



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

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

MATTER OF J-M-, INC.

DATE: NOV. 20, 2019

APPEAL OF NEBRASKA 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 senior software engineer. 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 immigrant classification allows a U.S. employer to sponsor a professional with an advanced degree for lawful permanent resident status.

The Acting Director of the Nebraska Service Center denied the petition, concluding that the Petitioner did not demonstrate its continuing ability to pay the combined proffered wages of this and other relevant immigrant petitions that it has filed. We rejected a subsequent appeal and later reopened the appeal on our own motion.

On appeal, the Petitioner submits additional evidence and asserts that it is not legally required to provide evidence relating to other petitions it has filed; that it has the ability to pay the combined proffered wages of this and other relevant immigrant petitions that it has filed; that we should consider its retained earnings as evidence of its ability to pay the proffered wage; that it paid salaries to officers that could have been used to pay the proffered wage; and that based on the totality of the circumstances of its business, it has established its ability to pay the relevant wages.

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

I. THE EMPLOYMENT-BASED IMMIGRATION PROCESS

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).¹ 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 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

¹ The priority date of a petition is the date the DOL accepted the labor certification for processing, which in this case is June 21, 2016. See 8 C.F.R. § 204.5(d).

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

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). In general, 8 C.F.R. § 204.5(g)(2) requires annual reports, federal tax returns, or audited financial statements as evidence of a petitioner's ability to pay the proffered wage. Here, the annual proffered wage of the offered position of senior software engineer is \$130,666.

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'l Comm'r 1967).²

In this case, the Petitioner submitted a copy of the Beneficiary's 2016 IRS Form W-2, Wage and Tax Statement, demonstrating that it employed and paid the Beneficiary \$121,251.20 in 2016. The amount on the Form W-2 is less than the annual proffered wage of \$130,666. Thus, the Petitioner must demonstrate its ability to pay the difference between the annual proffered wage and the amount it paid to the Beneficiary, which is \$9,414.80 in 2016.

The Petitioner's federal tax return states net income³ of \$82,218 in 2016, which is greater than the difference between the annual proffered wage and the amount it paid to the Beneficiary to the Beneficiary that year. However, as the Director found in her denial decision, USCIS records indicate the Petitioner's filing of multiple Forms I-140, Immigrant Petitions for Alien Workers.⁴ 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).

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); *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); *Rizvi 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).

³ 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 Oct. 24, 2019). In this case, the Petitioner's net income is found on line 18 of Schedule K of its Form 1120S.

⁴ USCIS records indicate that the Petitioner has filed over 130 Form I-140 petitions since 2001.

Thus, despite its assertions on appeal, 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.⁵

As set forth in the Director's request for evidence (RFE), 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.

In response to the Director's RFE, the Petitioner provided a chart containing information for 30 petitions that the Petitioner had filed through March 10, 2017, identifying the beneficiary, receipt number, priority date, and status⁶ of each petition. The chart lists two withdrawn petitions, six pending petitions, and 22 approved petitions. The chart identifies the "prevailing wage" of 22 of the 30 petitions. The chart does not show whether there is a difference between the proffered wage and the prevailing wage in these cases, and it does not list the proffered wage for any of the petitions. The Petitioner must demonstrate its continuing ability to pay the proffered wage, which in some cases may be higher than the prevailing wage. The Petitioner must resolve this ambiguity 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). Without the proffered wage for each case, we cannot calculate the total wage deficiency.

The chart also shows the "W-2 Pay" and "Annual Pay" for each of the beneficiaries, but it is not clear why there is a difference between the two amounts. *Id.* For example, the Beneficiary's Form W-2 shows gross pay and reported taxable wages of \$121,251.20. However, the Petitioner's chart lists his "Annual Pay" as \$122,500. It is unclear why the additional \$1,248.80 was added to his "Annual Pay." The record also contains another chart showing 25 withdrawn petitions, together with copies of withdrawal letters. In her denial decision, the Director found that the Petitioner had not provided a complete list of information regarding all relevant petitions and, therefore, she determined that the Petitioner did not demonstrate its continuing ability to pay the combined proffered wages of this and other relevant immigrant petitions that it has filed.

⁵ 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.

⁶ Although the chart shows that 22 of the petitions have been approved, the chart does not indicate whether any of the beneficiaries with approved petitions have obtained lawful permanent residence. The chart also indicates that six petitions are pending and two have been withdrawn.

On appeal, the Petitioner submits the missing “prevailing wage” information for seven of the I-140 beneficiaries listed on the previously submitted chart. It states that its “total liability” for its pending petitions in 2016 was \$197,713. However, the Petitioner’s net income for 2016 was \$82,218, and it had net current liabilities in 2016.⁷ Thus, it did not have sufficient net income or net current assets to cover its claimed “total liability” in 2016.

Further, the Petitioner’s calculation of its “total liability” is flawed. First, its calculation included the wage differential between the prevailing wage and the “Annual Pay” amounts for eight beneficiaries. However, as noted above, the wage deficiency should have been calculated using the proffered wage, not the prevailing wage, and the Petitioner did not provide information regarding the proffered wages of any of its other Form I-140 petitions. Second, because the record is not clear as to why the “Annual Pay” differs from the “W-2 Pay” amounts, the “Annual Pay” amounts are not credible evidence of wages paid to the relevant beneficiaries. Therefore, the “W-2 Pay” amounts should be used in the calculation of the Petitioner’s total wage deficiency, and the Petitioner erroneously used the “Annual Pay” amounts in its calculation. Third, the Petitioner did not indicate whether any of the beneficiaries with approved petitions have obtained lawful permanent residence and if so, when. Therefore, the calculation of the Petitioner’s total wage deficiency would likely include additional approved and pending petitions that were not included in the eight petitions considered by the Petitioner in its “total liability” calculation. For all of these reasons, the Petitioner’s calculation of its “total liability” is not reliable and does not represent its actual total wage deficiency. Thus, the Petitioner has not established by a preponderance of the evidence that it has the ability to pay the Beneficiary in this case and its other relevant beneficiaries.

On appeal, the Petitioner asserts that we should consider its retained earnings as evidence of its ability to pay the proffered wage. Retained earnings are a company’s accumulated earnings since its inception less dividends. Joel G. Siegel and Jae K. Shim, *Barron’s Dictionary of Accounting Terms* 378 (3rd ed. 2000). As retained earnings are cumulative, adding retained earnings to net income and/or net current assets is duplicative. Therefore, we look at each year’s net income, rather than the cumulative total of the previous years’ net incomes less dividends represented by the line item of retained earnings.

Further, even if considered separately from net income and net current assets, retained earnings might not be included appropriately in the calculation of a petitioner’s continuing ability to pay the proffered wage because retained earnings do not necessarily represent funds available for use. Retained earnings fall under the heading of shareholder’s equity on Schedule L of the petitioner’s tax returns and generally represent the non-cash value of the company’s assets. Thus, retained earnings do not generally represent current assets that can be liquidated during the course of normal business. The Petitioner cites unpublished AAO decisions as support for its assertion that retained earnings may be considered. However, these decisions were not published as precedent and therefore do not bind USCIS officers in future adjudications. *See* 8 C.F.R. § 103.3(c). Non-precedent decisions apply existing law and policy to the specific facts of the individual case, and may be distinguishable based on the evidence in the record of proceedings, the issues considered, and applicable law and policy.

⁷ Net current assets/liabilities are the difference between a petitioner’s current assets and current liabilities. A corporation’s year-end current assets are shown on Schedule L to IRS Form 1120S, lines 1 through 6, and its year-end current liabilities are shown on lines 16 through 18.

On appeal, the Petitioner asserts that an S corporation may strategically reduce income tax liability, so its net profits and assets are not an accurate reflection of its ability to pay the proffered wage. For example, it asserts that the Petitioner paid salaries to officers that could have been used to pay the proffered wage. The Petitioner's tax returns show that it paid officer compensation of \$180,000 to [redacted] and \$167,500 to [redacted] in 2016. However, the record does not establish that either of the officers would have been willing or able to forgo any part of their officer compensation in 2016 to pay the wage deficiency. The record also does not establish that the payments were discretionary and not fixed by contract. A petitioner's unsupported statements are of very limited weight and normally will be insufficient to carry its burden of proof. The Petitioner must support its assertions with relevant, probative, and credible evidence. See *Matter of Chawathe*, 25 I&N Dec. 369, 376 (AAO 2010). It has not done so here. The Petitioner cites *Construction and Design Co. v. USCIS*, 563 F.3d 593 (7th Cir. 2009), in support of its claim. However, *Construction and Design* is not binding precedent in this matter because the Petitioner is located in New York, which is not within the jurisdiction of the 7th Circuit Court of Appeals.⁸ Thus, the Petitioner has not established that the officer compensation paid to its two officers could alternatively have been used to pay the wage deficiency.

Additionally, on appeal, the Petitioner asserts that the Beneficiary's proposed employment will increase the Petitioner's income. The Beneficiary is currently employed by the Petitioner, and there is no indication in the record that his employment has resulted in any increase in income during that time. Moreover, in this case, the Petitioner has provided no evidence to show how the Beneficiary's employment will significantly increase income for the Petitioner's business. 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.

Further, the Petitioner has not calculated the actual revenue that the Beneficiary will generate or the additional costs (in addition to salary) in employing the Beneficiary, which may include legally required benefits (social security, Medicare, federal and state unemployment insurance, and worker's compensation), employer costs for providing insurance benefits (life, health, and disability), paid leave benefits (vacations, holidays, sick, and personal leave), retirement and savings, and supplemental pay.⁹ Therefore, the Petitioner has not established that that the Beneficiary's proposed employment will increase the Petitioner's income.

Finally, on appeal, the Petitioner states that USCIS may consider the totality of the Petitioner's circumstances, including the overall magnitude of its business activities, in determining the Petitioner's ability to pay the proffered wage. See *Matter of Sonogawa*, 12 I&N Dec. at 612. USCIS may, at its discretion, consider evidence relevant to the petitioner's financial ability that falls outside

⁸ The U.S. Court of Appeals for the Seventh Circuit covers Illinois, Indiana, and Wisconsin.

⁹ The record does not include an employment agreement between the Petitioner and the Beneficiary showing what benefits, if any, the Beneficiary will receive.

of its net income and net current assets. We may consider such factors as the number of years the petitioner has been doing business, the established historical growth of the petitioner's business, the petitioner's reputation within its industry, the overall number of employees, whether the beneficiary is replacing a former employee or an outsourced service, the occurrence of any uncharacteristic business expenditures or losses, and any other evidence that USCIS deems relevant to the petitioner's ability to pay the proffered wage.

In this case, the Petitioner was established in 1997 and indicated that it had 72 employees at the time the petition was filed in 2016. However, the Petitioner has not established its growth since its incorporation. Moreover, the record does not indicate the Petitioner's incurrence of uncharacteristic losses or expenses or its possession of an outstanding reputation in its industry. The record also does not indicate the Beneficiary's replacement of a current employee or outsourced service. Also, the Petitioner must demonstrate its ability to pay combined proffered wages of multiple petitions. Thus, we cannot conclude that the Petitioner has established its ability to pay the proffered wages of the instant Beneficiary and all of its other I-140 beneficiaries from 2016 onward based on the totality of its circumstances.

For the foregoing reasons, the Petitioner has not demonstrated by a preponderance of the evidence that it has the continuing ability to pay the proffered wage from the petition's priority date in 2016 onward. We will therefore affirm the Director's decision. In any future filings, the Petitioner must establish its ability to pay the proffered wage for 2016, 2017, 2018, and any applicable subsequent years.

III. THE BENEFICIARY'S EXPERIENCE

Although not addressed by the Director, the Petitioner did not establish that the Beneficiary possessed the experience required by the labor certification as of the priority date.

A beneficiary must meet all of the requirements of the offered position set forth on the labor certification by the priority date of the petition. 8 C.F.R. § 103.2(b)(1), (12); *Matter of Wing's Tea House*, 16 I&N Dec. 158, 159 (Acting Reg'l Comm'r 1977). In this case, the labor certification requires a bachelor's degree and 60 months of experience in any reasonably related occupation, or a master's degree and one month of experience. Here, the Beneficiary has the foreign equivalent of a U.S. bachelor's degree and, therefore, the Petitioner must establish that he has 60 months of related experience.

Evidence relating to qualifying experience must be in the form of a letter from a current or former employer and must include the name, address, and title of the writer, and a specific description of the duties performed by the beneficiary. See 8 C.F.R. § 204.5(g)(1).

The record contains experience letters from [redacted] and [redacted] detailing the Beneficiary's approximately one year and 10 months of related qualifying experience. The record also contains letters from [redacted] and [redacted]. Although the letters confirm the Beneficiary's technical skills, they do not give a specific description of the Beneficiary's duties. Thus, they do not meet the requirements of 8 C.F.R. § 204.5(g)(1) and the letters are not credible evidence

Matter of J-M-, Inc.

of the Beneficiary's experience. The Petitioner has not established that the Beneficiary possessed the 60 months of experience required by the labor certification as of the priority date.

IV. CONCLUSION

The appeal will be dismissed for the above stated reasons, with each considered an independent and alternative basis for the decision. In visa petition proceedings, it is the petitioner's burden to establish eligibility for the immigration benefit sought. Section 291 of the Act, 8 U.S.C. § 1361. The Petitioner has not met that burden.

ORDER: The appeal is dismissed.

Cite as *Matter of J-M-, Inc.*, ID# 5488845 (AAO Nov. 20, 2019)