



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

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

MATTER OF V-T-S- LTD.

DATE: JUNE 21, 2016

MOTION ON ADMINISTRATIVE APPEALS OFFICE DECISION

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

The Petitioner, a software development and consulting company, seeks to permanently employ the Beneficiary in the United States as a network systems engineer under the immigrant classification of skilled worker. *See* Immigration and Nationality Act (the Act) section 203(b)(3)(A)(i), 8 U.S.C. § 1153(b)(3)(A)(i). This employment-based immigrant classification allows a U.S. employer to sponsor a foreign national for lawful permanent resident status to work in a position that requires at least two years of training or experience.

The Director, Nebraska Service Center, denied the petition. The Director found that the Petitioner did not establish its continuing ability to pay the proffered wage of the instant Beneficiary and the proffered wages of all the other beneficiaries of I-140 petitions it had filed. We summarily dismissed the Petitioner's appeal.

The matter is now before us on a motion to reconsider. The Petitioner has submitted a brief from counsel and copies of documentation already in the record. We will deny the motion.

I. CASE HISTORY

The petition, Form I-140, was filed on November 17, 2014. It was accompanied by an ETA Form 9089, Application for Permanent Employment Certification, which was filed with the Department of Labor (DOL) on November 20, 2013, and certified by the DOL (labor certification). The date the labor certification application was filed with the DOL – November 20, 2013 – is the priority date of the instant petition. *See* 8 C.F.R. § 204.5(d). On March 5, 2015, the Director issued a request for evidence, to which the Petitioner responded with additional documentation.

In a decision dated June 25, 2015, the Director denied the petition on the ground that the Petitioner did not establish its continuing ability to pay the proffered wage of the instant Beneficiary, as well as the proffered wages of all the other beneficiaries of I-140 petitions it had filed, from the priority date of the instant petition onward. The Director indicated that the evidence of record, including the documentation submitted in response to the request for evidence (RFE), was incomplete with respect to the Petitioner's other I-140 beneficiaries, which made it impossible for the Director to determine the Petitioner's total wage obligations. Thus, the Petitioner did not meet its burden of proof to establish eligibility for the immigration benefit sought on behalf of the instant Beneficiary.

On July 27, 2015, the Petitioner filed a timely appeal on Form I-290B. In Part 3 of the Form I-290B the Petitioner indicated that a brief and/or additional evidence would be submitted to us within 30 days. Part 4 of the Form I-290B instructed the Petitioner, in pertinent part, as follows:

On a separate sheet of paper, **you must provide a statement** regarding the basis for the appeal or motion. You must include your name and A-number or USCIS ELIS Account Number on the top of each sheet.

Appeal: Provide a statement that specifically identifies an erroneous conclusion of law or fact in the decision being appealed.

Despite these instructions on the Form I-290B the Petitioner did not provide a statement in support of the appeal or identify any erroneous conclusion of law or fact. On August 25, 2015, the Petitioner submitted a letter to us requesting an additional 30 days (or until September 25, 2015) to submit a brief in support of the appeal. Accompanying the letter were copies of previously submitted lists of the Petitioner's approved, pending, denied, rejected, and withdrawn I-140 petitions. No brief or further correspondence was received by September 25, 2015. Therefore, in accordance with the regulation at 8 C.F.R. § 103.3(a)(1)(v) – which provides for the summary dismissal of an appeal “when the party concerned fails to identify specifically any erroneous conclusion of law or statement of fact for the appeal” – we issued a decision on January 20, 2016, summarily dismissing the appeal.

The Petitioner filed a timely motion to reconsider on February 18, 2016. While acknowledging that no brief or additional evidence was submitted in support of its appeal, the Petitioner asserts that we should have exercised our *de novo* review authority to consider the evidence in the record and make our own substantive determination of whether the Petitioner has established its ability to pay the proffered wages of the instant Beneficiary and its other I-140 beneficiaries. According to the Petitioner, the evidence of record does establish its ability to pay all of its I-140 beneficiaries.

II. LAW AND ANALYSIS

The requirements for a motion to reconsider are set forth at 8 C.F.R. § 103.5(a)(3):

A motion to reconsider must state the reasons for reconsideration and be supported by any pertinent precedent decisions to establish that the decision was based on an incorrect application of law or Service policy. A motion to reconsider a decision on an application or petition must, when filed, also establish that the decision was incorrect based on the evidence of record at the time of the initial decision.

A. Summary Dismissal of Appeal

The Petitioner contends that our summary dismissal of the appeal was an incorrect application of law and policy because we neglected to exercise our *de novo* review authority. In support of this contention the Petitioner cites two sections in Chapter 3 (**Appeals**) of the AAO Practice Manual.

The Petitioner cites section 3.4 (**De Novo Standard of Review**) which states that “[t]he AAO exercises *de novo* review of all issues of fact, law, policy, and discretion. This means that the AAO looks at the record anew and is not required to defer to findings made in the initial decision.” The Petitioner also cites section 3.8 (**Supplemental Briefs and Evidence**) which states that “[a]ppellants may, but are not required to, submit a supplemental brief or additional evidence. If the appellant elects not to file a brief, the appeal must otherwise specifically identify any erroneous conclusion of law or fact. An appellant may do so through a statement accompanying Form I-290B.”

While no brief was submitted in support of the appeal prior to our summary dismissal, the Petitioner asserts that its letter requesting additional time to file a brief, dated August 25, 2015, identified the Director’s finding that the Petitioner did not establish its ability to pay the proffered wages of its multiple I-140 beneficiaries as an “erroneous statement of fact” and “the basis for the Appeal.” The Petitioner also pointed to the resubmitted lists of its approved, pending, denied, and withdrawn petitions as supporting evidence. According to the Petitioner, therefore, we should have reviewed the record on appeal and made a *de novo* determination regarding the Petitioner’s ability to pay the proffered wages of the instant Beneficiary and all its other I-140 beneficiaries.

We do not agree with the Petitioner that our summary dismissal of the appeal was improper. The Petitioner did not provide a statement on a separate sheet of paper identifying an erroneous conclusion of law or fact in the Director’s decision. The Petitioner did not submit a brief and/or additional evidence after the appeal was filed. Contrary to the Petitioner’s claim, its letter of August 25, 2015, did not specifically identify an erroneous statement of fact as the basis for the appeal. Rather, the letter observed that the Director’s denial was based on his determination that the Petitioner had not established its ability to pay the proffered wages of all its I-140 beneficiaries and requested additional time to gather documentation. The letter did not identify any erroneous finding of law or fact in the decision. Nor did the lists of approved, pending, denied, and withdrawn petitions accompanying the Petitioner’s letter constitute additional evidence because all of that documentation was already in the record.

While we do have *de novo* review authority on appeal, we are not required to issue a comprehensive new decision if the Director’s decision is fundamentally sound and the Petitioner has submitted no statement of the grounds for its appeal, no legal brief, and no additional evidence for us to review. The Petitioner has not complied with the requirements for an appeal set forth in section 3.8 of the AAO Practice Manual. In lieu of a supplemental brief or additional evidence, the Petitioner must at least “specifically identify any erroneous conclusion of law or fact.” The Petitioner did not do so in this case, either in a statement accompanying the appeal or in any subsequent submission prior to our summary dismissal.

In considering the appeal, we did in fact review the entire record before issuing our decision. In our view, the initial decision by the Director was fundamentally sound. Since the Petitioner added nothing to the existing record on appeal, our summary dismissal of the appeal was appropriate.

B. Petitioner's Ability to Pay the Proffered Wage

Even if the Petitioner had identified an error of law or fact in the Director's decision, the evidence of record does not establish the Petitioner's continuing ability to pay the proffered wages of the instant Beneficiary and its other I-140 beneficiaries from the priority date onward. The evidentiary requirements for the Petitioner to establish its ability to pay the proffered wage are inscribed in the regulation at 8 C.F.R. § 204.5(g)(2), which provides as follows:

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. In a case where the prospective United States employer employs 100 or more workers, the director may accept a statement from a financial officer of the organization which establishes the prospective employer's ability to pay the proffered wage. In appropriate cases, additional evidence, such as profit/loss statements, bank account records, or personnel records may be submitted by the petitioner or requested by the Service.

Thus, the petitioner must demonstrate its continuing ability to pay the proffered wage beginning on the priority date. In this case, the priority date is November 20, 2013.

The petitioner must establish that its job offer to the beneficiary is a realistic one. Because the filing of an ETA Form 9089 labor certification application establishes a priority date for any immigrant petition later based on the certified ETA Form 9089, the petitioner must establish that the job offer was realistic as of the priority date and that the offer remained realistic for each year thereafter, until the beneficiary obtains lawful permanent residence. The 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 its evaluation of whether a job offer is realistic, USCIS requires the petitioner to demonstrate financial resources sufficient to pay the beneficiary's proffered wages, although the totality of the circumstances affecting the petitioning business will also be considered if the evidence warrants such consideration. *See Matter of Sonegawa*, 12 I&N Dec. 612 (Reg'l Comm'r 1967).

Aside from the instant Beneficiary, the records of U.S. Citizenship and Immigration Services (USCIS) indicate that the Petitioner has filed numerous other Forms I-140, Immigrant Petitions for Alien Workers. 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 combined proffered wages of the instant Beneficiary and the beneficiaries of all other petitions that remained pending after the instant petition's priority date of November 20, 2013. 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 their petitions

were denied, withdrawn, or revoked. *See 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 the petitioner's ability to pay the proffered wage, USCIS first examines whether the beneficiary was employed and paid by the petitioner during the period following the priority date. If the petitioner establishes by documentary evidence that it employed the beneficiary at a salary equal to or greater than the proffered wage, the evidence is considered *prima facie* proof of the petitioner's ability to pay the proffered wage.

In this case, the record shows that the Beneficiary has been employed by the Petitioner since before the priority date. The proffered wage of the job offered, as stated in Part G of the ETA Form 9089, is \$91,853 per year. The Beneficiary's Form W-2 for 2013 shows that he received "wages, tips, other compensation" of \$81,400, which was \$10,453 below the proffered wage. The Beneficiary's Form W-2 for 2014 shows that he received "wages, tips, other compensation" of \$55,124.98, which was \$36,728.02 below the proffered wage. In the first quarter of 2015, according to a chart submitted by the Petitioner, the Beneficiary received no wages at all. Thus, the Petitioner has not established its ability to pay the proffered wage from the priority date (November 20, 2013) onward based on the wages actually paid to the Beneficiary since then.

If the petitioner does not establish that it has paid the beneficiary an amount at least equal to the proffered wage from the priority date onward, USCIS will examine the net income and net current assets figures entered on the petitioner's federal income tax return(s). If either of these figures equals or exceeds the proffered wage(s) or the difference between the proffered wage(s) and the amount(s) paid to the beneficiary (or beneficiaries) in a given year, the petitioner would be considered able to pay the proffered wage(s) during that year. There is ample judicial precedent for determining a petitioner's ability to pay the proffered wage based on its federal income tax returns. *See e.g. Elatos Restaurant Corp. v. Sava*, 632 F.Supp. 1049, 1054 (S.D.N.Y. 1986) (citing *Togatapu Woodcraft Hawaii, Ltd. v. Feldman*, 736 F.2d 1305 (9th Cir. 1984)).

The record includes copies of the Petitioner's Forms 1120, U.S. Corporation Income Tax Returns, for 2013 and 2014. USCIS considers net income to be the figure shown on Line 28 of the Form 1120. Net current assets (or liabilities) are the difference between the Petitioner's current assets, entered on lines 1-6 of Schedule L, and its current liabilities, entered on lines 16-18 of Schedule L. As shown in the tax returns, the Petitioner's figures were as follows for 2013 and 2014:

<u>Year</u>	<u>Net Income</u>	<u>Net Current Assets</u>
2013	\$224,739	-\$1,628,270
2014	\$172,589	-\$1,689,226

We will determine the Petitioner's ability to pay the proffered wages to its I-140 beneficiaries in each of these years based on the higher (and positive) figures of net income.

The Petitioner's net income exceeded the wage gap between the instant Beneficiary's proffered wage and the wages actually paid to him in both 2013 and 2014.

As for the Petitioner's other I-140 beneficiaries, the record includes several charts with supporting documentation that were originally submitted with the Petitioner's response to the Director's RFE on May 28, 2015. In that RFE the Director specifically requested that the Petitioner submit:

- A list of all Form I-140 receipt numbers that you have filed, including the following information:
 - the name of each beneficiary;
 - the offered wage of each beneficiary;
 - the priority date of each petition;
 - the status of each petition (pending, approved, denied, withdrawn, on appeal, etc.) and the date of such status; and
 - whether the beneficiary of each petition obtained lawful permanent residence and when.
- Documentary evidence which shows the petitioner has paid the offered wage to each beneficiary as of each petition's priority date (when applicable)

The first chart (Exhibit P of the RFE response) lists 66 beneficiaries of I-140 petitions whom the Petitioner wishes to continue sponsoring. According to the chart, the total wages paid to these beneficiaries exceeded their total proffered wages by \$712,195.17 in 2013, by \$871,513.56 in 2014, and by \$250,717.88 in the first quarter of 2015. Corroborating pay records were also submitted.

The second chart (Exhibit Q of the RFE Response) lists 85 I-140 petitions that were withdrawn – two in 2010, 74 on December 11, 2014, one on December 16, 2014, eight on May 18, 2015, and one on an unstated date. Accompanying letters from the Petitioner to USCIS explained that the petitions had been approved, but that the Petitioner now requested that the approvals be revoked because the beneficiaries were no longer employed by the Petitioner or the Petitioner no longer wished to sponsor them. The chart lists the proffered wage for each beneficiary, but not the wages actually paid to each beneficiary in 2013, 2014, and 2015. No pay records were submitted.

The third chart (Exhibit R of the RFE response) lists 113 beneficiaries of I-140 petitions who have adjusted status to legal permanent resident (LPR). The chart lists the proffered wage for each beneficiary, but not the wages actually paid to each beneficiary, if any, in 2013, 2014, and 2015. No pay records were submitted. Nor does the chart list the dates the beneficiaries obtained LPR status.

The fourth chart (Exhibit S of the RFE response) lists 17 I-140 petitions that were denied (16) or rejected (one), and the names of the beneficiaries. Corroborating documentation shows that two of the denials were issued after the priority date of the instant petition – on January 7, 2014, and on October 16, 2014. The chart lists the proffered wage for each beneficiary, but not the wages actually paid to them, if any, in 2013 and 2014. No pay records were submitted.

As gleaned from the last three charts, the Petitioner has identified 198 beneficiaries of I-140 petitions (83 in Exhibit Q, 113 in Exhibit R, and 2 in Exhibit S) for whom it has not provided information or corroborating evidence as to:

- whether and when they were employed by the Petitioner since November 20, 2013 (the priority date of the instant petition);
- the wages they were paid from November 20, 2013, onward; or
- the dates when the Petitioner's wage obligations ceased – such as when a beneficiary acquired LPR status, or when a petition was withdrawn or an approval revoked because the Petitioner no longer sponsored a beneficiary or a beneficiary ceased to work for the Petitioner.

In the absence of all this information and corroborating documentation – which was specifically requested in the Director's RFE – we cannot determine the total dollar amounts of the Petitioner's proffered wage obligations in the years 2013, 2014, and 2015, and whether the Petitioner paid all of the proffered wages it was obligated to pay on its I-140 petitions from the priority date of the instant petition onward. The regulation at 8 C.F.R. § 103.2(b)(14) provides that “[f]ailure to submit requested evidence that precludes a material line of inquiry shall be grounds for denying the benefit request.” In his decision the Director pointed out the evidentiary deficiencies discussed above. The Petitioner has not remedied these evidentiary deficiencies on appeal or in the current motion.

In its motion brief the Petitioner contends that its ability to pay the proffered wages of all its I-140 beneficiaries was enhanced by the withdrawal of the 85 I-140 petitions listed in Exhibit Q. According to the Petitioner, the subject petitions had all been approved and its requests to have the approvals revoked made the effective dates of withdrawal retroactive to the dates of approval. While the regulation at 8 C.F.R. § 205.2(a)(3)(iii)(C) does provide that the approval of an employment-based immigrant visa petition is automatically revoked as of the approval date upon the filing of a written notice of withdrawal by the petitioner, the regulation does not alter the fact that up until the dates the instant Petitioner filed the pertinent withdrawal notices for 83 petitions in 2014 and 2015¹ the Petitioner had to be able to establish its ability to pay the proffered wages to those I-140 beneficiaries. Accordingly, we do not agree with the Petitioner's claim that its withdrawal of 83 approved I-140 petitions in December 2014 and May 2015 had an *ex post facto* effect of eliminating its ability to pay obligations. We find that the Petitioner had to show its continuing ability to pay the proffered wages due under the 83 petitions until the dates that USCIS issued its notices acknowledging the withdrawals and automatic revocations.

Even if the Petitioner's claim with regard to the 83 withdrawals had support, the Petitioner's motion does not address the evidentiary shortcomings with regard to the 115 other I-140 petitions listed in Exhibits R and S (involving 113 beneficiaries who acquired LPR status and two denials), as previously discussed in this decision. We note that the record has not been supplemented by any additional documentary evidence since the Director issued his decision. We find no reason,

¹ USCIS records show that two other petitions, not approved and still pending, were withdrawn in 2010.

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therefore, to overturn the Director's determination that the Petitioner has not established its continuing ability to pay the proffered wages of the instant Beneficiary and all of its other I-140 beneficiaries from the priority date of this petition, November 20, 2013, onward.

III. CONCLUSION

We conclude that the requirements for a motion to reconsider set forth in 8 C.F.R. § 103.5(a)(3) have not been met. In particular, the motion does not establish that our summary dismissal of the appeal, or the Director's initial denial, were incorrect based on the evidence of record furnished by the Petitioner.

In visa petition proceedings, it is the Petitioner's burden to establish eligibility for the immigration benefit sought. See section 291 of the Act, 8 U.S.C. § 1261; *Matter of Otiende*, 26 I&N Dec. 127, 128 (BIA 2013). The Petitioner has not met that burden.

ORDER: The motion to reconsider is denied.

Cite as *Matter of V-T-S- Ltd.*, ID# 17674 (AAO June 21, 2016)