



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

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

MATTER OF D-C-N-, INC.

DATE: APR. 22, 2016

MOTION ON ADMINISTRATIVE APPEALS OFFICE DECISION

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

The Petitioner, a telecommunications marketing business, seeks to employ the Beneficiary as a marketing analyst. It requests classification of the Beneficiary as a member of the professions holding an advanced degree under the second preference immigrant classification. *See* Immigration and Nationality Act (the Act) section 203(b)(2), 8 U.S.C. § 1153(b)(2). This employment-based immigrant classification allows a U.S. employer to sponsor a professional with an advanced degree for lawful permanent resident status.

The Director, Nebraska Service Center, denied the petition, concluding that the Petitioner had not demonstrated the existence of a *bona fide* job offer and that the Beneficiary sought to procure an immigration benefit by fraud or willful misrepresentation of a material fact. The matter came before us on appeal, and on March 3, 2015, we withdrew the Director's decision regarding the *bona fide* job offer and willful misrepresentation issues. Nevertheless, we dismissed the appeal and concluded that the Petitioner had not demonstrated its ability to pay the proffered wages of the Beneficiary and its other sponsored workers.

The matter is now before us on a motion to reopen and a motion to reconsider. On motion, the Petitioner states that it has the ability to pay the proffered wage to the Beneficiary and the other sponsored workers. The Petitioner asserts that one of its employees resigned and that the wages formerly paid to that individual may be used to pay the Beneficiary's proffered wage. We will deny the motion to reopen and the motion to reconsider.

I. LAW AND ANALYSIS

In pertinent part, section 203(b)(2) of the Act provides immigrant classification to members of the professions holding advanced degrees or their equivalent and whose services are sought by an employer in the United States. 8 U.S.C. § 1153(b)(2).

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). The labor certification was accepted on April 8, 2013, the priority date. *See* 8 C.F.R. § 204.5(d). The proffered wage as stated on the labor certification is \$34,070 per year.

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The regulation at 8 C.F.R. § 103.5(a)(2) states, in pertinent part, that “[a] motion to reopen must state the new facts to be provided in the reopened proceeding and be supported by affidavits or other documentary evidence.” In this case, the motion qualifies for consideration as a motion to reopen under 8 C.F.R. § 103.5(a)(2) as the Petitioner has submitted additional evidence that was not previously submitted. The motion to reconsider qualifies for consideration under 8 C.F.R. § 103.5(a)(3) because the Petitioner asserts that our prior decision was an erroneous misapplication of law or policy.

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

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 [REDACTED] and to currently employ six workers. According to the tax returns in the record, the Petitioner’s fiscal year is based on a calendar year. On the labor certification, signed by the Beneficiary on December 17, 2013, the Beneficiary did not claim to have worked for the Petitioner.

A 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 labor certification, 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. 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, 144 (Acting Reg’l Comm’r 1977); *see also* 8 C.F.R. § 204.5(g)(2). In evaluating whether a job offer is realistic, U.S. Citizenship and Immigration Services (USCIS) requires a 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, 614-15 (Reg’l Comm’r 1967).

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 a 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. In the instant case, the Petitioner has not established that it paid the Beneficiary the proffered wage during any relevant timeframe including the period from the priority date in 2013 or subsequently.

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 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). 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 Rest. Corp. v. Sava*, 632 F. Supp. 1049, 1054 (S.D.N.Y. 1986) (citing *Tongatapu Woodcraft Haw., Ltd. v. Feldman*, 736 F.2d 1305 (9th Cir. 1984)). Reliance on a petitioner's gross receipts and wage expense is misplaced. Showing that the petitioner's gross receipts exceeded the proffered wage is insufficient. Similarly, showing that a petitioner paid wages in excess of the proffered wage is insufficient.

In *K.C.P. Food Co.*, 623 F. Supp. at 1084, the court held that the Immigration and Naturalization Service, now USCIS, had properly relied on the petitioner's net income figure, as stated on the petitioner's corporate income tax returns, rather than the petitioner's gross income. The court specifically rejected the argument that USCIS should have considered income before expenses were paid rather than net income. *See also Taco Especial*, 696 F. Supp. 2d at 881 (gross profits overstate an employer's ability to pay because it ignores other necessary expenses).

On October 1, 2015, we issued the Petitioner a notice of intent to deny and request for evidence (NOID/RFE). In response, the Petitioner submitted its federal tax return for 2014, state quarterly tax returns, and evidence of the resignation of one of its employees in 2012.

As we indicated in our previous decision and in our NOID/RFE, the Petitioner has sponsored two other workers, Mr. F- and Mr. A-. In addition to establishing that the Petitioner has the continuing ability to pay the instant Beneficiary's proffered wage, it must also establish the ability to pay the proffered wages of its other sponsored workers who have not yet adjusted to lawful permanent resident status. On motion, the Petitioner submitted evidence demonstrating that Mr. A- resigned in 2012, terminating this wage obligation. Therefore, the Petitioner must demonstrate its ability to pay the proffered wages of the Beneficiary and Mr. F- from the instant priority date of April 8, 2013. The following table demonstrates the amount of these wages.

Year	Proffered wage for the Beneficiary	Proffered wage for Mr. F- (minus wages paid)	Total wages owed
2013	\$34,070	\$61,027	\$95,097
2014	\$34,070	\$35,590 (the difference between the proffered wage and wage paid of \$25,437)	\$69,660

The Petitioner's tax returns demonstrate its net income for 2013 and 2014 as shown below.

- In 2013, the Form 1120S stated net income¹ of \$117,011.
- In 2014, the Form 1120S stated net income of \$52,205.

The Petitioner had sufficient net income to pay both proffered wages for 2013, but it did not have sufficient net income to pay the Beneficiary's proffered wage and the wages owed to the other sponsored worker for 2014.

As an alternate means of determining a petitioner's ability to pay the proffered wage, USCIS may review the petitioner's net current assets. Net current assets are the difference between the petitioner's current assets and current liabilities.² 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 its end-of-year net current assets for 2013 and 2014, as shown below.

- In 2013, the Form 1120S stated net current assets of -\$390,332.
- In 2014, the Form 1120S stated net current assets of -\$404,817.

For the years 2013 and 2014, the Petitioner did not have sufficient net current assets to pay the proffered wage to the Beneficiary or the other sponsored worker.

Therefore, after examining wages paid and the Petitioner's net income and net current assets, the Petitioner has not established that it had the continuing ability to pay the proffered wages of the Beneficiary and its other sponsored worker from the date the labor certification was accepted for processing by the DOL.

The Petitioner asserts on appeal that, since Mr. A- resigned from the company in 2012, the wages paid to Mr. A- can now be used to pay the instant Beneficiary. However, the record does not provide evidence that the Petitioner replaced Mr. A- with the Beneficiary. In general, wages already paid to

¹ 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 (2006-2012) of Schedule K. See Instructions for Form 1120S, at <http://www.irs.gov/pub/irs-pdf/i1120s.pdf> (accessed April 11, 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 and deductions shown on its Schedule K for 2013 and 2014, the Petitioner's net income is found on Schedule K of its tax returns for these years.

² 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). Joel G. Siegel & Jae K. Shim, *Dictionary of Accounting Terms* 118 (3d ed., Barron's Educ. Series 2000).

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others are not available to prove the ability to pay the wage proffered to the beneficiary. If Mr. A- performed other kinds of work, then the Beneficiary could not have replaced him. There is no evidence that the position held by Mr. A- involves the same duties as those set forth in the labor certification for the proffered position.

The Petitioner's assertions on motion do not outweigh the evidence in the record regarding its ability to pay the proffered wage to the Beneficiary and the other sponsored worker from the priority date.

USCIS may consider the overall magnitude of the petitioner's business activities in its determination of the petitioner's ability to pay the proffered wage. *See Sonogawa*, 12 I&N Dec. at 614-15. As in *Sonogawa*, USCIS may, at its discretion, consider evidence relevant to a petitioner's financial ability that falls outside of a petitioner's net income and net current assets. USCIS may consider such factors as the number of years a petitioner has been doing business, the established historical growth of a petitioner's business, the overall number of employees, the occurrence of any uncharacteristic business expenditures or losses, a 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 a petitioner's ability to pay the proffered wage.

In the instant case, the Form I-140 and the tax returns in the record indicate that the Petitioner has been in business since [REDACTED]. The record includes the Petitioner's tax return for 2012 through 2014. These tax returns reflect declining gross receipts in the amounts of \$917,013, \$780,694, and \$614,891 for 2012, 2013, and 2014, respectively. The tax returns also indicate a decline in salaries and wages paid in the amounts of \$168,279, \$132,626, and \$131,399 for 2012, 2013, and 2014, respectively. Together, these declines in gross receipts and wages paid indicate a lack of growth of the Petitioner's business. The Petitioner's tax returns state net income of \$40,615, \$117,011, and \$52,205 in 2012, 2013, and 2014, respectively. These tax returns also reflect net current assets of -\$378,174, -\$390,332, and -\$404,817 in 2012, 2013, and 2014. The Petitioner reported increasingly negative net current assets in each year. Although the Petitioner's net income spiked in 2013, its net income significantly decreased in 2014. As the net income increased in only one of the three years of the Petitioner's financial history in the record, this increase appears to be an anomaly, rather than a pattern. The Petitioner has not demonstrated that its tax returns for 2012 through 2014 paint an inaccurate picture of its ability to pay the proffered wages at issue. The Petitioner has not provided any evidence demonstrating it incurred any unexpected expenses in 2014 or any evidence of its reputation in the industry. Thus, assessing the totality of the circumstances in this individual case, it is concluded that the Petitioner has not established that it had the continuing ability to pay the proffered wages at issue.

II. CONCLUSION

For the foregoing reasons, we conclude that the evidence submitted does not establish that the Petitioner has the continuing ability to pay the proffered wage to the Beneficiary and the other sponsored worker beginning on the priority date.

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

ORDER: The motion to reopen is denied.

FURTHER ORDER: The motion to reconsider is denied.

Cite as *Matter of D-C-N-, Inc.*, ID# 14036 (AAO Apr. 22, 2016)