



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

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

In Re: 17288352

Date: JUNE 24, 2022

Motion on Administrative Appeals Office Decision

Form I-140, Petition for Multinational Managers or Executives

The Petitioner states that it operates as an “import export auto parts/repair” business. It seeks to permanently employ the Beneficiary as its “President” under the first preference immigrant classification for multinational executives or managers. *See* Immigration and Nationality Act (the Act) section 203(b)(1)(C), 8 U.S.C. § 1153(b)(1)(C). This classification allows a U.S. employer to permanently transfer a qualified foreign employee to the United States to work in an executive or managerial capacity.

The Director of the Texas Service Center denied the petition, concluding that the Petitioner did not establish that: (1) the Beneficiary was employed abroad in a managerial or executive capacity; (2) the Beneficiary would be employed in the United States in a managerial or executive capacity; and (3) the Petitioner had the ability to pay the Beneficiary’s proffered wage. We summarily dismissed the Petitioner’s subsequent appeal for failure to specifically identify an erroneous conclusion of law or statement of fact in the unfavorable decision under 8 C.F.R. § 103.3(a)(1)(v). The matter is now before us on a motion to reopen.

The evidence submitted with the motion to reopen establishes that the Petitioner timely submitted an appeal brief that specifically alleged an erroneous conclusion of law or statement of fact. Accordingly, we will provide a decision on the merits of the matter concerning the ability to pay.

In these proceedings, it is the Petitioner’s burden to establish eligibility for the requested benefit. *See* Section 291 of the Act, 8 U.S.C. § 1361. Upon *de novo* review of the entire record of proceeding we conclude that the Petitioner has not established that it had the ability to pay the Beneficiary’s proffered wage. Because the identified basis for denial is dispositive of the Petitioner’s appeal, we decline to reach and hereby reserve the Petitioner’s appellate arguments regarding the remaining issues.<sup>1</sup>

## **I. LEGAL FRAMEWORK**

An immigrant visa is available to a beneficiary who, in the three years preceding the filing of the petition, has been employed outside the United States for at least one year in a managerial or executive

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<sup>1</sup> *See INS v. Bagamasbad*, 429 U.S. 24, 25 (1976) (“courts and agencies are not required to make findings on issues the

capacity, and seeks to enter the United States in order to continue to render managerial or executive services to the same employer or to its subsidiary or affiliate. Section 203(b)(1)(C) of the Act.

The Form I-140, Immigrant Petition for Alien Worker, must include a statement from an authorized official of the petitioning United States employer which demonstrates that the beneficiary has been employed abroad in a managerial or executive capacity for at least one year in the three years preceding the filing of the petition, that the beneficiary is coming to work in the United States for the same employer or a subsidiary or affiliate of the foreign employer, and that the prospective U.S. employer has been doing business for at least one year. *See* 8 C.F.R. § 204.5(j)(3). The petition must also be accompanied by evidence demonstrating the Petitioner's ability to pay the Beneficiary's proffered wage at the time of filing. 8 C.F.R. § 204.5(g)(2).

## II. ABILITY TO PAY

The Petitioner must establish that it has the ability to pay the \$140,000 proffered wage stated in the petition. The regulation at 8 C.F.R. § 204.5(g)(2) states:

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. In a case where the prospective United States employer employs 100 or more workers, the director may accept a statement from a financial officer of the organization which establishes the prospective employer's ability to pay the proffered wage. In appropriate cases, additional evidence, such as profit/loss statements, bank account records, or personnel records may be submitted by the petitioner or requested by [USCIS].

As indicated in the above regulation, the Petitioner must establish its ability to pay the proffered wage from the priority date of the petition.<sup>2</sup> The priority date in this case is August 1, 2019.

In determining a petitioner's ability to pay the proffered wage, USCIS first examines whether the beneficiary was employed and paid by the petitioner during the period following the priority date. A petitioner's submission of documentary evidence that it employed the beneficiary at a salary equal to or greater than the proffered wage for the time period in question, when accompanied by a form of evidence required in the regulation at 8 C.F.R. § 204.5(g)(2), may establish the petitioner's ability to pay the proffered wage.

Absent evidence that the Petitioner has paid the Beneficiary a salary equal to or above the proffered wage from the priority date onward, USCIS next examines the net income and net current assets figures recorded on the petitioner's federal income tax return(s), annual report(s), or audited financial statements(s). If either of these figures, net income or net current assets, equals or exceeds the proffered wage, or the difference between the proffered wage and the amount paid to the beneficiary

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decision of which is unnecessary to the results they reach"); *see also Matter of L-A-C-*, 26 I&N Dec. 516, 526 n.7 (BIA 2015) (declining to reach alternative issues on appeal where an applicant is otherwise ineligible).

<sup>2</sup> For multinational executives or managers, the priority date is the date the completed, signed petition is properly filed with USCIS. *See* 8 C.F.R. § 204.5(d).

in a given year, the petitioner would ordinarily be considered able to pay the proffered wage during that year.

If a petitioner's net income or net current assets are not sufficient to establish its ability to pay the proffered wage, USCIS may also consider the totality of the Petitioner's circumstances. *See Matter of Sonegawa*, 12 I&N Dec. 612 (Reg'l Comm'r 1967). USCIS may, at its discretion, 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, 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 the matter at hand, the Petitioner was structured as a corporation and claims to have been established in June 2016. At the time of filing, it claimed to have three employees and gross income of \$400,971. It also claimed to have employed the Beneficiary at the time of filing. In support of the petition, the Petitioner provided its 2016 federal income tax return and bank statements for 2017 and 2018.<sup>3</sup> The petition also contained the 2017 and 2018 federal income tax returns of the Petitioner's U.S. subsidiary, [REDACTED].

In a subsequent request for evidence (RFE), the Director stated that the submitted documents did not establish that the Petitioner possessed the ability to pay the proffered wage. The Director noted that the Petitioner's bank statements are not among the types of required evidence specified in the regulation and further informed the Petitioner that evidence pertaining to its subsidiary is not relevant to the Petitioner's ability to pay the proffered wage. Accordingly, the Director requested additional evidence of the Petitioner's ability to pay, including evidence of wages it had paid to the Beneficiary, such as IRS Forms W-2, Wage and Tax Statement, IRS Forms 1099-MISC, Miscellaneous Income, pay vouchers, or IRS Forms 941, Employer's Quarterly Federal Tax Return.

In response, the Petitioner provided its 2019 federal income tax return showing a net income of -\$8,854 and net current assets of \$55,212.<sup>4</sup> The Petitioner also submitted [REDACTED]'s 2019 federal income tax return and Quarterly Federal Tax Return for 2017 and 2018, asserting that by virtue of owning the [REDACTED] the Petitioner and its subsidiary are "[e]ssentially . . . the same entity." Finally, the Petitioner submitted 2019 IRS Form W-2s and IRS Form W-3, Transmittal of Wage and Tax Statements, which document wages paid by [REDACTED].

In denying the petition, the Director noted that the record does not show that the Petitioner paid any wages to the Beneficiary; and the Petitioner's 2019 tax return showed that its net income and current net assets did not establish its ability to pay the \$140,000 proffered wage. The Director also declined to consider the documents relating to [REDACTED] as evidence of the Petitioner's ability to pay, explaining that despite the Petitioner's ownership of the company, the two are separate legal entities and only the Petitioner's finances are considered in determining whether it has the ability to pay the

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<sup>3</sup> Since these documents precede the priority date of the petition, they do not establish the Petitioner's ability to pay the proffered wage.

<sup>4</sup> Net current assets are the difference between a petitioner's current assets and current liabilities. A corporation's year-end current assets are shown on Schedule L, lines 1 through 6 and its year-end current liabilities are shown on lines 16 through 18. The 2019 return also showed that no funds were paid in officer compensation or employee wages and salaries.

proffered wage. In light of these deficiencies, the Director concluded that the Petitioner did not demonstrate that it met the ability to pay requirement.

On appeal, the Petitioner contends that the tax returns it provided show “sufficient sources” of funds, arguing that its assets include its ownership of [REDACTED] and that the Director “blindly” denied the petition without considering those assets. We disagree and find that the Director correctly addressed this issue both in the RFE and in the denial. The Director correctly informed the Petitioner that the financial documents pertaining to [REDACTED] may not be used to establish its ability to pay the proffered wage. Since a corporation is a separate and distinct legal entity from its owners and shareholders, the assets of its shareholders or of other enterprises or corporations cannot be considered in determining the petitioning corporation's ability to pay the proffered wage. *See Matter of Aphrodite Investments, Ltd.*, 17 I&N Dec. 530 (Comm'r 1980). In a similar case, the court in *Sitar Restaurant v. Ashcroft*, 2003 WL 22203713 (D.Mass. Sept. 18, 2003) stated that “nothing in the governing regulation, 8 C.F.R. § 204.5, permits [USCIS] to consider the financial resources of individuals or entities who have no legal obligation to pay the wage.” Accordingly, the determination of whether the Petitioner has met the ability to pay requirement must be made based on the Petitioner's finances, rather than those of a separate legal entity, even if that entity is a subsidiary. *See id.* Therefore, the Director's exclusion of the subsidiary entity's federal income tax return and other financial data is in accordance with the applicable law and does not demonstrate unfair “bias” against the Petitioner.

Further, considering the totality of the circumstances, the record lacks evidence showing that the Petitioner has been a consistently profitable and growing business, nor does the record show the Petitioner's reputation within its industry, the magnitude of its operations, the occurrence of any uncharacteristic business expenditures or losses, or other factors that would overcome the shortfall in net income and net current assets on its tax return.

In light of the above, in this reopened proceeding, we conclude that the Petitioner has not established its continuing ability to pay the proffered wage from the priority date of the petition. The petition remains denied.

**ORDER:** The motion to reopen is dismissed.