



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

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

MATTER OF S-T- CORP.

DATE: MAY 16, 2016

APPEAL OF TEXAS SERVICE CENTER DECISION

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

The Petitioner, an information technology services company, seeks to permanently employ the Beneficiary as a senior software developer. 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 found that the Petitioner did not establish its continuing ability to pay the proffered wage of the job offered from the priority date of the petition onward.

The matter is now before us on appeal. The Petitioner has submitted additional documentation and asserts that these materials establish its continuing ability to pay the proffered wage from the priority date up to the present. Upon *de novo* review, we will dismiss the appeal.

I. PROCEDURAL HISTORY

The instant petition, Form I-140, was filed on May 4, 2015. As required by statute, the petition was accompanied by an ETA Form 9089, Application for Permanent Employment Certification, which was filed with the U.S. Department of Labor (DOL) on August 6, 2014, and certified by the DOL (labor certification) on January 9, 2015. In section G of the labor certification the Petitioner stated that the proffered wage for the job offered is \$103,315 per year. In section K of the labor certification the Petitioner stated that it had employed the Beneficiary as a senior software developer since March 12, 2012.

As evidence of the Petitioner's ability to pay the proffered wage the Petitioner submitted copies of the following documentation with the Form I-140 petition and in response to the Director's request for evidence (RFE):

- The Beneficiary's Form W-2, Wage and Tax Statement, for 2013 and 2014;
- A payroll summary of the Beneficiary's pay from January to July 2015;
- The Petitioner's Form 1120S, U.S. Income Tax Return for an S Corporation, for 2014;

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- A letter from the Petitioner's vice president and 35% shareholder, [REDACTED] notarized on July 9, 2015, stating that he would forgo a portion of his officer's compensation in the amount of \$40,000 to ensure the Beneficiary is paid the proffered wage.
- The 2014 Form W-2 of [REDACTED] showing that he received "wages, tips, other compensation" from the Petitioner totaling \$60,000 that year.

On July 23, 2015, the Director denied the petition on the ground that the Petitioner did not establish its ability to pay the Beneficiary the full proffered wage in 2014. The Director focused exclusively on the documentation of record for 2014, including the Beneficiary's Form W-2 and the Petitioner's Form 1120S. These documents showed that the Beneficiary was paid \$64,000 in 2014 – \$38,315 below the proffered wage of \$102,315 – and that neither the Petitioner's net income in 2014 of \$23,011 nor its net current assets in 2014 of \$28,799 was enough to cover the shortfall between the proffered wage and the wages actually paid to the Beneficiary. Therefore, the Director found that the Petitioner did not establish its ability to pay the proffered wage in 2014, and denied the petition on that basis.

The Petitioner filed an appeal on August 21, 2015, accompanied by a brief from counsel. The Petitioner claims that the Director's decision was erroneous because he did not consider all of the evidence, including the letter from the Petitioner's vice president stating his willingness to forgo some of his officer's compensation, and also did not consider the totality of the Petitioner's circumstances, in accord with *Matter of Sonogawa*, 12 I&N Dec. 612 (Reg'l Comm'r 1967), in determining the Petitioner's ability to pay the proffered wage.

On January 21, 2016, we issued an RFE requesting additional evidence of the Petitioner's ability to pay the proffered wage in 2015 – specifically, copies of the Beneficiary's Form W-2 and the Petitioner's annual report, or audited financial statement, or federal income tax return. We also noted that the records of U.S. Citizenship and Immigration Services (USCIS) showed that two other I-140 petitions had been filed by the Petitioner and approved for other beneficiaries in 2013 and 2015. We requested pertinent information and documentation concerning those petitions including the offered wages, wages paid, dates of employment, and current immigration status of the respective beneficiaries.

On April 19, 2016, the Petitioner responded to the RFE with a letter from counsel and additional documentation, including copies of the Beneficiary's Form W-2 and the Petitioner's Form 1120S for 2015. With regard to the beneficiaries of its other two I-140 petitions, the Petitioner indicates that the first, whose petition was approved on January 9, 2013, ceased to work for the Petitioner in 2013, while the second, whose petition was approved on September 23, 2015, has been employed by the Petitioner since June 2013 and has a priority date of December 15, 2014. The Petitioner provided a copy of the second beneficiary's Form W-2 for 2014, but not for 2015. The Petitioner asserts that the preponderance of the evidence establishes its ability to pay the proffered wage, and requests that we approve the petition.

II. LAW AND ANALYSIS

The regulation at 8 C.F.R. § 204.5(g)(2) provides, in pertinent part, as follows:

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. . . . 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 the continuing ability to pay the proffered wage beginning on the priority date, which is the date the labor certification application was accepted for processing by any office within the employment system of the DOL. *See* 8 C.F.R. § 204.5(d). In this case, the priority date is August 6, 2014.

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 addition to the instant Beneficiary, the Petitioner must establish its ability to pay the proffered wages of all its other beneficiaries of employment-based immigrant (Form I-140) petitions from the priority date of the instant petition until each beneficiary obtains lawful permanent residence. *Id.* In evaluating 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*.

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 \$102,315 per year. The Beneficiary's Form W-2 for 2014 shows that he received "wages, tips, other compensation" of \$64,000, which was \$38,315 less than the proffered wage. The Beneficiary's Form W-2 for 2015 shows that he received "wages, tips, other compensation" of

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\$55,750, which was \$46,565 less than the proffered wage. Thus, the Petitioner has not established its ability to pay the proffered wage from the priority date (August 6, 2014) onward based on the wages actually paid to the Beneficiary since then.

Furthermore, the record indicates that the Petitioner's other I-140 beneficiary was also paid less than his (or her) proffered wage in 2014. While the Petitioner indicates that the proffered wage of that beneficiary was \$70,741, the W-2 in the record shows that the beneficiary was paid only \$58,995.69 in 2014, which was \$11,745.31 below the proffered wage.

Thus, the total shortfall between the proffered wages and the wages actually paid to the instant Beneficiary and the other beneficiary in 2014 was \$50,060.31. For 2015 no such figure can be calculated because the Petitioner has not provided the other beneficiary's Form W-2 (or alternative evidence of the individual's pay) for that year.

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 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 federal income tax returns, Forms 1120S, for 2014 and 2015. The figures for ordinary business income (or loss) appear on line 21 of page 1,¹ while 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 in 2014 and 2015:

<u>Year</u>	<u>Net Income</u>	<u>Net Current Assets</u>
2014	\$23,011	\$ 28,799
2015	\$76,174	\$104,973

We will determine the Petitioner's ability to pay the proffered wage in each of these years based on the higher figures of net current assets.

¹ If an S corporation's income is exclusively from a trade or business, USCIS considers its net income to be the figure for ordinary income on page 1, line 21. However, if there are relevant entries for additional income, credits, deductions or other adjustments from sources other than a trade or business, they are reported on Schedule K of the Form 1120S, and the corporation's net income or loss will be found in line 18 (income/loss reconciliation) of Schedule K. In this case, there are no relevant entries in Schedule K of either the 2014 tax return or the 2015 tax return, so the income figure on page 1, line 21, is the same as that on line 18 of Schedule K.

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In 2015 the Petitioner's net current assets of \$104,973 exceeded by \$58,408 the difference between the instant Beneficiary's proffered wage and wages he actually received. Even taking the other I-140 beneficiary into consideration, based on the documentation of record we are persuaded by the preponderance of the evidence that the Petitioner had the ability to pay the full proffered wages of the instant Beneficiary and its other I-140 beneficiary in 2015.

In 2014, however, adding the Petitioner's net current assets of \$28,799 to the \$64,000 of wages paid to the Beneficiary yields a total of \$92,799, which is \$9,506 short of the Beneficiary's proffered wage of \$102,315. In addition, as previously discussed, the other beneficiary was also paid less than his (or her) proffered wage by \$11,745.31. Thus, the Petitioner paid its two I-140 employees a combined \$21,251.31 below their proffered wages in 2014.

The Petitioner's vice president, [REDACTED] states in the aforementioned notarized letter of July 9, 2015, that he will forgo a portion of his officer's compensation in the amount of \$40,000 to ensure the payment of the Beneficiary's full proffered wage. [REDACTED] restates at the end of the letter that the \$40,000 will come from officer compensation, not his salary. The Petitioner's 2014 Form 1120S lists a figure of \$60,000 for "[c]ompensation of officers" on page 1, line 7, and in Form 1125-E identifies [REDACTED] as the recipient of that entire amount. [REDACTED] 2014 Form W-2 records "wages, tips, other compensation" of \$60,000 from the Petitioner. These documents do not indicate that [REDACTED] received a salary that was over and above his officer compensation. Rather, they indicate that his officer compensation was recorded as "wages, tips, other compensation" on his Form W-2. In other words, [REDACTED] officer compensation and his salary were one and the same figure – \$60,000.

Considering the amount of [REDACTED] income in 2014 – \$60,000 – we are not persuaded that he could have allocated \$21,251.31, over 35% of the total, to pay his two I-140 employees the difference between their proffered wages and the wages they actually received in 2014. Even less persuasive is [REDACTED] statement that he was prepared to forgo \$40,000 of officer compensation – nearly 67% of his income in 2014 – to pay his two I-140 employees. We find, therefore, that [REDACTED] letter of July 9, 2015 does not establish the Petitioner's ability to pay the proffered wages of the instant Beneficiary and the other I-140 beneficiary in 2014 based on his officer compensation that year.

USCIS may consider the totality of the Petitioner's circumstances, including the overall magnitude of its business activities, in determining the Petitioner's ability to pay the proffered wage. See *Matter of Sonogawa*, 12 I&N Dec. 612. USCIS may, at its discretion, consider evidence relevant to the petitioner's financial ability that falls outside of its net income and net current assets. USCIS may consider such factors as the number of years the petitioner has been doing business, the established historical growth of the petitioner's business, the petitioner's reputation within its industry, the overall number of employees, whether the beneficiary is replacing a former employee or an outsourced service, the amount of compensation paid to officers, the occurrence of any uncharacteristic business expenditures or losses, and any other evidence that USCIS deems relevant to the petitioner's ability to pay the proffered wage.

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In this case, the Petitioner states that it has been in business since 1993. The online business search function of the Office of the Georgia Secretary of State, Georgia Corporations Division, confirms that [REDACTED] was initially registered on June 11, 1992, with its principal office at [REDACTED] but indicates that the corporation was administratively dissolved on July 9, 2005. See <https://ecorp.sos.ga.gov/BusinessSearch/>. An apparently reconstituted [REDACTED] was registered on February 14, 2012, with its principal office address at [REDACTED] Georgia. *Id.* Thus, it does not appear that the Petitioner has been in business continuously since 1992-93. On the labor certification application and the instant Form I-140, filed in 2014 and 2015, the Petitioner stated that it had seven employees. On its federal income tax returns for 2014 and 2015 the Petitioner recorded gross receipts of \$579,607 and \$543,549, respectively. Thus, the size and volume of the business are modest, and there is no evidence in the record of a historic pattern of growth. There is no evidence of the Petitioner's financial condition prior to 2014 aside from an entry on Schedule L of its 2014 Form 1120S which listed net current assets (cash) of \$5,788 at the end of 2013. Based on the evidence of record we determine that the Petitioner has not established that the totality of its circumstances, as in *Sonegawa*, demonstrates its ability to pay the \$21,251.31 shortfall between the proffered wages of the instant Beneficiary its other I-140 beneficiary and the wages actually paid to those two individuals in 2014.

Therefore, the Petitioner has not established its continuing ability to pay the full proffered wages of the instant Beneficiary and its other I-140 beneficiary from the priority date of the instant petition (August 6, 2014) up to the present.

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. § 1361; *Matter of Otiende*, 26 I&N Dec. 127, 128 (BIA 2013). The Petitioner has not met that burden.

ORDER: The appeal is dismissed.

Cite as *Matter of S-T- Corp.*, ID# 15763 (AAO May 16, 2016)