



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

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

In Re: 33383715

Date: SEPT. 13, 2024

Appeal of Texas Service Center Decision

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

The Petitioner provides staffing for senior care and seeks to employ the Beneficiary as a personal care aide. The company requests her classification under the employment-based, third-preference (EB-3) immigrant visa category as an “other worker.” *See* Immigration and Nationality Act (the Act) section 203(b)(3)(A)(iii), 8 U.S.C. § 1153(b)(3)(A)(iii). Businesses may sponsor noncitizens for U.S. permanent residence in this category to work in jobs requiring less than two years of training or experience. *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 offered job’s proffered wage. On appeal, the company contends that the Director disregarded copies of its bank account statements that establish 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 submitted regulatory required evidence regarding its ability to pay the proffered wage. We will therefore withdraw the Director’s contrary decision. But, because additional questions remain about the Petitioner’s ability to pay and its intent to employ the Beneficiary in the offered job, we will remand the matter for entry of a new decision consistent with the following analysis.

## I. LAW

Immigration as an other – or “unskilled” – worker generally follows a three-step process. First, a prospective employer must obtain certification from the U.S. Department of Labor (DOL) that: there are insufficient U.S. workers able, willing, qualified, and available for an offered job; and a noncitizen’s permanent 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. Immigration and Citizenship Services (USCIS). Section 204(a)(1)(F) of the Act, 8 U.S.C.

§ 1154(a)(1)(F). Among other things, USCIS determines whether a noncitizen beneficiary meets the requirements of a DOL-certified position and a requested immigrant visa category. 8 C.F.R. § 204.5(l)(3)(ii)(D).

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.

## II. ANALYSIS

### A. Ability to Pay the Proffered Wage

A petitioner must demonstrate its continuing ability to pay an offered job’s 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.*<sup>1</sup>

When determining ability to pay, USCIS examines whether a petitioner paid a beneficiary the full proffered wage each year, beginning with the year of the petition’s priority date. *See generally* 6 USCIS Policy Manual E.(4)(C), [www.uscis.gov/policy-manual](http://www.uscis.gov/policy-manual). If a petitioner did not annually pay a beneficiary the full proffered wage, or did not pay a beneficiary at all, the Agency 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, USCIS may consider other factors potentially affecting a petitioner’s ability to pay a proffered wage. *See Matter of Sonogawa*, 12 I&N Dec. 612, 614-15 (Reg’l Comm’r 1967).<sup>2</sup>

The Petitioner’s labor certification states the proffered wage of the offered job of personal care aide as \$23,878 a year. The petition’s priority date is October 25, 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).

The Petitioner did not submit evidence that it paid the Beneficiary. Thus, based solely on wages paid, the company has not demonstrated its ability to pay the proffered wage.

As evidence of its ability to pay, the Petitioner’s initial filing included copies of its bank account statements from October 2021 through November 2022. As the Director found, bank statements are not among regulatory required materials that a petitioner must submit. *See* 8 C.F.R. § 204.5(g)(2) (requiring a petitioner to provide “copies of annual reports, federal tax returns, or audited financial statements”). The Director therefore issued a request for additional evidence (RFE) of the company’s ability to pay.

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<sup>1</sup> If a petitioner employs at least 100 people, it may submit a statement from a financial officer establishing its ability to pay a proffered wage. 8 C.F.R. § 204.5(g)(2). The record does not indicate – nor does the Petitioner claim – the company’s employment of at least 100 people.

<sup>2</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); *Four Holes Land & Cattle, LLC v Rodriguez*, No. 5:15-cv-03858, 2016 WL 4708715, \*\*X (D.S.C. Sept. 9, 2016).

The Petitioner's RFE response included: a letter from its owner; copies of additional bank statements from November 2022 through September 2023; and a copy of its owner's personal federal income tax return for 2021. The Director concluded that, contrary to regulation, the Petitioner had not submitted required evidence of its ability to pay the proffered wage. *See* 8 C.F.R. § 204.5(g)(2) (requiring a petitioner to submit "copies of annual reports, federal tax returns, or audited financial statements").

The 2021 tax return of the Petitioner's owner, however, effectively includes the company's federal income tax return for that year. The return and other evidence identifies the Petitioner's owner as the sole member of the limited liability company (LLC). The owner listed the LLC's 2021 financial activities on his individual federal income tax return at Schedule C, Profit or Loss from Business. The U.S. Internal Revenue Service (IRS) then treated the single-member LLC as a "disregarded entity." *See* 26 C.F.R. § 301.7701-2(a); IRS, "Single member limited liability companies," [www.irs.gov/businesses/small-businesses-self-employed/single-member-limited-liability-companies](http://www.irs.gov/businesses/small-businesses-self-employed/single-member-limited-liability-companies). Thus, for ability-to-pay purposes, the Schedule C of the Petitioner's owner represents the company's 2021 federal income tax return. The company therefore submitted regulatory required evidence of its ability to pay in 2021, the year of the petition's priority date. We will therefore withdraw the Director's contrary decision.

On appeal, the Petitioner submits a copy of its owner's 2022 individual federal income tax return, which also includes a Schedule C for the company. That Schedule C similarly serves as the company's federal income tax return for 2022.

The 2021 and 2022 Schedules C, however, do not demonstrate the Petitioner's ability to pay the proffered wage. Both schedules report that, each year, the company "broke even," generating neither a profit nor a loss.

To demonstrate its ability to pay the proffered wage, the Petitioner points to its bank statements from October 2021 through September 2023. The statements bear the company's name and show monthly balances ranging from \$59,760.09 to \$132,829.04.

Besides concluding that the bank statements do not constitute regulatory required evidence, the Director found the statements insufficient to establish the Petitioner's ability to pay. The Director stated that the documents "show only the amount in an account on a given date, and cannot show the sustainable ability to pay a proffered wage." The Director further stated that "no evidence was submitted to demonstrate that the funds reported on the petitioner's bank statements somehow reflect additional available funds that were not reflected on its tax returns."

The Director's reasoning, however, does not apply to this case's facts. The Petitioner's monthly bank statements continuously span the period from October 2021 through September 2023. Thus, they indicate more than the funds available "on a given date" and potentially show a sustainable ability to pay the annual proffered wage of \$23,878, or about \$1,990 a month. Also, the Schedule Cs of the Petitioner's owner do not include the company's cash reserves in 2021 or 2022. Therefore, the schedules do not reflect the funds listed in the bank statements.<sup>3</sup>

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<sup>3</sup> If the Petitioner wants to use its owner's Schedule Cs to demonstrate its net current assets in 2021 or 2022, however, USCIS policy requires the company to submit an audited balance sheet listing any liabilities.

A couple of evidentiary questions remain, however. First, the record indicates that, in November 2022, the Petitioner transferred \$125,000 from its bank accounts into a “certificate of deposit” (CD) at another bank. A CD pays a fixed interest rate on money held for an agreed-upon period of time. *See, e.g.,* Investopedia, “What is a Certificate of Deposit?” [www.investopedia.com/terms/c/certificateofdeposit.asp](http://www.investopedia.com/terms/c/certificateofdeposit.asp); *see also Loc. 109 Ret. Fund v. First Union Nat’l Bank*, 57 F. App’x. 139, 141 (4th Cir. 2003) (describing a CD as a bank’s agreement “to repay a specified amount of money (plus interest)”). If CD funds are withdrawn before the end of the agreed-upon period, penalties usually apply. *See* Investopedia, *supra*. The record does not indicate the period for which the Petitioner’s funds must be held or whether the company would face any early-withdrawal penalties. The company therefore has not demonstrated that it could maintain access to sufficient funds in the CD to pay the Beneficiary’s wage.

Second, USCIS records show the Petitioner’s filing of Forms I-140, Immigrant Petitions for Alien Workers, for other beneficiaries. A petitioner must demonstrate its ability to pay the proffered wage of each petition it files until a beneficiary obtains U.S. permanent residence. 8 C.F.R. § 204.5(g)(2). This Petitioner must therefore demonstrate its ability to pay the combined proffered wages of this petition and any others that were pending or approved at the time of this petition’s October 25, 2021 priority date or filed thereafter. *See Patel v. Johnson*, 2 Fed.Supp.3d 108, 124 (D. Mass. 2014) (affirming our revocation of a petition’s approval where a petitioner did not demonstrate its ability to pay the combined proffered wages of multiple Form I-140 petitions).<sup>4</sup>

USCIS records indicate that, after this petition’s priority date, the Petitioner filed at least four Form I-140 petitions for other beneficiaries.<sup>5</sup> The record, however, does not indicate the proffered wages or priority dates of these petitions. Thus, USCIS cannot determine the amount of combined proffered wages that the Petitioner must demonstrate its ability to pay.

For the foregoing reasons, the Petitioner has not demonstrated its ability to pay the proffered wage.

#### B. Intent to Employ in the Offered Job

The Petitioner also has not established its continuing intent to employ the Beneficiary in the offered job. To petition for a noncitizen, a business must be “desiring and intending to employ [them] within the United States.” Section 204(a)(1)(F) of the Act. A petitioner must demonstrate its intent to employ a beneficiary consistent with DOL-approved job requirements on an accompanying labor certification. *See Matter of Izdebska*, 12 I&N Dec. 54, 55 (Reg’l Comm’r 1966) (affirming a petition’s denial where, contrary to an accompanying labor certification, a petitioner did not demonstrate its intent to employ a beneficiary as a domestic worker on a full-time, live-in basis).

Online government records in the Petitioner’s home state list the company’s business status as “pending inactive.” *See* Va. State Corp. Comm’n, “Business Entity Search,” [cis.scc.virginia.gov/](http://cis.scc.virginia.gov/)

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<sup>4</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* 6 USCIS Policy Manual E.(4)(D)(2). The company also need not establish its ability to pay proffered wages before the priority dates of corresponding petitions or after corresponding beneficiaries obtain U.S. permanent residence. *Id.*

<sup>5</sup> USCIS records identify the four petitions by the following receipt numbers:

EntitySearch/Index. The business status casts doubt on whether the company still conducts business and still intends to employ the Beneficiary in the offered job. The Petitioner therefore has not demonstrated its continuing intent to employ the Beneficiary in the job.

The Director did not inform the Petitioner of the remaining evidentiary questions regarding its ability to pay the proffered wage or the need for additional evidence of its continuing intent to employ the Beneficiary in the offered job. We will therefore remand the matter.

On remand, the Director should notify the Petitioner of these issues and afford it a reasonable opportunity to respond. The Director may also ask the company for evidence of its ability to pay the proffered wage in 2023, if available. *See* 8 C.F.R. § 204.5(g)(2) (requiring a petitioner to demonstrate its ability to pay “continuing until the beneficiary obtains lawful permanent residence”).

If supported by the record, the Director may further inform the Petitioner of any additional potential denial grounds. The Director, however, must notify the company of all potential denial grounds and afford it a reasonable opportunity to respond to all issues raised on remand. Upon receipt of a timely response, the Director should review the entire record and enter a new decision.

### III. CONCLUSION

Contrary to the Director’s decision, the Petitioner submitted regulatory required evidence regarding its ability to pay the offered job’s proffered wage. Evidentiary questions remain regarding the Petitioner’s ability to pay, however, and the company has not demonstrated its continuing intent to employ the Beneficiary in the job.

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