



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

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

In Re: 19596008

Date: AUG. 17, 2022

Appeal of Texas Service Center Decision

Form I-140, Immigrant Petition for Other Worker

The Petitioner seeks to employ the Beneficiary as a factory worker. It requests classification of the Beneficiary as unskilled worker under the third preference immigrant classification. Immigration and Nationality Act (the Act) 203(b)(3)(A)(iii), 8 U.S.C. § 1153(b)(3)(A)(iii). 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 less than two years of training or experience.

Although the Director of the Texas Service Center initially granted the petition, the U.S. Department of State (DOS) returned the petition because the Beneficiary appeared ineligible for the requested benefit. After sending a notice of intent to revoke (NOIR), the Director revoked the approval of the petition, concluding that the record did not establish the Petitioner's continuing ability to pay the proffered wage and the record did not establish that the job offer is *bona fide*. On appeal, the Petitioner reasserts that it has the ability to pay the proffered wage and that the job offer is *bona fide*.

In these proceedings, it is the Petitioner's burden to establish eligibility for the requested benefit. Section 291 of the Act, 8 U.S.C. § 1361. Upon *de novo* review, we will withdraw the Director's decision and remand the matter to the Director for the entry of a new decision.

I. THE EMPLOYMENT-BASED IMMIGRATION PROCESS

Immigration as an unskilled worker generally follows a three-step process. To permanently fill a position in the United States with a foreign worker, a prospective employer must first obtain certification from the U.S. Department of Labor (DOL). *See* section 212(a)(5) of the Act, 8 U.S.C. § 1182(a)(5). DOL approval signifies that insufficient U.S. workers are able, willing, qualified, and available for a position. *Id.* Labor certification also indicates that the employment of a noncitizen will not harm wages and working conditions of U.S. workers with similar jobs. *Id.*

If DOL approves a position, an employer must next submit the certified labor application with an immigrant visa petition to U.S. Citizenship and Immigration Services (USCIS). *See* section 204 of the Act, 8 U.S.C. § 1154. Among other things, USCIS considers whether a beneficiary meets the requirements of a certified position and a requested immigrant visa classification. If USCIS approves the petition, a noncitizen may finally 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.

Section 205 of the Act, 8 U.S.C. § 1155, provides that the Secretary of Homeland Security may “for good and sufficient cause, revoke the approval of any petition.” By regulation, this revocation authority is delegated to any USCIS officer who is authorized to approve an immigrant visa petition “when the necessity for the revocation comes to the attention of [USCIS].” 8 C.F.R. § 205.2(a). USCIS must give the petitioner notice of its intent to revoke the prior approval of the petition and the opportunity to submit evidence in opposition thereto, before proceeding with written notice of revocation. *See* 8 C.F.R. § 205.2(b) and (c).

II. ABILITY TO PAY THE PROFFERED WAGE

As discussed above, the Director revoked the approval of the petition on March 31, 2021, concluding in part that the Petitioner did not establish its continuing ability to pay the proffered wage.

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.¹

Further, where a petitioner has filed Form I-140 petitions for multiple beneficiaries, it must demonstrate that its job offer to each beneficiary is realistic, and that it has the ability to pay the proffered wage to each beneficiary. *See* 8 C.F.R. § 204.5(g)(2); *see also Patel v. Johnson*, 2 F. Supp. 3d 108, 124 (D. Mass. 2014) (upholding our denial of a petition where a petitioner did not demonstrate its ability to pay multiple beneficiaries). Thus, the Petitioner must establish its ability to pay this Beneficiary as well as the beneficiaries of the other Form I-140 petitions that were pending or approved as of, or filed after, the priority date of the current petition.²

¹ 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, 294-295 (5th Cir. 2015).

² The Petitioner’s ability to pay the proffered wage of one of the other I-140 beneficiaries is not considered:

- After the other beneficiary obtains lawful permanent residence;
- If an I-140 petition filed on behalf of the other beneficiary has been withdrawn, revoked, or denied without a pending appeal or motion; or
- Before the priority date of the I-140 petition filed on behalf of the other beneficiary.

The Form I-140, Petition for Alien Workers, indicated that the proffered wage would be \$8.50 per hour, or \$17,680 annually (based on a 40-hour workweek). The Form I-140 also indicated that the Petitioner employed 85 workers at the time of filing. The priority date is the date that DOL received the DOL ETA Form 9089, Application for Permanent Employment Certification, which is April 28, 2016.

The record does not contain evidence that the Petitioner has paid the Beneficiary any wages. The Petitioner submitted IRS Forms 1120S, U.S. Income Tax Return for an S Corporation, for the years 2016 through 2019, which indicate the Petitioner's annual net income exceeded the proffered wage each year. However, the Director noted that the Petitioner filed 37 petitions between the instant Form I-140 filing date and the date of the revocation of its approval, and he concluded that the Petitioner did not demonstrate that it had the ability to pay the proffered wages to those beneficiaries. The Director calculated that the Petitioner would have to demonstrate its ability to pay those workers a total of \$442,000 per year, assuming that the average pay rate for the petitions is \$8.50 per hour, or \$17,680 annually.

The Director appears to have erred in the calculation of the Petitioner's ability to pay the beneficiaries of its other petitions. The Director assumed an average pay rate for the petitions, instead of utilizing the actual proffered wage for each of the petitions. Moreover, the total number of workers to be considered in the ability to pay analysis generally includes not only those for whom the Petitioner filed between the instant Form I-140 filing date and the date of the revocation of its approval, but also those that were pending or approved during that period.

Because the Director appears to have miscalculated the Petitioner's ability to pay the Beneficiary and the other beneficiaries during the relevant period, we will remand the matter to the Director to determine the Petitioner's ability to pay. On remand, the Director should request additional, updated evidence of the Petitioner's ability to pay all of its applicable beneficiaries. The Director should allow the Petitioner a reasonable time to respond. The Petitioner should document the receipt numbers, names of beneficiaries, priority dates, and proffered wages of these other petitions, and indicate the status of each petition and the date of any status change (i.e., pending, approved, withdrawn, revoked, denied, on appeal or motion, beneficiary obtained lawful permanent residence). To offset the total wage burden, the Petitioner may submit documentation showing that it paid wages to other beneficiaries. To demonstrate that it has the ability to pay the Beneficiary and the other beneficiaries, we would expect to see the Petitioner perform the following calculation for each year at issue: (a) calculate any shortfall between the proffered wages and any actual wages paid to the primary Beneficiary and its other beneficiaries, (b) add these amounts together to calculate the total wage deficiency, and (c) demonstrate that its net income or net current assets exceed the total wage deficiency. The Petitioner may also submit additional materials in support of the factors discussed in *Matter of Sonogawa*, 12 I&N Dec. 612, 614-15 (Reg'l Comm'r 1967), which permits USCIS to consider the totality of the circumstances affecting a petitioner's ability to pay the proffered wage.³

³ In determining the Petitioner's ability to pay the proffered wage, we may examine such factors as: the number of years the Petitioner has conducted business; its number of employees; the growth of its business; its incurrence of uncharacteristic losses or expenses; its reputation in its industry; the Beneficiary's replacement of a current employee or outsourced service; or other factors affecting the Petitioner's ability to pay. *See id.*

We note that on appeal, the Petitioner asserts that another entity, [redacted] “has been the W-2 employer for beneficiaries whose certified labor certificates and I-140 petitions have been filed by Petitioner” but that the Petitioner “is indeed the true employer of the certified labor certificate and filed I-140 petition on behalf of the instant [B]eneficiary.” The Petitioner also submits a letter from the Petitioner’s president, stating that he is also the president of [redacted] and that “[a]fter April 1, 2012, [the Petitioner] decided to hire [redacted] services to handle payroll, taxes, health insurance, workers’ compensation, and related paperwork for employees of [the Petitioner’s] manufacturing department because [redacted] has a much larger number of manufacturing employees.” The affidavit reiterates that [redacted] merely serves as the bookkeeper for employees in [the Petitioner’s] manufacturing department.” Despite the Petitioner’s assertions, the record does not contain documentary evidence that the Petitioner contracted [redacted] to process payroll for its employees. The court in *Sitar v. Ashcroft*, 2003 WL 22203713 (D.Mass. Sept. 18, 2003) stated, “nothing in the governing regulation, 8 C.F.R. § 204.5, permits [USCIS] to consider the financial resources of individuals or entities who have no legal obligation to pay the wage.” *Id.* at *2.

We note that the Petitioner also submits on appeal bank statements for the Petitioner and [redacted] [redacted] for the periods of May through October 2019, reflecting transactions of sums of money described as “bills, payroll.” The description “bills, payroll” does not clearly establish whether the transactions were solely for payroll expenses, solely for bills other than payroll expenses, or some combination of payroll-related expenses and other billed expenses. Moreover, even if [redacted] had established that it has been processing payroll for the Petitioner since 2012, which it did not, the record does not explain why the Petitioner reported annual wages paid on the Forms 1120S for the years of 2016 and 2017, but no annual wages paid for the years of 2018 and 2019.⁴ If it paid wages to employees or contractors as asserted, those amounts should be represented on its tax returns as well as on IRS Forms W-2, Wage and Tax Statements, or IRS Forms 1099-MISC, Miscellaneous Income.

The discrepancies discussed above cast doubt on the veracity of the descriptions that the transfers of money from the Petitioner to [redacted] were for the purposes of paying the wages of the Petitioner’s employees during those months of 2019 and otherwise. Doubt cast on any aspect of a petitioner’s proof may undermine the reliability and sufficiency of the remaining evidence offered in support of the visa petition. *Matter of Ho*, 19 I&N Dec. 582, 591 (BIA 1988). On remand, the Director should request independent, objective evidence to resolve the ambiguities and inconsistencies in the record. *See id.*

III. BONA FIDE JOB OFFER

The Director also revoked the petition’s approval because the record did not establish that the job offer is *bona fide* and open to U.S. workers. Specifically, the Director determined that the Beneficiary paid recruitment costs in connection with the labor certification process in violation of 20 C.F.R. § 656.12. On appeal, the Petitioner contests this determination.

⁴ We note that the bank statements purportedly belonging to [redacted] do not have any identifying information on them other than the company name, which appears to be in a different font than the font contained in the other portions of the statements. Further, the redaction above the company name on the statements may include relevant information, such as a joint owner of the bank account.

The Director indicated in the revocation decision that the Petitioner failed to provide evidence requested by the NOIR relating to this issue. However, the Petitioner submitted materials in response to the NOIR that do not appear to have been considered by the Director. When revoking the approval of a petition, a director has an affirmative duty to explain the specific reasons for the revocation; this duty includes informing a petitioner why the evidence did not satisfy its burden of proof pursuant to section 291 of the Act. *See* 8 C.F.R. § 103.3(a)(1)(i). The Director's decision in this case does not explain why the information provided in response to the NOIR was insufficient with regard to the issue of a *bona fide* job offer or how it failed to satisfy its burden of proof regarding eligibility for the benefit sought. Therefore, we will remand this matter to the Director for further consideration of the Petitioner's NOIR response.

IV. CONCLUSION

For the reasons discussed above, we will withdraw the Director's revocation, and we will remand this case to the Director for further consideration of the Petitioner's eligibility for the immigration benefit it seeks on behalf of the Beneficiary. On remand, the Director may wish to issue a new NOIR, and allow the Petitioner an opportunity to respond.

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