U.S. Citizenship and Immigration Services

Non-Precedent Decision of the Administrative Appeals Office

In Re: 04244658

Date: AUG. 09, 2022

Appeal of Nebraska Service Center Decision

Form I-140, Immigrant Petition for a Skilled Worker

The Petitioner, a software development and consulting business, seeks to employ the Beneficiary as a programmer analyst. It requests classification of the Beneficiary under the third-preference, immigrant classification for skilled workers. 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 based on a job offer requiring at least two years of training or experience.

After the petition's initial grant, the Director of the Nebraska Service Center revoked the petition's approval. The Director's revocation was based on five grounds: 1) that a *bona fide* job offer at the claimed work location did not exist; 2) that the Petitioner misrepresented the Beneficiary's work experience; 3) that the record did not establish that the Beneficiary possessed the experience required for the offered position; 4) that the Petitioner did not establish its ability to pay the proffered wage to the Beneficiary; and, 5) that the Petitioner misrepresented the actual minimum requirements for the offered position. The Director also found that the Petitioner willfully misrepresented facts material to the petition and invalidated the labor certification.[1]

The matter is now before us on the Beneficiary's appeal.[2]

In these proceedings, it is the Petitioner's burden to establish eligibility for the requested benefit by a preponderance of the evidence. Section 291 of the Act, 8 U.S.C. § 1361; *Matter of Chawathe*, 25 I&N Dec. 369, 375 (AAO 2010). The Administrative Appeals Office (AAO) reviews the questions in this

[1] The Petitioner's president and sole shareholder was convicted in [redacted] 2018 of wire and visa fraud relating to his collection of illegal filing fees and related expenses from more than 100 fraudulent visas and employer-sponsored green cards for nonimmigrant workers. *See United States v.* [redacted]

[2] Beneficiaries generally cannot file appeals or motions in visa petition proceedings. *See* 8 C.F.R. § 103.3(a)(1)(iii)(B).

matter *de novo*. *See Matter of Christo's Inc.*, 26 I&N Dec. 537, 537 n.2 (AAO 2015). Upon *de novo* review, we will dismiss the appeal.

I. THE BENEFICIARY AS AN AFFECTED PARTY

Beneficiaries generally cannot file appeals or motions in visa petition proceedings. *See* 8 C.F.R. § 103.3(a)(1)(iii)(B) (excluding a beneficiary of a visa petition as an "affected party"). U.S. Citizenship and Immigration Services (USCIS), however, treats beneficiaries as affected parties if they are eligible to "port" under section 204(j) of the Act, 8 U.S.C. § 1154(j), and properly request to do so. *See Matter of V-S-G- Inc.*, Adopted Decision 2017-06, *14 (AAO Nov. 11, 2017). "A beneficiary's request to port is 'proper' when USCIS has evaluated the request and determined that the beneficiary is indeed eligible to port prior to the issuance of a NOIR [notice of intent to revoke] or NOR [notice of revocation]." USCIS Policy Memorandum PM 602-0152, *Guidance on Notice to, and Standing for, AC 21 Beneficiaries about I-140 Approvals Being Revoked After Matter of V-S-G- Inc.* 5 (Nov. 11, 2017), https://www.uscis.gov/legal-resources/policy-memoranda. Thus, a beneficiary becomes an "affected party" with legal standing in a revocation proceeding when USCIS makes a favorable determination that the beneficiary is eligible to port. *Id.*

In this case, the Beneficiary filed a Form I-485 Supplement J, Request for Job Portability Under INA Section 204(j), on June 12, 2018, which was later approved. The Director's NOIR is dated August 20, 2018 and was issued to the Petitioner and the Beneficiary. The Director issued the decision to both the Petitioner and the Beneficiary, which states, "The beneficiary was found to be eligible to receive notices and, therefore, was granted the opportunity to respond in revocation proceedings, ... in accordance with the findings in the adopted decision in *Matter of V-S-G-, Inc.* ..." Therefore, the Beneficiary is considered in affected party in these revocation proceedings.

II. EMPLOYMENT-BASED IMMIGRATION

Employment-based immigration 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) of the Act, 8 U.S.C. § 1182(a)(5). DOL approval signifies that insufficient U.S. workers are able, willing, qualified, and available for a position. *Id.* Labor certification also indicates that the 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 certified labor application 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 considers whether a beneficiary meets the requirements of a certified position and a requested immigrant visa classification. If USCIS approves the 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.

Pursuant to the statutory framework for the granting of immigrant status, any United States employer desiring and intending to employ an alien entitled to immigrant classification under the Act may file a petition for classification. Section 204(a)(1)(F) of the Act, 8 U.S.C. § 1154(a)(1)(F); *see* 8 C.F.R. § 204.5(c). Such petitions must be accompanied by a labor certification from the DOL. *See* section

212(a)(5) of the Act, 8 U.S.C. § 1182(a)(5); *see also* 8 C.F.R. § 204.5(l)(3)(i). The 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 denial where, contrary to an accompanying labor certification, a petitioner did not intend to employ a beneficiary under the terms of the labor certification); s*ee also Matter of Sunoco Energy Dev. Co.*, 17 I&N Dec. 283, 284 (Reg'l Comm'r 1979) (affirming a petition's denial under 20 C.F.R. § 656.30(c)(2) where the labor certification did not remain valid for the intended geographic area of employment). Because the filing of a labor certification establishes a priority date for any immigrant petition later based on the labor certification, the petitioner must establish that the job offer was realistic as of the priority date and that the offer remained realistic for each year thereafter, until the beneficiary obtains lawful permanent residence. *See Matter of Great Wall*, 16 I&N Dec. 142 (Acting Reg'l Comm'r 1977).

Further, the Act requires USCIS to determine eligibility for the visa classification requested. *See* section 204(a)(1)(F) of the Act, 8 U.S.C. § 1154(a)(1)(F). Certain classifications require a labor certification to establish eligibility. *See* section 203(b)(3)(C) of the Act, 8 U.S.C. § 1153(b)(3)(C); 8 C.F.R. § 204.5(a)(2); 8 C.F.R. § 204.5(l)(3)(i). Section 204(b) of the Act allows a petition's approval only after an investigation of the facts in each case to ensure that the facts stated in the petition, which necessarily includes the labor certification, are true. Section 204(b) of the Act, 8 U.S.C. § 1154(b). Thus, the labor certification is not conclusive evidence of eligibility. Instead, it is a pre-condition to being eligible to file a Form I-140. USCIS is responsible for reviewing the Form I-140, and the labor certification is incorporated into the Form I-140 by statute and regulation. *See* section 203(b)(3)(C) of the Act, 8 U.S.C. § 1153(b)(3)(C); 8 C.F.R. § 204.5(a)(2); 8 C.F.R. §103.2(b)(i). USCIS is required to approve an employment-based immigrant visa petition only where it is determined that the facts stated in the petition, which incorporates the labor certification, are true and the foreign worker is eligible for the benefit sought. Section 204(b) of the Act, 8 U.S.C. § 1154(b).

Section 205 of the Act, 8 U.S.C. § 1155, provides that the Secretary of Homeland Security may "for good and sufficient cause, revoke the approval of any petition." By regulation this revocation authority is delegated to any USCIS officer who is authorized to approve an immigrant visa petition "when the necessity for the revocation comes to the attention of [USCIS]." 8 C.F.R. § 205.2(a). USCIS must give the petitioner notice of its intent to revoke the prior approval of the petition and the opportunity to submit evidence in opposition thereto, before proceeding with written notice of revocation. *See* 8 C.F.R. § 205.2(b) and (c). A NOIR "is not properly issued unless there is 'good and sufficient cause' and the notice includes a specific statement not only of the facts underlying the proposed action, but also of the supporting evidence." *Matter of Estime*, 19 I&N Dec. 450, 451 (BIA 1987). Per *Matter of Estime*, "[i]n 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 based on the petitioner's failure to meet his or her burden of proof." *Id.*

III. ANALYSIS

The Petitioner requests classification of the Beneficiary as a skilled worker.[3] The regulation at 8 C.F.R. § 204.5(l)(3)(ii)(B) states that to qualify for skilled worker classification:

> ... the petition must be accompanied by evidence that the [beneficiary] meets the educational, training or experience, and any other requirements of the individual labor certification ... The minimum requirements for this classification are at least two years of training or experience.

The regulation at 8 C.F.R. § 204.5(l)(3) further provides:

> (ii) *Other documentation*—
>
> (A) *General.* Any requirements of training or experience for skilled workers, professionals, or other workers must be supported by letters from trainers or employers giving the name, address, and title of the trainer or employer, and a description of the training received or the experience of the alien.

To be eligible for skilled worker classification, therefore, the Beneficiary must meet all specific requirements of the labor certification and have at least two years of relevant experience (or training). All requirements must be met by the petition's priority date, which in this case is December 11, 2006. *See Matter of Wing's Tea House*, 16 I&N Dec. 158, 159 (Acting Reg'l Comm'r 1977).

Additionally, a business may file a petition if it is "desiring and intending to employ [a foreign national] 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 specified in an accompanying labor certification. *Matter of Izdeska*, 12 I&N Dec. 54, 55 (Reg'l Comm'r 1966) (affirming a petition's denial where, contrary to the terms of the accompanying labor certification, the petitioner did not intend to employ the beneficiary as a domestic worker on a full-time, live-in basis). A petitioner must establish this intent to employ a beneficiary in a *bona fide* position at the time of filing. *See Matter of Katigbak*, 14 I&N Dec. 45, 49 (Comm'r 1971). For labor certification purposes, the job offer must be for permanent, full-time work. *See* 20 C.F.R. § 656.3; *see also* 20 C.F.R. § 656.10(c)(10).

The labor certification and the petition indicate that the Petitioner is located in [redacted] Pennsylvania. The Petitioner attested on the petition and the labor certification that it intends to employ the Beneficiary in the permanent, full-time position of programmer analyst at its primary location in [redacted] Pennsylvania. The labor certification does not indicate that the job requires travel to any other worksites, or list any other work locations.

[3] On the petition, in Part 2, Petition Type, the Petitioner checked box "e," requesting classification of the Beneficiary as "a professional (at a minimum, possessing a bachelor's degree or a foreign degree equivalent to a U.S. bachelor's degree) or a skilled worker (requiring at least two years of specialized training or experience). USCIS revised the Form I-140 as of January 6, 2010, and separated the professional (now box "e") and skilled worker (now box "f") categories, and a petitioner now must select one category or the other for consideration. Previously, and at the time of filing the instant petition, the two categories were combined into one box (box "e").

In this case section H of the labor certification (Job Opportunity Information) specifies the requirements for the job of programmer analyst as no education or training, and 24 months of experience in the job offered. Experience is an alternate occupation is not accepted.

Section K of the labor certification lists the following employment experience for the Beneficiary:

- The Petitioner, in the offered position, from June 27, 2005 to at least the date of filing on December 11, 2006;[4]
- [redacted] as a programmer analyst, from October 1, 2003 to June 26, 2005;
- [redacted] as a programmer analyst, from July 14, 2002 to September 30, 2003 and;
- [redacted] as a programmer, from April 1, 2000 to September 1, 2001.

With the petition, in support of the Beneficiary's experience, the Petitioner submitted a letter signed by its president listing the Beneficiary's previous employment with it and the above employers. However, the Petitioner did not submit documentation to corroborate the Beneficiary's claimed employment history or qualifying experience, such as letters from the Beneficiary's previous employers, as required by the regulation at 8 C.F.R. § 204.5(l)(3).

In the NOIR, the Director noted that one 2011 USCIS site visit to the Petitioner's address in Pennsylvania found no employees working on the premises at that time and no evidence that the physical size of the location could accommodate the Petitioner's claimed 160 employees at that time.[5] This cast doubt on the Petitioner's claim on the petition and labor certification that the Beneficiary's primary work location was at its Pennsylvania address.

The Director also noted that the record did not include evidence required by 8 C.F.R. § 204.5(l)(3) to document the Beneficiary's qualifying experience. He further noted inconsistencies in the Beneficiary's claimed employment history on the labor certification with other evidence in the record. This evidence included a Form G-325A, Biographic Information, signed by the Beneficiary in August 2007, and statements the Beneficiary made during an interview for his Form I-485, Application to Register Permanent Residence or Adjust Status.

The Director also informed the Petitioner that the record did not establish its ability to pay the proffered wage, as it submitted only its 2005 federal income tax return with the petition, which was before the 2006 priority date.

---

[4] A labor certification employer cannot rely on experience that a foreign national gained with it, unless the experience was in a job substantially different than the offered position or the employer demonstrates the impracticality of training a U.S. worker for the offered position. 20 C.F.R. § 656.17(i)(3).

[5] Other site visits reflect that a small number of employees were onsite, and that the physical premises would support some of the Petitioner's workforce, but not the total number of claimed employees. The Petitioner's President explained during one visit that some employees worked at end client locations.

Further, the Director noted that the Beneficiary's approved H-1B nonimmigrant status, in the specialty occupation[6] of programmer analyst, cast doubt on the actual minimum requirements for the offered position described on the labor certification, requiring no education or training and 24 months of experience. *See* section 101(a)(15)(H)(i)(b), 8 U.S.C. § 1101(a)(15)(H)(i)(b) of the Act.

In response to the NOIR, the Beneficiary asserted that he was a victim of the Petitioner's fraud. He asserted that he believed his primary work location for the offered employment to be the Petitioner's Pennsylvania address. He further asserted that the inconsistencies in his employment history were a result of typographical errors and mistaken recollection of dates during his adjustment interview. He submitted pay records, including pay stubs and Internal Revenue Service (IRS) Forms W-2, Wage and Tax Statements, to demonstrate that the Petitioner paid him partial wages from 2006 to 2009, and above the proffered wage from 2010 to 2013.

A. The Claimed Work Location

As noted, the Petitioner must intend to employ the Beneficiary in the offered position on a permanent, full-time basis. A labor certification also remains valid only for the geographic area of intended employment stated on it. 20 C.F.R. § 656.30(c)(2); *see also Matter of Sunoco Energy Dev. Co.,* 17 I&N Dec. 283, 284 (Reg'l Comm'r 1979) (affirming denial where a petitioner intended to employ a beneficiary in a different U.S. state than listed in the worksite address on the accompanying labor certification).

While we agree that the Beneficiary's employment with the Petitioner in other locations, and the 2011 USCIS site visit verifying the small size of the office cast doubt on the Petitioner's ability to employ the Beneficiary in the geographic location listed on the labor certification, we acknowledge that a petition represents an offer of *future* employment. A petitioner need not employ a beneficiary in an offered position until he or she obtains lawful permanent resident status. Indeed, a beneficiary of a petition can remain outside the United States until granted an immigrant visa. *See* section 221(a) of the Act, 8 U.S.C. § 1201(a) (authorizing consular officers to issue immigrant visas). The Beneficiary's employment with the Petitioner at other locations prior to obtaining lawful permanent resident status, therefore, was insufficient evidence to conclude that the Petitioner did not intend to later employ him in the offered position at its Pennsylvania address. Additionally, site visits conducted showed that there was space to employ some of the Petitioner's workforce at that location. Therefore, we will withdraw this portion of the Director's decision.

B. Willful Misrepresentation of a Material Fact

To find a willful and material misrepresentation of fact an immigration officer must determine that (1) the petitioner or beneficiary made a false representation to an authorized official of the U.S. government, (2) the misrepresentation was willfully made, and (3) the fact misrepresented was material. *See Matter of M-*, 6 I&N Dec. 149 (BIA 1954); *Matter of Kai Hing Hui*, 15 I&N Dec. 288, 289 (BIA 1975). The term "willfully" means knowing and intentionally, as distinguished from accidentally, inadvertently, or in an honest belief that the facts are otherwise. *See Matter of Healy and*

[6] The H-1B program allows a U.S. employer to temporarily employ a qualified foreign worker in a position that requires both: (a) the theoretical and practical application of a body of highly specialized knowledge; and (b) the attainment of a bachelor's or higher degree in the specific specialty (or its equivalent) as a minimum prerequisite for entry into the position.

Goodchild, 17 I&N Dec. 22, 28 (BIA 1979). A "material" misrepresentation is one that "tends to shut off a line of inquiry relevant to the alien's eligibility." *Matter of Ng*, 17 I&N Dec. 536, 537 (BIA 1980).

Accordingly, for an immigration officer to find a willful and material misrepresentation in visa petition proceedings, they must determine: 1) that the petitioner or beneficiary made a false representation to an authorized official of the United States government; 2) that the misrepresentation was willfully made; and 3) that the fact misrepresented was material. *See Matter of M-*, 6 I&N Dec. 149 (BIA 1954); *Matter of L-L-*, 9 I&N Dec. 324 (BIA 1961); *Matter of Kai Hing Hui*, 15 I&N Dec. at 288.

As noted above, the Director found that the Petitioner misrepresented material facts on the labor certification. Specifically, that it misrepresented the Beneficiary's work experience and the actual minimum requirements for the offered position, facts material to the petition. Here, the response provided to the NOIR offered a plausible explanation of the inconsistencies.

The Beneficiary's assertions on appeal are persuasive. The Petitioner must prove eligibility by a preponderance of evidence, such that the applicant's claim is "probably true" based on the factual circumstances of each individual case. *Matter of Chawathe*; *Matter of E-M-*. We find that the burden has been met with respect to the *bona fides* of the job offer, its representations of the Beneficiary's employment history attested on the labor certification, and the position's minimum requirements. Accordingly, we will withdraw the Director's decision with respect to the alleged misrepresentations of facts and the invalidation of the labor certification.[7]

C. The Beneficiary's Qualifications

As noted above, the regulation at 8 C.F.R. § 204.5(l)(3) states, "Any requirements of training or experience for skilled workers, professionals, or other workers must be supported by letters from trainers or employers giving the name, address, and title of the trainer or employer, and a description of the training received or the experience of the alien."

Here, the record at the time of the petition's approval did not include regulatory prescribed evidence that the Beneficiary possessed the required 24 months of experience as of the priority date. In response to the NOIR, the Beneficiary provided a letter dated August 28, 2006, from [redacted] stating that he was "contracted through [redacted] to provide technical services." However, the letter does not state the position's job title, describe its duties, or state the dates of his employment. Further, the Beneficiary's claimed employment history does not include [redacted] or [redacted] as a prior employer.[8]

[7] We recognize that that the Director raised significant if somewhat speculative concerns. While not sufficiently developed for purposes of this visa petition, the Director is not barred from further inquiry, investigation, or the development of questions for consular processing or adjustment of status proceedings. *See Matter of O*, 8 I&N Dec. 295 (BIA 1959) (stating that the immigrant visa petition is not the appropriate stage of the process for questions regarding admissibility). We additionally note that the allegations of misrepresentation were only found against the Petitioner.

[8] We note that the Beneficiary claims to have been employed with the Petitioner in August 2006. As noted above, 20 C.F.R. § 656.17(i)(3) prohibits a labor certification employer from relying on experience that a foreign national gained with it, unless the experience was in a job substantially different than the offered position or the employer demonstrates the impracticality of training a U.S. worker for the offered position.

On appeal, the Beneficiary submits four letters for the first time (described in the appeal brief as "new"), asserting to verify his prior employment with the Petitioner and three prior employers. However, in the NOIR the Beneficiary was put on notice of a deficiency in the evidence related to his prior experience and was given an opportunity to respond to that deficiency. The Beneficiary does not claim that this evidence was previously unavailable or explain why it was not submitted with the NOIR response. Therefore, we will not accept evidence offered for the first time on appeal. *Matter of Soriano*, 19 I&N Dec. 764 (BIA 1988); *Matter of Obaigbena*, 19 I&N Dec. 533 (BIA 1988).

On appeal the Beneficiary also requests that we use discretion in not revoking the approval of the petition. The Beneficiary states that he was a victim of the Petitioner's fraud scheme, losing thousands of dollars in income and causing significant delays and additional costs in his immigration process. While we are sympathetic to the Beneficiary's financial losses and personal situation, we find that the NOIR was issued for good and sufficient cause. The evidence of record at the time the notice was issued, would have warranted a denial based on the Petitioner's failure to demonstrate the Beneficiary's qualifications for the offered position. It is the Petitioner's burden to establish eligibility for the requested benefit by a preponderance of the evidence. Section 291 of the Act, 8 U.S.C. § 1361; *Matter of Chawathe*, 25 I&N Dec. 369, 375 (AAO 2010). Here, the evidence does not demonstrate eligibility.

Accordingly, the record does not establish that the Beneficiary met the minimum requirements for the offered position as of the priority date and we will dismiss the appeal on this basis.

D. Ability to Pay

To be eligible for the classification it requests for the beneficiary, a petitioner must establish that it has the ability to pay the proffered wage stated in the labor certification. As provided in the regulation at 8 C.F.R. § 204.5(g)(2):

> The petitioner must demonstrate this ability at the time the priority date is established and continuing until the beneficiary obtains lawful permanent residence. Evidence of this ability shall be either in the form of copies of annual reports, federal tax returns, or audited financial statements. In a case where the prospective United States employer employs 100 or more workers, the director may accept a statement from a financial officer of the organization which establishes the prospective employer's ability to pay the proffered wage. In appropriate cases, additional evidence, such as profit/loss statements, bank account records, or personnel records, may be submitted by the petitioner or requested by [USCIS].

As indicated in the above regulation, the Petitioner must establish its continuing ability to pay the proffered wage from the priority date of the petition onward. The priority date in this case is December 11, 2006. The labor certification states that the wage offered for the job of programmer analyst is $56,181 per year.

In determining a petitioner's ability to pay the proffered wage, USCIS first examines whether the beneficiary was employed and paid by the petitioner during the period following the priority date. A

petitioner's submission of documentary evidence that it employed the beneficiary at a salary equal to or greater than the proffered wage for the time period in question, when accompanied by a form of evidence required in the regulation at 8 C.F.R. § 204.5(g)(2), may be considered proof of the petitioner's ability to pay the proffered wage.

Absent evidence that the Petitioner has paid the Beneficiary a salary equal to or above the proffered wage from the priority date onward, USCIS will generally examine the net income and net current assets figures recorded on the petitioner's federal income tax return(s), annual report(s), or audited financial statements(s). If either of these figures, net income or net current assets, equals or exceeds the proffered wage, or the difference between the proffered wage and the amount paid to the beneficiary in a given year, the petitioner would ordinarily be considered able to pay the proffered wage during that year.

When a petitioner has filed other I-140 petitions, however, it must establish that its job offer is realistic not only for the instant beneficiary, but also for the beneficiaries of its other I-140 petitions (I-140 beneficiaries). A petitioner's ability to pay the proffered wage is an essential element in evaluating whether a job offer is realistic. *See Matter of Great Wall*, 16 I&N Dec. 142 (Acting Reg'l Comm'r 1977). Accordingly, a petitioner must demonstrate its ability to pay the combined proffered wages of the instant beneficiary and every other I-140 beneficiary from the priority date of the instant petition until the other I-140 beneficiaries obtain lawful permanent resident status. *See Patel v. Johnson*, 2 F.Supp. 3d 108, 124 (D.Mass. 2014) (upholding our denial of a petition where a petitioner did not demonstrate its ability to pay multiple beneficiaries).[9]

With the initial filing of the petition, the Petitioner submitted a portion of its 2005 IRS Form 1120S, U.S. Income Tax Return for an S Corporation, and the Form W-2 it issued to the Beneficiary in 2006 reflecting partial wages in that year.

In issuing the NOIR, the Director determined that the record did not include regulatory prescribed evidence of the Petitioner's ability to pay the proffered wage for 2006, the year of the priority date.

In response to the NOIR, the Beneficiary submitted additional Forms W-2 reflecting that the Petitioner appears to have paid him partial wages from 2006 to 2009, and appears to have paid him above the proffered wage from 2010 to 2013. However, as the Director noted, the federal employer identification number (FEIN) listed on the 2013 W-2 is different than the Petitioner's FEIN listed on the other Forms W-2 and claimed on the petition and labor certification.

In his brief on appeal, counsel for the Beneficiary asserts that he was paid more than the amounts claimed on the Forms W-2, in payment for a per diem allowance for his travels, in some instances totaling 25-40% of his income. The Beneficiary submitted one paycheck, dated May 31, 2007, reflecting per diem in the amount of $1,600. Generally, per diem paid to a beneficiary is not considered as

[9] The Petitioner's ability to pay the proffered wage of one of the other I-140 beneficiaries is not considered:

- After the other beneficiary obtains lawful permanent residence;
- If an I-140 petition filed on behalf of the other beneficiary has been withdrawn, revoked, or denied without a pending appeal or motion; or
- Before the priority date of the I-140 petition filed on behalf of the other beneficiary.

wages.[10] No other paychecks in the record reflect any per diem payments to the Beneficiary. However, even if we considered per diem amounts, the Beneficiary did not submit evidence to support this claimed additional amount as 25-40% of his income. Assertions of counsel do not constitute evidence. *Matter of Obaigbena*, 19 I&N Dec. 533, 534 n.2 (BIA 1988) (citing *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980)). Counsel's statements must be substantiated in the record with independent evidence, which may include affidavits and declarations. Nor does the Beneficiary provide any explanation for the different FEIN on the 2013 Form W-2. This inconsistency in the record must be resolved with independent, objective evidence pointing to where the truth lies. *Matter of Ho*, 19 I&N Dec. 582, 591-92 (BIA 1988).

Therefore, the record does not demonstrate that the Petitioner had the continuing ability to pay the proffered wage to this Beneficiary, and to the beneficiaries of all of its petitions, as of the priority date. The appeal will also be dismissed on this basis.

E. Actual Minimum Requirements

As noted above, the Director found that the Beneficiary's approved H-1B nonimmigrant status as a programmer analyst requiring a bachelor's or higher degree, conflicted with the minimum requirements for the position as described on the labor certification, requiring no education or training and 24 months of experience.

The Petitioner must set forth on the labor certification its actual minimum requirements for the proffered position. *See* 20 C.F.R. § 656.17(i). However, we again acknowledge that a petition represents an offer of *future* employment and that a petitioner need not employ a beneficiary in an offered position until he or she obtains lawful permanent resident status. In this instance, the Beneficiary's employment with the Petitioner in H-1B nonimmigrant status was insufficient evidence to conclude that the labor certification did not set forth the actual minimum requirements.[11] Therefore, we will also withdraw this portion of the Director's decision.

III. CONCLUSION

Portions of the Director's decision are withdrawn, including that the job offer was not *bona fide*, that the Petitioner willfully misrepresented material facts, and that the labor certification did not reflect the actual minimum requirements of the offered position. However, the record does not establish that the Beneficiary meets the minimum experience requirements as set forth on the accompanying labor certification, or that the Petitioner had the ability to the Beneficiary the proffered wage. Therefore, the petition's approval remains revoked.

---

[10] *See* https://www.irs.gov > pub > perdiemfaq&a.prn.pdf.

[11] Again, we recognize that that the Director raised significant if somewhat speculative concerns. While not sufficiently developed for purposes of this visa petition, the Director is not barred from further inquiry, investigation, or the development of questions for consular processing or adjustment of status proceedings.

It is the Petitioner's burden to establish eligibility for the immigration benefit sought. Section 291 of the Act, 8 U.S.C. § 1361; *Matter of Skirball Cultural Ctr.*, 25 I&N Dec. 799, 806 (AAO 2012). The Petitioner has not met that burden.

ORDER: The appeal is dismissed.