



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

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

In Re: 1740254

Date: FEB. 15, 2022

Appeal of Nebraska Service Center Decision

Form I-140, Immigrant Petition for Skilled Worker

The Petitioner, a provider of messenger and delivery services, seeks to employ the Beneficiary as a logistician. The company seeks his classification under the third-preference, immigrant visa category for skilled workers. Immigration and Nationality Act (the Act) section 203(b)(3)(A)(i), 8 U.S.C. § 1153(b)(3)(A)(i).

After the filing's initial grant, the Acting Director of the Nebraska Service Center revoked the petition's approval. The Acting Director concluded that the Petitioner did not demonstrate its required ability to pay the proffered wage of the offered position. The Acting Director also found that, on the accompanying certification from the U.S. Department of Labor (DOL), the Petitioner misrepresented the availability of the job opportunity to U.S. workers.

In petition 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. To permanently fill a position in the United States with a foreign worker, a prospective employer must first obtain DOL certification that: 1) insufficient U.S. workers are able, willing, qualified, and available for the position; and 2) employment of a noncitizen will 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).

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, 8 U.S.C. § 1154. Among other things, USCIS considers whether a beneficiary meets the requirements of a DOL-certified position and a requested immigrant visa category.

Finally, if USCIS approves a petition, a noncitizen 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.

At any time before a beneficiary obtains lawful permanent resident status, 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 may justify 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 unrebutted record at the time of the NOIR's issuance would have warranted the petition's denial. *Matter of Esteime*, 19 I&N Dec. 450, 451 (BIA 1987). USCIS properly revokes a petition's approval if a NOIR response does not rebut or resolve the alleged revocation grounds. *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). This petition's priority date is July 21, 2015, 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). Evidence of ability to pay must generally include copies of annual reports, federal income tax returns, or audited financial statements. *Id.*¹

In determining ability to pay, USCIS examines whether a petitioner paid a beneficiary the full proffered wage each year, beginning with the year of a petition's priority date. If a petitioner did not pay a beneficiary or did not annually pay the beneficiary the full proffered wage, USCIS considers whether the business generated annual amounts of net income or net current assets sufficient to pay any differences between the annual proffered wage and 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 Sonagawa*, 12 I&N Dec. 612, 614-15 (Reg'l Comm'r 1967).²

The accompanying labor certification states the proffered wage of the offered position of logistician as \$53,768 a year. USCIS approved the petition in May 2016. Therefore, to overcome revocation of the petition's approval on this ground, the Petitioner must demonstrate its ability to pay the proffered wage in 2015, the year of the petition's priority date, and 2016, the year of the filing's approval.

On the labor certification, the Beneficiary did not attest that he has worked for the Petitioner. Also, the company did not submit evidence that it ever paid him wages. Thus, based solely on wages paid, the record does not establish the Petitioner's ability to pay the proffered wage in 2015 or 2016.

The petition included copies of the Petitioner's federal income tax returns for 2013 and 2014. Contrary to 8 C.F.R. § 204.5(g)(2), however, the company did not submit required evidence of its ability to pay the proffered wage in 2015 or 2016. The Acting Director therefore properly issued the NOIR. Without copies of annual reports, federal tax returns, or audited financial statements for 2015 and 2016, the record would have warranted the petition's denial. *See* 8 C.F.R. § 204.5(g)(2) (stating that evidence

¹ If a petitioner employs at least 100 people, USCIS may accept a statement from a financial officer of the business establishing its ability to pay a proffered wage. 8 C.F.R. § 204.5(g)(2).

² Federal courts have upheld USCIS' method of determining ability to pay a proffered wage. *See, e.g., River St. Donuts, LLC v. Napolitano*, 558 F.3d 111, 118 (1st Cir. 2009).

of ability to pay “*shall be* either in the forms of copies of annual reports, federal tax returns, or audited financial statements”) (emphasis added).

The Petitioner’s NOIR response included a copy of its federal income tax return for 2016. But neither the company’s NOIR response nor its evidence on appeal contains regulatory required evidence of its ability to pay in 2015. Thus, contrary to 8 C.F.R. § 204.5(g)(2), the record does not establish the Petitioner’s ability to pay the proffered wage from the petition’s priority date.

Also, the Petitioner’s federal income tax return for 2016 does not demonstrate the company’s ability to pay the proffered wage that year. The tax return reflects net income of \$48,992 and net current assets of \$39,506. These amounts neither equal nor exceed the annual proffered wage of \$53,768. As previously indicated, the company also did not submit any evidence that it paid wages to the Beneficiary in 2016. Thus, based on examinations of the Petitioner’s payments to the Beneficiary, its net income, and its net current assets, the record does not establish its ability to pay the proffered wage in 2015 or 2016.

As previously indicated, when determining a petitioner’s ability to pay, we may consider factors other than wages paid, net income, and net current assets. *See Matter of Sonogawa*, 12 I&N Dec. at 614-15. But the absence of regulatory required evidence of the Petitioner’s ability to pay in 2015, the year of the petition’s priority date, renders a determination under *Sonogawa* moot. Even if *Sonogawa* factors indicated the company’s ability to pay in the relevant years, its omission of required evidence for 2015 would preclude a favorable determination. *See* 8 C.F.R. § 204.5(g)(2) (stating that evidence of ability to pay “*shall be* in the forms of copies of annual reports, federal tax returns, or audited financial statements”) (emphasis added).

Although unaddressed by the Acting Director, USCIS records also show that, after the petition’s priority date, the Petitioner filed a Form I-140 petition for another beneficiary.³ A petitioner must demonstrate its ability to pay the proffered wage of each petition it files from the petition’s priority date 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 and its other petition from this petition’s priority date until its approval. *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).⁴

For the forgoing reasons, the record on appeal does not demonstrate the Petitioner’s ability to pay the proffered wage of the offered position, from the petition’s priority date until its approval. We will therefore affirm the revocation of the petition’s approval.

The Director also found that the accompanying labor certification misrepresented the availability of the job opportunity to U.S. workers. *See* 20 C.F.R. § 656.10(c)(8) (requiring a labor certification employer to certify that “[t]he job opportunity has been and is clearly open to any U.S. worker”). We will withdraw this revocation ground.

³ USCIS records identify the Petitioner’s other petition by the receipt number

⁴ In any future filings in this matter, the Petitioner must provide the proffered wage and priority date of its other petition. The company may also submit additional evidence of its ability to pay the combined proffered wages of the petitions, including documentation of any wages it paid the other beneficiary in 2015 or 2016.

III. CONCLUSION

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

ORDER: The appeal is dismissed.