



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

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

MATTER OF F-&F-, PLLC

DATE: NOV. 6, 2015

APPEAL OF TEXAS SERVICE CENTER DECISION

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

The Petitioner, a law firm, seeks to permanently employ the Beneficiary as an immigration law clerk 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 September 11, 2014.

The record shows that the appeal is properly filed and alleges specific errors in law and fact. *See* 8 C.F.R. § 103.3(a)(1)(v) (authorizing summary dismissal of an appeal that does not specifically identify an erroneous conclusion of law or statement of fact). The record documents the procedural history of the case, which is 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.*

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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 the submission of additional evidence on appeal. The record in the instant case provides no reason to preclude consideration of any documents newly submitted on appeal.

(b)(6)

*Matter of F-&F-, PLLC*

The instant record does not contain a copy of the Petitioner's annual report, federal income tax return, or audited financial statements for 2014. In response to our request for evidence (RFE) of April 3, 2015, the Petitioner submitted evidence of its request for an automatic extension of time in which to file its 2014 tax return. Our Supplemental RFE of June 26, 2015 again requested a copy of the Petitioner's annual report, federal income tax return, or audited financial statements for 2014. However, we did not receive a response to our Supplemental RFE. We will therefore consider the Petitioner's ability to pay the proffered wage only through 2013.<sup>2</sup>

In determining ability to pay, we consider whether a petitioner paid wages to a beneficiary. A petitioner demonstrates its *prima facie* ability to pay if its payments to a beneficiary during a relevant period equaled or exceeded a proffered wage. Otherwise, we examine a petitioner's amounts of net income and net current assets. If a petitioner's net income or net current assets during a relevant period equal or exceed the difference between wages paid (if any) and a proffered wage, then the petitioner demonstrates its ability to pay. In addition, we may consider other circumstances 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).<sup>3</sup>

In the instant case, the accompanying ETA Form 9089, Application for Permanent Employment Certification (labor certification), approved by the U.S. Department of Labor (DOL), states the proffered wage of the offered position of immigration law clerk as \$56,451 per year. The petition's priority date is September 26, 2013, the date the DOL accepted the labor certification application for processing. See 8 C.F.R. § 204.5(d).

The Beneficiary attested on the labor certification to her employment by the Petitioner since June 14, 2012. The Petitioner submitted copies of the Beneficiary's pay receipts and her IRS Form W-2, Wage and Tax Statement, for 2013, which reflect payments to her totaling \$45,800.04.

However, as indicated in our RFE, the Beneficiary's pay receipts and Form W-2 for 2013 do not indicate her payment by the Petitioner. The materials state the Beneficiary's receipt of payments from [REDACTED] a company with a different name, address, and federal employer identification number (FEIN) than the Petitioner. See 20 C.F.R. § 656.3 (requiring an "employer" for labor certification purposes to possess a valid and distinctive FEIN). The Form I-140, Petition for Alien Worker, and the accompanying labor certification identify the Petitioner, not the New York entity, as the Beneficiary's prospective employer.

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<sup>2</sup> We do not find the Petitioner's lack of response to our Supplemental RFE to preclude a material line of inquiry. See 8 C.F.R. § 103.2(b)(14) (authorizing us to deny a petition for a petitioner's failure to submit requested evidence that precludes a material line of inquiry). However, in any future filings regarding this petition, the Petitioner must submit a copy of its annual report, federal tax return, or audited financial statements for 2014 pursuant to 8 C.F.R. § 204.5(g)(2).

<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); *Just Bagels Mfg., Inc. v. Mayorkas*, 900 F. Supp. 2d 363, 373-76 (S.D.N.Y. 2012).

(b)(6)

*Matter of F-&F-, PLLC*

The assets of other enterprises generally cannot establish a petitioner's ability to pay. *See Matter of Aphrodite Invs., Ltd.*, 17 I&N Dec. 530, 531 (Comm'r 1980) (holding that a corporation constitutes a separate legal entity from its owners); *see also Sitar v. Ashcroft*, No. CIV. A. 02-30197-MAP, 2003 WL 22203713, \*3 (D. Mass. Sept. 18, 2003) (stating that "nothing in the governing regulation, 8 C.F.R. § 204.5, permits [USCIS] to consider the financial resources of individuals or entities who have no legal obligation to pay the wage").

Although the Beneficiary received pay checks and Forms W-2 from another company in 2013, the Petitioner argues that it and the other entity "are one and the same business." The Petitioner argues that it provided the New York entity with the funds from which it paid the Beneficiary's wages in 2013.

In response to our RFE, the Petitioner's sole member stated that the Petitioner began leasing an office in [REDACTED] in 2009 and hired the Beneficiary as the office's first, full-time employee in 2012.<sup>4</sup> At that time, the member stated that the Petitioner obtained a separate FEIN for its New York office for the convenience of its payroll service provider, which must withhold New York-based taxes from the Beneficiary's pay that do not apply to the wages of the Petitioner's other employees in Florida.

However, another attorney with the Petitioner provided a different explanation for the creation of the New York entity. In a May 14, 2015, affidavit, the other attorney stated that the Petitioner attempted to register its business in New York under its own name, "but the registration was rejected." He stated that the Petitioner therefore registered in New York under the name of a new entity. The conflicting explanations regarding the creation of the New York entity cast doubt on the Petitioner's claimed funding of the Beneficiary's wages in 2013. *See Matter of Ho*, 19 I&N Dec. 582, 591-92 (BIA 1988) (requiring a petitioner to resolve inconsistencies of record by independent, objective evidence).

The Petitioner's member stated that the Petitioner, not the New York entity, files federal income tax returns on behalf of the business "since a majority of the work was being completed in Florida." The member stated that all income derives from contracts signed by clients with the Florida entity and that the New York entity does not receive any income for tax purposes.

The record contains copies of email messages indicating that clients generated through the New York office signed agreements with the Petitioner. However, the record does not establish that the New York entity files no federal income tax returns. Online information from the Internal Revenue Service (IRS) indicates that an LLC, like the New York entity, need not necessarily file a separate income tax return. *See Internal Revenue Serv., Publication 3402 "Taxation of Limited Liability Companies,"* at <http://www.irs.gov/pub/irs-pdf/p3402.pdf> (accessed Sept. 15, 2015) (stating that an LLC with one member can be classified as "an entity disregarded as separate from its owner" and report any income, deductions, gains, losses, or credits on the owner's income tax return). However,

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<sup>4</sup> Effective January 1, 2015, unless expressly provided otherwise in an operating agreement, a former "managing member" of a Florida limited liability company (LLC) is considered to be a "member." *See Fla. Stat. § 605.0407(1).*

the record does not establish the number of members of the New York entity or its appropriate classification for federal tax purposes. *See Matter of Soffici*, 22 I&N Dec. 158, 165 (Comm'r 1998) (citation omitted) (stating that a petitioner's uncorroborated assertions do not meet the burden of proof in visa petition proceedings).

The Petitioner also argues that it controls the bank account of the New York entity through which the Beneficiary is paid. The record contains documentation indicating the Petitioner's access to an account in the name of the New York entity and the Petitioner's transfers of funds into the account. However, the record does not establish the Petitioner's payment of the Beneficiary's full wages in 2013.

Copies of bank account statements indicate the Petitioner's transfer of \$2,000 from the checking account in its name to the checking account in the name of the New York entity in 2013 after the petitioner's September 26 priority date. However, this amount is insufficient to fund even one of the Beneficiary's monthly paychecks of \$3,816.67 in October, November, or December 2013.

The Petitioner asserts that other funds in the account of the New York entity during that period derived from client contracts in the Petitioner's name. However, documentary evidence of record does not specifically link any of the other deposits into the New York entity's account with client contracts in the Petitioner's name. The record does not indicate the sources of the account's remaining funds used to pay the bulk of the Beneficiary's wages during that period. *See Soffici*, 22 I&N Dec. at 165 (stating that a petitioner's uncorroborated assertions do not meet the burden of proof in visa petition proceedings). Thus, the record establishes the Petitioner's funding of only \$2,000 of the Beneficiary's wages in 2013.

The Petitioner submitted evidence of the New York entity's operations under the Petitioner's name, the Petitioner's hiring of the Beneficiary, and the supervision of her work by its attorneys in Florida. This evidence supports the Petitioner's common law "employment" of the Beneficiary. *See Nationwide Mut. Ins. Co. v. Darden*, 503 U.S. 318, 323-24 (1992) (stating that a variety of factors must be considered in determining the existence of a common law employer-employee relationship, including a hiring party's right to control the manner and means of the work, and the method of payment). However, our focus here is on the Petitioner's ability to pay the proffered wage, not on its status as the Beneficiary's common law employer. As the Beneficiary's common law employer, the Petitioner would not necessarily pay her wages. *See, e.g.*, 26 U.S.C. § 3401(d)(1) (requiring an entity that controls the payment of a worker's wages to withhold federal payroll taxes from her pay if her common law employer does not control the payment of her wages).

The record establishes the Petitioner's funding of \$2,000 of the Beneficiary's wages in 2013. Because this amount does not equal or exceed the annual proffered wage of \$56,451, the record does not establish the Petitioner's ability to pay based on the wages it funded. However, we credit the Petitioner's funding of the Beneficiary's wages. Therefore, the Petitioner need only establish its ability to pay the difference between the annual proffered wage and the amount of the Beneficiary's wages it funded, or \$54,451.

A copy of the Petitioner's 2013 federal income tax return reflects an annual net income amount of \$16,855 in 2013. Because the annual net income amount does not equal or exceed the difference between the proffered wage and the amount of the Beneficiary's wages funded by the Petitioner, the record does not establish its ability to pay based on its net income.

The Petitioner's 2013 federal income tax return reflects an annual net current asset amount of \$(28,984).<sup>5</sup> Because the annual net current asset amount is negative, the record does not establish the Petitioner's ability to pay the proffered wage based on its net current assets.

The Petitioner argues that the funds in its bank accounts in 2013 should be considered in determining its ability to pay the proffered wage. However, the Petitioner presumably included the bank account funds in the current assets it reported on its 2013 federal tax return. *See* Joel G. Siegel & Jae K. Shim, *Barron's Dictionary of Accounting Terms* 118 (3d ed. 2000) (defining the term "current assets" to include assets that generally may be liquidated within one year, such as cash). As previously discussed, in considering the Petitioner's ability to pay in 2013, we have considered its net current assets. The record does not indicate that the bank account balances constituted additional funds available to pay the proffered wage. The account statements therefore do not establish the Petitioner's ability to pay the proffered wage in 2013.

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

As previously indicated, we may also consider the scope of a petitioner's business activities 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 a net annual income of about \$100,000. However, during the year of the petition's filing, the petitioner's federal tax returns did not reflect its ability to pay the proffered wage. During that year, the petitioner relocated 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 found that the petitioner would likely resume successful business operations and established its ability to pay the proffered wage. The record identified the petitioner as a fashion designer whose work had been featured in national magazines. The record indicated that her clients included the then Miss Universe, movie actresses, society matrons and women included on the lists of the best-dressed in California. The record also established the petitioner's practice of lecturing at U.S. fashion shows and 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 asset amounts. We may consider such factors as: the number of years it has conducted business; the growth of its business; its number of employees; the occurrence of any uncharacteristic business expenditures or losses; its reputation in its industry; whether a beneficiary will replace a

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<sup>5</sup> Numbers in parentheses reflect negative amounts.

former employee or an outsourced service, and any other evidence of a petitioner's ability to pay the proffered wage.

In the instant case, the record indicates the Petitioner's continuous business operations since 2006. Copies of the Petitioner's federal income tax returns also reflect increasing gross revenues and wages paid from 2011 through 2013.

The Petitioner attributes the losses reflected on its tax returns for 2011 and 2012 to increased costs from its "aggressive expansion" into New York and its "aggressive advertising" of its entire business. However, unlike the petitioner in *Sonegawa*, the record does not indicate that the Petitioner ever possessed the ability to pay the Beneficiary's proffered wage based on its low net income and negative net current assets in 2013, the year of the petition's priority date.

Citing a high peer-review rating from other U.S. law firms, the Petitioner argues that it "has grown into a well-respected and recognizable law firm with high levels of customer service, results and competency." However, the record does not indicate the Petitioner's enjoyment of a reputation in the legal industry that matches the outstanding reputation attained by the petitioner in *Sonegawa* in the fashion industry. Thus, assessing the totality of the circumstances in this case, the record does not establish the Petitioner's continuing ability to pay the proffered wage from the petition's priority date onward.

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.

The petition will be denied for the above-stated reason. In visa petition proceedings, a petitioner bears the burden of establishing eligibility for the beneficiary sought. Section 291 of the Act, .8 U.S.C. § 1361; *Matter of Otiende*, 26 I&N Dec. 127, 128 (BIA 2013). Here, that burden was not met.

**ORDER:** The appeal is dismissed.

Cite as *Matter of F-&F-, PLLC*, ID# 13233 (AAO Nov. 6, 2015)