



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

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

In Re: 11271272

Date: JUL. 13, 2022

Appeal of Texas Service Center Decision

Form I-140, Immigrant Petition for Skilled Worker

The Petitioner seeks to employ the Beneficiary as a chef, Chinese food. It requests classification of the Beneficiary under the third-preference, immigrant category as a skilled worker. Immigration and Nationality Act (the Act) section 203(b)(3)(A)(i), 8 U.S.C. § 1153(b)(3)(A)(i). This employment-based 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 Texas Service Center revoked the petition's approval. The Director concluded that, because the Petitioner and the Beneficiary had a personal relationship, the Petitioner's job offer was not a *bona fide* because it did not desire and intend to hire the Beneficiary in the offered position. The Director also made a finding of fraud or willful misrepresentation of a material fact and invalidated the labor certification.

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 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 sustain the appeal.

## **I. 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.

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 notice of intent to revoke (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 Esteime*, 19 I&N Dec. 450, 451 (BIA 1987). Per *Matter of Esteime*, “[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 un rebutted, would have warranted a denial based on the petitioner’s failure to meet his or her burden of proof.” *Id.*

## II. ANALYSIS

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); *see 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).

In this case, the accompanying labor certification was filed on March 31, 2014. The Petitioner checked “no” to question C.9 on the labor certification, “Is the employer a closely held corporation, partnership, or sole proprietorship in which the alien has an ownership interest, or is there a familial relationship between the owners, stockholders, corporate officers, incorporators, or partners, and the alien?”

The Director found that the Petitioner did not disclose a prior non-familial relationship to the DOL, and that the relationship calls into question whether the Petitioner’s job offer was *bonafide*. However, the Petitioner notes that the labor certification was audited by the DOL and includes a copy of the audit notice.<sup>1</sup> The DOL reviewed the Petitioner’s response to the audit notification and certified the labor certification.

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 Petitioner has met that burden with respect to the nature of the existing relationship between the Petitioner and the Beneficiary and its disclosure, if required, to the DOL in the labor certification process. Accordingly, we will withdraw the Director’s decision and the finding of willful misrepresentation.

Upon review of the entire record, including evidence submitted on appeal, we conclude that the Petitioner has established by a preponderance of the evidence that the job offer to the Beneficiary was *bona fide* and the Beneficiary is eligible for the benefit sought. Accordingly, the appeal is sustained, and the petition’s approval is reinstated under section 203(b)(3)(A)(i) of the Act, 8 U.S.C. § 1153(b)(3)(A)(i).

**ORDER:** The appeal is sustained.

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<sup>1</sup> The DOL’s audit notification included four specific audit requests for the Petitioner: 1) provide the resumes and applications for all U.S. workers who applied for the job opportunity, with a report that lists information for each rejected U.S. worker; 2) provide declarations from the employer and the foreign worker stating whether the employer received payments of any kind by the foreign worker or a third party for any activity related to obtaining permanent labor certification; 3) provide business necessity for all levels of education, experience, training, skills and qualifications for the job opportunity, and; 4) provide documentation explaining why U.S. applicants deemed not qualified for the job opportunity could not have attained the necessary skills to perform the duties during a reasonable period of on-the-job training.