U.S. Citizenship and Immigration Services

Non-Precedent Decision of the Administrative Appeals Office

In Re: 02688046

Date: DEC. 3, 2021

Appeal of Texas Service Center Decision

Form I-140, Immigrant Petition for a Skilled Worker

The Petitioner, an auto repair business, sought to employ the Beneficiary as an auto technician. It requested skilled worker classification for the Beneficiary under the third preference immigrant category. *See* Immigration and Nationality Act (the Act) section 203(b)(3)(A)(i), 8 U.S.C. § 1153(b)(3)(A)(i). This employment-based "EB-3" immigrant classification allows an employer to sponsor a foreign national for lawful permanent resident status to work in a position that requires at least two years of training or experience.

After initially approving the petition, the Director of the Texas Service Center revoked the petition's approval on multiple grounds. The Director determined that the Petitioner did not establish that the Beneficiary had the requisite education and experience to qualify for the proffered position under the terms of the labor certification. The Director also found that the Beneficiary willfully misrepresented material facts on the labor certification concerning his training and experience, and invalidated the required labor certification on that basis. Finally, the Petitioner determined that the Petitioner did not establish its ability to pay the proffered wage for multiple beneficiaries.

The matter is now before us on the Beneficiary's appeal.[1] Although normally not the case, under certain circumstances described below a beneficiary may be considered an affected party in immigrant petition revocation proceedings. In this case the Director determined that the Beneficiary met the requisite conditions to be considered an affected party and sent a revocation decision to the Beneficiary as well as to the Petitioner.

On appeal the Beneficiary asserts that he met all of the labor certification requirements to qualify for the job offered, and that he did not willfully misrepresent any material facts in the labor certification concerning his qualifications. The Beneficiary also asserts that the Petitioner proved its ability to pay the proffered wage at the time the petition was filed, and that no further evidence need be submitted from that entity since the Beneficiary has ported to a new employer and the original Petitioner is no longer seeking to employ the Beneficiary.

[1] USCIS regulations do not generally allow a beneficiary to appeal a petition's revocation. *See* 8 C.F.R. § 103.3(a)(1)(iii)(B) (stating that a beneficiary is not an "affected party" with legal standing in a proceeding).

The AAO reviews the questions in this matter *de novo*. *See 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 case for further consideration and the issuance of a new decision. As an appellant in revocation proceedings, it is the Beneficiary's burden in these proceedings to establish eligibility for the requested benefit by a preponderance of the evidence. *See* Section 291 of the Act, 8 U.S.C. § 1361; *Matter of Chawathe*, 25 I&N Dec. 369, 375 (AAO 2010).

I. LAW

A. Employment-based Immigrant Petition Process

Employment-based immigration generally follows a three-step process. First, an employer obtains an approved labor certification (ETA Form 9089) 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 (Form I-140) 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.

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). A notice of intent to revoke (NOIR) "is not properly issued unless there is 'good and sufficient cause' and the notice includes a specific statement not only of the facts underlying the proposed action, but also of the supporting evidence." *Matter of Estime*, 19 I&N Dec. 450, 451 (BIA 1987). Per *Matter of Estime*, "[i]n determining what is 'good and sufficient cause' for the issuance of a notice of intention to revoke, we ask whether the evidence of record at the time the notice was issued, if unexplained and unrebutted, would have warranted a denial based on the petitioner's failure to meet his or her burden of proof." *Id.*

B. The Beneficiary as an Affected Party

USCIS regulations do not generally allow a beneficiary to appeal a petition's revocation. *See* 8 C.F.R. § 103.3(a)(1)(iii)(B) (stating that a beneficiary is not an "affected party" with legal standing in a proceeding). However, certain "portability-eligible" beneficiaries of revoked I-140 visa petitions are treated as affected parties in revocation proceedings. Section 204(j) of the Act, 8 U.S.C. § 1154(j). *See Matter of V-S-G- Inc.*, Adopted Decision 2017-06 (AAO Nov. 11, 2017). In that case we held that "[b]eneficiaries of valid employment-based immigrant visa petitions who are eligible to change jobs or employers and who have properly requested to do so [under section 204(j)], are 'affected parties'

under DHS regulations for purposes of revocation proceedings. . . ." *Matter of V-S-G- Inc.*, Adopted Decision 2017-06 at *1.

Under the portability provision of section 204(j) of the Act, approved petitions may remain valid under certain conditions even after eligible beneficiaries change jobs or employers. A beneficiary of a valid visa petition, whose application for adjustment of status remains pending for at least 180 days, may "port" the petition to a new job if that job is in the same or similar occupational classification as the position offered in the petition. *See* 8 C.F.R. § 245.25(a)(2)(i). In order to be deemed an affected party in revocation proceedings, a beneficiary must have submitted to USCIS a proper request to port to another employer. As of January 17, 2017, a request to port must be submitted on a Form I-485 "Supplement J, Confirmation of Bona Fide Job Offer or Request for Job Portability Under INA Section 204(j)." *See* USCIS Policy Memorandum PM-602-0152, *Guidance on Notice to, and Standing for, AC21 Beneficiaries about I-140 Approvals Being Revoked After Matter of V-S-G- Inc.* (Nov. 11, 2017), http://www.uscis.gov/laws/policy-memoranda, at 2; *see also* 8 C.F.R. § 245.25(a). A beneficiary's request to port is "proper" when USCIS has evaluated the request and determined, prior to the issuance of a NOIR or a notice of revocation (NOR), that the beneficiary is indeed eligible to port. *See* USCIS Policy Memorandum PM-602-0152, *supra*, at 5. Thus, a beneficiary becomes an "affected party" with legal standing in a revocation proceeding when USCIS makes a favorable determination that the beneficiary is eligible to port. *Id.*

II. PROCEDURAL HISTORY

The instant petition was filed by [redacted] on November 18, 2014, accompanied by a labor certification that was filed with the DOL on April 8, 2013 and approved in October 2014. A Form I-485 adjustment of status application by the Beneficiary was also filed on November 18, 2014. The I-140 petition was initially approved on May 7, 2015. On June 29, 2017, however, the Director sent a NOIR to the Petitioner, copied to the Petitioner's attorney, who responded with a brief and supporting documentation on July 24, 2017. On that same date the Beneficiary filed a Form I-485 Supplement J with the Texas Service Center on which he affirmed his intent to accept the job offer from the Petitioner.[2] On February 22, 2018, the Beneficiary filed a second Form I-485 Supplement J with the Texas Service Center, requesting to port to [redacted][3] and identifying the Petitioner's attorney as his attorney as well. The Director proceeded the revoke the I-140 petition's approval on July 2, 2018, in separate NORs sent to the Petitioner and the Beneficiary, with copies to the attorney representing both parties. In the revocation decision sent to the Beneficiary the Director stated that the Beneficiary was eligible to receive notices and participate in the proceedings based on his compliance with the requirements for portability under section 204(j) of the Act. On July 19, 2018, the Beneficiary filed an appeal. We will address each of the Director's grounds for revocation in turn.

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[2] The Beneficiary checked the box at Part 1.1.a. of Supplement J which states: "Confirm that the job offered to you in the Form I-140, that is the basis of your Form I-485, remains a bona fide job offer that you intend to accept once your Form I-485 is approved."

[3] The record indicates that [redacted] was established by the Beneficiary in May 2015, and that he has been self-employed in that business since June 2015. On the second Supplement J filed in February 2018 the Beneficiary checked the box at Part 1.1.b. which states: "Request job portability under INA section 204(j) to a new, full-time, permanent job offer that you intend to accept once your Form I-485 is approved."

III. ANALYSIS

A. Labor Certification Requirements

The education, training, and experience requirements for the proffered position of auto technician were listed as follows in section H of the labor certification:

4.	Education: Minimum level required:	High School
5.	Is training required for the job?	No
6.	Is experience in the job offered required?	Yes
6-A.	How long?	24 months
7.	Is an alternate field of study acceptable?	No
8.	Is an alternate combination of education and experience acceptable?	No
9.	Is a foreign educational equivalent acceptable?	Yes
10.	Is experience in an alternate occupation acceptable?	No
14.	Specific skills or other requirements:	

High School diploma with 2 years relevant training/experience.
Any suitable combination of education, training or experience is acceptable.

Sections J and K of the labor certification state that the Beneficiary's highest level of education relevant to the job opportunity was a high school diploma in 1994 from [redacted] High School in [redacted] South Korea, and claim that the Beneficiary had the requisite experience for the job opportunity by virtue of (1) his employment as an auto technician by [redacted] Auto Repair in [redacted] from June 16, 1993, to February 2, 1995, and (2) his student/trainee course in auto repair at [redacted] Technical School in [redacted] from June 2, 1992, to May 26, 1993.

As evidence of the Beneficiary's education the Petitioner submitted a copy of an English language "Certificate of Graduation" certifying that the Beneficiary entered [redacted] High School on March 2, 1991, and after completing the course requirements graduated on February 15, 1994. The certificate itself is undated.

As evidence of the Beneficiary's experience the Petitioner submitted copies of:

- A "Certificate of Course Completion" (in Korean with an English translation) from the principal of [redacted] Technical School, dated May 26, 1993, certifying that the Beneficiary completed the "auto (heavy machinery) mechanic" courses during the period of June 2, 1992, to May 26, 1993; and

- An English language "Verification of Employment" on the letterhead of [redacted] Auto Repair, signed by the general manager and dated February 17, 2013, certifying that the Beneficiary was employed as an auto technician from June 16, 1993, to February 2, 1995, and describing his job duties; and

- A "Certificate of Discharge from Military Service" from the Army Chief of Staff (in Korean with an English translation) indicating that the Beneficiary had completed his military service from February 9, 1995, to April 17, 1997 (though the Beneficiary's military service was not listed in the labor certification as qualifying experience for the job offered).[4]

In response to the NOIR the Petitioner supplemented its initial evidence of the Beneficiary's experience with a copy of a "Certificate of Experience" (in Korean with an English translation) from the president of [redacted] Auto Repair, dated July 18, 2007, certifying that the Beneficiary was employed in the "KIA A/S" department from June 16, 1993, to February 2, 1995.[5]

In the revocation decision the Director stated that the evidence of the Beneficiary's graduation certificate from [redacted] High School was in doubt because the asserted time in high school from March 1991 to February 1994 overlapped with some or all of the time in which the Beneficiary assertedly gained experience at [redacted] Technical School from June 1992 to May 1993 and at [redacted] Auto Repair from June 1993 to February 2005. The Director noted that the subject school was identified as the [redacted] Technical School in the earlier labor certification that accompanied the I-140 petition filed by another petitioner in 2007. The Director also stated that the Beneficiary's "Certificate of Course Completion" from [redacted] Technical School appeared to be a specialized training diploma, which was not shown to be the foreign equivalent of a U.S. high school diploma.

As for the Beneficiary's experience with [redacted] Auto Repair, the Director stated that the Petitioner had not satisfactorily explained a discrepancy regarding the Beneficiary's employment dates in the labor certification filed with the earlier petition in 2007 (alleging employment from June 1, 1993 to February 1, 1995) and the "verification of employment" submitted with the instant petition (alleging June 16, 1993 to February 2, 1995). Nor had the Petitioner satisfactorily explained why the labor certification accompanying the earlier I-140 petition identified the Beneficiary's employer during the time period from June 1993 to February 1995 as Kia Motors, not [redacted] Auto Repair. Several other minor differences between the earlier petition and the current petition were also pointed out by the Director. With regard to the experience the Beneficiary claimed as a student/trainee in auto mechanics at [redacted] Technical School from June 1992 to May 1993, the Director questioned whether the Beneficiary could have completed that course load at the same time he was attending the [redacted] High School and stated that the record lacked credible and probative evidence establishing that the Beneficiary actually attended the schools. Finally, the Director noted that the Beneficiary's "Certificate of Discharge from Military Service" identified somewhat different dates of service (February 9, 1995 to April 17, 1997) than the labor certification submitted with the earlier I-140 petition (January 1, 1995 to January 1, 1997), and did not describe the Beneficiary's job in the military.

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[4] We note that the alleged experience in the South Korean army was listed in the labor certification that accompanied an earlier Form I-140 petition filed on behalf of the Beneficiary by another petitioner in 2007 (receipt number [redacted]). This petition was originally approved, but the approval was subsequently revoked (along with that of the instant petition) on July 2, 2018. No appeal was filed in that case.

[5] This document had initially been submitted to USCIS in support of the earlier Form I-140 petition filed on behalf of the Beneficiary in 2007.

The Director further noted that the Korean to English translations in the record did not fully comply with the regulatory requirements of 8 C.F.R. § 103.2(b)(3).

Based on the foregoing discussion the Director determined that the Beneficiary did not meet the terms of the labor certification with respect to the educational and experience requirements for the proffered position of auto technician.

On appeal the Beneficiary reiterates his contention that he meets the labor certification's educational requirement with his diploma from [redacted] High School in 1994 and that he meets the labor certification's experience requirement with his jobs as a student/trainee in auto mechanics at [redacted] Technical School from June 1992 to May 1993 and as an auto technician at [redacted] Auto Repair from June 1993 to February 1995, as well as in his military service from February 1995 to April 1997. The Beneficiary submits additional documentation pertaining to his alleged education and experience in South Korea, including a copy of his "School Record" at [redacted] High School in the years 1991-1994 and a "School History" indicating that the school's name was changed to [redacted] High School in 1997. The foregoing documents are submitted in Korean with English translations and certifications of the translators which comply with the requirements of 8 C.F.R. § 103.2(b)(3). In addition, the Beneficiary resubmits copies of (1) the "Certificate of Course Completion" from the principal of [redacted] Technical School, dated May 26, 1993, certifying that the Beneficiary completed the "auto (heavy machinery) mechanic" courses during the period of June 2, 1992, to May 26, 1993; (2) the "Certificate of Experience" from [redacted] Auto Repair, dated July 18, 2007, certifying that the Beneficiary was employed in the "KIA Motors After Sales" department from June 16, 1993, to February 2, 1995; and (3) the "Certificate of Discharge from Military Service" indicating that the Beneficiary served in a maintenance mobility division. This time the Korean and English language versions of these documents are accompanied by certifications of the translators that comply with the requirements of 8 C.F.R. § 103.2(b)(3).[6]

The Beneficiary asserts that [redacted] High School is a vocational high school in which students receive a general education in the first year and specialized career-focused courses in their last two years. The credential advice of the Electronic Database for Global Education (EDGE),[7] created by the American Association of Collegiate Registrars and Admissions Officers (AACRAO),[8] states that a vocational high school certificate (Silop Kodung Hakkyo) in South Korea, is awarded upon completion of three years of vocational high school and is comparable to completion of a vocational or other specialized high school curriculum in the United States. *aacrao.org/edge/country/credential/Korea-Republic-of/silop-kodung-kakkyo-(vocational-high-school-certificate)* (last visited Aug. 16, 2021). In the revocation decision the Director did not question whether a certificate of graduation from [redacted] High School was equivalent to a U.S. high school

[6] The Beneficiary also resubmits the English-language "Verification of Employment" with [redacted] Auto Repair from June 1993 to February 1995.

[7] As described on its website, AACRAO EDGE "has been the leading US resource for evaluating foreign educational credentials for more than 15 years." *aacrao.org/edge/about-edge* (last visited Aug. 16, 2021).

[8] AACRAO is described on its website as "a nonprofit, voluntary, professional association of more than 11,000 higher education admissions and registration professionals who represent more than 2,600 institutions in over 40 countries." *http://www.aacrao.org/who-we-are* (last visited Aug. 16, 2021).

diploma. Rather, the Director questioned whether the Beneficiary could actually have earned such a credential while also working full-time as a student/trainee in auto repair at [redacted] Technical School and, after that, as an auto technician at [redacted] Auto Repair. Such combinations of work and study are hardly unknown, however, and merely expressing skepticism about the Beneficiary's ability to do both is not a sufficient basis for concluding that the Beneficiary's graduation certificate from [redacted] High School was not genuine. Thus, the Director's conclusion that the Beneficiary did not meet the minimum educational requirement of the labor certification because of his concurrent full-time employment is not well grounded. We will remand for further consideration of this issue.

With regard to the Beneficiary's experience, the Director determined that he had failed to resolve the evidentiary inconsistencies in the record. On appeal the Beneficiary asserts that the date discrepancies between the labor certification accompanying the earlier I-140 petition and the other documentation of record concerning the Beneficiary's employment with [redacted] Auto Repair and the South Korean army, and the misidentification of previous employers in the earlier labor certification as Kia Motors rather than [redacted] Auto Repair and [redacted] Technical School rather than [redacted] Technical School, were careless errors of the original attorney. The Beneficiary contends that the date discrepancies were not substantial in any event, that the "Certificate of Experience" from [redacted] Auto Repair submitted on appeal shows that the Beneficiary was employed from June 1993 to February 1995 in the company's "Kia Motors After Sales Services" department, and that the Beneficiary's employer from June 1992 to May 1993 is correctly identified in all supporting documentation as [redacted] Technical School. The Beneficiary also asserts that minor inconsistencies concerning the address, phone, and fax number of [redacted] Auto Repair are explainable in the documents themselves. Based on our review of the materials discussed by the Director in the revocation decision, we are not persuaded that the decision adequately explains how the Beneficiary fell short of resolving the inconsistencies in the record. At the same time, we also note that the Beneficiary has not provided any social security or pension documentation from the South Korean government, or pay records from any of his alleged employers, as requested in the NOIR, to bolster his claim to have gained the experience claimed in this proceeding. The Beneficiary claims that no such materials are available. We will remand for further consideration of the experience issue as well, including the materials submitted by the Beneficiary on appeal and the Beneficiary's claim that he is unable to provide the specific documentation requested in the NOIR.[9]

The Beneficiary relies on testimonial evidence from his purported former employers to establish his claimed employment experience. No independent, objective evidence has been submitted in support of this testimony. Probative evidence beyond a letter or affidavit may be considered when submitted to resolve inconsistencies or discrepancies in the record. *See Matter of Ho*, 19 I&N Dec. 582, 591-92 (BIA 1988). Ultimately, to determine whether a petitioner has established eligibility for a requested benefit by a preponderance of the evidence, USCIS must examine each piece of evidence – both

[9] The regulation at 8 C.F.R. § 103.2(b)(2) states that "[t]he non-existence or other unavailability of required evidence creates a presumption of ineligibility. . . . If a required document . . . does not exist or cannot be obtained, an applicant or petitioner must demonstrate this and submit secondary evidence . . . If secondary evidence also does not exist or cannot be obtained, the applicant or petitioner must demonstrate the unavailability of both the required document and relevant secondary evidence and submit two or more affidavits, sworn to or affirmed by persons who are not parties to the petition who have direct personal knowledge of the event and circumstances.

individually and within the context of the entire record – for relevance, probative value, and credibility. *Matter of Chawathe*, 25 I&N Dec. 369, 376 (AAO 2010). It is the Appellant's burden in these proceedings to establish eligibility for the immigration benefit sought. Section 291 of the Act, 8 U.S.C. § 1361; *Matter of Skirball Cultural Ctr.*, 25 I&N Dec. 799, 806 (AAO 2012).

B. Willful Misrepresentation of Material Facts in the Labor Certification

Pursuant to the statutory framework for the granting of immigrant status, any United States employer desiring and intending to employ an alien entitled to immigrant classification under the Act may file a petition for classification. Section 204(a)(1)(F) of the Act, 8 U.S.C. § 1154(a)(1)(F); see 8 C.F.R. § 204.5(c). Such petitions must be accompanied by a labor certification from the DOL. *See* section 212(a)(5) of the Act, 8 U.S.C. § 1182(a)(5); *see also* 8 C.F.R. § 204.5(l)(3)(i). The Petitioner must intend to employ a beneficiary under the terms and conditions of an accompanying labor certification. *See Matter of Izdebska*, 12 I&N Dec. 54, 55 (Reg'l Comm'r 1966) (affirming denial where, contrary to an accompanying labor certification, a petitioner did not intend to employ a beneficiary under the terms of the labor certification); s*ee also Matter of Sunoco Energy Dev. Co.*, 17 I&N Dec. 283, 284 (Reg'l Comm'r 1979) (affirming a petition's denial under 20 C.F.R. § 656.30(c)(2) where the labor certification did not remain valid for the intended geographic area of employment). Because the filing of a labor certification establishes a priority date for any immigrant petition later based on the labor certification, the petitioner must establish that the job offer was realistic as of the priority date and that the offer remained realistic for each year thereafter, until the beneficiary obtains lawful permanent residence. The *bona fides* of the job opportunity are essential elements in evaluating whether a job offer is realistic. *See Matter of Great Wall,* 16 I&N Dec. 142 (Acting Reg'l Comm'r 1977).

The Act requires USCIS to determine eligibility for the visa classification requested. *See* section 204(a)(1)(F) of the Act, 8 U.S.C. § 1154(a)(1)(F). Certain classifications require a labor certification to establish eligibility. *See* section 203(b)(3)(C) of the Act, 8 U.S.C. § 1153(b)(3)(C); 8 C.F.R. § 204.5(a)(2); 8 C.F.R. § 204.5(l)(3)(i). Section 204(b) of the Act allows a petition's approval only after an investigation of the facts in each case to ensure that the facts stated in the petition, which necessarily includes the labor certification, are true. Section 204(b) of the Act, 8 U.S.C. § 1154(b). For those petitions requiring a labor certification, USCIS's investigation into the facts must include consultation with DOL. *Id*. Thus, the labor certification is not conclusive evidence of eligibility. Instead, it is a pre-condition to being eligible to file a Form I-140. USCIS is responsible for reviewing the Form I-140, and the labor certification is incorporated into the Form I-140 by statute and regulation. *See* section 203(b)(3)(C) of the Act, 8 U.S.C. § 1153(b)(3)(C); 8 C.F.R. § 204.5(a)(2); 8 C.F.R. §103.2(b)(i). USCIS is required to approve an employment-based immigrant visa petition only where it is determined that the facts stated in the petition, which incorporates the labor certification, are true and the foreign worker is eligible for the benefit sought. *See* section 204(b) of the Act, 8 U.S.C. § 1154(b).

As previously discussed, we are remanding this case for further consideration of whether the Beneficiary met the educational and experience requirements of the labor certification. Since we are not affirming the Director's prior determinations on these issues, the Director must also reconsider whether the Beneficiary willfully misrepresented any material fact(s) in the labor certification regarding his education and experience.

C. Petitioner's Ability to Pay the Proffered Wage

To be eligible for the classification it requests for the beneficiary, a petitioner must establish that it has the ability to pay the proffered wage stated in the labor certification. As provided in the regulation at 8 C.F.R. § 204.5(g)(2):

> 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 appropriate cases, additional evidence, such as profit/loss statements, bank account records, or personnel records, may be submitted by the petitioner or requested by [USCIS].

As indicated in the above regulation, the Petitioner must establish its continuing ability to pay the proffered wage from the priority date[10] of the petition onward. In this case the proffered wage is $41,662 per year and the priority date is April 8, 2013.

In determining a petitioner's ability to pay the proffered wage, USCIS first examines whether the beneficiary was employed and paid by the petitioner during the period following the priority date. A petitioner's submission of documentary evidence that it employed the beneficiary at a salary equal to or greater than the proffered wage for the time period in question, when accompanied by a form of evidence required in the regulation at 8 C.F.R. § 204.5(g)(2), may be considered proof of the petitioner's ability to pay the proffered wage.

In this case, the record does not show that the Beneficiary was employed by the Petitioner at any time before or after the priority date. Therefore, the Petitioner could not establish its ability to pay the proffered wage of $41,662 per year based on wages paid to the Beneficiary from the priority date of April 8, 2013, onward.

If a petitioner does not establish that it has paid the beneficiary an amount equal to or above the proffered wage from the priority date onward, USCIS will examine the net income and net current assets figures recorded on the petitioner's federal income tax return(s), annual report(s), or audited financial statements(s). If either of these figures, net income or net current assets, equals or exceeds the proffered wage or the difference between the proffered wage and the amount paid to the beneficiary in a given year, the petitioner would ordinarily be considered able to pay the proffered wage during that year.

[10] The "priority date" of an employment-based immigrant petition is the date the underlying labor certification application is filed with the DOL. *See* 8 C.F.R. § 204.5(d).

The Petitioner's initial evidence included a copy of its federal income tax return, Form 1120S, for the year 2013, which recorded net income of $42,020[11] and net current assets of $31,020[12] that year. Thus, the Petitioner's net income exceeded the proffered wage in the priority date year of 2013.

In the revocation decision the Director determined that the Petitioner did not establish its continuing ability to pay the proffered wage after 2013 "for multiple beneficiaries." The Director's reference to "multiple beneficiaries" is confusing since there is no evidence in the record of multiple beneficiaries nor any previous reference thereto by the Petitioner, the Beneficiary, or the Director in the course of these proceedings. Accordingly, we will withdraw the Director's determination on this issue. As we are already remanding on other issues, the Director should revisit the ability to pay issue as well, explain the reference to multiple beneficiaries in the revocation decision, and consider whatever additional evidence the Beneficiary may provide.

IV. CONCLUSION

For the reasons discussed above we will remand this case to the Director, who may issue a new NOIR in accordance with the requirements of 8 C.F.R. § 205.2(b) and (c) and *Matter of Estime*. Following the Petitioner's response to the NOIR, or the expiration of the time period for response, the Director shall issue a new decision.

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

[11] If an S corporation, like the Petitioner, has income exclusively from a trade or business, USCIS considers its net income (or loss) to be the figure for "Ordinary business income (loss)" on page 1, line 21, of the Form 1120S. However, if there are relevant entries for additional income, credits, deductions or other adjustments from sources other than a trade or business, they are reported on Schedule K of the Form 1120S, and the corporation's net income or loss will be found in line 18 of Schedule K ("Income/loss reconciliation").

[12] For a corporation net current assets (or liabilities) are the difference between its current assets, entered on Schedule L, lines 1-6, of the Form 1120S, and its current liabilities, entered on Schedule L, lines 16-18, of the Form 1120S.