



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

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

In Re: 25767381

Date: MAR. 20, 2023

Appeal of Nebraska Service Center Decision

Form I-140, Immigrant Petition for a Professional

The Petitioner, a logistics company, seeks to employ the Beneficiary as an outside sales representative. The company requests his classification under the third-preference, immigrant visa category for professionals. *See* 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 Nebraska Service Center denied the petition, concluding the record did not establish the Petitioner's ability to pay the proffered wage. The matter is now before us on appeal.

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.

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 foreign national 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. Among other things, USCIS considers whether a beneficiary meets the requirements of a certified position and a requested immigrant visa classification. 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.

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 the 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. *See Matter of Sonogawa*, 12 I&N Dec. 612, 614-15 (Reg'l Comm'r 1967).¹

The Petitioner's labor certification lists the proffered wage of the offered position of outside sales representative as \$76,482 year. The petition's priority date is August 25, 2021, 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).

In the matter at hand, the Petitioner was structured as a limited liability company and claims to have been established in 2007. It filed the Form I-140 on May 13, 2022, without supporting evidence of its ability to pay. In a subsequent request for evidence (RFE), the Director stated that the Petitioner had not submitted documents to establish its ability to pay the proffered wage. Accordingly, the Director requested additional evidence of the Petitioner's ability to pay, including evidence of annual reports, audited financial statements, U.S. federal income tax returns, or wages it had paid to the Beneficiary (such as IRS Forms W-2, Wage and Tax Statement, IRS Forms 1099-MISC, Miscellaneous Income, or pay vouchers).

In response, the Petitioner provided its 2021 federal income tax return showing a net income of -\$261,907 and net current assets of -\$354,474.² In denying the petition, the Director indicated that the Petitioner's 2021 tax return showing the company's net income and net current assets did not establish its ability to pay the \$76,482 proffered wage. The Director concluded therefore that the Petitioner had not demonstrated it met the ability to pay requirement.

On appeal, the Petitioner contends that it is a part of a conglomerate of companies all controlled by R-D- and that his other companies earned sufficient net income to pay the proffered wage. The Petitioner submits corporate charts showing the relationship of all the companies and that the Petitioner works with them. In addition, the Petitioner presents audited financial statements for both "C-H-, LLC and Subsidiaries" and "C-F-H-G, LLC and Subsidiaries."³ The Director, however, had afforded the

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); *Rahman v. Chertoff*, 641 F. Supp. 2d 349, 351-52 (D. Del. 2009).

² 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.

³ While financial data for each of C-H-, LLC and C-F-H-G-, LLC's subsidiaries are presented separately within the audited financial statements, the Petitioner is not identified as a subsidiary and its financial statements are not included in these documents. The "C-H-, LLC and Subsidiaries" audited financial statement only briefly mentions the Petitioner on page 15, stating that "[t]he Company uses [the Petitioner] to manage and operate its various operations" and listing the management fees paid to the Petitioner over a three-year period.

Petitioner the opportunity to present audited financial statements in response to the RFE. Accordingly, we are not required to consider new eligibility claims or evidence in our adjudication of this appeal. *See Matter of Soriano*, 19 I&N Dec. 764, 766 (BIA 1988) (providing that if “the petitioner was put on notice of the required evidence and given a reason opportunity to provide it for the record before the denial, we will not consider evidence submitted on appeal of any purpose” and that “we will adjudicate the appeal based on the record of proceedings” before the Chief); *see also Matter of Obaigbena*, 19 I&N Dec. 533 (BIA 1988).

Notwithstanding the above, the audited financial statements for both “C-H-, LLC and Subsidiaries” and “C-F-H-G, LLC and Subsidiaries” do not establish the Petitioner’s 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 or entities. *See id.* Here, the audited financial statements presented on appeal do not establish the Petitioner’s ability to pay the proffered wage.⁴

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 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, the Petitioner has not established its continuing ability to pay the proffered wage from the priority date of the petition.

ORDER: The appeal is dismissed.

⁴ A legal entity generally has a separate existence from its shareholders, members, managers, officers, or owners. Generally, USCIS does not consider the financial resources of persons or entities that have no explicit legal obligation to pay the proffered wage, including a parent company, shareholders and officers of a corporation, members or managers of a limited liability company (LLC) (even if the LLC is taxed as a partnership or disregarded entity), and limited partners. An annual report, audited financial statement, or tax return of a parent company is more probative of a subsidiary’s ability to pay the proffered wage where the subsidiary’s financial data is presented separately within the document. *See 6 USCIS Policy Manual E.4(A)(5)*, <https://www.uscis.gov/policy-manual/volume-6-part-e-chapter-4>.