



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

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

In Re: 7051443

Date: JUNE 19, 2020

Appeal of Texas Service Center Decision

Form I-140, Immigrant Petition for Advanced Degree Professional

The Petitioner seeks to employ the Beneficiary as a programmer analyst under the second-preference, immigrant classification as a member of the professions holding an advanced degree. *See* Immigration and Nationality Act (the Act) section 203(b)(2)(A), 8 U.S.C. § 1153(b)(2)(A).

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 combined proffered wages of this and other Form I-140 petitions it filed.

The Petitioner bears the burden of demonstrating its eligibility for the requested benefit. *See* 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. EMPLOYMENT-BASED IMMIGRATION

Immigration as an advanced degree professional 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). *See* section 212(a)(5)(A)(i) of the Act, 8 U.S.C. § 1182(a)(5)(A)(i). DOL approval signifies that insufficient U.S. workers are able, willing, qualified, and available for an offered position. *Id.* Labor certification also indicates that employment of a foreign national 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). *See* section 204 of the Act, 8 U.S.C. § 1154. Among other things, USCIS determines whether a beneficiary meets the requirements of a DOL-certified position and a requested visa classification. If USCIS grants a petition, a foreign national may finally 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. ABILITY TO PAY THE PROFFERED WAGE

A petitioner must demonstrate its continuing ability to pay the proffered wage of an offered position, 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 include copies of a petitioner's annual reports, federal tax returns, or audited financial statements. *Id.* If a petitioner employs at least 100 people, as in this case, USCIS may also accept a statement from a financial officer demonstrating the business's ability to pay a proffered wage. *Id.*

In determining ability to pay, USCIS examines whether a petitioner paid a beneficiary the full proffered wage each year from a petition's priority date. If a petitioner did not annually pay a beneficiary a full proffered wage, USCIS considers whether it generated annual amounts of net income or net current assets sufficient to pay any difference 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

Here, the accompanying labor certification states the proffered wage of the offered position of programmer analyst as \$81,910 a year. The petition's priority date is December 8, 2017, 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 Petitioner initially submitted a letter from its vice president of operations. The letter states that, in 2017, the company generated more than \$92 million in revenues and employed 850 people. The Director, however, did not abuse his discretion in rejecting the statement as evidence of the Petitioner's ability to pay. USCIS records indicate the Petitioner's filing of additional Form I-140 petitions for other beneficiaries. 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 any of its other petitions that were pending or approved as of this petition's priority date of December 8, 2017, 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 grant, the petitioner did not demonstrate its ability to pay the combined proffered wages of multiple petitions).² In light of the Petitioner's filing of multiple Form I-140 petitions, the vice president's letter constituted insufficient evidence of the company's ability to pay.

The record indicates the Petitioner's employment of the Beneficiary in nonimmigrant work visa status since March 2017. The record, however, lacks evidence that the Petitioner paid him in 2017. Thus, based solely on wages paid, the Petitioner has not demonstrated its ability to pay the proffered wage in 2017.

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); *Taco Especial v. Napolitano*, 696 F.Supp.2d 873, 881 (E.D. Mich. 2010), *aff'd*, No. 10-1517 (6th Cir. Nov. 10, 2011).

² 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 their corresponding petitions, or after their corresponding beneficiaries obtained lawful permanent residence.

The Petitioner submitted a copy of its federal income tax return for 2017. The return reflects a negative amount of net current assets, but net income of more than \$3.5 million. The net income amount exceeds the annual proffered wage of \$81,910. Thus, based on net income, the Petitioner appears to have demonstrated its ability to pay the Beneficiary's individual proffered wage in 2017.

As previously discussed, however, the Petitioner must also demonstrate its ability to pay the combined proffered wages of its additional Form I-140 petitions that were pending or approved as of December 8, 2017, or filed thereafter. In response to the Director's written request for additional evidence (RFE), the Petitioner provided a list of 101 Form I-140 petitions that it filed for other beneficiaries. The record indicates the Petitioner's withdrawal of one of the Form I-140 petitions on its list and USCIS' denials of two others. The company therefore need not demonstrate its ability to pay the proffered wages of those three petitions.³

The Petitioner submitted evidence of its payment of wages to other beneficiaries in 2018. But the company did not submit proof of wages paid to the other beneficiaries in 2017, nor did the Director's RFE notify the company of its ability to do so. We will therefore remand the matter. On remand, the Director should issue a new RFE asking the Petitioner to submit evidence of wages it paid to other beneficiaries in 2017. The RFE should also request the Petitioner to submit copies of annual reports, federal tax returns, or audited financial statements for 2018 and 2019.

Also, USCIS records indicate the Petitioner's omission of at least 15 other petitions that it filed in 2017 or 2018.⁴ The record lacks the proffered wages and priority dates of these petitions. Nor has the company explained why it need not demonstrate its ability to pay the proffered wages of these petitions. Thus, the new RFE should also ask the Petitioner to submit the proffered wages and priority dates of the 15 petitions or explain why it need not demonstrate its ability to pay their proffered wages. The RFE may also include any additional deficiencies noted by the Director and supported by the record.

In addition, the Director found that, in 2018, the Petitioner paid the Beneficiary total wages of \$70,737.62, less than the annual proffered wage of \$81,910. The Petitioner, however, submitted an IRS Form W-2, Wage and Tax Statement, showing that it paid the Beneficiary total wages that year of \$85,270.40. The Form W-2 indicates that, before withholding money from the Beneficiary's wages to pay income taxes, the Petitioner deducted funds from his pay to cover the cost of certain fringe benefits that the Beneficiary chose to receive, including a contribution to his "401K" retirement account. The payment of the Beneficiary's benefits with "pre-tax" funds reduced his taxable wages in 2018 by about \$14,500. But his wages still totaled \$85,270.40, more than the annual proffered wage. Thus, if the Petitioner submits copies of annual reports, federal tax returns, or audited financial statements for 2018 as required under 8 C.F.R. § 204.5(g)(2), the Form W-2 would demonstrate the company's ability to pay the Beneficiary's proffered wage in 2018, and the Petitioner would not need to establish its ability to pay the proffered wages of other beneficiaries that year.

³ USCIS records identify the withdrawn petition by the receipt number [redacted] and the denied petitions by the receipt numbers [redacted] and [redacted].

⁴ USCIS records identify the omitted petitions as: [redacted]

The Director should provide the Petitioner a reasonable period to respond to all issues raised in the new RFE. Upon receipt of a timely response, the Director should review the entire record and issue a new decision.

IV. CONCLUSION

The Petitioner did not receive notice of its ability to submit evidence of wages it paid to other beneficiaries in 2017. The record also lacks required evidence of the company's ability to pay the proffered wage in 2018 and 2019.

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