



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

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

MATTER OF D-C-, INC.

DATE: NOV. 24, 2017

APPEAL OF TEXAS SERVICE CENTER DECISION

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

The Petitioner, a provider of information technology development and consulting services, seeks to employ the Beneficiary as a consultant. 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 in positions requiring master’s degrees, or bachelor’s degrees followed by five years of experience.

The Director of the Texas Service Center denied the petition. The Director concluded that the Petitioner did not demonstrate its required ability to pay the combined proffered wages of this and other petitions it filed that remain pending or approved.

On appeal, the Petitioner submits additional evidence. It asserts that the Director did not consider all relevant factors and erred in requiring the Petitioner to pay proffered wages of petitions that it withdrew.

Upon *de novo* review, we will withdraw the Director’s decision and remand the matter for further proceedings 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, an employer must 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 the 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 a proffered wage, 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 the full proffered wage, USCIS considers whether it generated sufficient annual amounts of net income or net current assets to pay any difference between the proffered wage and the wages paid. If net income and net current assets are insufficient, USCIS may also 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 with a priority date of May 9, 2016, states the proffered wage of the offered position of consultant as \$113,235 a year. In response to the Director's request for additional evidence (RFE), the Petitioner submitted a copy of an IRS Form W-2, Wage and Tax Statement. The Form W-2 indicates that the Petitioner paid the Beneficiary \$80,359.70 in 2016, the year of the petition's priority date. The amount on the Form W-2 does not equal or exceed the annual proffered wage of \$113,235. The Petitioner therefore has not demonstrated its ability to pay the proffered wage based solely on its payments to the Beneficiary. As of the Petitioner's response to the Director's RFE, the required evidence of the company's ability to pay the proffered wage in 2016 was not yet available. Therefore, the Director was unable to analyze the Petitioner's net income or net current assets because the record lacked one of the regulatory required forms of evidence noted above. As of this decision, the required evidence should be attainable. We will therefore remand this matter for further proceedings.

Also, we note that because the Petitioner paid the Beneficiary less than the proffered wage in 2016, the Director properly required it to demonstrate its ability to pay combined proffered wages of this petition and others it filed that remained pending or approved after this petition's priority date. A petitioner must demonstrate its ability to pay the proffered wage of each petition it files until a beneficiary obtains lawful permanent residence. 8 C.F.R. § 204.5(g)(2). The Petitioner here must therefore demonstrate its ability to pay the combined proffered wages of this and its other petitions in 2016. *See Patel v. Johnson*, 2 F. Supp. 3d 108, 124 (D. Mass. 2014) (affirming a petition's

¹ This petition's priority date is the date the DOL received the accompanying labor certification 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 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); *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).

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revocation where, as of the filing's approval, the petitioner did not demonstrate its ability to pay combined proffered wages of multiple petitions).

On remand, the Director should ask the Petitioner to submit copies of an annual report, federal income tax returns, or audited financial statements for 2016. The Petitioner may also submit additional evidence of its ability to pay, including evidence in support of the factors stated in *Sonegawa* and of any payments it made to applicable beneficiaries in 2016. If required evidence of the Petitioner's ability to pay in 2017 is available, the Director may also consider the Petitioner's ability to pay combined proffered wages in that year. Upon the Petitioner's timely response, the Director should review the entire record and enter a new decision.

III. CONCLUSION

The record lacks required evidence of the Petitioner's ability to pay proffered wage in 2016, the year of the petition's priority date.

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 D-C-, Inc.*, ID# 884345 (AAO Nov. 24, 2017)