



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

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

In Re: 21160413

Date: JUNE 27, 2022

Motion on Administrative Appeals Office Decision

Form I-140, Immigrant Petition for an Alien Worker

The Petitioner, a poultry processing business, seeks to employ the Beneficiary as a poultry trimmer. It requests classification of the Beneficiary as an “other worker” under the third preference immigrant category. Immigration and Nationality Act section 203(b)(3)(A)(iii), 8 U.S.C. § 1153(B)(3)(A)(iii). This employment-based “EB-3” immigrant classification allows a U.S. employer to sponsor for lawful permanent resident status a foreign national who is capable of performing unskilled labor that requires less than two years of training or experience and is not of a temporary or seasonal nature.

The Director of the Texas Service Center denied the petition on the ground that the Petitioner did not establish its ability to pay the proffered wage of the instant Beneficiary as well as the proffered wages of the beneficiaries of all its other Form I-140 petitions. We agreed with the Director and dismissed the Petitioner’s appeal. On motion, the Petitioner submits an auditor’s report and a letter asserting that it has the ability to pay all of its proffered wage obligations.

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. Upon review, we will dismiss the motion to reopen.

**I. LAW**

A motion to reopen must state new facts and be supported by documentary evidence. 8 C.F.R. § 103.5(a)(2). The requirements of a motion to reopen are located at 8 C.F.R. § 103.5(a)(2). We may grant a motion that satisfies these requirements and demonstrates eligibility for the requested immigration benefit.

To be eligible for the classification it requests for the beneficiary, a petitioner must establish that it has the ability to pay the proffered wage stated in the labor certification. As provided in the regulation at 8 C.F.R. § 204.5(g)(2):

The petitioner must demonstrate this ability at the time the priority date<sup>1</sup> 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 a case where the prospective United States employer employs 100 or more workers, the director may accept a statement from a financial officer of the organization which establishes the prospective employer's ability to pay the proffered wage. 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 [U.S. Citizenship and Immigration Services (USCIS)].

## II. ANALYSIS

In our February 2021 decision, we concluded that the Petitioner had not established its continuing ability to pay the proffered wage of the instant Beneficiary and the proffered wages of all its other I-140 beneficiaries from the priority date of November 17, 2016, onward.

Because USCIS records indicated that the Petitioner had filed numerous other I-140 petitions, the Director issued a request for evidence (RFE) on July 7, 2017, in which the Petitioner was asked to submit specific information about those other petitions and beneficiaries. The Petitioner was also requested to submit copies of its most recent federal income tax returns or audited financial statements. In the RFE, the Director referred to two pieces of evidence submitted with the petition. One was a "Private Company Financial Report" "created November 9, 2015" which the Director noted did not include sufficient financial information to meet the requirements of 8 C.F.R. § 204.5(g)(2).<sup>2</sup> The other was a letter from the Petitioner's chief financial officer (CFO) with alleged income and employee figures for 2016 (indicating that the Petitioner was a lucrative business employing well over 100 workers), which the Director indicated was not acceptable evidence of the Petitioner's ability to pay the proffered wage because multiple I-140 petitions had been filed in a short period of time.

In response to the RFE, the Petitioner submitted additional evidence pertaining to its other I-140 beneficiaries. However, it did not submit copies of any federal income tax return or audited financial statement, as specifically requested. The Petitioner asserted that such documentation is not required from a U.S. employer with 100 or more workers under the regulation at 8 C.F.R. § 204.5(g)(2) or the Memorandum from William R. Yates, Associate Director for Operations, *Determination of Ability to Pay under 8 CFR 204.5(g)(2)*, HQOPRD 90/16.45, (May 4, 2004) (Yates Memorandum). Instead, the Petitioner submitted a document entitled "Unemployment Insurance Tax Information" with a list of figures for wages, taxes, and employees during the first quarter of 2017, and a copy of the letter from the Petitioner's CFO originally submitted with the petition, in addition to a copy of the Yates Memorandum.

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<sup>1</sup> The priority date of an employment-based immigrant petition is the date the underlying labor certification was filed with the DOL, in this case November 17, 2016. See 8 C.F.R. § 204.5(d).

<sup>2</sup> The Petitioner has not established that the "Private Company Financial Report" dated November 2015 constitutes an "annual report" under 8 C.F.R. § 204.5(g)(2). For example, the report did not include an income statement, balance sheet, or statement of cash flows. Nor did this November 2015 report offer evidence of the Petitioner's ability to pay from the priority date of November 17, 2016, onward.

In the decision denying the petition, the Director pointed out that the Petitioner's response to the RFE did not include any of the three types of evidence – an annual report, a federal tax return, or an audited financial statement – required by 8 C.F.R. § 204.5(g)(2) and requested in the RFE. The Director stated that USCIS has the discretionary authority under the regulation and the Yates Memorandum to accept additional types of evidence, like the Petitioner's Unemployment Insurance Tax Information document and the letter from its CFO, but is not obligated to do so. Since the Petitioner in this case had filed multiple I-140 petitions, the Director indicated that requesting a form of regulatory required evidence was warranted and the Petitioner's failure to submit such evidence precluded a material line of inquiry that was grounds for denying the petition, citing 8 C.F.R. § 103.2(b)(14).

With the motion, the Petitioner now submits a "June 3, 2017 and June 4, 2016" "Independent Auditor's Report." However, as the Petitioner did not submit this document before the Director, either at the time it filed the petition or in response to the Director's RFE, we will not consider this evidence in our adjudication of this motion.<sup>3</sup> See *Matter of Soriano*, 19 I&N Dec. 764, 766 (BIA 1988) (providing that if "the petitioner was put on notice of the required evidence and given a reasonable opportunity to provide it for the record before the denial, we will not consider evidence submitted on appeal for any purpose" and that "we will adjudicate the appeal based on the record of proceedings" before the Chief); see also *Matter of Obaighena*, 19 I&N Dec 533 (BIA 1988). Although the Independent Auditor's Report pre-dates the filing of the Form I-140 on June 26, 2017, the Petitioner did not explain why it did not present this document before the Director. Accordingly, we will not consider this evidence to determine the Petitioner's ability to pay the proffered wage for the first time on motion.

### III. CONCLUSION

The Petitioner has not established new facts relevant to our decision that would warrant reopening of the proceedings. Consequently, we have no basis for reopening our appellate decision. The Petitioner's appeal therefore remains dismissed, and the underlying petition remains denied.

**ORDER:** The motion to reopen is dismissed.

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<sup>3</sup> In our appellate decision, we noted that the Director specifically requested the submission of at least one type of regulatory required evidence in the RFE sent to the Petitioner on July 7, 2017. See 8 C.F.R. § 204.5(g)(2). Our decision further stated: "In response to the RFE, the Petitioner could have submitted its federal tax return or an audited financial statement for the priority date year of 2016, in compliance with 8 C.F.R. § 204.5(g)(2) and the Director's RFE. It chose not to do so. The Director noted the absence of such documentation in his decision. On appeal, the Petitioner had another chance to submit its federal tax return or an audited financial statement for 2016, but once again chose not to do so. The regulation at 8 C.F.R. § 103.2(b)(14) provides that the failure to submit requested evidence that precludes a material line of inquiry shall be grounds for denying the petition."