



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

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

In Re: 28077334

Date: AUG. 15, 2023

Appeal of Texas Service Center Decision

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

The Petitioner, a home healthcare agency, seeks to permanently employ the Beneficiary as a registered nurse. The company requests her classification under the employment-based, third-preference (EB-3) immigrant visa category as a professional. *See* Immigration and Nationality Act (the Act) section 203(b)(3)(A)(ii), 8 U.S.C. § 1153(b)(3)(A)(ii). This category allows a U.S. business to sponsor a noncitizen for permanent residence to work in a job requiring at least a bachelor's degree. *Id.*

The Director of the Texas Service Center denied the petition. The Director concluded that the Petitioner did not demonstrate its required ability to pay the proffered wage of this and another petition the company filed. On appeal, the Petitioner contends that the Director disregarded evidence and other factors affecting its ability to pay.

The Petitioner bears the burden of demonstrating eligibility for the requested benefit by a preponderance of the evidence. *Matter of Chawathe*, 25 I&N Dec. 369, 375-76 (AAO 2010). Exercising de novo appellate review, *see Matter of Christo's, Inc.*, 26 I&N Dec. 537, 537 n.2 (AAO 2015), we conclude that the company has not established its required ability to pay the combined proffered wages. We will therefore dismiss the appeal.

## I. LAW

Immigration as a professional usually follows a three-step process. First, a prospective employer must apply to the U.S. Department of Labor (DOL) for certification that: there are insufficient U.S. workers able, willing, qualified, and available for an offered position; and a noncitizen's employment in the position would not harm wages and working conditions of U.S. workers with similar jobs. Section 212(a)(5)(A)(i) of the Act, 8 U.S.C. § 1182(a)(5)(A)(i). Second, an employer must submit a DOL-approved labor certification with an immigrant visa petition to U.S. Citizenship and Immigration Services (USCIS). Section 204(a)(1)(F) of the Act, 8 U.S.C. § 1154(a)(1)(F); 8 C.F.R. § 204.5(l)(3)(i). Finally, if USCIS approves a petition, a beneficiary 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.

DOL, however, has predetermined that the United States lacks sufficient workers who are able, willing, qualified, and available for employment as registered nurses. 20 C.F.R. § 656.5(a)(2) (listing “professional nurses” under “Schedule A,” Group I). Thus, the Petitioner did not need to apply to DOL for labor certification or advertise the offered position to U.S. workers. Rather, the company submitted its Schedule A labor certification application with its petition, and USCIS adjudicated the application under DOL regulations. *See* 20 C.F.R. § 656.15(a). USCIS’ determination on a Schedule A labor certification is “conclusive and final.” 20 C.F.R. § 656.15(e).

## II. ANALYSIS

A petitioner must demonstrate its continuing ability to pay a proffered wage, from a petition’s priority date until a beneficiary obtains permanent residence. 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.*

When determining ability to pay, USCIS examines whether a petitioner paid a beneficiary the full proffered wage each year, beginning with the year of a petition’s priority date. *See generally* 6 *USCIS Policy Manual* E.(4)(B), [www.uscis.gov/policy-manual](http://www.uscis.gov/policy-manual). If a petitioner did not annually pay the full proffered wage or did not pay a beneficiary at all, USCIS considers whether the business generated annual amounts of net income or net current assets sufficient to pay any differences between the proffered wage and the wages paid. *Id.* If net income and net current assets are insufficient, the Agency may consider other factors affecting a petitioner’s ability to pay a proffered wage. *Matter of Sonogawa*, 12 I&N Dec. 612, 614-15 (Reg’l Comm’r 1967).<sup>1</sup>

The Petitioner’s labor certification application states the proffered wage of the offered position of registered nurse as \$73,133 a year. The petition’s priority date is May 28, 2021, the date of the petition’s filing. *See* 8 C.F.R. § 204.5(d) (explaining how to determine a petition’s priority date).

As the Director found, USCIS records indicate the Petitioner’s filing of a Form I-140, Petition for Alien Worker, for another beneficiary that was pending or approved as of this petition’s May 28, 2021 priority date.<sup>2</sup> The company must therefore demonstrate its ability to pay the combined proffered wages of this and its other petition. *See Patel v. Johnson*, 2 F. Supp. 3d 108, 124 (D. Mass. 2014) (affirming our revocation of a petition’s approval where, as of the filing’s grant, the petitioner had not demonstrated its ability to pay the combined proffered wages of multiple petitions); *see also* 6 *USCIS Policy Manual* E.(4)(C)(2) n.25 (“A substantially increased total labor expense of multiple beneficiaries may potentially impact the petitioner’s ability to continue to pay existing employees.”)<sup>3</sup>

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<sup>1</sup> Federal courts have upheld USCIS’ method of determining a petitioner’s ability to pay a proffered wage. *See, e.g., River St. Donuts, Inc. v. Napolitano*, 558 F.3d 111, 118 (1st Cir. 2009); *Rizvi v. Dep’t of Homeland Sec.*, 37 F. Supp. 3d 870, 883-84 (S.D. Tex. 2014), *aff’d*, 627 Fed. App’x. 292 (5th Cir. 2015).

<sup>2</sup> USCIS records identify the other petition’s receipt number as

<sup>3</sup> The Petitioner need not demonstrate its ability to pay proffered wages of petitions that it withdrew or that USCIS rejected, denied, or revoked. *See generally* 6 *USCIS Policy Manual* E.(4)(C)(2). The Petitioner also need not demonstrate its ability to pay proffered wages before the priority dates of their corresponding petitions or after the dates their corresponding beneficiaries obtain permanent residence. *Id.*

The Petitioner indicated that the other petition's proffered wage is also \$73,133 a year. Thus, the company must demonstrate its ability to pay combined proffered wages of \$146,266 a year.

The Petitioner submitted regulatory required evidence of its ability to pay in 2021: a copy of its federal income tax return. At the time of the Petitioner's response to the Director's most recent request for additional evidence (RFE), required evidence of the company's ability to pay in 2022 was not yet available. Thus, for purposes of this decision, we will consider the company's ability to pay the proffered wage only in 2021, the year of the petition's priority date.<sup>4</sup>

As evidence of its payment of wages to the Beneficiary, the Petitioner submitted copies of payroll records from August 15, 2022 through October 23, 2022. The record lacks evidence of any payments the company made to her in 2021. Thus, based solely on wages paid, the company has not demonstrated its ability to pay the proffered wage in 2021.

The Petitioner's 2021 tax return reflects net income of -\$402,280 and net current assets of -\$54,192. Therefore, based on net income and net current assets, the record also does not demonstrate the company's ability to pay the proffered wage.

On appeal, the Petitioner contends that the Director should have considered other factors in determining the company's ability to pay. We agree. As previously indicated, USCIS may consider additional factors outlined in *Sonegawa*, including: the number of years a petitioner has conducted business; its number of employees; growth of its business; its reputation in its industry; and a beneficiary's replacement of a current employee or outsourced services. *Matter of Sonegawa*, 12 I&N Dec. at 614-15.

The record shows that the Petitioner has conducted business since 2012 and, as of the third quarter of 2022, employed 33 people. Copies of the company's federal income tax returns indicate that, from 2020 to 2021, its annual gross income and amounts of salaries and wages paid increased.

Unlike the petitioner in *Sonegawa*, however, the Petitioner has not established its possession of a good business reputation in its industry, and the company must demonstrate its ability to pay the combined proffered wages of multiple petitions. Also, the record does not indicate the Beneficiary's proposed replacement of a current employee or outsourced service. Thus, on balance, the factors stated in *Sonegawa* do not demonstrate the Petitioner's ability to pay the proffered wage.

The Petitioner notes that an employer may demonstrate its ability to pay by showing that it has paid a beneficiary at least the offered position's proffered wage. *See generally* 6 *USCIS Policy Manual* E.(4)(B)(1). The company contends that it pays the Beneficiary more than the offered job's proffered wage. The 2022 payroll records indicate that the Petitioner paid her \$50 an hour.

USCIS policy, however, requires a petitioner's total payments to a beneficiary in a relevant year to equal or exceed the proffered wage. The Agency's policy manual states: "If the petitioner establishes

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<sup>4</sup> In any future filings in this matter, however, the Petitioner must also demonstrate its ability to pay the proffered wage in 2022. *See* 8 C.F.R. § 204.5(g)(2) (requiring a petitioner to demonstrate its ability to pay "at the time the priority date is established and continuing until the beneficiary obtains lawful permanent residence").

by documentary evidence that it has paid the beneficiary a salary equal to or greater than the proffered wage for each year from the priority date, the evidence may establish the petitioner's ability to pay." 6 USCIS Policy Manual E.(4)(B)(1). Otherwise, petitioners unable to pay proffered wages over full years could nevertheless demonstrate their abilities to pay by paying proffered wages to beneficiaries over short periods.

The Petitioner's payroll records show that it paid the Beneficiary a total of \$11,100 in 2022. On appeal, the company also submits a copy of her 2022 IRS Form W-2, Wage and Tax Statement, indicating that the company paid her a total of \$26,606.25 that year.<sup>5</sup> Both amounts fall below the annual proffered wage of \$73,133. Further, the 2022 payments do not establish the company's ability to pay in 2021, the year of the petition's priority date. Thus, evidence of the Petitioner's payments to the Beneficiary do not establish its ability to pay the proffered wage.

Submitting copies of bank account statements on appeal, the Petitioner asserts that it had more than \$195,000 in cash in 2021 with which it could have paid the combined proffered wages. But the Director's most recent RFE, dated September 12, 2022, specifically invited the company to submit additional evidence of its ability to pay, including "[y]our bank account records." The Petitioner has not demonstrated the unavailability of its 2021 bank records at the time of its RFE response. As the company previously received notice of the evidence and a reasonable opportunity to submit it, we decline to consider it on appeal. See *Matter of Soriano*, 19 I&N Dec. 764, 766 (BIA 1988).

Even if we did consider the bank records on appeal, the Petitioner has not explained how they would demonstrate its ability to pay the proffered wage in 2021. The company asserts its possession of more than \$195,000 in cash that year. The bank records include monthly statements for a checking account in one bank and a deposit account in another. But the 2021 year-end balances for the checking account (\$15,737.68) and the deposit account (\$8,722.63) total only \$24,460.31. Also, Schedule L of the Petitioner's 2021 IRS Form 1120-S, U.S. Income Tax Return for an S Corporation, indicates that the company ended the year with only \$41,044 in cash, which we already considered in calculating the Petitioner's net current assets. A petitioner must resolve inconsistencies with independent, objective evidence pointing to where the truth lies. *Matter of Ho*, 19 I&N Dec. 582, 591 (BIA 1988). The Petitioner has not explained the cash amount discrepancies of record. The record therefore would not demonstrate the company's possession of sufficient cash available to pay the combined proffered wages in 2021. Also, the company has not demonstrated that the cash indicated in the bank statements represents additional funds that we did not already consider in calculating the company's net current assets that year.

The Petitioner also contends that the COVID-19 pandemic affected its ability to pay the proffered wage. The company states that, as a healthcare provider, it "relied heavily on governmental invoicing and reimbursement payments, which was limited during the [pandemic]." The company submits copies of news articles about the pandemic's economic effects on the home healthcare industry.

The Director's RFE did not invite the Petitioner to submit non-financial documentation, such as news articles. We will therefore consider the pandemic articles on appeal. The record, however, lacks

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<sup>5</sup> At the time of the Petitioner's response to the Director's most recent RFE, the 2022 Form W-2 was not yet available. We will therefore consider the evidence on appeal.

sufficient, evidence of how the pandemic specifically affected the Petitioner. The company neither submitted documentary evidence of how claimed declines in government reimbursements hurt it nor provided evidence of its pre-pandemic finances. The articles therefore do not demonstrate that the pandemic economically harmed the company or merit excusing the insufficient evidence of its ability to pay in 2021.

For the foregoing reasons, the Petitioner has not demonstrated its ability to pay the offered position's proffered wage. We will therefore affirm the petition's denial.

### III. CONCLUSION

The Petitioner has not demonstrated its required ability to pay the offered position's proffered wage. We will therefore affirm the petition's denial.

**ORDER:** The appeal is dismissed.