



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

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

In Re: 25693806

Date: AUG. 10, 2023

Appeal of Texas Service Center Decision

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

The Petitioner, an information technology services provider, seeks to employ the Beneficiary as a senior systems analyst. The company requests his classification under the third-preference, immigrant visa category for professionals. *See* Immigration and Nationality Act (the Act) section 203(b)(3)(A)(ii), 8 U.S.C. § 1153(b)(3)(A)(ii).

The Director of the Texas Service Center denied the petition, concluding the Petitioner did not establish, as required, that it had the continuing ability to pay the proffered wage. On appeal, the Petitioner submits evidence and contends that it has established that it has the continuing ability to pay the proffered wage from the priority date onward. The matter is now before us on appeal. 8 C.F.R. § 103.3.

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 withdraw the Director's decision and remand the matter for entry of a new decision consistent with the following analysis.

In the request for evidence (RFE), the Petitioner was notified that insufficient evidence was initially submitted to establish that it possessed the ability to pay the proffered wage. A petitioner must demonstrate its continuing ability to pay a proffered wage, from a petition's priority date until a beneficiary obtains lawful permanent residence, which in this case is June 16, 2013. 8 C.F.R. § 204.5(g)(2). Evidence of ability to pay must generally include copies of annual reports, federal tax returns, or audited financial statements. *Id.* Though the Petitioner responded to the RFE, the Director concluded that the documentation provided was not sufficient. The Director based his denial solely on his conclusion that the Petitioner did not meet the ability to pay regulatory requirements, and therefore he determined the Petitioner was ineligible for the immigration benefit sought in the petition.

In most cases, our decision will be limited to the evidence in the record at the time of the unfavorable decision, as the appellate regulations have never explicitly allowed for the submission of evidence with regular appeals. Accordingly, when new evidence is submitted with an appeal, we will apply

both *Matter of Soriano*¹ and *Matter of Obaighena*² to determine whether we will consider that evidence was we adjudicate the appeal. In applying the framework of those cases to the matter at hand, we note again that the RFE provided notice to the Petitioner that an evidentiary deficiency prevented the Director from determining whether the Petitioner met the ability to pay requirements.

In response to the RFE and again on appeal, the Petitioner asserts the evidence submitted establishes its ability to pay the proffered wage. We also note that a significant amount of additional evidence that appears directly material to that determination has been submitted on appeal. The Petitioner had a reasonable opportunity to respond to the evidentiary deficiency through the RFE process and, in fact did provide an RFE response which addressed its ability to pay the proffered wage. The Director determined it was not sufficient.

With regard to the additional evidence submitted on appeal, we question whether the Petitioner was in possession of and/or capable of submitting these documents within its RFE response. Accordingly, the AAO is not required to consider this additional evidence submitted on appeal, and we conclude the Director is the more appropriate party to consider its impact on the Petitioner's eligibility for the benefit sought.

ORDER: The Director's decision is withdrawn. The matter is remanded for the entry of a new decision consistent with the foregoing analysis.

¹ *Matter of Soriano*, 19 I&N Dec. 764 (BIA 1988).

² *Matter of Obaighena*, 19 I&N Dec. 533 (BIA 1988).