



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

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

In Re: 29096449

Date: DEC. 12, 2023

Appeal of Nebraska Service Center Decision

Form I-140, Immigrant Petition for Alien Workers (Other Worker)

The Petitioner, a food and beverage company, seeks to employ the Beneficiary as a crew member. It requests classification of the Beneficiary as an “other worker” under the third preference employment-based immigrant visa category. Immigration and Nationality Act (the Act) section 203(b)(3)(A)(iii), 8 U.S.C. § 1153(b) (3)(A)(iii). This immigrant visa category allows a U.S. employer to sponsor a foreign national for lawful permanent resident status to work in a position that requires less than two years of training or experience.

Petitions for other workers must be accompanied by a valid 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) of the Act, 8 U.S.C. § 1182(a)(5). 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. A labor certification expires if, within 180 days of its approval, it is not filed in support of a petition. 20 C.F.R. § 656.30(b)(1).

In this case, the Director of the Nebraska Service Center denied the petition because it was accompanied by an expired labor certification. The Director concluded that the Petitioner did not properly file the immigrant visa petition until April 17, 2023, one day after the April 16, 2023 expiration date of the labor certification. However, as the Petitioner notes on appeal, the April 16, 2023 expiration date of the labor certification fell on a Sunday. Where the last day of the validity period of the labor certification falls on a Sunday, the deadline is extended until the end of the next business day. 6 *USCIS Policy Manual* E.6(B)(3), <https://www.uscis.gov/policy-manual>. *See also* 1 *USCIS Policy Manual* B.6(D). As the petition was timely filed on April 17, 2023, the next business day following the Sunday expiration date of the labor certification, the Director’s decision is withdrawn. However, we cannot conclude that the Petitioner has established eligibility for the benefit sought, as further detailed below. Upon de novo review, we will withdraw the Director’s decision and remand the matter for entry of a new decision consistent with the following analysis.

I. ANALYSIS

Immigration as a skilled worker generally follows a three-step process. As noted above, a prospective employer must first obtain certification from DOL, then submit an approved labor certification with an immigrant visa petition to USCIS. Section 204(a)(1)(F) of the Act, 8 U.S.C. § 1154(a)(1)(F). USCIS determines whether a beneficiary meets the requirements of a DOL-certified position and a requested immigrant visa category. 8 C.F.R. § 204.5(l)(3)(ii)(B). In addition, USCIS determines whether the employer established its ability to pay the proffered wage. 8 C.F.R. § 204.5(g)(2). 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. The Petitioner as Employer

An employer may petition for a foreign national if it is “desiring and intending to employ [him or her] within the United States.” Section 204(a)(1)(F) of the Act. 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.¹ The bona fides of the job opportunity are essential elements in evaluating whether a job offer is realistic. See *Matter of Great Wall*, 16 I&N Dec. 142 (Acting Reg’l Comm’r 1977).

Public records reveal that the Petitioner is no longer an active business in good standing after merging with another business. See Missouri Secretary of State, [https://bsd.sos.mo.gov/BusinessEntity/\[redacted\]](https://bsd.sos.mo.gov/BusinessEntity/[redacted]) (visited Dec. 11, 2023). According to the Summary Articles of Merger on record, the Petitioner merged with [redacted] and the surviving entity is [redacted], rather than the Petitioner. See *id.* The effective date of the merger is [redacted], 2023. This is after the filing of the labor certification on February 14, 2022, and before the filing of the instant petition on April 17, 2023.

Because we cannot affirmatively find that the Petitioner remains in business and that a bona fide job offer exists, we will remand the matter to the Director for further consideration. The Director may wish to request additional evidence of the status of the Petitioner’s business and allow the Petitioner an opportunity to respond.

¹ The “priority date” of a petition is the date the underlying labor certification is filed with the DOL. See 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.

B. Ability to Pay

The regulation at 8 C.F.R. § 204.5(g)(2) requires that “[e]vidence of this ability shall be either in the form of copies of annual reports, federal tax returns, or audited financial statements.” The record does not contain regulatory-required evidence of the Petitioner’s continuing ability to pay the proffered wage of \$11.00 per hour, from the priority date on February 14, 2022. Although the record includes the Petitioner’s federal tax return for 2021, this evidence is before the priority date and does not demonstrate the Petitioner’s continuing ability to pay the proffered wage. Without this regulatory-required evidence, we cannot affirmatively find that the Petitioner has the continuing ability to pay the proffered wage from the priority date.

We note that where a petitioner has filed I-140 petitions for multiple beneficiaries, it must demonstrate that its job offer to each beneficiary is realistic, and that it has the ability to pay the proffered wage to each beneficiary. *See Patel v. Johnson*, 2 F.Supp.3d 108, 124 (D. Mass. 2014) (affirming our revocation of a petition’s approval where, as of the filing’s grant, a petitioner did not demonstrate its ability to pay the combined proffered wages of multiple petitions). USCIS records show that the Petitioner has filed Form I-140 petitions for 16 other beneficiaries. Thus, the Petitioner must establish its ability to pay this Beneficiary as well as the beneficiaries of the other Form I-140 petitions that were pending or approved as of, or filed after, the priority date of the current petition.

Therefore, we will remand the matter to the Director to request additional evidence, if deemed appropriate, and analyze the record and determine whether the Petitioner has established its ability to pay the proffered wage to this Beneficiary, and the beneficiaries of its other petitions, from the priority date onward. On remand, the Director should request such regulatory-required evidence and allow the Petitioner reasonable time to respond.

II. CONCLUSION

Considering the above discussed deficiencies, we are withdrawing the Director’s decision. However, the record does not demonstrate affirmatively that the Petitioner is eligible for the benefit sought, including whether the Petitioner can establish that it is a valid business entity and that it has the ability to pay the proffered wage to the Beneficiary as required by 8 C.F.R. § 204.5(g)(2). Therefore, we will remand this case to the Director for further consideration of the Petitioner’s eligibility for the requested benefit. The Petitioner bears the burden of proof to demonstrate eligibility by a preponderance of the evidence. *Matter of Chawathe*, 25 I&N Dec. 369, 375-76 (AAO 2010).

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