



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

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

In Re: 18312944

Date: JUNE 10, 2022

Appeal of Nebraska Service Center Decision

Form I-140, Immigrant Petition for Advanced Degree Professional

The Petitioner seeks to employ the Beneficiary as a software developer. It requests classification of the Beneficiary as a member of the professions holding an advanced degree under the second preference immigrant classification. Immigration and Nationality Act section 203(b)(2), 8 U.S.C. § 1153(b)(2). This employment-based immigrant classification allows a U.S. employer to sponsor a professional with an advanced degree for lawful permanent resident status.

The Director of the Nebraska Service Center denied the petition, concluding that the record did not establish the Petitioner's continuing ability to pay the proffered wage from the petition's priority date onward. The matter is now before us on appeal.

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 to the Director for further consideration and 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).¹ 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, if USCIS approves the petition, the noncitizen applies 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.

¹ The priority date of a petition is the date the DOL accepted the labor certification for processing, which in this case is December 19, 2017. See 8 C.F.R. § 204.5(d).

II. ABILITY TO PAY THE PROFFERED WAGE

The Director concluded that the Petitioner did not establish its continuing ability to pay the proffered wage from the petition's priority date onward. The proffered wage is \$70,304 per year.

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.²

Further, 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). As noted by the Director in his decision, USCIS records show that the Petitioner filed multiple Forms I-140, Immigrant Petition for Alien Workers, for other beneficiaries. Thus, the Petitioner must establish its ability to pay this Beneficiary as well as the beneficiaries of the other Form I-140 petitions that were pending or approved as of, or filed after, the priority date of the current petition.³ We do not consider the other beneficiaries for any year that the Petitioner has paid the Beneficiary a salary equal to or greater than the proffered wage.

The Petitioner must document the receipt numbers, names of beneficiaries, priority dates, and proffered wages of these other petitions, and indicate the status of each petition and the date of any

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*, 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).

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

- After the other beneficiary obtains lawful permanent residence;
- If a Form I-140 filed on behalf of the other beneficiary has been withdrawn, revoked, or denied without a pending appeal or motion; or
- Before the priority date of the Form I-140 filed on behalf of the other beneficiary.

status change (i.e., pending, approved, withdrawn, revoked, denied, on appeal or motion, beneficiary obtained lawful permanent residence). To offset the total wage burden, the Petitioner may submit documentation showing that it paid wages to other beneficiaries. To demonstrate that it has the ability to pay the Beneficiary and the other beneficiaries, we would expect to see a Petitioner perform the following calculation for each year at issue: (a) calculate any shortfall between the proffered wages and any actual wages paid to the primary Beneficiary and its other beneficiaries, (b) add these amounts together to calculate the total wage deficiency, and (c) demonstrate that its net income or net current assets exceed the total wage deficiency. *See Patel v. Johnson*, 2 F. Supp. 3d at 124.

The Director reviewed information submitted to the record about the other beneficiaries and determined that the Petitioner did not have the ability to pay the combined proffered wages of all of its applicable beneficiaries. However, the Director did not analyze whether the Petitioner had the ability to pay in 2017, the year of the priority date. Further, in his calculation regarding the Petitioner's ability to pay multiple beneficiaries, the Director erred in including the Petitioner's withdrawn petitions in periods following the Petitioner's written withdrawal requests. The Director also did not analyze the evidence of the 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. 612, 614-615 (Reg'l Comm'r 1967).

For these reasons, we will remand the matter to the Director for further review of the Petitioner's continuing ability to pay. On remand, the Director should request additional evidence of the Petitioner's ability to pay and allow the Petitioner reasonable time to respond.

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