



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

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

In Re: 28184766

Date: SEP. 27, 2023

Appeal of Texas Service Center Decision

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

The Petitioner seeks to employ the Beneficiary as a computer software engineer. 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 (the 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 Texas Service Center denied the petition, concluding that the record did not establish that the Petitioner has the ability to pay the Beneficiary the proffered wage. 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 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 a case where the prospective United States employer employs 100 or more workers, the director may accept a statement from a financial officer of the organization which establishes the prospective employer's ability to pay the proffered wage.

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.¹

The priority date in this matter is September 13, 2021, the date on which the U.S. Department of Labor (DOL) received the DOL ETA Form 9089, Application for Permanent Employment Certification, for processing. On the ETA Form 9089, the annual proffered wage is listed as \$140,014. The Form I-140, Immigrant Petition for Alien Workers, indicates that, at the time of filing, the Petitioner employed 1,000 U.S. workers.

After sending a request for evidence (RFE), the Director denied the petition, concluding that the record did not establish the Petitioner's ability to pay the Beneficiary the proffered wage. Specifically, the Director noted that copies of the Beneficiary's IRS Forms W-2, Wage and Tax Statement, for the year 2021 "are not among the three types of evidence, enumerated in 8 C.F.R. Section 204.5(g)(2), required to illustrate a petitioner's ability to pay a proffered wage." The Director also noted that a copy of the Petitioner's Company Overview document in the record does not report the Petitioner's net income or net current assets, nor does it indicate it has been audited. The Director further noted that the Petitioner submitted the Beneficiary's pay stubs for the year 2022 in response to the RFE but that the total wages the Petitioner paid were less than the proffered wage. Additionally, the Director acknowledged that the Petitioner submitted a statement from its chief operating officer, but the Director observed that "the [P]etitioner has not provided evidence to show that the Chief Operating Officer is the company's designated Financial Officer," referencing 8 C.F.R. § 204.5(g)(2) (providing that a director "may accept a statement from a financial officer of . . . [a] prospective United States employer [that] employs 100 or more workers" as evidence of a petitioner's ability to pay).

On appeal, the Petitioner asserts that the Director disregarded information in the record that indicates the Petitioner's chief operating officer "was acting as the company's designated financial officer, despite holding the formal job title of Chief Operating Officer" during the relevant time. In the interim, the Petitioner has assigned the formal job title of "President and Chief Financial Officer" to another individual, and the Petitioner submits on appeal a letter from that individual, which addresses the issue of whether the Petitioner has the ability to pay the Beneficiary. This submission is material to the Petitioner's claim that it has the ability to pay the proffered wage. Therefore, we will remand the matter to the Director to consider this new evidence in the first instance and determine whether the Petitioner has the continuing ability to pay the proffered wage from the priority date onward.

We note that the Director did not address the factors discussed in *Matter of Sonogawa*, 12 I&N Dec. 612, 614-15 (Reg'l Comm'r 1967), which permits U.S. Citizenship and Immigration Services (USCIS) to consider the totality of the circumstances affecting a petitioner's ability to pay the proffered wage. Additionally, USCIS records indicate that the Petitioner has filed Form I-140 petitions for multiple beneficiaries that were pending or approved as of, or filed after, the priority date of the current petition; therefore, it must demonstrate that its job offer to each beneficiary is realistic, and that it has the ability to

¹ 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, 942-46 (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, 294-95 (5th Cir. 2015).

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).² We further note that, although [redacted] filed the Form I-140 with USCIS, [redacted], submitted the ETA Form 9089 to DOL. [redacted] and [redacted] appear to be separate legal entities with different federal employer identification numbers and addresses. Therefore, on remand, the Petitioner must establish that it is the same entity or a successor-in-interest to [redacted]. *See generally* section 204 of the Act, 8 U.S.C. § 1154.³

The record does not contain copies of the Petitioner's relevant annual reports, federal tax returns, or audited financial statements. Instead, the record contains the aforementioned copies of Forms W-2 and pay stubs, indicating that the Petitioner paid the Beneficiary less than the proffered wage of \$140,014 in 2021 and 2022. However, the record also contains the letters from the Petitioner's officers, referenced above.

Based on the foregoing, we will remand the matter for the entry of a new decision. The Director may request any additional evidence considered pertinent to the new determination regarding the Petitioner's ability to pay the Beneficiary the proffered wage from the priority date and continuing until the Beneficiary obtains lawful permanent residence, and any other issue including, but not limited to, whether the Petitioner is the same entity or a successor-in-interest to the entity that filed the labor certification. As such, we express no opinion regarding the ultimate resolution of this case on remand.

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

² 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 or denied without a pending appeal or motion, or its approval has been revoked; or
- Before the priority date of the I-140 petition filed on behalf of the other beneficiary.

³To establish a valid successorship, the Petitioner must demonstrate that it acquired the rights and obligations needed to operate a predecessor's business or a discrete part of it. *See generally* 6 USCIS Policy Manual E.3, www.uscis.gov/policy-manual. The Petitioner must further demonstrate that the job opportunity offered by the Petitioner is the same as the job opportunity originally offered on the labor certification. The Petitioner also bears the burden of proof to establish all elements of eligibility as of the priority date, including the provision of required evidence from the predecessor entity, such as evidence of the predecessor's ability to pay the proffered wage. Additionally, for a valid successor-in-interest relationship to exist between the Petitioner and the predecessor that filed the labor certification, the petition must fully describe and document the transfer and assumption of the ownership of the predecessor by the Petitioner. *Id.* at E.3(F).