



**U.S. Citizenship
and Immigration
Services**

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

In Re: 00463994

Date: JUN. 7, 2022

Appeal of Texas Service Center Decision

Form I-140, Immigrant Petition for Skilled Worker

The Petitioner, an operator of two retail beauty supply stores, seeks to employ the Beneficiary as a wig maker. The business requests his classification under the third-preference, immigrant visa category for “skilled workers.” *See* Immigration and Nationality Act (the Act) section 203(b)(3)(A)(i), 8 U.S.C. § 1153(b)(3)(A)(i).

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 demonstrate: its required ability to pay the proffered wage of the offered position; the Beneficiary’s possession of the minimum employment experience required for the job and the requested immigrant visa category; or the job’s availability to U.S. workers. The Director also found that the Petitioner and Beneficiary willfully misrepresented materials facts on the accompanying certification from the U.S. Department of Labor (DOL).

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) (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 dismiss the appeal.

I. EMPLOYMENT-BASED IMMIGRATION

Immigration as a skilled worker generally follows a three-step process. First, a prospective employer must obtain DOL certification that: (1) there are insufficient U.S. workers able, willing, qualified, and available for an offered position; and (2) employment of a noncitizen in the position would not 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 DOL-certified position and a requested immigrant visa category. 8 C.F.R. § 204.5(l).

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.

But “at any time” before a beneficiary obtains lawful 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, the erroneous nature of a petition’s approval justifies its revocation. *Matter of Ho*, 19 I&N Dec. at 590.

USCIS properly issues a notice of intent to revoke (NOIR) a petition’s approval if the unexplained and un rebutted record at the time of the notice’s issuance would have warranted the petition’s denial. *Matter of Esteime*, 19 I&N Dec. 450, 451 (BIA 1987). If a NOIR response does not rebut or resolve the alleged revocation grounds, USCIS properly revokes a petition’s approval. *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, beginning with the year of the petition’s priority date. If a petitioner did not annually pay the full proffered wage or did not pay a beneficiary at all, USCIS considers 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 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).¹

The accompanying labor certification states the proffered wage of the offered position of wig maker as \$41,100 a year. The petition’s priority date is January 7, 2004, the date an office in DOL’s employment service system 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 Director initially approved the petition in February 2005. At that time, the Petitioner had to demonstrate its ability to pay the proffered wage in 2004, the year of the petition’s priority date, and 2005, the year of its approval.

The record identifies the Petitioner as a sole proprietorship, the same legal entity as its individual owner, who is known as the “sole proprietor.” *See Matter of United Inv. Grp.*, 19 I&N Dec. 248, 250 (Comm’r 1984). Thus, to determine the Petitioner’s ability to pay the proffered wage, USCIS must consider the assets of the business’s sole proprietor. In addition to demonstrating the ability to pay a

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); *Z-Noorani, Inc. v. Richardson*, 950 F. Supp. 2d 1330, 1345-46 (N.D. Ga. 2013).

position's proffered wage and a business's expenses, sole proprietors must establish their abilities to financially support themselves and any dependents. *See, e.g., Ubedav. Palmer*, 539 F.Supp. 647 (N.D. Ill. 1982), *aff'd*, 703 F.2d 571 (7th Cir. 1983).

A married couple appears to operate the Petitioner. But the record contains conflicting evidence as to which spouse is the business's sole proprietor. Copies of the couple's joint federal income tax returns for 2002, 2003 and 2005 through 2008 contain U.S. Internal Revenue Service (IRS) Schedules C, Profits or Losses from Businesses, listing the female spouse as the Petitioner's sole proprietor. Schedules C for 2009 through 2015, however, identify the sole proprietor as the male spouse. In an August 2016 affidavit in response to the Director's NOIR, the male claims that he is the Petitioner's sole proprietor. He states that: he is "the 100% owner" of the business; his spouse "was not involved in the management of the business;" he is "the owner and operator of this sole proprietorship;" and he has "always been the owner" of the business. The Petitioner has not explained why the couple's earlier tax returns list the other spouse as sole proprietor. *See Matter of Ho*, 19 I&N Dec. at 591 (requiring a petitioner to resolve inconsistencies of record with independent, objective pointing to the truth). But, based on the most recent tax returns and the 2016 affidavit, a preponderance of evidence identifies the male spouse as the Petitioner's sole proprietor.

At the time of the NOIR's issuance in July 2016, the Petitioner had not established its ability to pay the proffered wage. Contrary to 8 C.F.R. § 204.5(g)(2), the record lacked copies of the business's annual reports, federal tax returns, or audited financial statements for 2004 or 2005. Also, the Petitioner had not provided an estimate of the living expenses of its sole proprietor and his two dependents. Thus, USCIS could not determine whether the sole proprietor had sufficient assets to pay the proffered wage. The Director therefore properly issued the NOIR based on insufficient evidence of the business's ability to pay.

The Petitioner's sole proprietor stated that the business began employing the Beneficiary in the offered position in November 2004. The Petitioner, however, did not provide evidence of payments to him that year. Thus, based solely on wages paid, the business has not demonstrated its ability to pay the proffered wage in 2004.

For 2005, the Petitioner submitted a copy of the Beneficiary's IRS Form W-2, Wage and Tax Statement, indicating that the business paid him \$24,933.33 that year. That amount does not equal or exceed the annual proffered wage of \$41,100. Thus, based solely on wages paid, the Petitioner also has not demonstrated its ability to pay in 2005.

Nevertheless, USCIS credits the Petitioner's 2005 payments to the Beneficiary. For that year, the business need only demonstrate its ability to pay the difference between the annual proffered wage of \$41,100 and the \$24,933.33 in wages paid to the Beneficiary, or \$16,166.67.

The federal income tax return of the Petitioner's sole proprietor for 2005 reflects adjusted gross income of \$55,012. The Petitioner estimated that its sole proprietor and his two dependents incurred living expenses of \$18,032 that year. Subtracting the living expenses from the gross income leaves \$36,980. That amount suffices to pay the \$16,166.67 difference between the annual proffered wage and the

wages paid to the Beneficiary.² The business therefore has demonstrated its ability to pay the proffered wage in 2005.

The Petitioner, however, has not submitted regulatory required evidence of its ability to pay in 2004, the year of the petition's priority date. Consistent with 8 C.F.R. § 204.5(g)(2), the Director's NOIR asked the business to submit copies of its annual reports, federal tax returns, or audited financial statements "to show that it has the ability to pay the proffered wage *as of the priority date*." (emphasis added). The Petitioner, however, did not submit the requested evidence or sufficiently explain its absence. See 8 C.F.R. § 103.2(b)(14) (allowing a petition's denial if the petitioner does not submit "requested evidence which precludes a material line of inquiry").

On appeal, the Petitioner argues that a "totality of circumstances" under *Sonegawa* demonstrate its ability to pay the proffered wage. Because the business omitted required evidence of its ability to pay in the year of the petition's priority date, however, a favorable analysis under *Sonegawa* alone would not establish its ability to pay. See 8 C.F.R. § 204.5(g)(2) (stating that annual evidence of ability to pay "*shall be* either in the form of copies of annual reports, federal tax returns, or audited financial statements") (emphasis added). We therefore need not consider the Petitioner's ability to pay under *Sonegawa*.

The Petitioner did not demonstrate its ability to pay the proffered wage from the petition's priority date. We will therefore affirm the revocation of the petition's approval.

III. THE REQUIRED EXPERIENCE

A skilled worker must be capable of performing "skilled labor (requiring at least 2 years training or experience)." Section 203(b)(3)(A)(i) of the Act. A petitioner must also 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).

When 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 unlisted 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 the original).

The accompanying labor certification states the minimum requirements of the offered position of wig maker as two years of experience in the "Job Offered." The labor certification indicates that the job requires neither training nor education. Additionally, the Petitioner indicated that it will not accept experience in a "Related Occupation."

On the labor certification application, the Beneficiary attested that, by the petition's priority date, he gained more than five years of full-time, qualifying experience in South Korea. He stated that a wig

² The Petitioner also submitted evidence that, in 2005, its sole proprietor had additional funds in bank and "money market" accounts.

manufacturer employed him as a “Wig Repair and Manufacture Technician” from March 1995 to August 2000.

To support claimed experience, a petitioner must submit a letter from a beneficiary’s former employer. 8 C.F.R. § 204.5(l)(3)(ii)(A). The letter must contain the employer’s name, title, and address, and describe the beneficiary’s experience. *Id.*

The initial filing included a 2003 “certificate” from the Beneficiary’s claimed former employer. But, at the time of the NOIR’s issuance, the record did not demonstrate the Beneficiary’s possession of the minimum experience required for the offered position or the requested immigrant visa classification. Contrary to 8 C.F.R. § 103.2(b)(3), the certificate’s translator did not certify the translation’s completeness or accuracy, or their competency to translate from the Korean to the English language. Also, in a 2003 application for a U.S. nonimmigrant visa, the Beneficiary included a list of his former employers from March 30, 1997 to January 30, 2003 that omitted the wig manufacturer where he purportedly gained his qualifying experience for the offered position from March 1995 to August 2000. Based on the defective translation and the discrepancy in the Beneficiary’s employment history, the Director properly issued the NOIR for insufficient evidence of the Beneficiary’s qualifying experience.

In its NOIR response, the Petitioner submitted an amended translation of the 2003 “certificate” and a 2016 letter from the Beneficiary’s claimed, former employer. The letter states the Beneficiary’s full-time employment as a wig maker from March 1, 1995 to March 20, 1997. But the letter states that, from March 21, 1997 to August 31, 2000, the Beneficiary worked on only a part-time basis for the business, “making & repairing wig[s]” after hours.

In a sworn declaration, the Beneficiary stated that he omitted his purported wig-making experience from his nonimmigrant visa application in 2003 because, unlike his employment with the wig manufacturer from March 21, 1997 to August 31, 2000, he worked for the other companies listed on the application on full-time bases. The Beneficiary also explained his attestation on the labor certification application of full-time employment by the wig manufacturer from March 1995 to August 2000. The Beneficiary stated: “I did not think to separate my experience with [the wig manufacturer] into separate full-time and part-time jobs, since the job titles were the same and were with the same employer.”

The Petitioner, however, did not submit requested independent corroborating evidence of the Beneficiary’s qualifying experience, such as copies of wage and tax statements. *See* 8 C.F.R. § 103.2(b)(14) (allowing USCIS to deny petitions if petitions omit “requested evidence that precludes a material line of inquiry”); *see also Matter of Ho*, 19 I&N Dec. at 591 (requiring petitioners to resolve inconsistencies with independent, objective evidence). On appeal, counsel notes that, at the time of the NOIR’s issuance, the Beneficiary had not worked for his claimed, former employer for more than 15 years. She asserts that “the Director’s requested verification documentation is no longer available.”

Counsel’s assertion, however, does not constitute evidence. *Matter of Obaigbena*, 19 I&N Dec. 533, 534 n.2 (BIA 1988) (citation omitted). Neither the Beneficiary nor his purported former employer stated that the requested documentation was unavailable or that they had tried to obtain it. The

Petitioner's omission of independent, corroborating evidence renders the Beneficiary's explanations of the discrepancies of record insufficient.

Also, as the Director found, the Petitioner has not sufficiently demonstrated the Beneficiary's required experience in the "Job Offered." On a labor certification application, experience "in the job offered" means experience performing the "major job duties of the job offered" as listed on the application. *Matter of Maple Derby, Inc.*, 1989-INA-185, slip op. at *3 (BALCA May 15, 1991) (*en banc*). The labor certification states the following major job duties of the offered position of wig maker: "Manufacture and repair wigs for clientele. Draw wig patter[n]s on model of customer's head. Lay out, sew, and fasten together material and hair strands to make/repair wigs." In its 2016 letter, the Beneficiary's claimed former employer states that, from March 1, 1995 to March 20, 1997, the Beneficiary "Worked as a Full Time Wig Maker in [the] Wig Department." The letter states that, from March 21, 1997 to August 31, 2000, he "Worked as a Part Time worker for making & repairing wig[s]."

On appeal, the Petitioner argues that the combination of the letter's job descriptions and the title of the Beneficiary's purported former position ("Wig Repair and Manufacture Technician") sufficiently establish his qualifying experience for the offered position. But the job descriptions and title do not demonstrate the Beneficiary's performance of all the major duties of the offered position. *See Matter of Maple Derby*, slip op. at *3. Specifically, the evidence does not establish that he drew wig patterns on customer's heads, or laid out, sewed, or fastened materials and hair strands together to make or repair wigs.

The record does not sufficiently explain inconsistencies in the Beneficiary's employment history or establish his required experience in the "Job Offered." Thus, the Petitioner has not demonstrated the Beneficiary's qualifying experience for the offered position or the requested immigrant visa classification. For this additional reason, we will affirm revocation of the petition's approval.

IV. AVAILABILITY OF THE JOB TO U.S. WORKERS

A labor certification employer must attest that the "job opportunity has been and is clearly open to any qualified U.S. worker." 20 C.F.R. § 656.20(c)(8) (2004).³ A family relationship between a noncitizen and a prospective employer's owner, director, or employee indicates that a job opportunity may not be *bona fide*. *Matter of Modular Container Sys., Inc.*, 1989-INA-228, slip op. at **8-9 (BALCA Jul. 16, 1991) (*en banc*).

The Petitioner concedes that, at the time of the filing of the labor certification application, the Beneficiary was the brother-in-law of the business's sole proprietor. As currently constituted, however, the record does not support revocation of the petition's approval for insufficient evidence of the job's availability to U.S. workers. We will therefore withdraw that portion of the Director's decision.

³ Current DOL labor certification regulations apply to applications filed on or after March 28, 2005. Final Rule, Labor Certification Process for the Permanent Employment of Noncitizens in the United States, 69 Fed. Reg. 77326, 77326 (Dec. 27, 2004). The Petitioner filed its labor certification application before that date. We therefore cite to the prior labor certification regulations.

V. WILLFUL MISREPRESENTATION OF MATERIAL FACTS

The Director also found that, on the labor certification application, the Petitioner concealed the family relationship between the Beneficiary and the business's sole proprietor, and that the Beneficiary misrepresented his qualifying experience. The record, however, also does not currently support these revocation grounds. We will therefore also withdraw this portion of the decision.

VI. INTENT TO EMPLOY AND VALIDITY OF THE LABOR CERTIFICATION

Although unaddressed by the NOIR, the record does not establish the Petitioner's continuing intent to employ the Beneficiary in the offered position or the continuing validity of the accompanying labor certification. 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).

Also, unless accompanied by an application for Schedule A designation or evidence of a beneficiary's qualifications for a labor shortage position, a petition for a skilled worker must include a valid, individual labor certification from DOL. 8 C.F.R. § 204.5(l)(3)(i). A labor certification remains valid only for the "particular job opportunity" and area of intended employment stated on it. 20 C.F.R. § 656.30(c)(2).

The Petitioner attested on the Form I-140 and accompanying labor certification to the business's intent to permanently employ the Beneficiary as a wig maker on a full-time basis. Public records, however, indicate that, after this appeal's filing, the Petitioner's sole proprietor died. *See "Obituaries," The Atlanta Constitution*, B4 (Apr. 4, 2017). The Petitioner and the sole proprietor were the same legal entity. *See Matter of United Inv. Grp.*, 19 I&N Dec. at 250. Thus, the Petitioner no longer appears able to employ the Beneficiary, and the particular job opportunity stated on the labor certification no longer appears to exist.

Thus, in any future filings in this matter, the filer must demonstrate the continuing validity of the job opportunity and the accompanying labor certification.

VII. CONCLUSION

The record does not currently support the Director's revocation of the petition's approval based on insufficient evidence of the availability of the offered position to U.S. workers or misrepresentations by the Petitioner and Beneficiary. The Petitioner, however, did not demonstrate its ability to pay the proffered wage or the Beneficiary's possession of the minimum experience for the offered position and the requested immigrant visa category.

ORDER: The appeal is dismissed.