



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

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

MATTER OF U-C- INC.

DATE: APR. 2, 2019

APPEAL OF TEXAS SERVICE CENTER DECISION

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

The Petitioner, a healthcare staffing company, seeks an EB-2 immigrant visa to classify the Beneficiary as a member of the professions holding an advanced degree and who is employed in a Schedule A, Group I occupation, physical therapist. *See* of the Immigration and Nationality Act (the Act) section 203(b)(2), 8 U.S.C. § 1153(b)(2); section 212a(5)(A)(i) of the Act, 8 U.S.C. § 1182(a)(5)(A)(i); 20 C.F.R. § 656.5(a). The U.S. Department of Labor (DOL) has determined that there are not sufficient U.S. professional nurses and physical therapists who are able, willing, qualified, and available for these occupations, and that the wages and working conditions of similarly employed U.S. workers will not be adversely affected by the employment of foreign nationals. 20 C.F.R. § 656.5.

The Director of the Texas Service Center denied the petition, concluding that the record did not establish, as required, that the Petitioner has the ability to pay the wages offered to the Beneficiary as well as the beneficiaries of all of the Form I-140 petitions it has filed.

On appeal, the Petitioner submits additional evidence and asserts that it has the ability to pay the Beneficiary's salary, as well as that of the beneficiaries for whom it has filed a petition.

Upon *de novo* review, we will dismiss the appeal.

I. LAW

Section 203(b)(2)(A) of the Act provides classification to qualified individuals who are members of the professions holding advanced degrees or their equivalent. Petitions for Schedule A occupations do not require the petitioner to test the labor market and obtain a certified ETA Form 9089, Application for Alien Employment Certification, from DOL prior to filing the petition with U.S. Citizenship and Immigration Services (USCIS). Instead, the petition is filed directly with USCIS with an uncertified ETA Form 9089, in duplicate. 8 C.F.R. §§ 204.5(a)(2) and (k)(4); *see also* 20 C.F.R. § 656.15.

In addition, the petitioner must establish its ability to pay the wage proffered to the beneficiary. 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.

II. ANALYSIS

The sole issue to be addressed concerns the Petitioner's ability to pay the wage offered to the Beneficiary, as well as the beneficiaries of additional Form I-140 petitions it has filed. The Petitioner indicated on Form I-140 that it would pay the beneficiary a wage of \$70,616 per year.

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 Form 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 Form I-140 petitions that were pending or filed after the priority date of the current petition, September 15, 2017.¹ 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.

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.²

On appeal, the Petitioner states that it has been paying the Beneficiary since he became an employee, and submits paystubs showing that he has been paid at the rate of \$30 per hour (or \$62,400 on an annual basis) since July 2, 2018. However, this rate of pay is below the offered wage, and does not

¹ 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.

² 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).

cover the period from September 15, 2017 through July 1, 2018. Since the Petitioner has therefore not established that it has paid the Beneficiary at least the offered wage since the priority date, we will consider the submitted evidence to determine the Petitioner's ability to pay the Beneficiary, as well as the beneficiaries of the additional petitions identified by the Director.

In response to the Director's request for evidence (RFE), the Petitioner submitted a chart claiming to show all Form I-140 petitions it had filed during 2017 and 2018 (through May 30, 2018, the date of its response.) This chart shows receipt numbers and beneficiary names for 25 petitions, along with the priority date and offered wage for each. As noted by the Director, the chart falls far short of listing all Form I-140 petitions filed by the Petitioner during this period³. In addition, it does not include the many petitions filed for the EB-2 classification, which as in this case were filed on behalf of physical therapists with a higher prevailing wage than those for the registered nurses shown on the chart, thus increasing its overall obligation. The record also does not indicate whether any of these other petitions were withdrawn, revoked, or denied, or whether any of the other beneficiaries obtained lawful permanent residence. Without this information, we cannot determine the Petitioner's ability to pay the combined proffered wages of all of its applicable beneficiaries.

On appeal, the Petitioner submitted paystubs for the period ending August 12, 2018, for 87 employees on its payroll at the time. We note that when compared to the incomplete list of petitions submitted in response to the Director's RFE, none of the names of the listed beneficiaries appears on those paystubs. Therefore, the Petitioner would have to establish that it has sufficient net income or net current assets to pay the offered wages for those beneficiaries whose petitions were not withdrawn, revoked or denied, or who have not obtained lawful permanent residence, in addition to the wages for those beneficiaries of the petitions not included on the Petitioner's list. As noted above, we cannot determine the value of the Petitioner's combined ability to pay obligation, and therefore whether it meets that obligation, without this information.

The Petitioner also submits a bank statement for June 2018 to establish its ability to pay the combined proffered wages. 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. While this regulation allows additional material "in appropriate cases," the Petitioner has not demonstrated why the documentation specified at 8 C.F.R. § 204.5(g)(2) is inapplicable or otherwise depicts an inaccurate financial picture of the Petitioner. Further, bank statements show the amount in an account on a given date, and cannot show the sustainable ability to pay a proffered wage.

Further, on appeal the Petitioner submits evidence of payments received from clients, and asserts that the beneficiaries' proposed employment will increase the Petitioner's income. Against the projection of future earnings, *Matter of Great Wall*, 16 I&N Dec. 142, 144-145 (Acting Reg'l Comm'r 1977), states:

I do not feel, nor do I believe the Congress intended, that the petitioner, who admittedly could not pay the offered wage at the time the petition was filed, should subsequently become eligible to have the petition approved under a new set of facts hinged upon probability and projections, even beyond the information presented on appeal.

³ The Director noted that USCIS records indicated that the Petitioner had filed 59 Form I-140 petitions during 2017.

The Petitioner's assertions do not outweigh the evidence presented in its tax returns, which as the Director found are not sufficient to establish its continuing ability to pay the combined proffered wages of the beneficiaries on whose behalf it has petitioned.

III. CONCLUSION

The Petitioner has not established its continuing ability to pay the wage offered to the Beneficiary, as the record does not contain evidence that it has compensated him at at least the offered rate since the priority date. In addition, it has not submitted sufficient evidence of the value of its obligation to pay the beneficiaries of all of the petitions it has filed, and we are thus unable to determine its ability the combined wages of all applicable beneficiaries.

ORDER: The appeal is dismissed.

Cite as *Matter of U-C- INC.*, ID# 2521234 (AAO Apr. 2, 2019)