



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

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

In Re: 5355380

Date: MAY 27, 2022

Appeal of Nebraska Service Center Decision

Form I-140, Immigrant Petition for Other Worker

The Beneficiary sought to obtain lawful permanent resident status based on a job offer as a poultry boner. A petition in the name of a U.S. poultry processing company requested his classification under the third-preference, immigrant visa category for “other workers.” *See* Immigration and Nationality Act (the Act) section 203(b)(3)(A)(iii), 8 U.S.C. § 1153(b)(3)(A)(iii).

After the filing’s initial grant, the Director of the Nebraska Service Center revoked the petition’s approval. The Director concluded that the accompanying certification from the U.S. Department of Labor (DOL) misrepresented the poultry company’s intent to employ a noncitizen in the offered position and to pay him at least the prevailing wage for the occupation. The Director also found insufficient evidence of the company’s required ability to pay the position’s proffered wage.

As an appellant in revocation proceedings, the Beneficiary bears the burden of establishing eligibility for the requested benefit by a preponderance of evidence.¹ *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. at 369, 375 (AAO 2010) (discussing the standard of proof). Upon *de novo* review, we will dismiss the appeal.

I. EMPLOYMENT-BASED IMMIGRATION

Immigration as an “other,” or “unskilled,” worker generally follows a three-step process. First, a prospective employer must apply to the U.S. Department of Labor (DOL) for 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 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).

Second, an employer must submit a labor certification with an immigrant visa petition to USCIS. *See* section 204 of the Act, 8 U.S.C. § 1154. Among other things, USCIS determines whether a noncitizen

¹ The Director found that the Beneficiary properly requested and qualifies to “port” to a new employer under section 204(j) of the Act, 8 U.S.C. § 1154(j). Finding no material error in those determinations, we accept the Beneficiary’s appeal. *See Matter of V-S-G- Inc.*, Adopted Decision 2017-06 (AAO Nov. 11, 2017) (requiring U.S. Citizenship and Immigration Services (USCIS) to treat beneficiaries who are eligible to port and have properly requested to do so as affected parties in petition revocation proceedings).

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.

“[A]t 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 unrebutted record at the time of the notice’s issuance would have warranted the filing’s denial. *Matter of Esteime*, 19 I&N Dec. 450, 451 (BIA 1987). The Agency properly revokes a petition’s approval if an affected party’s NOIR response does not rebut or resolve the alleged revocation grounds. *Id.* at 451-52.

II. THE ALLEGED MISREPRESENTATIONS

The Director found that the accompanying labor certification misrepresented the poultry company’s intent to employ a noncitizen in the offered position and to pay him at least the occupation’s prevailing wage.² The Director’s NOIR notes that the firm that prepared the petition and accompanying labor certification application pleaded guilty in 2008 to conspiring to commit visa fraud. *See* 18 U.S.C. §§ 371, 1546(a). The firm admitted that, between 1997 and 2004, it filed at least 61 other labor certification applications and Form I-140 petitions in the names of the poultry company and other businesses without their consent.

We will withdraw the invalidation of the accompanying labor certification and the revocation of the petition’s approval based on the certification’s alleged misrepresentations. We will next consider the other revocation ground.

III. 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.* USCIS, however, may accept statements from financial officers of petitioners that employ at least 100 people as evidence of the businesses’ abilities to pay proffered wages. *Id.*

² The labor certification application, filed in November 2001, initially identified a proposed worker other than the Beneficiary. When USCIS approved the petition in March 2004, however, the Agency granted a request by the firm that prepared and filed the Form I-140 petition and accompanying labor application to substitute the Beneficiary into the certified application for the initial worker. *See* 20 C.F.R. § 656.11(a) (until July 16, 2007, allowing requests to substitute workers into labor certification applications). Because we will affirm the petition’s revocation, the Beneficiary would not be able to use the filing’s November 2001 priority date with any later, employment-based petitions for him. *See* 8 C.F.R. § 204.5(e) (barring establishment of a priority date “as a result of a denied petition”).

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 annually pay a beneficiary the full proffered wage or did not pay a beneficiary at all, USCIS considers whether the business generated annual amounts of net income or net current assets sufficient 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. *See Matter of Sonegawa*, 12 I&N Dec. 612, 614-15 (Reg'l Comm'r 1967).³

The accompanying labor certification states the proffered wage of the offered position of poultry boner as \$16,160 a year. The petition's priority date is November 16, 2001, 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).

As noted in the Director's NOIR, the record lacks regulatory required evidence of the poultry company's ability to pay the proffered wage.⁴ The petition contained copies of a commercial data report about the company and its federal unemployment tax returns for 2001 and 2002. These documents, however, do not constitute required evidence under 8 C.F.R. § 204.5(g)(2). The unemployment tax returns are "federal tax returns" and indicate the poultry company's payment of wages in 2001 and 2002. But the documents do not reflect the company's income or net current assets as needed to determine the business's ability to pay the proffered wage. Thus, contrary to 8 C.F.R. § 204.5(g)(2), the record lacks required evidence of the poultry company's ability to pay.

A NOIR must provide a petitioner "the opportunity to offer evidence in support of the petition . . . and in opposition to the grounds alleged for revocation of the approval." 8 C.F.R. § 205.2(b). A NOIR must also "include 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. at 452. On appeal, the Beneficiary asserts that the Director's NOIR insufficiently informed him of evidence needed to demonstrate the poultry company's ability to pay.

The NOIR, however, quotes the ability-to-pay regulation at 8 C.F.R. § 204.5(g)(2) in its entirety. The regulation states that evidence of ability to pay may include a statement from a financial officer of a petitioner that employs at least 100 people. 8 C.F.R. § 204.5(g)(2). Otherwise, the regulation states that "[e]vidence of this ability [to pay] shall be either in the form of copies of annual reports, federal tax returns, or audited financial statements." *Id.* The NOIR requested "copies of the petitioner's federal income tax returns, audited financial statements, or annual reports for every year from 2001 through the time of [the petition's] filing on November 24, 2003." Thus, contrary to the Beneficiary's argument, the NOIR sufficiently notified him of evidence needed to demonstrate the poultry company's ability to pay the proffered wage.

³ 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).

⁴ The Director issued an earlier NOIR and revocation decision to the poultry company. But, after realizing the Beneficiary's eligibility to port to another employer under section 204(j) of the Act, the Director reopened the revocation proceedings on her own motion and issued a second NOIR to both the poultry company and the Beneficiary. *See Matter of V-S-G-, supra*. The Petitioner did not respond to either NOIR. We will use the term "NOIR" to refer to the second notice.

The Beneficiary also argues that, because the record included the poultry company's number of employees and "net worth," the Director should have determined the company's ability to pay under *Sonegawa* by considering a totality of circumstances. *See Matter of Sonegawa*, 12 I&N Dec. at 614-15.

As previously discussed, however, the record lacks regulatory required evidence of the company's ability to pay. The record includes neither a statement from a financial officer of the poultry company nor copies of the company's annual reports, federal income tax returns, or audited financial statements. *See* 8 C.F.R. § 204.5(g)(2). Thus, without *required* evidence, a favorable determination under *Sonegawa* would not have demonstrated the Petitioner's ability to pay the proffered wage.

IV. CONCLUSION

The record at the time of the NOIR's issuance lacked required evidence of the poultry company's ability to pay the proffered wage of the offered position. We will therefore affirm the revocation of the petition's approval.

ORDER: The appeal is dismissed.