



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

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

MATTER OF I-N-, INC.

DATE: MAY 31, 2017

APPEAL OF TEXAS SERVICE CENTER DECISION

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

The Petitioner, an information technology consulting company, seeks to employ the Beneficiary as a lead Java developer. 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 a U.S. business to sponsor a foreign national for lawful permanent resident status if he or she has a master’s degree, or a bachelor’s degree followed by five years of experience.

The Director of the Texas Service Center denied the petition and the Petitioner’s following motions to reopen and reconsider. The Director concluded that the record did not demonstrate the Petitioner’s required ability to pay the proffered wage.

On appeal, the Petitioner submits additional evidence and asserts its ability to pay the proffered wages of this and other pending petitions.

Upon *de novo* review, we will sustain the appeal.¹

I. LAW

Employment-based immigration usually follows a three-step process. First, an employer files a labor certification application with 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). The DOL must certify that the United States lacks able, willing, qualified, and available workers for an offered position, and that employment of a foreign national will not hurt the wages and working conditions of U.S. workers with similar jobs. *Id.* If the DOL approves the labor certification application, the employer then files an immigrant visa petition with USCIS. *See* section 204 of the Act, 8 U.S.C. § 1154. Finally, if USCIS approves a petition, the foreign national may 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.

¹ While the appeal was pending, agency records indicate that U.S. Citizenship and Immigration Services (USCIS) approved another petition by the Petitioner for the Beneficiary. The approval of the other petition, however, does not moot the appeal. USCIS records indicate that the appeal’s sustenance will accord the Beneficiary an earlier priority date. *See* 8 C.F.R. § 204.5(e) (entitling a beneficiary of multiple, approved petitions to the earliest priority date).

A petitioner must demonstrate its continuing ability to pay a position's proffered wage from a petition's priority date until a beneficiary obtains lawful permanent residence.² 8 C.F.R. § 204.5(g)(2). 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, we first examine whether a petitioner 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 each year, we next examine whether it generated sufficient amounts of net income or net current assets to pay any difference between the annual proffered wage and the wage paid. If a petitioner's net income or net current assets are insufficient, we may also consider other factors affecting its ability to pay. *See Matter of Sonogawa*, 12 I&N Dec. 612, 614-15 (Reg'l Comm'r 1967).³

II. ANALYSIS

In this case, the labor certification states the proffered wage of the offered position of lead Java developer as \$109,000 a year. The petition's priority date is December 23, 2014. As of the Petitioner's response to our notice of intent to dismiss/request for evidence, regulatory required evidence of the Petitioner's ability to pay in 2016 was not yet available. We will therefore consider the Petitioner's ability to pay only in 2014 and 2015.

The record lacks evidence that the Petitioner paid wages to the Beneficiary in 2014, but the Petitioner submitted a copy of an IRS Form W-2, Wage and Tax Statement, indicating that it paid the Beneficiary wages of \$86,554.67 in 2015. That amount does not equal or exceed the annual proffered wage of \$109,000. Therefore, based on the Beneficiary's wages, the record does not establish the Petitioner's ability to pay in 2014 or 2015. Nevertheless, we credit the Petitioner's payments to the Beneficiary. For 2015, it need only demonstrate its ability to pay the difference between the annual proffered wage and the actual wages paid, or \$22,445.33.

The Petitioner submitted copies of its federal income tax returns for 2014 and 2015. The 2014 returns reflect net income of \$387,033 and net current assets of \$245,189, while the 2015 returns indicate net income of \$724,157 and net current assets of \$959,476.⁴ All of these amounts exceed

² If accompanied by a labor certification, a petition's priority date is the date the DOL received the labor certification application for processing. 8 C.F.R. § 204.5(d).

³ 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); *Estrada-Hernandez v. Holder*, 108 F. Supp. 3d 936, 942-43 (S.D. Cal. 2015).

⁴ The Petitioner files its federal income tax returns as an S corporation. S corporations that receive income adjustments from sources outside their trades or businesses reconcile their net income amounts on Schedules K to their IRS Forms 1120S, U.S. Income Tax Returns for S Corporations. *See* Internal Revenue Service (IRS), Instructions to IRS Form 1120S, at <https://www.irs.gov/pub/irs-pdf/i1120s.pdf> (last visited May 16, 2017). Because the Petitioner reported income adjustments from outside its business in 2014 and 2015, we consider the reconciled amounts on Schedules K, lines 18, of its tax returns to reflect its annual amounts of net income for those years.

the annual proffered wage of \$109,000. However, as originally stated in the Director's request for evidence, USCIS records indicate the Petitioner's filing of multiple, employment-based petitions.

A petitioner must demonstrate its ability to pay a petition's proffered wage from its priority date onward. 8 C.F.R. § 204.5(g)(2). Therefore, the Petitioner here must demonstrate its ability to pay the combined proffered wages of this and other petitions that remained pending after its priority date. The Petitioner must demonstrate its ability to pay the combined proffered wages from this petition's priority date until the beneficiaries of the other petitions obtained lawful permanent residence, or until their petitions were denied, withdrawn, or revoked. *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 approval, the petitioner did not demonstrate its ability to pay the combined proffered wages of multiple beneficiaries).

As the Petitioner did not have any other pending or approved petitions in 2014, the record establishes the Petitioner's ability to pay the proffered wage in 2014. For 2015, the record shows that the Petitioner had 48⁵ pending petitions (including this one) with a total of \$4,785,216 in combined proffered wages. The Petitioner paid its beneficiaries \$4,610,443.16 or \$174,772.84 less than the total proffered wage burden. Both the Petitioner's net income of \$724,157 and net current asset amounts of \$959,476, however, exceed that shortfall. The record therefore establishes the Petitioner's ability to pay the combined proffered wages in 2015.

III. CONCLUSION

The record on appeal establishes the Petitioner's continuing ability to pay the proffered wage from the petition's priority date onward.

ORDER: The appeal is sustained.

Cite as *Matter of I-N-, Inc.*, ID# 7955 (AAO May 31, 2017)

⁵ On appeal, the Petitioner documents its withdrawal of four of the petitions and USCIS' approval of lawful permanent residence for four of the other beneficiaries. The Petitioner asserts that it need not demonstrate its ability to pay the proffered wages of these eight petitions in 2015. As previously indicated, however, the Petitioner must demonstrate its ability to pay *until* the beneficiaries obtained lawful permanent resident or *until* the withdrawals of their petitions. Because neither the withdrawals nor the "green card" approvals predated 2015, the Petitioner must demonstrate its ability to pay the proffered wages of the eight petitions.