



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

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

MATTER OF M-, INC.

DATE: DEC. 12, 2017

APPEAL OF TEXAS SERVICE CENTER DECISION

PETITION: FORM I-140, IMMIGRANT PETITION FOR ALIEN WORKER

The Petitioner, a provider of information technology and consulting services, seeks to employ the Beneficiary as a software engineer. It requests his classification as a member of the professions holding an advanced degree under the second-preference, immigrant category. *See* Immigration and Nationality Act (the Act) section 203(b)(2)(A), 8 U.S.C. § 1153(b)(2)(A). This employment-based, “EB-2” category allows U.S. businesses to sponsor foreign nationals for lawful permanent resident status if they have master’s degrees, or bachelor’s degrees followed by at least five years of experience.

The Director of the Texas Service Center denied the petition and the Petitioner’s following motion to reopen. The Director concluded that the Petitioner did not demonstrate its required ability to pay the combined proffered wages of this and other petitions.

On appeal, the Petitioner submits additional evidence and asserts that the Director erred by requiring it to demonstrate its ability to pay the proffered wage of a beneficiary who ultimately declined its offer of permanent employment. The Petitioner also asserts that the Director should have prorated the wages it paid another beneficiary to reflect its payment of his full proffered wage.

Upon *de novo* review, we will withdraw the Director’s decision and remand this matter for further consideration consistent with the following opinion.

I. THE EMPLOYMENT-BASED IMMIGRATION PROCESS

Employment-based immigration generally follows a three-step process. First, an employer applies for 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 must determine whether the United States has able, willing, qualified, and available workers for an offered position, and whether employment of a foreign national would hurt the wages and working conditions of U.S. workers with similar jobs. *Id.* If DOL certifies a foreign national to permanently fill an offered position, the employer must next submit the certification with an immigrant visa petition to U.S. Citizenship and Immigration Services (USCIS). *See* section 204 of the Act, 8 U.S.C. § 1154. If USCIS approves 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. THE PETITIONER'S ABILITY TO PAY THE PROFFERED WAGE

A petitioner must demonstrate its continuing ability to pay the proffered wage of a DOL-certified position, from a petition's priority date until a beneficiary obtains lawful permanent residence. 8 C.F.R. § 204.5(g)(2).¹ Evidence of ability to pay must include copies of annual reports, federal income tax returns, or audited financial statements. *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 full proffered wage, USCIS considers whether it generated sufficient annual amounts of net income or net current assets to pay any differences between the annual proffered wage and 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).²

Here, the accompanying labor certification states the proffered wage of the offered position of software engineer as \$81,952 a year. The Petitioner submitted copies of an IRS Form W-2, Wage and Tax Statement, and payroll records. The Form W-2 indicates that the Petitioner paid the Beneficiary \$75,086 in 2015. The paystubs indicate that, as of May 31, the Petitioner paid the Beneficiary \$50,673 in 2016.

Neither the amount on the 2015 Form W-2 nor the year-to-date amount on the 2016 payroll record equal or exceed the annual proffered wage of \$81,952. Based on its payments to the Beneficiary, the Petitioner therefore has not demonstrated its ability to pay the proffered wage. Nevertheless, we credit the Petitioner's payments. It need only demonstrate its ability to pay the differences between the annual proffered wages and the wages paid to the Beneficiary, or \$6,866 in 2015 and \$31,279 in 2016.

The Petitioner provides copies of its federal income tax returns for 2015. The returns reflect net income of \$107,905 and a negative amount of net current assets.³ As the Petitioner's net income

¹ This petition's priority date is September 18, 2015, the date the DOL received the accompanying labor certification application for processing. *See* 8 C.F.R. § 204.5(d) (explaining how to determine a petition's priority date).

² Federal courts have upheld our method of determining a petitioner's ability to pay. *See, e.g., River St. Donuts, LLC v. Napolitano*, 558 F.3d 111, 118 (1st Cir. 2009); *Estrada-Hernandez v. Holder*, 108 F. Supp. 3d 936, 942-43 (S.D. Cal. 2015); *Rivzi v. Dep't of Homeland Sec.*, 37 F. Supp. 3d 870, 883-84 (S.D. Tex. 2014), *aff'd*, 627 Fed. App'x 292 (5th Cir. 2015).

³ The Petitioner files its federal income tax returns as an S corporation. S corporations that receive incomes, deductions, or other adjustments from sources outside their trades or businesses reconcile their income on Schedule K to IRS Forms 1120S, U.S. Income Tax Returns for S Corporations. *See* U.S. Internal Revenue Serv. (IRS), Instructions to Form 1120S, 20, <https://www.irs.gov/pub/irs-pdf/i1120s.pdf> (last visited Nov. 21, 2017). The Petitioner reported deductions and adjustments to its income from outside its business in 2015. We therefore consider line 18 of Schedule K to reflect its net income that year.

exceeds the difference between the proffered wage and the amount paid to the Beneficiary, the tax returns appear to establish the Petitioner's ability to pay the proffered wage in 2015.

However, where a petitioner has filed 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 revocation of a petition's approval where, as of the filing's grant, a petitioner did not demonstrate its ability to pay multiple beneficiaries). USCIS records show that the Petitioner filed at least 26 I-140 petitions for other beneficiaries. Thus, the Petitioner must establish its ability to pay this Beneficiary as well as the beneficiaries of the other I-140 petitions that were pending or filed after the priority date of the current petition.⁴

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 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 its ability to pay the Beneficiary and the other beneficiaries, the Petitioner must, 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.⁵ Without this information, we cannot determine the Petitioner's ability to pay the combined proffered wages of all applicable beneficiaries.

Because the record does not contain sufficient information to determine the Petitioner's wage burden in 2015, namely the priority dates of the eight petitions reported by the Petitioner and the priority dates and proffered wages of the Petitioner's later-filed I-140 petitions, we cannot determine whether or not the Petitioner had the ability to pay that year. As the Director did not request this information, we will remand this matter. On remand, the Director should request information noted above on the Petitioner's other filed I-140 petitions.⁶

On remand, the Director should also request copies of the Petitioner's annual reports, federal income tax returns, or audited financial statements for 2016. The Petitioner may also submit additional

⁴ The Petitioner's ability to pay the proffered wage of an I-140 beneficiary is not considered:

- After the beneficiary obtains lawful permanent residence;
- If the petition for the beneficiary has been withdrawn, revoked, or denied without a pending appeal or motion; or
- Before the priority date of the petition filed for the beneficiary.

⁵ The Petitioner must establish its eligibility for the immigration benefit sought. *See* section 291 of the Act, 8 U.S.C. § 1361; *Matter of Skirball Cultural Ctr.*, 25 I&N Dec. 799, 806 (AAO 2012).

⁶ The Petitioner has provided some information for eight of its filed petitions, but has not indicated the priority dates for those petitions and has not had the opportunity to submit the requested information for its later-filed petitions.

evidence of its ability to pay, including evidence of its payment of wages to this beneficiary and its other I-140 beneficiaries in 2016 and materials supporting the factors identified in *Sonegawa*.

We note that on appeal, the Petitioner asserts that the Director erred in requiring it to demonstrate its ability to pay the proffered wage of a beneficiary who declined its offer of permanent employment. The Petitioner's president states that the company intended to permanently employ the beneficiary, but that, after the petition's filing, the beneficiary declined to join the company for personal reasons. For purposes of determining ability to pay a proffered wage, USCIS policy requires combining the proffered wages of later-filed petitions, unless those petitions have been withdrawn, revoked, or denied. Here, the Petitioner provided evidence of the beneficiary's rejection of its job offer. But the record does not indicate that the approved petition on his behalf was withdrawn or revoked. Thus, absent USCIS' imminent revocation of the petition's approval, the Petitioner must withdraw the petition if it wants to avoid liability for demonstrating its ability to pay the beneficiary's proffered wage.

The Petitioner also asserts that the Director should have prorated the wages it paid another beneficiary at the end of 2015 to reflect its payment of his full proffered wage. USCIS policy, however, bars proration of proffered wages. A petitioner must demonstrate its ability to pay a full, proffered wage during relevant year(s). Unless the petition is withdrawn or revoked, the Petitioner therefore must demonstrate its ability to pay this beneficiary's full proffered wage in 2015.

For the foregoing reasons, we will remand this matter for consideration of the Petitioner's ability to pay the combined proffered wages in both 2015 and 2016.

III. CONCLUSION

We are remanding the matter for further consideration of the Petitioner's ability to pay the wages of its multiple petitions. The Director should ask the Petitioner to provide the additional evidence discussed above and afford the company a reasonable period to respond. Upon receipt of a timely response, the Director should review the entire record and enter a new decision.

ORDER: The decision of the Director is withdrawn. The matter is remanded for further proceedings consistent with the foregoing opinion and for the entry of a new decision.

Cite as *Matter of M-, Inc.*, ID# 651533 (AAO Dec. 12, 2017)