



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

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

In Re: 23232144

Date: DEC. 9, 2022

Appeal of Nebraska Service Center Decision

Form I-140, Immigrant Petition for Professional

The Petitioner seeks to employ the Beneficiary as a software developer. It requests classification of the Beneficiary as a professional under the third preference immigrant classification. Immigration and Nationality Act (the Act) 203(b)(3)(A)(ii), 8 U.S.C. § 1153(b)(3)(A)(ii). This employment-based immigrant classification allows a U.S. employer to sponsor a professional with a baccalaureate degree for lawful permanent resident status.

The Director of the Nebraska Service Center denied the petition, concluding that the record did not establish that the Petitioner had the ability to pay the Beneficiary the proffered wage at the time of the priority date and continuing through adjudication. On appeal, the Petitioner asserts that the Director miscalculated its ability to pay the proffered wage because “USCIS failed to consider [the Petitioner’s] net income based on the federal tax returns and audited financial statement as evidence of its ability to pay.”

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 remand the matter to the Director for the 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). *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, upon approval of the petition, a noncitizen may apply for an immigrant visa abroad, or if eligible, adjust status in the United States to lawful permanent resident. *See* section 245 of the Act, 8 U.S.C. § 1255.

II. ABILITY TO PAY THE PROFFERED WAGE

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.¹

The priority date in this matter is November 14, 2013, the date on which 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 \$96,616. The Director acknowledged that the Petitioner submitted the Beneficiary's income tax returns and IRS Forms W-2, Wage and Tax Statement, for the years of 2013-2021, and pay statements for the Beneficiary for the years of 2021-2022. However, the Director concluded that the documents did not establish the Petitioner's ability to pay the proffered wage to the Beneficiary from the time of the priority date continuing through adjudication because "[t]he highest amount the Beneficiary was paid was \$77,069 in 2020."

As noted above, the Petitioner asserts on appeal that the Director miscalculated its ability to pay the proffered wage because "USCIS failed to consider [the Petitioner's] net income based on the federal tax returns and audited financial statement as evidence of its ability to pay."

In the decision, the Director did not address the Petitioner's financial statements and IRS Forms 1120S, U.S. Income Tax Return for an S Corporation, in the record for the relevant years. The Director did not determine whether the Petitioner demonstrated sufficient net income or net current assets to pay the difference between the proffered wage and the wages it paid to the Beneficiary in any relevant year. Additionally, 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 USCIS to consider the totality of the circumstances affecting a petitioner's ability to pay the proffered wage.

Moreover, USCIS records indicate that the Petitioner has filed numerous additional Form I-140 petitions for other beneficiaries. Where a petitioner has filed Form I-140 petitions for multiple

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, 942-946 (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).

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). Thus, the Petitioner must establish its ability to pay this Beneficiary as well as the beneficiaries of its other Form I-140 petitions that were pending or approved as of, or filed after, the priority date of the current petition, particularly in light of the Petitioner's frequent annual net current liabilities. Accordingly, on remand, the Director should request evidence of the Petitioner's ability to pay the combined proffered wages of all of its applicable beneficiaries. Additionally, the Director should request the Petitioner to submit the forms of evidence of ability to pay prescribed by regulation for the years in which the Petitioner has not already done so. See 8 C.F.R. § 204.5(g)(2). The Petitioner may also submit additional materials in support of the factors discussed in *Matter of Sonogawa*, 12 I&N Dec. at 614-15. The Director may also request any additional documentation deemed relevant to determine the Petitioner's continuing ability to pay the proffered wage.

Based on the foregoing, we will withdraw the Director's conclusion that the Petitioner did not establish its continuing ability to pay the Beneficiary the proffered wage for the reasons stated in the decision, and we will remand the matter for the entry of a new decision.

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