



U.S. Citizenship
and Immigration
Services

Non-Precedent Decision of the
Administrative Appeals Office

MATTER OF F-&F-, PLLC

DATE: MAY 10, 2018

MOTION ON ADMINISTRATIVE APPEALS OFFICE DECISION

PETITION: I-140, IMMIGRANT PETITION FOR ALIEN WORKER

The Petitioner, a law office, seeks to employ the Beneficiary as an immigration law clerk. It requests classification of the Beneficiary as a professional under the third preference immigrant category. Immigration and Nationality Act (the Act) section 203(b)(3)(A)(ii), 8 U.S.C. § 1153(b)(3)(A)(ii). This employment-based immigrant classification allows a U.S. employer to sponsor a professional with a baccalaureate degree for lawful permanent resident status.

The Director of the Texas Service Center denied the petition on the ground that the Petitioner did not establish its continuing ability to pay the proffered wage from the priority date onward. The Petitioner filed an appeal, which we dismissed, affirming the Director's conclusion that the Petitioner did not establish its continuing ability to pay the proffered wage. The Petitioner subsequently filed two motions to reconsider, each of which we denied after confirming our previous findings that the Petitioner did not establish its continuing ability to pay the proffered wage. The Petitioner then filed a motion to reopen and a motion to reconsider, both of which we denied on the grounds that the Petitioner did not show a proper ground for reopening or reconsideration. The matter is now before us on another motion to reopen and motion to reconsider.

Upon review, we will deny the motions.

I. LAW

A motion to reopen must state new facts and be supported by documentary evidence. 8 C.F.R. § 103.5(a)(2). A motion to reconsider 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). A motion to reconsider must be supported by 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 (DHS) policy. *Id.* We may grant a motion that satisfies these requirements and demonstrates eligibility for the requested immigration benefit.

II. ANALYSIS

A petitioner must establish that it has the ability to pay the beneficiary the proffered wage, as stated on the labor certification, from the priority date of the petition until the beneficiary obtains lawful permanent residence. *See* 8 C.F.R. § 204.5(g)(2). Evidence of the petitioner's ability to pay "shall be either in the form of copies of annual reports, federal tax returns, or audited financial statements." *Id.* In this case the proffered wage is \$56,451 per year and the priority date is September 26, 2013. At issue here is whether the Petitioner has had the continuing ability to pay the proffered wage from the priority date onward.

A. Motion to Reopen

In our previous decisions we found that the Beneficiary, whom the Petitioner has employed since June 2012, was paid by a different legal entity wholly-owned by the Petitioner's owner and managing partner until well after the priority date. We concluded that payments from this other entity – [REDACTED] – could not be considered in assessing the Petitioner's ability to pay the proffered wage. However, the evidence submitted with this motion establishes that the New York LLC operated as a payroll company for the Petitioner and demonstrates that all wages paid to the Beneficiary were paid by the Petitioner. Based on all of the evidence now before us we are persuaded that wages paid through the New York LLC may properly be considered. On that basis we will now determine whether the Petitioner has established its continuing ability to pay the proffered wage from the priority date of September 26, 2013, onward.

In determining ability to pay, we first consider whether the wages the Petitioner paid to the Beneficiary equaled or exceeded the proffered wage. If they did in any particular year, those payments will be considered evidence of the Petitioner's ability to pay the proffered wage that year. In this case the record includes copies of the Form W-2, Wage and Tax Statement, issued to the Beneficiary for each of the years 2013 and 2014. They show that the Beneficiary received "wages, tips, other compensation" in the amount of \$45,008 in 2013 and \$46,500 in 2014.¹ No evidence has been submitted of the Beneficiary's pay in 2015. As for 2016, the record includes a copy of the Beneficiary's last monthly earnings statement of the year showing that her gross pay as of December 7, 2016, was \$34,400. Additional earnings statements through November 2017 show that the Beneficiary's year-to-date gross pay was \$48,828 as of November 7, 2017. Thus, the evidence of record does not establish that the Beneficiary's pay equaled or exceeded the proffered wage of \$56,451 in any year since the priority date.

Since the Beneficiary's pay, as far as the record shows, was below the proffered wage every year, we will examine the net income and net current assets figures recorded on the Petitioner's federal income tax return(s), annual report(s), or audited financial statements(s). If either of these figures, net income or net current assets, equals or exceeds the proffered wage or the difference between the proffered wage and the amount paid to the Beneficiary in a given year, the Petitioner would be

¹ The Beneficiary's pay in 2013 and 2014, as discussed, was routed through a payroll company in [REDACTED]

considered able to pay the proffered wage during that year. In this case the record includes copies of the Petitioner's federal income tax returns, Forms 1120S, for the years 2013, 2014, and 2015. They show the following figures:

<u>Year</u>	<u>Net Income (or Loss)²</u>	<u>Net Current Assets (or Liabilities)³</u>
2013	\$16,855	(\$28,984)
2014	(\$4,660)	\$206
2015	\$55,778	\$11,050

Taking the greater figure each year, we find that the Petitioner's net income of \$16,855 in 2013, added to the \$45,008 of wages paid to the Beneficiary that year, exceeded the proffered wage of \$56,400. Accordingly, the Petitioner has established its ability to pay the proffered wage in 2013. In 2014, however, the Petitioner's net current assets of \$206, added to the \$46,500 of wages paid to the Beneficiary, is well below the proffered wage. As for 2015, while the Petitioner's net income of \$55,778 was only \$622 below the proffered wage, there is no evidence of the wages paid to the Beneficiary that year. Thus, the Petitioner has not established its ability to pay the proffered wage in either 2014 or 2015 based on the sum of the wages paid to the Beneficiary and either its net income or net current assets in those years. Nor has the Petitioner established its ability to pay on that basis in the succeeding years of 2016 or 2017 since it has not submitted copies of its federal income tax returns (or an annual report or an audited financial statement) for either of those years.

The Petitioner asserts once again that we did not give proper weight in our *Sonegawa* analysis to the evidence it submitted of its reputation in the industry. No new facts have been stated, however, and no additional evidence pertinent to this issue has been submitted in support of the current motion.

In accordance with the foregoing analysis, we conclude that the new documentation submitted on motion, including the Petitioner's 2014 federal income tax return and the earnings statements issued to the Beneficiary in 2016 and 2017, is insufficient to overcome our previous findings that the Petitioner has not established its continuing ability to pay the proffered wage from the priority date of September 26, 2013, onward. Therefore, the motion to reopen will be denied.

B. Motion to Reconsider

The Petitioner asserts once again that we incorrectly applied *Matter of Sonegawa*, 12 I&N Dec. 612 (Reg'l Comm'r 1967), in considering the totality of the Petitioner's circumstances for the purpose of

² If an S corporation, like the Petitioner, has income exclusively from a trade or business, USCIS considers its net income (or loss) to be the figure for "Ordinary business income (loss)" on page 1, line 21, of the Form 1120S. However, if there are relevant entries for additional income, credits, deductions or other adjustments from sources other than a trade or business, they are reported on Schedule K of the Form 1120S, and the corporation's net income or loss will be found in line 18 ("Income/loss reconciliation") of Schedule K.

³ For a corporation net current assets (or liabilities) are the difference between its current assets, entered on lines 1-6 of Schedule L, and its current liabilities, entered on lines 16-18 of Schedule L.

assessing its ability to pay the proffered wage. The Petitioner claims that its federal income tax returns show that its annual income has grown constantly, and that such growth will continue in the future. In fact, the tax returns in the record show that the Petitioner's gross receipts were \$624,047 in 2011, \$837,759 in 2012, \$1,003,886 in 2013, \$902,238 in 2014, and \$1,084,440 in 2015. While these figures do show growth since 2011, most of it occurred before the priority date and the newly submitted tax return for 2014 shows that gross income actually declined that year. The Petitioner also claims that it has constantly increased the Beneficiary's salary, as evidenced by the earnings statements. The overall record, however, does not support the Petitioner's claim. The Beneficiary was paid \$45,008 in 2013 and \$46,500 in 2014. There is no record of wages paid in 2015. In 2016 the Petitioner's gross pay, as indicated on its last earnings statement of the year, was only \$34,440. In 2017 the Beneficiary's gross pay stood at \$48,828 as of November that year. Thus, the record does not show that the Beneficiary's salary has constantly increased, and the Petitioner has not explained how any of these figures indicate that we incorrectly applied *Sonegawa* standards in analyzing the totality of the Petitioner's circumstances in our previous decisions.

Although the Petitioner continues to disagree with our previous *Sonegawa* analyses, it has not demonstrated that our decisions were based on an incorrect application of law or USCIS policy. As the Petitioner's submission on motion to reconsider does not overcome our previous findings, the motion will be denied.

III. CONCLUSION

The Petitioner has established its ability to pay the proffered wage in 2013, but not for any time period thereafter. Therefore, we affirm our previous finding that the Petitioner has not established its continuing ability to pay the proffered wage from the priority date of September 26, 2013, onward. Accordingly, the Petitioner has not shown proper cause for reopening or reconsideration, nor established eligibility for the immigrant benefit sought.

ORDER: The motion to reopen is denied.

FURTHER ORDER: The motion to reconsider is denied.

Cite as *Matter of F-F-, PLLC* ID# 1227651 (AAO May 10, 2018)