



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

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

In Re: 25937510

Date: MAR. 28, 2023

Appeal of Nebraska Service Center Decision

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

The Petitioner, a restaurant, seeks to employ the Beneficiary as a cook. It requests classification of the Beneficiary as an unskilled worker under the third preference immigrant classification. *See* Immigration and Nationality Act (the Act) section 203(b)(3)(A)(iii), 8 U.S.C. § 1153(b)(3)(A)(iii). This employment-based immigrant classification allows a U.S. employer to sponsor a noncitizen for lawful permanent resident status to work in a position that requires less than two years of training or experience.

The Director of the Nebraska Service Center denied the petition, concluding that the record did not establish the Petitioner's ability to pay the proffered wage from the priority date. 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

A petitioner must establish its ability to pay the proffered wage from the priority date of the petition until the beneficiary obtains lawful permanent residence. 8 C.F.R. § 204.5(g)(2). Evidence of ability to pay must generally include annual reports, federal tax returns, or audited financial statements. *Id.* If a petitioner employs 100 or more workers, U.S. Citizenship and Immigration Services (USCIS) may accept a statement from a financial officer attesting to the petitioner's ability to pay the proffered wage. *Id.* In appropriate cases, additional evidence, such as profit/loss statements, bank account records, or personnel records, may be submitted by the petitioner or requested by USCIS. *Id.*

In determining ability to pay, USCIS first determines whether the petitioner paid the beneficiary the full proffered wage each year from the priority date. If the petitioner did not pay the proffered wage in any given year, USCIS next determines whether the petitioner had sufficient net income or net current assets to pay the proffered wage (reduced by any wages paid to the beneficiary).

If net income and net current assets are insufficient, USCIS may consider other relevant factors, such as the number of years the petitioner has been in business, the size of its operations, the growth of its business over time, its number of employees, the occurrence of any uncharacteristic business expenditures or losses, its reputation within its industry, or whether a beneficiary will replace a current employee or outsourced service. *See Matter of Sonogawa*, 12 I&N Dec. 612, 614-15 (Reg'l Comm'r 1967).

II. ANALYSIS

The Petitioner seeks to employ the Beneficiary as a cook at its restaurant. It indicated in Part G of ETA Form 9089, Application for Permanent Employment Certification, filed on October 13, 2021, that it would pay the Beneficiary a salary of \$29,432. The sole issue on appeal is whether the Petitioner has established its ability to pay this offered wage from the October 13, 2021 priority date to the present.

In his decision, the Director reviewed the Petitioner's 2021 IRS Form 1120S federal tax return, noting that it showed a net loss for that year and net current assets below that of the proffered wage. He also acknowledged the Petitioner's statement that the Beneficiary was abroad and thus was not employed by the Petitioner, and then reviewed the additional documentation submitted. This additional evidence consisted of a statement from the Petitioner's accountant, as well as the Petitioner's unaudited financial statements, IRS Forms W-2, 940 and 941 showing wages paid to its existing employees in 2021 and 2022, and bank account statements for the period from October 2021 to September 2022. The Director concluded that the bulk of this evidence was secondary evidence and thus insufficient to establish that the Petitioner had the ability to pay the offered wage to the Beneficiary from the priority date forward.

On appeal, the Petitioner first asserts that the Director used an improper, higher standard of proof in his analysis instead of the preponderance of the evidence. However, the Petitioner does not specifically identify instances where the Director used this improper standard, or otherwise support his assertion.¹

The Petitioner next asserts that the Director abused his discretion by not considering the secondary evidence it submitted and the size of the company but does not challenge the Director's assessment of its net income and net current assets as evidenced by its 2021 IRS Form 1120S. As noted, the Petitioner submitted 12 months of its bank statements beginning from the month of the priority date, and these reflect an average ending balance of approximately \$13,231 and a range of approximately \$2,576 to \$23,395. But the Petitioner has not demonstrated why the documentation specified at 8 C.F.R. § 204.5(g)(2) is inapplicable or otherwise characterizes the Petitioner's financial picture inaccurately. The Petitioner also has not established that the funds reported on its bank statements show additional available funds that were not reflected on its tax return, such as the Petitioner's taxable income (income minus deductions) or the cash specified on Schedule L that was considered in determining the Petitioner's net current assets.

¹ The Petitioner's arguments on appeal are limited to a basis statement in Part 7 of the Form I-290B, Notice of Appeal or Motion. While it indicated in Part 2 that it would submit a brief within 30 days of the filing of the appeal, we have not received a brief as of the date of this decision.

The record also includes the Petitioner's unaudited financial statements for the nine months ending September 30, 2022 and for 2021. However, where a petitioner relies on financial statements to demonstrate its ability to pay the proffered wage, the financial statements must be audited. *See id.* As there is no accountant's report accompanying these statements, we cannot conclude that they are audited statements. Unaudited financial statements are the unsupported representations of management. The unsupported representations of management are not persuasive evidence and are insufficient to demonstrate the Petitioner's ability to pay the proffered wage.

Turning to the other factors that we may consider beyond net income and net current assets, the Petitioner indicated that it was established in 2011. Although it did not indicate its number of employees on the Form I-140, Immigrant Petition for Alien Worker, the IRS W-2 forms for 2021 and the IRS Forms 940 and 941 for 2022 indicate that this number varied between seven and nine employees, including the Petitioner's sole member. Total salaries paid was approximately \$119,000 in 2021 and approximately \$114,000 for the first nine months of 2022. Unlike in *Sonegawa*, the Petitioner has not established the occurrence of any uncharacteristic business expenditures or losses in 2021 or 2022, or submitted evidence of its reputation in the industry. Further, the Petitioner stated that the Beneficiary is not being hired to replace a current employee. Therefore, a review of the totality of the circumstances in this case does not establish the Petitioner's continuing ability to pay the proffered wage pursuant to *Sonegawa*.

III. CONCLUSION

The Petitioner has not established that either its net income or net current assets are sufficient to show the ability to pay the wage proffered to the Beneficiary from the priority date to the present, nor has it employed or paid the Beneficiary at any time. In addition, a review of the totality of the circumstances does not show any other factors demonstrating its continuing ability to pay the proffered wage. Accordingly, the Petitioner has not met the requirement at 8 C.F.R. § 204.5(g)(2) and has not established eligibility for the requested immigration benefit.

ORDER: The appeal is dismissed.