



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

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

In Re: 19271112

Date: JUL. 13, 2022

Appeal of Nebraska Service Center Decision

Form I-140, Immigrant Petition for Professional

The Petitioner, a sales and marketing of augmented reality services company, seeks to employ the Beneficiary as a senior mobile augmented reality engineering manager. 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 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.

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 withdraw the Director's decision and remand the matter for entry of a new decision consistent with the following analysis.

I. LAW

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) 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 noncitizen will not harm wages and working conditions of U.S. workers with similar jobs. *Id.*

If DOL approves a position, an employer must next submit the certified labor application with an immigrant visa petition to U.S. Citizenship and Immigration Services (USCIS). Section 204 of the Act, 8 U.S.C. § 1154. Among other things, USCIS considers whether a 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. Section 245 of the Act, 8 U.S.C. § 1255.

II. ANALYSIS

The regulation at 8 C.F.R. § 204.5(g)(2) states that a petitioner must establish that it has the ability to pay the beneficiary the proffered wage from the priority date¹ onward. Documentation of 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.* This documentation should demonstrate the Petitioner's continuing ability to pay the annual proffered wage of \$135,300 starting on the priority date, which in this instance is March 9, 2020.

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. We next examine whether it had sufficient annual amounts of net income or net current assets to pay the proffered wage. 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.² USCIS may also consider the totality of the petitioner's circumstances, including the overall magnitude of its business activities, in determining the Petitioner's ability to pay the proffered wage. *See Matter of Sonogawa*, 12 I&N Dec. 612 (Reg'l Comm'r 1967).³

In the underlying case, the Petitioner stated that the Beneficiary had been employed by its [redacted] subsidiary, [redacted] since January 2020, and that therefore the Petitioner had been paying the Beneficiary a portion of the proffered wage. The Petitioner also provided evidence of the Petitioner's employment with [redacted]. The Director found that there was insufficient evidence in the record to establish that [redacted] was the Petitioner's subsidiary.

On appeal, the Petitioner states that the 2019 federal tax return it previously provided included an Internal Revenue Service (IRS) Form 8858, Information Return of U.S. Persons With Respect to Foreign Disregarded Entities (FDEs) and Foreign Branches (FBs). This form indicates that the Petitioner is the legal owner of [redacted] and that the Petitioner and [redacted] are considered the same entity for U.S. tax purposes. The appeal also includes a share exchange agreement documenting the Petitioner's 2016 purchase of all issued and outstanding shares of [redacted]. However, we do not consider the payment of wages by [redacted] as payment of wages by the Petitioner because the two are separate legal entities. In *Sitar v. Ashcroft*, 2003 WL 22203713 (D.Mass. Sept. 18, 2003), the court stated that "nothing in the governing regulation, 8 C.F.R. § 204.5, permits [USCIS] to consider the financial resources of individuals or entities who have no legal obligation to pay the wage." The record does not demonstrate that the Petitioner has paid the Beneficiary any wages from the priority date onward.

¹ 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.

² 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*, 107 F. Supp. 3d 936, 942-943 (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).

³ USCIS may, at its discretion, consider evidence relevant to the petitioner's financial ability that falls outside of its net income and net current assets. We may consider such factors as the number of years the petitioner has been doing business, the established historical growth of the petitioner's business, the petitioner's reputation within its industry, the overall number of employees, whether the beneficiary is replacing a former employee or an outsourced service, the amount of compensation paid to officers, the occurrence of any uncharacteristic business expenditures or losses, and any other evidence that USCIS deems relevant to the petitioner's ability to pay the proffered wage.

The Director found that the Petitioner's net income and net current assets, as shown on its 2019 federal tax return, were insufficient to pay the proffered wage. On appeal, the Petitioner provides publicity material about its business, media coverage of investment funding it has received, a biography of its chief executive officer, and a statement regarding the evidence of its ability to pay the proffered wage.

However, the record does not include the Petitioner's federal tax returns, audited financial statements,⁴ or annual reports from the 2020 priority date onward. Because the record is not clear as to whether this documentation was available at the time of filing the appeal, we will remand the matter to the Director for further consideration. The Director may request any additional documentation deemed relevant to determine the Petitioner's continuing ability to pay the proffered wage.

USCIS records indicate that the Petitioner has filed 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 for every 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. 2d 108, 124 (D. Mass. 2014) (upholding our denial of a petition where a petitioner did not demonstrate its ability to pay multiple beneficiaries). On remand, the Director should consider the Petitioner's net income and net current assets each year from 2020 onward, as well as information related to the Petitioner's other Form I-140 beneficiaries for the relevant time period. At their discretion, in accord with *Matter of Sonogawa*, 12 I&N Dec. 612, the Director may also consider the Petitioner's history of business growth, reputation within the industry, overall number of employees, and other evidence that is relevant to the Petitioner's financial situation.

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

⁴ The Petitioner submitted an unaudited profit and loss statement as evidence in the underlying case which included data for 2020. However, this is not one of the types of evidence of ability to pay required by 8 C.F.R. § 204.5(g)(2).