



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

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

MATTER OF F-P-I, INC.

DATE: DEC. 30, 2016

APPEAL OF TEXAS SERVICE CENTER DECISION

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

The Petitioner, an insurance company, seeks to employ the Beneficiary as a controller. It requests classification of the Beneficiary as an advanced degree professional 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, Texas Service Center, denied the petition, concluding that the Petitioner had not established its ability to pay the Beneficiary's proffered wage.

The matter is now before us on appeal. The Petitioner claims that it has the ability to pay the proffered wage through its bank statements and the personal assets of its president. We have reviewed all the evidence in the record of proceedings.

Upon *de novo* review, we will dismiss the appeal.

I. LAW

A U.S. employer may sponsor a foreign national for lawful permanent residence, which is a three-part process. First, the employer must obtain a Form ETA 9089, Application for Permanent Employment Certification (labor certification), from the U.S. Department of Labor (DOL) for certification that "there are not sufficient [U.S.] workers who are able, willing, qualified, and available" to perform the position offered where the beneficiary will be employed, and that the employment of the beneficiary will not "adversely affect the wages and working conditions of workers in the United States similarly employed." Section 212(a)(5)(A)(i) of the Act. The date the labor certification is accepted for processing by the DOL establishes the priority date, which determines when a visa is available for the beneficiary to adjust to lawful permanent status. *See* 8 C.F.R. § 204.5(d).

Second, the U.S. employer files a Form I-140, Immigrant Petition for Alien Worker, with the approved labor certification, to U.S. Citizenship and Immigration Services (USCIS). To demonstrate eligibility for the petition, the petitioner must establish that it has the ability to pay the proffered wage to the beneficiary under 8 C.F.R. § 204.5(g)(2), that the position offered and the

beneficiary meet the minimum requirements for the classification requested (*see* 8 C.F.R. § 204.5(k)(3) for advanced degree professionals), and that the beneficiary meets the terms of the labor certification (*See Matter of Wing's Tea House*, 16 I&N Dec. 158, 159 (Acting Reg'l Comm'r 1977)).

Third, if USCIS approves the Form I-140 and a visa is available based upon the priority date, the beneficiary may apply for an immigrant visa abroad or, if eligible, adjustment of status in the United States.

II. ANALYSIS

A. The Petitioner's Ability to Pay the Proffered Wage

The issue on appeal is whether the Petitioner has the ability to pay the Beneficiary's proffered wage. A petitioner must establish that its job offer to the beneficiary is a realistic one. 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).

The regulation 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.

In this case, the labor certification was accepted on November 23, 2011, the priority date. The proffered wage as stated on the labor certification is \$91,624 per year.

The evidence in the record shows that the Petitioner is structured as an S corporation. On the petition, the Petitioner claimed to have been established in 2011 and to employ 11 workers. According to the tax returns in the record, the Petitioner's fiscal year is based on a calendar year.

In determining the petitioner's ability to pay the proffered wage during a given period, 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 Sonegawa*, 12 I&N Dec. 612 (Reg'l Comm'r 1967). 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. Here, the Petitioner does not claim to

have employed the Beneficiary and the record does not indicate that the Petitioner paid the Beneficiary any wages.

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,¹ 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).

The Petitioner's tax returns demonstrate its net income for 2011, 2012, 2013, 2014, and 2015 as shown in the table below.

- In 2011, the Form 1120S stated net income² of \$112,936.
- In 2012, the Form 1120S stated net income of \$117,251.
- In 2013, the Form 1120S stated net income of \$333,405.
- In 2014, the Form 1120S stated net income of -\$67,971.
- In 2015, the Form 1120S stated net income of \$135,135.

Therefore, for the years 2011, 2012, 2013, and 2015, the Petitioner had sufficient net income to pay the proffered wage. The Petitioner did not have sufficient net income in 2014 to pay the Beneficiary's proffered wage.

As an alternate means of determining the 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.³ 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

¹ 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)).

² 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 a 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 (2011 through 2015) of Schedule K. *See* Instructions for Form 1120S, at <http://www.irs.gov/pub/irs-pdf/i1120s.pdf> (accessed December 16, 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 deductions shown on its Schedule K for 2011, 2012, 2013, and 2015 the Petitioner's net income is found on Schedule K of its tax returns for these years.

³ According to *Barron's Dictionary of Accounting Terms* 117 (3d 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.

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 2012, 2013, 2014, and 2015, as shown in the table below.

- In 2011, the Form 1120S stated net current assets of \$66,947.
- In 2012, the Form 1120S stated net current assets of -\$61,295.
- In 2013, the Form 1120S stated net current assets of \$31,457.
- In 2014, the Form 1120S stated net current assets of -\$8171.
- In 2015, the Form 1120S stated net current assets of -\$158,990.

Thus, for 2014, the year at issue, the Petitioner did not have sufficient net current assets to pay the proffered wage.

Therefore, from the date the labor certification was accepted for processing by the DOL, the Petitioner had not established that it had the continuing ability to pay the Beneficiary the proffered wage as of the priority date through an examination of wages paid to the Beneficiary, or its net income or net current assets.

On appeal, the Petitioner states that the Director erred in not considering its bank account statements.⁴ We do not find that the Petitioner's bank account statements demonstrate its ability to pay the proffered wage. First, 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," the Petitioner in this case 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. Second, bank statements show the amount in an account on a given date, and cannot show the sustainable ability to pay a proffered wage. Third, no evidence was submitted to demonstrate that the funds reported on the petitioner's bank statements somehow reflect additional available funds that were not reflected on its tax return(s), such as the petitioner's taxable income (income minus deductions) or the cash specified on Schedule L that was addressed above in determining the petitioner's net current assets.

The Petitioner also asserts that the personal assets of its president should be considered toward the ability to pay. The Director cited *Matter of M-*, 8 I&N Dec. 24 (BIA 1958), and *Matter of Aphrodite Investments Ltd.*, 17 I&N Dec. 530 (Comm'r 1980), for the proposition that assets of a corporation's shareholders cannot be considered in determining the petitioning corporation's ability to pay the proffered wage. On appeal, the Petitioner states that these cases are distinguishable from the present case as they do not involve a company's ability to pay the proffered wage. While the facts of those cases differ from the instant matter, we uphold this principle of law that the Director cited in *Matter of M-*, 8 I&N Dec. at 50, that "[i]t is an elementary rule that a corporation is a legal entity entirely separate and distinct from its stockholders, and this is true even though one person may own

⁴ On appeal, the Petitioner has submitted its bank account statements for January through October 2016, in addition to those already contained in the record.

all or nearly all of the capital stock.” Therefore, we will not consider the personal assets of the Petitioner’s president toward the ability to pay the proffered wage.

The Director also cited *Sitar v. Ashcroft*, 2003 WL 22203713 (D. Mass. Sept 18, 2003) which 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 states that “the opposite is also true in that there is nothing in the governing regulations that prevents the USCIS from considering the financial resources of the company’s owners.” However, the regulation at 8 C.F.R. § 204.5(g)(2) refers to the *employer’s* ability to pay the proffered wage. In these proceedings, the Petitioner is the employer. Thus, the Petitioner, not its president, owners, or shareholders, is the entity responsible to pay the proffered wage, and we will not consider the individual assets of the Petitioner’s president toward the ability to pay the proffered wage.

On appeal, the Petitioner cites to *Construction and Design Co. v. USCIS*, 563 F.3d 593 (7th Cir. 2009), asserting that according to this case:

An S corporation is specifically set up to allow the shareholder(s) to transfer money between their personal bank accounts and the company bank account in order to select the optimum tax rate. This creates a fiduciary responsibility as even though the money is in the owners personal account it is essentially the company’s money.

We note that *Construction and Design* is not binding precedent in this matter because the Petitioner is located in Florida, which is not within the 7th Circuit Court of Appeals.⁵ Even if this matter was within the 7th Circuit, the court in that case did not find that the formation of an S corporation creates a fiduciary responsibility on the Petitioner’s president to pay the proffered wage. Rather, in *Construction and Design*, the court stated that an S corporation allows the corporate income to pass through the corporation without being subject to corporate income tax; instead the income is taxed as individual income to the shareholders. *Construction and Design*, 563 F.3d at 595. The court specifically refers to tax advantages of the S corporation, but it does not indicate that a fiduciary responsibility is created between the Petitioner and its owners wherein its owners are legally obligated to use their assets to pay the proffered wage. Thus, the Petitioner has not established that the assets of Petitioner’s president should be considered toward the ability to pay the proffered wage.

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 *Matter of Sonogawa*, 12 I&N Dec. 612 (Reg’l Comm’r 1967). As in *Sonogawa*, USCIS may, at its discretion, consider evidence relevant to the 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 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

⁵ The U.S. Court of Appeals for the 7th Circuit covers Illinois, Indiana, and Wisconsin.

Matter of F-P-I, Inc.

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.

In this case, the Form I-140 states that the Petitioner has been in business since 2011 and that it employs 11 workers. We note that the Petitioner's tax returns state that it paid total wages to its employees of \$9,600 in 2012, \$0 in 2013, \$0 in 2014, and \$12,000 in 2015; amounts all well below the proffered wage in this case. These tax returns also state negative net income and negative net current assets for 2014, the year at issue. Moreover, the Petitioner has not provided any evidence of uncharacteristic business expenses for 2014. The record contains a letter from the Petitioner's president, dated December 6, 2012, in which he states that the Beneficiary would be working at a different location because the Petitioner's office in [REDACTED] was robbed of electrical installations and cables, amounting to a loss of \$30,000. While this letter does not state when this occurred, it is clear from the date of the letter that it happened before 2014, the year at issue. Therefore, in the totality of the circumstances, the Petitioner has not established that it had the continuing ability to pay the Beneficiary the proffered wage as of the priority date.

B. The Beneficiary's Qualifications

In addition to the decision reached by the Director, we will also consider whether Petitioner has established that the Beneficiary meets the terms of the labor certification.

A beneficiary must meet all of the requirements of the offered position set forth on the labor certification by the priority date of the petition. 8 C.F.R. § 103.2(b)(1), (12). *See Matter of Wing's Tea House*, 16 I&N Dec. 158, 159 (Acting Reg'l Comm'r 1977); *see also Matter of Katigbak*, 14 I&N Dec. 45, 49 (Reg'l Comm'r 1971).

In evaluating the beneficiary's qualifications, USCIS must look to the job offer portion of the labor certification to determine the required qualifications for the position. USCIS must examine "the language of the labor certification job requirements" in order to determine what the petitioner must demonstrate that the beneficiary has to be found qualified for the position. *Madany v. Smith*, 696 F.2d 1008, 1015 (D.C. Cir. 1983).

In this case, the labor certification states that the offered position has the following minimum requirements:

- H.4. Education: Master's degree in accounting.
- H.5. Training: None required.
- H.6. Experience in the job offered: 12 months.
- H.7. Alternate field of study: None accepted.
- H.8. Is there an alternate combination of education and experience that is acceptable? Yes.
- H.8-A. If Yes, specify the alternate level of education required: Master's degree.
- H.8-C If applicable, indicate the number of years experience acceptable in question 8: "5."

(b)(6)

Matter of F-P-I, Inc.

- H.9. Foreign educational equivalent: Accepted.
- H.10. Experience in an alternate occupation: None accepted.
- H.14. Specific skills or other requirements: "Must have Master's Degree in Accounting or equivalent plus one year experience."

USCIS interprets the meaning of terms used to describe the requirements of a job in a labor certification by "examin[ing] the certified job offer *exactly* as it is completed by the prospective employer." *Rosedale Linden Park Company v. Smith*, 595 F. Supp. 829, 833 (D.D.C. 1984) (emphasis added). USCIS's interpretation of the job's requirements, as stated on the labor certification must involve "reading and applying *the plain language* of the [labor certification]" even if the employer may have intended different requirements than those stated on the form. *Id.* at 834 (emphasis added). Here, the plain language of the labor certification requires, at a minimum, a U.S. master's degree or foreign equivalent degree in accounting plus 1 year of experience.

Part J of the labor certification states that the Beneficiary possesses a master's degree in accounting from the [redacted] completed in 2011. However, the record does not establish that the Beneficiary has this claimed degree. Rather, the Petitioner only submitted a copy of the Beneficiary's licentiate degree in public accounting from the [redacted] in [redacted] Venezuela, awarded on October 16, 2001.

The Petitioner did submit an evaluation from a professor of operations management and management science at the [redacted] concluding that the Beneficiary's degree from the [redacted] combined with his employment experience, constitute the equivalent of a U.S. master's degree in accounting. The Petitioner also submitted an evaluation from the [redacted] concluding that the Beneficiary's licentiate degree is equivalent to a U.S. bachelor's degree in accounting.

In order to evaluate the Beneficiary's credentials, we have reviewed the Electronic Database for Global Education (EDGE) created by the American Association of Collegiate Registrars and Admissions Officers (AACRAO).⁶ USCIS considers EDGE to be a reliable, peer-reviewed source of information about foreign credentials equivalencies. According to EDGE, the Beneficiary's licentiate degree in public accounting "represents attainment of a level of education comparable to a bachelor's degree in the United States." *See South America: Venezuela: Credential, Licenciado*, <http://edge.aacrao.org/country/credential/certificado-de-educacin-primaria?page=2>.

As such, the record establishes that the Beneficiary has the foreign degree equivalent of a U.S. bachelor's degree in accounting but does not demonstrate that the Beneficiary has the U.S. master's degree or foreign equivalent degree required by the terms of the labor certification. Rather, the Petitioner attempts to establish that the Beneficiary has the equivalent level of education of a U.S.

⁶ According to its website, AACRAO is "a nonprofit, voluntary, professional association of more than 11,000 higher education admissions and registration professionals who represent more than 2,600 institutions and agencies in the United States and in over 40 countries around the world." *See* <http://www.aacrao.org/About-AACRAO.aspx>.

master's degree by combining his bachelor's degree with experience.

However, the Beneficiary's claimed possession of the "equivalent" of a U.S. master's degree based on a combination of education and experience is insufficient to establish his qualifications for the proffered position. As noted above, the labor certification's requirements do not indicate the Petitioner's acceptance of the equivalent to a U.S. master's degree based on a combination of education and experience, such as a bachelor's degree and 5 years of experience. Rather, the labor certification states that the offered position requires the possession of at least a single, U.S. master's degree or a foreign equivalent degree. Both the primary and alternate requirements state that the minimum level of acceptable education is a master's degree. The information in part H.14 reinforces this minimum requirement, stating that an applicant must have a master's degree in accounting or equivalent, plus 1 year of experience. The Beneficiary must meet the minimum requirements of the job offered, as they are stated on the labor certification.

The record also contains the Petitioner's recruitment for the proffered positions. We note that the advertisements for the position offered all state minimum requirements of a master's degree or equivalent and 1 year of experience. The advertisements do not state that the Petitioner would accept an alternative to a U.S. master's degree or the foreign equivalent degree. Accordingly, potential U.S. workers were not put on notice that they could qualify for the position offered by having less than a U.S. master's degree or foreign equivalent degree, as U.S. workers would not necessarily understand that the master's requirement could be met through a combination of education and experience, such as bachelor's degree and five years of progressive post-baccalaureate experience.

Therefore, we find that the record does not establish that Beneficiary has a U.S. master's degree or foreign equivalent degree required to meet the terms of the labor certification.

III. CONCLUSION

For the reasons stated above, the Petitioner has not established that it has had the continuing ability to pay the Beneficiary's proffered wage from the priority date onward. In addition to the decision reached by the Director, we also find that the Petitioner has not established that the Beneficiary met the terms of the labor certification.

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 appeal is dismissed.

Cite as *Matter of F-P-I, Inc.*, ID# 13878 (AAO Dec. 30, 2016)