



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

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

In Re: 25787963

Date: FEB. 23, 2023

Appeal of Texas Service Center Decision

Form I-140, Immigrant Petition for Professional

The Petitioner, a provider of software development and consulting services, seeks to permanently employ the Beneficiary as a senior software developer. The company requests his classification under the third-preference, immigrant visa category for professionals. *See* Immigration and Nationality Act (the Act) section 203(b)(3)(A)(ii), 8 U.S.C. § 1153(b)(3)(A)(ii). This category allows a prospective, U.S. employer to sponsor a noncitizen for lawful permanent residence to perform work requiring a member of the professions holding at least a bachelor's degree. *Id.*

The Director of the Texas Service Center denied the petition. The Director concluded that the Petitioner did not demonstrate its required ability to pay the offered position's proffered wage. On appeal, the company contends that the Director improperly required it to establish its ability to pay before the petition's priority date. The Petitioner asserts that it demonstrated its ability to pay from the correct date.

The Petitioner bears the burden of demonstrating eligibility for the requested benefit by a preponderance of evidence. *Matter of Chawathe*, 25 I&N Dec. 369, 375-76 (AAO 2010). Exercising de novo appellate review, *see Matter of Christo's, Inc.*, 26 I&N Dec. 537, 537 n.2 (AAO 2015), we conclude that, in determining the Petitioner's ability to pay, the Director used the wrong date. But, because the company has not demonstrated its ability to pay from the correct date, we will dismiss the appeal.

I. LAW

Immigration as a professional generally follows a three-step process. First, a prospective employer must obtain U.S. Department of Labor (DOL) certification that: 1) there are insufficient U.S. workers able, willing, qualified, and available for an offered position; and 2) permanent employment of a noncitizen in the job would not harm wages and working conditions of U.S. workers with similar positions. Section 212(a)(5)(A)(i) of the Act, 8 U.S.C. § 1182(a)(5)(A)(i).

Second, an employer must submit an approved labor certification 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). Among other things, USCIS determines whether a noncitizen beneficiary meets the

requirements of a DOL-certified position and a requested immigrant visa category. 8 C.F.R. § 204.5(l)(3)(ii)(A), (C).

Finally, if USCIS approves a petition, a beneficiary may 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. ANALYSIS

A petitioner must demonstrate its continuing ability to pay an offered position’s proffered wage, from a petition’s priority date until a beneficiary obtains lawful permanent residence. 8 C.F.R. § 204.5(g)(2). Evidence of ability to pay must generally include copies of a business’s annual reports, federal tax returns, or audited financial statements. *Id.*

In determining ability to pay, USCIS examines whether a petitioner paid a beneficiary the full proffered wage each year, beginning with the year of a petition’s priority date. If a petitioner did not annually pay the full proffered wage or did not pay a beneficiary at all, USCIS considers whether the business generated annual amounts of net income or net current assets sufficient to pay any differences between the proffered wage and the wages paid. If net income and net current assets are insufficient, USCIS may consider other factors affecting a petitioner’s ability to pay a proffered wage. *See Matter of Sonogawa*, 12 I&N Dec. 612, 614-15 (Reg’l Comm’r 1967).¹

The Petitioner’s labor certification states the proffered wage of the offered position of senior software developer as \$96,600 a year. The petition’s priority date is September 4, 2020, the date DOL accepted the labor certification application for processing. *See* 8 C.F.R. § 204.5(d) (explaining how to determine a petition’s priority date).

The record contains a prior, approved petition for the Beneficiary in another immigrant visa category with a priority date of July 6, 2016. If USCIS approves this current petition, he could, for immigration purposes, apply the previous priority date to this petition’s requested immigrant visa category. *See* 8 C.F.R. § 204.5(e)(1) (stating that a beneficiary of multiple, approved petitions “shall be entitled to the earliest priority date”).

In determining the Petitioner’s ability to pay, the Director examined the company’s finances from the previous petition’s priority date of July 6, 2016 onward. As the Petitioner argues, however, USCIS must determine the company’s ability to pay from the current petition’s priority date. A noncitizen’s entitlement to an earlier priority date occurs “[i]n the event that the alien is the beneficiary of multiple *approved* petitions.” 8 C.F.R. § 204.5(e)(1) (emphasis added). Thus, the priority date of the Beneficiary’s previous petition would not apply to the current petition unless and until USCIS approves the current filing and would determine when he could apply to adjust status or consular process. Therefore, in determining the Petitioner’s ability to pay the current petition’s proffered wage,

¹ Federal courts have upheld USCIS’ 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); *Rahman v. Chertoff*, 641 F. Supp. 2d 349, 351-52 (D. Del. 2009).

USCIS must examine this Petitioner's finances from the current petition's priority date of September 4, 2020 onward.

At the time of the appeal's filing in November 2022, regulatory required evidence of the Petitioner's ability to pay in 2022 was not yet available. For purposes of this decision, we will therefore consider the company's ability to pay only in 2020 - the year of the petition's priority date - and 2021.² Although the Director referred to the wrong priority date, his request for evidence notified the company of its need to demonstrate its ability to pay from 2020 onward and afforded it a reasonable opportunity to respond. We therefore fairly consider the Petitioner's ability to pay from 2020 onward and need not remand this matter.

The Petitioner submitted copies of payroll records and IRS Forms W-2, Wage and Tax Statements, as evidence of its employment of the Beneficiary in 2020 and 2021. The Forms W-2 show his receipt of \$75,936.82 in 2020 and \$74,179.95 in 2021. The wage amounts neither equal nor exceed the annual proffered wage of \$96,600. Thus, based solely on wages paid, the Petitioner has not demonstrated its ability to pay the proffered wage. Nevertheless, we credit the company's payments to the Beneficiary. The Petitioner need only demonstrate its ability to pay the differences between the proffered wage and the annual amounts paid to the Beneficiary - or \$20,663.18 in 2020 and \$22,420.05 in 2021.

The Petitioner submitted copies of its federal income tax returns for 2020 and 2021. The 2020 tax return reflects annual net income of -\$811,426 and annual net current assets of -\$1,052,203. The 2021 tax return shows net income of -\$214,817 and net current assets of -\$367,120. None of the net income or net current asset amounts equal or exceed the annual differences between the proffered wage and the wages paid to the Beneficiary. Thus, based on examinations of wages paid, net income, and net current assets, the Petitioner has not demonstrated its ability to pay the offered position's proffered wage.

As previously indicated, we may consider other factors affecting the Petitioner's ability to pay the proffered wage. *See Matter of Sonegawa*, 12 I&N Dec. at 614-15. Under *Sonegawa*, we may consider: the number of years the company has conducted business; its number of employees; growth of its business; its incurrence of uncharacteristic losses or expenses; its reputation in its industry; the Beneficiary's proposed replacement of a current employee or outsourced service; or other factors affecting the Petitioner's ability to pay. *Id.*

The record indicates the Petitioner's continuous, business operations since 2006, and its employment of 15 workers. The Petitioner's tax returns reflect increases in net income and net current assets from 2020 to 2021, and the company submitted evidence of an average balance of \$221,725 in its checking account during the first quarter of 2022.

The tax returns, however, reflect that, from 2020 to 2021, the Petitioner's annual revenues dropped, and as noted above, the returns show substantial, negative amounts of net income and net current assets in both years. Also, unlike in *Sonegawa*, the company did not submit evidence of: uncharacteristic

² In any future filings in this matter, the Petitioner must also demonstrate its ability to pay the offered position's proffered wage in 2022. *See* 8 C.F.R. § 204.5(g)(2) (requiring a petitioner to establish its ability to pay "continuing until the beneficiary obtains lawful permanent residence").

losses or expenses; its reputation in its industry; or other factors potentially affecting its ability to pay. Further, unlike the petitioner in *Sonegawa*, the Petitioner has filed Forms I-140, Petitions for Immigrant Workers, for other beneficiaries. The company provided evidence that it withdrew four of its other Form I-140 petitions. But USCIS records show the company still has at least seven approved or pending petitions for other beneficiaries.³

A petitioner must demonstrate its ability to pay the proffered wage of each petition it files until a beneficiary obtains lawful permanent residence. 8 C.F.R. § 204.5(g)(2). This Petitioner must therefore demonstrate its ability to pay the combined proffered wages of this and its other petitions that were pending or approved as of this petition's priority date of September 4, 2020 or filed thereafter. *See Patel v. Johnson*, 2 F. Supp. 3d 108, 124 (D. Mass. 2014) (affirming our revocation of a petition's approval where, as of the filing's approval, the petitioner did not demonstrate its ability to pay the combined proffered wages of multiple petitions).⁴ The Petitioner has not provided the proffered wages or priority dates of these other seven petitions. The record therefore does not establish the company's ability to pay the combined proffered wages of all applicable petitions. Considering all these factors, a totality of circumstances under *Sonegawa* does not demonstrate the Petitioner's ability to pay the proffered wage.

III. CONCLUSION

The Director analyzed the Petitioner's ability to pay the offered position's proffered wage from the wrong priority date. Even so, the company has not demonstrated its ability to pay from the correct priority date. We will therefore affirm the petition's denial.

ORDER: The appeal is dismissed.

³ USCIS records identify the seven petitions by the following receipt numbers: [REDACTED]

⁴ The Petitioner need not demonstrate its ability to pay proffered wages of petitions that it withdrew or that USCIS rejected, denied, or revoked. The Petitioner also need not demonstrate its ability to pay proffered wages before the priority dates of corresponding petitions or after corresponding beneficiaries obtain lawful permanent residence.