



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

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

MATTER OF [REDACTED]

DATE: MAY 5, 2017

APPEAL OF TEXAS SERVICE CENTER DECISION

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

The Petitioner, a non-profit community development organization, seeks to employ the Beneficiary as an accountant. 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 of the Texas Service Center denied the petition, concluding that the record did not establish, as required, that the Petitioner possessed the ability to pay the Beneficiary's proffered wage.

On appeal, the Petitioner asserts that it has a consistent history of financial strength since 2012, and the reason it was unable to establish its ability to pay in 2014 was due to a write off of uncollectable debt.

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

I. LAW

Employment-based immigration generally follows a three-step process. First, an employer must obtain an approved labor certification from the U.S. Department of Labor (DOL). *See* section 212(a)(5)(A)(i) of the Act, 8 U.S.C. § 1182(a)(5)(A)(i). By approving the labor certification, the DOL certifies that there are insufficient U.S. workers who are able, willing, qualified, and available for the offered position; and that employing a foreign national in the position will not adversely affect the wages and working conditions of domestic workers similarly employed. Section 212(a)(5)(A)(i)(I)-(II) of the Act. Second, the employer may file an immigrant visa petition with U.S. Citizenship and Immigration Services (USCIS). *See* section 204 of the Act, 8 U.S.C. § 1154. Third, if USCIS approves the petition, the foreign national may apply for an immigrant visa abroad or, if eligible, adjustment of status in the United States. *See* section 245 of the Act, 8 U.S.C. § 1255.

II. ANALYSIS

The issue on appeal is whether the Petitioner has established its ability to pay the proffered wage to the Beneficiary.

The regulation at 8 C.F.R. § 204.5(g)(2) states that a petitioning U.S. employer must submit evidence establishing its ability to pay the proffered wage. The Petitioner must demonstrate this ability from the priority date of the petition and continuing until the Beneficiary obtains lawful permanent residence. *Id.* 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 proffered wage is \$56,243.99 per year and the priority date is January 16, 2014.¹ As a non-profit corporation, the Petitioner files its tax returns on IRS Form 990, Return of Organization Exempt from Income Tax. On the petition, the Petitioner claimed to have been established in 1979 and to have 25 employees. The Petitioner's fiscal year is based on the calendar year.

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 that it employed a 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 this case, the Beneficiary's salary, as reflected on her IRS Forms W-2, Wage and Tax Statement, was \$48,743.84 in 2014 and \$47,802.22 in 2015.² Therefore, the Petitioner has not established ability to pay for 2014 or 2015, with a shortfall of \$7,500.15 and \$8,441.77, respectively.

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, 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).³

The Petitioner's tax returns stated its net income as follows:⁴

¹ In this case, the "priority date" is the date the labor certification is filed with the DOL.

² The record includes the Beneficiary's 2016 paystubs through August 6, 2016, showing a biweekly salary of \$1,970.79 (which would be an annual salary of \$51,240.54 per year).

³ 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).

⁴ On the date the record before the Director closed, the Petitioner's 2015 federal income tax return was the most recent

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In 2014, the Petitioner's IRS Form 990 stated net income of -\$179,678.⁵

In 2015, the Petitioner's IRS Form 990 stated net income of \$1,612,025.

The Petitioner established its ability to pay the proffered wage in 2015. However, for 2014, the Petitioner did not establish that it had sufficient net income to pay the remaining proffered wage when added to the wage paid to the Beneficiary for each year.

If the Petitioner's net income (added to any wages paid to the Beneficiary) does not meet the proffered wage, USCIS will review the Petitioner's net current assets. Net current assets are the difference between the Petitioner's current assets and current liabilities.⁶ If the total of a partnership'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.

Net current assets are not stated on IRS Form 990. Instead, the Petitioner submitted a copy of its 2014 audited financial statements for the Petitioner and its 21 subsidiaries. The financial statements state the Petitioner's net current assets as follows:⁷

In 2014, the Petitioner's IRS Form 1065 stated net current assets of -\$14,761.

For 2014, the Petitioner did not establish that it had sufficient net current assets to pay the proffered wage, when added to the wage paid to the Beneficiary for each year.

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. Specifically, in 2014, the Petitioner had a shortfall of \$22,261.15 (based on the wage paid to the Beneficiary combined with the Petitioner's negative net current assets).

The record contains a letter from [REDACTED] the Petitioner's finance director. The letter states that the company's current liabilities for 2014 contain "soft debts" which are "loans that are not collected nor are they due." [REDACTED] states that the soft debts represent "grants provided for the use of rehabbing low income housing." When excluding the soft debts from the company's 2014

return available.

⁵ For a non-profit organization, USCIS considers net income to be the figure shown on Line 19 of the first page of the petitioner's IRS Form 990 (revenue less expenses).

⁶ 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 accounts payable, short-term notes payable, and accrued expenses (such as taxes and salaries). *Id.* at 118.

⁷ The financial statements list the Petitioner's current assets on page 36 and its current liabilities on page 38.

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current liabilities, [REDACTED] claims that the Petitioner's net current assets for 2014 is \$222,025, an amount sufficient to pay the proffered wage.

The record also contains a letter from [REDACTED] CPA of [REDACTED]. The letter states that the Petitioner's 2014 current liabilities include \$172,014 "of payables that are due to affiliates" of the Petitioner. While this amount is listed as a current liability, the letter states that these liabilities are paid "at the discretion of" the Petitioner. Therefore, [REDACTED] states that these amounts are properly excluded from current liabilities, and that the Petitioner's 2014 net current assets should therefore be \$157,253 instead of -\$14,761.

The evidence in the record does not contain copies of contracts or other agreements that corroborate the claim that the current liabilities listed on the financial statement are not, in fact, due within a year. Further, we do not have a basis to disregard a current liability that is listed on an audited financial statement in an ability to pay determination.

On Form I-290B, Notice of Appeal or Motion, counsel states that the Petitioner's net income shows a loss of -\$179,678 in 2014 because it "wrote off a big account receivable of \$279,917 . . . which was deemed uncollectable." This amount is listed on IRS Form 990 at Line 24 of Part IX, Statement of Functional Expenses, where it is listed as a "Project Expense." However, counsel does not reference a document to corroborate his claim, nor does counsel provide evidence why this project expense does not impact the Petitioner's ability to pay the proffered wage.

USCIS also considers the overall magnitude of a petitioner's business activities in its determination of its ability to pay the proffered wage. *See Matter of Sonogawa*, 12 I&N Dec. 612 (Reg'l Comm'r 1967). As in *Sonogawa*, USCIS considers evidence relevant to a petitioner's financial ability that falls outside of a petitioner's net income and net current assets. USCIS considers 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 a 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.

According to the Business Entity website for the Massachusetts Secretary of State, the Petitioner was organized in 1979 and merged with [REDACTED] in 2011. <http://corp.sec.state.ma.us/corpweb/CorpSearch/CorpSearch.aspx> (last visited Apr. 21, 2017). The Petitioner's audited financial statements state that it has over 20 subsidiaries.

The Petitioner's tax returns show that it had net income of \$98,419 in 2013. The Petitioner had increasing total revenues of \$1,272,697 in 2013, \$1,664,686 in 2014, and \$4,692,277 in 2015. It had an increasing payroll of \$565,803 in 2013, \$750,067 in 2014, and \$1,200,559 in 2015. The Petitioner's increasing payroll and revenues, the substantial size of its operations, and its number of years in operation outweigh the shortfall of \$22,261.15 in 2014. Thus, assessing the totality of the

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circumstances in this individual case, we conclude that the Petitioner has established that it had the ability to pay the proffered wage from the priority date until the present.

III. CONCLUSION

The appeal is sustained because the Petitioner has established its continuing ability to pay the proffered wage from the priority date onward.

ORDER: The appeal is sustained.

Cite as *Matter of* [REDACTED] ID #356804 (AAO May 5, 2017)