



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

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

In Re: 18407317

Date: AUG. 2, 2022

Appeal of Nebraska Service Center Decision

Form I-140, Immigrant Petition for Skilled Worker

The Petitioner, a construction firm, seeks to employ the Beneficiary as a bookkeeper, requesting classification of the Beneficiary under the third-preference, immigrant category as a skilled worker. Immigration and Nationality Act (the Act) section 203(b)(3)(A)(i), 8 U.S.C. § 1153(b)(3)(A)(i). This employment-based category allows a U.S. business to sponsor a foreign national for lawful permanent resident status based on a job offer requiring at least two years of training or experience.

The Director of the Nebraska Service Center denied the petition, concluding that the Petitioner did not demonstrate its required ability to pay the proffered wage to the Beneficiary. The matter is now before us on appeal. On appeal, the Petitioner asserts that the Director erred by denying the petition.

The Petitioner bears the burden of proof to demonstrate eligibility by a preponderance of the evidence. Section 291 of the Act; *Matter of Chawathe*, 25 I&N Dec. 369, 375 (AAO 2010). We review the questions in this matter *de novo*. *Matter of Christo's Inc.*, 26 I&N Dec. 537, 537 n.2 (AAO 2015). Upon *de novo* review, we will remand the matter for the entry of a new decision consistent with our analysis below.

I. EMPLOYMENT-BASED IMMIGRATION

Immigration as a skilled worker generally follows a three-step process. First, a prospective employer must apply to the U.S. Department of Labor (DOL) for certification that: (1) there are insufficient U.S. workers able, willing, qualified, and available for an offered position; and (2) the employment of a noncitizen in the position won't harm wages and working conditions of U.S. workers with similar jobs. *See* section 212(a)(5) of the Act, 8 U.S.C. § 1182(a)(5).

Second, an employer must submit an approved 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 noncitizen beneficiary meets the requirements of a certified position and a requested immigrant visa category. 8 C.F.R. § 204.5(l).

Finally, if USCIS approves a petition, a noncitizen beneficiary may 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

The sole issue on appeal is whether the Petitioner has the ability to pay the proffered wage stated in the labor certification.¹ 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). Evidence of ability to pay must generally include copies of annual reports, federal tax returns, or audited financial statements. *Id.*

The accompanying labor certification states the proffered wage is \$42,182 a year. The petition's priority date is April 16, 2014, the date DOL accepted the accompanying labor certification application for processing. *See* 8 C.F.R. § 204.5(d) (explaining how to determine a petition's priority date).

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 be considered proof of the petitioner's ability to pay the proffered wage. In this case the Petitioner does not assert nor does the record reflect that the Beneficiary has been employed by the Petitioner since the priority date. Therefore, the Petitioner cannot establish its ability to pay the proffered wage from the priority date, onward based on wages paid to the Beneficiary.

If a petitioner does not establish that it has employed and paid the beneficiary an amount equal to or above the proffered wage from the priority date onward, USCIS will examine the net income and net current assets figures recorded on the petitioner's federal 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 in a given year, the petitioner would ordinarily be considered able to pay the proffered wage during that year. If net income and net current assets are insufficient, USCIS may consider other factors affecting a petitioner's ability to pay a proffered wage. *See Matter of Sonegawa*, 12 I&N Dec. 612, 614-15 (Reg'l Comm'r 1967).²

The record includes a copy of the Petitioner's federal income tax return, Form 1120S, U.S. Income Tax Return for an S Corporation, for 2014 and 2015. As recorded in the 2014 tax return, the Petitioner had net income of \$9,155 and net current assets of \$2,719 in 2014.³ According to the Petitioner's 2015 tax return, it incurred a net loss of \$14,143 and had net current assets of \$6,351 in that year.⁴

¹ The Petitioner provided documentation in support of the petition. While we may not discuss every document submitted, we have reviewed and considered each one.

² 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); *Four Holes Land & Cattle, LLC v. Rodriguez*, No. 5:15-cv-03858, 2016 WL 4708715 (D.S.C. Sept. 9, 2016).

³ If an S corporation, like the Petitioner, has income exclusively from a trade or business, USCIS considers its net income (or loss) to be the figure for "Ordinary business income (loss)" on page 1, line 21, of the Form 1120S. For a corporation net current assets (or liabilities) are the difference between its current assets, entered on lines 1-6 of Schedule L, and its current liabilities, entered on lines 16-18 of Schedule L.

⁴ We note that our 2015 net current assets calculation of \$6,351 differs slightly from the Director's calculation in the denial of \$6,776 for this tax year.

The submitted tax returns do not show that the Petitioner earned sufficient net income or possessed adequate net current assets in 2014 and 2015 to pay the wage offered to the Beneficiary. Therefore, we agree with the Director that the Petitioner has not established its ability to pay the proffered wage in 2014 and 2015 based on either net income or net current assets that year.

In denying the petition, the Director acknowledged the Petitioner's submission of monthly bank statements from its business checking account with B- Bank (from April 2014 through February 2016), concluding that "the bank statements in this case are not sufficient evidence in their own right to prove ability to pay." The Petitioner avers on appeal that the Director dismissed this evidence without explanation. We note that the Director did not provide an analysis within the decision regarding other factors that may affect the Petitioner's ability to pay a proffered wage, to include an explanation regarding why the Petitioner's bank statements, considered within the totality of the Petitioner's circumstances did not establish eligibility. *See Matter of Sonogawa*, 12 I&N Dec. at 614-15.

On appeal, the Petitioner resubmits copies of the monthly bank statements, as well as its March 2016 monthly statement. The Petitioner reasserts that it could utilize the funds in its business checking account to pay the proffered wage. While the regulation at 8 C.F.R. § 204.5(g)(2) states that USCIS may consider bank account records "in appropriate cases," they are not among the three types of required evidence identified in the regulation – either annual reports, federal tax returns, or audited financial statements – to demonstrate a petitioner's ability to pay the proffered wage.

Therefore, we will remand this case for the Director to 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. At its discretion, the Director may consider evidence relevant to the Petitioner's financial ability that falls outside of its net income and net current assets, such as the Petitioner's bank statements. He may consider such factors as the number of years the Petitioner has been doing business, evidence of 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 submitted evidence that the Director deems relevant to the petitioner's ability to pay the proffered wage. After considering the Petitioner's circumstances, the Director should evaluate the evidence in the record and explain why the submitted documents in the record do not establish eligibility if that is his ultimate determination.

Additionally, USCIS records indicate that the Petitioner has also filed an I-140 petition on behalf of the Beneficiary's spouse.⁵ The record does not contain any form of regulatory required evidence – neither federal income tax returns, nor annual reports, nor audited financial statements – for any period of time after 2016. Without such documentation USCIS is unable to determine the Petitioner's continuing ability to pay the proffered wages of the instant Beneficiary and its other I-140 beneficiary (commencing as of the priority date in that petition).

⁵ See [redacted], petition for an unskilled worker as an office clerk, priority date of Apr. 21, 2020, and a proffered wage of \$25,064, which is pending before USCIS as of this date. The instant Beneficiary has filed a Form I-485 "adjustment of status application," seeking adjustment as the derivative applicant of his spouse. See [redacted]

Therefore, we will also remand this case for the Director to request the submission of regulatory required evidence from the Petitioner, as specified in 8 C.F.R. § 204.5(g)(2), for any year(s) subsequent to 2016. The Director may also request any other evidence that may be deemed necessary to determine the Petitioner's eligibility for the requested immigration benefit.

III. CONCLUSION

For the reasons discussed above, we will remand this case to the Director for further consideration of the Petitioner's eligibility for the immigration benefit it seeks on behalf of the Beneficiary. As such, we express no opinion regarding the ultimate resolution of this case on remand.

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