U.S. Citizenship and Immigration Services

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

In Re: 40140438

Date: DEC. 1, 2025

Appeal of Service Center Operations (SCOPS) Decision

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

The Petitioner, a restaurant, seeks to employ the Beneficiary as a cook. The business requests his 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 aliens for U.S. permanent residence in this category to work in jobs requiring less than two years of training or experience. *See* 8 C.F.R. § 204.5(l)(2) (defining the term "other worker").

Service Center Operations (SCOPS) denied the petition and dismissed the Petitioner's following combined motions to reopen and reconsider. SCOPS concluded that the business did not demonstrate the Beneficiary's qualifying education for the offered job. On appeal, the Petitioner contends that it mistakenly indicated its non-acceptance of a foreign equivalent of a U.S. high school diploma for the job. The Petitioner argues that information about the Beneficiary's education on the accompanying certification from the U.S. Department of Labor (DOL) indicated the business's acceptance of a foreign educational equivalent.

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 will withdraw SCOPS' decision and 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 DOL certification that: (1) insufficient U.S. workers are able, willing, qualified, and available for an offered position; and (2) an alien's employment in the position would not harm wages and working conditions of U.S. workers with similar jobs. *See* 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. Citizenship and Immigration Services (USCIS). *See* section 204(a)(1)(F) of the Act, 8 U.S.C.

§ 1154(a)(1)(F). USCIS determines, among other things, whether an alien 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(a)(1) of the Act, 8 U.S.C. § 1255(a)(1).

## II. ANALYSIS

### A. The Job's Educational Qualifications

A petitioner must demonstrate that, by a petition's priority date, a beneficiary met all DOL-certified requirements. *Matter of Christo's*, 26 I&N Dec. at 539. This petition's priority date is November 17, 2022, 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).

When assessing a beneficiary's qualifications, USCIS must examine the accompanying labor certification to determine an offered job's minimum requirements. USCIS may neither ignore a certification term nor impose unstated requirements. *See Madany v. Smith*, 696 F.2d 1008, 1015 (D.C. Cir. 1983) ("DOL bears the burden of setting the *content* of the labor certification.") (emphasis in original).

The Petitioner's labor certification states the minimum requirements of the offered cook's job as a U.S. high school diploma. The labor certification states that the job requires neither training nor experience.

As proof of the Beneficiary's educational qualifications, the Petitioner submitted a copy of a certificate from a higher secondary school in Nepal stating the Beneficiary's passage of a "Higher Secondary Education Board Examination." The business also provided a copy of an academic transcript from the board indicating that, by the petition's priority date, the Beneficiary completed Grade 12.

SCOPS concluded that the Petitioner did not demonstrate the Beneficiary's qualifying education for the offered job because the business did not establish his possession of a *U.S.* high school diploma. SCOPS noted that, in response to question H.9 on the labor certification application, "Is a foreign education equivalent acceptable?" the Petitioner checked the box labeled "No."

On appeal, counsel claims that the Petitioner unintentionally checked the "No" box in response to question H.9 on the labor certification application. Counsel's assertion, however, is not evidence. *See Luevano v. Holder*, 660 F.3d 1207, 1213 (10th Cir. 2011) ("Counsel's arguments are not evidence."); *see also Matter of S-M-*, 22 I&N Dec. 49, 51 (BIA 1998) ("[S]tatements in a brief, motion, or Notice of Appeal are not evidence and thus are not entitled to any evidentiary weight"). Also, the Petitioner has not explained how the error occurred given that, before the petition's filing, counsel and one of the business's owners attested to the truth and accuracy of the labor certification application's content. The Petitioner also contends that the labor certification application indicates the business's acceptance of a foreign equivalent of a U.S. high school diploma. The business notes that, in the application's

section J. "Alien Information," the Beneficiary attested to his completion of high school in Nepal. The Petitioner states: "Section J of the [application] clearly indicated … the name and address of the awarding school as being a foreign, non-U.S. school, which makes it clear that DOL was aware that saying no to H.9 was a typo."[1]

SCOPS should have considered the information on the labor certification application about the Beneficiary's foreign education. *See Matter of Credent Techs., LLC*, 2014-PER-00065, at *7 (BALCA Feb. 27, 2018) ("Reading the form as a whole," to interpret an employer's job requirements on a labor certification). Because the application states both a foreign high school credential's unacceptability and the Beneficiary's possession of one, the application was ambiguous regarding the offered job's minimum educational requirement. Faced with this ambiguity, we will look beyond the labor certification application for any additional evidence of the Petitioner's intended educational requirement for the offered job. *See SnapNames.com, Inc. v. Chertoff*, No. CV 06-65-MO, 2006 WL 3491005, at *11 (D. Or. Nov. 30, 2006) ("[T]he visa petitioner defines the labor certification requirements and therefore, where ambiguous, those requirements must be interpreted in light of the petitioner's intent.")

In the Petitioner's prior combined motions to reopen and reconsider, the business submitted copies of documentation regarding its advertisement of the offered job to U.S. workers during the labor certification proceedings.[2] We will remand the petition for SCOPS to consider in the first instance whether the advertisements resolve the ambiguity within the form's construction.

Also, the record lacks evidence – such as an independent professional evaluation of his foreign educational credentials – that his Nepalese education equates to a U.S. high school diploma. *See Matter of Caron Int'l, Inc.*, 19 I&N Dec. 791, 795 (Comm'r 1988) (stating that the immigration service may use expert testimony as advisory opinions); *see generally* 6 *USCIS Policy Manual* E.9, "Evaluation of Education Credentials."

SCOPS did not notify the Petitioner of this evidentiary deficiency. On remand SCOPS should inform the Petitioner of the deficiency and give the business a reasonable opportunity to respond with evidence, argument, or both.

B. Ability to Pay the Proffered Wage

Although unaddressed by SCOPS, the Petitioner also has not demonstrated its ability to pay the offered job's proffered wage. A petitioner must demonstrate its continuing ability to pay a proffered wage, from a petition's priority date until a beneficiary obtains U.S. permanent residence. 8 C.F.R. § 204.5(g)(2). Evidence of ability to pay must include copies of annual reports, audited financial statements, or federal tax returns. *Id.*

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[1] Contrary to the Petitioner's statement, the Beneficiary did not list the name and address of the school he attended on the labor certification application. Rather, he indicated that he received his high school credential from the "National Examination Board" in Nepal.

[2] To show the unavailability of able, willing, and qualified U.S. workers for the job, the Petitioner had to post notice of the labor certification application's filing at the offered job's intended worksite and place a 30-day order for the offered job with a state workforce agency. *See* 20 C.F.R. §§ 656.10(d)(1), 656.17(e)(2)(i). The business also had to place two Sunday newspaper ads for the job and prepare a recruitment report. *See* 20 C.F.R. § 656.17(e)(2)(ii), (g).

The proffered wage of the offered cook's job is $27,872 a year. As previously indicated, the petition's priority date is November 17, 2022.

The Petitioner's initial petition filing in June 2024 included a copy of the business's federal income tax return for 2023. SCOPS requested additional evidence, including proof of the business's ability to pay the proffered wage in 2022, the year of the petition's priority date. In response, the business submitted evidence of its ability to pay in 2024.

The record lacks required evidence (annual reports, audited financial statements, or federal tax returns) of the Petitioner's ability to pay in both 2022 and 2024. *See* 8 C.F.R. § 204.5(g)(2). On remand, SCOPS should notify the business of the evidentiary deficiencies and give it a reasonable opportunity to respond with evidence, argument, or both.

If supported by the record, SCOPS may notify the Petitioner of any additional potential denial grounds. Upon receipt of a timely response, SCOPS should review the entire record and enter a new decision.

## III. CONCLUSION

On remand, SCOPS should consider whether the Petitioner demonstrated its intent to accept a foreign equivalent of a U.S. high school diploma for the offered job. SCOPS should also consider whether the business can establish that the Beneficiary's completion of twelfth grade in Nepal equates to a U.S. high school diploma. The Petitioner also did not submit required evidence of its continuing ability to pay the job's proffered wage from the petition's priority date onward.

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

**NOTICE:** Aliens who are unlawfully present, or who are otherwise inadmissible or deportable, may receive Forms I-862, Notices to Appear, placing them in removal proceedings. *See* section 240 of the Act, 8 U.S.C. § 1229a. Removal proceedings may result in an alien's removal from the United States and ineligibility for future U.S. visas or other immigration benefits.