



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

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

MATTER OF T-E-, INC.

DATE: DEC. 18, 2015

APPEAL OF TEXAS SERVICE CENTER DECISION

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

The Petitioner, a home health care provider, seeks to permanently employ the Beneficiary as a registered nurse under the immigrant classification of professional. *See* Immigration and Nationality 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 continuing ability to pay the proffered wage from the petition's priority date onward. Accordingly, the Director denied the petition on May 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.¹

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

A petitioner must establish 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.*

A petitioner's ability to pay a proffered wage is essential in evaluating whether a job offer is realistic. *See Matter of Great Wall*, 16 I&N Dec. 142, 144 (Acting Reg'l Comm'r 1977). In determining ability to pay, we require a petitioner to demonstrate financial resources sufficient to pay a beneficiary's

¹ 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.

proffered wage. However, we will also consider the totality of the circumstances affecting a petitioner's business. See *Matter of Sonegawa*, 12 I&N Dec. 612, 614-15 (Reg'l Comm'r 1967).

In the instant case, the petition is accompanied by an application for Schedule A designation. Schedule A contains occupations for which the U.S. Department of Labor (DOL) has determined there are insufficient U.S. workers who are able, willing, qualified, and available. 20 C.F.R. § 656.5. The DOL has also determined that the wages and working conditions of Schedule A occupations will not adversely affect U.S. workers similarly employed. *Id.*

The Petitioner seeks the Beneficiary's designation as a professional nurse under Group I of Schedule A. See 20 C.F.R. § 656.5(a)(2). The DOL has authorized U.S. Citizenship and Immigration Services (USCIS) to determine whether an employer and a foreign national meet the applicable requirements for Schedule A designation. 20 C.F.R. § 656.15(e).

An ETA Form 9089, Application for Permanent Employment Certification, states the proffered wage for the offered position of registered nurse as \$82,222 per year. The petition's filing date is June 30, 2014, the date USCIS received the petition. See 8 C.F.R. § 204.5(d).

In determining a petitioner's ability to pay, we first examine whether it paid a beneficiary during the relevant period. A petitioner that documents its employment of a beneficiary at a salary equal to or greater than a proffered wage establishes its *prima facie* ability to pay the proffered wage.

The instant Beneficiary attested on the accompanying labor certification application to her employment by the Petitioner since November 23, 2009. The Petitioner submitted a copy of the Beneficiary's IRS Form W-2 Wage and Tax Statement for 2014. The Form W-2 indicates the Petitioner's payment to the Beneficiary of \$39,999.73.

The amount reflected on the Beneficiary's Form W-2 for 2014 does not equal or exceed the annual proffered wage of \$82,222. The record therefore does not establish the Petitioner's ability to pay the proffered wage based on the wages it paid the Beneficiary.

If a petitioner does not establish payments to a beneficiary in amounts equaling or exceeding a proffered wage, we next examine its net income, without consideration of depreciation or other expenses.² If a petitioner's net income amount equals or exceeds the difference between a proffered wage and the wages the petitioner paid a beneficiary, the record indicates the petitioner's ability to pay.

² Federal courts have upheld our method of determining ability to pay. See *River St. Donuts, LLC v. Napolitano*, 558 F.3d 111, 118 (1st Cir. 2009); *Rizvi v. Dep't of Homeland Sec.*, -- Fed. Appx. --, 2015 WL 5711445, ** 1-2 (Sept. 30, 2015); *Tongatapu Woodcraft Haw. Ltd. v. Feldman*, 736 F.2d 1305, 1309-10 (9th Cir. 1984); *Estrada-Hernandez v. Holder*, -- F. Supp. 3d --, 2015 WL 3634497, *5 (S.D. Cal. 2015); *Taco Especial v. Napolitano*, 696 F. Supp. 2d 873, 880 (E.D. Mich. 2010), *aff'd*, No. 10-1517 (6th Cir. Nov. 10, 2011).

The Petitioner's IRS Form 1120S U.S. Income Tax Return for an S Corporation states an annual net income amount of \$35,631 in 2014.³ The difference between the annual proffered wage of \$82,222 and the wage paid by the Petitioner to the Beneficiary in 2014 of \$39,999.73 is \$42,222.27.

The annual net income amount reflected on the Petitioner's 2014 tax return does not equal or exceed the difference between the proffered wage and the wages paid by the Petitioner to the Beneficiary. The record therefore does not establish the Petitioner's ability to pay the proffered wage based on its net income.

If a petitioner's net income is insufficient to demonstrate its ability to pay, we review its net current assets. Net current assets represent the difference between current assets and current liabilities.⁴ Lines 1 through 6 of Schedule L to IRS Form 1120S state an S corporation's year-end current assets. Lines 16 through 18 of Schedule L show an S corporation's year-end current liabilities. If a corporation's year-end net current assets equal or exceed the annual difference between the proffered wage and the wages paid to a beneficiary, a petitioner demonstrates its ability to pay based on its net current assets.

In the instant case, the Petitioner's 2014 tax return indicates an annual net current asset amount of \$(42,032).⁵ Because the Petitioner's net current assets amount for 2014 was negative, the record does not establish the Petitioner's ability to pay the proffered wage based on its net current assets.

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

The Petitioner notes that regulations required it to pay the Beneficiary an annual wage of only \$35,422 in 2014 pursuant to its approved H-1B nonimmigrant visa petition on her behalf as an in-service health educator. The Petitioner argues that we should therefore not fault it for paying the Beneficiary \$39,999.73 that year.

We appreciate the Petitioner's compliance with H-1B regulations. However, its compliance with regulations in nonimmigrant proceedings does not ease or eliminate its burden of demonstrating its ability to pay the proffered wage in immigrant proceedings. *See* 8 C.F.R. § 204.5(g)(2). Whether the Petitioner's 2014 payments to the Beneficiary complied with H-1B regulations or not, the record

³ S corporations that generate income or losses from sources outside their trades or businesses report their net incomes on Schedules K of their IRS Forms 1120S. *See* Internal Revenue Serv., Instructions to Form 1120S, at <http://www.irs.gov/pub/irs-pdf/i1120s.pdf> (accessed Oct. 1, 2015). The instant Petitioner reported additional income outside its business on Schedule K of its Form 1120S for 2013. However, its Form 1120S for 2014 does not report any income adjustments on Schedule K. Line 21 of Form 1120S therefore reflects its annual net income for 2014.

⁴ Current assets may generally be liquidated within one year, such as cash, marketable securities, inventory, and prepaid expenses. Joel G. Siegel & Jae K. Shim, *Dictionary of Accounting Terms* 118 (3d ed., Barron's Ed. Series 2000). Current liabilities are obligations generally payable within one year, such as accounts payable, short-term notes, and accrued expenses like taxes and salaries. *Id.*

⁵ Numbers in parentheses reflect negative amounts.

(b)(6)

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indicates that the payments did not equal or exceed the annual proffered wage. The record also indicates that the Petitioner's amounts of net income and net current assets in 2014 did not equal or exceed the difference between the proffered wage and the wages it paid the Beneficiary.

Counsel also asserts the Petitioner's current employment of many part-time registered nurses. Counsel argues that the Beneficiary would replace some of the part-time nurses when the Petitioner employs her in the full-time offered position of registered nurse upon final immigrant visa approval. Counsel therefore argues that funds currently dedicated to pay the wages of part-time nurses would become available to pay the full-time proffered wage of the Beneficiary.

However, the record does not establish the Petitioner's current employment of part-time registered nurses that the Beneficiary would replace, or the amount of wages paid to them. *See INS v. Phinpathya*, 464 U.S. 183, 188 n.6 (1984) (noting that counsel's assertions do not establish facts of record). The record does not indicate the Petitioner's employment of part-time nurses or the Beneficiary's future replacement of them. The record also does not contain documentary evidence to support those assertions. *See Matter of Soffici*, 22 I&N Dec. 158, 165 (Comm'r 1998) (citation omitted) (stating that uncorroborated assertions are insufficient to meet a petitioner's burden of proof in visa petition proceedings).

In addition, counsel argues that the proffered wage of the beneficiary of another immigrant visa petition filed by the Petitioner is available to pay the proffered wage of the instant Beneficiary. Despite the other petition's approval, counsel asserts that the other beneficiary no longer intends to work for the Petitioner in the United States.

Again, however, the record does not establish that the Petitioner's other beneficiary will not work for it in the United States. *See Phinpathya*, 464 U.S. at 188 n.6 (noting that counsel's assertions do not establish facts of record). The record also does not indicate whether the other beneficiary's proffered wage is sufficient to pay the proffered wage of the instant Beneficiary.

Further, USCIS' approval of the Petitioner's other petition does not bar us from determining that the Petitioner has not established its ability to pay the proffered wage of the instant Beneficiary. *See La. Philharmonic Orchestra v. INS*, 44 F. Supp. 2d 800, 803 (E.D. La. 2000), *affd*, 248 F.3d 1139 (5th Cir. 2001), *cert. denied*, 534 U.S. 819 (2001) (stating that USCIS need not follow a prior decision based on a misapplication of law). In addition to the instant petition and the other petition discussed above, USCIS records indicate the Petitioner's filing of at least four other immigrant visa petitions that remained pending beyond the priority date of the instant petition.⁶

A petitioner must demonstrate its ability to pay the proffered wage of each petition it files. *See* 8 C.F.R. § 204.5(g)(2). Therefore, the instant Petitioner must demonstrate its ability to pay the

⁶ Including the other petition discussed above, USCIS records identify the Petitioner's other petitions by the following receipt numbers: [REDACTED]

combined proffered wages of the instant Beneficiary and the beneficiaries of its other petitions that remained pending after the instant petition's priority date. The Petitioner must demonstrate 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 establish its ability to pay the proffered wages of multiple beneficiaries).

The record does not indicate the priority dates or proffered wages of the Petitioner's other petitions, or whether it paid any wages to the other beneficiaries. The record also does not indicate whether any of the other beneficiaries obtained lawful permanent residence, or whether their petitions were denied, withdrawn, or revoked. Without this information, we are unable to determine the Petitioner's ability to pay the combined proffered wages of its beneficiaries. The record therefore does not establish the Petitioner's continuing ability to pay the proffered wage from the petition's priority date onward.

As indicated previously, we may also consider the overall magnitude of a petitioner's business in determining its ability to pay a proffered wage. *See Sonogawa*, 12 I&N Dec. at 614-15. In *Sonogawa*, the petitioner conducted business for more than 11 years, routinely earning annual net income amounts of about \$100,000. However, in the year of the petition's filing, the petitioner's tax returns did not reflect its ability to pay. In that year, the record indicated the petitioner's relocation of its business, causing it to pay rent on two locations for a five-month period, to incur substantial moving costs, and to briefly suspend its business operations. Despite these setbacks, the Regional Commissioner determined the likely resumption of the petitioner's successful business operations and its demonstration of its ability to pay the proffered wage. The petitioner established the featuring of her work as a fashion designer in national magazines and 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 lectures at U.S. fashion shows and at California colleges and universities.

As in *Sonogawa*, 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 any uncharacteristic business expenditures or losses; its reputation within its industry; whether the beneficiary will replace a current employee or an outsourced service; and any other evidence of its ability to pay a proffered wage.

In the instant case, the record indicates the Petitioner's continuous business operations since 2006 and its employment of 48 people in 2014. However, its tax returns reflect decreases in its gross revenues and salaries paid from 2013 to 2014.

Also, unlike in *Sonogawa*, the record does not indicate the Petitioner's outstanding reputation in its industry or any uncharacteristic business losses or expenses. As previously discussed, the record does not establish the Beneficiary's future replacement of current, part-time employees. In addition,

unlike in *Sonegawa*, the instant Petitioner must demonstrate its ability to pay the combined proffered wages of multiple beneficiaries.

Thus, assessing the totality of the circumstances in this individual case, the record does not establish the Petitioner's continuing ability to pay. After careful consideration, we find that the record does not establish the Petitioner's 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.

II. ELIGIBILITY FOR SCHEDULE A DESIGNATION

Beyond the Director's decision, the record also does not establish the Petitioner's eligibility for the requested Schedule A designation.⁷

A petition must be accompanied by an individual labor certification, an application for Schedule A designation, or evidence of a beneficiary's qualifications for a shortage occupation. 8 C.F.R. § 204.5(l)(3)(i). As previously indicated, USCIS determines whether an employer and a foreign national meet the applicable requirements for Schedule A designation. 20 C.F.R. § 656.15(e).

An application for Schedule A designation must include evidence of a "notice of filing" to a bargaining representative or a petitioner's employees. 20 C.F.R. § 656.15(b)(2). A petitioner must provide notice of filing "between 30 and 180 days before filing the application." 20 C.F.R. § 656.10(d)(3)(iv).

The Petitioner's application for Schedule A designation contains a copy of a notice of filing, indicating the notice's posting at the Petitioner's address from May 19, 2014 to June 6, 2014. As previously indicated, the petition's filing date is June 30, 2014.

The record indicates the Petitioner's notice to its employees 24 days before the filing of the application for Schedule A designation. *See, e.g., Matter of Systematic IT Partners, Inc.*, 2011-PER-00495, 2011 WL 6739555, *2 (BALCA Dec. 14, 2011) (measuring notice from the last day of posting to the submission date of a labor application). The record does not indicate the Petitioner's provision of notice "between 30 and 180 days before filing the application" pursuant to 20 C.F.R. § 656.10(d)(3)(iv).

Because the record does not demonstrate the Petitioner's compliance with notice of filing requirements, the record does not establish the Petitioner's eligibility for Schedule A designation. The record does not otherwise include an individual labor certification or evidence of the Beneficiary's qualifications for a shortage occupation in the DOL's Market Information Pilot

⁷ We may deny a petition on valid grounds 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 possessed in issuing the original decision); *see also Soltane*, 381 F.3d at 145 (recognizing our review of appeals on a *de novo* basis); *Spencer Enters., Inc. v. United States*, 229 F. Supp. 2d 1025, 1043 (E.D. Cal. 2001), *aff'd*, 345 F.3d 683 (9th Cir. 2003) (finding that an applicant did not present any legal authority barring us from denying an application on valid grounds unidentified by a service center).

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Program. Therefore, we must also dismiss the appeal because the petition does not comply with 8 C.F.R. § 204.5(l)(3)(i).

III. CONCLUSION

The record does not establish the Petitioner's 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. In addition, the record does not establish the Petitioner's eligibility for the requested Schedule A designation. We will therefore also dismiss the appeal on this basis.

The petition will be denied for the reasons discussed 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. Here, that burden has not been met.

ORDER: The appeal is dismissed.

Cite as *Matter of T-E-, Inc.*, ID# 15350 (AAO Dec. 18, 2015)