



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

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

In Re: 24993120

Date: FEB. 7, 2023

Appeal of Texas Service Center Decision

Form I-140, Immigrant Petition for Skilled Worker

The Petitioner, the operator of an ice cream shop, seeks to permanently employ the Beneficiary as store manager. The sole proprietorship requests the Beneficiary's classification under the third-preference, immigrant visa category for "skilled workers." *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 prospective U.S. employer to sponsor a noncitizen for lawful permanent residence to perform work requiring at least two years of training or experience. *Id.*

The Director of the Texas Service Center denied the petition. The Director concluded that the Petitioner did not demonstrate the required ability of its sole proprietor to pay the offered position's proffered wage. On appeal, the business asserts that the Director disregarded: its employment of the Beneficiary at the proffered wage rate since February 2022; its closure for at least parts of the past three years due to the COVID-19 pandemic; and the proprietor's incurrence of one-time, renovation costs of more than \$50,000 on a rental property in 2019.

The Petitioner bears the burden of demonstrating eligibility for the requested benefit by a preponderance of evidence. *Matter of Chawathe*, 25 I&N Dec. 369, 375-76 (AAO 2010). We exercise de novo, appellate review. *Matter of Christo's, Inc.*, 26 I&N Dec. 537, 537 n.2 (AAO 2015). Upon de novo review, we conclude that the record lacks sufficient, corroborating evidence and resolutions of evidentiary discrepancies to demonstrate the sole proprietor's ability to pay the proffered wage. We will therefore 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). Among other things, USCIS determines whether a noncitizen 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).

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

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 business’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).¹

A sole proprietorship is an unincorporated business with one owner who pays personal income tax on the business’s profits. Thus, in determining a sole proprietorship’s ability to pay, USCIS must consider a proprietor’s personal income, assets, and liabilities. The Petitioner therefore must establish that the annual net income or net current assets of its sole proprietor equals or exceeds corresponding annual sums of his living expenses and the proffered wage. *See, e.g., Estrada-Hernandez v. Holder*, 108 F. Supp. 3d at 945.

The Petitioner’s labor certification states the proffered wage of the offered position of store manager as \$57,720 a year. The petition’s priority date is September 5, 2019, 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).

At the time of the appeal’s filing in September 2022, evidence of the Petitioner’s ability to pay the proffered wage for that year was not yet unavailable. Therefore, for purposes of this decision, we will consider the sole proprietor’s ability to pay in only 2019 - the year of the petition’s priority date - 2020, and 2021.²

¹ 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); *Estrada-Hernandez v. Holder*, 108 F. Supp. 3d 936, 942-43 (S.D. Cal. 2015).

² In any future filing in this matter, the Petitioner must submit required evidence of its sole proprietor’s ability to pay the proffered wage in 2022. *See* 8 C.F.R. § 204.5(g)(2) (requiring a petitioner to demonstrate ability to pay a proffered wage “continuing until the beneficiary obtains lawful permanent residence”).

The Petitioner did not submit evidence of any wage payments to the Beneficiary in 2019, 2020, or 2021. Thus, based solely on wages paid, the record does not demonstrate the business's ability to pay the proffered wage.

On appeal, the Petitioner notes its submission of paycheck copies indicating its monthly payments to the Beneficiary at the proffered wage rate beginning in February 2022. The Petitioner notes that it began employing the Beneficiary shortly after USCIS granted him U.S. employment authorization. *See* 8 C.F.R. § 274a.12(c)(9) (allowing applicants for adjustment of status to obtain U.S. employment authorization before becoming lawful permanent residents). The business argues that its payments to the Beneficiary demonstrate its sole proprietor's ability to pay the proffered wage.

As indicated above, however, without evidence for 2022, the scope of our analysis here does not include the sole proprietor's ability to pay the proffered wage that year. Evidence of ability to pay "*shall be* either in the form of copies of annual reports, federal tax return, or audited financial statements." 8 C.F.R. § 204.5(g)(2) (emphasis added). Required evidence of the proprietor's ability to pay in 2022 was not yet available at the time of the appeal's filing, nor did the business later provide the evidence. Thus, although the pay checks indicate the Petitioner's employment of the Beneficiary at the proffered wage rate for most of 2022, the record lacks a regulatory required annual report, federal tax return, or audited financial statement for that year. The pay checks alone therefore do not demonstrate the proprietor's ability to pay the proffered wage in 2022. Nor would the proprietor's ability to pay the proffered wage in 2022 establish his 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).

The Petitioner submitted copies of its sole proprietor's federal income tax returns for 2019, 2020, and 2021. The tax returns reflect adjusted gross income amounts of \$37,918 in 2019, -\$2,316 in 2020, and \$21,803 in 2021. None of these amounts equal or exceed the annual proffered wage of \$57,720. Also, the Petitioner did not provide a list of its proprietor's monthly living expenses for 2019 or 2020. Thus, because we cannot compare the proprietor's income to the combined amount of the proffered wage and his expenses in 2019 or 2020, we cannot accurately determine his ability to pay in those years. The proprietor's adjusted gross incomes in 2019 and 2020, however, do not exceed the annual proffered wage. Thus, the record indicates his inability to pay the proffered wage in those years. The sole proprietor listed monthly expenses of \$12,579, or \$150,948 a year, in 2021. Thus, the record also does not indicate his generation of sufficient income to pay the proffered wage and his living expenses in 2021.

The sole proprietor's list of monthly expenses for 2021 states his monthly income of \$14,950, \$2,371 above his monthly expenses of \$12,579. The proprietor's 2021 federal income tax return, however, does not support the claimed income amount, and the Petitioner does not explain the source(s) of most of the proprietor's purported monthly income. As indicated above, the tax return states the proprietor's total and adjusted gross incomes for the entire year as \$21,803. The proprietor's claimed monthly income is therefore unreliable and does not demonstrate his ability to pay the proffered wage in 2021. *See Matter of Ho*, 19 I&N Dec. 582, 591 (BIA 1988) (requiring a petitioner to resolve inconsistencies with independent, objective evidence pointing to where the truth lies).

The Petitioner argues that, contrary to case law, the Director did not consider unusual circumstances affecting the sole proprietor's ability to pay the proffered wage. *See Matter of Sonegawa*, 12 I&N Dec. at 614-15. The Petitioner claims that, due to the COVID-19 pandemic, the business closed from April 2020 to February 2022.

The Petitioner's claimed closure, however, conflicts with other evidence. Schedule C, Profit or Loss From Business, in the sole proprietor's 2021 federal income tax return states the business's generation of \$135,087 in gross receipts that year. If the Petitioner was closed for all of 2021 as it claims, it has not explained how it grossed more than \$100,000 that year. *See Matter of Ho*, 19 I&N Dec. at 591 (stating that doubt cast on any aspect of a petitioner's proof may lead to a reevaluation of the reliability and sufficiency of its remaining evidence). The record therefore does not sufficiently support the Petitioner's claimed closure due to the COVID-19 pandemic.

The Petitioner also claims that its sole proprietor spent a total of \$53,230 on renovating a rental property in 2019. The Petitioner argues that these "one-time" expenses affected the proprietor's ability to pay the proffered that year.

Again, however, the record does not support the Petitioner's claim. The business submitted copies of an invoice for \$450, a cost estimate from one contractor for \$36,250, and three cost estimates from another contractor for \$12,500, \$2,585, and \$1,450. The Petitioner claims that it paid all the referenced amounts as part of the rental property's renovation. But the cost estimates all bear October 2019 dates and appear to refer to the same work at the property. The estimates from both contractors itemize costs of lead paint abatement regarding the property's windows, doors, kitchen, bedrooms, and front exterior. The record does not explain why the sole proprietor would pay separate contractors to perform the same work. Also, the proprietor did not list any repair expenses for the rental property on Schedule E, Supplemental Income and Loss, of his 2019 federal income tax return. *See Matter of Ho*, 19 I&N Dec. at 591 (requiring a petitioner to resolve inconsistencies).

Further, the Petitioner did not submit reliable evidence that its sole proprietor paid the contractors who issued the estimates and invoice. The business submitted copies of its checking account statements from September 2019 through August 2020, including images of deposited or cashed checks. The statements indicate a check's issuance to only one of the contractors, for \$1,000 in June 2020. Because of the date and amount of the check, the record does not demonstrate the check's issuance for payment towards the claimed 2019 renovation of the rental property.³ The record therefore does not support the claimed renovation expenses of \$53,230. Even if the sole proprietor would have had an extra \$53,230 available in 2019, the Petitioner did not submit a list of his living expenses that year. The record therefore would not establish his ability to pay the combined proffered wage and living expenses in 2019.

³ A copy of the \$12,500 estimate includes a handwritten note that appears to indicate payment of \$2,250 on November 1, 2019, to the same contractor. The Petitioner's checking account statements, however, do not corroborate this purported payment.

III. CONCLUSION

The Petitioner has not demonstrated the ability of its sole proprietor to pay the offered position's proffered wage. We will therefore affirm the petition's denial.

ORDER: The appeal is dismissed.