



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

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

MATTER OF JSMC- INC.

DATE: JULY 30, 2019

APPEAL OF TEXAS SERVICE CENTER DECISION

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

The Petitioner, a provider of information technology consulting services, seeks to employ the Beneficiary as a programmer analyst. It requests her classification under the second-preference immigrant category as a member of the professions holding an advanced degree. *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 to work in a job requiring at least 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. The Director concluded that, contrary to Department of Homeland Security regulations, the Petitioner did not demonstrate its ability to pay the combined proffered wages of this and other petitions.

On appeal, the Petitioner submits additional evidence and argues that the Director based his conclusion on the company’s financial records for an unrelated period. The Petitioner contends that its most recent federal income tax return demonstrates its ability to pay all applicable proffered wages.

Upon *de novo* review, we will withdraw the Director’s decision and remand the matter for entry of a new decision consistent with the following analysis.

I. EMPLOYMENT-BASED IMMIGRATION

Immigration as an advanced degree professional generally follows a three-step process. To permanently fill a position in the United States with a foreign worker, a prospective employer must first obtain 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 approval signifies that insufficient U.S. workers are able, willing, qualified, and available for an offered position, and that employment of a foreign national will not harm wages and working conditions of U.S. workers with similar jobs. *Id.*

If DOL approves a position, an employer must next submit the labor 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. Among other things, USCIS determines whether a beneficiary meets the

requirements of a DOL-certified position and the requested visa classification. If USCIS grants a 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. ABILITY TO PAY THE PROFFERED WAGE

A petitioner must demonstrate its continuing ability to pay the proffered wage of an offered position, from a petition's priority date until a beneficiary obtains lawful permanent residence. 8 C.F.R. § 204.5(g)(2). As evidence of ability to pay, petitioners who employ less than 100 people - like the Petitioner here - must submit copies of annual reports, federal 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 annual amounts of net income or net current assets sufficient to pay any differences between the proffered wage and wages paid. If net income and net current assets are insufficient, USCIS may consider other factors affecting a petitioner's ability to pay the proffered wage. *See Matter of Sonogawa*, 12 I&N Dec. 612 (Reg'l Comm'r 1967).¹

Here, the accompanying labor certification states the proffered wage of the offered position of programmer analyst as \$135,283 a year. The petition's priority date is January 8, 2018, the date DOL accepted the labor certification application for processing. *See* 8 C.F.R. § 204.5(d) (explaining how to determine a petition's priority date).

On appeal, the Petitioner submits a copy of an IRS Form W-2, Wage and Tax Statement, indicating that it paid the Beneficiary \$71,875 in 2018. That amount does not equal or exceed the annual proffered wage of \$135,283. The Form W-2 therefore does not demonstrate the Petitioner's ability to pay the proffered wage.

As previously indicated, we typically credit amounts on Forms W-2 as wages that petitioners paid to beneficiaries. Here, however, the Form W-2 ascribes a different U.S. Social Security number to the Beneficiary than indicated on the Form I-140, Immigrant Petition for Alien Worker. The discrepancy casts doubt on the authenticity of the Form W-2 and the Petitioner's claimed payments to the Beneficiary in 2018. We therefore will not credit the Form W-2 amount as payment towards the annual proffered wage. *See Matter of Ho*, 19 I&N Dec. 582, 591 (BIA 1988) (requiring a petitioner to resolve inconsistencies of record with independent, objective evidence pointing to where the truth lies).

¹ Federal courts have upheld USCIS' 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); *Rahman v. Chertoff*, 641 F. Supp. 2d 349, 351-52 (D. Del. 2009).

The Petitioner's appeal also contains a copy of its federal income tax return for 2018, the year of the petition's priority date. As of the petition's filing in October 2018, required evidence of the Petitioner's ability to pay that year was not yet available. The Director therefore determined the company's ability to pay using a copy of its federal income tax return for 2017. The Petitioner's 2018 return reflects a negative amount of net income, but net current assets of \$309,120. The net current asset amount therefore exceeds the annual proffered wage and appears to demonstrate the Petitioner's ability to pay the Beneficiary's individual proffered wage.

As the Director found, however, the Petitioner has filed immigrant petitions for other beneficiaries. 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 other petitions that were pending or approved as of this petition's priority date of January 8, 2018, or filed thereafter. *See Patel v. Johnson*, 2 F.Supp.3d 108, 124 (D. Mass. 2014) (affirming our revocation of a petition's denial where, as of the filing's grant, a petitioner did not demonstrate its ability to pay the combined proffered wages of multiple petitions).²

As the Director requested, the Petitioner provided proffered wages and priority dates of two other petitions that it filed in 2018. USCIS records, however, indicate that the Petitioner filed at least four other immigrant petitions that were pending or approved as of January 8, 2018, or filed thereafter.³ The Petitioner must therefore also demonstrate its ability to pay the combined proffered wages of these additional petitions in 2018.

The Director did not request information about the Petitioner's additional petitions. We will therefore remand the matter for additional fact-finding. On remand, the Director should ask the Petitioner to provide the proffered wages and priority dates of the additional petitions. The Petitioner may also provide additional evidence of its ability to pay the petitions' combined wages, including proof of payments to applicable beneficiaries in 2018 and materials supporting the factors stated in *Sonegawa*. To receive credit for its claimed payments to the Beneficiary, the Petitioner must also submit independent, objective evidence explaining the different Social Security numbers ascribed to her.

III. CONCLUSION

The record lacks proffered wages and priority dates of other beneficiaries whose combined proffered wages the Petitioner must demonstrate its ability to pay. We will therefore remand this matter to the Director for further development of the record.

² The Petitioner need not demonstrate its ability to pay proffered wages of petitions that it withdrew or, unless pending on appeal, that USCIS denied, revoked, or rejected. The Petitioner also need not demonstrate its ability to pay proffered wages before the priority dates of corresponding petitions, or after the dates that corresponding beneficiaries obtained lawful permanent residence.

³ USCIS records identify the four additional petitions by the following receipt numbers: [] [] [] and []

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ORDER: The decision of the Director is withdrawn. The matter is remanded for entry of a new decision consistent with the foregoing analysis.

Cite as *Matter of JSMC- Inc.*, ID# 5083649 (AAO July 30, 2019)