



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

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

In Re: 22364053

Date: MAY 23, 2024

Appeal of Texas Service Center Decision

Form I-140, Immigrant Petition for Alien Workers (Advanced Degree)

The Petitioner, a professional staffing agency, seeks to permanently employ the Beneficiary as a “big data” engineer. The company requests his classification under the employment-based, second-preference (EB-2) immigrant visa category as a member of the professions holding an “advanced degree.” *See* Immigration and Nationality Act section 203(b)(2)(A), 8 U.S.C. § 1153(b)(2)(A). This category allows a U.S. business to sponsor a noncitizen for permanent residence to work in a job requiring at least a master’s degree or its equivalent. *See* 8 C.F.R. § 204.5(k)(2) (defining the term “advanced degree”).

The Director of the Texas Service Center denied the petition. The Director concluded that the Petitioner did not demonstrate its intent to employ the Beneficiary in the offered job. On appeal, we withdrew the Director’s decision and remanded the matter for further consideration. *See In Re: 6583001* (AAO Mar. 23, 2021).

After issuing a new request for evidence (RFE) and reviewing the Petitioner’s response, the Acting Director of the Texas Service Center again denied the petition. The Director concluded that the Petitioner did not establish: 1) the *bona fides* of its job offer; 2) its ability to pay the combined proffered wages of this and other beneficiaries; or 3) the offered job’s need for an advanced degree as required for the requested immigrant visa category.

The matter returns to us on a second appeal. *See* 8 C.F.R. § 103.3(a). The Petitioner bears the burden of demonstrating eligibility for the requested benefit by a preponderance of the evidence. *Matter of Chawathe*, 25 I&N Dec. 369, 375-76 (AAO 2010). Exercising de novo appellate review, *see Matter of Christo’s, Inc.*, 26 I&N Dec. 537, 537 n.2 (AAO 2015), we conclude that the company has established its ability to pay the combined proffered wages and the offered job’s need for an advanced degree. But the record does not demonstrate the Petitioner’s intent to employ the Beneficiary in the offered job after April 2024. We will therefore withdraw the Director’s decision and remand the matter for entry of a new decision consistent with the following analysis.

## I. LAW

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) that: insufficient U.S. workers are able, willing, qualified, and available for an offered position; and a noncitizen's employment in the job would not harm wages and working conditions of U.S. workers with similar jobs. *See* section 212(a)(5)(D) of the Act, 8 U.S.C. § 1182(a)(5)(D).

If DOL approves a position, an employer must next submit the certified labor application with an immigrant visa petition to U.S. Citizenship and Immigration Services (USCIS). *See* section 204(a)(1)(F) of the Act, 8 U.S.C. § 1154(a)(1)(F). Among other things, USCIS determines whether a beneficiary meets the requirements of the certified position and requested immigrant visa category. 8 C.F.R. § 204.5(k)(3)(i), (4)(i).

Finally, if USCIS approves a petition, a noncitizen may apply abroad for an immigrant visa or, if eligible, "adjustment of status" in the United States. *See* section 245(a) of the Act, 8 U.S.C. § 1255(a).

## II. ANALYSIS

### A. Ability to Pay

A petitioner must demonstrate its continuing ability to pay an offered job's 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 this ability shall be either in the form of copies of annual reports, federal tax returns, or audited financial statements." *Id.*

When determining ability to pay, USCIS examines whether a petitioner paid a beneficiary the full proffered wage each year, beginning with the year of a petition's priority date. *See generally* 6 *USCIS Policy Manual* E.(4)(C)(1), [www.uscis.gov/policy-manual](http://www.uscis.gov/policy-manual). If a petitioner did not annually pay the full proffered wage or did not pay a beneficiary at all, USCIS considers whether the business generated annual amounts of net income or net current assets sufficient to pay any differences between the proffered wage and wages paid. *Id.* at E.(4)(C)(2). If net income and net current assets are insufficient, USCIS may consider other factors potentially affecting a petitioner's ability to pay a proffered wage. *See Matter of Sonogawa*, 12 I&N Dec. 612, 614-15 (Reg'l Comm'r 1967); 6 *USCIS Policy Manual* E.(4)(C)(3).<sup>1</sup>

The Petitioner's labor certification states the offered job's proffered wage as \$55.00 an hour (or, based on a 40-hour work week, \$114,400 a year). The petition's priority date is October 12, 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).

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<sup>1</sup> 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); *Econo Inn Corp. v. Rosenberg*, No. 15-CV-10991, 2015 WL 6865896, \*\*6-9 (E.D. Mich. Nov. 9, 2015).

At the time the Director issued the RFE on remand, evidence of the Petitioner's ability to pay the proffered wage in 2021 was not yet available. Thus, for purposes of this decision, we will consider the Petitioner's ability to pay from 2018 through only 2020.

Also, as the Director found, USCIS records show the Petitioner's filing of 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 resident status. 8 C.F.R. § 204.5(g)(2). Thus, the Petitioner here must demonstrate its ability to pay the combined proffered wages of this and other beneficiaries whose petitions were approved, pending, or filed after this petition's October 12, 2018 priority date through 2020. *See Patel v. Johnson*, 2 Fed. Supp. 3d 108, 114 (D. Mass. 2014) (affirming our denial of a petition where the petitioner did not demonstrate its ability to pay multiple proffered wages at the time of the filing's revocation); *see 6 USCIS Policy Manual E.(4)(D)(2) n.25* ("A substantially increased total labor expense of multiple beneficiaries may potentially impact the petitioner's ability to continue to pay existing employees.")<sup>2</sup>

The Petitioner submitted copies of its federal income tax returns for 2018 through 2020 and the Beneficiary's Forms W-2, Wage and Tax Statements, for the same period. The Forms W-2 indicate that, during the period, the Petitioner annually paid the Beneficiary less than the proffered wage. But the company's tax returns show that its annual net current asset amounts for the period exceeded the difference between the proffered wage and wages paid to the Beneficiary.

After examining the Petitioner's tax returns, the Beneficiary's wages, and a letter from a company financial officer, we conclude that, based on the totality of the circumstances, the Petitioner has established its ability to pay the combined proffered wages of this and its other applicable beneficiaries. The Petitioner's workforce comprises more than 5,000 people and, the company has annual gross receipts of about \$577 million. A preponderance of the evidence therefore demonstrates the Petitioner's ability to pay the proffered wage. Thus, we will withdraw the contrary portion of the Director's decision.

#### B. The Job's Advanced Degree Requirement

The Director also concluded that the Petitioner did not establish the offered job's need for an advanced degree. *See 8 C.F.R. § 204.5(k)(4)(i)* (requiring a labor certification for an advanced degree professional to "demonstrate that the job requires a professional holding an advanced degree or the equivalent"). The labor certification states the minimum requirements of the offered job of big data engineer as a U.S. master's degree, or a foreign equivalent degree, in information technology or any engineering field, plus one year of experience in the offered job or a similar position. The Director, however, found that letters from the Petitioner's clients describing the Beneficiary's assigned work demonstrated the offered job's need for only a bachelor's degree.

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<sup>2</sup> The Petitioner need not demonstrate its ability to pay proffered wages of petitions that it withdrew or that USCIS rejected, denied, or revoked. The company also need not establish its ability to pay proffered wages before their petitions' priority dates or after their beneficiaries obtained permanent residence. *See 6 USCIS Policy Manual E.(4)(D)(2)*.

The Petitioner's assertions on appeal are persuasive. We find that a preponderance of the evidence demonstrates the offered job's need for at least an advanced degree. We will therefore also withdraw this portion of the Director's decision.

### C. The Bona Fides of the Job Offer

A business may file an immigrant visa petition if it is "desiring and intending to employ [a noncitizen] within the United States." Section 204(a)(1)(F) of the Act; 8 C.F.R. § 204.5(c). A petitioner must intend to employ a beneficiary under the terms and conditions of an accompanying labor certification. *See Matter of Izdebska*, 12 I&N Dec. 54, 55 (Reg'l Comm'r 1966) (affirming a petition's denial where the petitioner did not intend to employ a beneficiary consistent with the certification's terms); *see also Matter of Sunoco Energy Dev. Co.*, 17 I&N Dec. 283, 284 (Reg'l Comm'r 1979) (affirming a petition's denial where its accompanying labor certification did not authorize work for the intended geographic area).

The Petitioner's petition and labor certification indicate the company's location in Michigan. The professional staffing agency attested that it intends to employ the Beneficiary in the permanent, full-time job of big data engineer at a client site in [redacted] Florida. The labor certification does not indicate that the job requires relocation or travel to any other worksites.

In response to the Director's RFE on remand, the Petitioner submitted evidence that, through April 2024, the Beneficiary would work in the same job but for a different client than the one listed on the labor certification and petition. The evidence indicated that he would work remotely from his home in [redacted] Florida.

The Director determined that the Petitioner's job offer is not *bona fide* because it does not involve employment at the client site listed on the labor certification. But, because the Beneficiary would work in the same job in the same metropolitan statistical area as listed on the labor certification, we find that the Petitioner demonstrated its intent to employ him in the offered job through April 2024.

The record, however, lacks evidence of the Beneficiary's intended duties and worksite beyond April 2024. We will therefore withdraw the remainder of the Director's decision and remand the matter. On remand, the Director should ask the Petitioner for additional evidence that it still intends to employ the Beneficiary in the offered job in the same metropolitan statistical area on a full-time, permanent basis.

If supported by the record, the Director may notify the Petitioner of any other potential denial grounds. The Director, however, must afford the company a reasonable opportunity to respond to all issues raised on remand. Upon receipt of a timely response, the Director should consider the entire record, determine whether the company has demonstrated an intent to employ the Beneficiary under the terms and conditions of the accompanying labor certification, and enter a new decision.

#### IV. CONCLUSION

The Petitioner has demonstrated its ability to pay the offered job's proffered wage and the position's need for an advanced degree. But additional evidence is needed to determine the company's intent to employ the Beneficiary in the job beyond April 2024.

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