U.S. Citizenship and Immigration Services

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

In Re: 15820647

Date: SEP. 22, 2021

Appeal of Texas Service Center Decision

Form I-140, Immigrant Petition for Other Worker

The Petitioner, a restaurant operator, seeks to employ the Beneficiary as a wine steward. The company requests his classification under the third-preference, immigrant visa category for "other workers." *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 - because the Petitioner falsely concealed a personal relationship between the company's vice president/co-owner and the Beneficiary - it didn't demonstrate the *bona fides* of the job opportunity.

In revocation proceedings, the Petitioner bears the burden of establishing eligibility for the requested benefit by a preponderance of evidence. *See Matter of Ho*, 19 I&N Dec. 582, 589 (BIA 1988) (citation omitted) (discussing the burden of proof); *see also Matter of Chawathe*, 25 I&N Dec. 369, 375 (AAO 2010) (discussing the standard of proof). 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 "other," or unskilled, worker generally follows a three-step process. First, a prospective employer must apply to the U.S. Department of Labor (DOL) for certification that: (1) there are insufficient U.S. workers able, willing, qualified, and available for an offered position; and (2) the employment of a noncitizen in the position won't harm wages and working conditions of U.S. workers with similar jobs. *See* section 212(a)(5) of the Act, 8 U.S.C. § 1182(a)(5).

Second, an employer must submit an approved labor certification 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 noncitizen beneficiary meets the requirements of a certified position and a requested immigrant visa category. 8 C.F.R. § 204.5(l).

Finally, if USCIS approves a petition, a designated noncitizen 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 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.

## II. THE SUFFICIENCY OF THE NOIR

Unless a filing is subject to automatic revocation under 8 C.F.R. § 205.1, USCIS can't revoke a petition's approval without first issuing a petitioner a written notice of intent to revoke (NOIR). 8 C.F.R. § 205.2(a), (b). "The petitioner . . . must be given the opportunity to offer evidence in support of the petition . . . and in opposition to the grounds alleged for revocation of the approval." 8 C.F.R. § 205.2(b).

USCIS may issue a NOIR if the unexplained and unrebutted record at the time of the notice's issuance would have warranted the petition's denial. *Matter of Estime*, 19 I&N Dec. 450, 451 (BIA 1987). A NOIR "must include a specific statement not only of the facts underlying the proposed action, but also of the supporting evidence." *Id.* at 452.

> Where a notice of intention to revoke is based on an unsupported statement or an unstated presumption, or where the petitioner is unaware and has not been advised of derogatory evidence, revocation of the visa petition cannot be sustained, even if the petitioner did not respond to the notice of intention to revoke.

*Id.*

Revocation must be grounded on, and a petitioner need only respond to, the factual allegations in a NOIR. *Matter of Arias*, 19 I&N Dec. 568, 570 (BIA 1988). A NOIR's allegations don't support revocation of a petition's approval if they are "conclusory, speculative, equivocal, . . . [or] irrelevant" to the proposed revocation ground. *Id.*

In October 2019, the Director issued the Petitioner a NOIR alleging the company's submission of insufficient evidence of the *bona fides* of the job opportunity for a wine steward.[1] A labor certification employer must attest that "[t]he job opportunity has been and is clearly open to any U.S. worker." 20 C.F.R. § 656.10(c)(8). "This provision infuses the [labor certification] recruitment process with the requirement of a *bona fide* job opportunity." *Matter of Modular Container Sys., Inc.*, 89-INA-228, slip op. at *7 (BALCA July 16, 1991) (*en banc*).

> Where the alien for whom labor certification is sought is in a position to control hiring decisions or where the alien has such a dominant role in, or close personal relationship with, the sponsoring employer's business that it would be unlikely that the alien would be replaced by a qualified U.S. applicant, the question arises whether the employer has a *bona fide* job opportunity.

[1] The NOIR alleged additional revocation grounds. The Director, however, revoked the petition's approval based only on the purported unavailability of the job opportunity to U.S. workers. We therefore won't discuss the NOIR's other grounds.

*Id.*

Asked in part C.9 of the labor certification application "is there a familial relationship between the owners, stockholders, partners, corporate officers, or incorporators [of the employer], and the alien?" the Petitioner checked the box marked "No." The NOIR notes that, on an application for a U.S. visitor visa in 2016, before the filing of the labor certification application in 2017, the Beneficiary listed the Petitioner's vice president/co-owner as his "contact person" in the United States. The NOIR also notes that, in an interview with a U.S. official regarding the visa application, the Beneficiary testified that he learned of the Petitioner's job opportunity through his mother. He stated that his mother met the company's principal during her work as a notary and suggested the Beneficiary to him as a potential employee at the Petitioner's restaurant.

Based on this evidence, the NOIR alleges that, on the labor certification application, the Petitioner falsely concealed the pre-existing relationship between the company's principal and the Beneficiary. The NOIR states that "it is unclear how the petitioner could employ the beneficiary in the offered position because the job opportunity was not open to any U.S. worker."

The NOIR's allegations, however, wouldn't have warranted the petition's denial. First, the labor certification asked whether "a familial relationship" existed between a principal of the Petitioner and the Beneficiary. The record lacks evidence that the Beneficiary is related by blood or marriage to the Petitioner's principal. The record therefore doesn't support the company's false concealment of such a relationship. Also, under the labor certification process, employers may select noncitizens they wish to hire before beginning the required recruitment of U.S. workers for the offered positions. *See* 20 C.F.R. § 656.17. Thus, the Petitioner's offer of employment to the Beneficiary before the labor certification recruitment process doesn't indicate the unavailability of the position to U.S. workers. The Director therefore erred in revoking the petition's approval for lack of a *bona fide* job opportunity. We will therefore withdraw the Director's decision.

For the foregoing reasons, the NOIR's allegations wouldn't have warranted the petition's denial based on the alleged unavailability of the offered position to U.S. workers. We therefore can't sustain the petition's revocation and will withdraw the Director's decision.

## III. THE REQUIRED EXPERIENCE

The appeal overcomes the revocation ground. But the record nonetheless indicates USCIS' erroneous approval of the petition. At the time of the NOIR's issuance, the Petitioner didn't demonstrate the Beneficiary's qualifying experience for the offered position.

A petitioner must demonstrate a beneficiary's possession of 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 assessing a beneficiary's qualifications for a position, USCIS must examine the job-offered portion of an accompanying labor certification to determine the job's minimum requirements. USCIS may neither ignore a certification term nor impose additional

[2] This petition's priority date is September 7, 2017, the date DOL accepted the accompanying labor certification application for processing. *See* 8 C.F.R. § 204.5(d) (explaining how to determine a petition's priority date).

requirements. *See, e.g., Madany v Smith*, 696 F.2d 1008, 1015 (D.C. Cir. 1983) (holding that "DOL bears authority for setting the *content* of the labor certification") (emphasis in original).

The accompanying labor certification states the minimum requirements of the offered position of wine steward as one year of experience in the job offered. The labor certification indicates that the position requires neither education nor training.

On the labor certification, the Beneficiary attested that, by the petition's priority date, he gained about two years, 10 months of full-time, qualifying experience at three restaurants in France. He stated the following employment history:

- About eight months as a wine steward, from March 2016 to November 2016;
- About one year, two months as a waiter/wine advisor, from January 2015 to March 2016; and
- About one year as a wine steward, from January 2014 to January 2015.

To support claimed, qualifying experience, a petitioner must submit letters from a beneficiary's former employers. 8 C.F.R. § 204.5(l)(3)(ii)(A). The letters must include the employers' names, addresses, and titles, and descriptions of the beneficiary's experience. *Id.*

The Petitioner submitted a letter from only one of the Beneficiary's claimed former employers: the restaurant where he purportedly worked as a wine steward from January 2014 to January 2015. The address on the letter, however, doesn't match the address of the purported former employer listed on the labor certification. The discrepancy casts doubt on the Beneficiary's claimed experience. *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).

Also, the letter's description of the Beneficiary's experience matches verbatim the job duties of the offered position listed on the labor certification. The similarity of the job descriptions suggests that the purported former employer didn't describe the Beneficiary's experience based on the employer's records or personal knowledge. Rather, the letter appears to have been drafted by someone else. The reliability of the letter is therefore suspect.

For the foregoing reasons, the record at the time of the NOIR's issuance didn't demonstrate the Beneficiary's possession of the minimum experience required for the offered position. We will therefore remand the matter.

On remand, the Director should issue a new NOIR notifying the Petitioner of the evidentiary deficiency. The new notice should also instruct the company to provide independent, objective evidence - such as tax or contemporaneous business records - of the Beneficiary's claimed, qualifying experience. *See Matter of Ho*, 19 I&N Dec. at 591.

## IV. ABILITY TO PAY THE PROFFERED WAGE

Although unaddressed by the Director, the record at the time of the NOIR's issuance also did not establish the Petitioner's required 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). 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 didn't annually pay the full proffered wage or didn't 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. 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).[3]

The labor certification states the proffered wage of the offered position of wine steward as $45,198 a year. As previously noted, the petition's priority date is September 7, 2017. Thus, at the time USCIS approved the petition in June 2018, the Petitioner had to demonstrate its ability to pay the proffered wage in 2017 and 2018.

The Petitioner doesn't claim that it ever employed the Beneficiary and didn't submit any evidence of payments it made to him in 2017 or 2018. Thus, based solely on wages paid, the Petitioner didn't demonstrate its ability to pay the proffered wage from the petition's priority date onward.

The record contains copies of the Petitioner's federal income tax returns for 2017 and 2018. The returns reflect negative amounts of net current assets in both years, but net income of $103,730 in 2017 and $229,472 in 2018.[4] Both of these amounts exceed the annual proffered wage of $45,198. The Petitioner therefore appears to have demonstrated its ability to pay the Beneficiary's individual proffered wage in 2017 and 2018.

USCIS records, however, indicate the Petitioner's filing of a Form I-140 petition for another beneficiary. 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). This Petitioner must therefore demonstrate its ability to pay the combined proffered wages of this petition and any other petitions that were pending or approved at the time of this petition's priority date or filed thereafter in 2017 or 2018. *See Patel v. Johnson*, 2 F. Supp. 3d 108, 124 (D. Mass. 2014) (affirming our revocation of a petition's approval where, at the time of the filing's grant, a petitioner did not demonstrate its ability to pay the combined proffered wages of multiple petitions).[5]

---

[3] 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).

[4] The Petitioner chose to be treated as an S corporation for federal income tax purposes in 2017 and 2018. *See* 26 U.S.C. § 1261 (defining the term "S corporation"). As an S corporation, the Petitioner listed additional income deductions in those years on its Schedules K to IRS Forms 1120S, U.S. Income Tax Returns for an S Corporation. *See* U.S. Internal Rev. Serv. (IRS), "Instructions to Form 1120S," 22, https://www.irs.gov/pub/irs-pdf/i1120s.pdf (last visited Apr. 27, 2021) (describing Schedule K as "a summary schedule of all shareholders' shares of the corporation's income, deductions, credits, etc."). We therefore consider the "reconciliation" amounts listed on lines 18 of the Petitioner's Schedules K in 2017 and 2018 to reflect the company's net incomes more accurately than the amounts listed on the IRS Forms 1120S for those years.

[5] The Petitioner needn't demonstrate its ability to pay proffered wages of petitions that it withdrew or, unless pending on

USCIS records indicate the Petitioner's filing of its other petition in 2018. Because the priority date of the other petition is also in 2018, the Petitioner needn't demonstrate its ability to pay the combined proffered wages of both petitions in 2017. Rather, the record establishes the Petitioner's ability to pay in 2017. In 2018, however, the company must establish its ability to pay the combined proffered wages of this and the other petition. The record doesn't indicate the proffered wage of the Petitioner's other petition. Thus, we can't calculate the total amount of proffered wages that the company must demonstrate its ability to pay in 2018. The record therefore doesn't establish the company's ability to pay the proffered wage that year.

The record doesn't establish the Petitioner's ability to pay the combined proffered wages in 2018. Thus, on remand, the new NOIR should inform the Petitioner of this evidentiary defect and ask the company to provide the proffered wage of its other petition. The Petitioner may also submit additional evidence of its ability to pay in 2018, including materials supporting the factors stated in *Matter of Sonegawa*. *See* 12 I&N Dec. at 614-15.

If supported by the record, the new NOIR may include additional, potential grounds of revocation. The Director, however, must 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.

## V. CONCLUSION

The record doesn't support the revocation of the petition's approval based on the *bona fides* of the job opportunity. The Petitioner, however, didn't demonstrate the Beneficiary's qualifying experience for the offered position or the company's continuing ability to pay the proffered wage.

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

appeal or motion, that USCIS denied, rejected, or revoked. The Petitioner also needn't demonstrate its ability to pay proffered wages before the priority dates of corresponding petitions or after the dates that corresponding beneficiaries obtained lawful permanent residence.