



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

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

In Re: 20477362

Date: AUG. 10, 2022

Appeal of Texas Service Center Decision

Form I-140, Immigrant Petition for Professional

The Petitioner, an information technology company, seeks to employ the Beneficiary as a software engineer. It requests classification of the Beneficiary as a member of the professions under the third preference immigrant classification. Immigration and Nationality Act (the Act) 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 member of the professions for lawful permanent resident status.

The Director of the Texas Service Center denied the petition, concluding that the record did not establish the Petitioner's continuing ability to pay the Beneficiary the proffered wage, as of the priority date. On appeal, the Petitioner asserts that the Director miscalculated the wages it paid the Beneficiary during the relevant period.

In these proceedings, it is the Petitioner's burden to establish eligibility for the requested benefit. Section 291 of the Act, 8 U.S.C. § 1361. Upon *de novo* review, we will remand the matter to the Director for the entry of a new decision.

**I. THE EMPLOYMENT-BASED IMMIGRATION PROCESS**

Employment-based immigration generally follows a three-step process. First, an employer obtains an approved labor certification from the U.S. Department of Labor (DOL). *See* section 212(a)(5) of the Act, 8 U.S.C. § 1182(a)(5). By approving the labor certification, the DOL certifies that there are insufficient U.S. workers who are able, willing, qualified, and available for the offered position and that employing a noncitizen in the position will not adversely affect the wages and working conditions of domestic workers similarly employed. *See id.* Second, the employer files an immigrant visa petition with U.S. Citizenship and Immigration Services (USCIS) with the certified labor certification. *See* section 204 of the Act, 8 U.S.C. § 1154. Third, upon approval of the petition, a noncitizen may apply for an immigrant visa abroad, or if eligible, adjust status in the United States to lawful permanent resident. *See* section 245 of the Act, 8 U.S.C. § 1255.

## II. ABILITY TO PAY THE PROFFERED WAGE

As noted above, the Director concluded that the record does not establish the Petitioner's continuing ability to pay the Beneficiary the proffered wage as of the priority date. 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.<sup>1</sup>

The priority date in this matter is August 19, 2015, the date on which the 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 \$105,000. On the Form I-140, Petition for Alien Workers, filed on October 27, 2020, the Petitioner stated that the annual wage is \$120,500.

When the Petitioner submitted the Form I-140 in 2020, it also submitted copies of the Beneficiary's earnings statements for 2020 and his IRS Forms W-2, Wage and Tax Statements, reflecting wages paid to him in 2015 through 2019. The Director sent the Petitioner a request for evidence (RFE), notifying the Petitioner that it paid the Beneficiary less than the proffered annual wage in 2015 through 2019 and, accordingly, that the record did not establish that the Petitioner had the continuing ability to pay the Beneficiary the proffered wage as of the priority date. The RFE specifically requested the Petitioner to provide its federal income tax returns, annual reports, or audited financial statements for the relevant period to establish whether the Petitioner had the continuing ability to pay the Beneficiary the proffered wage as of the priority date.

In response to the RFE, the Petitioner submitted its IRS Forms 1120, U.S. Corporation Income Tax Returns, for 2015 through 2019 and the Beneficiary's earnings statements reflecting wages paid through July 15, 2021.

In the decision, the Director found that the Petitioner paid the Beneficiary the following annual wages:

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<sup>1</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); *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).

- 2015: \$94,840<sup>2</sup>
- 2016: \$102,117
- 2017: \$115,115
- 2018: \$114,206<sup>3</sup>
- 2019: \$118,407
- 2020: \$5,687.50 on a bimonthly basis, or \$136,500 annually<sup>4</sup>
- 2021: \$5,916 on a bimonthly basis, or \$142,000 annually<sup>5</sup>

The Director found that the Petitioner paid the Beneficiary a wage equal or greater to the proffered wage in 2020 and 2021, but that it paid the Beneficiary a wage less than the proffered wage from 2015 through 2019. The Director then reviewed the net income figure and net current assets reflected on the Petitioner's federal income tax return and concluded that, although the Petitioner's net income in 2016 and 2019 established its ability to pay the Beneficiary the proffered wage in those years, neither its net income nor net current assets in 2015, 2017, and 2018 established the Petitioner's ability to pay the Beneficiary the proffered wage in those years. Based on the foregoing, the Director concluded that the record did not establish the Petitioner's continuing ability to pay the proffered annual wage of \$120,500 as of the priority date.

On appeal, the Petitioner asserts that the annual proffered wage for the position, prior to filing the Form I-140 in 2020, was \$105,000, as listed on the ETA Form 9089 filed in 2015, rather than the wage of \$120,500 indicated on the Form I-140 filed in 2020. Pursuant to 8 C.F.R. § 204.5(g)(2), the Petitioner must demonstrate its continuing ability to pay the proffered wage from the date the priority date is established. Therefore, for the relevant years at issue on appeal, we will analyze the Petitioner's ability to pay the proffered wage of \$105,000 as listed on the ETA Form 9089.

On appeal, the Petitioner further asserts that the Director misstated the Beneficiary's wages in 2015, 2017, and 2018. Specifically, the Petitioner asserts that the Beneficiary's Forms W-2 establish that the Petitioner paid him gross wages of \$104,687.48 in 2015, gross wages of \$133,633.89 in 2017, and gross wages of \$130,881.69 in 2018. The Petitioner also asserts that the Beneficiary's 2015 gross wages of \$104,687 exceeded the prevailing wage of \$104,437, listed on the ETA Form 9089.

The gross wages reported on the Beneficiary's Forms W-2 for 2015 to 2019 in the record are as follows:

- 2015: \$103,218.54
- 2016: \$112,659.22
- 2017: \$131,151.21

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<sup>2</sup> This amount, and the amounts listed by the Director for 2016 through 2019, correspond to Box 1 of the Beneficiary's 2015 Form W-2. However, Box 1 reflects net wages, tips, and other compensation, after withholdings and deductions, not gross wages.

<sup>3</sup> This amount approximately corresponds to \$114,207.19, the sum of Box 1 from the Beneficiary's two 2018 Forms W-2.

<sup>4</sup> The amount of \$5,687.50 corresponds to the "salary" pay statements for the Beneficiary in 2020, indicating that the Petitioner pays him on the 15th and the last day of each month.

<sup>5</sup> The amount of \$5,916 corresponds to the "salary" pay statements for the Beneficiary in 2021, indicating that the Petitioner pays him on the 15th and the last day of each month. Without rounding, 24 bimonthly payments of \$5,916 would total \$141,984, not \$142,000.

- 2018: \$129,687.65
- 2019: \$136,848.33

These amounts correspond to the Beneficiary's "gross pay" amounts for the respective years.<sup>6</sup> Because Forms W-2 in the record establish that the Petitioner paid the Beneficiary wages equal to or greater than the proffered wage of \$105,000 for 2016 through 2019, the Director erred by stating the contrary.

The remaining issue on appeal, however, is that, in 2015, the Petitioner paid the Beneficiary gross wages of \$103,218, which is less than the proffered annual wage provided on the ETA Form 9089. The regulation at 8 C.F.R. § 204.5(g)(2) requires the Petitioner to establish its ability to pay the annual proffered wage of \$105,000. We also note that, in the decision, the Director did not address the factors discussed in *Matter of Sonogawa*, 12 I&N Dec. 612, 614-15 (Reg'l Comm'r 1967), which permits USCIS to consider the totality of the circumstances affecting a petitioner's ability to pay the proffered wage.<sup>7</sup>

Moreover, USCIS records indicate that the Petitioner has filed numerous additional Form I-140 petitions for other beneficiaries. 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). Thus, the Petitioner must establish its ability to pay this Beneficiary as well as the beneficiaries of its other Form I-140 petitions that were pending or approved as of, or filed after, the priority date of the current petition, particularly in light of the Petitioner's frequent annual net current liabilities. Accordingly, on remand, the Director should request evidence of the Petitioner's ability to pay the combined proffered wages of all of its applicable beneficiaries. Additionally, the Director should request the Petitioner to submit the forms of evidence of ability to pay prescribed by regulation for the years in which the Petitioner has not already done so. *See* 8 C.F.R. § 204.5(g)(2). The Petitioner may also submit additional materials in support of the factors discussed in *Matter of Sonogawa*, 12 I&N Dec. at 614-15. The Director may also request any additional documentation deemed relevant to determine the Petitioner's continuing ability to pay the proffered wage.

Based on the foregoing, we will withdraw the Director's conclusion that the Petitioner did not establish its continuing ability to pay the Beneficiary the proffered wage for the reasons stated in the decision, and we will remand the matter for the entry of a new decision.

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

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<sup>6</sup> To calculate the Beneficiary's gross pay, we added the "wages" reported in Box 1 and the "elective deferrals to a section 401(k) cash or deferred arrangement" (code D) reported in Box 12a or 12b of the Forms W-2 for the respective years.

<sup>7</sup> We may consider evidence of a petitioner's ability to pay beyond its net income and net current assets, including such factors as: the number of years it has conducted business; the growth of its business; its number of employees; the occurrence of any uncharacteristic business expenditures or losses; its reputation in its industry; whether a beneficiary will replace a current employee or outsourced service; or other evidence of its ability to pay a proffered wage. *See Matter of Sonogawa*, 12 I&N Dec. at 614-15.