



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

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

In Re: 28953061

Date: DEC. 11, 2023

Appeal of Texas Service Center Decision

Form I-140, Immigrant Petition for Alien Workers (Skilled Worker)

The Petitioner, a satellite telecommunications provider, seeks to employ the Beneficiary as a senior software developer. It requests his classification as a skilled worker under the employment-based, third preference immigrant classification. *See* Immigration and Nationality Act (the Act) section 203(b)(3)(A)(i), 8 U.S.C. § 1153(b)(3)(A)(i). This category allows a U.S. employer to sponsor a noncitizen for lawful permanent residence to work in a position requiring at least two years of training or experience.

The Director of the Texas Service Center denied the petition, concluding that the Petitioner did not establish its ability to pay the proffered wage. The matter is now before us on appeal. 8 C.F.R. § 103.3.

The Petitioner bears the burden of proof to demonstrate eligibility by a preponderance of the evidence. *Matter of Chawathe*, 25 I&N Dec. 369, 375-76 (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 dismiss the appeal.

## I. LAW

Immigration as a skilled worker generally follows a three-step process. First, a prospective employer must obtain certification from the U.S. Department of Labor (DOL) that: there are insufficient U.S. workers able, willing, qualified, and available for an offered position; and permanent employment of a noncitizen in the position would not harm wages and working conditions of U.S. workers with similar jobs. Section 212(a)(5)(A)(i) of the Act, 8 U.S.C. § 1182(a)(5)(A)(i).

Second, an employer must submit an approved labor certification with an immigrant visa petition to U.S. Citizenship and Immigration Services (USCIS). Section 204(a)(1)(F) of the Act, 8 U.S.C. § 1154(a)(1)(F). USCIS determines whether a beneficiary meets the requirements of a DOL-certified position and a requested immigrant visa category. 8 C.F.R. § 204.5(l)(3)(ii)(B). In addition, USCIS determines whether the employer established its ability to pay the proffered wage. 8 C.F.R. § 204.5(g)(2). Finally, if USCIS approves a petition, a 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. ANALYSIS

The sole issue addressed by the Director is whether the Petitioner established its ability to pay the offered wage.

A petitioner must demonstrate its continuing ability to pay an offered position’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 ability to pay must generally include copies of a petitioner’s annual reports, federal tax returns, or audited financial statements. *Id.*

In 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. 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. If net income and net current assets are insufficient, USCIS may consider other factors affecting a petitioner’s ability to pay a proffered wage. *Matter of Sonogawa*, 12 I&N Dec. 612, 614-15 (Reg’l Comm’r 1967).<sup>1</sup>

The proffered wage for the position of senior software engineer, as stated on the Petitioner’s labor certification, is \$112,694 annually. The petition’s priority date is November 6, 2020, the date DOL accepted the labor certification application for processing. *See* 8 C.F.R. § 204.5(d). Therefore, we will consider the Petitioner’s continuing ability to pay since November 6, 2020.

The Petitioner submitted copies of the Beneficiary’s IRS Forms W-2, Wage and Tax Statement, for the years 2020 and 2021. The Petitioner paid the Beneficiary total wages of \$39,875 in 2020 and \$76,914 in 2021. Thus, based solely on the wages paid to the Beneficiary, the Petitioner has not demonstrated its ability to pay the proffered wage from the priority date. Nevertheless, we credit the Petitioner’s payments to the Beneficiary. The Petitioner must demonstrate its ability to pay the difference between the proffered wage and the Beneficiary’s wage for each year. For 2020, this difference is \$72,819 and for 2021, the difference is \$35,780.

The record contains copies of the Petitioner’s federal income tax returns for the years 2020 and 2021. As noted by the Director, the company’s 2020 tax return shows a net loss of \$513,120 and net current liabilities of \$130,608, while the 2021 tax return reflects a net loss of \$285,849 and net current liabilities of \$370,820. The Petitioner’s tax returns do not demonstrate that it had sufficient net income or net current assets to compensate for the difference between the proffered wage and the amount paid to the Beneficiary for the years 2020 and 2021. Thus, based on examinations of the Petitioner’s net

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<sup>1</sup> 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*, 108 F. Supp. 3d 936, 942-946 (S.D. Cal. 2015); *Rizvi v. Dep’t of Homeland Sec.*, 37 F. Supp. 3d 870, 883-884 (S.D. Tex. 2014), *aff’d*, 627 Fed. App’x 292, 294-295 (5th Cir. 2015).

income, net current assets, and wages paid to the Beneficiary, the company has not demonstrated its continuing ability to pay the proffered wage from the priority date.

The Director's examination of the Petitioner's ability to pay was limited to the years 2020 and 2021 because the company's 2022 tax return was not yet available when it responded to the RFE in June 2022. The Petitioner emphasizes on appeal that it has been paying the Beneficiary at a rate higher than the proffered wage since 2022. Although the Petitioner submitted an appellate brief and additional evidence in June 2023, it has not provided copies of the Beneficiary's 2022 IRS Form W-2 or its 2022 federal tax return, annual report, or audited financial statements. The record contains a letter from the Petitioner addressed to the Beneficiary informing him that his compensation was increased to \$116,500 as of June 15, 2022. His earnings statement for the pay period ending June 30, 2022, shows that he received a semi-monthly wage of \$4,854.17, consistent with this new annual salary, and that he had year-to-date earnings of \$52,979.17. The record does not contain evidence of his total wages in 2022; therefore, the Petitioner must establish it can pay the difference of \$59,714.83 between the proffered wage and wages paid. Because the Petitioner has not provided its 2022 federal tax return, annual report, or audited financial statements, we cannot conclude it had the ability to pay the difference between his wages paid and the proffered wage in 2022. Nor would the company's ability to pay the proffered wage in 2022 establish its ability to pay in prior years. *See* 8 C.F.R. § 204.5(g)(2) (requiring a petitioner to demonstrate its ability to pay "at the time the priority date is established *and continuing* until the beneficiary obtains lawful permanent residence") (emphasis added).

As previously indicated, we may consider evidence of a petitioner's ability to pay beyond its wages paid, net income, and net current assets. *See Matter of Sonogawa*, 12 I&N Dec. at 614-615. Under *Sonogawa*, we may consider such factors as: the number of years a petitioner has conducted business; its number of employees; growth of its business; the occurrence of any uncharacteristic business expenditures or losses; its reputation in its industry; whether a beneficiary will replace a current employee or outsourced service; or other evidence of its ability to pay a proffered wage. In some cases, such as when a petitioner has one unprofitable year despite a history of profitability, these facts may establish a petitioner's ability to pay the proffered wage despite a shortfall in net income or net current assets. *See generally* 6 *USCIS Policy Manual* E.4(B)(3), <https://www.uscis.gov/policy-manual> (addressing factors USCIS will consider when conducting an ability to pay analysis).

The Director considered whether the Petitioner established its ability to pay based on the totality of the facts and circumstances presented. The Director determined that the Petitioner did not provide evidence of the company's historical growth or sufficient evidence of its favorable reputation in the industry. They also noted that the Petitioner, unlike the petitioner in *Sonogawa*, did not claim any unusual business expenditures or losses for the years in question or provide evidence to establish that the years 2020 and 2021 were uncharacteristically unprofitable years.

On appeal, the Petitioner emphasizes that the Director overlooked evidence of the company's growth and expansion since its establishment in 2017 and failed to consider the effect of the COVID-19 pandemic on its ability to pay the proffered wage. The Petitioner emphasizes that where "an employer's inability to pay a beneficiary's wage is due to 'temporary or exceptional circumstances beyond its control,' USCIS should consider evidence of financial ability prior to and after such circumstances." Specifically, the Petitioner asserts that its "financial records for the years preceding

and following the exceptional year demonstrate the company's consistent ability to pay the beneficiary's proffered wage."

As noted above, the Petitioner did not show its ability to pay the proffered wage in the years 2020 and 2021, a fact that the company attributes to temporary, pandemic-related business disruptions. The record contains the Petitioner's 2019 federal tax return along with a copy of the Beneficiary's 2019 IRS Form W-2, showing that he was paid \$105,000. While this figure is only \$7,654 less than the proffered wage, the evidence reflects that the Petitioner operated at a loss that year, with a net loss of \$1,109,682 and net current liabilities of \$290,679. As noted, Petitioner has not submitted its 2022 federal tax return or the Beneficiary's IRS Form W-2 in support of its claim that it had the ability to pay the proffered wage in that year.<sup>2</sup>

The Petitioner emphasized that "[i]n 2020 and 2021, due to COVID restrictions and sharp decline in sales, the company was forced to place all employees on the part time basis, to retain our employees while the business overcame the significant, yet temporary, loss of revenue." However, the referenced "sharp decline in sales" is not reflected in the Petitioner's tax returns. The company reported gross revenue of \$1,073,948 in 2019, \$1,025,688 in 2020, and \$1,786,732 in 2021, a 66 percent increase over its 2019 revenue. In these same years, the Petitioner paid \$325,384 in salaries and wages in 2019, \$205,529 in 2020 and \$286,839 in 2021, only a 12% decrease from its pre-pandemic 2019 payroll levels. Further, the Petitioner's reported losses decreased each year based on the figures reported on its tax returns, and the payments made to company officers increased annually, from \$196,930 in 2019 to \$257,183 in 2020, and \$286,839 in 2021. Therefore, the record does not support the Petitioner's claim that it experienced significant, but temporary, revenue loss during the COVID-19 pandemic, or that the economic effects of the pandemic hindered the Petitioner from demonstrating its ability to pay in 2020 and 2021.

The Petitioner has also maintained that, considering the company was only established in 2017 and survived through the COVID-19 pandemic, it is doing "financially exceptionally well." The Petitioner documented some of its long-term service contracts (including those executed before and after the priority date) and provided evidence that it obtained a \$6.5 million promissory note to acquire a Spanish teleport satellite communications provider in June 2022. The record on appeal also includes a chart summarizing the company's current sales pipeline; payroll statements for the month of May 2023 showing bi-weekly payments of approximately \$60,000 to 14 employees over two pay periods; and an unaudited consolidated financial statement for the first quarter of 2023 which includes the financial results of the Petitioner's Spanish subsidiary. All this evidence supports the Petitioner's claims regarding its potential for growth, particularly with the acquisition of the Spanish company in 2022. This factor is weighed favorably in considering its *continuing* ability to pay the proffered wage under the totality of the circumstances, but is not the only factor considered, particularly given the Petitioner's burden to establish its ability to pay the proffered wage from the priority date. Neither the Petitioner's prospective growth nor its ability to weather the pandemic as a relatively new company are sufficient by themselves to overcome the shortfall in net income and net current assets over multiple years.

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<sup>2</sup> On appeal, the Petitioner submits an internally prepared company presentation with summarized results for the years 2019 through 2022, and projections for the years 2023 through 2025. While this document indicates the company had gross sales of \$2.77 million and achieved an operating profit for the first time in 2022, it cannot be accepted in lieu of a federal tax return, audited financial statement, or annual report. *See* 8 C.F.R. § 204.5(g)(2).

As noted, the Petitioner's primary claim on appeal is that the Director overlooked evidence demonstrating that the COVID-19 pandemic contributed to a "sharp decline in sales" that prevented the company from demonstrating its ability to pay the proffered wage in 2020 and 2021, and evidence demonstrating the company's growth as of 2022. While we have considered these factors, they do not overcome the Director's determination that the Petitioner did not establish its ability to pay the proffered wage from the priority date. The Petitioner has not submitted evidence demonstrating that other factors, such as its gross sales and revenue, number of years in business, its overall reputation in the industry, or its number of employees warrant a favorable determination under the totality of the circumstances and does not assert that the Director failed to consider any other relevant evidence.

For the reasons discussed, the Petitioner has not shown by a preponderance of the evidence that it has the continuing ability to pay the proffered wage beginning on the priority date. Accordingly, the appeal will be dismissed.

**ORDER:** The appeal is dismissed.