



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

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

MATTER OF SMAM-L- INC

DATE: AUG. 22, 2016

APPEAL OF TEXAS SERVICE CENTER DECISION

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

The Petitioner, a clinical laboratory, seeks to employ the Beneficiary permanently in the United States as a clinical laboratory manager. It requests classification of the Beneficiary as a professional under the third preference immigrant classification. *See* 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, Texas Service Center, denied the petition. The Director determined that the record did not establish the Petitioner's ability to pay the Beneficiary the proffered wage as of the visa petition's priority date.

The matter is now before us on appeal. On appeal and in response to our notice of intent to dismiss and request for evidence (NOID/RFE), the Petitioner submits additional evidence of its ability to pay, as well as the Beneficiary's qualifications for the job opportunity. Upon *de novo* review, we will dismiss the appeal.

#### I. LAW

Employment-based immigration is generally a three-step process. First, an employer must obtain an approved labor certification from the U.S. Department of Labor (DOL). *See* section 212(a)(5)(A)(i) of the Act, 8 U.S.C. § 1182(a)(5)(A)(i). Next, U.S. Citizenship and Immigration Services (USCIS) must approve an immigrant visa petition. *See* section 204 of the Act, 8 U.S.C. § 1154. Finally, the foreign national must apply for an immigrant visa abroad or, if eligible, adjustment of status in the United States. *See* section 245 of the Act, 8 U.S.C. § 1255.

As required by statute, an ETA Form 9089, Application for Permanent Employment Certification (labor certification), approved by the DOL, accompanies the instant petition. By approving the labor certification, the DOL certified that there are insufficient U.S. workers who are able, willing, qualified, and available for the offered position. Section 212(a)(5)(A)(i)(I) of the Act. The DOL also certified that the employment of a foreign national in the position will not adversely affect the wages and working conditions of domestic workers similarly employed. Section 212(a)(5)(A)(i)(II) of the Act.

In these visa petition proceedings, USCIS determines whether a foreign national meets the job requirements specified on a labor certification and the requirements of the requested immigrant classification. See section 204(b) of the Act (stating that USCIS must approve a petition if the facts stated in it are true and the foreign national is eligible for the requested preference classification); see also, e.g., *Tongatapu Woodcraft Haw., Ltd. v. Feldman*, 736 F. 2d 1305, 1309 (9th Cir. 1984); *Madany v. Smith*, 696 F.2d 1008, 1012-13 (D.C. Cir. 1983) (both holding that USCIS has authority to make preference classification decisions).

The priority date of a petition is the date the DOL accepted the labor certification for processing. See 8 C.F.R. § 204.5(d). The priority date is used to calculate when the beneficiary of the visa petition is eligible to adjust his or her status to that of a lawful permanent resident. See 8 C.F.R. § 245.1(g). A petitioner must establish the elements for the approval of the petition at the time the priority date is established and continuing until the beneficiary obtains lawful permanent residence. See 8 C.F.R. §§ 204.5(g)(2), 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).

The regulation at 8 C.F.R. § 204.5(g)(2) states in pertinent part:

*Ability of prospective employer to pay wage.* Any petition filed by or for an employment-based immigrant which requires an offer of employment must be accompanied by evidence that the prospective United States employer has the ability to pay the proffered wage. The petitioner must demonstrate this ability at the time the priority date is established and continuing until the beneficiary obtains lawful permanent residence. Evidence of this ability shall be either in the form of copies of annual reports, federal tax returns, or audited financial statements.

A petitioner must establish that its job offer to the beneficiary is a realistic one. Because the filing of a labor certification application establishes a priority date for any immigrant petition later based on the labor certification, a petitioner must establish that the job offer was realistic as of the priority date and that the offer remains realistic for each year thereafter, until the beneficiary obtains lawful permanent residence. A petitioner's ability to pay the proffered wage is an essential element in evaluating whether a job offer is realistic. See *Matter of Great Wall*, 16 I&N Dec. 142 (Acting Reg'l Comm'r 1977); see also 8 C.F.R. § 204.5(g)(2).

In the present case, the priority date of the visa petition is June 28, 2013, the date on which the Petitioner filed the labor certification with the DOL, and Part G.1. of the labor certification reflects a proffered wage of \$68,350. Accordingly, to meet the requirements of 8 C.F.R. § 204.5(g)(2), the Petitioner must establish its ability to pay the Beneficiary the annual wage of \$68,350 from the June 28, 2013, priority date onward.

To determine a petitioner's ability to pay the proffered wage, USCIS first examines whether the petitioner was employing the beneficiary as of the date on which the labor certification was accepted for processing by DOL and whether it continues to do so. If the petitioner documents that it has

employed the beneficiary at a salary equal to or greater than the proffered wage, that evidence may be considered *prima facie* proof of the petitioner's ability to pay under 8 C.F.R. § 204.5(g)(2). If the petitioner does not demonstrate that it employed and paid the beneficiary at an amount at least equal to the proffered wage during the required period, USCIS then examines the net income figure reflected on the petitioner's federal income tax returns, without consideration of depreciation or other expenses. *River Street Donuts, LLC v. Napolitano*, 558 F.3d 111 (1st Cir. 2009); *Taco Especial v. Napolitano*, 696 F. Supp. 2d 873 (E.D. Mich. 2010), *aff'd*, No. 10-1517 (6th Cir. Nov. 10, 2011).<sup>1</sup> If the petitioner's net income during the required time period does not equal or exceed the proffered wage, or when added to any wages paid to the beneficiary does not equal or exceed the proffered wage, USCIS reviews the petitioner's net current assets.

In cases where neither a petitioner's net income nor its net current assets establish its ability to pay the proffered wage during the required period, USCIS may also consider the overall magnitude of the petitioner's business activities. *Matter of Sonogawa*, 12 I&N Dec. 612 (Reg'l Comm'r 1967). In assessing the totality of a petitioner's circumstances, USCIS may consider such factors as the number of years it has been in business, its record of growth, the number of individuals it employs, abnormal business expenditures or losses, its reputation within its industry, whether the beneficiary is replacing a former employee or an outsourced service, or any other evidence it deems relevant.

Where a petitioner has filed Forms I-140 for multiple beneficiaries, it must also demonstrate that its job offer to each beneficiary is realistic, and that it has the ability to pay the proffered wage to each. 8 C.F.R. § 204.5(g)(2). See *Great Wall*, at 144-45; see also *Patel v. Johnson*, 2 F. Supp. 3d 108, 124 (D. Mass. 2014) (upholding our denial of a petition where a petitioner did not demonstrate its ability to pay multiple beneficiaries). In determining whether a petitioner has established its ability to pay the proffered wage to multiple beneficiaries, USCIS adds together the proffered wages for each beneficiary for each year starting from the priority date of the petition being adjudicated, and analyzes the petitioner's ability to pay the combined wages. However, the wages offered to the other beneficiaries are not considered after the dates any beneficiary obtained lawful permanent residence, or after the date a Form I-140 petition was withdrawn, revoked, or denied without a pending appeal. In addition, USCIS will not require a petitioner to establish the ability to pay additional beneficiaries for any year that the beneficiary of the petition under consideration was paid the full proffered wage.

## II. ANALYSIS

The record contains the following evidence relating to the Petitioner's ability to pay the proffered wage: the Beneficiary's 2013 and 2014 Forms W-2, Wage and Tax Statements; her earning statements from December 2012 to January 2015; the Petitioner's 2013 Form 1120, U.S. Corporation Income Tax Return; the Petitioner's 2013 Form 1125-E, Compensation of Officers; its

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<sup>1</sup> Reliance on federal income tax returns as a basis for determining a petitioner's ability to pay the proffered wage is well established by judicial precedent. *Elatos Restaurant Corp. v. Sava*, 632 F. Supp. 1049, 1054 (S.D.N.Y. 1986) (citing *Tongatapu Woodcraft Hawaii, Ltd. V. Feldman*, 736 F.2d 1305 (9th Cir. 1984)); see also *Chi-Feng Chang v. Thornburgh*, 719 F. Supp. 532 (N.D. Texas 1989); *K.C.P. Food Co., Inc. v. Sava*, 623 F. Supp. 1080 (S.D.N.Y. 1985); *Ubeda v. Palmer*, 539 F. Supp. 647 (N.D. Ill. 1982), *aff'd*, 703 F.2d 571 (7th Cir. 1983).

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bank statements from June 2013 through January 2015; a statement from the Petitioner confirming the availability of these bank funds to pay the proffered wage; the Petitioner's financial statements for 2013 and 2014, and the first three months of 2015; a statement from the Petitioner's financial officer, [REDACTED] two statements from [REDACTED] the Petitioner's only shareholder; and copies of the Petitioner's Forms 940, Employer's Annual Federal Unemployment (FUTA) Tax Returns, and Forms 941, Employer's Quarterly Federal Tax Return, for 2012 through 2015.

A. Wages Paid to the Beneficiary

The Petitioner currently employs the Beneficiary and has submitted her Forms W-2 for 2013 and 2014. The Beneficiary's Forms W-2 reflect that she earned \$44,907.76 in 2013 and \$44,827.72 in 2014, approximately \$23,500 less than the proffered wage of \$68,350. Accordingly, the Petitioner cannot establish its ability to pay based on the wages it paid the Beneficiary in 2013 and 2014.

Further, subsequent to its May 26, 2016, response to our NOID/RFE, the Petitioner filed Form I-140 petitions for two additional beneficiaries [REDACTED] on June 13, 2016, and [REDACTED] on June 30, 2016), and the record does not demonstrate its ability to also pay the proffered wages in these cases. Where a petitioner has filed Forms I-140 for multiple beneficiaries, it must demonstrate that its job offer to each beneficiary is realistic, and that it has the ability to pay the proffered wage to each. 8 C.F.R. § 204.5(g)(2). *See Great Wall*, at 144-45; *see also Patel v. Johnson*, 2 F. Supp. 3d 108, 124 (D. Mass. 2014) (upholding our denial of a petition where a petitioner did not demonstrate its ability to pay multiple beneficiaries). Therefore, in any future proceedings to establish its ability to pay the proffered wage in this case, the Petitioner should submit evidence establishing the priority dates for these two petitions, the proffered wages to be paid to the beneficiaries, and any actual wages paid them.

B. Tax Returns and Financial Statements

The record contains the Petitioner's Form 1120, U.S. Corporation Income Tax Return, for 2013, which reflects net income of \$2147<sup>2</sup> and negative net current assets of -\$1,041,348 and, therefore, does not establish its ability to pay the proffered wage in that year.

The Petitioner submitted evidence contending that the \$2147 in taxable income reported on the return includes a non-cash depreciation expense of \$276,169 that is more than sufficient to cover the proffered wage. However, as previously stated, USCIS relies on the net income figure reflected on a petitioner's federal income tax return, without consideration of depreciation or other expenses. *River St. Donuts, LLC v. Napolitano*, 558 F.3d 111, 118 (1st Cir. 2009); *Taco Especial v. Napolitano*, 696 F. Supp. 2d 873, 880 (E.D. Mich. 2010), *aff'd*, No. 10-1517 (6th Cir. Nov. 10, 2011). Our reasons for rejecting depreciation expenses in determining a petitioner's net income were noted by the court in *River Street Donuts* as follows:

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<sup>2</sup> We consider the Petitioner's net income to be the figure shown on Line 28 of the Form 1120.

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[t]he AAO recognized that a depreciation deduction is a systematic allocation of the cost of a tangible long-term asset and does not represent a specific cash expenditure during the year claimed. Furthermore, the AAO indicated that the allocation of the depreciation of a long-term asset could be spread out over the years or concentrated into a few depending on the petitioner's choice of accounting and depreciation methods. Nonetheless, the AAO explained that depreciation represents an actual cost of doing business, which could represent either the diminution in value of buildings and equipment or the accumulation of funds necessary to replace perishable equipment and buildings. Accordingly, the AAO stressed that even though amounts deducted for depreciation do not represent current use of cash, neither does it represent amounts available to pay wages.

We find that the AAO has a rational explanation for its policy of not adding depreciation back to net income. Namely, that the amount spent on a long term tangible asset is a "real" expense.

*River St. Donuts*, at 118.

Therefore, we do not find the Petitioner's 2013 Form 1120 to establish that it had sufficient net income or net current assets to pay the proffered wage as of the visa petition's June 28, 2013, priority date.

We further note that the Petitioner has not provided its 2014 Form 1120 for the record, although we requested its submission in the NOID/RFE we issued to the Petitioner following our receipt of its appeal. In its response to the NOID/RFE, the Petitioner did not indicate or document that it was unable to provide its 2014 return. Accordingly, the Petitioner has also not established its ability to pay the proffered wage based on its net income or net current assets in 2014.

While the Petitioner has provided financial statements for both 2013 and 2014, and the first 3 months of 2015, we will not consider them in determining its ability to pay in this matter. The regulation at 8 C.F.R. § 204.5(g)(2) requires that where a petitioner relies on financial statements to demonstrate its ability to pay the proffered wage, those financial statements be audited. Here, the Petitioner's 2013 financial statement for the year ending June 30, 2013, is accompanied by a statement from [REDACTED] to the Petitioner's Board of Directors, which states: [w]e have not audited or reviewed the accompanying financial statements." We also find no statements or letters to indicate that the Petitioner's 2014 financial statement (ending December 31, 2014) and its report for the first three months of 2015 have been audited. As a result, the submitted financial statements will be considered the representations of the Petitioner's management and, therefore, unreliable evidence of its ability to pay the proffered wage. Accordingly, the Petitioner's financial statements do not establish its ability to pay during the relevant period.

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Additionally, we will not consider the Petitioner's bank statements, which cover the period June 2013 through January 2015, as they are not among the three types of evidence that the regulation at 8 C.F.R. § 204.5(g)(2) states may be used to illustrate a petitioner's ability to pay the proffered wage. While we acknowledge that the regulation allows additional material "in appropriate cases," the Petitioner in this matter has not asserted or established that the required documentation is inapplicable to its business or that such documentation provides an inaccurate picture of its financial circumstances. Moreover, we find bank statements to reflect the amount in a petitioner's account on a given date, rather than its ability to pay a proffered wage.

C. Officer Compensation

The record contains a July 26, 2015, statement from [REDACTED] who claims to be the Petitioner's only shareholder and indicates her willingness to forego some portion of the \$150,000 in officer compensation she earned in 2013 to cover the proffered wage.<sup>3</sup> We note that a sole shareholder of a corporation has the authority to allocate the expenses of that corporation for various legitimate business purposes, including the reduction of the corporation's taxable income. Compensation of officers is an expense category explicitly stated on the Form 1120 and a petitioner's compensation of its officers may, therefore, be considered an additional financial resource with which to pay the proffered wage.

However, while the Petitioner's 2013 tax documentation supports [REDACTED] claim to be its only shareholder and reflects that she took \$150,000 in officer compensation that year, the record does not establish that in addition to being willing to reassign part of her 2013 annual compensation to cover the proffered wage, [REDACTED] is also financially able to do so. The record contains insufficient evidence of [REDACTED] personal finances and, therefore, the extent to which she is financially dependent on the \$150,000 in officer compensation she earned in 2013. The Petitioner cannot meet its burden of proof in this matter simply by claiming a fact to be true, without supporting documentary evidence. See *Matter of Soffici*, 22 I&N Dec. 158, 165 (Comm'r 1998) (citing *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg'l Comm'r 1972)); see also *Matter of Chawathe*, 25 I&N Dec. 369 (AAO 2010). The Petitioner must support assertions with relevant, probative, and credible evidence. *Chawathe*, at 369. We also note that, as the record does not contain the Petitioner's tax return for 2014, it does not establish [REDACTED] compensation in that year as being sufficient to cover the difference between the proffered wage and the Beneficiary's 2014 earnings.

The NOID/RFE we issued following our receipt of the Petitioner's appeal, notified it of the need for additional evidence of [REDACTED] financial circumstances and specifically requested copies of its 2014 Form 1120; copies of [REDACTED] Forms 1040, U.S. Individual Income Tax Returns, for 2013 and 2014; and documentation of her monthly expenses, including any mortgage or loan payments. While the Petitioner did not include this evidence in its response to the NOID/RFE,

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<sup>3</sup> The total amount of officer compensation reflected on the Petitioner's 2013 Form 1120 is \$1,550,000. Form 1125-E, Compensation of Officers, reflects that [REDACTED] earned compensation in the amount of \$150,000.

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it did not indicate that it was not available or could not be readily provided. Accordingly, the Petitioner has not established that [REDACTED] compensation may serve as a financial resource with which it may pay the proffered wage.

D. Statement of Financial Officer

In cases where a petitioner employs 100 or more workers, the regulation at 8 C.F.R. § 204.5(g)(2) allows USCIS to accept a statement from a financial officer of that company as proof of its ability to pay the proffered wage.

Here, the record contains the previously noted May 21, 2015, statement from [REDACTED] the Petitioner's financial officer, who asserts that the company employs more than 100 individuals and has the ability to pay the proffered wage of \$68,350. The Petitioner has also submitted a March 28, 2016, letter signed by [REDACTED] in which she states that, on the date the Petitioner filed the labor certification, it employed 122 individuals. In support of these statements, the Petitioner provides copies of its Forms 941 for all quarters of the years 2012 through 2015. Each of the Forms 941 reports a workforce of more than 100 employees. This evidence is not, however, sufficient to establish the Petitioner's ability to pay the proffered wage.

While USCIS may accept a statement from the financial officer of a petitioner that employs 100 or more workers as proof of its ability to pay, we are not required to do so. In the present case, the 100+ employee totals reflected in the Petitioner's Forms 941 for 2013 and 2014, and [REDACTED] claim that her company had a workforce of 122 persons at the time of the labor certification's filing are inconsistent with information provided by the instant labor certification, filed June 28, 2013, and the Form I-140, filed May 22, 2014, both of which were signed by [REDACTED] as being true and correct/accurate under penalty of perjury. On both forms, [REDACTED] stated that the Petitioner employed 85 workers. As no evidence in the record explains this discrepancy, we will not accept the above statements as proof of the Petitioner's ability to pay the proffered wage. Unresolved material inconsistencies may lead us to reevaluate the reliability and sufficiency of the evidence submitted in support of the requested immigration benefit. *Matter of Ho*, 19 I&N Dec. 582, 591-92 (BIA 1988).

E. Totality of Circumstances

The Petitioner in this matter also asserts that, pursuant to *Matter of Sonegawa*, the totality of its circumstances establishes its ability to pay the proffered wage. It points to the gross profit of \$14,018,422 reported in its 2013 tax return; its consistent employment of more than 100 workers; the employment of the Beneficiary in a position she already holds; and the willingness of its only shareholder to use her officer compensation to cover the proffered wage.

We acknowledge that the offered position is that of a clinical laboratory manager and that the Beneficiary will be employed in the position she already holds. However, the record does not, for the reasons already discussed, reliably establish that the Petitioner employs more than 100 workers, that its sole shareholder is financially able to reassign her 2013 officer compensation to cover the

proffered wage, or that such compensation would be available to her for this purpose in 2014. Moreover, the record contains insufficient evidence to establish the Petitioner's growth since its 2001 founding. Instead, the \$15,319,877 in gross profits reflected in a 2011 tax return that the Petitioner submitted for the record exceeds the \$14,018,422 in gross profits reported in its 2013 return, potentially signaling a decline in its business. The Petitioner has not indicated that this decrease in its gross profits was temporary, the result of uncharacteristic business expenditures or losses, and has not submitted evidence to establish that its income subsequently rebounded, e.g., its 2014 tax return, audited financial statement, or annual report. Accordingly, we do not find the Petitioner to have provided sufficient evidence to establish that the totality of its circumstances demonstrates its ability to pay the proffered wage.

### III. CONCLUSION

A petitioner must establish the elements for the approval of a visa petition at the time of filing. *Katigbak*, at 49. For the reasons noted above, the record does not establish the Petitioner's ability to pay the Beneficiary the proffered wage from the June 28, 2013, priority date onward. Therefore, we will affirm the Director's denial of the visa petition.

In visa petition proceedings, it is a petitioner's burden to establish eligibility for the immigration benefit 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 has not been met. Accordingly, the appeal will be dismissed.

**ORDER:** The appeal is dismissed.

Cite as *Matter of SMAM-L- Inc*, ID# 16122 (AAO Aug. 22, 2016)