



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

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

In Re: 28804893

Date: NOV. 8, 2023

Appeal of Texas Service Center Decision

Form I-140, Immigrant Petition for Alien Workers (Advanced Degree)

The Petitioner, a healthcare technology company, seeks to employ the Beneficiary as its Director of Software Engineering. The company requests classification of the Beneficiary as a member of the professions holding an advanced degree under the second preference immigrant classification. Immigration and Nationality 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 Petitioner had not established its ability to pay the proffered wage. The matter is now before us on appeal.

The Petitioner bears the burden of proof to demonstrate eligibility by a preponderance of the evidence. *Matter of Chawathe*, 25 I&N Dec. 369, 375-76 (AAO 2010). We review the questions in this matter de novo. *Matter of Christo's, Inc.*, 26 I&N Dec. 537, 537 n.2 (AAO 2015). Upon de novo review, we will dismiss the appeal.

A petitioner must establish its ability to pay the proffered wage from the priority date of the petition until the beneficiary obtains lawful permanent residence. 8 C.F.R. § 204.5(g)(2). Evidence of ability to pay must generally include annual reports, federal tax returns, or audited financial statements. *Id.* If a petitioner employs 100 or more workers, USCIS may accept a statement from a financial officer attesting to the petitioner's ability to pay the proffered wage. *Id.* 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 USCIS. *Id.*

In determining ability to pay, USCIS first determines whether the petitioner paid the beneficiary the full proffered wage each year from the priority date. If the petitioner did not pay the proffered wage in any given year, USCIS next determines whether the petitioner had sufficient net income or net current assets to pay the proffered wage (reduced by any wages paid to the beneficiary).¹

¹ Federal courts have upheld USCIS' method of determining a petitioner's ability to pay a proffered wage. *See, e.g., River St. Donuts, LLC v. Napolitano*, 558 F.3d 111, 118 (1st Cir. 2009); *Rahman v. Chertoff*, 641 F. Supp. 2d 349, 351-52 (D. Del. 2009).

If net income and net current assets are insufficient, USCIS may consider other relevant factors, such as the number of years the petitioner has been in business, the size of its operations, the growth of its business over time, its number of employees, the occurrence of any uncharacteristic business expenditures or losses, its reputation within its industry, or whether a beneficiary will replace a current employee or outsourced service. *See Matter of Sonogawa*, 12 I&N Dec. 612, 614-15 (Reg'l Comm'r 1967).

The Petitioner's labor certification lists the proffered wage of the offered position as \$169,312 per year. The petition's priority date is September 17, 2021, the date DOL accepted the labor certification application for processing. *See* 8 C.F.R. § 204.5(d) (explaining how to determine a petition's priority date).

In the matter at hand, the Petitioner provided "Articles of Incorporation" indicating that it was structured as a corporation in [redacted] 2018. It filed the Form I-140 on July 27, 2022, with copies of unaudited financial statements (balance sheet, profit and loss statement, and statement of cash flows) for [redacted] for the year ending December 31, 2021. These 2021 financial statements show a net income of -\$287,099 and net current assets of -\$1,791,236.²

In a subsequent request for evidence (RFE), the Director stated that the Petitioner had not submitted sufficient documentation to establish its ability to pay the proffered wage. Accordingly, the Director requested additional evidence of the Petitioner's ability to pay, including evidence of annual reports, audited financial statements, U.S. federal income tax returns, or wages it had paid to the Beneficiary (such as IRS Forms W-2, Wage and Tax Statement, IRS Forms 1099-MISC, Miscellaneous Income, or pay vouchers).

In response to the RFE, the Petitioner resubmitted copies of the unaudited financial statements for [redacted] for the year ending December 31, 2021. In a subsequent notice of intent to deny (NOID), the Director explained that the Petitioner had not submitted sufficient documentation to establish its ability to pay the proffered wage:

The evidence shows that the Petitioner submitted secondary evidence in lieu of the three types of the primary evidence which a petitioner is required to submit to illustrate its ability to pay the proffered wage. While 8 C.F.R. § 204.5(g)(2) allows additional material in appropriate cases, the Petitioner did not explain why it could not obtain primary evidence, or establish that it was not available.

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The Petitioner has not submitted primary evidence that it has the ability to pay the proffered wage as of the priority date.

In response to the NOID, the Petitioner submitted a January 2023 letter from its certified public accountant stating: "[The Petitioner] has some very complex international tax reporting requirements.

² Net current assets are the difference between a petitioner's current assets and current liabilities.

They have engaged our firm as well as an international tax attorney to sort through all of their filing requirements, so they can file an accurate return. . . . We would request that you consider the attached draft copy of the 2021 Form 1120 at this time based on the current situation.”

The NOID response included a “Draft Copy” the Petitioner’s 2021 Form 1120, U.S. Corporation Income Tax Return, showing a net income of -\$287,099 and net current assets of -\$1,791,236.³ The Petitioner also resubmitted copies of the unaudited financial statements for “[redacted]” for the year ending December 31, 2021.

In denying the petition, the Director concluded that the Petitioner had not demonstrated its ability to pay the proffered wage. The Director indicated that the Petitioner had not submitted primary evidence (such as tax returns filed with the Internal Revenue Service, audited financial statements, or annual reports) demonstrating it met the ability to pay requirement.

On appeal, the Petitioner contends that it “is the subsidiary of parent company [redacted] and therefore is not required to file its own tax returns.” The Petitioner provides a July 2019 “Agreement Between Parent Company and Subsidiary” identifying [redacted] as the “Parent Company” and the Petitioner as its “Subsidiary.” It also submits [redacted] 2021 Form 1120, U.S. Corporation Income Tax Return.⁴ The Petitioner argues that we should consider its parent company’s “total assets” of \$2,339,192 (Form 1120, Schedule L, line 15) for the end of tax year 2021.⁵

The tax return for [redacted] does not establish the Petitioner’s ability to pay the proffered wage. Since 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 Restaurant v. Ashcroft*, 2003 WL 22203713 (D.Mass. Sept. 18, 2003) stated that “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.” Accordingly, the determination of whether the Petitioner has met the ability to pay requirement must be made based on the Petitioner’s finances, rather than those of a separate legal entity or entities. *See id.* Here, the documentation presented on appeal does not establish the Petitioner’s ability to pay the proffered wage.⁶

³ A corporation’s year-end current assets are shown on Schedule L, lines 1 through 6 and its year-end current liabilities are shown on lines 16 through 18. The “Draft Copy” of the Petitioner’s 2021 tax return showing the company’s net income and net current assets does not establish its ability to pay the \$169,312 proffered wage.

⁴ Even if we were to consider the information in [redacted] 2021 Form 1120, the parent company’s tax return shows a net income of \$68,909 and net current assets of -\$2,302,826. These amounts are not sufficient to demonstrate the parent company’s ability to pay the proffered wage.

⁵ Even if we were to accept the Petitioner’s argument, we note that [redacted] 2021 Form 1120 also shows liabilities of \$2,302,834 (Schedule L, line 21). The difference in the parent company’s total assets and liabilities is \$36,358, which is insufficient to show ability to pay the proffered wage.

⁶ A legal entity generally has a separate existence from its shareholders, members, managers, officers, or owners. Generally, USCIS does not consider the financial resources of persons or entities that have no explicit legal obligation to pay the proffered wage, including a parent company, shareholders and officers of a corporation, members or managers of a limited liability company (LLC) (even if the LLC is taxed as a partnership or disregarded entity), and limited partners.

Further, considering the totality of the circumstances, the record lacks evidence showing that the Petitioner has been a consistently profitable and growing business, nor does the record show the Petitioner's reputation within its industry, the occurrence of any uncharacteristic business expenditures or losses, or other factors that would overcome the shortfall in net income and net current assets on its 2021 draft tax return and other financial statements.

In light of the above, the Petitioner has not established its continuing ability to pay the proffered wage from the priority date of the petition.

ORDER: The appeal is dismissed.

An annual report, audited financial statement, or tax return of a parent company is more probative of a subsidiary's ability to pay the proffered wage where the subsidiary's financial data is presented separately within the document. *See 6 USCIS Policy Manual E.4(A)(5)*, <https://www.uscis.gov/policy-manual/volume-6-part-e-chapter-4>.