



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

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

MATTER OF T-S-, INC.

DATE: SEPT. 28, 2017

APPEAL OF TEXAS SERVICE CENTER DECISION

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

The Petitioner, an IT services company, seeks to employ the Beneficiary as a software engineer. It requests classification of the Beneficiary as a member of the professions holding an advanced degree under the second preference immigrant classification. *See* Immigration and Nationality Act (the Act) section 203(b)(2), 8 U.S.C. § 1153(b)(2). This employment-based immigrant classification allows a U.S. employer to sponsor a professional with an advanced degree for lawful permanent resident status.

The Director of the Texas Service Center denied the petition, concluding that the record did not establish, as required, that the Petitioner had the continuing ability to pay the proffered wages of all of its Form I-140, Immigrant Petition for Alien Worker, beneficiaries.

On appeal, the Petitioner submits additional evidence and asserts that it had the continuing ability to pay the proffered wages of all of its Form I-140 beneficiaries; that it had sufficient liquidity based on its tax returns and bank statements; and that it has reliable cash flows and a history of meeting payroll obligations.

While the Petitioner established that it had the ability to pay the proffered wage to the Beneficiary of this petition, it did not provide requested information regarding dozens of other Form I-140 petitions that it has filed. Without this information, we cannot determine the Petitioner's ability to pay the combined proffered wages of all of its Form I-140 beneficiaries. Thus, upon *de novo* review, we will dismiss the appeal.

## I. LAW

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).<sup>1</sup> *See* section 212(a)(5)(A)(i) of the Act, 8 U.S.C. § 1182(a)(5)(A)(i). By approving the labor certification, the DOL certifies that there are insufficient U.S. workers who are able, willing, qualified, and available for the

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<sup>1</sup> The priority date of a petition is the date the DOL accepted the labor certification for processing, which in this case is April 20, 2009. *See* 8 C.F.R. § 204.5(d).

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* section 212(a)(5)(A)(i)(I)-(II) of the Act. Second, the employer files an immigrant visa petition with U.S. Citizenship and Immigration Services (USCIS). *See* section 204 of the Act, 8 U.S.C. § 1154. Third, if USCIS approves the petition, the foreign national applies 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. ABILITY TO PAY THE PROFFERED WAGE

The Director denied the petition, concluding that the Petitioner did not establish its continuing ability to pay the proffered wage from the petition's priority date onward. The proffered wage is \$76,150 per year.

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.<sup>2</sup>

In this case, the Petitioner submitted copies of IRS Forms W-2, Wage and Tax Statements, demonstrating that it employed the Beneficiary in 2009, 2010, 2011, 2012, 2013, 2014, 2015, and 2016. The Forms W-2 reflect that the Petitioner paid the Beneficiary as follows:

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<sup>2</sup> 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*, -- F. Supp. 3d --, 2015 WL 3634497, \*5 (S.D. Cal. 2015); *Rivzi v. Dep't of Homeland Sec.*, 37 F. Supp. 3d 870, 883-84 (S.D. Tex. 2014), *aff'd*, -- Fed. Appx. --, 2015 WL 5711445, \*1 (5th Cir. Sept. 30, 2015).

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- \$32,798.08 in 2009;
- \$49,450.00 in 2010;
- \$53,343.35 in 2011;
- \$57,500.01 in 2012;
- \$79,500.04 in 2013;
- \$73,500.04 in 2014;
- \$75,200.04 in 2015; and
- \$76,750.04 in 2016.

The amounts on the Forms W-2 exceed the annual proffered wage in 2013 and 2016. However, the amounts on the Forms W-2 do not equal or exceed the annual proffered wage in 2009, 2010, 2011, 2012, 2014, or 2015. The record therefore does not establish the Petitioner's ability to pay the proffered wage based on the wages it paid to the Beneficiary. But we credit the Petitioner's payments to the Beneficiary. The Petitioner must demonstrate its ability to pay the difference between the annual proffered wage and the amounts it paid to the Beneficiary, which is \$43,351.92 in 2009; \$26,700.00 in 2010; \$22,806.65 in 2011; \$18,649.99 in 2012; \$2,649.96 in 2014; and \$949.96 in 2015.

The Petitioner's federal tax returns reflect net income<sup>3</sup> amounts as follows:

- \$244,438 in 2009;
- \$621,523 in 2010;
- \$1,556,682 in 2011;
- \$1,730,583 in 2012;
- \$552,297 in 2014; and
- \$600,342 in 2015.

Therefore, for the years 2009, 2010, 2011, 2012, 2014, and 2015, the Petitioner had sufficient net income to pay the difference between the annual proffered wage and the amounts it paid to the Beneficiary.<sup>4</sup>

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<sup>3</sup> The record indicates that the Petitioner is an S corporation. Where an S corporation's income is exclusively from a trade or business, USCIS considers net income to be the figure for ordinary income, shown on line 21 of page 1 of a petitioner's IRS Form 1120S, U.S. Income Tax Return for an S Corporation. However, where an S corporation has income, credits, deductions, or other adjustments from sources other than a trade or business, net income is found on line 18 of Schedule K to Form 1120S. See Internal Revenue Serv., Instructions to Form 1120S, 22, at <https://www.irs.gov/pub/irs-pdf/i1120s.pdf> (last visited Sept. 20, 2017). In this case, the Petitioner's net income is found on line 18 of Schedule K of its Form 1120S in 2009, 2010, and 2011, and on line 21 of page 1 of its Form 1120S in 2012, 2014, and 2015.

<sup>4</sup> Because the Petitioner's net income exceeds the difference between the annual proffered wage and wages paid to the Beneficiary in each relevant year, we do not need to analyze the Petitioner's net current assets in those years to determine if the Petitioner has the ability to pay the proffered wage to this Beneficiary.

However, where a petitioner has filed Form 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 denial of a petition where a petitioner did not demonstrate its ability to pay multiple beneficiaries). USCIS records show that the Petitioner filed multiple 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.<sup>5</sup> We do not consider the other beneficiaries for any year that the Petitioner has paid the Beneficiary a salary equal to or greater than the proffered wage, which in this case is 2013 and 2016.

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 that it has the 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.<sup>6</sup> Without this information, we cannot determine the Petitioner's ability to pay the combined proffered wages of all of its applicable beneficiaries.

In response to the Director's request for evidence, the Petitioner submitted a chart identifying 30 other I-140 petitions that it filed.<sup>7</sup> The Petitioner also submitted Forms W-2 indicating its payments to the beneficiaries of the other petitions. But the Petitioner did not provide information regarding over 70 other petitions that it has filed since 2007, including 17 filed in 2007;<sup>8</sup> 14 filed in 2008;<sup>9</sup> 11 filed in

<sup>5</sup> The Petitioner's ability to pay the proffered wage of one of the other 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.

<sup>6</sup> It is the Petitioner's burden to establish eligibility for the immigration benefit sought. Section 291 of the Act, 8 U.S.C. § 1361; *Matter of Skirball Cultural Ctr.*, 25 I&N Dec. 799, 806 (AAO 2012).

<sup>7</sup> The chart identified two additional beneficiaries, but it did not list receipt numbers for these beneficiaries.

<sup>8</sup> The receipt numbers for the petitions filed in 2007 are [REDACTED]

[REDACTED] and [REDACTED] Even though these petitions were filed before 2009, without information regarding the status of these petitions, we cannot determine whether they should be included in the wage deficiency calculation for the years 2009, 2010, 2011, 2012, 2014, and 2015.

<sup>9</sup> The receipt numbers for the petitions filed in 2008 are [REDACTED]

2009;<sup>10</sup> 12 filed in 2010;<sup>11</sup> 12 filed in 2011;<sup>12</sup> 4 filed in 2012;<sup>13</sup> 1 filed in 2013;<sup>14</sup> 3 in 2015;<sup>15</sup> and 1 in 2016.<sup>16</sup> We note that the majority of the annual proffered wages of the 30 petitions listed by the Petitioner exceed \$80,000. If the omitted petitions have similar proffered wages, the total wage deficiency would greatly exceed the Petitioner’s net income and/or net current assets in one or more relevant years. On appeal, the Petitioner states that it had the continuing ability to pay the proffered wages of all of its Form I-140 beneficiaries; that it had sufficient liquidity based on its tax returns and bank statements;<sup>17</sup> and that it has reliable cash flows and a history of meeting payroll obligations. However, without information regarding the Petitioner’s additional beneficiaries, we cannot determine the Petitioner’s ability to pay the combined proffered wages of all of its Form I-140 beneficiaries.

The Petitioner also asserts on appeal that it has established its ability to pay based on the totality of the circumstances, including its “corporate structure, company’s history, reputation and past earning capacity.” However, the Petitioner has not established its outstanding reputation in its industry, nor has it established any historical growth, as its sales fluctuated between 2009 and 2016. Also, as discussed above, without information regarding all of its I-140 beneficiaries, we cannot determine the Petitioner’s ability to pay the combined proffered wages of all of the applicable beneficiaries. Thus, assessing the totality of circumstances in this case, the record does not establish the Petitioner’s continuing ability to pay the proffered wage.

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\_\_\_\_\_ and \_\_\_\_\_. Even though these petitions were filed before 2009, without information regarding the status of these petitions, we cannot determine whether they should be included in the wage deficiency calculation for the years 2009, 2010, 2011, 2012, 2014, and 2015.

<sup>10</sup> The receipt numbers for the petitions filed in 2009 are \_\_\_\_\_ and \_\_\_\_\_.

<sup>11</sup> The receipt numbers for the petitions filed in 2010 are \_\_\_\_\_ and \_\_\_\_\_.

<sup>12</sup> The receipt numbers for the petitions filed in 2011 are \_\_\_\_\_, and \_\_\_\_\_.

<sup>13</sup> The receipt numbers for the petitions filed in 2012 are \_\_\_\_\_ and \_\_\_\_\_.

<sup>14</sup> The receipt number for the petition filed in 2013 is \_\_\_\_\_.

<sup>15</sup> The receipt numbers for the petitions filed in 2015 are \_\_\_\_\_ and \_\_\_\_\_.

<sup>16</sup> The receipt number for the petition filed in 2016 is \_\_\_\_\_.

<sup>17</sup> Specifically, it asserts that it has had an average monthly ledger balance exceeding approximately \$400,000 since 2012. However, bank statements are not among the three types of evidence, listed in 8 C.F.R. § 204.5(g)(2), required to illustrate a petitioner’s ability to pay a proffered wage.

### III. CONCLUSION

The Petitioner has not established its continuing ability to pay the Beneficiary because it has not demonstrated its ability to pay the proffered wages of all of its Form I-140 beneficiaries from the petition's priority date onward.

**ORDER:** The appeal is dismissed.

Cite as *Matter of T-S-, Inc.*, ID# 615951 (AAO Sept. 28, 2017)