U.S. Citizenship and Immigration Services

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

In Re: 20224300

Date: SEP. 07, 2022

Appeal of Texas Service Center Decision

Form I-140, Immigrant Petition for Other Worker

The Petitioner, a harness racing stable, seeks to employ the Beneficiary as a groom. It requests classification of the Beneficiary as an "other" worker under the third preference immigrant classification. Immigration and Nationality Act (the Act) section 203(b)(3)(A)(iii), 8 U.S.C. § 1153(b)(3)(A)(iii). This employment-based immigrant classification allows a U.S. employer to sponsor a noncitizen for lawful permanent resident status to work in a position that requires less than two years of training or experience.

The Director of the Texas Service Center denied the petition, concluding that the Beneficiary had willfully misrepresented material facts regarding her work history. 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. Upon *de novo* review, we will withdraw the Director's finding of willful misrepresentation and remand the matter for the entry of a new decision.

## I. EMPLOYMENT-BASED IMMIGRATION

Employment-based immigration generally follows a three-step process. First, an employer obtains an approved labor certification from the U.S. Department of Labor (DOL). *See* section 212(a)(5) of the Act, 8 U.S.C. 1182(a)(5). By approving the labor certification, the DOL certifies that there are insufficient U.S. workers who are able, willing, qualified, and available for the offered position and that employing a noncitizen in the position will not adversely affect the wages and working conditions of similarly employed domestic workers. *See* section 212(a)(5)(A)(i)(I)-(II) of the Act.

Second, the employer files an immigrant visa petition with U.S. Citizenship and Immigration Services (USCIS) with the certified labor certification. *See* section 204 of the Act, 8 U.S.C. § 1154. Third, if USCIS approves the petition, the noncitizen 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.

## II. ANALYSIS

### A. Beneficiary's Experience

A petition for the "other worker" classification must be accompanied by evidence that the beneficiary meets any educational, training, experience, or other requirements of the labor certification. 8 C.F.R. § 204.5(l)(3)(ii)(D). The labor certification in this case does not require any education or training to qualify for the job of groom, but does require 12 months of prior experience in the offered position of groom. The regulation at 8 C.F.R. § 204.5(l)(3)(ii)(A) states that work experience must be demonstrated with letters from employers giving the name, address, and title of the employer, as well as a description of the noncitizen's work experience.

The labor certification instructions require petitioners to list all jobs that a beneficiary has held in the past three years, as well as any other experience that qualifies the beneficiary for the offered position. The labor certification in this instance was filed on May 3, 2019, and states the following work history for the Beneficiary:

- Groom at the Petitioner[1] from August 1, 2017, to May 3, 2019; and
- Groom at [redacted] from September 3, 2012, to August 31, 2014.

The stated duties for both positions are: "Daily care of race horses mares and foals. Brushing, bathing and exercising horses. Prepping yearlings for sale." The Petitioner also provided a translated letter from [redacted] a manager at [redacted] stating that the Beneficiary worked there as a full-time groom from September 3, 2012, to August 31, 2014, and naming the same duties.

On March 10, 2021, the Director issued a Notice of Intent to Deny (NOID), stating that the Beneficiary may have misrepresented her work history because it was inconsistent with the work history she provided when applying for a nonimmigrant visa (NIV) on April 15, 2015. In that NIV application, the work history provided was as follows:

- Jockey at [redacted] from September 1, 2012, to August 29, 2014; and
- Jockey at [redacted] from October 1, 2010, to August 31, 2012.

The stated duties for both positions are "training of trot horses." The Director noted that the position at [redacted] was not mentioned in the labor certification,[2] which made it inconsistent with the work history provided in the labor certification.

In response to the NOID, the Petitioner provided a copy of the Beneficiary's resume, which states the following work history:

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[1] According to the answer to Part J.21 on the labor certification, the Beneficiary's experience working as a groom with the Petitioner is not being used to demonstrate the required 12 months of qualifying experience.

[2] The NOID and denial state that the NIV application states the Beneficiary worked as a jockey at [redacted] from 2010 to 2014. The NIV application actually states that she was employed there from 2010 to 2012.

- Full-time Jockey at [redacted] from October 1, 2010, to August 31, 2012;
- Full-time Groom at [redacted] from September 3, 2012, to August 31, 2014; and
- Part-time Jockey at [redacted] from July 3, 2012,[3] to August 31, 2014.

The duties for the full-time jockey position are described as riding horses for promenade and training, riding young horses and teaching them, and going to races. The duties for the groom position are described as caring daily for racehorses, mares and foals; brushing, bathing, and exercising horses; and preparing yearlings for sale. The part-time jockey position is described as riding in races at night as needed.

The Petitioner also provided an attorney letter stating that the labor certification only required the disclosure of the Beneficiary's complete work history for the three years preceding its submission – in this case, from May 2016 to May 2019 – and the disclosure of other work experience that qualifies the Beneficiary for the offered position of groom. The letter explains that the Beneficiary's employment at [redacted] ended in 2014, and so was not within the three-year period prior to the filing of the labor certification. The letter further states that the Beneficiary's work at [redacted] was as a jockey, not a groom, and so was not relevant experience for the offered position. Therefore, this work was not included in the labor certification.

To support this claim, the Petitioner provided translated copies of the Beneficiary's pay statements from [redacted] from October 2011 to September 2012, all of which state that she was employed as a jockey. The Petitioner also provided a letter from [redacted] the manager of [redacted] stating that the Beneficiary was employed there as a jockey from October 1, 2010, to August 31, 2012, and as a part-time jockey from September 3, 2012, to August 31, 2014, naming the same duties as those listed on the Beneficiary's resume. To support the claim of the Beneficiary's employment at [redacted] the Petitioner provided translated pay statements from September 2012 to August 2014, which indicate that she was employed there full-time during that period.

On August 23, 2021, the Director denied the petition and found that the Petitioner and the Beneficiary made willful misrepresentations of material fact on the labor certification and experience letter regarding the Beneficiary's work at [redacted] The Petitioner disputes this finding on appeal.

Section 212(a)(6)(C)(i) of the Act, 8 U.S.C. § 1182(a)(6)(C)(i), states that "in general – any alien, who by fraud or willfully misrepresenting a material fact, seeks (or has sought to procure, or who has procured) a visa, other documentation, or admission to the United States or other benefit provided under the Act is inadmissible." In order to support a finding of willful misrepresentation of a material fact, the record must show that a petitioner or beneficiary procured or sought to procure a benefit under U.S. immigration laws, that they made a false representation, that the false representation was made willfully, that the false representation was material, and that the false representation was made to a U.S. government official. *See Matter of Y-G-*, 20 I&N Dec. 794, 796 (BIA 1994); *see also* 8 *USCIS*

[3] While the resume states that the Beneficiary was employed at [redacted] both full-time and part-time from July to August 2012, the signed letter from this employer states that her part-time employment began in September 2012, which eliminates this overlap and matches the period of full-time employment shown in the pay statements provided.

*Policy Manual* J.2(B), https://www.uscis.gov/policymanual. A false representation is an assertion or manifestation that is not in accordance with the true facts.[4]

In their NOID, the Director stated that the inconsistencies created by the NIV application were the Beneficiary's work as a jockey from 2010 to 2012 and her employment with [redacted] from 2010 to 2014, which were not mentioned in the labor certification. The denial restates these omissions from the labor certification as the reason for the finding of willful misrepresentation of a material fact.[5] However, the Director does not specifically identify a false representation made by the Petitioner or the Beneficiary on the labor certification or employment letter regarding the Beneficiary's work at [redacted].[6] Therefore, we will withdraw the findings of willful misrepresentation of a material fact against the Petitioner and the Beneficiary.

However, the evidence of record does not demonstrate eligibility for the immigration benefit because it does not demonstrate that the Beneficiary is qualified for the offered position. Specifically, the record does not resolve the inconsistencies between the NIV petition, on which the Beneficiary stated she was a jockey at [redacted] from 2012 to 2014 and that her duties consisted of training horses, and on the labor certification, where she stated she was employed there as a groom and that her duties consisted of bathing, exercising, and prepping horses for sale. Because the position at [redacted] is the Beneficiary's only qualifying job experience, the Petitioner has not demonstrated by a preponderance of the evidence that the Beneficiary has 12 months of such experience, as required by the labor certification. Because the Petitioner was not sufficiently informed of this issue by the Director, we will remand the matter to the Director to reevaluate the provided evidence and request any evidence pertinent to issuance of a new decision.

B. Petitioner's Ability to Pay the Proffered Wage

Although not addressed by the Director in their decision, the Petitioner has not established its continuing ability to pay the proffered wage. The regulation at 8 C.F.R. § 204.5(g)(2) states that a petitioner must establish that it has the ability to pay the beneficiary the proffered wage from the priority date[7] onward. Documentation of ability to pay shall be in the form of copies of annual reports, federal tax returns, or audited financial statements, and in appropriate cases, additional financial evidence may be submitted. *Id.* This documentation should demonstrate the Petitioner's continuing ability to pay the proffered wage of $26,749 a year starting on the priority date, which in this instance is May 3, 2019.

In determining a petitioner's ability to pay, we first examine whether it paid a beneficiary the full proffered wage each year from a petition's priority date. We next examine whether it had sufficient annual amounts of net income or net current assets to pay the proffered wage. If a petitioner's net income or net current assets are insufficient, we may also consider other evidence of its ability to pay

[4] *8 USCIS Policy Manual* J.3(C)(1), https://www.uscis.gov/policymanual.
[5] It is further noted that the denial mentions but does not fully address the Petitioner's assertion that the [redacted] position did not need to be disclosed per the labor certification instructions.
[6] We note that the letter was written by a manager at [redacted] not by the Petitioner or the Beneficiary. Further, the Beneficiary, not the Petitioner, certified the Beneficiary's experience at Section J of the labor certification.
[7] The "priority date" of a petition is the date the underlying labor certification is filed with DOL. 8 C.F.R. § 204.5(d). The Petitioner must establish that all eligibility requirements for the petition have been satisfied as of the priority date.

the proffered wage.[8] USCIS may also consider the totality of the petitioner's circumstances, including the overall magnitude of its business activities, in determining the Petitioner's ability to pay the proffered wage. *See Matter of Sonegawa,* 12 I&N Dec. 612 (Reg'l Comm'r 1967).[9]

The evidence indicates that the Petitioner paid the Beneficiary $15,040 in 2019, or $11,709 less than the proffered wage, and $7,600 in 2020, or $19,149 less than the proffered wage. Therefore, we will next examine whether the Petitioner's net income or net current assets were sufficient to pay the difference between the wages paid and the proffered wage (the wage deficiency).

The Petitioner appears to be a sole proprietorship, a business in which one person operates the business in their personal capacity. Black's Law Dictionary 1398 (7th ed. 1999). Unlike a corporation, a sole proprietorship does not exist as an entity apart from the individual owner. *See Matter of United Investment Group*, 19 I&N Dec. 248, 250 (Comm'r 1984). Therefore, the sole proprietor's adjusted gross income (AGI), assets, and personal liabilities are considered as part of the Petitioner's ability to pay. Sole proprietors report annual income and expenses from their businesses on their Internal Revenue Service Form 1040, U.S. Individual Income Tax Return. The business-related income and expenses are reported on Form 1040, Schedule C, and are carried forward to the first page of the tax return. Sole proprietors must show that they can cover their existing household expenses as well as pay the proffered wage out of their AGI or other available funds. *See Ubeda v. Palmer*, 539 F. Supp. 647, 650 (N.D. Ill. 1982), *aff'd*, 703 F.2d 571 (7th Cir. 1983).

The Petitioner's 2019 tax return states that his AGI that year was -$52,769. This is not sufficient to cover the $11,709 wage deficiency in 2019. The record does not contain the Petitioner's tax returns, annual reports, or audited financial statements for 2020. Therefore, the evidence of record also does not indicate that the Petitioner had sufficient net income to pay the $19,149 wage deficiency in 2020. Further, the record does not contain audited balance sheets showing the Petitioner's net current assets for any relevant year.

The record includes a letter from the Petitioner's accountant which states that "[f]rom May 2019 to present, there has always been sufficient funds in the business back account to cover the proffered salary…on a weekly basis." To support this claim, the Petitioner provided its bank statements from May 2019 to March 2021. These bank statements include daily ledger balances which indicate that the account was overdrawn on several occasions during this time period, thus they do not support the Petitioner's ability to pay. It is further noted that the bank account statements are documentation of funds located in the sole proprietorship's business checking account. Therefore, these funds are likely shown on Schedule C of the sole proprietorship's tax return as gross receipts and expenses. The

[8] Federal courts have upheld our 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); *Tongatapu Woodcraft Haw., Ltd. v. Feldman*, 736 F.2d 1305, 1309 (9th Cir. 1984); *Estrada-Hernandez v. Holder*, 107 F. Supp. 3d 936, 942-943 (S.D. Cal. 2015); *Rizvi v. Dep't of Homeland Sec.*, 37 F. Supp. 3d 870, 883-84 (S.D. Tex. 2014), *aff'd*, 627 Fed. App'x 292, 294-295 (5th Cir. 2015).

[9] USCIS may, at its discretion, consider evidence relevant to the petitioner's financial ability that falls outside of its net income and net current assets. We may consider such factors as the number of years the petitioner has been doing business, the established historical growth of the petitioner's business, the petitioner's reputation within its industry, the overall number of employees, whether the beneficiary is replacing a former employee or an outsourced service, the occurrence of any uncharacteristic business expenditures or losses, and any other evidence that USCIS deems relevant to the petitioner's ability to pay the proffered wage. *Id.*

Petitioner's net profit/loss is included in the calculation of the sole proprietor's AGI, which is insufficient in 2019 to establish the Petitioner's ability to pay the proffered wage.

The documentation of the totality of the Petitioner's circumstances also does not establish its continuing ability to pay the proffered wage. The record indicates that the Petitioner is a harness racing stable which was established in 1985. While we acknowledge the Petitioner's many years in business, the record does not demonstrate factors beyond its net income and net current assets that would allow it to pay the wage deficiency.

The accountant's letter states that the horse racing industry suffered a downturn in 2020 due to the COVID-19 pandemic and that the Petitioner's revenues should return to pre-pandemic levels in the future. However, the financial documentation submitted does not establish that the Petitioner had uncharacteristic losses in 2020. Further, it is not possible to determine whether the Petitioner has had a history of business growth since its establishment in 1985 due to the limited financial documentation submitted to the record. The record does not contain documentation of the Petitioner's reputation in the industry, its overall number of employees, or an indication that the Beneficiary will be replacing a former employee or outsourced service. Therefore, the Petitioner has not established its continuing ability to pay the proffered wage based on the totality of the circumstances.

When addressing the Petitioner's ability to pay, the NOID treated the Petitioner as a corporation rather than a sole proprietorship. The denial did not address ability to pay. Furthermore, as noted above, the record does not include the Petitioner's federal tax returns, annual reports, or audited financial statements from 2020 onward, and the record is not clear as to whether this documentation was available for submission as required. Therefore, we will remand the matter to the Director for further consideration. The Director may request any additional documentation deemed relevant to determine the Petitioner's continuing ability to pay the proffered wage.

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