



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

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

In Re: 17956411

Date: JUL. 13, 2022

Appeal of Texas Service Center Decision

Form I-140, Immigrant Petition for Professional

The Petitioner, a restaurant and food services business, seeks to employ the Beneficiary as a marketing and production processes engineer. It requests classification of the Beneficiary as a professional under the third preference immigrant classification. Immigration and Nationality Act (the Act), section 203(b)(3)(A)(ii), 8 U.S.C. § 1153(b)(3)(A)(ii). This employment-based immigrant classification allows a U.S. employer to sponsor a professional with a baccalaureate degree for lawful permanent resident status.

The Director of the Texas Service Center denied the petition, concluding that the record did not establish that the Beneficiary is qualified for the offered position or that the Petitioner had the continuing ability to pay the proffered wage.

In these proceedings, it is the Petitioner's burden to establish eligibility for the requested benefit. Section 291 of the Act, 8 U.S.C. § 1361. Upon *de novo* review, we will dismiss the appeal.

I. LAW

Employment-based immigration 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) of the Act, 8 U.S.C. § 1182(a)(5). DOL approval signifies that insufficient U.S. workers are able, willing, qualified, and available for a position. *Id.* Labor certification also indicates that the employment of a noncitizen 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 certified labor application with an immigrant visa petition to U.S. Citizenship and Immigration Services (USCIS). *See* section 204 of the Act, 8 U.S.C. § 1154. If USCIS approves the 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. ANALYSIS

A. Ability to Pay the Proffered Wage

The regulation at 8 C.F.R. § 204.5(g)(2) states that a petitioner must establish that it has the ability to pay the beneficiary the proffered wage, as stated on the labor certification, from the priority date¹ onward. Documentation of ability to pay shall be in the form of copies of annual reports, federal tax returns, or audited financial statements, and in appropriate cases, additional financial evidence may be submitted. *Id.* This documentation should demonstrate the Petitioner's continuing ability to pay the annual proffered wage of \$124,800² starting on the priority date, which in this instance is June 28, 2019.

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. We next examine whether it had sufficient annual amounts of net income or net current assets to pay the proffered wage. 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.³ USCIS may also 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 Sonegawa*, 12 I&N Dec. 612 (Reg'l Comm'r 1967).⁴

With the initial filing, the Petitioner submitted an unaudited income statement for the first three quarters of 2019. Because this document was not an annual report, federal tax return, or audited financial statement, the Director found that it was insufficient to establish the Petitioner's ability to pay the proffered wage and issued a Request for Evidence (RFE) to allow the Petitioner to submit appropriate documentation.

¹ The "priority date" of a petition is the date the underlying labor certification is filed with the DOL. *See* 8 C.F.R. § 204.5(d). The Petitioner must establish that all eligibility requirements for the petition have been satisfied as of the priority date.

² The record includes the job listings that the Petitioner used to advertise the offered position to U.S. workers. One listing, from Indeed.com, states that the position's wage is \$2,500 to \$3,500 per month, or \$30,000 to \$42,000 per year. The other listing, from PA Career Link, states that the position's wage is from \$45,000 to \$50,000 per year. Where there are discrepancies in the record, the Petitioner must resolve those discrepancies with independent, objective evidence pointing to where the truth lies. *Matter of Ho*, 19 I&N Dec. 582, 591-92 (BIA 1988). The Petitioner does not provide any explanation of why the wage listed in the Form I-140 and the labor certification differs from the wage advertised to U.S. workers.

³ 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*, 107 F. Supp. 3d 936, 942-943 (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).

⁴ USCIS may, at its discretion, consider evidence relevant to the petitioner's financial ability that falls outside 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 amount of compensation paid to officers, 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. *See Matter of Sonegawa*, 12 I&N Dec. at 614-15.

In response to the RFE, the Petitioner submitted a letter from its accountant, an unaudited profit and loss statement for the first half of 2020, and a letter from the Petitioner's owner.⁵ The letter from the accountant states that the Petitioner "has been a viable business" since 2004. The letter from the Petitioner's owner states that he and the Beneficiary "have developed a verbal Service Agreement to cover her living expenses" while her petition is being adjudicated, and that the Petitioner has never employed the Beneficiary or paid her a wage. The unaudited profit and loss statement indicates that the Petitioner had a net loss of -\$102,650.64 for the first half of 2020. The Director found that none of these documents were the ones required by 8 C.F.R. § 204.5(g)(2) and that the Petitioner had not provided a reason why the required documentation could not be submitted. Therefore, the Director found that the Petitioner had not demonstrated its continuing ability to pay the proffered wage from the priority date and denied the petition accordingly.

On appeal, the Petitioner submits a copy of its 2019 Internal Revenue Service (IRS) Form 1065, U.S. Return of Partnership Income. This document indicates that the Petitioner's net income in 2019 was \$70,825.⁶ This is insufficient to pay the proffered wage of \$124,800. The Petitioner's net current liabilities as listed on Schedule L were -\$100,625.⁷ This is also insufficient to pay the proffered wage. The Petitioner has not demonstrated that it has been paying the Beneficiary the proffered wage or that it had sufficient net income or net current assets in 2019 to pay the proffered wage.⁸

Furthermore, the totality of the circumstances beyond the Petitioner's net income and net current assets do not establish the Petitioner's ability to pay the proffered wage. *See Matter of Sonagawa*, 12 I&N Dec. at 612. The record indicates that the Petitioner is a restaurant and food services business founded in 2004. While we acknowledge the Petitioner's many years in business, we also note that the Petitioner has not established its historical growth since its incorporation. Further, the record does not contain documentation of the Petitioner's reputation within its industry or that it made any guaranteed payments to its partners. The letter from the Petitioner's accountant only states that the Petitioner is "viable," not that it will be able to pay the proffered wage. There is also no indication that the Petitioner has had uncharacteristic business expenditures or losses, or that the Beneficiary will be replacing a former employee or outsourced service.

⁵ We note that the accountant letter provided by the Petitioner is from [redacted] who states that they have been the Petitioner's accountant since 2004. The Petitioner's 2019 federal tax return also states that it was prepared by [redacted]. However, the 2019 unaudited income statement initially provided with the petition is signed by the Petitioner's owner and by [redacted] whose title is given as "Accountant." [redacted] also acted as the Petitioner's signatory on the Form I-140 and gave her title there as "Supervisor." No explanation is provided for these inconsistencies.

⁶ For a limited liability company (LLC) taxed as a partnership, where the LLC's income is exclusively from a trade or business, USCIS considers net income to be the figure shown on Line 22 of page one of the Petitioner's IRS Form 1065. However, where the Petitioner has income, credits, deductions, or other adjustments from sources other than a trade or business, net income is found on page 5 of IRS Form 1065 at line 1 of the Analysis of Net Income (Loss) of Schedule K. *See* Internal Revenue Serv., Instructions for Form 1065, <https://www.irs.gov/pub/irs-pdf/i1065.pdf> (last visited July 11, 2022). In this case, the Petitioner's net income is found on line 1 of the Analysis of Net Income (Loss) of Schedule K of its Form 1065.

⁷ Net current assets/liabilities are the difference between a petitioner's current assets and current liabilities. The LLC's year-end current assets are shown on Schedule L, lines 1(d) through 6(d). Its year-end current liabilities are shown on lines 15(d) through 17(d).

⁸ In any future filings based on the present labor certification, the Petitioner must establish its continuing ability to pay the proffered wage from the 2019 priority date onward.

Additionally, the Form I-140 and the labor certification state that the Petitioner has 50 employees, and the unaudited 2019 income statement states that the Petitioner paid \$2,349,000 in wages and benefits in the first three quarters of that year. However, the Petitioner's 2019 federal tax return states payroll expenses and casual labor costs totaling \$184,591.⁹ Furthermore, the unaudited profit and loss statement for the first two quarters of 2020 states that the Petitioner had \$233,474.37 in "payroll" costs to various types of workers during that time and classifies this under Cost of Goods Sold. The Petitioner provides no explanation for the inconsistencies relating to its claimed number of employees. It is therefore not possible to determine its overall number of employees for the purpose of establishing whether it has the ability to pay the proffered wage. *Id.*

Therefore, the totality of the circumstances does not indicate that the Petitioner has had the continuing ability to pay the proffered wage from the priority date onwards.

B. Other Grounds of Denial

The Director also found that the record did not establish that the Beneficiary had sufficient work experience to qualify for the offered position. However, because the Petitioner's ability to pay the proffered wage is dispositive, we need not reach this issue and hereby reserve it. *See INS v. Bagamasbad*, 429 U.S. 24, 25 (1976) ("courts and agencies are not required to make findings on issues the 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).

III. CONCLUSION

The Petitioner has not established its continuing ability to pay the proffered wage from the priority date as required by 8 C.F.R. § 204.5(g)(2). Therefore, the appeal will be dismissed.

ORDER: The appeal is dismissed.

⁹ On Page 1, Line 9 of its 2019 federal tax return, the Petitioner did not list any salaries or wages paid that year, and the accompanying IRS Form 1125-A, Cost of Goods Sold, states that the Petitioner had no labor costs.