



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

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

In Re: 19310127

Date: AUG. 25, 2022

Appeal of Texas Service Center Decision

Form I-140, Immigrant Petition for Skilled Worker

The Petitioner, a restaurant, seeks to employ the Beneficiary as a chef. 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)(i), 8 U.S.C. § 1153(b)(3)(A)(i). This employment-based, “EB-3” category allows a U.S. employer to sponsor a worker for lawful permanent resident status who is capable of performing skilled labor that requires at least two years education, training, or experience.

After initially approving the Form I-140, Immigrant Petition for Skilled Worker, the Texas Service Center Director revoked the petition’s approval. The Director concluded the Petitioner did not demonstrate the *bona fides* of the job opportunity.

In these proceedings, it is the filing party’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). We review the questions in this 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 withdraw the Director’s decision and remand the matter for entry of a new decision.

## **I. EMPLOYMENT-BASED IMMIGRATION**

Immigration as a skilled worker usually follows a three-step process. First, to permanently fill a position in the United States with a foreign worker, a prospective employer must obtain certification from the U.S. Department of Labor. See section 212(a)(5) of the Act, 8 U.S.C. § 1182(a)(5). If the Department of Labor 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). Section 204 of the Act, 8 U.S.C. § 1154. If USCIS grants a petition, a designated noncitizen may finally apply abroad for an immigrant visa or, if eligible, for 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. BONA FIDE JOB OPPORTUNITY

The issue before us on appeal is whether the Director properly revoked the approval of the petition based on a determination that the Petitioner did not demonstrate that it had a *bona fide* job opportunity.

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). In circumstances where the beneficiary may have influence and control over the job opportunity, the labor certification employer “must be able to demonstrate the existence of a bona fide job opportunity, *i.e.*, the job is available to all U.S. workers, ...” See 20 C.F.R. § 656.17(l). Factors considered include whether a beneficiary is in a position to control or influence hiring decisions for the offered position; has family relationships with the Petitioner's directors, officers, or employees; incorporated or founded the company; has an ownership interest in it; participates in its management; serves on its board of directors; or is one of a small number of employees. *Id.*

The Director initially approved the petition but issued a NOIR after further review revealed a pre-existing but non-familial relationship between the Petitioner and the Beneficiary. The Director concluded that due to the pre-existing relationship “it is not reasonable to conclude that this job offer was available to any U.S. worker; but instead only available to the beneficiary.”

In its response to the NOIR, the Petitioner provided all evidence requested to establish that it had made a *bona fide* job offer, including evidence of its recruitment efforts. This evidence included a declaration from the Petitioner's owner asserting that he is the individual responsible for interviewing and hiring applicants for the job opportunity listed in the labor certification and that he has no familial relationship with the Beneficiary. The Beneficiary also submitted a declaration asserting that he is not a manager, member, shareholder or officer of the petitioning company, has no familial relationship with its officers, shareholders or employees, and has no influence or control over its hiring decisions.

After receiving the Petitioner's response to the NOIR, the Director revoked the approval of the petition. The Director emphasized that the fact that the Petitioner advertised the job offer and engaged in the recruitment process is not sufficient to establish a *bona fide* job offer. He acknowledged that there is no known familial relationship between the Beneficiary and the Petitioner's owners, but emphasized that the lack of such a relationship is immaterial. The Director further acknowledged the Beneficiary's statement that he has no influence over the Petitioner's hiring decisions but noted that based on the small size of the petitioning company and the relationship between the Petitioner and Beneficiary, “it is not reasonable to conclude that the job opportunity was ever available to any qualified U.S. worker.”

On appeal the Petitioner states that, despite its good faith recruitment efforts, it was not able to find any qualified U.S. workers for the proffered position. The Petitioner also outlines the factors to be

examined to establish the existence of a *bona fide* job offer, as set forth in *Matter of Modular Container Sys., Inc.*, 1989-INA-228, slip op. at \*\*8-9 (BALCA Jul. 16, 1991) (*en banc*). The Petitioner asserts that the Director did not sufficiently address and weigh these factors in his decision, despite acknowledging the totality of the circumstances test set forth in *Modular Container*.

We conclude that the record as currently constituted 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 the Director's decision.

### III. ABILITY TO PAY

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.*

The record contains the Petitioner's federal tax returns for the years 2014 through 2018 but does not contain any of the regulatory-prescribed evidence of its ability to pay the proffered wage of \$46,904 per year for the years 2019 and onward. Without this evidence, we cannot affirmatively find that the Petitioner has the continuing ability to pay the proffered wage from the priority date.

Therefore, we will remand this matter. On remand, the Director should analyze the record and determine whether the Petitioner has established its ability to pay the proffered wage from the priority date onward. The Director should request such regulatory-required evidence in a new NOIR and allow the Petitioner reasonable time to respond.

### IV. CONCLUSION

For the reasons discussed, we are withdrawing the Director's decision. We will remand this case to the Director for further consideration of the Petitioner's ability to pay the proffered wage from the priority date onward.

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