



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

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

MATTER OF C-H-H-S-, INC.

DATE: APR. 29, 2016

MOTION ON ADMINISTRATIVE APPEALS OFFICE DECISION

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

The Petitioner, a home health care provider, seeks to permanently employ the Beneficiary as an operations manager. The Petitioner requests the Beneficiary's classification as a member of the professions holding an advanced degree under the second preference immigrant classification. *See* Immigration and Nationality Act (the Act) section 203(b)(2)(A), 8 U.S.C. § 1153(b)(2)(A). This classification allows a U.S. employer to sponsor a professional with an advanced degree for lawful permanent resident status.

The Director, Texas Service Center, denied the petition and the Petitioner's following motion to reopen. In both decisions, the Director concluded that the record did not establish the Petitioner's ability to pay the proffered wage. On appeal, we affirmed the Director's decision.

The matter is now before us on the Petitioner's motions to reopen and reconsider. The Petitioner submits additional evidence and arguments in support of its ability to pay the proffered wage. The motions will be denied.

I. LAW AND ANALYSIS

A petitioner must demonstrate its ability to pay a proffered wage from a petition's priority date until a beneficiary obtains lawful permanent residence. 8 C.F.R. § 204.5(g). Evidence of ability to pay must include copies of annual reports, federal income tax returns, or audited financial statements. *Id.*

In the instant case, the petition is accompanied by an ETA Form 9089, Application for Permanent Employment Certification (labor certification), approved by the U.S. Department of Labor (DOL). The labor certification states the proffered wage of the offered position of operations manager as \$156,520 per year. The petition's priority date is September 22, 2010, the date the DOL accepted the labor certification application for processing. *See* 8 C.F.R. § 204.5(d).

In determining ability to pay, we first examine whether a petitioner paid a beneficiary the full proffered wage each year from a petition's priority date. If a petitioner has not paid the full proffered wage each year, we next examine whether it had sufficient annual amounts of net income or net current assets to pay the difference between the wages paid, if any, and the proffered wage. If

net income or net current assets are insufficient, we may also consider the overall magnitude of a petitioner's business activities. *See Matter of Sonegawa*, 12 I&N Dec. 612, 614-15 (Reg'l Comm'r 1967).¹

The instant record contains evidence of the Petitioner's payments to the Beneficiary from 2010 through 2014. Copies of IRS Forms W-2, Wage and Tax Statements, indicate the Petitioner's payment of the following amounts to the Beneficiary:

- \$48,305.50 in 2010;
- \$92,439.84 in 2011;
- \$79,984.30 in 2012;
- \$70,848.32 in 2013; and
- \$68,261.50 in 2014.

None of the amounts stated on the Forms W-2 equal or exceed the annual proffered wage of \$156,520. The record therefore does not establish the Petitioner's ability to pay the proffered wage based on the wages it paid the Beneficiary.

The Petitioner asserts that we err in requiring it to pay the full proffered wage to the Beneficiary. Citing DOL regulations, the Petitioner argues that it need not pay the proffered wage to the Beneficiary until she obtains lawful permanent residence. *See* 20 C.F.R. § 656.10(c)(4) (requiring an employer to certify its ability "to place the alien on the payroll on or before the date of the alien's proposed entrance into the United States").

We agree that the Petitioner need not pay the proffered wage to the Beneficiary until she obtains lawful permanent residence. However, contrary to the Petitioner's argument, we do not require it to pay the proffered wage to the Beneficiary before that time. Rather, we consider the Petitioner's payments to the Beneficiary merely for the purpose of determining its ability to pay the proffered wage.

Had the Petitioner paid the full proffered wage to the Beneficiary since the petition's priority date, it would have established its ability to pay. Otherwise, we credit any lesser payments to the Beneficiary and consider other information to determine its ability to pay. However, we do not require, as the Petitioner asserts, that it pay the Beneficiary the full proffered wage before she obtains lawful permanent residence. A petitioner may, but need not, pay a beneficiary the full proffered wage to establish its ability to pay.

¹ Federal courts have upheld our method of determining a petitioner's ability to pay a proffered wage. *See 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, 942-43 (S.D. Cal. 2015); *Rivzi v. Dep't of Homeland Sec.*, 37 F. Supp. 3d 870, 883-84 (S.D. Tex. 2014), *aff'd*, -- Fed. Appx. --, 2015 WL 5711445, *1 (5th Cir. Sept. 30, 2015).

We do, however, credit the Petitioner's payments to the Beneficiary. It need only demonstrate its ability to pay the annual differences between the wages it paid the Beneficiary and the annual proffered wage. Therefore, the Petitioner must demonstrate its ability to pay the following annual amounts:

- \$108,214.50 in 2010;
- \$64,080.16 in 2011;
- \$76,535.70 in 2012;
- \$85,671.68 in 2013; and
- \$88,258.50 in 2014.

The record also contains copies of the Petitioner's federal income tax returns from 2010 through 2014. On motion, the Petitioner states that it submits a copy of an amended tax return for 2010. However, the Petitioner also appears to submit amended tax returns for 2011 and 2012, as information on them differs from the prior 2011 and 2012 returns of record. *See Matter of Ho*, 19 I&N Dec. 582, 591 (BIA 1988) (requiring a petitioner to resolve inconsistencies of record by independent, objective evidence).

For purposes of this decision, we will refer to information in the tax returns submitted by the Petitioner on motion. However, the record does not establish the validity of the information contained in the returns. Therefore, in any future filings in this matter, the Petitioner must submit copies of IRS tax transcripts or other evidence showing its filing of the returns with the Internal Revenue Service (IRS) before we can reliably conclude that the Petitioner can meet its burden of proof and pay the proffered wage in any year given the discrepancies.

The returns on motion show the following annual amounts of net income:

- -\$6801 in 2010;
- \$1628 in 2011;
- \$9694 in 2012;
- \$3468 in 2013; and
- \$543 in 2014.

The Petitioner's prior tax returns of record reflected annual net income amounts of \$11,715 in 2010, \$2,480 in 2011, and \$23,909 in 2012.

None of the annual amounts of net income reflected on the Petitioner's tax returns equals or exceeds the annual differences between the wages paid to the Beneficiary and the proffered wage. The record therefore does not establish the Petitioner's ability to pay the proffered wage based on its net income.

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The Petitioner's tax returns indicate the following annual amounts of net current assets:

- \$15,546 in 2010;
- -\$92,307 in 2011;
- \$173,956 in 2012;
- \$161,492 in 2013; and
- \$346,633 in 2014.

The Petitioner's prior tax returns of record reflected annual current asset amounts of \$65,553 in 2010, -\$92,307 in 2011, and -\$135,959 in 2012.

The annual amounts of net current assets for 2010 and 2011 (based on the amended returns) do not equal or exceed the annual differences between the wages paid to the Beneficiary and the proffered wage. The record therefore does not establish the Petitioner's ability to pay in 2010 or 2011.

The annual amounts of net current assets for 2012 (based on the amended return), 2013, and 2014 would exceed the annual differences between the wages paid to the Beneficiary and the proffered wage. However, as indicated in our prior decision, U.S. Citizenship and Immigration Services (USCIS) records indicate the Petitioner's filing of multiple Forms I-140, Immigrant Petitions for Alien Workers.

A petitioner must demonstrate its ability to pay the proffered wage of each petition it files. 8 C.F.R. § 204.5(g)(2). Therefore, the instant Petitioner must demonstrate its ability to pay the combined proffered wages of the instant Beneficiary and the beneficiaries of any other petitions that remained pending after the instant petition's priority date of September 22, 2010. The Petitioner must establish its ability to pay the combined proffered wages from the instant petition's priority date until the other beneficiaries obtained lawful permanent residence, or until their petitions were denied, withdrawn, or revoked. *See Patel v. Johnson*, 2 F. Supp. 3d 108, 124 (D. Mass. 2014) (upholding our denial of a petition where a petitioner did not demonstrate its ability to pay multiple beneficiaries).

USCIS records indicate that at least 11 other petitions filed by the Petitioner remained pending after the instant petition's priority date.² On motion, the Petitioner provides information about beneficiaries of three of the other petitions who continued working for it. However, the evidence of record does not indicate the proffered wages of any of the other petitions or the amount of wages paid by the Petitioner to other beneficiaries.

² USCIS records identify the other pending petitions by the following receipt numbers: [REDACTED]
[REDACTED]
[REDACTED]

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Thus, based on examinations of the wages paid to the Beneficiary by the Petitioner and its annual amounts of net income and net current assets, the record does not establish the Petitioner's ability to pay the proffered wage from the petition's priority date.

The Petitioner asserts that it can provide only limited information about its other petitions because the Department of Homeland Security seized its applicable records. The Petitioner submits evidence that government officials executed a search warrant on [REDACTED] 2012 and took 23 boxes of documents from its premises.

However, as previously discussed, the record indicates the Petitioner's inability to pay the Beneficiary's proffered wage from the petition's priority date. It thus follows that the Petitioner lacks the ability to pay the combined proffered wages of additional beneficiaries from the petition's priority date. Therefore, despite the seizure of the Petitioner's records, we will consider the other petitions pending after the instant petition's priority date in determining the Petitioner's ability to pay.

As previously indicated, USCIS may consider the overall magnitude of a petitioner's business activities in determining its ability to pay a proffered wage. *See Sonegawa*, 12 I&N Dec. at 614-15.

In *Sonegawa*, the petitioner continuously conducted business for more than 11 years, routinely earning gross annual income of about \$100,000 and employing at least four full-time workers. However, the petitioner's federal income tax return for the year of the petition's filing did not reflect her ability to pay the proffered wage. During that year, the petitioner relocated her business, causing her to pay rent on two locations for a five-month period, to incur substantial moving costs, and to temporarily suspend her business operations. Despite the setbacks, the Regional Commissioner determined that the petitioner would likely resume successful business operations and had established her ability to pay the proffered wage. The record identified the petitioner as a fashion designer whose work had been featured in national magazines. The record indicated that her clients included the then Miss Universe, movie actresses, society matrons, and women on lists of the best-dressed in California. The record also indicated the petitioner's frequent lectures at design and fashion shows throughout the United States and at California colleges and universities.

As in *Sonegawa*, we may consider evidence of a petitioner's ability to pay beyond its net income and net current assets. We may consider such factors as: the number of years a petitioner 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.

In the instant case, the record indicates the Petitioner's continuous business operations since 1999. However, its tax returns indicate that its annual total income decreased from 2010 to 2014.

In our prior decision, based on a letter from the Petitioner's executive vice president, we found that the Petitioner employed more than 150 people in 2011. However, on motion, the Petitioner submits copies of IRS Forms 941, Employer's Quarterly Federal Tax Returns, indicating its employment of

no more than 79 people from 2011 through 2013. We therefore withdraw our prior statement related to the Petitioner's number of employees.

The number of employees cited by the Petitioner's executive vice president appears to include employees of another corporation. The Petitioner argues that the companies share ownership, services, staff, and a "dual operating structure." However, as discussed in our prior decision, pursuant to 8 C.F.R. § 204.5(g)(2), we cannot consider the resources of another corporation in determining the Petitioner's ability to pay the proffered wage. *See Sitar Rest. v. Ashcroft*, No. Civ. A. 02-30197-MAP, 2003 WL 22203713, *2 (D. Mass. Sept. 18, 2003) (stating 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").

The Petitioner also asserts that it has an outstanding reputation in its industry. It submits evidence that it is purportedly the first agency to become part of a Medicare "accountable care organization" and is the only homecare agency in northern Virginia to be included in another provider's "home-based services program." However, the record does not establish that these achievements in the Petitioner's industry rise to the level of acclaim obtained by the *Sonegawa* petitioner in the field of fashion design.

In our prior decision, we found that, as of 2014, the Petitioner owed more than \$500,000 in outstanding government tax liens. On motion, the Petitioner submits evidence of its payment of a federal tax lien in the amount of \$326,932.07 on July 29, 2015. However, the record does not establish the Petitioner's payment of all outstanding tax liens against it.

Thus, the totality of the circumstances does not establish the Petitioner's ability to pay the proffered wage. Unlike the petitioner in *Sonegawa*, the record does not indicate the instant Petitioner's incurrence of any uncharacteristic business losses or expenses. Also unlike the petitioner in *Sonegawa*, the instant Petitioner must establish its ability to pay multiple beneficiaries. Therefore, the record does not establish the Petitioner's ability to pay pursuant to *Sonegawa*.

II. CONCLUSION

After careful reconsideration, we find that the record on motion does not establish the Petitioner's ability to pay the proffered wage from the petition's priority date onward. We will therefore affirm our prior decision and deny the motions.

A petitioner bears the burden of establishing eligibility for the requested benefit. *See* section 291 of the Act, 8 U.S.C. § 1361; *Matter of Otiende*, 26 I&N Dec. 127, 128 (BIA 2013). Here, the Petitioner has not met that burden.

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ORDER: The motion to reopen is denied.

FURTHER ORDER: The motion to reconsider is denied.

Cite as *Matter of C-H-H-S-, Inc.*, ID# 16861 (AAO Apr. 29, 2016)