



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

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

In Re: 25690728

Date: MAR. 28, 2023

Appeal of Texas Service Center Decision

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

The Petitioner, a hotel, seeks to employ the Beneficiary as a lodging manager. It requests classification of the Beneficiary as a skilled worker under the third preference immigrant classification. *See* Immigration and Nationality Act section 203(b)(3)(A)(i), 8 U.S.C. § 1153(b)(3)(A)(i). This employment-based immigrant classification allows a U.S. employer to sponsor a noncitizen for lawful permanent resident status to work in a position that requires at least two years of training or experience.

The Director of the Texas Service Center denied the petition, concluding that the record did not establish that the Petitioner had the ability to pay the Beneficiary the proffered wage during the relevant period. 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.

The regulation at 8 C.F.R. § 204.5(g)(2) states in pertinent part:

*Ability of prospective employer to pay wage.* Any petition filed by or for an employment-based immigrant which requires an offer of employment must be accompanied by evidence that the prospective United States employer has the ability to pay the proffered wage. The petitioner must demonstrate this ability at the time the priority date 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 determining a petitioner's ability to pay, we first examine whether it paid a beneficiary the full proffered wage each year from a petition's priority date. If a petitioner did not pay a beneficiary the full proffered wage, we next examine whether it had sufficient annual amounts of net income or net current assets to pay the difference between the proffered wage and the wages paid, if any. If a

petitioner's net income or net current assets are insufficient, we may also consider other evidence of its ability to pay the proffered wage.<sup>1</sup>

The priority date in this matter is April 12, 2021, the date on which the U.S. Department of Labor (DOL) received the DOL ETA Form 9089, Application for Permanent Employment Certification, for processing. On the ETA Form 9089, the annual proffered wage is listed as \$35,589. On the Form I-140, Immigrant Petition for Alien Workers, the Petitioner indicated that, at the time of filing in October 2021, it had four current U.S. employees.

In relevant part, the Director noted that the record establishes the Petitioner had a significant net loss in 2020; net current liabilities of \$39,122 at the end of 2020; and that the record did not contain a copy of the Petitioner's 2021 federal income tax return. The Director also noted that the Petitioner received certain loans from the U.S. Small Business Administration (SBA) between May 2020 and January 2022. The Director gave "less weight to loans and debt as a means of paying salary since the debts will increase the firm's liabilities and will not improve its overall financial position," citing *Matter of Great Wall*, 16 I&N Dec. 142 (Reg'l Comm'r 1977). Ultimately, the Director denied the petition, concluding that "the [P]etitioner did not establish that it has the ability to pay the proffered wage since the priority date." However, the Director did not address the factors discussed in *Matter of Sonegawa*, 12 I&N Dec. 612, 614-15 (Reg'l Comm'r 1967), which permits U.S. Citizenship and Immigration Services (USCIS) to consider the totality of the circumstances affecting a petitioner's ability to pay the proffered wage.<sup>2</sup>

On appeal, the Petitioner describes the COVID-19 pandemic as "the greatest economic disaster in the history of the United States since the Great Depression." The Petitioner references an article published by U.S. News and World Report, "indicating that the American Hotel and Lodging Association was especially devastated by the coronavirus pandemic . . . as people were inhibited in their ability to travel." The Petitioner also discusses *Matter of Sonegawa* and asserts that "the same analysis should apply in this case." Specifically, the Petitioner notes that it has been in operation for more than a decade, and it further notes that its tax returns for 2018 and 2019, shortly before the COVID-19 pandemic, report net profits of \$481,907 and \$1,104,823, respectively, indicating the Petitioner's recent revenue potential. The Petitioner also asserts that its \$500,000 loan from the SBA dated shortly before the petition filing date, in particular, "is evidence that the U.S. government fully expects that the [Petitioner] will remain viable for the future." The Petitioner further states that "the factors that led to a decline in income was not an on-going occurrence" and that it "has taken action to insure [sic] its ability to pay the proffered salary in the future as the [B]eneficiary awaits his permanent resident visa."

---

<sup>1</sup> Federal courts have upheld our 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); *Tongatapu Woodcraft Haw., Ltd. v. Feldman*, 736 F.2d 1305, 1309 (9th Cir. 1984); *Estrada-Hernandez v. Holder*, 108 F. Supp. 3d 936, 942-946 (S.D. Cal. 2015); *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, 294-95 (5th Cir. 2015).

<sup>2</sup> USCIS may consider evidence of the Petitioner's ability to pay beyond its net income and net current assets, including such factors as: the number of years it has conducted business; the growth of its business; its number of employees; the occurrence of any uncharacteristic business expenditures or losses; its reputation in its industry; whether the Beneficiary will replace a current employee or outsourced service; or other evidence of its continuing ability to pay the proffered wage. *See id.*

The record does not contain regulatory-prescribed evidence of the Petitioner's ability to pay for 2021. Without this regulatory-required evidence, we cannot affirmatively find that the Petitioner has the continuing ability to pay the proffered wage from the priority date. The record is unclear whether regulatory-required evidence of the Petitioner's ability to pay in 2021 was available before the record closed in this matter. The Director stated that the record contains "acknowledgement letters that the IRS has received the federal income tax return for 2021 and that it was accepted on February 16, 2022. There is no mention that an extension was requested in the letters." However, the documents the Director appears to reference are titled Acknowledgement and General Information for Entities That File Returns Electronically, confirming that the Petitioner's "2021 7004-09 income tax return for Federal was [sic] filed electronically [and] accepted on 02-16-2022." We take administrative notice that the IRS instructs entities, "Use [IRS] Form 7004 to request an automatic 6-month extension of time to file certain business income tax, information, and other returns," not to use Form 7004 file actual returns. IRS, *About Form 7004, Application for Automatic Extension of Time To File Certain Business Income Tax, Information, and Other Returns*, <https://www.irs.gov/forms-pubs/about-form-7004>. Therefore, the record does not appear to support the Director's statement that the IRS accepted the Petitioner's 2021 federal income tax return on February 16, 2022. Moreover, as noted above and as addressed on appeal, the Director did not address the factors discussed in *Matter of Sonogawa*, which may establish a petitioner's ability to pay the proffered wage under the totality of the circumstances. *See id.* at 614-15.

Based on the foregoing, we will withdraw the Director's decision and we will remand the matter for the entry of a new decision. The Director may request any additional evidence considered pertinent to the new determination regarding the Petitioner's ability to pay the Beneficiary the proffered wage from the priority date and continuing until the Beneficiary obtains lawful permanent residence, *see* 8 C.F.R. § 204.5(g)(2), and any other issue. As such, we express no opinion regarding the ultimate resolution of this case on remand.

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