



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

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

In Re: 20277865

Date: JUL. 19, 2022

Appeal of Nebraska Service Center Decision

Form I-140, Immigrant Petition for Skilled Worker

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

The Director of the Nebraska Service Center denied the petition, concluding the record did not establish that the Petitioner had the ability to pay the proffered wage. The matter is now before us on appeal. On appeal, the Petitioner contends it submitted evidence to establish that it has sufficient net income to pay the proffered wage; or in the alternative, that it has demonstrated its ability to pay considering the totality of the circumstances.

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 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 foreign national 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.

¹ The priority date of a petition is the date the DOL accepted the labor certification for processing, which in this case is October 4, 2019. *See* 8 C.F.R. § 204.5(d).

II. ABILITY TO PAY THE PROFFERED WAGE

The annual proffered wage is \$72,000. The Petitioner must demonstrate its continuing ability to pay the proffered wage from the priority date in 2021 until the Beneficiary obtains lawful permanent residence. 8 C.F.R. § 204.5(g)(2). The regulation requires that “[e]vidence of this ability shall be either in the form of copies of annual reports, federal tax returns, or audited financial statements.” *Id.* The regulation further provides that if a petitioner employs 100 or more workers, we may accept a statement from a financial officer of the petitioner which establishes its ability to pay the proffered wage. *Id.*

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. We next examine whether it had sufficient annual amounts of net income or net current assets to pay the proffered wage. 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. USCIS may also consider the totality of the petitioner’s circumstances, including the overall magnitude of its business activities, in determining the Petitioner’s ability to pay the proffered wage. *See Matter of Sonogawa*, 12 I&N Dec. 612 (Reg’l Comm’r 1967).

The record does not contain the Petitioner’s annual reports, federal tax returns, or audited financial statements from the priority date in 2021 onward. The most recent federal tax return the Petitioner submitted was its 2016 IRS Form 1120, U.S. Corporation Income Tax Return², and it indicated that it had filed extensions related to all subsequent annual returns. The Petitioner further provided a letter from its accountant explaining these extensions, stating the returns had not been filed “due to the pandemic.” The accountant also indicated that the Petitioner’s gross income in each year from 2018 to 2020 was “approximately \$14,000,000 to \$19,000,000” and its net income during each year was “approximately \$400,000 to \$600,000.” The accountant further noted that its current assets as of June 2021 were “approximately \$85,000,000 to \$100,000,000.” He also pointed to the Petitioner’s IRS Forms 941, Employer’s Quarterly Federal Tax Returns, from 2020 and 2021, including the most recent one from the first quarter of 2021 reflecting that it had paid 76 employees approximately \$1.2 million in wages.

As noted, the Petitioner submitted its federal tax return for 2016. However, without annual reports, federal tax returns, or audited financial statements for 2021 onward, we cannot affirmatively conclude that the Petitioner has the continuing ability to pay from the priority date. Because it is unclear whether these documents were available at the time of filing the appeal, we will remand the matter to the Director for further consideration. The Director may request any additional documentation deemed relevant to determine the Petitioner’s continuing ability to pay the proffered wage.

In addition, where a petitioner has filed Forms I-140, Immigrant Petition for Alien Workers, 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). Thus, the Petitioner must establish its ability to pay this Beneficiary as well as any beneficiaries of other Form I-140 petitions pending or approved as of, or

² The Petitioner’s fiscal year on the Form 1120 was from August 1, 2016, to July 31, 2017.

filed after, the priority date of the current petition.³ Here, USCIS records indicate that the Petitioner has filed Form I-140 petitions for other beneficiaries. Accordingly, on remand, the Director should request evidence of the Petitioner's ability to pay the combined proffered wages of all applicable beneficiaries for whom the Petitioner has filed Forms I-140. The Petitioner may also submit additional materials in support of the factors discussed in *Matter of Sonogawa*, 12 I&N Dec. at 614-15.⁴

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

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 an I-140 petition 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 I-140 petition filed on behalf of the other beneficiary.

⁴ In determining the Petitioner's ability to pay the proffered wage, we may examine such factors as: the number of years the Petitioner has conducted business; its number of employees; the established historical growth of its business; its incurrence of uncharacteristic losses or expenses; its reputation in its industry; the Beneficiary's replacement of a current employee or outsourced service; or other factors affecting the Petitioner's ability to pay. See *Matter of Sonogawa*, 12 I&N Dec. at 614-15.