U.S. Citizenship and Immigration Services

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

MATTER OF Y-R-

DATE: SEPT. 19, 2019

APPEAL OF NEBRASKA SERVICE CENTER DECISION

PETITION: FORM I-140, IMMIGRANT PETITION FOR ALIEN WORKER

The Petitioner, a restaurant operator, seeks to employ the Beneficiary as a market research analyst. It requests his classification under the third-preference, immigrant category as a professional. *See* Immigration and Nationality Act (the Act) section 203(b)(3)(A)(ii), 8 U.S.C. § 1153(b)(3)(A)(ii). This employment-based, "EB-3" category allows a U.S. business to sponsor a foreign national for lawful permanent resident status to work in a job requiring at least a bachelor's degree.

After the filing's initial grant, the Director of the Nebraska Service Center revoked the petition's approval. The Director concluded that the Petitioner had not demonstrated the Beneficiary's possession of the minimum requirements of the offered position.

On appeal, the Petitioner argues that the record demonstrated the Beneficiary's qualifications for the position.[1]

Upon *de novo* review, we will withdraw the decision and remand the matter for entry of a new decision consistent with the following analysis.

## I. EMPLOYMENT-BASED IMMIGRATION

Immigration as a professional 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)(A)(i) of the Act, 8 U.S.C. § 1182(a)(5)(A)(i). DOL approval signifies that insufficient U.S. workers are able, willing, qualified, and available for an offered position, and 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 labor certification with an immigrant visa petition to U.S. Citizenship and Immigration Services (USCIS). *See* section 204 of the Act,

[1] The Petitioner's Form I-290B, Notice of Appeal or Motion, indicated that the business would submit a written brief, additional evidence, or both within 30 days of the appeal's filing. As of the date of this decision, however, more than four months after the appeal's filing, we have not received additional materials in this matter.

8 U.S.C. § 1154. Among other things, USCIS determines whether a beneficiary meets the requirements of a DOL-certified position and the 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 resident status, 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 the record, the erroneous nature of a petition's approval may justify its revocation. *Matter of Ho*, 19 I&N Dec. 582, 590 (BIA 1988). USCIS may issue a notice of intent to revoke (NOIR) if the unexplained and unrebutted record would have warranted a petition's denial. *Matter of Estime*, 19 I&N Dec. 450, 451 (BIA 1987).

## II. REQUIREMENTS OF THE OFFERED POSITION

A petitioner must establish that a beneficiary met all DOL-certified job requirements of an offered position by a petition's priority date. *Matter of Wing's Tea House,* 16 I&N Dec. 158, 160 (Acting Reg'l Comm'r 1977).[2] In evaluating a beneficiary's qualifications, USCIS must examine the job-offer portion of an accompanying labor certification to determine a position's minimum requirements. USCIS may neither ignore a certification term, nor impose additional requirements. *See, e.g., Tongatapu Woodcraft Haw., Ltd. v. Feldman, 736* F.2d 1305 (9th Cir. 1984) (holding that, absent a finding of fraud or willful misrepresentation of a material fact involving a labor certification, the immigration service "is bound by DOL's certification").

Here, the labor certification identified the minimum requirements of the offered position of market research analyst as a U.S. bachelor's degree or a foreign equivalent degree in marketing, economics, business, or a related field of study. The labor certification specified that the position does not require training or experience.

On the labor certification, the Beneficiary attested that, by the petition's priority date, a U.S. university awarded him a bachelor's degree in economics. To support the claimed qualification, the Petitioner submitted copies of the Beneficiary's degree and a university transcript. *See* 8 C.F.R. § 204.5(l)(3)(ii)(C) (requiring evidence of a baccalaureate degree "in the form of an official college or university record showing the date the baccalaureate degree was awarded and the area of concentration of study").

Based on a report of the Beneficiary's immigrant visa interview in Japan, however, the Director's NOIR alleged that "[t]he beneficiary is not fully qualified for the offered position as certified by [DOL]." The labor certification stated the job duties of the offered position as establishing research methodology, designing data-gathering formats, and examining and analyzing statistical data to forecast future market trends. The Beneficiary reportedly told a U.S. consular officer that, during the Beneficiary's prior tenure with the Petitioner as a marketing manager, he conducted research by "driving around, talk[ing] to friends." The Beneficiary also stated that he obtained market data "on-

[2] This petition's priority date is June 28, 2011, 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).

line." But he reportedly could not provide detailed descriptions of the data's location or of the tools used to analyze it. The Beneficiary stated that he worked as marketing manager at the Petitioner's restaurant for more than 10 years. But he reportedly could not provide a detailed description of the restaurant's operations or its most recent annual revenues. Based on the Beneficiary's reported statements, the NOIR alleged that "the beneficiary does not possess the technical knowledge, skills, experience, or ability to perform the job duties described on [the labor certification]."

As of the NOIR's issuance, however, the record would not have warranted the petition's denial based on the Beneficiary's qualifications. As previously discussed, the plain language of the labor certification states that the offered position requires only a bachelor's degree in a specified field. The Petitioner indicated in parts H.5, H.6, and H.10 of the labor certification that "No" training or experience is required. Part H.14 of the certification also states that the position requires no "Specific skills or other requirements." Thus, contrary to the NOIR, the offered position does not require "technical knowledge, skills, experience, or ability to perform the job duties described." *See Tongatapu*, 736 F.2d at 1309 (holding that the immigration service "is bound by DOL's certification"). The Petitioner provided regulatory required evidence of the Beneficiary's possession of the requisite degree in a specified field, the offered position's sole requirement. The inconsistencies alleged in the NOIR do not undermine the evidence of the Beneficiary's qualifications for the offered position.

Thus, despite the NOIR's allegations, the unexplained and unrebutted record established the Beneficiary's qualifications for the offered position. Because the record would not have warranted the petition's denial, USCIS improperly issued the NOIR on this ground. We will therefore withdraw the revocation decision.

We also note that in the revocation decision, the Director doubted the Beneficiary's claimed experience with the Petitioner because the Beneficiary did not list the work on the labor certification application. *See Matter of Leung*, 16 I&N Dec. 12, 14-15 (Distr. Dir. 1976), *disapp'd of another ground by Matter of Lam*, 16 I&N Dec. 432, 434 (BIA 1978) (finding qualifying experience claimed in adjustment of status proceedings "not credible" where the applicant omitted the experience from the labor certification application on his behalf). The Director's NOIR, however, did not cite the absence of the Beneficiary's claimed experience from the labor certification application. The Petitioner therefore lacked an opportunity to respond to the Director's discounting of the experience. *See Matter of Arias*, 19 I&N Dec. 568, 570 (BIA 1988) (stating that a revocation can only be grounded on, and a petitioner need only respond to, the factual allegations in an NOIR). If the Director wishes to question the Beneficiary's claimed experience, she must properly notify the Petitioner of the allegation and explain why the issue would have warranted the petition's denial.

## III. ABILITY TO PAY THE PROFFERED WAGE

The appeal overcomes the revocation ground. But the record did not establish the petition's approvability. Although unaddressed by the Director, the Petitioner did not demonstrate its ability to pay the proffered wage of the offered position.

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). For

petitioners who employ less than 100 people, like this Petitioner, evidence of ability to pay must include annual reports, federal income tax returns, or audited financial statements. *Id.*

Here, the labor certification states the proffered wage of the offered position of market research analyst as $38,064 a year. As previously noted, the petition's priority date is June 28, 2011. As of the petition's approval in January 2013, the Petitioner therefore had to demonstrate its ability to pay the proffered wage in 2011 and 2012.

The record indicates that the Petitioner was a sole proprietorship. Its owner operated the business in his personal capacity. Unlike other legal entities, a sole proprietorship does not exist apart from its owner. *Matter of United Inv. Grp.*, 19 I&N Dec. 248, 250 (Comm'r 1984). Therefore, in determining the ability of a sole proprietorship to pay a proffered wage, USCIS considers the owner's adjusted gross income, personal assets, and liabilities. Sole proprietors must not only demonstrate their abilities to pay proffered wages, but also to cover any other business expenses and to support themselves and any dependents. *See Ubeda v. Palmer*, 539 F.Supp. 647, 650 (N.D. Ill. 1982) (affirming the immigration service's decision that a sole proprietor with a dependent spouse and five children did not demonstrate his ability to pay a proffered wage).

Also, the Petitioner filed immigrant petitions for three other beneficiaries that, as of this petition's priority date of June 28, 2011, were pending, approved, or submitted shortly thereafter. The Petitioner therefore had to demonstrate the ability of its owner to pay the combined proffered wages of this and the three other petitions, in addition to covering other business expenses and supporting himself, his spouse, and his son. *See Patel v. Johnson*, 2 F.Supp.3d 108, 124 (D. Mass. 2014) (affirming 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).

The Petitioner submitted information about its other petitions and copies of the federal income tax returns of its owner for 2011. It also submitted copies of its owner's bank account and mutual fund statements and a list of his household expenses for 2011 and part of 2012. The materials demonstrated the owner's ability to pay the combined proffered wages of the petitions and all relevant expenses in 2011. Contrary to 8 C.F.R. § 204.5(g)(2), however, the record lacked copies of the owner's annual report, federal tax returns, or audited financial statements for 2012. The record therefore did not establish the Petitioner's continuing ability to pay the proffered wage from the petition's priority date.

The NOIR did not notify the Petitioner of this deficiency. We will therefore remand the matter. On remand, the Director should issue a new NOIR to the Petitioner, informing it of the lack of required evidence of its owner's ability to pay the proffered wage in 2012. The Director may also allege other revocation grounds, if supported by the record.

The Director must afford the Petitioner a reasonable period in which to respond to the new NOIR. Upon receipt of a timely response, the Director should review the entire record and enter a new decision.

## IV. CONCLUSION

Contrary to the revocation decision, the record establishes the Beneficiary's possession of the minimum requirements of the offered position by the petition's priority date. However, the record does not establish eligibility for the benefit sought.

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

Cite as *Matter of Y-R-*, ID# 5918112 (AAO Sept. 19, 2019)