



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

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

In Re: 26843640

Date: MAY 25, 2023

Appeal of Nebraska Service Center Decision

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

The Petitioner, a residential care home facility for the elderly, seeks to employ the Beneficiary as a caregiver. It requests classification of the Beneficiary as an unskilled worker under the third preference immigrant classification. 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 that the Petitioner has the ability to pay the Beneficiary the proffered wage from the priority date and continuing until the Beneficiary obtains permanent residence. 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

The regulation at 8 C.F.R. § 204.5(g)(2) states in pertinent part:

Ability of prospective employer to pay wage. Any petition filed by or for an employment-based immigrant which requires an offer of employment must be accompanied by evidence that the prospective United States employer has the ability to pay the proffered wage. The petitioner must demonstrate this ability at the time the priority date is established and continuing until the beneficiary obtains lawful permanent residence. Evidence of this ability shall be either in the form of copies of annual reports, federal tax returns, or audited financial statements.

In determining a petitioner's ability to pay, we first examine whether it paid a beneficiary the full proffered wage each year from a petition's priority date. If a petitioner did not pay a beneficiary the

full proffered wage, we next examine whether it had sufficient annual amounts of net income or net current assets to pay the difference between the proffered wage and the wages paid, if any. If a petitioner's net income or net current assets are insufficient, we may also consider other evidence of its ability to pay the proffered wage.¹

II. ANALYSIS

The priority date in this matter is March 22, 2021, the date on which the U.S. Department of Labor (DOL) received the DOL ETA Form 9089, Application for Permanent Employment Certification, for processing. On the ETA Form 9089, the annual proffered wage is listed as \$25,230.

The Petitioner does not assert, and the record does not support the conclusion, that the Petitioner has paid the Beneficiary the full proffered wage each year, beginning with the priority date year. On the contrary, the Beneficiary's only employment experience listed on the Form 9089 in the three years preceding the priority date is having worked as a caregiver 40 hours per week for a home health services company in [] beginning in January 2019 and ending in December 2020.

In response to a request for evidence (RFE), the Petitioner submitted a copy of an IRS Form 1040 Schedule C, Profit or Loss from Business (Sole Proprietorship), for 2021. The Form 1040 Schedule C indicates that the Petitioner, a single-member limited liability company (LLC), had net income of \$22,193 for 2021.² The Director denied the petition because the Petitioner's net income of \$22,193 for the priority date year, which is less than the annual proffered wage of \$25,230, did not establish the Petitioner's ability to pay the Beneficiary. Since the Petitioner did not submit audited financial statements or annual reports pursuant to the regulation at 8 C.F.R. § 204.5(g)(2), and current assets and current liabilities are not stated on the IRS Form 1040, Schedule C, submitted by the Petitioner, the Petitioner's net current assets could not be ascertained for 2021.

The Petitioner then filed a combined motion to reopen and motion to reconsider. The Director sent the Petitioner a second RFE, explaining again that the Petitioner had yet to establish its ability to pay the Beneficiary the proffered wage each year, beginning with the priority date year, and requesting evidence including, but not limited to, a complete copy of the Petitioner's audited 2021 balance sheet or 2021 annual reports, given that the Petitioner had not paid the Beneficiary and that the Petitioner's net income for the priority date year was less than the proffered wage. The Petitioner responded to the Director's second RFE with a copy of its member's 2021 IRS Form 1040, U.S. Individual Income Tax Return, and copies of the Petitioner's monthly bank account statements from January 2021 through October 2022.

Although the Director granted the Petitioner's combined motion and reviewed the motion submission, they ultimately concluded that the record does not establish the Petitioner's ability to pay the

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 The Petitioner's net income is reported on its member's IRS Form 1040, U.S. Individual Income Tax Return, Schedule C, at line 31.

Beneficiary the proffered wage. Specifically, the Director noted, “Personal assets are not considered when determining ability to pay for LLCs.” Accordingly, the Director disregarded evidence of the Petitioner’s member’s personal assets when determining whether the record establishes the Petitioner’s ability to pay. The Director also disregarded the Petitioner’s bank statements submitted in response to the second RFE because “bank statements are not among the types of evidence enumerated in 8 CFR 204.5(g)(2), which are the requisite evidence of a petitioner’s ability to pay a proffered wage.” Although the Director acknowledged that 8 C.F.R. § 204.5(g)(2) permits “additional material in ‘appropriate cases,’” they found that the Petitioner “has not demonstrated that this required evidence is inapplicable, inaccurate, or unavailable” in this case. Moreover, the Director observed that bank statements alone do not suffice to establish a petitioner’s net current assets because they omit a petitioner’s current liabilities, which are deducted from a petitioner’s current assets as reflected, in part, in a bank statement in order to determine whether a petitioner has sufficient net current assets to pay the proffered wage.

On appeal, the Petitioner asserts that the Director should grant the Form I-140, Immigrant Petition for Alien Workers, “because it has previously approved the same petition on September 30, 2022.” The Petitioner also asserts on appeal that, because the Petitioner is solely owned by its member, it “is automatically treated as a sole proprietor when it comes to filing its business income by using Schedule C.” The Petitioner further states that both its member’s taxable income for 2021 and its monthly bank statement balance throughout 2021 exceed the proffered wage. The Petitioner also states that it “should be given favorable consideration” because elder caregivers, like the Beneficiary’s prospective position, “have in fact been declared by our government to be our heroes, together with other frontliners.”

We first note that a prior approval dated September 30, 2022, appears to be related to the decision to grant the combined motion to reopen and motion to reconsider the petition for further review of the proceedings, not a decision to approve the petition outright. Moreover, even to the extent that the Director may have approved the petition at some point before ultimately denying it, which they did not, we are not required to approve petitions where eligibility has not been demonstrated, merely because of prior approvals that may have been erroneous. *See Matter of Church Scientology Int’l*, 19 I&N Dec. 593, 597 (Comm’r 1988); *see also Sussex Eng’g, Ltd. v. Montgomery*, 825 F.2d 1084, 1090 (6th Cir. 1987). Furthermore, we are not bound to follow a contradictory decision of a service center. *See La. Philharmonic Orchestra v. INS*, No. 98-2855, 2000 WL 282785, at *2 (E.D. La. 2000).

Next, as noted above, the Petitioner’s 2021 Form 1040 Schedule C indicates that the Petitioner had net income of \$22,193 for the priority date year, which does not establish on its face the Petitioner’s ability to pay the proffered wage because it is less than the annual proffered wage of \$25,230. The Petitioner asserts on appeal that the “average monthly expenses of the business is \$17,380.13,” based on “a copy of the breakdown of expenses” submitted on appeal. However, the 2021 Form 1040 Schedule C in the record reports that the Petitioner’s total expenses for 2021 were \$226,403, which is the equivalent of \$18,866.92 per month, not \$17,380.13, and in any event resulted in a net income of \$22,193, which again is less than the proffered annual wage.

Next, as the Director explained, we do not consider the personal assets of the Petitioner’s member, which are separate from the Petitioner’s business assets, when determining whether the Petitioner has the ability to pay the proffered wage at the time the priority date is established and continuing until

the Beneficiary obtains lawful permanent residence. An LLC is a legal entity separate and distinct from its members. The debts and obligations of the company generally are not the debts and obligations of the members.³ A member's liability is limited to his or her initial investment. Because a member is only liable to his or her initial investment, the total income and assets of the members and their ability to pay the company's debts and obligations cannot be utilized to demonstrate the Petitioner's ability to pay the proffered wage. The Petitioner must show the ability to pay the proffered wage out of its own funds. In turn, as the Director explained, bank statements in isolation do not establish whether a petitioner has sufficient net current assets to pay the proffered wage, because they may omit certain net liabilities.

Additionally, although the Petitioner requests "special consideration," it provides no authority under the Act or Federal regulations that delegates U.S. Citizenship and Immigration Services discretion to do so. We must determine whether the Petitioner has the ability to pay the proffered wage at the time the priority date is established and continuing until the Beneficiary obtains lawful permanent residence, as required by 8 C.F.R. § 204.5(g)(2).

Finally, we may consider evidence of a petitioner's ability to pay beyond its net income and net current assets, including such factors 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; 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. *See Matter of Sonogawa*, 12 I&N Dec. 612, 614-615 (Reg'l Comm'r 1967). In this case, the record indicates that the Petitioner was organized in California just one year prior to the priority date. On the Form I-140 and on the labor certification, the Petitioner indicated that it had three current U.S. employees. The record does not establish that the Petitioner's has developed a reputation in its industry or that its growth since its founding in 2020 demonstrates ability to pay the Beneficiary beyond its net income and net current assets. Moreover, the record does not indicate that the Beneficiary would merely replace an existing payroll employee or outsourced service and the corresponding expenses; rather, it indicates the Beneficiary would be an additional payroll employee with additional payroll expenses. Thus, assessing the totality of circumstances in this individual case, the record does not establish the Petitioner's continuing ability to pay the proffered wage pursuant to *Sonogawa*.

In summation, the record does not establish that the Petitioner had the ability to pay the proffered wage at the time the priority date is established and continuing until the Beneficiary obtains lawful permanent residence. 8 C.F.R. § 204.5(g)(2).

ORDER: The appeal is dismissed.

³ Although this general rule might be amenable to alteration pursuant to contract or otherwise, the record does not indicate that the general rule is inapplicable in this case.