



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

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

MATTER OF F-&F-, PLLC

DATE: MAY 23, 2016

MOTION ON ADMINISTRATIVE APPEALS OFFICE DECISION

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

The Petitioner, a law firm, seeks to employ the Beneficiary as an immigration law clerk. 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 Petitioner had not established its ability to pay the proffered wage from the priority date onwards. On November 6, 2015, we affirmed the Director's decision and dismissed the appeal.

The matter is now before us on a motion to reconsider. The Petitioner claims that it has established it had the ability to pay the proffered wage either through payment of wages or through the totality of the circumstances for its business. We will deny the motion to reconsider.

I. LAW AND ANALYSIS

The regulation at 8 C.F.R. § 103.5(a) provides, that "[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."

The instant 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). The priority date of the petition, which is the date the DOL accepted the labor certification for processing, is September 26, 2013. *See* 8 C.F.R. § 204.5(d).

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

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 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.

The issue before us is whether the Petitioner established that it has the ability to pay the proffered wage of \$56,451 from the September 26, 2013, priority date onwards.

A. The Petitioner's Net Income and Net Current Assets

In determining the petitioner's ability to pay the proffered wage during a given period, U.S. Citizenship and Immigration Services (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.

If the 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, 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. filed Nov. 10, 2011). 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). Reliance on the petitioner's gross sales and profits and wage expense is misplaced. Showing that the petitioner's gross sales and profits exceeded the proffered wage is insufficient. Similarly, showing that the petitioner paid wages in excess of the proffered wage is insufficient. The courts have specifically rejected the argument that the Service should have considered income before expenses were paid rather than net income. *See Taco Especial v. Napolitano*, 696 F. Supp. 2d at 881 (gross profits overstate an employer's ability to pay because it ignores other necessary expenses). Similarly, the courts have agreed that adding depreciation back into net income does not reflect an employer's ability to pay the proffered wage. *See River Street Donuts*, 558 F.3d at 118 and *Chi-Feng Chang*, 719 F. Supp. at 537.

If the net income the petitioner demonstrates it had available during that period, if any, added to the wages paid to the beneficiary during the period, if any, do not equal the amount of the proffered

wage or more, USCIS will review the petitioner's net current assets. Net current assets are the difference between the petitioner's current assets and current liabilities.¹

The Petitioner's 2013 tax returns indicate that it had \$16,885 in net income and -\$28,984 in net current assets. We determined that the Petitioner did not submit evidence that it had sufficient net income or net current assets to pay the proffered wage from the priority date onwards. In our previous decision we noted that the record of proceedings contained insufficient evidence to establish that the Petitioner has paid the Beneficiary any wages because the record demonstrated that the wages were paid by another entity and not the Petitioner.

B. The Petitioner and the NY Entity

The Petitioner filed the labor certification and the Form I-140, Immigrant Petition for Alien Worker. Before the Director and on appeal, the Petitioner submitted evidence that a New York business entity with a separate Federal Employer Identification Number (FEIN) paid wages to the Beneficiary in 2012 and 2013. On motion, the Petitioner states that, even though the two entities have separate FEINs, they are one and the same. The Petitioner asserts that we should have considered the NY entity's payment of the Beneficiary's wages in determining the Petitioner's ability to pay the proffered wage. The Petitioner states that it submitted extensive records to show that it registered and owns the NY entity, controls the NY entity's bank account and that the funds that circulate at the NY entity belong entirely to the Petitioner.

As discussed in our previous decision, the Internal Revenue Service (IRS) permits an LLC with one member to be classified as "an entity disregarded as separate from its owner" and requires it to either report any income, deductions, gains, losses, or credits on the owner's income tax return or file a separate income tax return. See *Internal Revenue Serv., Publication 3402, Taxation of Limited Liability Companies*, www.irs.gov/pub/irs-pdf/p3402.pdf (accessed May 5, 2016). The Petitioner's 2013 Internal Revenue Service (IRS) Form 1120S, U.S. Income Tax Return for an S Corporation, does not list the NY entity in any capacity, either as a subsidiary, a partner or a pass-through entity. According to its tax returns, the Petitioner does not claim any ownership interest in any companies. Therefore, the record does not establish that the NY entity is a disregarded entity or that it was owned by the Petitioner.

While the record does not reflect that the Petitioner owns the NY entity, it appears that the Petitioner's sole shareholder is also a shareholder of the NY entity. Although the record demonstrates that the Petitioner and the NY entity are separate entities owned by the same individual, common ownership does not bestow an obligation on one entity to pay wages to employees of the other.

¹ According 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 as accounts payable, short-term notes payable, and accrued expenses (such as taxes and salaries). *Id.* at 118.

Moreover, the NY entity's bank records do not establish that the Petitioner has any control over its accounts. The bank records reflect that the NY entity's statements are not sent in care of or to the Petitioner's address, but are sent to the shareholder's personal address. While the NY entity and the Petitioner can transfer funds across their accounts, this is due to common ownership of the two entities, rather than a legal relationship and obligation between the companies themselves.

Because a corporation is a separate and distinct legal entity from its owners and shareholders, the assets of its shareholders or of other enterprises or corporations cannot be considered in determining the petitioning corporation's ability to pay the proffered wage. See *Matter of Aphrodite Investments, Ltd.*, 17 I&N Dec. 530 (Comm'r 1980). In a similar case, the court in *Sitar v. Ashcroft*, 2003 WL 22203713 (D.Mass. Sept. 18, 2003) stated, "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." The Petitioner's assertion that the NY entity's assets can be used to meet its ability to pay the proffered wage because the Petitioner owns and controls it is unpersuasive. While it is true that the sole member of the Petitioner owns the NY entity, the record does not demonstrate that the Petitioner as a corporation owns or controls the NY entity. Therefore, the Petitioner has not established that the NY entity is an entity which has a legal obligation to pay the Beneficiary's wage. As such, we cannot consider the NY entity's assets when considering the Petitioner's ability to pay the proffered wage.

B. Totality of the Circumstances

On motion, the Petitioner asserts that we did not consider the totality of the scope of its business and misrepresented the facts of *Matter of Sonogawa*, 12 I&N Dec. 612, 614-15 (Reg'l Comm'r 1967). We concede that in *Sonogawa*, the petitioner earned gross annual income of about \$100,000, rather than \$100,000 in net annual income.² However, this fact is not what drives a *Sonogawa* analysis. Rather, under *Sonogawa*, we consider the factors we discussed in our decision: 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 former employee or an outsourced service, and any other evidence of a petitioner's ability to pay the proffered wage.

On motion, the Petitioner states that the instant case is similar to *Sonogawa* because it has established a similar gross income (between \$800,000 to \$1 million with continued growth) after

² *Sonogawa* had been in business for over 11 years and routinely generated an annual gross income of about \$100,000. During the year in which the petition was filed, the petitioner changed business locations and paid rent on both the old and new locations for five months. There were large moving costs and also a period of time when the petitioner was unable to do regular business. The petitioner was a fashion designer whose work had been featured in *Time* and *Look* magazines, as well as the *Fashion Service Review* and numerous other fashion magazines. The petitioner's clients had been included in the lists of the best-dressed California women and included Miss Universe, movie actresses, and society matrons. The petitioner also received appearances fees for lecturing on fashion design at colleges and universities in California and at design and fashion shows throughout the United States.

adjusting for inflation since 1966, employs a similar number of employees, has been in business for the same length of time, has a similar reputation and experienced uncharacteristic business expenditures (advertising expenses) in 2013. However, the Petitioner's case is distinguishable from *Sonegawa*.

While the Petitioner commands a similar gross income to that shown in *Sonegawa*, and employs a similar number of employees, the Petitioner had negative net income and net current assets in 2011 and 2012, prior to the year in which it claims it had uncharacteristic expenditures. Admittedly, the decision in *Sonegawa* does not provide specific information regarding that petitioner's net income in years before the business incurred uncharacteristic expenses related to moving. However, the decision indicates that the petitioner had an ability to pay the proffered wage at the time of filing the petition. *Sonegawa* also established that it had since resumed normal business operations and generated sufficient net income in the space of 5 months to pay more than 75% of the proffered wage.

On motion, counsel states that the Petitioner incurred uncharacteristic business expenditures in 2013 due to a major advertising campaign, accounting for \$4,000 per month and that it has made further cuts in advertising in the amount of \$13,000 per month. In response to the Director's August 14, 2014, request for evidence (RFE), counsel stated that the Petitioner incurred uncharacteristic business expenditures in 2011 and 2012 due to a major advertising campaign in Florida and an expansion into New York. However, the NY entity was not registered until May 25, 2012, and, as discussed above, any funds used for this business do not reflect funds available to the Petitioner to establish its ability to pay the proffered wage. Additionally, the Petitioner classifies business expenses which occurred over the period of at least three years as "uncharacteristic," whereas the uncharacteristic expenses incurred by *Sonegawa* occurred over a period of 5 months. Moreover, the record does not contain any documentation of the expenses the Petitioner claims are uncharacteristic, such as contracts for services, receipts or invoices. The record does not contain documentary evidence to support the Petitioner's assertions regarding its uncharacteristic expenses. These assertions, unsubstantiated by supporting evidence, are insufficient to satisfy the Petitioner's burden of proof. *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)); and *Matter of Obaigbena*, 19 I&N Dec. 533, 534 (BIA 1988); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980). Further, despite having the opportunity to submit additional evidence below and on motion, the Petitioner did not submit evidence of its net income or net current assets for 2014, the year in which it claims the uncharacteristic expenses ceased.³

On motion, the Petitioner lists a number of its ratings, awards, publications and appearances to support the assertion that it has a reputation within its industry comparable to *Sonegawa*. However, the record does not contain documentary evidence of the listed awards, publications and appearances

³ The Petitioner notes that it did not receive a June 26, 2015, RFE asking for its 2014 tax returns. On motion and below, it has not provided its 2014 or 2015 tax returns or any other evidence to establish it has recovered from the claimed uncharacteristic expenditures.

and the Petitioner's assertions do not constitute evidence. *Id.* Further, some of the appearances and lectures listed, such as radio show appearances, hosting a weekly radio show, guest lecturing for potential clients and publishing eZine articles, are self-promotional in nature and would not indicate that the business is considered to be outstanding.

Finally, the Petitioner states that we ignored its bank statements which showed sufficient funds to the pay the proffered wage. As discussed in our November 6, 2015, decision, bank statements are not among the three types of evidence, enumerated in 8 C.F.R. § 204.5(g)(2), required to illustrate a petitioner's ability to pay a proffered wage. While this regulation allows additional material "in appropriate cases," as discussed above the Petitioner has not demonstrated why the documentation specified at 8 C.F.R. § 204.5(g)(2) is inapplicable or otherwise paints an inaccurate financial picture of the petitioner. Further, the Petitioner did not demonstrate that the funds reported on its bank statements constitute additional available funds that were not reflected on its tax returns, such as the petitioner's taxable income (income minus deductions) or the cash specified on Schedule L that was considered in determining its net current assets.

For the above reasons, the Petitioner has not established its ability to pay the proffered wage.

II. CONCLUSION

In summary, the Petitioner did not establish that it has the ability to pay the proffered wage from the priority date onwards. Our November 6, 2015, decision is affirmed and the petition remains denied.

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; *Matter of Brantigan*, 11 I&N Dec. 493 (BIA 1966); *Matter of Otiende*, 26 I&N Dec. 127, 128 (BIA 2013). Here, that burden has not been met.

ORDER: The motion to reconsider is denied.

Cite as *Matter of F-&F-, PLLC*, ID# 16703 (AAO May 23, 2016)