



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

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

In Re: 23090698

Date: JUL. 14, 2023

Appeal of Texas Service Center Decision

Form I-140, Immigrant Petition for Alien Workers (Skilled Worker)

The Petitioner, a healthcare company, seeks to employ the Beneficiary as a registered nurse. It requests classification of the Beneficiary as a skilled worker under the third preference immigrant classification. Immigration and Nationality Act (the Act) section 203(b)(3)(A)(i), 8 U.S.C. § 1153(b)(3)(A)(i). This employment-based immigration classification allows a U.S. employer to sponsor a noncitizen for lawful permanent residence to work in a position that requires at least two years of training or experience.

The Director of the Texas Service Center denied the petition, concluding that the record did not establish that the Petitioner was a valid U.S. employer. 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 offered position of registered nurse is a "Schedule A" occupation. The Department of Labor has determined that there insufficient U.S. workers who are able, willing, qualified, and available and that employment of noncitizens in these "Schedule A" positions will not harm the wages or working conditions of U.S. workers in similar positions. 20 CFR § 656.5. Therefore, DOL authorizes U.S. Citizenship and Immigration Services (USCIS) to adjudicate Schedule A labor certification applications for registered nurses in immigrant visa petition proceedings. 20 C.F.R. § 656.15(a).

A petitioner may file a Form I-140 on a noncitizen's behalf if that petitioner is an "employer desiring and intending to employ [the noncitizen] within the United States." Section 204(a)(1)(F) of the Act. For purposes of filing such a petition, an employer must have a location in the United States and a valid Federal Employer Identification Number (FEIN) and propose to employ the noncitizen in the United States on a full-time basis. 20 C.F.R. § 656.3 (defining "Employer").

The Director denied the present petition because the record did not establish that the Petitioner exists as an entity which can employ a noncitizen in the United States under the name and address provided. On appeal, the Petitioner provides corporate ownership documents, documentation of its trade name and FEIN, and evidence that it is the entity licensed to operate the care facility that will employ the Beneficiary at the U.S. work location provided on the labor certification form and Form I-140. This establishes that the Petitioner is a valid U.S. employer for purposes of filing an employment visa petition. However, while the Petitioner has overcome the sole ground of the Director's denial, the record indicates that further review is required to establish eligibility.

A petitioner must establish that it has the ability to pay the beneficiary the proffered wage from the priority date¹ onward. 8 C.F.R. § 204.5(g)(2). To demonstrate that the job offer to the beneficiary is realistic, the petitioner must also establish its ability to pay the proffered wages of its other Form I-140 beneficiaries.²

The regulation at 8 C.F.R. § 204.5(g)(2) states that documentation of ability to pay shall be in the form of copies of annual reports, federal tax returns, or audited financial statements, and that in appropriate cases, additional financial evidence may be submitted. This documentation should demonstrate the Petitioner's continuing ability to pay the proffered wage of \$66,560 starting on the priority date, which in this instance is May 21, 2021.

The record in the present case includes the Petitioner's 2019 federal tax return, but does not include its federal tax returns, audited financial statements, or annual reports from the priority date year of 2021 onward. Additionally, USCIS records indicate that the Petitioner has filed Forms I-140 for over a dozen 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 at 124. The Petitioner here must therefore establish its ability to pay not only the Beneficiary of this petition, but also the beneficiaries of the other petitions that were pending or approved as of the Beneficiary's priority date, as well as those filed after the priority date.³ The record in this case does not include any documentation regarding the wages of these other beneficiaries. Because the record does not establish the Petitioner's ability to pay the Beneficiary's wages, we will remand the matter to the Director for further consideration.

On remand, the Director should issue a new request for evidence requesting documentation of the Petitioner's ability to pay starting on the priority date, as well as a list of all of the Petitioner's pertinent Forms I-140, their proffered wages, and any other evidence relevant to determining the Petitioner's ability to pay.

¹ The priority date of a Schedule A petition is the date the petition is properly filed with USCIS. 8 C.F.R. § 204.5(d).

² *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 when the petitioner did not demonstrate its ability to pay multiple beneficiaries).

³ The Petitioner's ability to pay the proffered wage of one of the other I-140 beneficiaries is not considered:

- After the other beneficiary obtains lawful permanent residence;
- If an I-140 petition filed on behalf of the other beneficiary has been withdrawn, revoked, or denied without a pending appeal or motion;
- Before the priority date of the I-140 petition filed on behalf of the other beneficiary; or
- In any year when the Petitioner has paid the Beneficiary a salary equal to or greater than the proffered wage.

Upon receiving a timely response, the Director should consider the Petitioner's net income and net current assets each year from 2021 onward, as well as information related to the Petitioner's other Form I-140 beneficiaries for the relevant time period. At their discretion, the Director may consider other evidence that is relevant to the Petitioner's financial situation.⁴

Finally, we note that the Petitioner may not have provided appropriate notice of filing the application for labor certification. All Schedule A petitions must include evidence that notice of the labor certification application's filing was given to the appropriate bargaining representative for the offered occupational classification, or if there is no bargaining representative, to the petitioner's employees. 20 C.F.R. §§ 656.15, 656.10(d)(1)(i)-(ii).

The Petitioner here indicated that there was no bargaining representative for the offered position and provided evidence that it gave notice of filing to its employees. However, publicly available information from the Connecticut Department of Health indicates that the Petitioner was cited in [] 2021 for failure to file a strike contingency plan after receiving notice of a labor strike from its healthcare workers' union in [] 2021.⁵ This indicates that the healthcare workers at the work location where the Petitioner proposes to employ the Beneficiary were unionized in May 2021, when the petition was filed.

On remand, the Director should request documentation regarding the union representation that existed at the stated work location at the time of filing, including whether the nurses at this work location were unionized, and if so, whether the Petitioner gave appropriate notice of filing to the bargaining representative as per 20 CFR § 656.10(d)(1)(i).

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

⁴ Where a petitioner's net income and net current assets are insufficient to pay the offered wage, USCIS may, at its discretion, consider other relevant factors, such as the number of years the petitioner has been in business, the size of its operations, the growth of its business over time, its number of employees, the occurrence of any uncharacteristic business expenditures or losses, its reputation within its industry, and whether a beneficiary will replace a current employee or outsourced service. *See Matter of Sonogawa*, 12 I&N Dec. 612, 614-15 (Reg'l Comm'r 1967).

⁵ Notice of Civil Penalty from Conn. Dep't. of Health [] 2021), *License Lookup*, <https://elicense.ct.gov/Lookup/LicenseLookup.aspx> (choose "Chronic & Convalescent Nursing Home" under "License Type," enter "[]" in the "Business Name/DBA" field, then press "Submit"; press "Detail" in the resulting popup, and click the appropriate document link in the "Citations" section to access the PDF) (last visited Jul. 14, 2023).