U.S. Citizenship and Immigration Services

Non-Precedent Decision of the Administrative Appeals Office

In Re: 40766636

Date: JUNE 3, 2026

Appeal of Service Center Operations (SCOPS) Decision

Form I-140, Immigrant Petition for Alien Workers (Advanced Degree)

The Petitioner, a software development company, seeks to employ the Beneficiary as a computer programmer. The company requests his classification under the employment-based, second-preference (EB-2) immigrant visa category as a member of the professions holding an "advanced degree." *See* Immigration and Nationality Act (the Act) section 203(b)(2)(A), 8 U.S.C. § 1153(b)(2)(A). Businesses may sponsor aliens for U.S. permanent residence in this category to work in jobs that require at least master's degrees or their equivalents. *See* 8 C.F.R. § 204.5(k)(2) (defining the term "advanced degree").

After first granting the filing, Service Center Operations (SCOPS) revoked the petition's approval. Based in part on the Beneficiary's testimony to a U.S. immigration officer after the petition's approval, SCOPS concluded that the Petitioner did not demonstrate its required intent to employ the Beneficiary in the offered job or his qualifying experience for the job. On appeal, the company contends that SCOPS disregarded evidence.

In these petition revocation proceedings, the Petitioner continues to bear 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) (citation omitted). Exercising de novo appellate review, *see Matter of Christo's, Inc.*, 26 I&N Dec. 537, 537 n.2 (AAO 2015), we conclude that SCOPS did not address one of the company's arguments regarding its intent to employ the Beneficiary in the offered job and the record contains additional potential revocation grounds. We will therefore withdraw SCOPS' decision and remand the matter for entry of a new decision consistent with the following analysis.

I. LAW

Immigration as an advanced degree professional 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 an alien's employment in the job would not harm wages or working conditions of U.S. workers with similar jobs. *See* section 212(a)(5)(D) of the Act, 8 U.S.C. § 1182(a)(5)(D).

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). Among other things, USCIS determines whether an alien beneficiary meets the requirements of a DOL-certified position and a requested immigrant visa category. 8 C.F.R. § 204.5(k)(3).

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 of the Act, 8 U.S.C. § 1255.

"[A]t any time" before a beneficiary obtains U.S. permanent residence, 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, a petition's erroneous approval may justify 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 evidence 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 does not timely respond to a NOIR or if the NOIR response does not rebut or explain the stated revocation grounds. *Id.* at 451-52.

II. ANALYSIS

A. Intent to Employ in the Offered Job

An employer may file an immigrant visa petition if the business is "desiring and intending to employ [an alien] 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 terms of an accompanying labor certification, a petitioner did not intend to employ a domestic worker in a full-time, live-in capacity).

On the Petitioner's labor certification and Form I-140, Immigrant Petition for Alien Workers, the company attested to its intent to employ the Beneficiary full-time as a computer programmer. The record shows that he has worked for the company since March 2009. The company stated that he would earn $67,766 a year and work from its office, the same address stated on both the Form I-140 and the labor certification. SCOPS approved the petition on March 2, 2011.

In March 2025,[1] however, SCOPS issued a NOIR, alleging, in part, that the Petitioner did not demonstrate its intent to employ the Beneficiary in the offered job. As previously indicated, the company's Form I-140 and labor certification state that the Beneficiary would work at the company's office. According to the NOIR, the Beneficiary told a USCIS officer at an October 2022 interview regarding the Beneficiary's adjustment-of-status application that he had been working remotely for

[1] Although USCIS approved the petition in 2011, a backlog in the Beneficiary's immigrant visa category for nationals of his home country prevented his filing of an application for adjustment of status until several years later. *See* sections 201(d), 8 U.S.C. § 1151(d); 245(a)(3) of the Act (limiting the annual number of employment-based immigrant visas the United States can issue and requiring an immigrant visa's immediate availability at the time of an adjustment application's filing).

the Petitioner from his home since the COVID-19 pandemic struck the United States in 2020. But he stated that, before the pandemic, he worked at client sites and went to the Petitioner's office only "a few times a year." The NOIR stated: "This raises questions as to whether the petitioner intended to employ the beneficiary outside the area of intended employment listed on Form I-140 and the labor certification."

SCOPS issued the NOIR for good and sufficient cause. The Petitioner's Form I-140 and labor certification limit the Beneficiary's proposed employment to the area within normal commuting distance of the company's office. *See* 20 C.F.R. § 656.30(c)(2) (restricting a labor certification's validity to the "area of intended employment" stated on it); 20 C.F.R. § 656.3 (defining the term "area of intended employment" as "the area within normal commuting distance of the place (address) of intended employment," including "any place within the same MSA [Metropolitan Statistical Area]"). The immigration service properly denies an immigrant visa petition if a petitioner intends to employ a beneficiary outside the area of intended employment stated on an accompanying labor certification. *Matter of Sunoco Energy Dev. Co.*, 17 I&N Dec. 283, 284 (Reg'l Comm'r 1979). Thus, without rebuttal or explanation, the Beneficiary's possible employment beyond the normal commuting distance of the Petitioner's office would have warranted the petition's denial. *See* section 204(b) of the Act (requiring a determination "that the facts stated in the petition are true"; 8 C.F.R. § 103.2(b)(1) ("Any evidence submitted in connection with a benefit request is incorporated into and considered part of the request.")

In response to the NOIR, the Petitioner denied its intent to employ the Beneficiary beyond its office's normal commuting distance. A letter from the company's president notes that job offers in immigrant visa petitions propose "future employment." The letter states: "[The Beneficiary's] current employment with us, which has been ongoing for the past 15+ years, is on a temporary, nonimmigrant basis, ... which is outside the terms of [the] Labor Certification underlying his Immigrant Visa Petition." The Beneficiary need not work for the Petitioner in the offered job until and unless USCIS approves the petition. *See Matter of Rajah*, 25 I&N Dec. 127, 132 (BIA 2009) ("An alien is not required to have been employed by the certified employer [in the offered job] prior to adjustment of status.") The Petitioner therefore argued that the Beneficiary's prior work for the company outside its office's normal commuting distance does not demonstrate its lack of intent to employ him within that area upon the petition's future approval.

SCOPS did not address the Petitioner's argument. We will therefore withdraw SCOPS' finding regarding the company's intent to employ the Beneficiary in the offered job and remand the matter. On remand, SCOPS should consider the Petitioner's argument. If SCOPS has other concerns, it should articulate them in a new NOIR.

B. Qualifying Experience

A petitioner must demonstrate a beneficiary's satisfaction of all DOL-certified requirements of an offered job by a petition's priority date. *Matter of Wing's Tea House*, 16 I&N Dec. 158, 160 (Acting Reg'l Comm'r 1977). This petition's priority date is September 29, 2010, 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).

When assessing a beneficiary's qualifications, USCIS must examine the job-offer portion of an accompanying labor certification to determine a job's minimum requirements. The Agency 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 computer programmer job as a U.S. master's degree, or a foreign equivalent degree, in computer science, engineering, or computer applications, plus one year's experience "in the job offered" or as a senior Java/J2EE developer. On a labor certification, the phrase "in the job offered" means "experience performing the key duties of the job opportunity, specifically those listed in Question H.11 [of the labor certification application]." *Matter of Symbioun Techs., Inc.*, 2010-PER-01422, at *4 (BALCA October 24, 2011) (citations omitted). Thus, the Petitioner's labor certification indicates that the offered job requires one year's experience in the job duties, skills, and technologies listed in Question H.11 on the labor certification *or* one year's experience as a senior Java/J2EE developer.

The Petitioner submitted copies of the recruitment materials it used for the offered job during the labor certification proceedings. Based on these materials, SCOPS' NOIR interpreted the job's alternative experience criterion to also require one year's experience in the job's duties, skills, and technologies. The recruitment materials – including newspaper ads, notice of filing, and prevailing wage determination application – state that the job requires only "one year experience in these job duties/skills," referring to the job's duties, skills, and technologies listed in Question H.11 on the labor certification application.[2] As previously indicated, however, the job requirements stated on a certified labor certification govern. *See Madany*, 969 F.2d at 1015; *Rosedale & Linden Park Co. v. Smith*, 595 F. Supp. 829, 833 (D.D.C. 1984) ("The Court – like the [immigration service] – must examine the certified job offer exactly as it is completed by the prospective employer.") Because SCOPS misinterpreted the offered job's experience requirements stated on the labor certification, we will withdraw SCOPS' experience finding.[3]

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[2] The Petitioner's recruitment materials indicate that it advertised multiple positions available for the job, suggesting that the company used the materials to support labor certification applications for other aliens. *See* DOL, Office of Foreign Labor Certification, "Frequently Asked Questions (FAQs)," www.dol.gov/agencies/eta/foreign-labor/faqs/print (allowing labor certification employers to place single ads for multiple positions).

[3] The record, however, contains other anomalies in the advertised experience that the Petitioner should be given an opportunity to address. The labor certification states that the job requires one year's experience "in the job offered" *or* as a senior Java/J2EE developer. But this does not match the experience requirement stated in the company's advertising. Specifically, both the *Boston Globe* ad, dated June 10, 2010, and the local ad, in the *Milford Daily News*, dated June 21, 2010, require experience "in the job offered" and omit the alternate experience as a Java/J2EE developer. The Petitioner attested on the labor certification that it advertised the offered job to U.S. workers and that none were available, willing, or qualified. *See* 20 C.F.R. § 656.10(c)(9) (requiring labor certification employers to certify that "[t]he U.S. workers who applied for the job opportunity were rejected for lawful job-related reasons"). But, contrary to the company's attestation, the record does not demonstrate the company's advertisement of the offered job – as listed on the labor certification – to U.S. workers. *See* section 204(b) of the Act (requiring a determination "that the facts stated in the petition are true"); 8 C.F.R. § 103.2(b)(1) ("Any evidence submitted in connection with a benefit request is incorporated into and considered part of the request.") Before approving a visa petition, USCIS must investigate the facts of each case to ensure the facts stated in the petition, which necessarily includes the labor certification, are true. *See* INA § 203(b)(3)(C); § 204(b); 8 C.F.R. §§ 204.5(a)(2), 204.5(k)(4)(i) and (l)(3)(i).

C. Ability to Pay the Proffered Wage

Although unaddressed by SCOPS, the Petitioner also did not demonstrate its required 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 lawful permanent residence. 8 C.F.R. § 204.5(g)(2). Evidence of ability to pay must generally include copies of annual reports, federal income tax returns, or audited financial statements. *Id.*[4]

In 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 generally* 6 *USCIS Policy Manual* E.4(C)(1), www.uscis.gov/policy-manual. If a petitioner did not annually pay the 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 difference between the proffered wage and wages paid. *See generally* 6 *USCIS Policy Manual* E.4(C)(2). If net income and net current assets are insufficient, USCIS 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); *see generally* 6 *USCIS Policy Manual* E.4(C)(3).[5]

As previously indicated, the Petitioner's labor certification states the proffered wage of the offered computer programmer's job as $67,766 a year. The petition's priority date is September 29, 2010. USCIS approved the petition in March 2011. The company therefore needed only to demonstrate its ability to pay the proffered wage from the priority date until the time of the petition's approval.

The Petitioner submitted evidence that it paid the Beneficiary in 2010. A copy of his IRS Form W-2, Wage and Tax Statement, shows that the company paid him $59,019.78 that year. That amount does not equal or exceed the annual proffered wage of $67,766. Nevertheless, we credit the Petitioner's payment. Under USCIS policy, the company need only demonstrate its ability to pay the difference between the proffered wage and his actual wage, or $8,746.22. *See generally* 6 *USCIS Policy Manual* E.4(C)(2).

The Petitioner submitted a copy of its federal income tax return for 2009. As the company's federal income tax return for 2010 was not yet available at the time of the petition's approval, USCIS allowed the 2009 federal income tax return to serve as proof of the company's ability to pay in 2010. *See generally* 6 *USCIS Policy Manual* E.4(A) n.5 ("In the event that a tax return, annual report, or audited financial statement is not available for the priority date year at the time of filing, USCIS may consider one of these three documents for the year before the priority date.") The 2009 tax return reflects net income of $30,198 and net current assets of $321,631. Either amount exceeds the $8,746.22 difference between the annual proffered wage and the Beneficiary's actual wage. Thus, the company appears to have demonstrated its ability to pay the proffered wage.

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[4] If a petitioner employs at least 100 people, a statement from a financial officer may demonstrate the business's ability to pay a proffered wage in lieu of the regulatory required material. 8 C.F.R. § 204.5(g)(2). The Petitioner, however, has neither claimed nor demonstrated its employment of at least 100 people.

[5] 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).

USCIS records, however, indicate that the Petitioner has filed Forms I-140 for other alien 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). Thus, the Petitioner must establish its ability to pay the combined proffered wages of this petition and others that remained pending as of this petition's September 29, 2010 priority date or were filed after that date and before the petition's March 2, 2011 approval. *See Patel v. Johnson*, 2 F. Supp. 3d 108, 124 (D. Mass. 2014) (affirming a petition's revocation where, as of the filing's approval, the petitioner did not demonstrate its ability to pay the combined proffered wages of multiple pending and approved petitions).[6] USCIS records show that at least five of the Petitioner's Form I-140 petitions for other beneficiaries remained pending as of September 29, 2010 or were filed between that date and the petition's March 2, 2011 approval.[7]

SCOPS did not inform the Petitioner of its need to demonstrate its ability to pay the combined proffered wages of this and its other relevant Form I-140 petitions. Thus, on remand, SCOPS may wish to issue a new NOIR asking the company to provide the receipt numbers and proffered wages of its other relevant petitions. The company could also submit regulatory required evidence of its ability to pay in 2010, such as a copy of its 2010 federal income tax return. The company could also submit additional evidence of its ability to pay, including evidence that it paid the beneficiaries of its other relevant petitions in 2010.

If supported by the record, SCOPS may include any additional, potential revocation grounds in the new NOIR. Upon receipt of a timely NOIR response, SCOPS should review the entire record and issue a new decision.

III. CONCLUSION

SCOPS did not consider one of the Petitioner's arguments about its intent to employ the Beneficiary in the offered job. Also, the record contains additional potential revocation grounds regarding the company's ability to pay the combined proffered wages of this and other petitions.

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

[6] The Petitioner need not demonstrate its ability to pay proffered wages of petitions that it withdrew or that USCIS rejected, denied, or revoked. *See generally* 6 *USCIS Policy Manual* E.(4)(C)(2). The company also need not demonstrate its ability to pay proffered wages before their petitions' corresponding priority dates or after the dates their corresponding beneficiaries became permanent residents. *Id.*

[7] USCIS records identify the Petitioner's five petitions by the following receipt numbers: [redacted]