



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

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

MATTER OF A-I- INC.

DATE: NOV. 6, 2015

APPEAL OF TEXAS SERVICE CENTER DECISION

PETITION: FORM I-140, IMMIGRANT PETITION FOR ALIEN WORKER

The Petitioner, an IT software development business, seeks to employ the Beneficiary permanently in the United States as a solution developer. *See* Section 203(b)(2) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(2). The Director, Texas Service Center, denied the petition. The matter is now before us on appeal. The appeal will be dismissed.

Section 203(b)(2) of the Act, 8 U.S.C. § 1153(b)(2), provides immigrant classification to members of the professions holding advanced degrees. *See also* 8 C.F.R. § 204.5(k)(1). As required by statute, the petition is accompanied by ETA Form 9089, Application for Permanent Employment Certification, approved by the United States Department of Labor (DOL). The Director determined that the Petitioner had not established that it had the continuing ability to pay the Beneficiary the proffered wage beginning on the priority date of the visa petition. The Director denied the petition accordingly.

The record shows that the appeal is properly filed, timely and makes a specific allegation of error in law or fact. The procedural history in this case is documented by the record and incorporated into the decision. Further elaboration of the procedural history will be made only as necessary.

We conduct appellate review on a *de novo* basis. *See Soltane v. DOJ*, 381 F.3d 143, 145 (3d Cir. 2004). We consider all pertinent evidence in the record, including new evidence properly submitted upon appeal.¹

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

¹ The submission of additional evidence on appeal is allowed by the instructions to the Form I-290B, which are incorporated into the regulations by the regulation at 8 C.F.R. § 103.2(a)(1).

(b)(6)

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permanent residence. Evidence of this ability shall be either in the form of copies of annual reports, federal tax returns, or audited financial statements.

The petitioner's ability to pay the proffered wage is an essential element in evaluating whether a job offer is realistic. *See Matter of Great Wall*, 16 I&N Dec. 142 (Acting Reg'l Comm'r 1977); *see also* 8 C.F.R. § 204.5(g)(2). In evaluating whether a job offer is realistic, U.S. Citizenship and Immigration Services (USCIS) requires the petitioner to demonstrate financial resources sufficient to pay the beneficiary's proffered wages, although the totality of the circumstances affecting the petitioning business will be considered if the evidence warrants such consideration. *See Matter of Sonogawa*, 12 I&N Dec. 612 (Reg'l Comm'r 1967).

The petitioner must demonstrate the continuing ability to pay the proffered wage beginning on the priority date, which is the date the ETA Form 9089, Application for Permanent Employment Certification was accepted for processing by the DOL. *See* 8 C.F.R. § 204.5(d). Here, the ETA Form 9089 was accepted on December 20, 2013. The proffered wage as stated on the ETA Form 9089 is \$82,971.00 per year.

On the petition, the Petitioner claimed to have been established in [REDACTED], to have a gross annual income of over \$21 million, and to currently employ 80 workers in the United States. On the ETA Form 9089, signed by the Beneficiary on July 24, 2014, the Beneficiary claims to have worked for the Petitioner most recently since February 25, 2008.

In determining the petitioner's ability to pay the proffered wage during a given period, USCIS will first examine whether the petitioner employed and paid the beneficiary during that period. If the petitioner establishes by documentary evidence that it employed the beneficiary at a salary equal to or greater than the proffered wage, the evidence will be considered *prima facie* proof of the petitioner's ability to pay the proffered wage. In the instant case, the Beneficiary's Internal Revenue Service (IRS) Forms W-2, Wage and Tax Statements, indicate that the Petitioner paid the Beneficiary \$78,833.36 in 2013 and \$73,929.81 in 2014 in gross pay.² As such, the Petitioner paid the Beneficiary partial wages and must establish that it has the ability to pay the difference between the proffered wage and the actual wages paid in 2013 and 2014.³

In response to our May 1, 2015, request for evidence (RFE), the Petitioner notes that the Beneficiary's income for 2014 was less than the proffered wage due to unpaid vacation. However, we consider evidence of wages paid to the beneficiary in determining whether the petitioner has the ability to pay the proffered wage. If the petitioner does not pay the beneficiary for vacation, this has no bearing on the overall wages paid to the beneficiary. In the instant case the proffered wage listed on the ETA Form 9089 is an annual wage. We will not consider an hourly wage to account for unpaid vacation hours by the Beneficiary. Rather, we will look to other evidence described in 8

² The Beneficiary's Forms W-2 reflect non-taxable benefits as well as taxable salary, which result in the above-listed gross pay amounts.

³ The difference between the proffered wages and the actual wages paid are \$4,137.00 in 2013 and \$9,041.19 in 2014.

C.F.R. § 204.5(g)(2) to determine whether the Petitioner has the ability to pay the difference between the proffered wage and actual wages paid to the Beneficiary.

If the petitioner does not establish that it employed and paid the beneficiary an amount at least equal to the proffered wage during that period, USCIS will next examine the net income figure reflected on the petitioner's federal income tax return, without consideration of depreciation or other expenses. *River Street Donuts, LLC v. Napolitano*, 558 F.3d 111 (1st Cir. 2009); *Taco Especial v. Napolitano*, 696 F. Supp. 2d 873 (E.D. Mich. 2010), *aff'd*, No. 10-1517 (6th Cir. filed Nov. 10, 2011). Reliance on federal income tax returns as a basis for determining a petitioner's ability to pay the proffered wage is well established by judicial precedent. *Elatos Restaurant Corp. v. Sava*, 632 F. Supp. 1049, 1054 (S.D.N.Y. 1986) (citing *Tongatapu Woodcraft Hawaii, Ltd. v. Feldman*, 736 F.2d 1305 (9th Cir. 1984)); *see also Chi-Feng Chang v. Thornburgh*, 719 F. Supp. 532 (N.D. Texas 1989); *K.C.P. Food Co., Inc. v. Sava*, 623 F. Supp. 1080 (S.D.N.Y. 1985); *Ubeda v. Palmer*, 539 F. Supp. 647 (N.D. Ill. 1982), *aff'd*, 703 F.2d 571 (7th Cir. 1983). Reliance on the petitioner's gross sales and profits and wage expense is misplaced. Showing that the petitioner's gross sales and profits exceeded the proffered wage is insufficient. Similarly, showing that the petitioner paid wages in excess of the proffered wage is insufficient. The courts have specifically rejected the argument that the Service should have considered income before expenses were paid rather than net income. *See Taco Especial v. Napolitano*, 696 F. Supp. 2d at 881 (gross profits overstate an employer's ability to pay because it ignores other necessary expenses). Similarly, the courts have agreed that adding depreciation back into net income does not reflect an employer's ability to pay the proffered wage. *See River Street Donuts*, 558 F.3d at 118 and *Chi-Feng Chang*, 719 F. Supp. at 537.

If the net income the petitioner demonstrates it had available during that period, if any, added to the wages paid to the beneficiary during the period, if any, do not equal the amount of the proffered wage or more, USCIS will review the petitioner's net current assets. Net current assets are the difference between the petitioner's current assets and current liabilities.⁴

The Petitioner's annual returns reflect -\$2,996,000.00 in 2013 and -\$3,447,000.00 in 2014 in net income respectively. The annual returns further reflect -\$3,790,000.00 and -\$4,738,000.00 in net current assets in 2013 and 2014, respectively.

As such, for the years 2013 and 2014, the Petitioner did not have sufficient net income or net current assets to pay the difference between the proffered wage and the actual wages paid for the instant Beneficiary.

Additionally, USCIS records indicate that the Petitioner has filed Form I-140 immigrant petitions on behalf of two other immigrant beneficiaries which were pending or approved from the instant

⁴ According to *Barron's Dictionary of Accounting Terms* 117 (3rd ed. 2000), "current assets" consist of items having (in most cases) a life of one year or less, such as cash, marketable securities, inventory and prepaid expenses. "Current liabilities" are obligations payable (in most cases) within one year, such accounts payable, short-term notes payable, and accrued expenses (such as taxes and salaries). *Id.* at 118.

priority date onwards.⁵ Accordingly, the Petitioner must establish that it has had the continuing ability to pay the combined proffered wages to each beneficiary from the priority date of the instant petition. See *Matter of Great Wall*, 16 I&N Dec. 142, 144-145 (Acting Reg'l Comm'r 1977). In response to our RFE, which specifically requested information on the priority date, proffered wages and actual wages paid to the beneficiaries, the Petitioner only provided information regarding one of the two Form I-140 immigrant petitions filed on behalf of other beneficiaries.⁶ The evidence in the record does not fully document the priority date, proffered wage or wages paid to the other beneficiary. Thus, it is concluded that the Petitioner has not established its continuing ability to pay the proffered wage to the Beneficiary and the proffered wages to the beneficiaries of its other petitions.

A September 23, 2014, letter from the Petitioner's chief financial officer (CFO) states that the company currently has more than 150 employees and that it easily fulfills its salary obligations. The CFO explains that the Petitioner has transitioned from perpetual licenses to hosted/subscription licenses which has caused recent annual losses for the company but asserts that it will provide a growing, predictable and reliable source of revenue. The annual reports and copies of the Petitioner's contracts with third parties reflect the change in licensing. However, the annual reports do not reflect any additional income received through the restructuring and there is no evidence to support the CFO's assertion that the restructuring will provide a growing, predictable and reliable source of revenue. Going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. *Matter of Soffici*, 22 I&N Dec. 158, 165 (Comm'r 1998) (citing *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg'l Comm'r 1972)).

USCIS may consider the overall magnitude of the petitioner's business activities in its determination of the petitioner's ability to pay the proffered wage. See *Matter of Sonogawa*, 12 I&N Dec. 612 (Reg'l Comm'r 1967). The petitioning entity in *Sonogawa* had been in business for over 11 years and routinely earned a gross annual income of about \$100,000. During the year in which the petition was filed in that case, the petitioner changed business locations and paid rent on both the old and new locations for five months. There were large moving costs and also a period of time when the petitioner was unable to do regular business. The Regional Commissioner determined that the petitioner's prospects for a resumption of successful business operations were well established. The petitioner was a fashion designer whose work had been featured in *Time* and *Look* magazines. Her clients included Miss Universe, movie actresses, and society matrons. The petitioner's clients had been included in the lists of the best-dressed California women. The petitioner lectured on fashion design at design and fashion shows throughout the United States and at colleges and universities in California. The Regional Commissioner's determination in *Sonogawa* was based in part on the petitioner's sound business reputation and outstanding reputation as a couturiere. As in *Sonogawa*, USCIS may, at its discretion, consider evidence relevant to the petitioner's financial ability that falls outside of a petitioner's net income and net current assets. USCIS may consider such factors as the

⁵ The approved Form I-140 immigrant petitions included in this number consist of only those which were approved and whose beneficiary had not yet adjusted status by the instant priority date.

⁶ The Petitioner provides evidence that it paid at least the proffered wage to this beneficiary in 2013 and 2014.

number of years the petitioner has been doing business, the established historical growth of the petitioner's business, the overall number of employees, the occurrence of any uncharacteristic business expenditures or losses, the petitioner's reputation within its industry, whether the beneficiary is replacing a former employee or an outsourced service, or any other evidence that USCIS deems relevant to the petitioner's ability to pay the proffered wage.

In the instant case, the Petitioner did not provide the proffered wage and actual wages paid for one of the two other beneficiaries on whose behalf it filed Form I-140 immigrant petitions. Without this information we are precluded from making a determination as to whether the Petitioner has the ability to pay all of its proffered wages for each relevant year. The Petitioner generated a net loss of \$3.4 million in 2014 compared to a net loss of \$3.0 million in 2013 and net loss of \$0.2 million in 2012. The Petitioner had net income of \$0.7 million in 2011. However, prior to 2011, the Petitioner generated a net loss of \$1.6 million, \$0.9 million and \$3.1 million in 2010, 2009 and 2008, respectively. The Petitioner's net current assets have not been positive since 2009. The Petitioner continues to incur additional operating expenses for research and development. Further, on October 8, 2014, the NASDAQ Stock Market LLC ("NASDAQ") determined that the Petitioner was not in compliance with the minimum stockholders' equity requirement of at least \$2.5 million under NASDAQ Marketplace Listing Rule 5550(b)(1). The Petitioner withdrew its October 2014 appeal of NASDAQ's determination and was delisted on February 19, 2015. *See* www.sec.gov (accessed October 28, 2015). In addition, there is insufficient evidence in the record of the occurrence of any uncharacteristic business expenditures or losses from which it has since recovered or of the Petitioner's business reputation. Thus, assessing the totality of the circumstances in this individual case, it is concluded that the Petitioner has not established that it had the continuing ability to pay the proffered wage.

The evidence submitted does not establish that the Petitioner had the continuing ability to pay the proffered wage beginning on the priority date.

In visa petition proceedings, it is the petitioner's burden to establish eligibility for the immigration benefit sought. Section 291 of the Act, 8 U.S.C. § 1361; *Matter of Otiende*, 26 I&N Dec. 127, 128 (BIA 2013). Here, that burden has not been met.

ORDER: The appeal is dismissed.

Cite as *Matter of A-I- Inc.*, ID# 12430 (AAO Nov. 6, 2015)