



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

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

MATTER OF P-S-, INC.

DATE: AUG. 30, 2018

MOTION ON ADMINISTRATIVE APPEALS OFFICE DECISION

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

The Petitioner, a provider of content management software, seeks to employ the Beneficiary as a senior technical consultant. 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 for lawful permanent resident status to work in a position requiring at least a master's degree, or a bachelor's degree plus five years of experience.

The Acting Director of the Texas Service Center denied the petition. On appeal, we affirmed the Director's decision, agreeing that the Petitioner did not demonstrate its required ability to pay the proffered wage. We also found that the Petitioner had not established the Beneficiary's qualifications for the offered position. *See Matter of P-S-, Inc.*, ID# 1176647 (AAO Apr. 26, 2018).

The matter is now before us on the Petitioner's motions to reopen and reconsider. The Petitioner submits additional evidence and argues that its software has a strong reputation in its industry. It also asserts that wage payments to its employees and recent profits demonstrate its ability to pay the proffered wage.

Upon review, we will deny the motions.

I. MOTION REQUIREMENTS

A motion to reopen must state new facts, supported by documentary evidence. 8 C.F.R. § 103.5(a)(2). In contrast, a motion to reconsider must establish that our prior decision misapplied law or policy as of the record at that time. 8 C.F.R. § 103.5(a)(3). A motion to reconsider must also cite a pertinent precedent or adopted decision, statutory or regulatory provision, or statement of U.S. Citizenship and Immigration Services (USCIS) or Department of Homeland Security policy. If motions meet these requirements and demonstrate eligibility for the requested benefit, we may grant them.

II. ABILITY TO PAY THE PROFFERED WAGE

The Petitioner's motions do not address many of the evidentiary deficiencies identified in our appellate decision regarding the company's ability to pay the proffered wage. On appeal, we found that the Petitioner did not demonstrate its generation of sufficient net income or net current assets in 2013, the year of the petition's priority date, to pay the difference between the annual proffered wage of \$112,174 and the \$95,000.04 wage the Petitioner paid the Beneficiary that year.¹ See 8 C.F.R. § 204.5(g)(2) (requiring a petitioner to demonstrate its continuing ability to pay a proffered wage, from a petition's priority date until a beneficiary obtains lawful permanent residence). The motions omit new evidence or arguments regarding the Petitioner's ability to pay in 2013.

The appellate record also lacked required evidence of the Petitioner's ability to pay in 2014 and 2015. See 8 C.F.R. § 204.5(g)(2) (requiring a petitioner to submit copies of annual reports, federal income tax returns, or audited financial statements). On motion, required evidence for those years is still lacking.

In addition, our appellate decision found that the Petitioner did not demonstrate its ability to pay the combined proffered wages of this and its other immigrant petitions that were pending or approved as of this petition's June 12, 2013, priority date, or filed thereafter. See *Patel v. Johnson*, 2 F. Supp. 3d 108, 124 (D. Mass. 2014) (affirming our revocation of a petition's approval where, as of the filing's grant, the petitioner did not demonstrate its ability to pay the combined proffered wages of multiple petitions). The record on motion also lacks evidence of the Petitioner's ability to pay the combined proffered wages. Contrary to our prior decision's requirement, the Petitioner does not provide the proffered wages or priority dates of its other petitions. Thus, based on examinations of the Petitioner's wage payments to the Beneficiary, its net income, and its net current assets, the record does not establish its ability to pay the proffered wage in 2013, 2014, or 2015.²

On motion, the Petitioner submits copies of online articles favorably reviewing its software products. We may consider the Petitioner's good reputation in its industry as an indicator of its ability to pay the proffered wage. See *Matter of Sonogawa*, 12 I&N Dec. 612, 614-15 (Reg'1 Comm'r 1967) (allowing the immigration service, when determining ability to pay a proffered wage, to consider factors beyond a petitioner's wage payments, net income, and net current assets). The Petitioner also argues that our appellate decision erred in considering a drop in its number of employees as a negative factor. Rather, the Petitioner asserts that its headcount reduction was "prudent management" that allowed it to pay its employees competitive wages.

¹ The petition's priority date is June 12, 2013, the date the U.S. Department of Labor accepted 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 As indicated in our appellate decision, the Petitioner demonstrated its ability to pay the proffered wage in 2016 by establishing that it paid the Beneficiary more than the proffered wage that year.

The factors mentioned by the Petitioner, however, do not outweigh the negative factors of record. The Petitioner has not demonstrated its ability to pay the proffered wage in three of the four relevant years. Its tax returns also indicate a decrease in gross annual revenues from 2012 to 2016. The Petitioner asserts that, while it “has suffered net losses in prior fiscal years, the company shows an overall profit” from the petition’s priority date. The tax returns show that the Petitioner’s 2016 profit exceeds its 2013 loss by almost \$1 million. But the Petitioner’s 2016 tax returns include a financial comparison to 2015, indicating that the company lost more than \$1.27 million in the earlier year. Thus, contrary to the Petitioner’s assertion, the record does not establish its generation of an overall profit since the petition’s priority date. In addition, unlike the petitioner in *Sonegawa*, the Petitioner here must demonstrate its ability to pay the combined proffered wages of multiple petitions. Thus, a totality of the circumstances under *Sonegawa*, does not establish the Petitioner’s ability to pay. The Petitioner therefore has not demonstrated its ability to pay the proffered wage from the petition’s priority date onward.

III. THE REQUIRED EXPERIENCE

As our appellate decision indicated, the record also does not establish the Beneficiary’s possession of the requisite three years of experience in the job offered or in “Java-based web application development.”³ See *Matter of Wing’s Tea House*, 16 I&N Dec. 158, 160 (Acting Reg’l Comm’r 1977) (requiring a petitioner to establish a beneficiary’s possession of all DOL-certified job requirements by a petition’s priority date).

Contrary to 8 C.F.R. § 204.5(g)(1), the Petitioner did not submit letters from the Beneficiary’s former employers describing her experience. The record also lacks copies of contracts or other objective documentary evidence of the Beneficiary’s claimed experience with the employers. In addition, the record indicates that she gained some of her claimed experience while working in a “substantially comparable” position with the Petitioner. See 20 C.F.R. § 656.17(i)(3) (generally barring labor certification employers from relying on experience that a beneficiary gained with it, including as a contractor).

On motion, the Petitioner submits neither additional evidence nor argument regarding the Beneficiary’s claimed, qualifying experience. The record therefore does not establish the Beneficiary’s qualifications for the offered position.

IV. CONCLUSION

The record on motion does not establish the Petitioner’s ability to pay the proffered wage or the Beneficiary’s possession of the minimum experience required for the offered position. We will therefore affirm our appellate decision.

³ The labor certification states the minimum job requirements of the offered position as a bachelor’s degree plus five years of experience, or a master’s degree plus three years of experience. The Petitioner asserts that the Beneficiary meets the latter requirements.

Matter of P-S-, Inc.

ORDER: The motion to reopen is denied.

FURTHER ORDER: The motion to reconsider is denied.

Cite as *Matter of P-S-, Inc.*, ID# 1762970 (AAO Aug. 30, 2018)