



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

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

In Re: 22650804

Date: SEP. 29, 2022

Appeal of Texas Service Center Decision

Form I-140, Immigrant Petition for Skilled Worker

The Petitioner, a convenience store business, seeks to employ the Beneficiary as a store manager. It requests classification of the Beneficiary as a skilled worker under the third preference immigrant classification. Immigration and Nationality Act (the Act) section 203(b)(3)(A)(i), 8 U.S.C. § 1153(b)(3)(A)(i). This employment-based “EB-3” immigrant classification allows a U.S. employer to sponsor a foreign national for lawful permanent resident status to work in a position that requires at least two years of training or experience.

The petition was initially approved. However, the Director of the Texas Service Center subsequently revoked the approval on the ground that the Petitioner did not properly complete the Form I-140 petition, and the labor certification is not valid for the job offered.

On appeal, the Petitioner acknowledges it indicated the incorrect North American Industry Classification System (NAICS)<sup>1</sup> code for its business on both the Form I-140 petition and the labor certification, but asserts that the misclassifications of its NAICS code do not change the validity of the proffered job under the labor certification.

The 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 withdraw the Director’s decision and remand the case for further action, consideration, and entry of a new decision in accordance with below.

## **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). 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

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<sup>1</sup> NAICS is the standard used by federal statistical agencies in classifying business establishments for the purpose of collecting, analyzing, and publishing statistical data related to the U.S. business economy. NAICS was developed under the auspices of the Office of Management and Budget, and adopted in 1997 to replace the Standard Industrial Classification system. It was developed jointly by the U.S. Economic Classification Policy Committee, Statistics Canada, and Mexico's Instituto Nacional de Estadística y Geografía, to allow for a high level of comparability in business statistics among the North American countries. <http://www.census.gov/naics/>.

employment of a foreign national will not harm wages and working conditions of U.S. workers with similar jobs. *Id.* 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 the foreign worker and the offered position are eligible for the requested immigrant classification, and that the employer has the ability to pay the proffered wage. See 8 C.F.R. § 204.5.<sup>2</sup> 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.

At any time before a beneficiary obtains lawful permanent residence, however, 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 the record, a petition's erroneous approval may justify its revocation. See *Matter of Ho*, 19 I&N Dec. 582, 590 (BIA 1988). 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).

## II. ANALYSIS

The instant petition for skilled worker classification was filed on January 26, 2018, accompanied by a labor certification that was filed with the DOL on April 19, 2017, and certified in December 2017. The petition was approved on May 14, 2018. On March 1, 2021, the Director issued a notice of intent to revoke (NOIR) the petition's approval on the grounds that the Petitioner did not properly complete the Form I-140 when it indicated the incorrect NAICS code, and the labor certification was not valid for the job offered since the offered manager position was not the same as that listed on the labor certification. Upon review, we will remand the matter to the Director to determine whether the Petitioner has demonstrated that the Beneficiary qualifies for the EB-3 classification as a skilled worker, and whether she meets the specific requirements of the labor certification.

### A. Validity of the Job Opportunity

A labor certification remains valid only for the particular job opportunity, foreign national, and geographic area of intended employment stated on it. 20 C.F.R. § 656.30(c)(2). If a job opportunity changes during a petition's pendency, the validity of an accompanying labor certification may expire. *Matter of United Inv. Grp.*, 19 I&N Dec. 248, 249 (Comm'r 1984). For a job opportunity to remain as DOL-certified, "the facts of employment or intended employment must remain as stated and the specific employer-employee relationship stipulated and intended must continue both in present fact and prospectively." *Id.*

USCIS must assess a petition "to ensure that the position offered is the same or similar to the position

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<sup>2</sup> 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). In this case, the priority date is April 19, 2017.

that the DOL certified and that the beneficiary meets the qualifications for the position.” 6 USCIS Policy Manual E.6(A), <https://www.uscis.gov/policymanual>. A petitioner is required to submit a new labor certification with the petition in certain circumstances, including, a successor-in-interest relationship has not been established; “the labor certification is not valid for the new geographic area of a beneficiary’s proposed employment; or any other material change in the job opportunity covered by the original permanent labor certification.” *Id.* at E.6(D)(1); see 20 C.F.R. § 656.30(c)(2); *Matter of Sunoco Energy Development Co.*, 17 I&N Dec. 283 (Reg’l. Comm’r. 1979).

The Petitioner is a company established in 2004 in the State of Texas with approximately four employees. The Form I-140 and the labor certification list the Petitioner’s NAICS business activity code as 447110, and the Form I-140 describes the Petitioner’s business as “Gas stations with convenience store.” At the time of filing this petition in 2018, businesses falling within this NAICS code 447110 are described as, “establishments engaged in retailing automotive fuels (e.g., diesel fuel, gasohol, gasoline) in combination with convenience store or food mart items.” USCIS conducted a site visit to the job location and found no gasoline pumps at the location. The Director issued a NOIR advising the Petitioner of the discrepancies in its business classification and explained the NAICS business activity code indicated on the petition and on the labor certification is incorrect, and should be 445120. In 2018, businesses falling within this NAICS code are described as, “establishments known as convenience stores or food marts (except those with fuel pumps) . . . .”<sup>3</sup>

The Director revoked the approval citing the evidence on record “does not show that the offered position is the same as that listed on the labor certification. Based on the fact that the [P]etitioner’s business is a convenience store and not a gas station the job offered is different than the job listed on the labor certification. The [P]etitioner’s job offer is for a manager of a convenience store not a manager of a gas station. As such, the labor certification is no longer valid.”

The Petitioner does not dispute its correct NAICS code is 445120, and that it is operating as a convenience store without a gas station. The Petitioner argues that the error with the NAICS code “does not affect the proffered job in any manner” since the job was open to all qualified U.S. workers and the NAICS code is not part of the recruitment. The Petitioner argues the proffered job is for a manager of a retail business whether it is a convenience store with or without a gas station. The Petitioner included its recruitment materials with its reply to the NOIR and with this appeal.

We find the Petitioner’s assertions persuasive. The Petitioner’s NAICS code misclassification as a gas station with a convenience store, instead of the correct classification as a convenience store without a gas station, does not appear to be a material change to the job opportunity covered by the labor certification. The labor certification identifies the proffered job title as “manager” with job duties, “Manage store activities. Prepare work schedule of workers. Personnel management. Oversee inventory tracking and stocking. Respond to customer inquiries and complaints.” The labor certification assigned the proffered job with the SOC/O\*NET (OES) occupational code 41-1011.00, which falls under the detailed occupation of “First-Line Supervisors of Retail Sales Workers”.<sup>4</sup> The

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<sup>3</sup> Descriptions of the NAICS codes can be found at <https://www.naics.com/naics-code-description/>.

<sup>4</sup> The Occupational Information Network (O\*NET) is the current occupational classification system in use by the DOL. O\*NET is developed under the sponsorship of the DOL/Employment and Training Administration through a grant to the North Carolina Department of Commerce. O\*NET incorporates the Standard Occupational Classification (SOC) system,

job duties associated with this OES occupational code state, “Directly supervise and coordinate activities of retail sales workers in an establishment or department. Duties may include management functions, such as purchasing, budgeting, accounting, and personnel work, in addition to supervisory duties.” *Id.* Based on the record, the “manager” position offered to the Beneficiary appears to be similar, although not the same as, the job opportunity that the DOL certified. The job duties detailed in the labor certification relate to the management of a retail business, with no specific duties associated with a gas station. The Petitioner’s misclassification of its business activities on the petition and the labor certification as a gas station with a convenience store, instead of as a convenience store without a gas station, does not appear to materially change the job opportunity in the labor certification. Accordingly, we withdraw the Director’s revocation decision.

## B. Additional Concerns

Although not discussed by the Director, the record does not establish the Beneficiary has the requisite 24 months of qualifying experience stated in the labor certification.

With the petition, the Petitioner submitted a letter dated March 18, 2012 from [redacted] of [redacted] Superstore Shop located in Pakistan indicating the Beneficiary held a general manager position with its store from March 1, 2007 to February 28, 2012. However, the letter does not indicate whether the Beneficiary’s employment was full time. During the Form I-485 interview, USCIS identified inconsistencies in the Beneficiary’s employment history as claimed in the labor certification and supporting evidence, with the information indicated on the Beneficiary’s previous nonimmigrant visa applications. Specifically, on three previous nonimmigrant visa applications submitted in support of the Beneficiary’s prior B1/B2 visa requests on April 9, 2015, April 24, 2015, and November 25, 2015, under the work experience sections, she did not list her work history with [redacted] Superstore Shop. During the adjustment of status interview, the Beneficiary explained she omitted her work experience because another person assisted her with filling out the applications and they did not feel it necessary to include her work history since she planned to travel to the U.S. as a visitor.

Additionally, the record does not demonstrate the Petitioner’s ability to pay the proffered wage. In this case, the proffered wage is \$56,389 per year and the priority date is April 19, 2017. The record does not contain evidence of the Petitioner’s ability to pay the proffered wage from 2017 onward. For the year 2017, the record includes a copy of the Petitioner’s federal income tax return, IRS Form 1120S, U.S. Income Tax Return for an S Corporation, which shows that it had a net income of \$48,819<sup>5</sup> and current net assets of \$46,819.<sup>6</sup> This tax return does not demonstrate that the Petitioner has a net income, or current net assets, equal to or greater than the proffered wage. Therefore, the Petitioner has not established its ability to pay the proffered wage in 2017 based on either net income or net current assets that year.

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which is designed to cover all occupations in the United States. DOL uses the O\*NET data to understand the rapidly changing nature of work and how it impacts the workforce and U.S. economy. <https://www.onetonline.org>.

<sup>5</sup> If an S corporation, like the Petitioner, USCIS considers its net income (or loss) to be the figure for “Ordinary business income (loss)” on page 1, line 21, of the Form 1120S. However, if there are relevant entries for additional income, credits, deductions, or other adjustments from sources other than a trade or business, they are reported on Schedule K of the Form 1120S, and the corporation’s net income or loss will be found in line 18 of Schedule K (“Income/loss reconciliation”).

<sup>6</sup> For a corporation net current assets (or liabilities) are the difference between its current assets, entered on Schedule L, lines 1-6, of the Form 1120S, and its current liabilities, entered on Schedule L, lines 16-18.

The Director did not address the Beneficiary's work experience or the Petitioner's ability to pay the proffered wage in the revocation decision. Therefore, we will remand this case for the Director to request the submission of regulatorily required evidence from the Petitioner, as specified in 8 C.F.R. § 204.5(g)(2). The Director may also request any other evidence that may be deemed necessary to determine the Petitioner's eligibility for the requested immigration benefit.

### III. CONCLUSION

For the reasons discussed above, we will remand this case to the Director for further consideration of the Petitioner's eligibility for the immigration benefit it seeks on behalf of the Beneficiary. The Director may issue a new NOIR in accordance with the requirements of 8 C.F.R. § 205.2(b) and (c) and Matter of Esteim. Following the Petitioner's response to the NOIR, or the expiration of the time period to respond, the Director shall issue 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.