



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

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

MATTER OF E-V-D-H-N-, LLC

DATE: APR. 3, 2018

MOTION ON ADMINISTRATIVE APPEALS OFFICE DECISION

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

The Petitioner, a newspaper publisher, seeks to employ the Beneficiary as a marketing research analyst. It requests her classification under the second-preference, immigrant category as a member of the professions holding an advanced degree. Immigration and Nationality Act (the Act) section 203(b)(2)(A), 8 U.S.C. § 1153(b)(2)(A). This employment-based, “EB-2” category allows a U.S. business to sponsor a foreign national with a master’s degree, or a bachelor’s degree and five years of experience, for lawful permanent resident status.

The Director of the Texas Service Center denied the petition, concluding that the Petitioner did not demonstrate the required ability to pay the proffered wage. On appeal, we affirmed the Director’s decision. *See Matter of E-V-D-H-N-, LLC*, ID #480969 (AAO Sept. 8, 2017). Specifically, we found that the Petitioner did not establish its ability to pay the combined proffered wages of this and another petition.

The matter is now before us on the Petitioner’s motions to reopen and reconsider. The Petitioner submits additional evidence of its payments to the other beneficiary and asserts that it need only demonstrate its ability to pay the proffered wage of the Beneficiary.

Upon review, we will deny the motions.

I. MOTION REQUIREMENTS

A motion to reopen must be supported by documentary evidence and state new facts. 8 C.F.R. § 103.5(a)(2). A motion to reconsider, on the other hand, must establish that our decision was based on an incorrect application of law or policy and that the decision was incorrect based on the evidence in the record of proceedings at the time of the decision. 8 C.F.R. § 103.5(a)(3). We may grant a motion that satisfies these requirements and demonstrates eligibility for the requested immigration benefit.

II. THE MOTION TO RECONSIDER

The Petitioner does not assert that our prior decision was incorrect based on the appellate record. Rather, the Petitioner relies on new evidence submitted on motion. We will therefore deny the motion to reconsider.

III. THE MOTION TO REOPEN

A petitioner must establish its ability to pay the proffered wage of each petition it files until a beneficiary obtains lawful permanent residence. 8 C.F.R. § 204.5(g)(2). The Petitioner here must therefore demonstrate its ability to pay the combined proffered wages of this and its other petitions that were pending or filed after the priority date of August 13, 2015,¹ until those beneficiaries obtained lawful permanent residence.² The Petitioner filed an immigrant petition for another beneficiary in 2015 that USCIS ultimately approved in 2017. As we found on appeal, because the other petition remained pending after this petition's priority date, the Petitioner must demonstrate its ability to pay the combined proffered wages of both petitions. *See Patel v. Johnson*, 2 F. Supp. 3d 108, 124 (D. Mass. 2014) (affirming revocation of a petition's approval where, as of the filing's grant, the petitioner did not demonstrate its ability to pay combined proffered wages of multiple beneficiaries).

On motion, the Petitioner provides evidence that the offered position in its other petition commands an annual proffered wage of \$60,000. Thus, including the annual proffered wage of \$84,885 in this petition, the Petitioner must demonstrate its ability to pay combined proffered wages of \$144,885 a year.

The Petitioner did not submit required evidence of its ability to pay the proffered wage in 2016 or 2017. *See* 8 C.F.R. § 204.5(g)(2) (requiring a petitioner, as evidence of its ability to pay a proffered wage from a petition's priority date onward, to submit copies of annual reports, federal income tax returns, or audited financial statements). We will therefore consider the Petitioner's ability to pay only in 2015, the year of this petition's priority date.³

In determining ability to pay, USCIS first examines whether a petitioner paid a beneficiary the full proffered wage each year from a petition's priority date. If a petitioner did not annually pay the full proffered wage, USCIS next considers whether it generated sufficient annual amounts of net income or net current assets to pay any differences between an annual proffered wage and wages paid. If net

¹ This is the date the U.S. Department of Labor received the accompanying labor certification application for processing. *See* 8 C.F.R. § 204.5(d) (explaining how to determine a petition's priority date).

² The Petitioner's ability to pay the proffered wage of one of the other I-140 beneficiaries is not considered: after the other beneficiary obtains lawful permanent residence; if an I-140 petition filed on behalf of the other beneficiary has been withdrawn, revoked, or denied without a pending appeal or motion; or before the priority date of the I-140 petition filed on behalf of the other beneficiary.

³ In any future filings in this matter, the Petitioner must submit copies of annual reports, federal income tax returns, or audited financial statements for 2016 and, if available, 2017.

income and net current assets are insufficient, USCIS may also consider other factors affecting a petitioner's ability to pay a proffered wage. *See Matter of Sonogawa*, 12 I&N Dec. 612, 614-15 (Reg'l Comm'r 1967).⁴

Copies of IRS Forms W-2, Wage and Tax Statements, and payroll records indicate that, in 2015, the Petitioner paid the Beneficiary \$54,999.98 and paid the other beneficiary \$45,000. Thus, the Petitioner paid the two beneficiaries total wages of \$99,999.98. This amount is less than the combined proffered wages of \$144,885. Based on wages paid, the record therefore does not establish the Petitioner's ability to pay the combined proffered wages. Nevertheless, we credit the wages paid. The Petitioner need only demonstrate its ability to pay the difference between the total proffered wages and the wages paid, or \$44,885.02.

The Petitioner's audited financial statements and amended federal income tax returns for 2015 reflect net income of \$31,488 and net current assets of \$1,016.⁵ Neither of these amounts equals or exceeds the \$44,885.02 difference between the proffered wages and wages paid. Thus, after considering the wages the Petitioner paid, its net income, and its net current assets, the record does not establish the Petitioner's ability to pay the combined proffered wages in 2015.

On motion, the Petitioner asserts that it need not pay the combined proffered wages. Its evidence on motion establishes that, in April 2015, it began paying the other beneficiary \$5,000 a month. Because the other beneficiary's wages would have totaled the \$60,000 annual proffered wage of her position over the full year, the Petitioner contends that it need only demonstrate its ability to pay the proffered wage of the Beneficiary. The Petitioner further argues that its net income of \$31,488 exceeds the \$29,885.02 difference between the Beneficiary's proffered wage of \$84,885 and the \$54,999.98 in wages it paid her in 2015.

If a petitioner pays a beneficiary at least his or her proffered wage, USCIS excuses the petitioner from demonstrating its ability to pay any combined proffered wages during the payment year. That policy, however, only applies if a petitioner pays the beneficiary of the petition under adjudication. Here, the record establishes that the Petitioner did not pay the Beneficiary of this petition her full proffered wage in 2015. Rather, the Petitioner asserts that it paid the full proffered wage of the beneficiary of the other petition. Because the Petitioner did not pay the proffered wage of the Beneficiary, it must demonstrate its ability to pay the combined proffered wages.

Moreover, the record does not establish that the Petitioner paid the other beneficiary the full proffered wage of \$60,000 in 2015. The Petitioner paid the other beneficiary a monthly rate that

⁴ Federal courts have upheld USCIS' method of determining a petitioner's ability to pay a proffered wage. *See, e.g., River St. Domus, LLC v. Napolitano*, 558 F.3d 111, 118 (1st Cir. 2009); *Rivzi v. Dep't of Homeland Sec.*, 37 F. Supp. 3d 870, 883-84 (S.D. Tex. 2014), *aff'd*, 627 Fed. App'x. 292 (5th Cir. 2015).

⁵ The Petitioner's original federal income tax returns for 2015 reflected net income of \$24,919. On appeal, the Petitioner submitted audited financial statements and amended tax returns for 2015. The materials indicate that the Petitioner's original tax returns mistakenly deducted employee expenses from the company's income.

would have equaled the annual proffered wage over the full year. But the record indicates that, in 2015, it paid her only \$45,000. The Petitioner's payments to the other beneficiary therefore would not excuse it from demonstrating its ability to pay the combined proffered wages of both beneficiaries.

As previously indicated, in determining ability to pay, we may consider factors beyond a petitioner's net income and net current assets. Under *Sonegawa*, we may consider: the number of years a petitioner has conducted business; its number of employees; the growth of its business; its incurrence of uncharacteristic losses or expenses; its reputation in its industry; a beneficiary's replacement of a current employee or outsourced service; or other evidence of a petitioner's ability to pay a proffered wage. *Matter of Sonegawa*, 12 I&N Dec. 612, 614-15.

The record here indicates the Petitioner's continuous business operations since 2010. Also, as of the petition's filing, the company employed six people. Unlike the petitioner in *Sonegawa*, however, the Petitioner has not established its incurrence of uncharacteristic losses or expenses, or its possession of an outstanding reputation in its industry. Also unlike the petitioner in *Sonegawa*, the Petitioner here must demonstrate its ability to pay combined proffered wages. Lacking full financial records for any year but 2015, the record does not demonstrate growth of the Petitioner's business. In addition, the record does not indicate the Beneficiary's replacement of a current employee or outsourced service. Thus, a totality of circumstances under *Sonegawa* does not demonstrate the Petitioner's ability to pay the proffered wage.

For the foregoing reasons, the record on motion does not establish the Petitioner's continuing ability to pay the proffered wage from the petition's priority date onward.

IV. CONCLUSION

The Petitioner does not assert our misapplication of law or policy based on the appellate record, and its new evidence does not establish its ability to pay the proffered wage.

ORDER: The motion to reopen is denied.

FURTHER ORDER: The motion to reconsider is denied.

Cite as *Matter of E-V-D-H-N-, LLC*, ID# 1062042 (AAO Apr. 3, 2018)