



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

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

In Re: 04058325

Date: NOV. 17, 2022

Appeal of Texas Service Center Decision

Form I-140, Immigrant Petition for Skilled Worker

The Petitioner, a clothing recycling company in [] Texas, seeks to employ the Beneficiary as its production manager. The Petitioner seeks to classify the Beneficiary under the third-preference, immigrant visa category for “skilled workers.” See Immigration and Nationality Act (the Act) section 203(b)(3)(A)(i), 8 U.S.C. § 1153(b)(3)(A)(i).

The Director of the Texas Service Center denied the petition, determining that the Petitioner had not established that it had made a *bona fide* job offer, available to qualified U.S. workers. The matter is now before us on appeal.

In these proceedings, it is the Petitioner’s burden to establish eligibility for the requested benefit. Section 291 of the Act, 8 U.S.C. § 1361; *Matter of Chawathe*, 25 I&N Dec. 369, 375 (AAO 2010). Upon *de novo* review, we determine that the Petitioner has established by a preponderance of the evidence that the proffered position was a *bona fide* job opportunity open to U.S. workers.¹ Notwithstanding this determination, we remand for the Petitioner to demonstrate its continuing ability to pay as specified in 8 C.F.R. § 204.5(g)(2). Accordingly, we will withdraw the Director’s decision and remand the matter for further consideration and adjudication within the statutory and regulatory framework for I-140 immigrant visa petitions.

I. LAW

Immigration as a skilled worker usually follows a three-step process. First, the prospective employer must obtain a labor certification approval from the U.S. Department of Labor (DOL) to establish that there are not sufficient U.S. workers who are able, willing, qualified, and available for the offered position. Section 212(a)(5)(A)(i) of the Act, 8 U.S.C. § 1182(a)(5)(A)(i).

Second, the employer must submit the approved labor certification with an immigrant visa petition to U.S. Citizenship and Immigration Services (USCIS). Section 204 of the Act, 8 U.S.C. § 1154. The immigrant visa petition must establish that the foreign worker qualifies for the offered position, that

¹ We recognize that that the Director raised significant 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 a adjustment of status proceedings.

the foreign worker and the offered position are eligible for the requested immigrant visa category, and that the employer has the ability to pay the proffered wage. *See* 8 C.F.R. § 204.5.

These requirements must be satisfied by the priority date of the immigrant visa petition. *See* 8 C.F.R. § 204.5(g)(2); *Matter of Wing's Tea House*, 16 I&N Dec. 158, 159 (Act. Reg'l Comm'r 1977). For petitions that require a labor certification, the priority date is the date on which the DOL accepted the labor certification application for processing. *See* 8 C.F.R. § 204.5(d).

Finally, if USCIS approves the immigrant visa petition, the foreign worker may apply for an immigrant visa abroad or, if eligible, for adjustment of status in the United States. Section 245 of the Act, 8 U.S.C. § 1255.

II. ANALYSIS

The Petitioner is a limited liability company (LLC) established in New Jersey in 2013. On the Form I-140 and ETA Form 9089, the Petitioner stated that it has five employees in the United States. After hiring the Beneficiary as an H-1B nonimmigrant in 2014, the company relocated to Texas in 2015. The Petitioner filed the ETA Form 9089 on August 4, 2017, while the Beneficiary was already employed in the position offered as a production manager.

On line C.9 of the ETA Form 9089, the Petitioner answered “no” to the question: “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, partners, corporate officers or incorporators, and the alien?”

The Director denied the petition, concluding that the Petitioner had falsely answered “no” to the question on line C.9. The Director cited the Petitioner’s prior filings with the Texas Secretary of State, in which the Petitioner identified the Beneficiary as a “governing person” in 2015 and as a “registered agent” in 2016.

On appeal, the Petitioner does not dispute the cited information, but asserts that it does not show that the labor certification included false information. The Petitioner asserts that it temporarily appointed the Beneficiary as an officer of the company, after it had already hired him as an H-1B nonimmigrant, essentially to act as a proxy for the company’s two members while the members were abroad.² The Petitioner maintains that the Beneficiary had no independent authority over the company. The Petitioner also asserts that DOL’s approval of the labor certification establishes that the job offer was *bona fide*.

Based on a review of the totality of the evidence, we determine that the Petitioner has established by a preponderance of the evidence that the proffered position was a *bona fide* job opportunity. We withdraw the Director’s decision.

As noted above, however, we will remand the matter for additional evidence related to the Petitioner’s ability to pay the proffered wage. On remand, the Director should request updated information relating

² Because the Petitioner is an LLC, its owners are termed “members” rather than “shareholders.”

to the Petitioner's continuing ability to pay the proffered wage, because the Petitioner must demonstrate this ability at the time the priority date is established and continuing until the beneficiary obtains lawful permanent residence. 8 C.F.R. § 204.5(g)(2). Upon receipt of the Petitioner's timely response, the Director should review the entire record and enter a new decision.

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