



U.S. Citizenship
and Immigration
Services

(b)(6)



DATE: JUL 15 2015

FILE #: [REDACTED]

PETITION RECEIPT #: [REDACTED]

IN RE: Petitioner: [REDACTED]
Beneficiary: [REDACTED]

PETITION: Immigrant Petition for Alien Worker as a Skilled Worker or Professional Under Section 203(b)(3)(A) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)(3)(A)

ON BEHALF OF PETITIONER:



Enclosed is the non-precedent decision of the Administrative Appeals Office (AAO) for your case.

If you believe we incorrectly decided your case, you may file a motion requesting us to reconsider our decision and/or reopen the proceeding. The requirements for motions are located at 8 C.F.R. § 103.5. Motions must be filed on a Notice of Appeal or Motion (Form I-290B) **within 33 days of the date of this decision**. The Form I-290B web page (www.uscis.gov/i-290b) contains the latest information on fee, filing location, and other requirements. **Please do not mail any motions directly to the AAO.**

Thank you,


Ron Rosenberg
Chief, Administrative Appeals Office

DISCUSSION: The Director, Vermont Service Center, approved the immigrant visa petition on April 15, 2005. However, he revoked the petition's approval on November 13, 2007. Upon consideration of the petitioner's appeal, the Administrative Appeals Office (AAO) withdrew the revocation decision on September 19, 2011, and remanded the matter to the Director, Texas Service Center (Director), for further proceedings.¹ The Director affirmed the petition's approval and certified the matter for our review as instructed in our decision. The matter will be remanded again to the Director.

The petitioner refurbishes machinery. It seeks to permanently employ the beneficiary in the United States as a machinery mechanic. The petition requests classification of the beneficiary as a skilled worker or professional under section 203(b)(3)(A) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(3)(A).²

A Form ETA 750, Application for Alien Employment Certification (labor certification), certified by the U.S. Department of Labor (DOL), accompanies the petition. The petition's priority date is April 30, 2001, which is the date an office within DOL's employment service system accepted the labor certification application for processing. See 8 C.F.R. § 204.5(d).

U.S. Citizenship and Immigration Services (USCIS) may revoke a petition's approval "at any time" for "good and sufficient cause." Section 205 of the Act, 8 U.S.C. § 1155. A director's realization that a petition was erroneously approved may constitute good and sufficient cause for revocation if supported by the record. *Matter of Ho*, 19 I&N Dec. 582, 590 (BIA 1988).

In his Notice of Certification (NOC), dated February 10, 2015, the Director concluded that the petitioner overcame the revocation grounds stated in his Notice of Intent to Revoke (NOIR).

We may review a case on certification after an initial decision if the matter is within our appellate jurisdiction. 8 C.F.R. § 103.4(a)(5). We have jurisdiction to review revocations of petition approvals under former 8 C.F.R. § 103.1(f)(3)(iii)(D). See Dep't of Homeland Sec. Delegation No.: 0150.1, para. II U. (effective Mar. 1, 2003), available at, <https://www.hsdl.org/?view&did=234775> (accessed Apr. 22, 2015) (delegating appellate jurisdiction to us of all the matters described in former 8 C.F.R. § 103.1(f)(3)(iii)).

¹ We found that the petitioner did not receive proper notice of the revocation grounds. The Texas Service Center handled the continued revocation proceedings because the Vermont Service Center no longer adjudicates employment-based immigrant visa petitions. See USCIS News Release (Mar. 24, 2006), available at, http://www.uscis.gov/sites/default/files/files/pressrelease/BiSpecPh01_24Mar06PR.pdf (accessed Apr. 23, 2015) (announcing that the Nebraska and Texas Service Centers will process all employment-based immigrant visa petitions as of April 1, 2006).

² Section 203(b)(3)(A)(i) of the Act provides preference classification to qualified immigrants who are capable of performing permanent skilled labor (requiring at least two years training or experience) for which qualified workers are not available in the United States. Section 203(b)(3)(A)(ii) of the Act provides preference classification to qualified immigrants who hold baccalaureate degrees and are members of the professions.

The record indicates that, pursuant to 8 C.F.R. § 103.4(a)(2), the Director notified the petitioner of the certification and afforded it an opportunity to submit a brief within 30 days after the NOC's service. However, the record does not include a submission from the petitioner.³

The record documents the procedural history of the case, which will be incorporated into the decision. We will elaborate on the procedural history only as necessary. We conduct review on a *de novo* basis. See, e.g., *Soltane v. Dep't of Justice*, 381 F.3d 143, 145 (3d Cir. 2004).

Good and sufficient cause exists to issue a notice of intent to revoke if the record at the time of the notice's issuance, if unexplained or un rebutted, would warrant the petition's denial. *Matter of Estime*, 19 I&N Dec. 450, 451 (BIA 1987). Similarly, USCIS properly revokes a petition's approval if the record at the time of the decision, including any explanation or rebuttal submitted by the petitioner, warrants the petition's denial. *Id.* at 452.

In the instant case, the record at the time of the NOIR's issuance on December 10, 2014 supported the proposed revocation grounds. The NOIR alleged that the petitioner did not establish its relationship as a "successor-in-interest" to the company that filed the accompanying labor certification or its continuing ability to pay the proffered wage. The notice also alleged that the letter supporting the beneficiary's qualifying experience for the position lacked a certified English translation and was inconsistent with other evidence of record.

The Petitioner's Purported Successor-In-Interest Relationship

A petition for a skilled worker or professional must be accompanied by a valid, individual labor certification, an application for Schedule A designation, or documentation establishing the beneficiary's qualifications for a shortage occupation. 8 C.F.R. § 204.5(1)(3)(i). A labor certification remains valid only for the particular job opportunity and the geographic area of intended employment stated on it. 20 C.F.R. § 656.30(c)(2) (2004).⁴ For labor certification purposes, the term "area of intended employment" means "the area within normal commuting distance of the place (address) of intended employment" and includes any place within the same Metropolitan Statistical Area (MSA). 20 C.F.R. § 656.3.

A petition is properly denied if a petitioner intends to employ a beneficiary outside the geographic area of intended employment stated on an accompanying labor certification. See *Matter of Sunoco Energy Dev. Co.*, 17 I&N Dec. 283, 283 (Reg'l Comm'r 1979) (upholding a petition's denial where a petitioner intended to employ a beneficiary in a different state than indicated on the accompanying labor certification); *Che-Li Shen v. INS*, 749 F.2d 1469, 1472-73 (10th Cir. 1984) (same).

³ Because the Director took action favorable to the petitioner, he could have suspended the 30-day period for submission of a brief. See 8 C.F.R. § 103.4(a)(3).

⁴ The filing of the accompanying labor certification pre-dated the March 28, 2005 effective date of the DOL's current regulations. Thus, DOL's prior regulations govern the labor certification in this matter. See Final Rule for PERM (Program Electronic Review Management) Process, 69 Fed. Reg. 77326 (Dec. 27, 2004). This decision will therefore cite to 20 C.F.R. § 656, *et seq.*, as the regulations existed in 2004.

A petitioner other than the employer identified on an accompanying labor certification may offer the certified job opportunity to a beneficiary for immigration purposes only if it establishes itself as a successor-in-interest to the original prospective employer. *Matter of Dial Auto Repair Shop*, 19 I&N Dec. 481, 482 (Comm'r 1986). To establish a successor-in-interest relationship, a petitioner must demonstrate that it acquired the essential rights and obligations needed to carry on the predecessor's business. It must: fully describe and document the transaction transferring ownership of all, or a relevant part of, the predecessor to it; demonstrate that the job opportunity is the same one indicated on the labor certification; and prove its eligibility for an immigrant visa in all respects, including its ability to pay the proffered wage. *See id.* at 482-83.

In the instant case, as the NOIR indicated, the accompanying labor certification identifies an employer with a different name, address, and corporate structure than the petitioner. The labor certification identifies the employer as ' [REDACTED] ' and provides a [REDACTED] address for the company and the area of intended employment. A 2001 federal income tax return and Internal Revenue Service Forms W-2 Wage and Tax Statements for 2001 and 2004 also accompanied the petition. These documents identify a corporation at the same [REDACTED] address stated on the labor certification as ' [REDACTED] ' and state its federal employer identification number (FEIN).

The Form I-140, Petition for Alien Worker, states that the petitioner will employ the beneficiary in the offered position. The Form I-140 identifies the petitioner as ' [REDACTED] ' and states an address in [REDACTED], Connecticut as the petitioner's address and area of intended employment. The form also states an FEIN for the petitioner different than the FEIN associated with the labor certification employer.

In response to the Director's NOIR, the petitioner provided a letter from its president on the stationery of another company, [REDACTED], which has the same address as the petitioner. The letter states that [REDACTED] originally employed the beneficiary and filed the labor certification application on his behalf. The letter states that the petitioner was formed in Connecticut in 2004 as a wholly owned subsidiary of [REDACTED]. The petitioner purportedly bought the assets of [REDACTED] on December 8, 2004, and the petitioner submitted a copy of the purchase agreement.

The letter states that the beneficiary became the petitioner's employee on May 16, 2005, shortly after the petition's approval. It states that the beneficiary later became an employee of [REDACTED] on September 11, 2006, when the manufacturing operations of the petitioner and [REDACTED] were consolidated.

The letter on [REDACTED] stationery and the purchase agreement constitute evidence of the petitioner's acquisition of essential rights and obligations need to carry on the labor certification employer's business. However, because the petitioner intends to employ the beneficiary in [REDACTED] Connecticut, rather than in [REDACTED] the geographic area of intended employment stated on the labor certification, the record does not establish the same job opportunity or the continued validity of the accompanying labor certification.

Connecticut is not in the same MSA as . See U.S. Dep't of Labor, Foreign Labor Data Ctr., at <http://www.flcdatcenter.com> (accessed Apr. 23, 2015). We take administrative notice that is about miles from . However, the petitioner did not submit evidence to establish whether is "within normal commuting distance" of . See *Matter of MEMC Elec. Materials*, 98-INA-226, 1999 WL 64506, *4 (BALCA Feb. 3, 1999) (citing U.S. Dep't of Labor, Emp't & Training Admin., Gen. Admin. Letter 4-95) (stating that "[i]f the place of employment is not within the boundaries of an MSA ..., a determination as to the normal commuting distance must be made based on the [state employment security agency]'s knowledge of commuting practices in the area"). The record thus did not establish the same job opportunity in the geographic area of intended employment stated on the labor certification. The record therefore also did not establish the continued validity of the accompanying labor certification pursuant to 20 C.F.R. § 656.30(c)(2).

In addition, the record did not demonstrate the petitioner's offer of a position with the same duties stated on the accompanying labor certification. The labor certification states the main duties of the offered position of machinery mechanic as "repair[ing] and maintain[ing] industrial grommet, rivet, eyelet, and snap machinery." However, in a November 2, 2005 letter submitted in support of the beneficiary's application for adjustment of status, the petitioner stated that it employed the beneficiary as "a full-time production worker" whose duties "related to the assembly and manufacture of machines."

Thus, while the labor certification describes a position involving repairing and maintaining machines, the petitioner's letter describes a position involving the assembly and manufacture of machines. The record therefore did not establish that the petitioner intended to employ the beneficiary in the same job opportunity described on the labor certification. See *Ho*, 19 I&N Dec. at 591-92 (requiring a petitioner to resolve inconsistencies in the record by independent and objective evidence).

For the foregoing reasons, the record at the time of the Director's decision did not establish the continuing validity of the accompanying labor certification or the petitioner's relationship as a successor-in-interest to the labor certification employer.

The Petitioner's Ability to Pay the Proffered Wage

The record at the times of the NOIR's issuance and the Director's decision also did not establish the petitioner's ability to pay the proffered wage.

A petitioner must establish its continuing ability to pay a proffered wage from the petition's priority date until the beneficiary obtains lawful permanent residence. 8 C.F.R. § 204.5(g)(2). Evidence of ability to pay "shall be in the form of copies of annual reports, federal tax returns, or audited financial statements." *Id.* A petitioner must demonstrate the unavailability of required documentation before other evidence will be considered. 8 C.F.R. § 103.2(a)(2)(i).

A company claiming to be a successor-in-interest to a labor certification employer must demonstrate the labor certification employer's ability to pay the proffered wage, as well as its own. *Dial Auto Repair*, 19 I&N Dec. at 482 (stating that "it is incumbent upon the petitioner to establish that the

wage offer could have been met when the application for a labor certification was accepted for processing by the Department of Labor”).

In the instant case, the accompanying labor certification states the proffered wage for the offered position as \$12 per hour, or \$24,960 per year for a 40-hour work week. As previously indicated, the petition’s priority date is April 30, 2001.

The record contains a copy of the 2001 federal income tax returns of the labor certification employer. However, the record does not contain copies of the labor certification employer’s annual reports, federal tax returns, or audited financial statements for any other years between the petition’s 2001 priority date and its 2005 filing date. The record also does not contain any annual reports, federal tax returns, or audited financial statements of the petitioner. Because the petitioner did not submit evidence required by 8 C.F.R. § 204.5(g)(2) or establish the evidence’s unavailability pursuant to 8 C.F.R. § 103.2(b)(2)(i), the record did not establish its continuing ability to pay the proffered wage.

The record contains copies of the beneficiary’s Forms W-2 for 2001, and for 2003 through 2013, indicating the beneficiary’s successive employment with the labor certification employer, the petitioner, and [REDACTED] over those years.⁵ Such additional evidence may be submitted to establish a petitioner’s ability to pay a proffered wage. However, such documentation may not substitute for evidence required by regulation. See 8 C.F.R. § 204.5(g)(2) (stating that evidence of ability to pay “*shall be* in the form of copies of annual reports, federal tax returns, or audited financial statements.” (emphasis added)).

Also, the Forms W-2 ascribe different U.S. Social Security numbers to the beneficiary. The Forms W-2 issued by the labor certification employer identify the beneficiary by one number, while the Forms W-2 issued by the petitioner identify him by another. The Form I-140 ascribes a third Social Security number to the beneficiary.

Government records identify the number stated on the Forms W-2 from the petitioner as a valid number for the beneficiary. The records identify the number on the Forms W-2 from the labor certification employer as that of another person, and the number on the Form I-140 as “unverified.” The record does not explain the different Social Security numbers attributed to the beneficiary. The inconsistencies cast doubt on the beneficiary’s claimed employment with the labor certification employer. See *Ho*, 19 I&N Dec. at 591-92 (stating that a petitioner must resolve inconsistencies of record by independent, objective evidence).

In concluding that the petitioner established its continuing ability to pay the proffered wage, the Director examined “the totality of the circumstances.” He found that the Forms W-2 of record

⁵ The NOC indicates that the petitioner submitted a copy of the beneficiary’s IRS Form W-2 for 2002, issued by the labor certification employer. However, we are unable to locate that document in the record.

demonstrated the labor certification employer's ability to pay almost the entire proffered wage each year from 2001 through 2004. The Director considered the length of time the petitioner had been in business and the number of workers it claimed to employ. He also found that the terrorist attacks in New York City on September 11, 2001 likely affected the labor certification employer's ability to pay.

As the Director's decision indicates, we can consider a company's overall business circumstances when determining its ability to pay a proffered wage. See *Matter of Sonogawa*, 12 I&N Dec. 612, 614-15 (Reg'l Comm'r 1967). However, we may only do so if a petitioner provides evidence required by regulation or establishes the evidence's unavailability. See 8 C.F.R. § 204.5(g)(2) (requiring evidence of the ability to pay in the form of copies of annual reports, federal tax returns, or audited financial statements); 8 C.F.R. § 103.2(b)(2)(i) (requiring a petitioner to demonstrate the unavailability of required documentation before other evidence will be considered).

Also, the record did not establish that the events of September 11, 2001 affected the labor certification employer's ability to pay the proffered wage. The petitioner's president stated in the letter on [redacted] stationery that the labor certification employer was located about one mile from the World Trade Center, where the terrorist attacks in New York City occurred. He stated that the company "was effectively incapacitated as a result of the 9/11 events, due to its proximity to the World Trade Center site and the residual economic slowdown when operations were able to be restored." However, the record does not include any evidence to support the statements of the petitioner's president. See *Matter of Soffici*, 22 I&N Dec. 158, 165 (Comm'r 1998) (citing *Matter of Treasure Craft of Cal.*, 14 I&N Dec. 190, 193 (Reg'l Comm'r 1972) (stating that uncorroborated statements are insufficient to meet the burden of proof in the visa petition proceedings).

For the foregoing reasons, the record at the time of the NOIR's issuance and the Director's decision did not establish the continuing abilities of the labor certification employer and the petitioner to pay the proffered wage from the petition's priority date onward.

The Beneficiary's Qualifying Experience

The record at the times of the NOIR's issuance and the Director's decision also did not establish the beneficiary's qualifying experience for the offered position.

A petitioner must establish a beneficiary's possession of all the education, training, and experience specified on an accompanying labor certification by a petition's priority date. 8 C.F.R. §§ 103.2(b)(1), (12); see also *Matter of Wing's Tea House*, 16 I&N Dec. 158, 159 (Acting Reg'l Comm'r 1977); *Matter of Katigbak*, 14 I&N Dec. 45, 49 (Reg'l Comm'r 1971).

In evaluating a beneficiary's qualifications, we must examine the job offer portion of the labor certification to determine the minimum requirements of the offered position. We may not ignore a term of the labor certification, nor may we impose additional requirements. See *K.R.K. Irvine, Inc. v. Landon*, 699 F.2d 1006, 1009 (9th Cir. 1983); *Madany v. Smith*, 696 F.2d 1008, 1012-13 (D.C.

Cir. 1983); *Stewart Infra-Red Commissary of Mass., Inc. v. Coomey*, 661 F.2d 1, 3 (1st Cir. 1981).

In the instant case, the accompanying labor certification states that the offered position of machinery mechanic requires two years of experience in the job offered. The beneficiary attested on the labor certification to more than 14 years of full-time, qualifying experience before joining the labor certification employer in the offered position in January 1991. He stated that he worked for [REDACTED] in [REDACTED] Poland as a machinery mechanic from 1975 to August 1990.

A petitioner must support a beneficiary's claimed qualifying experience with a letter from an employer. 8 C.F.R. § 204.5(l)(3)(ii)(A). The letter must provide the name, address, and title of the employer, and a description of the beneficiary's experience. *Id.*

The record contains a copy of a March 7, 2005 letter on the stationery of the beneficiary's claimed former employer in [REDACTED] Poland. The English translation submitted with the original petition states that the beneficiary worked full-time for the company from November 16, 1974 to July 31, 1990 as a "mechanic/milling machine operator."

The Director's NOIR noted that the English translation was not certified pursuant to 8 C.F.R. 103.2(b)(3) and that it stated slightly different dates of employment than indicated on the labor certification. In response, the petitioner submitted a new, certified translation of the letter. The new translation states that the beneficiary worked full time from November 16, 1974 to July 31, 1990 as a "lathe machine operator."

Besides the slightly inconsistent dates of employment, neither translation of the letter contains a description of the beneficiary's experience or duties pursuant to 8 C.F.R. § 204.5(l)(3)(ii)(A). The record therefore does not establish the beneficiary's qualifying experience for the offered position.

The translations of the letters also contain different job titles for the beneficiary's purported position. The first translation identified the position as a "mechanic/milling machine operator," while the second translation described the position as a "lathe machine operator."⁶ The beneficiary identified his position on the labor certification as a "machinery mechanic." The inconsistencies in the job titles cast doubt on the beneficiary's claimed qualifying experience. *See Ho*, at 591-92 (stating that a petitioner must resolve inconsistencies of record by independent, objective evidence).

For the foregoing reasons, the evidence of record does not establish the beneficiary's possession of the required experience specified on the labor certification by the petition's priority date.

⁶ The first translation also does not clearly indicate whether the beneficiary worked in one position ("mechanic/milling machine operator") during his tenure with the company, or whether he worked in two separate positions ("mechanic" and "milling machine operator") over the course of his employment with the company.

Conclusion

Pursuant to our instructions, the Director certified his decision in this matter for our review. Contrary to the Director's findings, the record indicates the petition's erroneous approval. The record at the times of the NOIR's issuance and the Director's decision did not establish the petitioner's relationship as a successor-in-interest to the labor certification employer. The record also did not establish the continuing abilities of the labor certification employer and the petitioner to pay the proffered wage, or the beneficiary's qualifying experience for the offered position. In view of the foregoing, we will remand the petition to the Director for consideration of the above. The Director may request additional evidence considered pertinent. Similarly, the petitioner may provide additional evidence within a reasonable period of time determined by the Director.

In visa revocation proceedings, as in visa petition proceedings, the petitioner bears the burden of proving eligibility for the benefit sought. Section 291 of the Act, 8 U.S.C. § 1361; *Ho*, 19 &N Dec. at 589. Here, that burden has not been met.

ORDER: The Director's decision of February 10, 2015 is withdrawn. The petition is remanded to the Director, Texas Service Center, for further action consistent with the foregoing and the entry of a new decision.