



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

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

MATTER OF T-E-, INC.

DATE: DEC. 14, 2015

APPEAL OF TEXAS SERVICE CENTER DECISION

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

The Petitioner, a home healthcare provider, seeks to permanently employ the Beneficiary as a registered nurse under the immigrant classification of professional worker. *See* Immigration and National Act (the Act) § 203(b)(3)(A)(ii), 8 U.S.C. § 1153(b)(3)(A)(ii). The Director, Texas Service Center, denied the petition. The matter is now before us on appeal. The appeal will be dismissed.

The Director concluded that the record did not establish the Petitioner's ability to pay the proffered wage. Accordingly, the Director denied the petition on March 12, 2015.

The appeal is properly filed and alleges specific errors of fact and law. The record documents the case's procedural history, which will be incorporated into the decision. We will elaborate on the procedural history only as necessary.

We conduct appellate review on a *de novo* basis. *See, e.g., Soltane v. Dep't of Justice*, 381 F.3d 143, 145 (3d Cir. 2004). We consider all pertinent evidence of record, including new evidence properly submitted on appeal.<sup>1</sup>

#### I. THE PETITIONER'S ABILITY TO PAY THE PROFFERED WAGE

A petitioner must demonstrate its continuing 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)(2). 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 Petitioner seeks designation of the Beneficiary as a professional nurse under Schedule A. *See* 20 C.F.R. § 656.5 (stating that Schedule A contains occupations for which the U.S. Department of Labor (DOL) has pre-determined there are insufficient U.S. workers who are able, willing, qualified, and available, and which will not adversely affect the wages and working conditions of U.S. workers similarly employed).

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<sup>1</sup> The instructions to Form I-290B, Notice of Appeal or Motion, which are incorporated into the regulations by 8 C.F.R. § 103.2(a)(1), allow submission of additional evidence on appeal.

The accompanying ETA Form 9089, Application for Permanent Employment Certification (labor certification), states the proffered wage of the offered position as \$82,222 per year.

The priority date of a petition accompanied by a Schedule A application is “the date the completed, signed petition (including all initial evidence and the correct fee) is properly filed with” U.S. Citizenship and Immigration Services (USCIS). 8 C.F.R. § 204.5(d). In the instant case, the record indicates the Petitioner’s initial submission of the petition on June 30, 2014. However, USCIS rejected the filing for lack of an accompanying labor certification. The Petitioner resubmitted the petition on July 28, 2014, explaining the petition’s request for Schedule A designation.

It is unclear whether the Petitioner properly filed the petition on June 30, 2014, or as the Director found, on July 28, 2014. USCIS may have rejected the petition in error, as an individual labor certification approved by the DOL need not accompany a petition seeking Schedule A designation. *See* 20 C.F.R. § 656.15(a) (requiring the filing of a Schedule A application with USCIS, not DOL). However, we note that Part 2.b. of the Form I-140, Immigrant Petition for Alien Worker, initially submitted on June 30, 2014, was incomplete as it does not indicate the petition’s filing for Schedule A designation as required by the form’s instructions. *See* 8 C.F.R. § 103.2(a)(1) (incorporating a form’s instructions into the regulations).

For purposes of determining the Petitioner’s ability to pay the proffered wage, in the instant matter we need not determine the petition’s correct priority date. At the time the Director received the Petitioner’s response to his request for evidence of February 4, 2015, required evidence of the Petitioner’s ability to pay the proffered wage in 2014 was unavailable.<sup>2</sup> We will therefore consider the Petitioner’s ability to pay as of only 2013, the most recent year for which required evidence was available.

In determining a petitioner’s ability to pay, we first consider whether it paid a beneficiary the full proffered wage each year from a petition’s priority date. If a petitioner has not paid a beneficiary 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 any wages paid and the proffered wage.<sup>3</sup> If a petitioner’s net income or net current assets are insufficient to demonstrate its ability to pay, we may also consider the overall magnitude of its business activities. *See Matter of Sonogawa*, 12 I&N Dec. 612, 614-15 (Reg’l Comm’r 1967).

In the instant case, the Petitioner submitted a copy of an IRS Form W-2, Wage and Tax Statement, indicating the Petitioner’s payment of \$850 to the Beneficiary in 2013. Because the amount on the

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<sup>2</sup> The Petitioner submitted a profit-and-loss statement for 2014. However, the record does not indicate that the financial statement was audited pursuant to 8 C.F.R. § 204.5(g)(2). The statement therefore does not constitute required evidence of the Petitioner’s ability to pay in 2014.

<sup>3</sup> 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*, -- F. Supp. 3d --, 2015 WL 3634497, \*5 (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).

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Form W-2 does not equal or exceed the annual proffered wage of \$82,222, the record does not demonstrate the Petitioner's ability to pay based on its payments to the Beneficiary. However, we credit the Petitioner's payment to the Beneficiary. The Petitioner need only demonstrate its ability to pay the difference between the proffered wage and the wage paid, or \$81,372, in 2013.

The Director found the Petitioner's net income for 2013 to be \$(66,548), the ordinary business loss indicated on Line 21 of the first page of the Petitioner's 2013 Form 1120S, U.S. Income Tax Return for an S Corporation.<sup>4</sup> However, as an S corporation, the Petitioner reported additional income received from a "tower lease" on Schedule K to Form 1120S. *See* Internal Revenue Serv., Instructions to Form 1120S, at <http://www.irs.gov/pub/irs-pdf/i1120s.pdf> (accessed Nov. 9, 2015) (stating that an S corporation should include income from sources other than its trade or business on Schedule K).

Schedule K indicates the Petitioner's net income of \$70,826. However, this amount does not equal or exceed the \$81,372 difference between the proffered wage and the Petitioner's payments to the Beneficiary. Thus, the record does not establish the Petitioner's ability to pay the proffered wage based on its net income.

The Petitioner's 2013 federal tax return reflects annual net current assets of \$(29,581). Because this amount does not equal or exceed the difference between the proffered wage and the Petitioner's payments to the Beneficiary, the record also does not establish the Petitioner's ability to pay based on its net current assets.

Thus, based on examinations of the Petitioner's payments to the Beneficiary and its amounts of net income and net current assets, the record does not demonstrate its ability to pay the proffered wage.

In addition, USCIS records indicate the Petitioner's filing of at least five other petitions that remained pending beyond the instant petition's priority date.<sup>5</sup> A petitioner must demonstrate its ability to pay the proffered wage of each beneficiary it sponsors from a petition's priority date onward. *See* 8 C.F.R. § 204.5(g)(2). Thus, the instant Petitioner must demonstrate its ability to pay the combined proffered wages of the instant Beneficiary and its other beneficiaries whose petitions remained pending after the instant petition's priority date. 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 the other petitions were denied, withdrawn, or revoked. *See Patel v. Johnson*, 2 F. Supp. 3d 118, 124 (D. Mass. 2014) (upholding our denial of a petition where the petitioner did not demonstrate its ability to pay multiple beneficiaries).

The record does not document the priority dates or proffered wages of the other petitions, or whether the Petitioner paid the other beneficiaries. The record also does not indicate whether any of the other petitions were denied, withdrawn, or revoked, or whether any of the other beneficiaries obtained lawful

<sup>4</sup> Numbers in parentheses represent negative amounts.

<sup>5</sup> USCIS records identify the other petitions by the following receipt numbers: [REDACTED]

permanent residence. Without this information, the record does not establish the Petitioner's ability to pay the proffered wage in this matter.

On appeal, the Petitioner argues that its payments to the Beneficiary in 2013 and 2014 do not reflect its inability to pay the proffered wage.<sup>6</sup> The Petitioner argues that USCIS failed to consider the Beneficiary's choice to work for it on only a part-time basis in 2013 and the expiration of her employment authorization in 2014, preventing her legal, full-time employment by the Petitioner for the entire year.

However, the nature of the Beneficiary's employment by the Petitioner is immaterial for purposes of determining its ability to pay. We would consider and credit payments made to the Beneficiary by the Petitioner whether she worked full-time or part-time, with or without employment authorization. Competent evidence of the Petitioner's payment of the proffered wage to the Beneficiary would establish its ability to pay. However, conversely, its non-payment of the proffered wage to the Beneficiary is not a ground of denial, as there are other ways by which the Petitioner may demonstrate its ability to pay.

The Petitioner also argues that it "is not obliged to pay the proffered wage." The Petitioner states that the proffered wage is "prospective" in nature and need only be paid if and when the Beneficiary is approved to work full-time as a lawful permanent resident.

The Petitioner correctly states that it need not immediately pay the Beneficiary the proffered wage. The regulations do not require the Beneficiary's current employment by the Petitioner, or even her physical presence in the United States. However, whether or not the Petitioner currently employs the Beneficiary, it must demonstrate its "ability to pay the proffered wage" from the petition's priority date. 8 C.F.R. § 204.5(g)(2). Payment of the proffered wage to the Beneficiary is only one consideration in determining a petitioner's ability to pay.

In addition, counsel asserts on appeal that the Beneficiary would replace multiple part-time nurses currently on the Petitioner's payroll. However, counsel's assertion does not constitute evidence. *See INS v. Phinpathya*, 464 U.S. 183, 188 n.6 (1984) (noting that a lawyer's unsupported assertions do not establish facts of record); *see also Matter of Soffici*, 22 I&N Dec. 158, 165 (Comm'r 1998) (citation omitted) (finding that uncorroborated assertions are insufficient to meet the burden of proof in visa petition proceedings). The record lacks evidence of current employees the Beneficiary would replace, their duties, their hours, and their wages. The record therefore does not establish the Beneficiary's purported replacement of multiple part-time employees.

Counsel also asserts the Beneficiary's potential replacement of another I-140 beneficiary of the Petitioner who purportedly decided not to work for it pursuant to her approved petition. The Petitioner submits a copy of the I-140 approval notice on behalf of the beneficiary.

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<sup>6</sup> The Petitioner submitted a copy of a Form W-2 for 2014, indicating its payment of \$1,970 to the Beneficiary that year.

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Again, however, the record lacks evidence to support counsel's assertion. See *Phinpathya*, 464 U.S. at 188 n.6; *Soffici*, 22 I&N Dec. at 165. The record does not indicate the Petitioner's withdrawal of the other I-140. The record also does not contain corroborating evidence of the other beneficiary's purported decision to return to her home country, the Petitioner's intention to employ the Beneficiary in the other beneficiary's offered position, the Beneficiary's qualifications for the other position, or the proffered wage of the other position. The record therefore does not establish the Beneficiary's replacement of the other I-140 beneficiary.

As previously indicated, we may also consider the overall magnitude of a petitioner's business in determining its ability to pay a proffered wage. See *Sonegawa*, 12 I&N Dec. at 614-15. In *Sonegawa*, the petitioner conducted business for more than 11 years, routinely earning gross annual incomes of about \$100,000 and employing at least four people. During the year of the petition's filing, however, the petitioner's tax return 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 briefly suspend her operations. Despite these setbacks, the Regional Commissioner determined that the petitioner would likely resume successful business operations and had demonstrated her ability to pay the proffered wage. The record established the petitioner as a fashion designer whose work had been featured in national magazines. The record identified her clients as 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 the petitioner has conducted business; the growth of its business; its number of employees; the occurrence of uncharacteristic business expenditures or losses; its reputation in its industry; or other relevant evidence of its ability to pay the proffered wage.

In the instant case, the record indicates the Petitioner's continuous business operations since 1996. Also, on the Form I-140 and accompanying ETA Form 9089, the Petitioner stated its employment of 48 people.

However, the Petitioner's 2013 federal tax return and its 2014 profit-and-loss statement indicate decreases in gross annual revenues and amounts of salaries and wages paid from 2013 to 2014. Unlike in *Sonegawa*, the instant record does not demonstrate the occurrence of any uncharacteristic business expenditures or losses, or the Petitioner's outstanding reputation in its industry. Also unlike in *Sonegawa*, the instant Petitioner must demonstrate its ability to pay multiple beneficiaries. Thus, assessing the totality of circumstances in this individual case, the record does not establish the Petitioner's continuing ability to pay the proffered wage pursuant to *Sonegawa*.

The Petitioner has not demonstrated its continuing ability to pay the proffered wage from the petition's priority date onward. We will therefore affirm the Director's decision and dismiss the appeal.

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## II. THE BENEFICIARY'S QUALIFYING EXPERIENCE

Beyond the Director's decision, the record also does not establish the Beneficiary's qualifying experience for the offered position.<sup>7</sup>

A petitioner must establish a beneficiary's possession of all the education, training, and experience specified on an accompanying labor certification by a petition's priority date. 8 C.F.R. §§ 103.2(b)(1), (12); *see also Matter of Wing's Tea House*, 16 I&N Dec. 158, 159 (Acting Reg'l Comm'r 1977); *Matter of Katigbak*, 14 I&N Dec. 45, 49 (Reg'l Comm'r 1971).

In evaluating a beneficiary's qualifications, we must examine the job offer portion of an accompanying labor certification to determine the minimum requirements of an offered position. We may neither ignore a term of the labor certification, nor impose additional requirements. *See K.R.K. Irvine, Inc. v. Landon*, 699 F.2d 1006, 1009 (9th Cir. 1983); *Madany v. Smith*, 696 F.2d 1008, 1015 (D.C. Cir. 1983); *Stewart Infra-Red Commissary of Mass., Inc. v. Coomey*, 661 F.2d 1, 3 (1st Cir. 1981).

In the instant case, the labor certification states the minimum requirements of the offered position of registered nurse as a U.S. Bachelor's degree or a foreign equivalent degree in nursing, plus at least 12 months of experience in the job offered.

The Beneficiary attested on the labor certification to about 19 months of related full-time experience in the United States before the petition's filing. The Beneficiary stated the following experience:

- About 11 months as a registered nurse with [REDACTED] from March 8, 2013 to February 10, 2014; and
- About eight months as a registered nurse with [REDACTED] from October 2010 to June 2011.

A petitioner must support a beneficiary's claimed qualifying experience with letters from employers. 8 C.F.R. § 204.5(g)(1). The letters must provide the names, addresses, and titles of the employers, and descriptions of the beneficiary's experiences. *Id.* In response to the Director's RFE, the Petitioner submitted letters from the Beneficiary's claimed former employers.

A February 11, 2015, letter from a human resources specialist on the stationery of [REDACTED] states the Beneficiary's full-time employment by the organization from March 1, 2013 to February 10, 2014. A February 13, 2015, letter from an officer manager on the stationery of [REDACTED] states the Beneficiary's full-time employment by that organization from November 5, 2010 to June 16, 2011.

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<sup>7</sup> We may deny a petition on a valid ground unidentified by a director. *See* 5 U.S.C. § 557(b) (stating that, except as limited by notice or rule, a federal agency on review retains all the powers it had in issuing the original decision).

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However, the letters on [REDACTED] stationery do not describe the Beneficiary's experience pursuant to 8 C.F.R. § 204.5(g)(1). The letters therefore do not establish the Beneficiary's claimed qualifying experience with the employers.

The Petitioner also submitted a February 18, 2015, letter from an alternative administrator/office manager on the stationery of [REDACTED]. This letter states the Beneficiary's employment as a private duty registered nurse from February 24, 2013 to November 25, 2013.

Like the other letters, however, the letter on [REDACTED] stationery does not describe the Beneficiary's experience pursuant to 8 C.F.R. § 204.5(g)(1). Also, the Beneficiary did not attest to any related experience with [REDACTED] on the accompanying labor certification. The unexplained omission of this employer from the labor certification casts doubt on the Beneficiary's claimed qualifying experience there. *See Matter of Ho*, 19 I&N Dec. 582, 591-92 (BIA 1988) (requiring a petitioner to resolve inconsistencies by independent, objective evidence); *see also Matter of Leung*, 16 I&N Dec. 12, 14-15 (Dist. Dir. 1976), *disapp'd of on another ground by Matter of Lam*, 16 I&N Dec. 432, 434 (BIA 1978) (finding testimony of an applicant for adjustment of status to be not credible where he stated qualifying experience with a former employer unidentified on his labor certification).

In addition, the Beneficiary's purported dates of experience with [REDACTED] overlap her purported dates of full-time employment with [REDACTED]. On appeal, the Petitioner states the Beneficiary's full-time employment by [REDACTED] and part-time employment by [REDACTED] supported by copies of 2013 Forms W-2 of the Beneficiary from [REDACTED] and [REDACTED]. However, the record does not explain the omission of [REDACTED] as an employer on the labor certification or describe the Beneficiary's purported experience with the organization.

Further, the accompanying labor certification does not identify the Beneficiary as the Petitioner's intended employee. Section J.1. to J.10 of the ETA Form 9089 identifies the intended employee as another foreign national with a different name and date of birth than the Beneficiary. However, Section K and the remainder of Section J of ETA 9089 appear to state the educational and employment qualifications of the Beneficiary. The unexplained discrepancy on the labor certification regarding the intended employee casts further doubts on the Beneficiary's purported qualifying experience. *See Ho*, 19 I&N Dec. at 591-92 (requiring a petitioner to resolve inconsistencies of record by independent, objective evidence).

For the foregoing reasons, the record does not establish the Beneficiary's possession of the qualifying experience specified on the accompanying labor certification by the petition's priority date. We will therefore also dismiss the appeal for this reason.

### III. THE APPLICATION FOR SCHEDULE A DESIGNATION

A petition for a professional worker must be accompanied by an individual labor certification from DOL, an application for Schedule A designation, or evidence of a beneficiary's qualifications for a shortage occupation under DOL's Labor Market Information Pilot Program. 8 C.F.R. § 204.5(l)(3)(i).

An application for Schedule A designation must include evidence that notice of the application's filing was provided to a bargaining representative or the employer's employees. 20 C.F.R. § 656.15(b)(2). Notice to employees must be posted for at least 10 consecutive business days and "provided between 30 and 180 days before filing the application." 20 C.F.R. §§ 656.10(d)(1)(ii), (3)(iv).

A Schedule A application must also include a prevailing wage determination. 20 C.F.R. § 656.15(b)(1). An employer must file its application within the validity period of the accompanying prevailing wage determination. 20 C.F.R. § 656.40(c). USCIS determines whether an employer and a foreign national meet the DOL's Schedule A requirements. 20 C.F.R. § 656.15(e). USCIS' Schedule A determination is "conclusive and final." *Id.*

The instant record contains a notice of filing to the Petitioner's employees stating its posting from May 19, 2014 to June 6, 2014. If we consider the priority date of the petition and the accompanying Schedule A application as June 30, 2014, the record indicates the Petitioner's posting of the filing notice within 30 days of the application's filing. The posting would therefore violate 20 C.F.R. § 656.10(d)(3)(iv), requiring denial of the Petitioner's application for Schedule A designation.

If we instead use the July 28, 2014, priority date found by the Director, posting of the notice of filing would have occurred between 30 and 180 days of the application's filing in compliance with 20 C.F.R. § 656.10(d)(3)(iv). However, the accompanying prevailing wage determination expired on June 30, 2014. Thus, a priority date of July 28, 2014 would result in the filing of the Schedule A application without a valid prevailing wage determination in violation of 20 C.F.R. §§ 656.15(b)(1), 656.40(c). Thus, regardless of which priority date is used, the Petitioner's Schedule A application cannot be approved.

The record does not establish the Beneficiary's eligibility for Schedule A designation. The record does not otherwise include an individual labor certification from DOL or evidence of the Beneficiary's qualifications for a shortage occupation under the pilot program. We will therefore also dismiss the appeal for this reason.

### IV. CONCLUSION

The record does not establish the Petitioner's continuing ability to pay the proffered wage from the petition's priority date onwards. We will therefore affirm the Director's decision and dismiss the appeal. The record also does not establish the Beneficiary's qualifying experience for the offered position or the approvability of the application for Schedule A designation that accompanies the petition.

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The petition will be denied for the reasons indicated above, with each considered an independent and alternative basis for denial. In visa petition proceedings, a petitioner bears the burden of proving eligibility for the benefit sought. INA § 291, 8 U.S.C. § 1361; *Matter of Otiende*, 26 I&N Dec. 127, 128 (BIA 2013). Here, the Petitioner has not met that burden.

**ORDER:** The appeal is dismissed.

Cite as *Matter of T-E-, Inc.*, ID# 15073 (AAO Dec. 14, 2015)