U.S. Citizenship and Immigration Services

Non-Precedent Decision of the Administrative Appeals Office

In Re: 31415602

Date: JULY 2, 2024

Appeal of Nebraska Service Center Decision

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

The Petitioner, a dry cleaning business, seeks to employ the Beneficiary as a tailor. The company requests her classification under the employment-based, third-preference (EB-3) immigrant visa category as a "skilled worker." *See* Immigration and Nationality Act (the Act) section 203(b)(3)(A)(i), 8 U.S.C. § 1153(b)(3)(A)(i). U.S. businesses may sponsor noncitizens for permanent residence in this category to work in jobs requiring at least two years of training or experience. Section 203(b)(3)(A)(i) of the Act.

After initially granting the filing, the Director of the Nebraska Service Center revoked the petition's approval. The Director concluded that, at the time of the grant, the Petitioner did not demonstrate its required intent to employ the Beneficiary in the offered job or her satisfaction of the job's minimum experience requirements. On appeal, we remanded the matter after finding errors in the Director's decision and prior notice of intent to revoke (NOIR) the petition. *See In Re: 20633721* (AAO Oct. 13, 2022).

On remand, the Director issued a new NOIR and ultimately revoked the petition's approval again on the same grounds. The Director also concluded that the company had not established its required ability to pay the job's proffered wage and found that both the company and the Beneficiary willfully misrepresented material facts. On appeal, the Petitioner contends that the Director misinterpreted and overlooked evidence.

In these revocation proceedings, the Petitioner bears the burden of demonstrating eligibility for the requested benefit by a preponderance of the evidence. *Matter of Ho*, 19 I&N Dec. 582, 589 (BIA 1988). Exercising de novo appellate review, *see Matter of Christo's, Inc.*, 26 I&N Dec. 537, 537 n.2 (AAO 2015), we conclude that the Petitioner has not established its intent to employ the Beneficiary in the offered job, her satisfaction of the offered job's minimum experience requirements, or the company's ability to pay the proffered wage. We will therefore dismiss the appeal.

I. LAW

Immigration as a skilled worker generally follows a three-step process. First, a prospective employer must obtain certification from the U.S. Department of Labor (DOL) that: there are insufficient U.S.

workers able, willing, qualified, and available for an offered job; and a noncitizen's permanent employment in the job would not harm wages and working conditions of U.S. workers with similar jobs. Section 212(a)(5)(A)(i) of the Act, 8 U.S.C. § 1182(a)(5)(A)(i).

Second, an employer must submit an approved labor certification with an immigrant visa petition to U.S. Citizenship and Immigration Services (USCIS). Section 204(a)(1)(F) of the Act, 8 U.S.C. § 1154(a)(1)(F). Among other things, USCIS determines whether a noncitizen 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), (4).

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) of the Act, 8 U.S.C. § 1255(a).

"[A]t any time" before a beneficiary obtains 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; *Nouritajer v. Jaddou*, 18 F.4th 85, 88 (2d Cir. 2021). If supported by the record, a petition's erroneous approval may justify its revocation. *Matter of Ho*, 19 I&N Dec. at 590.

USCIS properly issues a NOIR 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). If a petitioner does not timely respond to a NOIR or the response does not overcome the listed revocation grounds, USCIS may revoke a petition's approval. *Id.* at 452.

II. ANALYSIS

A. Intent to Employ the Beneficiary in the Offered Job

A business may file an immigrant visa petition if it is "desiring and intending to employ [a noncitizen] within the United States." Section 204(a)(1)(F) of the Act. A 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 a petition's denial where, contrary to the accompanying labor certification, the petitioner did not intend to employ the beneficiary as a domestic worker on a full-time, live-in basis).

In this petition and on its accompanying labor certification, the Petitioner attested to its intent to permanently employ the Beneficiary in the full-time job of custom tailor.[1] The labor certification states that the offered job requires two years of experience in the job and pays $28,496 a year.

The Director's latest NOIR noted that the Beneficiary's spouse owns a dry cleaning business about 25 miles away from the Petitioner's business. The business of the Beneficiary's spouse petitioned for the spouse of the Petitioner's president/sole shareholder in the same job as offered to the Beneficiary. The two offered jobs have the same titles, duties, requirements, and proffered wages. The NOIR alleged:

[1] On the Form I-140, Immigrant Petition for Alien Worker, the Petitioner identified the offered job as "alteration tailor." We, however, will refer to the job as "custom tailor," the job title stated on the labor certification.

"The two couples did not provide an explanation as to why their own businesses would petition for another individual for the same position and pay at another location."

The NOIR further noted that, in October 2020, USCIS officers visited the two dry cleaning businesses. The officers reportedly found the Beneficiary and the spouse of the Petitioner's president working at their respective spouses' businesses, rather than at their petitioners' worksites. Letters from the Petitioner and its labor certification state the company's full-time employment of the Beneficiary in the offered job since July 2015.[2]

The Director properly issued the NOIR. The dry cleaners' sponsorships of each other's spouses in the same position suggest that the petitioners did not truly need the beneficiaries' services and that the businesses sponsored the noncitizens solely for immigration purposes. Also, the Petitioner stated its continuous full-time employment of the Beneficiary in the offered job since before the petition's filing. Thus, the USCIS officers' discovery of the Beneficiary at her spouse's business cast doubt on the Petitioner's credibility and its intent to employ her in the offered job. Thus, the unexplained and unrebutted record at the time of the NOIR's issuance would have warranted the petition's denial for lack of demonstrated intent to employ the Beneficiary in the offered job. *See Matter of Estime*, 19 I&N Dec. at 451.

On appeal, the Petitioner's president denies that the discovery of the Beneficiary at her spouse's business casts doubt on the Petitioner's credibility or its intent to employ her in the offered job upon her receipt of permanent residence. The president argues that, at the time of the USCIS officers' visit to her business, the COVID-19 pandemic had forced her to reduce the Beneficiary's hours. Copies of the business's federal income tax transcript for 2020 show large decreases in revenues and wages paid. The president stated:

> In 2020, [the] Coronavirus [pandemic] devastated my business and demand for the alteration work dropped drastically; I had no choice but to change [the Beneficiary]'s employment from [a] full time to part time basis. On October 27, 2020 when USCIS officers conducted a work site visit, [the Beneficiary] happened to be off and stayed at her husband's work place.

The Petitioner's president also contends that the business needs to hire a new tailor because her spouse lacks the necessary skills. The president stated:

> In 2015 I had been looking for a skilled worker whose specialty is replacing zippers, buttons, and overlocking and repairing holes. Although my husband, [the beneficiary of the other dry cleaning business], was also an alteration tailor, he had a different specialty skill set such as hemming pants, skirts, dresses, and shortening sleeves.

The president also stated that the Beneficiary's "expertise" helped the Petitioner expand its business.

[2] Beneficiaries need not work for their petitioners in their offered jobs until the noncitizens obtain permanent residence. *See, e.g., Matter of Rajah*, 25 I&N Dec. 127, 132 (BIA 2009) ("A [noncitizen] is not required to have been employed by the certified employer prior to adjustment of status.") Here, however, the Petitioner claims to have continuously employed the Beneficiary in the offered job since before the petition's filing. Thus, the discovery of her working at her spouse's business casts doubt on the Petitioner's credibility and its intent to employ her in the offered job.

The company stated that it hired the Beneficiary based on her skills in replacing zippers, buttons, and overlocking holes. The NOIR, however, noted that neither the labor certification nor the company's initial support letter indicate the offered job's need for those skills.

The Petitioner states that it provided "a general job description of a tailor hoping to solicit more applicants. If the recruitment documents specifically include too detailed [a] job description, the petitioner knew that the applicant pool will have been significantly affected." The Petitioner also states that, under counsel's advice, it provided a broad job description to avoid a DOL finding that it had "tailored" the job to the Beneficiary's qualifications. *See, e.g., Matter of Synechron*, 2022-PER-00152, *3 (BALCA May 20, 2024) (citations omitted) (explaining the use of DOL Specific Vocational Preparation levels "to ensure the job requirements are tailored to the position, not the [noncitizen]'s credentials").

As the Director acknowledged, the effects of the COVID-19 pandemic decreased the business of many U.S. companies. Also, in October 2020 sworn statements to USCIS officers, the Beneficiary and the Petitioner's president stated that, because of the pandemic, she worked part-time for the Petitioner, two or three days a week. We therefore accept the Petitioner's explanation, supported by its federal income tax returns, that USCIS officers found the Beneficiary working at her spouse's business in 2020 because the Petitioner had reduced her hours during the pandemic. Thus, the officers' discovery of the Beneficiary at her spouse's business does not cast doubt on the Petitioner's intent to employ her in the offered job.

But the record does not sufficiently support the Petitioner's claim that it used a broad, general job description of a tailor to attract more applicants for the job. If the offered job truly required skills in replacing zippers, buttons, and overlocking holes, the Petitioner would have jeopardized its application by omitting the skills from the labor certification. If qualified U.S. workers had applied for the job, the company would not have been able to legally disqualify the applicants for lacking required skills, and the application would have been denied. *See, e.g., Matter of Honeywell Int'l, Inc.*, 2016-PER-00434, **3-4 (BALCA June 27, 2018) (affirming the certifying officer's finding that "all [job] requirements . . . must be specified on the application form"). Also, contrary to the Petitioner's claim, the record does not indicate that the broad description of the offered job generated more applicants. The business's recruitment documentation shows no applicants for the job. Thus, we doubt that the Petitioner hired the Beneficiary based on her possession of the described skills. We find it more likely that the company misrepresented its need for the skills in its NOIR response to explain why its president's spouse could not provide tailoring services to the business.

The Director also found the Petitioner's willful misrepresentation of the offered job's requirements. Misrepresentations are willful if they are "deliberately made with knowledge of their falsity." *Matter of Valdez*, 27 I&N Dec. 496, 498 (BIA 2018) (citations omitted). A misrepresentation is material when it has a "natural tendency to influence, or [be] capable of influencing, the decision of the decision-making body to which it was addressed." *Id.* Because of potential, severe consequences to noncitizens and their petitioning employers, we must "closely scrutinize" the factual bases of fraud or material misrepresentation findings. *Matter of Y-G-*, 20 I&N Dec. 794, 797 (BIA 1994).

The Director found the skills of replacing zippers, buttons, and overlocking holes to be "material to the position offered." The Director therefore concluded that, by omitting the skills from the offered job's duties on the labor certification, the Petitioner misrepresented a material fact.

In contrast, as previously indicated, we believe it more likely that the labor certification reflects the offered job's true duties and that later, in response to the NOIR, the Petitioner mispresented the job's need for the skills of replacing zippers, buttons, and overlocking holes. If the job truly required the skills, we believe the Petitioner would have listed them on the labor certification to better disqualify potential U.S. applicants for the job. Thus, we will withdraw the Director's contrary misrepresentation finding.

Although the Petitioner may have mispresented the offered job's need for the described skills, the NOIR did not base its misrepresentation allegation on those facts. Thus, we will make no further misrepresentation findings. *See Matter of Arias*, 19 I&N Dec. 568, 570 (BIA 1988) (stating that the immigration service may only ground a revocation on, and a petitioner need only respond to, a NOIR's factual allegations).

The Petitioner has not demonstrated its required intent to employ the Beneficiary in the offered job at the time of the petition's filing. We will therefore affirm the petition's denial. The record, however, does not support the Director's misrepresentation finding against the company.

B. The Required Experience

A petitioner for a skilled worker must demonstrate that a beneficiary met all DOL-certified requirements of an offered job by a petition's priority date. 8 C.F.R. § 204.5(l)(3)(ii)(B); *Matter of Wing's Tea House*, 16 I&N Dec. 158, 160 (Acting Reg'l Comm'r 1977). This petition's priority date is October 28, 2015, the date DOL accepted the Petitioner's 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 job-offer portion of an accompanying labor certification to determine the offered job's minimum requirements. USCIS may neither ignore certification terms nor impose unstated requirements. *See, e.g., Madany v. Smith*, 696 F.2d 1008, 1015 (D.C. Cir. 1983) (holding that "DOL bears the authority for setting the *content* of the labor certification") (emphasis in original).

The Petitioner's labor certification states the minimum requirements of the offered job of "custom tailor" as two years' experience "in the job offered." For labor certification purposes, the phrase "in the job offered" means "experience performing the key duties of the job opportunity, specifically those listed [on the labor certification]." *See, e.g., Matter of Symbioun Techs., Inc.*, 2010-PER-01422, *3 (BALCA Oct. 24, 2011) (citations omitted). The Petitioner's labor certification requires neither education nor training for the job. The company indicated that it would not accept experience in an alternate occupation.

On the labor certification, the Beneficiary attested that, by the petition's priority date of October 28, 2015, she gained more than three, full-time years of qualifying experience in South Korea, her native country. She stated that a dry cleaning business there employed her as a custom tailor from January

2010 to February 2013. The Beneficiary also attested to the Petitioner's employment of her in the offered job since July 2015.

To demonstrate qualifying experience, a petitioner must submit letters from a beneficiary's former or current employer. 8 C.F.R. § 204.5(l)(3)(ii)(A). The letters must include the employer's name, address, and title, and describe the beneficiary's experience. *Id.* "If such evidence is unavailable, other documentation relating to the [noncitizen]'s experience . . . will be considered." 8 C.F.R. § 204.5(g)(1).

The Director properly sought revocation of the petition's approval based on evidence of the Beneficiary's experience. At the time of the NOIR's issuance, the Petitioner had not demonstrated that the Beneficiary had the minimum experience for the offered job. *See Matter of Estime*, 19 I&N Dec. at 451 ("In 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.") The petition included a September 2016 letter from the Petitioner's president stating the company's employment of the Beneficiary since 2015. The letter, however, did not establish her qualifying experience. The letter documented less than the requisite two years of experience by the petition's priority date.

Also, a labor certification employer generally cannot rely on experience that a beneficiary gained with it, unless they obtained the experience in a substantially different job than the offered one or the employer can demonstrate the impracticality of training a U.S. worker for the job. 20 C.F.R. § 656.17(i)(3). The Petitioner has not indicated its reliance on the Beneficiary's experience with it, nor has it demonstrated either of the two conditions needed to use the experience. The company therefore cannot rely on her experience with it.

Contrary to the labor certification requirement, the Petitioner has not demonstrated the Beneficiary's qualifying experience "in the job offered." As previously indicated, the company must demonstrate that the Beneficiary has two years' experience "in the job offered," meaning experience performing the duties of the offered job listed on the labor certification. The labor certification lists the following duties of the offered job: "Provide alterations and adjustments, and redesign and resize clothing on clients' demands. Make made-to-measure clothing available to customer's specifications and measurements with the high regards to garment, detail, design, and fit." The employment certificates from the Beneficiary's purported former foreign employer list "alteration/redesign/resize of clothing" as her former job duties. But, contrary to the offered job's duties, the certificate does not indicate that she created "made-to-measure clothing available to customer's specifications and measurements." Also, as the NOIR noted, a letter from her purported former employer inconsistently states: "Her job was to tailor specifically replacement of zippers and overlocking [holes]."

On appeal, the Petitioner acknowledges that the duties of the offered job and the Beneficiary's purported former foreign job seem "inconsistent." But the company states that it listed "the broadest job description" of the offered job to attract as many U.S. candidates for the job as possible.

By requiring experience "in the job offered," however, the Petitioner obligated itself to prove that the Beneficiary has at least two years' experience performing the offered job's duties as listed on the labor certification. *See Matter of Symbioun Techs., Inc.*, 2010-PER-01422, *3. Also, the company should

have listed the "actual minimum requirements for the job opportunity" on the labor certification. *See* 20 C.F.R. § 656.17(i)(1) ("The job requirements, as described, must represent the employer's actual minimum requirements for the job opportunity.") Thus, the Petitioner's explanation does not relieve it of the obligation to demonstrate the Beneficiary's experience "in the job offered."

Also, in finding insufficient evidence of the Beneficiary's claimed qualifying experience, the Director cited the following evidentiary inconsistencies:

1. The Beneficiary's Inability to Immediately Recall the Name of Her Former Employer

On remand, the Director's NOIR noted that USCIS officers visited the business of the Beneficiary's spouse in October 2020. Through a Korean interpreter, they asked the Beneficiary for the name of her claimed former employer in South Korea. She reportedly "was unable to provide the answer" until the officers showed her a copy of an employment certificate from the South Korean employer.

In an affidavit in the Petitioner's NOIR response, the Beneficiary stated that she did not immediately provide her former foreign employer's name because, in the Korean language, the word for "employer" can mean a business or a person. She stated that she hesitated in answering because she did not know whether to provide the name of her boss or the business where she worked.

On appeal, the Petitioner claims that the Beneficiary did not initially recall the name of her former employer "due to language barriers and the stress of the situation." The company states: "This should not be interpreted as an attempt to deceive but as a momentary lapse under pressure, which was rectified upon seeing the employment letter."

The Petitioner's explanation on appeal differs from the Beneficiary's statement. She did not attribute the delay in her response to "language barriers and the stress of the situation." Rather, as indicated above, she attested that she delayed answering while determining whether to provide the name of her boss or the business. *See Matter of Ho*, 19 I&N Dec. at 591 (requiring a petitioner to resolve inconsistencies of record); *AB Discount Depot, LLC v. USCIS*, No. 20-3245-cv, 2022 WL 453378, *1 (2d Cir. Feb. 15, 2022) ("[A] petitioner has a duty to provide reliable evidence and to resolve any inconsistencies or ambiguities in the record.") Thus, the Petitioner has not consistently explained the Beneficiary's inability to immediately recall her former employer's name, casting doubt on her claimed qualifying experience.

2. The Beneficiary's Omission of Her Claimed Qualifying Experience on Her Form G-325A

The NOIR indicated that the Beneficiary's October 2016 application for adjustment of status contained a Form G-325A, Biographic Information. The form required her to list her employment for the prior five years and, if not already included, her last job abroad. The Beneficiary's claimed qualifying experience in South Korea, from January 2010 to February 2013, fell within the prior five-year period and was her last job abroad. But she did not list the employment on the Form G-325A.

In the Petitioner's NOIR response, counsel asserted that the Beneficiary omitted her claimed qualifying experience because "[s]he [mistakenly] thought she had to indicate her job history in the United States." On appeal, counsel describes the omission as an "unintentional oversight."

Counsel's assertions, however, do not constitute evidence. *See, e.g., 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.") The Petitioner must corroborate counsel's claims with affidavits, declarations, or other documentary evidence. The company therefore has not sufficiently explained the Beneficiary's omission of her claimed qualifying experience from the Form G-325A.

3. The Beneficiary's Omission of Her Purported Employment on Visa Applications

As previously discussed, the labor certification and the Beneficiary's experience certificates indicate her employment in South Korea from January 17, 2010 to February 18, 2013. The NOIR, however, notes that, on U.S. nonimmigrant visa applications on February 7, 2013 and June 5, 2013, the Beneficiary listed her "primary occupation" as "homemaker." Also, asked by the application forms "[w]ere you previously employed?" she answered "no."

In its NOIR response, the Petitioner stated that, in Korean culture, jobs that pay cash are not considered "primary occupations" because a "'primary occupation' requires proof of tax payments. The beneficiary thought her tail[or]ing job was not a primary occupation because she was paid in cash." On appeal, the Petitioner reiterates this explanation, stating: "This cultural context, coupled with the language barrier, led to the misunderstanding that her tailoring job did not need to be declared as it was not considered a 'primary occupation' in the traditional sense."

The record lacks independent, objective evidence corroborating the claimed interpretation of the Korean words for "primary occupation." *See Matter of Ho*, 19 I&N Dec. at 591. The company therefore has not resolved the Beneficiary's omission of her qualifying experience from her U.S. nonimmigrant visa applications.

The Director also found that the Beneficiary willfully misrepresented her prior, foreign experience in the petition.[3] The Petitioner has not sufficiently explained the Beneficiary's omissions of her claimed qualifying experience on other immigration-related forms. But she has submitted experience certificates from her purported former employer. Thus, the record does not sufficiently indicate whether she misrepresented her claimed qualifying experience in this petition or on the other immigration-related forms. We therefore find that the record does not sufficiently support the Director's finding that the Beneficiary misrepresented her claimed, qualifying experience in this petition. We will therefore withdraw that portion of the Director's decision.

The Petitioner has not demonstrated the Beneficiary's qualifying experience for the offered job. For this additional reason, we will affirm the petition's revocation. But the record does not sufficiently support the Director's misrepresentation finding against the Beneficiary.

[3] The Director's misrepresentation determination in these proceedings was a "finding of fact," not an admissibility determination. Petition proceedings are an inappropriate forum for considering a beneficiary's admissibility. *Matter of O-*, 8 I&N Dec. 295, 296-97 (BIA 1959). USCIS decisions, however, should include specific findings and conclusions on any material issues of law or fact that arise in a case, including findings of fraud or material misrepresentation. *See* 8 C.F.R. § 103.3(a)(1)(i); *see also* 5 U.S.C. § 557(c). Thus, after we enter a finding of fact in this decision, USCIS or another agency may consider the Beneficiary's admissibility in separate proceedings.

C. Ability to Pay the Proffered Wage

A petitioner must demonstrate its continuing ability to pay an offered job's proffered wage, from a petition's priority date onward. 8 C.F.R. § 204.5(g)(2). Evidence of ability to pay must include copies of annual reports, federal tax returns, or audited financial statements. *Id.*

When determining ability to pay, USCIS examines whether a petitioner paid a beneficiary the full proffered wage each year, beginning with the year of a petition's priority date. *See* 6 *USCIS Policy Manual* E.(4)(C)(1), www.uscis.gov/policy-manual. If a petitioner did not annually pay a beneficiary the full proffered wage or did not pay a beneficiary at all, USCIS considers whether the business generated annual amounts of net income or net current assets sufficient to pay any differences between the proffered wage and the wages paid. *Id.* at E.(4)(C)(2). If net income and net current assets are insufficient, the Agency may consider other factors 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).[4]

The Petitioner's labor certification states the proffered wage of the offered job of custom tailor as $28,496 a year. As previously indicated, the petition's priority date is October 28, 2015.

USCIS approved the petition on November 15, 2016. The Petitioner must therefore demonstrate its ability to pay the proffered wage in 2015, the year of the petition's priority date, and in 2016.

The Petitioner stated its employment of the Beneficiary in the offered job since 2015. The company submitted copies of her IRS Form W-2, Tax and Wage Statement, and state quarterly payroll tax returns showing that the company paid her that year a total of $30,000. That amount exceeds the annual proffered wage of $28,496. The Director accordingly found that the company had demonstrated its ability to pay the proffered wage in 2015.

Our prior appellate decision, however, questioned the Petitioner's purported payments to the Beneficiary in 2015. She attested on the labor certification that she began to work for the company on July 1, 2015. We noted that the company had not explained why she received more than the offered job's annual proffered wage in 2015 after working only six months of the year. Also, the Petitioner's federal income tax return for 2015 states the company's payment of $42,707 in total salaries and wages that year. But state tax documentation indicates the company's payment of $68,498.40 in total wages that year.

Because of the unresolved inconsistencies, we withdrew the Director's finding on the Petitioner's ability to pay the proffered wage and remanded the matter. *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). On remand, the Director's most recent NOIR informed the Petitioner of our appellate findings and asked the company to explain the discrepancies and submit IRS transcripts.

[4] Federal courts have upheld USCIS' method of determining a petitioner's ability to pay a proffered wage. *See, e.g., River St. Donuts, Inc. v. Napolitano*, 558 F.3d 111, 118 (1st Cir. 2009); *Just Bagels Mfg., Inc. v. Mayorkas*, 900 F. Supp. 2d 363, 373-76 (S.D.N.Y. 2012).

The Petitioner's NOIR response stated that the Beneficiary began to work for the company in May 2015, rather than in July 2015, and completed a "probation period" during which she did not receive pay. The company indicated that, once she completed the probation period, it retroactively provided her wages from the probation period and overtime wages for additional hours she worked that year.

The Petitioner also stated that we misanalysed its total wages paid in 2015. The company stated that the $42,707 salary-and-wage figure on the federal income tax return excluded its president's wages, which the return listed separately as "officer compensation." The company said that the amount on the state tax documentation included her $25,250 in compensation. The Petitioner also stated that, consistent with the NOIR, it requested IRS tax transcripts but had not yet received them for the years before 2020.

The Director found that the record lacked sufficient, credible evidence to demonstrate the Petitioner's ability to pay the proffered wage in 2015. The Director noted that, while the company appeared to have explained the discrepancies in its total wages paid that year, its total wage paid amounts on state and federal tax documents do not match. The company's federal income tax returns for 2015 show that it paid $70,957 in officer compensation and wages. But the company's state tax documents show that it paid total compensation that year of $68,498.40, a difference of $1,458.60.

The Director also questioned the Beneficiary's wages. The Director noted that the $30,000 the Beneficiary's received in 2015 exceeded the annual wages of any other employee of the Petitioner and found her tailoring services to be "secondary" to the Petitioner's "primary" dry cleaning services. The Director stated: "USCIS is not convinced that the beneficiary was remitted a higher wage than any other employee, including the President, for 6 months of work for a secondary service, even with overtime wages." The Director also found that, without transcripts of the Petitioner's 2015 taxes and the Beneficiary's 2015 Form W-2, USCIS cannot reliably determine the company's ability to pay in 2015.

We will not consider the Director's finding that the Petitioner paid the Beneficiary more than any of its other employees in 2015. The NOIR did not contain that factual allegation or list evidence supporting it. The Petitioner therefore did not have an opportunity to respond to the allegation. *See Matter of Arias*, 19 I&N Dec. at 570 (stating that the immigration service can only ground a revocation on, and a petitioner need only respond to, the factual allegations in a NOIR).

Also, the Director improperly expected the Petitioner to submit an IRS transcript of the 2015 Form W-2 it issued to the Beneficiary. Neither our prior appellate decision nor the latest NOIR specifically requested a Form W-2 transcript for 2015 or any other year. The Petitioner reasonably interpreted the NOIR's transcript request as a request for federal income tax return transcripts. Thus, we do not expect the company to have submitted Form W-2 transcripts. *See Matter of Arias*, 19 I&N Dec. at 570.

The Petitioner has sufficiently explained the discrepancies that we alleged in its 2015 total wage payments. We acknowledge that we neglected to include the officer compensation of the company's president in the total compensation listed on its 2015 federal income tax return. Copies of the company's federal quarterly payroll taxes indicate its total wage payments that year of $68,498.40, matching the amount on its state tax documents. Thus, a preponderance of the evidence shows that the Petitioner paid total wages of $68,498.40 in 2015. We consider the $1,458.60 discrepancy on the

company's 2015 federal income tax returns to be a minor error and find the company's federal income tax returns that year to be otherwise reliable.

Nevertheless, the record supports the Director's finding that the Petitioner has not demonstrated its ability to pay the proffered wage in 2015. The company has not sufficiently corroborated its explanation of how, despite not working the full year, the Beneficiary earned $30,000 in 2015. Copies of the company's state quarterly payroll taxes corroborate her receipt of $30,000 in 2015 - $17,499 in third quarter and $12,501 in the fourth quarter of that year. But the company did not demonstrate its purported payment of overtime wages to her that year or indicate the unavailability of such payroll records. The Petitioner therefore has not resolved all the inconsistencies regarding its purported ability to pay the offered job's proffered wage in 2015.

The Director also found that the Petitioner "fabricated financial documents for 2015." The record, however, does not sufficiently support that finding. As discussed above, the company pointed out our mistaken exclusion of its officer compensation in 2015. The copies of its federal payroll tax returns and state tax returns confirm that it paid total wages of $68,498.40 that year. We do not find the $70,957 amount listed on the company's 2015 federal income tax returns enough of a discrepancy to support the Director's finding of a willful misrepresentation of a material fact. We will therefore withdraw the finding.

The Petitioner has not sufficiently demonstrated its ability to pay the offered job's proffered wage in 2015, the year of the petition's priority date. We will therefore also affirm the petitions' revocation on this ground. The record, however, does not support the Director's finding that the Petitioner materially misrepresented a material fact by submitting false financial documents.

III. CONCLUSION

The record does not support the Director's misrepresentation findings. But the Petitioner has not sufficiently demonstrated: its intent to employ the Beneficiary in the offered job; her satisfaction of the job's minimum experience requirements; or the company's ability to pay the proffered wage. We will therefore affirm the revocation of the petition's approval.

ORDER: The appeal is dismissed.