



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

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

MATTER OF A-H-C-P-, INC.

DATE: FEB. 1, 2019

APPEAL OF TEXAS SERVICE CENTER DECISION

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

The Petitioner, a provider of health care personnel, seeks to employ the Beneficiary as a registered nurse. It requests classification of the Beneficiary as a member of the professions holding an advanced degree under the second preference immigrant classification. Immigration and Nationality Act (the Act) section 203(b)(2), 8 U.S.C. § 1153(b)(2). This employment-based (EB-2) 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 Petitioner did not demonstrate that the Beneficiary was qualified for the offered position, and that the Petitioner had not established its continuing ability to pay the combined proffered wages of this and other immigrant petitions. The Director subsequently denied the Petitioner's motion to reopen.

On appeal, the Petitioner submits additional evidence and asserts that a totality of the circumstances demonstrates its ability to pay the combined proffered wages.

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

**I. EMPLOYMENT-BASED PETITIONS FOR SCHEDULE A OCCUPATIONS**

A Schedule A occupation is an occupation codified at 20 C.F.R. § 656.5(a) for which the U.S. Department of Labor (DOL) has determined that there are not sufficient U.S. workers who are able, willing, qualified and available and that the wages and working conditions of similarly employed U.S. workers will not be adversely affected by the employment of foreign nationals in such occupations. The current list of Schedule A occupations includes professional nurses and physical therapists. *Id.*

Petitions for Schedule A occupations do not require a petitioner to test the labor market and obtain a certified labor certification from the DOL prior to filing the petition with U.S. Citizenship and Immigration Services (USCIS). Instead, the petition is filed directly with USCIS with a duplicate

uncertified labor certification. See 8 C.F.R. § 204.5(a)(2); see also 20 C.F.R. § 656.15.<sup>1</sup> 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. BENEFICIARY'S QUALIFICATIONS

The Director denied the petition concluding, in part, that the Petitioner did not establish that the Beneficiary was qualified for the offered position.

For Schedule A professional nurse petitions, a petitioner must establish that the beneficiary has a Certificate from the Commission on Graduates of Foreign Nursing Schools (CGFNS); a permanent, full and unrestricted license to practice professional nursing in the state of intended employment; or passed the National Council Licensure Examination for Registered Nurses (NCLEX-RN).<sup>2</sup> See 20 C.F.R. § 656.5(a)(2). A petitioner must establish that this eligibility requirement was satisfied at the priority date. 8 C.F.R. § 103.2(b)(1).

A beneficiary must also meet all of the requirements of the offered position set forth on the labor certification by the priority date. *Matter of Wing's Tea House*, 16 I&N Dec. 158, 159 (Acting Reg'l Comm'r 1977). The labor certification requires a bachelor's degree in nursing<sup>3</sup> and 60 months of experience in the job offered, or a master's degree.

A beneficiary's claimed qualifying experience must be supported by letters from employers giving the name, address, and title of the employer, and a description of the beneficiary's experience. 8 C.F.R. § 204.5(g)(1). The labor certification states that the Beneficiary qualifies for the offered position based on experience as a registered nurse with [REDACTED] in Guam from July 2015 to the date the petition was filed on April 11, 2016; as a registered nurse with [REDACTED] in KSA from September 2012 to November 2014; as a registered nurse with [REDACTED] in the Philippines from November 2010 to May 2012; and as a registered nurse with [REDACTED] in the Philippines from February 2009 to October 2010.

The record contains the following experience verification letters:

- Letter from [REDACTED] stating that it employed the Beneficiary as a registered nurse from July 7, 2015, to the date of the letter on March 28, 2016;
- Letter from [REDACTED] stating that it employed the Beneficiary as a staff nurse from September 12, 2012, to November 17, 2014;

<sup>1</sup> The priority date of the petition is April 11, 2016, the date the completed, signed petition was properly filed with USCIS. See 8 C.F.R. § 204.5(d).

<sup>2</sup> The labor certification in this case required either a state registered nurse license or a CGFNS certificate. The record contains the Beneficiary's CGFNS Certificate.

<sup>3</sup> The record establishes that the Beneficiary has the foreign equivalent of a U.S. bachelor's degree in nursing.

- Letter from [REDACTED] stating that it employed the Beneficiary as a staff nurse from November 15, 2010, to May 2, 2012; and
- Letter from [REDACTED] stating that it employed the Beneficiary as a staff nurse from February 1, 2009, to October 30, 2010.

The Director determined that the Beneficiary does not possess the 60 months of experience required by the labor certification as of the priority date. Specifically, he noted that the experience verification letters from [REDACTED] and [REDACTED] do not provide a description of the Beneficiary's duties. The letter from [REDACTED] also omits the Beneficiary's duties. Therefore, the three letters are not credible evidence of the Beneficiary's experience as a registered nurse. 8 C.F.R. § 204.5(g)(1). The letter from [REDACTED] certifies only eight months and 22 days (266 days) of experience as a registered nurse, which is less than the 60 months required by the labor certification.

The Petitioner did not address the Beneficiary's experience in its prior motion, or on appeal. Thus, the Petitioner has not established that the Beneficiary possessed the experience required by the labor certification as of the priority date, and the petition's approval was properly denied on that basis.

### III. 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). Evidence of ability to pay must include copies of annual reports, federal tax returns, or audited financial statements. *Id.*

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. *See Matter of Sonogawa*, 12 I&N Dec. 612, 614-15 (Reg'1 Comm'r 1967).<sup>4</sup>

Here, the labor certification application states the proffered wage of the offered position of registered nurse as \$73,000 a year. As of the appeal's filing, required evidence of the Petitioner's ability to pay the proffered wage in 2017 was not yet available. We will therefore consider the Petitioner's ability to pay only in 2016, the year of the petition's filing date.

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<sup>4</sup> Federal courts have upheld our method of determining a petitioner's ability to pay a proffered wage. *See, e.g., 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, 294-295 (5th Cir. 2015).

The Petitioner submitted a copy of a paystub indicating that, as of November 18, 2016, it paid the Beneficiary \$4,295.32 that year. This amount does not equal or exceed the annual proffered wage of \$73,000. Based on payments to the Beneficiary, the record therefore does not establish the Petitioner's ability to pay the proffered wage. Nevertheless, we credit the Petitioner's payments to the Beneficiary. It need only demonstrate its ability to pay the difference between the annual proffered wage and the amount it paid the Beneficiary, or \$68,704.68.

On appeal, the Petitioner submits a copy of its federal tax return for 2016, reflecting net income of \$45,901 and net current assets of \$266,579. The net current assets reflected on the returns exceed the difference between the annual proffered wage and the amount paid to the Beneficiary. As the Director found, however, USCIS records indicate the Petitioner's filing of multiple Forms I-140, Immigrant Petitions for Alien Workers. 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). 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 approved as of, or filed after, the priority date of the current petition.<sup>5</sup>

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>

In response to the Director's request for evidence (RFE), the Petitioner provided information for 78 petitions that the Petitioner had filed through the date of the RFE response, identifying the beneficiary, priority date and offered wage of each petition. The list indicated that five beneficiaries had obtained LPR status, that one petition had been denied, and that one beneficiary had resigned.<sup>7</sup>

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<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 Petitioner must submit evidence that it withdrew this I-140 petition. In the absence of a withdrawal, the wages

No current status was indicated for the other 71 petitions, and the Petitioner did not indicate that wages had been paid to any of these 71 beneficiaries.<sup>8</sup> The Director found that the proffered wages for the 71 beneficiaries averaged approximately \$60,000; that their combined proffered wages totaled more than \$4 million; and that the Petitioner had not established its ability to pay the combined proffered wages of these beneficiaries through its net income or net current assets.

On appeal, the Petitioner has not supplemented the record with any additional evidence of wages paid to any of the 71 other beneficiaries of its pending or approved Form I-140 petitions. Rather, the Petitioner argues that it has shown growth and submits a compilation report from a certified public accountant (CPA) with financial statements consisting of a balance sheet as of June 30, 2017, and statements of income, changes in stockholders' equity, and cash flows for the six-month period from January 1 to June 30, 2017. As stated in the compilation report, however, the CPA did not audit the financial statements. The CPA further stated that “[m]anagement has elected to omit substantially all of the disclosure required by accounting principles generally accepted in the United States of America.” Thus, the financial statements do not comply with regulation at 8 C.F.R. § 204.5(g)(2), which makes clear that when a petitioner relies on financial statements to demonstrate its ability to pay the proffered wage, those financial statements must be audited. An audit is conducted in accordance with generally accepted auditing standards to obtain a reasonable assurance that the financial statements of the business are free of material misstatements. The unaudited financial statements submitted by the Petitioner, therefore, do not meet this standard and are not persuasive evidence of the Petitioner's overall financial condition or its ability to pay the proffered wage(s) in this proceeding.

As previously indicated and as the Petitioner asserts on appeal, we may consider evidence of a petitioner's ability to pay a proffered wage beyond its payments to a beneficiary and its net income and net current assets. *Sonegawa*, 12 I&N Dec. at 614-15. Under *Sonegawa*, we may consider such factors as: the number of years a petitioner has conducted business; the growth of its business; its number of employees; its incurrence of uncharacteristic losses or expenses; its reputation in its industry; whether a beneficiary will replace a current employee or outsourced service; or other evidence of its ability to pay.

Here, the record indicates the Petitioner's incorporation in 2012 and its claimed employment, as of the petition's filing, of 23 people. Copies of the Petitioner's federal tax returns indicate that, from 2015 to 2016, its total annual income increased. On appeal, the Petitioner's unaudited financial statements show even greater growth in 2017, but as noted above, the unaudited nature of the statements limits their probative value. Moreover, unlike the petitioner in *Sonegawa*, the record does not indicate the Petitioner's continuous operations for more than 10 years, its incurrence of uncharacteristic losses or expenses, or its possession of an outstanding reputation in its industry.

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owed to this beneficiary will be considered as part of the Petitioner's overall wage burden.

<sup>8</sup> USCIS records show that the Petitioner has continued to file I-140 petitions since the date of the RFE response. In any future filings, the Petitioner must submit the required information for each petition that was pending or approved as of the priority date of this petition, or filed thereafter.

The record also does not indicate the Beneficiary's replacement of a current employee or outsourced service. Also unlike *Sonegawa*, the Petitioner here must demonstrate its ability to pay combined proffered wages of multiple petitions. Thus, based on the totality of the circumstances under *Sonegawa*, the Petitioner has not established its ability to pay the proffered wage.

For the foregoing reasons, the Petitioner has not demonstrated its continuing ability to pay the proffered wage from the petition's priority date onward. We will therefore affirm the Director's decision.

#### IV. CONCLUSION

The record on appeal does not establish the Beneficiary's qualifications for the offered position or the Petitioner's continuing ability to pay the proffered wage from the petition's priority date onward.<sup>9</sup>

**ORDER:** The appeal is dismissed.

Cite as *Matter of A-H-C-P-, Inc.*, ID# 1175413 (AAO Feb. 1, 2019)

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<sup>9</sup> To meet Schedule A eligibility, a petitioner must submit a valid prevailing wage determination (PWD) obtained in accordance with 20 C.F.R. §§ 656.40 and 656.41. See 20 C.F.R. § 656.15(b)(1). In this case, the PWD states that the offered job is a nurse supervisor, while the labor certification and Form I-140 state that the offered job is a registered nurse. In any future proceedings, the Petitioner must resolve this discrepancy in the record with independent, objective evidence pointing to where the truth lies. *Matter of Ho*, 19 I&N Dec. 582, 591-92 (BIA 1988). The record also does not contain proper notice of the filing of a labor certification (Notice). Petitions for Schedule A occupations must contain evidence establishing that the petitioner provided its U.S. workers with Notice prescribed by 20 C.F.R. § 656.10(d). In this case, the record does not contain a Notice that was properly provided between 30 and 180 days before filing the labor certification application. See 20 C.F.R. § 656.10(d)(3)(iv).