § 1182(a)(5). DOL approval signifies that insufficient U.S. workers are able, willing, qualified, and available for a position. *Id.* Labor certification also indicates that the employment of a foreign national will not harm wages and working conditions of U.S. workers with similar jobs. *Id.*

If DOL approves a position, the employer must next submit the certified labor application with an immigrant visa petition to U.S. Citizenship and Immigration Services (USCIS). *See* section 204 of the Act, 8 U.S.C. § 1154. Among other things, USCIS considers whether the Beneficiary meets the requirements of a certified position and a requested immigrant visa classification. If USCIS approves the petition, a foreign national may finally apply for an immigrant visa abroad or, if eligible, adjustment of status in the United States. *See* section 245 of the Act, 8 U.S.C. § 1255.

II. ABILITY TO PAY

The labor certification indicates that the priority date is April 7, 2020, and the proffered wage is \$110,822.¹ A petitioner must demonstrate its continuing ability to pay the proffered wage from the priority date in 2020 until the beneficiary obtains lawful permanent residence. 8 C.F.R. § 204.5(g)(2). The regulation requires that “[e]vidence of this ability shall be either in the form of copies of annual reports, federal tax returns, or audited financial statements.” *Id.*

According to the 2019 and 2020 Form W-2s, the Petitioner paid the Beneficiary \$76,066.77 and \$79,612.15 respectively. Absent evidence that the Petitioner paid the Beneficiary a salary equal to or above the proffered wage from the priority date onward, we will generally 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 the proffered wage, or the difference between the proffered wage and the amount paid to the Beneficiary in a given year, the Petitioner would ordinarily be considered able to pay the proffered wage during that year. Here, the Petitioner’s 2019 federal income tax return reflects a net income of \$51,244. The Petitioner, therefore, has established its ability to pay for 2019. Because the Director’s decision that the Petitioner lacks the ability to pay the proffered wage hinged largely upon his contrary determination, we will withdraw it. However, without annual reports, federal tax returns, or audited financial statements for 2020 onward, the Petitioner not established that it has the continuing ability to pay.

The Director should therefore request the Petitioner’s 2020 tax return, as well as any subsequent tax returns, and any other documentation deemed relevant to determining the continuing ability to pay the proffered wage.

III. THE JOB OFFER

A business may file a petition if it is “desiring and intending to employ [a foreign national] within the United States.” Section 204(a)(1)(F) of the Act.² A petitioner must intend to employ a beneficiary under the terms and conditions specified in an accompanying labor certification. *Matter of Izdeska*, 12 I&N Dec. 54, 55 (Reg’l Comm’r 1966) (affirming a petition’s denial where, contrary to the terms of the accompanying labor certification, the petitioner did not intend to employ the beneficiary as a domestic worker on a full-time, live-in basis). A petitioner must establish this intent to employ a beneficiary in a *bona fide* position at the time of filing. *See Matter of Katigbak*, 14 I&N Dec. 45, 49 (Comm’r 1971). USCIS must consider the merits of a petitioner’s job offer to determine whether the job offer is realistic. *Matter of Great Wall*, 16 I&N Dec. 145 (Acting Reg’l Comm’r 1977). For labor certification purposes, the job offer must be for permanent, full-time work. *See* 20 C.F.R. § 656.3; *see also* 20 C.F.R. § 656.10(c)(10).

The Petitioner is an information technology consulting services provider established in 2013 with five employees. It attested on the labor certification that it will permanently employ the Beneficiary in the

¹ The date DOL accepted the labor certification application for processing is the petition’s priority date. 8 C.F.R. § 204.5(d) (explaining how to determine a petition’s priority date).

² Contrary to statements in the Director’s decision, the Petitioner is not required to employ the Beneficiary pursuant to the terms of the labor certification as of the priority date.

full-time position of technical architect at its own address in [REDACTED] Florida. The labor certification does not indicate that the job requires the Beneficiary to travel to, or be located at, any other worksite(s).

Based upon the nature of the Petitioner's business and evidence in the record, however, it appears that the Beneficiary will be placed at an end-client, rather than at the Petitioner's location in Florida. For example, in response to the Director's request for evidence, the Petitioner indicated that the Beneficiary "will be designing, implementing, and maintaining IT systems for the Petitioner's end clients" and that he "will use his extensive experience to build large, scalable systems and platforms that will facilitate a specific goal of the end client's business." The Petitioner also referenced the "the fully executed Employment Agreement" which states that the Beneficiary "agrees to work at premises designated by EMPLOYER." Further, the January 21, 2021 "confirmation of future employment" letter states the Petitioner will "coordinate with the end client regarding projects such as those that will be assigned."³ We also note that the Petitioner indicated that the Beneficiary "will replace" two outsourced contractors, who, according to the submitted work orders, are performing their duties in [REDACTED] Kentucky.⁴ The Petitioner must resolve this inconsistency in the record with independent, objective evidence pointing to where the truth lies. *Matter of Ho*, 19 I&N Dec. 582, 591-92 (BIA 1988).

DOL's regulations require an employer to 1) give notice of the filing of the application for permanent employment certification,⁵ 2) conduct required pre-filing recruitment, including placing a job order and advertisements,⁶ and 3) prepare a recruitment report⁷ as part of a pre-filing recruitment effort. The job order and advertisements must be placed in the area of intended employment. *Id.* Newspaper advertisements must also provide "a description of the vacancy specific enough to apprise the U.S. workers of the job opportunity for which certification is sought" and "indicate the geographic area of employment with enough specificity to apprise applicants of any travel requirements and where applicants will likely have to reside to perform the job opportunity." 20 C.F.R. § 656.17(f)(4).

The Petitioner also requested a prevailing wage determination (PWD) pursuant to the provisions of 20 C.F.R. § 656.40.⁸ The prevailing wage was determined by considering the "wages of workers similarly employed in the area of intended employment," as the job was described by the Petitioner on the application for the PWD.⁹

While we acknowledge the Petitioner's claims that it will control the Beneficiary's work, the issue here is that, based upon the evidence in the record, the Petitioner has not established that the labor certification, and the accompanying prevailing wage, reflected the proper area of intended employment. Further, the Petitioner has also not established that it had permanent, full-time work

³ The language in this letter closely resembles the "confirmation of current employment" letter (also dated January 21, 2021) regarding the Beneficiary's current employment at an unnamed end client in [REDACTED] Kentucky.

⁴ It is unclear whether the Petitioner intends to place the Beneficiary at the [REDACTED] Kentucky worksite location of the two outsourced contractors.

⁵ 20 C.F.R. § 656.10(d).

⁶ 20 C.F.R. §§ 656.17(e), (f). The labor certification indicates that the advertisements were placed in the [REDACTED]

⁷ 20 C.F.R. § 656.17(g).

⁸ The labor certification includes the prevailing wage tracking number and the date of the determination.

⁹ 20 C.F.R. § 656.40(b)(2).

available for the Beneficiary as of the date of filing. As previously noted, the Petitioner must intend to employ the Beneficiary in a *bona fide* position under the terms of the labor certification.

The Director should therefore request copies of the Petitioner's PWD, notice of filing, and recruitment to confirm how and where the job was advertised to U.S. workers, as well as evidence, such as copies of all relevant contracts, to establish the availability of permanent work for the Beneficiary since the priority date and its location.¹⁰

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

¹⁰ While evidence in the form of contracts and agreements is not specifically required to establish that a job offer is *bona fide*, given the nature of its business, the Petitioner must sufficiently establish that it will permanently employ the Beneficiary on a full-time basis in accordance with the terms of the labor certification.