U.S. Citizenship and Immigration Services

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

In Re: 14442584

Date: FEB. 12, 2021

Appeal of Texas Service Center Decision

Form I-140, Immigrant Petition for Other Worker

The Petitioner, an operator of [redacted] restaurants, seeks to employ the Beneficiary as a [redacted], a preparer of sandwiches and other foods. The company requests his classification under the third-preference, immigrant category for "other workers" in jobs requiring less than two years of training or experience. *See* Immigration and Nationality Act (the Act) section 203(b)(3)(A)(iii), 8 U.S.C. § 1153(b)(3)(A)(iii).

After initially granting the filing, the Director of the Texas Service Center revoked the petition's approval. The Director concluded that the Petitioner did not establish its required ability to pay the proffered wage of the offered position.

In these revocation proceedings, the Petitioner bears the burden of establishing eligibility for the requested benefit. *See Matter of Ho*, 19 I&N Dec. 582, 589 (BIA 1988). Upon *de novo* review, we will withdraw the Director's decision and remand the matter for entry of a new decision consistent with the following analysis.

## I. EMPLOYMENT-BASED IMMIGRATION

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 an offered position. *Id.* A labor certification also signifies that employment of a foreign national 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 determines whether a beneficiary meets the requirements of a DOL-certified position and a requested visa classification. If USCIS grants a petition, a foreign national 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.

"[A]t any time" before a beneficiary obtains lawful permanent residence, however, USCIS may revoke a petition's approval for "good and sufficient cause." Section 205 of the Act, 8 U.S.C. § 1155. If supported by a record, the erroneous nature of a petition's approval justifies its revocation. *Matter of Ho*, 19 I&N Dec. at 590.

USCIS may issue a notice of intent to revoke (NOIR) a petition's approval if the unexplained and unrebutted record at the time of the NOIR's issuance would have warranted the petition's denial. *Matter of Estime*, 19 I&N Dec. 450, 451 (BIA 1987). USCIS properly revokes a petition's approval if a petitioner's NOIR response does not overcome the stated revocation grounds. *Id.* at 451-52.

## II. ABILITY TO PAY THE PROFFERED WAGE

A petitioner must demonstrate its continuing ability to pay the proffered wage of an offered position, from a petition's priority date until a beneficiary obtains lawful 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.*

In determining ability to pay, USCIS examines whether a petitioner paid a beneficiary the full proffered wage each year from a petition's priority date. If a petitioner did not annually pay the full proffered wage or did not pay a beneficiary at all, USCIS examines whether the business generated sufficient annual amounts of net income or net current assets to pay any differences between the proffered wage and the wages actually paid. 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 Sonegawa,* 12 I&N Dec. 612, 614-15 (Reg'l Comm'r 1967).[1]

The regulation also states: "In a case where the prospective United States employer employs 100 or more workers, the director may accept a statement from a financial officer of the organization which establishes the prospective employer's ability to pay the proffered wage." 8 C.F.R. § 204.5(g)(2).

Here, the accompanying labor certification states the proffered wage of the offered position of [redacted] as $16,994 a year. The petition's priority date is November 17, 2017, 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 petition did not include copies of annual reports, federal tax returns, or audited financial statements. Rather, the Petitioner, which listed 127 employees on the Form I-140 and accompanying labor certification application, submitted a letter from its president/chief financial officer/sole shareholder. The letter states the Petitioner's employment of more than 100 people and its annual payment of more than $1 million in wages to workers at its 11 restaurants.

[1] Federal courts have upheld USCIS' 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); *Rivzi v. Dep't of Homeland Sec.*, 37 F. Supp. 3d 870, 883-84 (S.D. Tex. 2014), *aff'd*, 627 Fed. App'x. 292 (5th Cir. 2015).

Exercising his regulatory discretion, the Director accepted the letter from the Petitioner's president as proof of the company's ability to pay the proffered wage and approved the petition. The Director's NOIR, however, states that, because the Petitioner did not explain why it could not submit evidence otherwise required by 8 C.F.R. § 204.5(g)(2), USCIS erred in accepting the letter as sufficient proof of the company's ability to pay.

As the Petitioner argues on appeal, however, 8 C.F.R. § 204.5(g)(2) does not condition USCIS' acceptance of a statement from a financial officer on the unavailability of a petitioner's annual reports, federal tax returns, or audited financial statements. Rather, the regulation allows USCIS to accept such a statement from any petitioner that employs at least 100 people, including a business that can submit evidence otherwise required by the regulation. Thus, the absence of proof of the unavailability of other evidence would not have prevented USCIS' acceptance of the president's letter and would not have warranted the petition's denial for insufficient evidence of ability to pay. We will therefore withdraw the Director's decision.

The appeal overcomes the revocation grounds stated in the NOIR. Nevertheless, the record does not establish USCIS' discretionary authority to accept the letter from the Petitioner's president as proof of the company's ability to pay the proffered wage.

As previously indicated, on the Form I-140, filed in May 2018, the Petitioner asserted its employment of 127 people. In response to the Director's NOIR, the Petitioner submitted copies of its federal quarterly payroll tax returns for 2018. The quarterly returns indicate the Petitioner's employment of less than 100 people in each quarter of that year.[2] Thus, the record does not demonstrate the company's claimed employment of at least 100 people. *See Matter of Ho*, 19 I&N Dec. at 591 (requiring a petitioner to resolve inconsistencies of record with independent, objective evidence pointing to where the truth lies). Because the Petitioner apparently did not meet the 100-employee threshold of 8 C.F.R. § 204.5(g)(2), USCIS lacked discretionary authority to accept the letter from the company's president as proof of its ability to pay the proffered wage.

Consistent with the general requirements of 8 C.F.R. § 204.5(g)(2), the Petitioner's NOIR response includes copies of the company's federal income tax returns for 2017 and 2018. But these documents do not demonstrate the Petitioner's ability to pay the proffered wage. The 2017 return reflects net income of -$82,978 and net current assets of -$1,942,307. The 2018 return shows net income of - $212,973 and net current assets of -$2,013,161. None of these negative amounts equal or exceed the annual proffered wage of $16,994.

Also, USCIS records show the Petitioner's filing of Form I-140 petitions for other beneficiaries. A petitioner must demonstrate its ability to pay the proffered wage of each petition it files until a beneficiary obtains lawful permanent residence. 8 C.F.R. § 204.5(g)(2). The Petitioner here must therefore demonstrate its ability to pay the combined proffered wages of this and any other petitions that were pending or approved as of this petition's priority date or filed before this petition's approval.

[2] The 2018 payroll tax returns show the Petitioner's employment of 64 people in the first quarter, 61 people in the second quarter, and 57 people in the fourth quarter. The third-quarter return lists the company's employment of "0" workers. Based on the stated amount of wages paid, however, the number of workers listed in the third quarter appears to be a typographical error. The third-quarter wage amount exceeds the first-quarter amount, but falls short of the amounts for the second and fourth quarters.

*See Patel v. Johnson*, 2 F. Supp. 3d 108, 124 (D. Mass. 2014) (affirming our revocation of a petition's approval where, as of the filing's grant, a petitioner did not demonstrate its ability to pay the combined proffered wages of multiple petitions).[3]

USCIS records indicate that, after this petition's priority date of November 17, 2017, and before the filing's approval on November 6, 2018, the Petitioner filed at least three Form I-140 petitions for other beneficiaries.[4] The record lacks proffered wages and priority dates of the other petitions. Thus, USCIS cannot calculate the total, combined proffered wages that the Petitioner must demonstrate its ability to pay. For this additional reason, the record does not demonstrate the Petitioner's ability to pay the proffered wage. Also, as we lack information regarding the Petitioner's total wage obligation, we cannot properly and fully assess the Petitioner's totality of the circumstances under *Sonegawa*.

The Petitioner did not receive notice of the evidentiary discrepancy regarding the company's number of employees or the company's need to demonstrate its ability to pay the combined proffered wages of multiple petitions. We will therefore remand the matter.

On remand, the Director should issue a new NOIR explaining why the record does not establish the Petitioner's ability to pay the proffered wage. The company may submit additional evidence/argument regarding its number of employees and its ability to pay, including proof of any payments it made to applicable beneficiaries in 2017 and 2018, and materials supporting the factors stated in *Sonegawa*.

If supported by the record, the new NOIR may also include additional, potential grounds of revocation. The Director should afford the Petitioner 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

The NOIR's stated grounds do not support revocation of the petition's approval. The Petitioner, however, did not demonstrate its ability to pay the proffered wage of the offered position.

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

[3] The Petitioner need not demonstrate its ability to pay the proffered wages of petitions that it withdrew or that USCIS rejected, denied, or revoked. The Petitioner also need not demonstrate its ability to pay proffered wages before the priority dates of their corresponding petitions, or after their corresponding beneficiaries have obtained lawful permanent residence.

[4] USCIS records identify the three other petitions by the following receipt numbers: [redacted]; [redacted] and [redacted]