



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

Non-Precedent Decision of the  
Administrative Appeals Office

In Re: 21500527

Date: JUL. 18, 2022

Appeal of Nebraska Service Center Decision

Form I-140, Immigrant Petition for Other Worker

The Petitioner, a landscape contractor business, seeks to employ the Beneficiary as a maintenance working foreman. It requests classification of the Beneficiary as an “other” worker under the third preference immigrant category. Immigration and Nationality Act (the 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 residence 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 Nebraska Service Center denied the petition, concluding that the record did not establish that the Beneficiary possessed the requisite three months of experience per the ETA 9089, Application for Permanent Employment Certification (labor certification). On appeal the Petitioner asserts the Director misinterpreted the nature and purpose of the evidence. In support, the Petitioner submits a brief and additional documentation.

The AAO reviews the questions in this matter de novo. *Matter of Christo’s Inc.*, 26 I&N Dec. 537, 537 n.2 (AAO 2015). The Petitioner bears the burden of proof to establish eligibility for the requested benefit by a preponderance of the evidence. Section 291 of the Act, 8 U.S.C. § 1361; *Matter of Chawathe*, 25 I&N Dec. 369, 375 (AAO 2010). Upon de novo review, we will remand this case to the Director for further consideration.

## I. LAW

Employment-based immigration generally follows a three-step process. First, an employer obtains an approved labor certification from the U.S. Department of Labor (DOL). See section 212(a)(5) of the Act, 8 U.S.C. § 1182(a)(5). By approving the labor certification, the DOL certifies that there are insufficient U.S. workers who are able, willing, qualified, and available for the offered position and that employing a foreign national in the position will not adversely affect the wages and working conditions of domestic workers similarly employed. See section 212(a)(5)(A)(i)(I)-(II) of the Act. Second, the employer files an immigrant visa petition with U.S. Citizenship and Immigration Services (USCIS). See section 204 of the Act, 8 U.S.C. § 1154. Third, if USCIS approves the petition,

the foreign national 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. The Beneficiary's Experience

The Director determined that the Petitioner had not demonstrated that the Beneficiary possessed the requisite three months of experience performing outdoor physical labor in the job offered. In its initial filing, the Petitioner provided a letter from [redacted] which stated that the Beneficiary performed maintenance work for her from December 2018 to January 2019 and December 2019 to January 2020. The Director explained that because this letter contained no specific dates for the specified time periods, it did not establish that the Beneficiary possessed the requisite three months of experience. Additionally, the Director noted that although the record contained the Beneficiary's statement concerning his self-employment work history, the Petitioner had not provided any evidence "to support [the Beneficiary's] work history beyond the letter submitted by [redacted] [redacted] Accordingly, the Director determined that the evidence did not establish that the Beneficiary met the minimum requirements for the position by the priority date of December 30, 2019. The priority date is determined by the date DOL accepted the accompanying labor certification application for processing. See 8 C.F.R. § 204.5(d) (explaining how to determine a petition's priority date).

On appeal, the Petitioner contends that the Director misinterpreted the nature and purpose of the evidence. The Petitioner states that the [redacted] letter was meant to complement and corroborate the Beneficiary's self-employment claims rather serve as an employment verification letter. Further, the Petitioner states that [redacted] is the Beneficiary's customer, not his employer. Nevertheless, we agree with the Director that without specific dates, it is possible to interpret its stated date range as less than three months of experience.<sup>1</sup>

On appeal, the Petitioner submits two additional customer letters. A letter from [redacted] [redacted] states that the Beneficiary worked for him from November 25, 2019, to March 20, 2020, performing interior and exterior maintenance. The Petitioner also submits a customer letter from [redacted] claiming that the Petitioner performed interior and exterior maintenance for her during the following time periods:

- January 1, 2016, to March 30, 2016;
- November 19, 2016, to March 30, 2017;
- November 18, 2017, to March 30, 2018;
- November 17, 2018, to March 30, 2019; and
- November 25, 2019, to March 30, 2020.

Per 8 C.F.R. § 204.5(d), we consider only experience gained as of the priority date. Accordingly, even if we considered the letter as a complement and corroboration of the Beneficiary's self-employment

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<sup>1</sup> For instance, December 31, 2018, to January 1, 2019, and December 31, 2019, to January 1, 2020, would collectively represent only four days of experience. Furthermore, because the petition's priority date is December 30, 2019, any experience gained after December 30, 2019, would not be considered.

experience statement, [redacted] letter would represent only five work weeks of experience gained prior to the petition's priority date. Similarly, the most recent period of experience listed in the [redacted] letter would represent only five work weeks of experience gained as of the priority date.<sup>2</sup>

Furthermore, neither letter indicates whether the Beneficiary's work was full- or part-time. While we acknowledge that these are customer letters, not employment letters, the Petitioner still must establish that the Beneficiary has the required experience. For instance, if the listed experience derived from part-time work, the Beneficiary would need to demonstrate more than three months' duration of experience, as the three months of experience listed in the labor certification contemplates full-time experience. Here, the evidence suggests that the Beneficiary worked for both [redacted] and [redacted] during the November 25, 2019, to March 30, 2020, timeframe and as such, it is not apparent that the work for these or other customers was performed on a full-time basis. However, given that the duration of the period during which [redacted] claims the Beneficiary worked for her spanned more than three years, albeit intermittent and part-time, the evidence suggests that Beneficiary's experience in the aggregate totals at least three months of full-time experience.

#### B. Successor in Interest

The Petitioner stated in its initial filing that its former name was [redacted] and that it changed its name to [redacted]. Although the Director did not address this issue, we conclude that the record contains insufficient evidence regarding this name change. We reviewed the Articles of Incorporation for [redacted] and Articles of Organization for [redacted] but these documents do not indicate that [redacted] changed its name to [redacted]. We acknowledge the Petitioner's statement that it submitted proof of the entity's name change; however, the Petitioner does not point to what specifically in the Articles of Incorporation, Articles of Organization, or other documents establishes the entity's name change. Moreover, the Petitioner has not addressed the usage of [redacted] and [redacted] in other documents in the record. An Illinois business entity search reveals that [redacted] effected a name change in September 2020 and that [redacted] and [redacted] underwent "conversions." Nevertheless, this information does not establish that the entities are one in the same, rather than separate entities operating at the same address or organized by the same agent. Furthermore, this information does not resolve other discrepancies in the record concerning the petitioning entity's name.

We acknowledge that the Federal Employee Identification Number (FEIN) on the I-140 petition, the labor certification, and the 2018 tax return are consistent with each other; however, the name differs throughout other documentation.<sup>3</sup> For instance, the Beneficiary's 2019 W-2 states that the Petitioner is [redacted] as does the labor certification, and the 2018 tax returns; however, the I-140 petition, filed in November 2020, contains the name [redacted]. Even if we were to assume that the entity's name changed prior to the I-140 filing date, this would not explain why the

<sup>2</sup> In addition, we note that based upon their identical last names, [redacted] appears to be a relative of the Beneficiary's spouse.

<sup>3</sup> We also note that the 2017 1120S tax return contains the name [redacted] and lists a different FEIN.

Petitioner's quarterly tax return for 2020 carries the name [redacted] While these entities may be related or one in the same, the Petitioner must provide sufficient evidence to establish this.

### C. The Petitioner's Ability to Pay

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.

As indicated in the above regulation, the Petitioner must establish its continuing ability to pay the proffered wage from the petition's priority date onward. In support of its ability to pay the proffered wage, the Petitioner provided a letter on [redacted] letterhead stating that [redacted] has the ability to pay all costs and payroll expenses for employees hired under the PERM program." We note that the return address for this letter belongs to a third-party company the Petitioner hired to process its PERM applications.<sup>4</sup> Although the letter is signed by the "Vice President of Finance," the letter does not indicate whether the signee is the Vice President of Finance for the [redacted] [redacted] or the third-party company. The Petitioner submitted the Beneficiary's 2019 W-2 forms indicating that [redacted] paid the Beneficiary a wage higher than the proffered wage. In addition, we note that the Petitioner provided the first page of both [redacted] Internal Revenue Service (IRS) Forms 1120S, U.S. Income Tax Return for an S Corporation (1120S) for 2017 and an 1120S return for [redacted] for 2018. In addition, the Petitioner provided the first page of IRS Form 941, Employer's Quarterly Federal Tax Return (941), for the first two quarters of 2020. The Petitioner states that its fiscal year runs from December 1 to November 30 and that therefore its 2017 tax return contains 2018 information, while its 2018 tax return contains information from 2019. Assuming the Petitioner does in fact operate on a December 1-November 30 fiscal year, the record reflects the following details:

Tax Year	Ordinary Business Income (Loss) <sup>5</sup>
2017	\$41,730
2018	\$691
2019	not provided
2020	not provided <sup>6</sup>

<sup>4</sup> Although the Petitioner may want this third-party agent to receive correspondence on its behalf, the Petitioner has not provided a valid Form G-28, Notice of Entry of Appearance as Attorney or Accredited Representative for its agent.

<sup>5</sup> This is found at line 21 on the 1120S.

<sup>6</sup> The Petitioner provided only the first page of quarterly returns for the first and second quarters of 2020.

Presumably, the Petitioner did not submit its 2019 federal tax return, purportedly containing December 1, 2019, to November 30, 2020, information because its fiscal year would not have ended at the time the Petitioner filed the I-140 petition on November 27, 2020. However, without the Beneficiary's 2020 W-2, the Petitioner's 2019 federal tax return, or other probative evidence, the record currently does not reflect the Petitioner's continuing ability to pay. In view of the requirement to establish the Petitioner's continuing ability to pay the proffered wage, we will remand this matter for further consideration. The Director may request copies of the Petitioner's federal tax returns for 2019 and 2020 and any other documentation deemed relevant at his discretion in determining the Petitioner's ability to pay the proffered wage.

#### D. The Validity of the Labor Certification

Also unaddressed by the Director, we note that the underlying labor certification appears to contain scanned or electronic signatures from both the Beneficiary and the Petitioner. Therefore, this petition may not have been eligible for approval at filing if it was not accompanied by a valid labor certification. The regulation at 20 C.F.R. § 656.17 describing the basic labor certification process provides in pertinent part:

##### (a) Filing applications.

- (1) . . . Applications filed and certified electronically must, upon receipt of the labor certification, be signed immediately by the employer in order to be valid. Applications submitted by mail must contain the original signature of the employer, alien, attorney, and/or agent when they are received by the application processing center. DHS will not process petitions unless they are supported by an original certified ETA Form 9089 that has been signed by the employer, alien, attorney and/or agent.

Although an ETA Form 9089 approved by DOL accompanied the petition, it appears to contain scanned or photocopied signatures for the Petitioner and Beneficiary. We acknowledge that the record contains a printout of guidance from the Office of Foreign Labor Certification (OFLC) concerning the issuance of electronic labor certifications. The electronic signature of the DOL certifying officer is therefore not a concern. We also acknowledge that the record contains a copy of a USCIS Public Engagement Division email addressing the validity of electronic signatures on the Form I-140. We further acknowledge the section of the Form I-140 instructions that recognizes the validity of electronic signatures. Finally, we are aware of the COVID-19 flexibility in required signatures, which USCIS announced in a March 2020 news alert found at <https://www.uscis.gov/news/alerts/uscis-announces-flexibility-in-submitting-required-signatures-during-covid-19-national-emergency>, as well as the USCIS policy manual that states USCIS accepts “[a]n original signature on the benefit request that is later photocopied, scanned, faxed, or similarly reproduced. . . .” 1 USCIS Policy Manual B.2(B), <https://www.uscis.gov/policymanual>. The validity of scanned, photocopied, or electronic signatures on USCIS forms and the validity of electronic signatures from the certifying DOL officer in approved labor certifications are not at issue.

However, the Petitioner has not established that the above sources of guidance may be interpreted to mean that USCIS will accept scanned, photocopied, or electronic signatures of a petitioner, preparer,

or beneficiary on DOL's certified Forms ETA 9089. In other words, the approved labor certification that a petitioner provides must be the original per 20 C.F.R. § 656.17. Here, the Petitioner has not established that the record contains an original ETA Form 9089, at least in terms of the Petitioner and Beneficiary's signatures.<sup>7</sup> Rather, it appears that although the Petitioner and Beneficiary may have signed the approved labor certification after printing it, the Petitioner provided a scanned or photocopied version of the original labor certification to USCIS instead of the original. Alternatively, it is also possible that electronic images of the Petitioner and Beneficiary's signatures were placed on the electronically approved labor certification before printing. Ultimately, the Director may wish to examine whether the petition was accompanied by a properly signed original labor certification.

### III. CONCLUSION

The Petitioner has submitted additional evidence of the Beneficiary's experience, which the Director did not have an opportunity to review. Additionally, the issues of the labor certification's validity, as well as the petitioning entity's name and its continuing ability to pay the proffered wage were not previously addressed by the Director. Therefore, we will remand this case for further consideration. The Director may issue a request for any evidence that may be deemed relevant in his discretion. After the Petitioner's response is received, or the response period expires, the Director may issue a new decision.

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

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<sup>7</sup> The preparer's signature on the labor certification appears to be original.