



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

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

In Re: 24845251

Date: MAY 8, 2023

Appeal of Nebraska Service Center Decision

Form I-140, Immigrant Petition for Alien Workers (National Interest Waiver)

The Petitioner, a technology development company, seeks to employ the Beneficiary as a software engineer. The company requests her 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 that the Petitioner had not established its 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 the petition's priority date until the 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.* If a petitioner submits such evidence, USCIS will then examine whether a petitioner has paid the beneficiary the full proffered wage each year from the petition's priority date. If a petitioner has not paid the beneficiary the full proffered wage each year, USCIS will consider whether the business generated annual amounts of net income or net current assets sufficient to pay any difference 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 such as the number of years it has conducted business, the growth of its business, its number of employees, the occurrence of any uncharacteristic business expenditures or losses, or its reputation in its industry. *See Matter of Sonegawa*, 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 software engineer as \$100,000.00 per year. The petition's priority date is July 17, 2020, 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 this case, the Petitioner presented the Beneficiary's 2020 Form W-2, Wage and Tax Statement, indicating that it paid her \$79,999.92 in that year. It also offered copies of two of the Beneficiary's earnings statements for January 2021 (listing a bimonthly wage of \$3,333.33 per 86.67 hours). In addition, the Petitioner provided the Beneficiary's earning statements from February 2021 until April 2021 (listing a bimonthly wage of \$3,583.33 per 86.67 hours). These amounts do not equal or exceed the annual proffered wage of \$100,000.00 per year. Accordingly, the record supports the Director's finding that the Petitioner had not established its ability to pay the proffered wage based on the wages it paid to the Beneficiary in 2020 or 2021.

The Petitioner must therefore demonstrate its ability to pay the difference between the annual proffered wage and the amounts it paid to the Beneficiary in 2020 and 2021. In the matter at hand, the Petitioner was structured as a C corporation and claims to have been established in 2014. The Petitioner initially provided its 2020 federal income tax return showing a net income of -\$1,005,877 and net current assets of \$4,207. In response to the Director's request for evidence (RFE), the Petitioner submitted its 2021 federal income tax return showing a net income of -\$1,291,531 and net current assets of \$7,181.² The Petitioner's federal income tax returns did not show that the Petitioner had sufficient net income or net current assets to pay the difference between the annual proffered wage and the amounts it paid to the Beneficiary in 2020 and 2021.

The Petitioner also submitted 2020 and 2021 U.S. Individual Income Tax Returns for two of its major shareholders (V-J-W- and E-L-W-) and an affidavit from these shareholders asserting that they "are financially able and willing to invest our personal funds to [the Petitioner] for its future operations including but not limited to those pertaining to covering [the Beneficiary's] proffered annual salary of

¹ 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, 883-84 (S.D. Tex. 2014), *aff'd*, 627 Fed. App'x 292, 294-295 (5th Cir. 2015).

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.

\$100,000.” These documents, however, 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 its shareholders. Here, the shareholders’ personal income does not establish the Petitioner’s ability to pay the proffered wage.

In addition, the Petitioner submitted its monthly bank statements from January 2020 until May 2022. For example, in 2020, the company’s ending balances on these bank statements ranged from \$385.84 (September 2020) up to \$72,290.94 (May 2020). In 2022, the company’s ending balances ranged from \$3,035.23 (April 2022) up to \$38,028.12 (February 2022). These bank statements show the amount in the Petitioner’s account on a given date and do not identify if any funds may already be obligated for other purposes.³ Here, the Petitioner has not demonstrated that the amounts indicated on the bank statements have not already been considered elsewhere, such as in our calculation of the Petitioner’s net current assets in 2020 and 2021. Moreover, not one of the monthly ending balances for 2022 equals or exceeds the annual proffered wage of \$100,000.00 per year.

Furthermore, the Petitioner presented multiple “Simple Agreement(s) for Future Equity” (2019 – 2021). The Petitioner stated that it is “substantially and almost exclusively supported by [V-J-W- and E-L-W-] as pursuant to the Simple Agreement for Future Equity (SAFE). . . . Petitioner’s operating funds have largely derived from [V-J-W- and E-L-W-’s] personal investment in exchange for [the Petitioner’s] stock shares.” With the appeal, the Petitioner provides an Investor Bulletin from the U.S. Securities and Exchange Commission, entitled “Be Cautious of SAFE’s in Crowdfunding.” This bulletin defines a SAFE as an agreement between “the investor and the company in which the company generally promises to give you a future equity stake in the company if certain trigger events occur.” It also submits a letter from M-R-, Managing Principal at [REDACTED], discussing the elements of a SAFE and how it is used in venture financing.

The Petitioner’s appellate submission includes a letter from R-S-, a Certified Public Accountant in California, stating: “In the case of [the Petitioner], there is a section of [the Petitioner’s] tax return that is called ‘Long term notes payable.’ This looks like a loan that must be paid back. In fact, the large majority of this \$4.7M was cash invested via a SAFE.” The information and evidence presented indicates that the Petitioner’s SAFE funding derives from the financial resources of its principal shareholders. Again, the assets of a Petitioner’s shareholders cannot be considered in determining the petitioning corporation’s ability to pay the proffered wage. *See Matter of Aphrodite Investments, Ltd.*,

³ Bank statements often reflect funds that were included on the tax return, annual report, or audited financial statements, such as taxable income or cash used in determining net current assets. If a petitioner submits all monthly statements since the priority date, the petitioner must establish that the amounts reported on the bank statements have not already been considered elsewhere, such as in a calculation of the petitioner’s net current assets, and must establish that such amounts reported on the bank statements reflect sufficient cash to establish ability to pay under the totality of the circumstances. *See generally* 6 USCIS Policy Manual E.4(A)(5), <https://www.uscis.gov/policy-manual/volume-6-part-e-chapter-4>.

17 I&N Dec. at 530. Further, we agree with the Director's determination that the Petitioner's SAFE funding is insufficient because it has not been shown that it represents a guaranteed source of sustainable income or cash flow. Here, the Petitioner has not established that its SAFE funding, which was identified as a long-term liability on its tax returns, sufficiently demonstrates its ability to pay the proffered wage.

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 returns.

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.