



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

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

MATTER OF A-T-, INC.

DATE: MAY 23, 2016

APPEAL OF TEXAS SERVICE CENTER DECISION

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

The Petitioner, an information technology business, seeks to employ the Beneficiary as a .net software engineer. 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 concluded that the Petitioner had not established its ability to pay the wages proffered to this Beneficiary, and to the beneficiaries of the other Form I-140 petitions it had filed, as of the priority date.

The matter is now before us on appeal. The Petitioner asserts that it had withdrawn most of the petitions cited by the Director. The Petitioner states that it has established its ability to pay the wages proffered to the beneficiaries of the petitions that remain pending. Upon *de novo* review, we will dismiss the appeal.

I. LAW AND ANALYSIS

As required by statute, the petition is accompanied by an approved ETA Form 9089, Application for Permanent Employment Certification (labor certification), certified by the U.S. Department of Labor (DOL).¹ Here, the labor certification was accepted on November 13, 2011.² The proffered wage as stated on the labor certification is \$83,000 per year.

The Petitioner must demonstrate the continuing ability to pay the proffered wage of \$83,000 beginning on the priority date of November 13, 2011. 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

¹ *See* Section 212(a)(5)(D) of the Act, 8 U.S.C. § 1182(a)(5)(D); *see also* 8 C.F.R. § 204.5(a)(2).

² The priority date is the date the DOL accepted the labor certification for processing. *See* 8 C.F.R. § 204.5(d).

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.

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 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 be considered if the evidence warrants such consideration. See *Matter of Sonogawa*, 12 I&N Dec. 612 (Reg'l Comm'r 1967). Where a petitioner has filed multiple petitions, we will also consider the petitioner's ability to pay the combined wages of each beneficiary. See *Patel v. Johnson*, 2 F.Supp.3d 108 (D. Mass. 2014); see also *Great Wall*, 144-145 (Acting Reg'l Comm'r 1977).

The evidence in the record of proceeding shows that the Petitioner is structured as an S corporation. On the petition, the Petitioner claimed to have been established in 1999 and to currently employ 22 workers.

In determining a petitioner's ability to pay the proffered wage during a given period, USCIS will first examine whether the petitioner employed and paid the beneficiary during that period. 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 will be considered *prima facie* proof of the petitioner's ability to pay the proffered wage. The Petitioner provided IRS Forms W-2 that reflect that it paid the Beneficiary as follows:

	Wages Paid
2011	\$49,993.33
2012	\$75,304.33
2013	\$76,105.80
2014	\$68,505.33
2015	\$72,928.13

The Petitioner has not established that it employed and paid the Beneficiary the full proffered wage, but it did establish that it paid partial wages since 2011. As the proffered wage is \$83,000 per year, the Petitioner must establish that it can pay the difference between the proffered wage and the wages actually paid to the Beneficiary, that is:

2011	\$33,006.67
2012	\$7695.67
2013	\$6894.20
2014	\$14,494.67

2015	\$10,071.87
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If a petitioner does not establish that it employed and paid the beneficiary an amount at least equal to the proffered wage during that period, USCIS will next examine the net income figure reflected on the petitioner's federal income tax return. The Petitioner's tax returns³ reflect the following net income:

	Net Income
2011	\$100,451
2012	\$66,162
2013	\$9907
2014	\$18,920
2015	Not submitted

As an alternate means of determining a petitioner's ability to pay the proffered wage, USCIS may review a petitioner's net current assets. Net current assets are the difference between the petitioner's current assets and current liabilities.⁴ A corporation's year-end current assets are shown on Schedule L, lines 1 through 6. Its year-end current liabilities are shown on lines 16 through 18. If the total of a corporation's end-of-year net current assets and the wages paid to the beneficiary (if any) are equal to or greater than the proffered wage, the petitioner is expected to be able to pay the proffered wage using those net current assets. The Petitioner's tax returns demonstrate the following end-of-year net current assets:

	Net Current Assets
2011	\$217,741
2012	\$285,175
2013	\$196,666
2014	\$149,854
2015	Not submitted

³ Forms 1120S, U.S. Income Tax Return for an S Corporation. Where an S corporation's income is exclusively from a trade or business, USCIS considers net income to be the figure for ordinary income, shown on line 21 of page one of the petitioner's IRS Form 1120S. However, where an S corporation has income, credits, deductions or other adjustments from sources other than a trade or business, they are reported on Schedule K. If the Schedule K has relevant entries for additional income, credits, deductions or other adjustments, net income is found on line 18 of Schedule K. See Instructions for Form 1120S, at <http://www.irs.gov/pub/irs-pdf/i1120s.pdf> (accessed May 12, 2016) (indicating that Schedule K is a summary schedule of all shareholders' shares of the corporation's income, deductions, credits, etc.). Because the Petitioner had additional income, credits, deductions, or other adjustments shown on the Schedule K of its 2014 tax return, the Petitioner's net income is found on Schedule K of its tax return for that year.

⁴According to *Barron's Dictionary of Accounting Terms* 117 (3rd ed. 2000), "current assets" consist of items having (in most cases) a life of one year or less, such as cash, marketable securities, inventory and prepaid expenses. "Current liabilities" are obligations payable (in most cases) within one year, such accounts payable, short-term notes payable, and accrued expenses (such as taxes and salaries). *Id.* at 118.

While the Petitioner's net income and net current assets are greater than the difference between the wage offered and the wages actually paid to this Beneficiary, the Petitioner has not paid the Beneficiary the full proffered wage in all relevant years. USCIS records indicate that the Petitioner has filed Form I-140 petitions on behalf of other beneficiaries in addition to the current Beneficiary. The Petitioner would need to demonstrate its ability to pay the proffered wage for each of these I-140 beneficiaries from the priority date of the current petition until each beneficiary obtains permanent residence. See 8 C.F.R. § 204.5(g)(2). In determining whether a petitioner has established its ability to pay the proffered wage to multiple beneficiaries, USCIS will add together the proffered wages for each beneficiary for each year starting from the priority date of the instant petition.⁵ See *Patel v. Johnson*, 2 F.Supp.3d at 108.

In response to the Director's December 3, 2014, notice of intent to deny (NOID), the Petitioner provided partial information regarding its other Form I-140 immigrant petitions. The Director determined that the Petitioner did not establish its ability to pay the wages proffered to its other beneficiaries and denied the current petition. On appeal, the Petitioner states that it had withdrawn 14 of its other petitions and that only five of its petitions remained pending.

Although the Petitioner states on appeal that only five of the petitions remained pending, including the current petition, the record of proceedings lacks evidence of wages the Petitioner owed and paid to all of its beneficiaries through the date each petition was withdrawn. Noting that the record reflects that the additional petitions were withdrawn in 2014 or 2015, on March 22, 2016, we issued a notice of intent to dismiss (NOID) requesting updated wage information for all beneficiaries from the November 13, 2011, priority date until each petition was withdrawn.

In response to our NOID, the Petitioner states that the beneficiaries of 11 of these withdrawn petitions had left employment with the Petitioner prior to the 2011 priority date of the current petition. However, this assertion is not supported by any corroborating evidence. Going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. *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)). The Petitioner submitted evidence that one of the petitions was denied on June 30, 2008, but did not submit any evidence to suggest that any of the other petitions was withdrawn or denied earlier than the 2014 and 2015 dates reflected in the record. Therefore, the Petitioner still bears the burden to establish its ability to pay the wages offered to those beneficiaries from the priority date of the current petition until each of those petitions was denied or withdrawn.

The Petitioner states that "three of the priority dates are in 2011 and therefore we should really be prorating the proffered wages for 2011 with regard to ability to pay." We will not, however,

⁵ However, the wages offered to the other beneficiaries are not considered after the dates the beneficiaries obtained lawful permanent residence, or after the dates their Form I-140 petitions have been withdrawn, revoked, or denied without a pending appeal. In addition, USCIS will not consider a petitioner's ability to pay additional beneficiaries for each year that the beneficiary of the instant petition was paid the full proffered wage.

consider 12 months of income towards an ability to pay a lesser period of the proffered wage any more than we would consider 24 months of income towards paying the annual proffered wage. While USCIS will prorate the proffered wage if the record contains evidence of net income or payment of a beneficiary's wages specifically covering the portion of the year that occurred after the priority date (and only that period), such as monthly income statements or pay stubs, the Petitioner has not submitted such evidence.

In our NOID, we specifically alerted the Petitioner that without the requested evidence we would not be able to substantively adjudicate the appeal. The failure to submit requested evidence that precludes a material line of inquiry shall be grounds for denying the petition. *See* 8 C.F.R. § 103.2(b)(14). Without the requested evidence we are unable to calculate the total wages offered to the beneficiaries of its petitions, nor are we able to determine wages actually paid to those beneficiaries for the relevant period of time.

USCIS may also consider the overall magnitude of a petitioner's business activities in its determination of the petitioner's ability to pay the proffered wage. *See Matter of Sonogawa*, 12 I&N Dec. 612 (Reg'l Comm'r 1967). 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 overall number of employees, the occurrence of any uncharacteristic business expenditures or losses, the petitioner's reputation within its industry, whether the beneficiary is replacing a former employee or an outsourced service, or any other evidence that USCIS deems relevant to the petitioner's ability to pay the proffered wage. Here, the Petitioner's tax returns reflect that it has been in business since 1999. The Petitioner's net income, net current assets and total wages and salaries paid have steadily declined since 2011. The Petitioner has not demonstrated its historical growth or the occurrence of any uncharacteristic business expenses or losses. The Petitioner did not submit evidence of the wages offered and paid to all of its beneficiaries, which prevents us from making a full analysis. Considering the totality of the circumstances, the Petitioner has not demonstrated its ability to pay all of the proffered wages beginning on the priority date and continuing to the present. Therefore, from the date the labor certification was accepted for processing by the DOL, the Petitioner has not established that it had the continuing ability to pay the wages proffered to the beneficiaries of its petitions.

II. CONCLUSION

In visa petition proceedings, it is the petitioner's burden to establish eligibility for the immigration benefit sought. Section 291 of the Act, 8 U.S.C. § 1361; *See Matter of Brantigan*, 11 I&N Dec. 493 (BIA 1966); *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 A-T-, Inc.*, ID# 16379 (AAO May 23, 2016)