



U.S. Citizenship
and Immigration
Services

(b)(6)



DATE: JUN 25 2015

FILE #: [REDACTED]
PETITION RECEIPT #: [REDACTED]

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

PETITION: Immigrant Petition for Alien Worker as a Skilled Worker or Professional Pursuant to 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, Texas Service Center (Director), approved the immigrant visa petition on December 15, 2009. However, on December 19, 2014, he revoked the petition's approval. The matter is now before the Administrative Appeals Office (AAO) on appeal. The director's decision will be withdrawn in part and the appeal will be dismissed. The petition's approval will remain revoked.

The petitioner owns and operates a restaurant. It seeks to permanently employ the beneficiary in the United States as an IT [information technology] Director. 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).¹

An ETA Form 9089, Application for Permanent Employment Certification (labor certification), certified by the U.S. Department of Labor (DOL), accompanies the petition. The petition's priority date is November 12, 2008, which is the date the DOL 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. If supported by the record, a director's realization that he erroneously approved a petition may constitute good and sufficient cause for revocation. *Matter of Ho*, 19 I&N Dec. 582, 590 (BIA 1988).

The Director concluded that the record did not establish the beneficiary's qualifications for the offered position or the petitioner's continuing ability to pay the proffered wage. Accordingly, the Director revoked the petition's approval.

The record shows that the appeal is properly filed and alleges specific errors in law and fact. The record documents the case's procedural history, which is incorporated into the decision. We will elaborate on the procedural history only as necessary.

We conduct appellate review on a *de novo* basis. *See, e.g., Soltane v. Dep't of Justice*, 381 F.3d 143, 145 (3d Cir. 2004). We consider all pertinent evidence of record, including new evidence properly submitted on appeal.²

¹ 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 unavailable 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.

² The instructions to Form I-290B, Notice of Appeal or Motion, which are incorporated into the regulations by 8 C.F.R. § 103.2(a)(1), allow the submission of additional evidence on appeal. The instant record provides no reason to preclude consideration of documents newly submitted on appeal. *See Matter of Soriano*, 19 I&N Dec. 764, 766 (BIA 1988).

The Notice of Intent to Revoke

Good and sufficient cause exists to issue a notice of intent to revoke where 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 revocation, including any rebuttal evidence or arguments submitted by the petitioner, would warrant the petition's denial. *Id.* at 452.

In the instant case, the Director's Notice of Intent to Revoke (NOIR), dated October 7, 2014, alleges two revocation grounds. The record at the time of the NOIR's issuance did not establish the petitioner's ability to pay the proffered wage. Good and sufficient cause therefore existed to issue the NOIR on that ground.

The NOIR does not clearly describe the other revocation ground. The NOIR alleges that the petitioner did not establish the existence of a "bona fide job offer." The petitioner interpreted the allegation as an assertion that a special relationship between the petitioner and the beneficiary rendered the offered position unavailable to U.S. workers. See *Matter of Modular Container Sys., Inc.*, 89-INA-228, 1991 WL 223955, *7 (BALCA July 16, 1991) (*en banc*) (stating that "[w]here the alien for whom labor certification is sought is in a position to control hiring decisions or where the alien has such a dominant role in, or close personal relationship with, the sponsoring employer's business that it would be unlikely that the alien would be replaced by a qualified U.S. applicant, the question arises whether the employer has a bona fide job opportunity"). However, as the Director ultimately found in the Notice of Revocation (NOR), the record did not support the existence of a special relationship between the petitioner and the beneficiary.

Citing evidence that another company hosts the petitioner's website, the NOIR also appears to question the petitioner's intention to employ the beneficiary in the offered position. The evidence cited by the NOIR is insufficient to support this potential revocation ground. However, we cited additional evidence in support of this ground in our Notice of Derogatory Information and Intent to Dismiss the appeal (NOID), dated April 10, 2015. See 5 U.S.C. § 557(b) (stating that an administrative agency retains all the powers on review that it would have in making the initial decision); see also *Betancur v. Roark*, No. 10-11131-RWZ, 2012 WL 4862774, *9 (D. Mass. Oct. 15, 2012 (finding that our issuance of a Request for Evidence or NOID "cures" a prior, deficient NOIR). We will discuss this revocation ground later in the decision.

In addition, the NOIR alleges inconsistencies in the beneficiary's claimed qualifying experience for the offered position. However, as discussed below, the record does not warrant revocation of the petition's approval on this ground.

The Beneficiary's Qualifications

A beneficiary must meet all the requirements of an offered position 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 determining 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).

The instant labor certification states that the offered position of IT Director requires a Master's degree or a foreign equivalent degree in information management, computer science, or a related field, without any experience. Alternatively, the labor certification states that the petitioner will accept a Bachelor's degree and two years of experience as a System Developer, Computer Systems Administrator, Web Designer, or Systems Analyst.

The record establishes the beneficiary's receipt of a U.S. Master's degree in information management in 2004. The beneficiary also attested on the labor certification that he gained more than two years of qualifying experience. He stated that he worked for [REDACTED] in Thailand as a System Developer from February 1, 2001 to July 31, 2003.

The Director found a "discrepancy" in the beneficiary's claimed, qualifying experience. A copy of the beneficiary's resume states that he worked for Safety Insurance as a "Credit Analyst and Debt Collection System Developer," rather than as a "System Developer" as indicated on the labor certification. However, despite the different job titles, the labor certification and the beneficiary's resume do not state any material differences in his job duties at Safety Insurance. Moreover, the beneficiary qualifies for the offered position based on his Master's degree alone; his qualifying experience is irrelevant. The record therefore establishes the beneficiary's qualifications for the offered position stated on the labor certification by the petition's priority date.

Because the record on appeal establishes the beneficiary's qualifications for the offered position, we will withdraw this portion of the Director's decision.

Ability to Pay the Proffered Wage

As indicated in our NOID, the record at the time of the petition's revocation did not establish the petitioner's continuing ability to pay the proffered wage.

A petitioner must establish its continuing ability to pay a proffered wage from a petition's priority date until a beneficiary obtains lawful permanent residence. 8 C.F.R. § 204.5(g)(2). Evidence of ability to pay must include copies of annual reports, federal income tax returns, or audited financial statements. *Id.*

In determining a petitioner's ability to pay, we first examine whether the petitioner paid a beneficiary the full proffered wage each year from the petition's priority date. If the petitioner did not pay the

beneficiary the full proffered wage, we next examine whether it had sufficient annual net income or net current asset amounts to pay the difference between the wages paid, if any, and the proffered wage.³ If a petitioner's net income and net current asset amounts are insufficient to demonstrate its ability to pay, we may consider the overall magnitude of its business activities. See *Matter of Sonegawa*, 12 I&N Dec. 612, 614-15 (Reg'l Comm'r 1967).

In the instant case, the accompanying labor certification states the proffered wage for the offered position of IT Director as \$50,850 per year. As previously indicated, the petition's priority date is November 12, 2008.

The record contains copies of the beneficiary's Internal Revenue Service (IRS) Forms W-2, Wage and Tax Statements for 2008 through 2013. The materials indicate that the petitioner paid the beneficiary the following annual wage amounts:

- \$8,259.92 in 2008;
- \$46,860 in 2009;
- \$50,814.40 in 2010;
- \$51,940.80 in 2011;
- \$54,475.20 in 2012; and
- \$54,475.20 in 2013.

The Forms W-2 establish the petitioner's ability to pay in 2010, 2011, 2012, and 2013, as the stated annual wage amounts it paid the beneficiary in those years equaled or exceeded the annual proffered wage.⁴ However, the materials do not demonstrate the petitioner's ability to pay in 2008 and 2009, before the petition's approval on December 15, 2009. The petitioner must establish its ability to pay the differences between the annual wages it paid the beneficiary and the annual proffered wage in 2008 and 2009. Thus, it must establish its ability to pay \$42,591.08 in 2008 and \$3,990 in 2009.

The petitioner's tax returns reflect the following annual net income amounts:

- \$(3,930) in 2008;⁵ and
- \$(1,626) in 2009.

Because the petitioner's tax returns reflect negative annual net income amounts for 2008 and 2009, the returns do not establish its ability to pay in those years based on its net income.

³ Federal courts have upheld our method of determining a petitioner's ability to pay a proffered wage. See *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); *Rivzi v. Dep't of Homeland Sec.*, 37 F. Supp. 3d 870, 884-85 (S.D. Tex. 2014); *Just Bagels Mfg., Inc. v. Mayorkas*, 900 F. Supp. 2d 363, 373-76 (S.D.N.Y. 2012); *Taco Especial v. Napolitano*, 696 F. Supp. 2d 873, 880 (E.D. Mich. 2010), *aff'd*, No. 10-1517 (6th Cir. Nov. 10, 2011).

⁴ We consider the beneficiary's wages of \$50,814.40 in 2010 to be the equivalent of the annual proffered wage of \$50,850.

⁵ Figures in parentheses reflect negative amounts.

The petitioner's tax returns reflect the following annual net current asset amounts:

- \$(48,529) in 2008; and
- \$(156,729) in 2009.

As the petitioner's tax returns also reflect negative annual net current asset amounts for 2008 and 2009, the record does not establish its ability to pay based on its net current assets.

Thus, based on examinations of the wages the petitioner paid the beneficiary, its annual net income, and its annual net current assets, the record does not establish its ability to pay the proffered wage in 2008 and 2009.

In addition, USCIS records indicate that the petitioner filed an I-140 petition [REDACTED] for another beneficiary that remained pending after the instant petition's priority date. A petitioner must demonstrate its ability to pay the proffered wage of each beneficiary. See 8 C.F.R. § 204.5(g)(2); *Matter of Great Wall*, 16 I&N Dec. 142, 145 (Acting Reg'l Comm'r 1977) (holding that a petitioner must demonstrate its ability to pay the proffered wage at the time of its offer). Therefore, the petitioner must demonstrate its ability to pay the combined proffered wages of both the instant beneficiary and the beneficiary of its other petition. The petitioner must establish its ability to pay the combined proffered wages from the instant petition's priority date until the other beneficiary obtained lawful permanent residence, or until the other petition was withdrawn, denied, or revoked. See *Patel v. Johnson*, 2 F. Supp. 3d 108, 124 (D. Mass. 2014) (upholding our finding that a petitioner did not demonstrate its ability to pay multiple beneficiaries).

The instant record does not indicate the priority date or proffered wage of the petitioner's other petition, or whether the petitioner paid any wages to the other beneficiary during the relevant period. The record also does not indicate whether the other beneficiary obtained lawful permanent residence, or whether the other petition was denied, withdrawn, or revoked. Without this information, the record does not establish the petitioner's ability to pay the combined proffered wages of both beneficiaries pursuant to 8 C.F.R. § 204.5(g)(2) and *Great Wall*.

On appeal, the petitioner argues that it has employed the beneficiary full-time since December 8, 2008, when it filed an H-1B nonimmigrant visa petition amending his employment status from part-time to full-time. Noting that it paid the beneficiary \$46,860 in 2009, nearly the annual proffered wage of \$50,850, the petitioner argues that "[s]light fluctuations in wages such as this are normal (medical leaves, extended trips) and are certainly not justification" for revocation of the petition's approval.

However, as previously indicated, a petitioner must demonstrate its continuing ability to pay a proffered wage in all relevant years, beginning with the year of the petition's priority date. See 8 C.F.R. § 204.5(g)(2). The instant record indicates that the petitioner promised in the amended H-1B petition to pay the beneficiary full-time, annual wages of \$50,814. However, the record does not demonstrate the petitioner's payment to the beneficiary of the proffered wage (or even the promised, full-time H-1B wage) in 2008 and 2009. The petitioner asserts that medical leaves and extended trips can cause wages

to fluctuate. However, the record does not indicate that the beneficiary took medical leaves, extended trips, or other forms of unpaid absences from the petitioner in 2008 or 2009. *See Matter of Soffici*, 22 I&N Dec. 158, 165 (Comm'r 1998) (citation omitted) (stating that uncorroborated assertions are insufficient to meet the burden of proof in visa petition proceedings). In addition, the petitioner's response to our NOID did not include the requested information about its other pending petition. Therefore, the petitioner's financial documentation does not demonstrate its continuing ability to pay the proffered wage from the petition's priority date onward.

As previously indicated and as the petitioner argues, we may consider the overall magnitude of its business activities in determining its ability to pay the proffered wage. *See Sonogawa*, 12 I&N Dec. at 614-15. In *Sonogawa*, the petitioner conducted business for more than 11 years, routinely earning a net annual income of about \$100,000. However, in the year of the petition's filing, the petitioner's tax returns did not reflect its ability to pay the proffered wage. During that year, the petitioner relocated its business, causing it to pay rent on two locations for a five-month period, incur substantial moving costs, and briefly suspend its business operations. Despite these difficulties, the Regional Commissioner determined that the petitioner would likely resume successful business operations and had established its ability to pay. The record indicated that national magazines had featured the petitioner's work as a fashion designer and that her clients included the then Miss Universe, movie actresses, society matrons, and women on lists of the best-dressed in California. The record also demonstrated that the petitioner lectured at U.S. design and fashion shows and at California colleges and universities.

As in *Sonogawa*, we may consider evidence of the instant petitioner's ability to pay beyond its net income and net current assets. We may consider such factors as: the number of years it has conducted business; the growth of its business; its number of employees; the occurrence of any uncharacteristic business expenditures or losses; its reputation within its industry; whether the beneficiary will replace a former employee or an outsourced service; and other evidence of its ability to pay the proffered wage.

The instant record indicates that the petitioner has conducted business since 2004 and that, as of the petition's filing in 2009, it employed 31 people. However, unlike in *Sonogawa*, the record does not indicate the occurrence of any uncharacteristic business expenditures or losses, or establish the petitioner's outstanding reputation in its industry. Also unlike in *Sonogawa*, the record indicates that the petitioner must demonstrate its ability to pay multiple beneficiaries.

Noting that its tax returns reflect annual gross revenues of more than \$1 million from 2008 through 2013, the petitioner argues that it can "easily fill the gap of \$3,990" between the annual proffered wage and the amount paid to the beneficiary in 2009. However, the petitioner does not specify how it can "fill the gap." Moreover, the petitioner's tax returns indicate that its annual wages paid have decreased significantly since 2008, while its annual gross revenue amounts have stagnated over the same period. Also, unlike the petitioner in *Sonogawa*, the instant petitioner's tax returns do not reflect sufficient annual net income or net current asset amounts to pay the proffered wage in any year.

Thus, assessing the totality of the circumstances in this individual case, the record does not establish the petitioner's continuing ability to pay the proffered wage. We will therefore affirm the revocation of the petition's approval on this ground.

Intent to Permanently Employ the Beneficiary in the Offered Position on a Full-Time Basis

As indicated in our NOID, the record also does not establish the petitioner's intent to permanently employ the beneficiary in the offered position on a full-time basis.

A labor certification remains valid only for the particular job opportunity, the alien, and the geographical area of intended employment stated on it. 20 C.F.R. § 656.30(c). For labor certification purposes, "employment" means "permanent, full-time work." 20 C.F.R. § 656.3. A petitioner must intend to employ a beneficiary pursuant to the terms of an accompanying labor certification. *See Matter of Izdebska*, 12 I&N Dec. 54, 54 (Reg'l Comm'r 1966) (upholding a visa petition denial where the petitioner did not intend to employ the beneficiary as a live-in domestic worker pursuant to the accompanying labor certification).

The instant labor certification states that the offered permanent, full-time position of IT Director involves: designing, updating, and maintaining the petitioner's website; and monitoring and maintaining computer systems used for taking orders, accounting, and restaurant inventory.

The petitioner claims that it has employed the beneficiary as a Computer Systems Administrator/Web Designer pursuant to its H-1B petitions on his behalf. However, evidence of record indicates that the beneficiary also performs the duties of a restaurant manager for the petitioner. In his November 4, 2014 letter in response to the Director's NOIR, the petitioner's owner stated that the beneficiary spends 10 percent of his time in his current position performing "[m]iscellaneous managerial duties, as needed."

Also, as indicated in the NOIR, an employee of the petitioner told an immigration officer on February 8, 2012 that the beneficiary's duties included talking to customers, resolving their complaints, managing approximately 12 servers and hostesses, scheduling staff, expediting food orders, and waiting tables as needed. The immigration officer also reported that, during her visit to the petitioner's restaurant, the beneficiary processed inventory, worked on payroll records, and supervised employees. The beneficiary's reported duties mirror those of a food service manager, not a computer systems analyst. *See Bureau of Labor Statistics, Occupational Outlook Handbook, 2014-15 Edition, Food Serv. Managers, available at <http://www.bls.gov/ooh/management/food-service-managers.htm> (accessed May 26, 2015) (stating that the duties of food service managers typically include: overseeing employees; managing inventory; investigating and resolving complaints; scheduling staff hours; and maintaining payroll records).*

The immigration officer also reported that the beneficiary told her that the petitioner pays [REDACTED] to maintain its website and that the beneficiary "was unable to articulate in a manner that showed proficiency" in the computer languages he purportedly uses to maintain the

website. In response to the Director's NOIR, counsel asserted that [REDACTED] only hosts the petitioner's website on its servers and that the petitioner designs, maintains, and updates its website.

However, the record does not establish that [REDACTED] merely hosts the petitioner's website. [REDACTED]'s website states that the company provides website design and other website services in addition to webhosting services. See [REDACTED] at [https://\[REDACTED\]](https://[REDACTED]) (accessed May 26, 2015). Moreover, counsel's assertions do not constitute evidence. *INS v. Phinpathya*, 464 U.S. 183, 188 n.6 (1984) (noting that an attorney's unsupported assertions do not establish facts of record).

In addition, as indicated in our NOID, a [REDACTED], 2012 article in a local newspaper identified the manager of the petitioner's restaurant as "[REDACTED]," an apparent reference to the beneficiary. See [REDACTED] "For local vegetarians, dining options grow," available at, [http://\[REDACTED\]](http://[REDACTED]) (accessed May 26, 2015).

Thus, the record indicates that the beneficiary does not solely perform information technology duties for the petitioner. Rather, the record indicates that at least part of his duties involve managing the petitioner's restaurant. The record therefore does not establish the petitioner's ability or intention to employ the beneficiary in the offered position on a full-time basis as specified on the labor certification. See *Matter of Albert Einstein Med. Ctr.*, 2009-PER-00379, 2011 WL 5901395, **38-41 (BALCA Nov. 21, 2011) (*en banc*) (finding that an offer of permanent employment must include "work of lasting duration" and an ability and intention to employ on a continuous basis).

Our NOID afforded the petitioner an opportunity to submit additional evidence and arguments in support of its claimed intention to employ the beneficiary pursuant to the terms of the accompanying labor certification. However, the petitioner's NOID response does not contain any evidence or arguments addressing the issue.

The beneficiary's current managerial duties and the services provided to the petitioner by [REDACTED] suggest that the petitioner does not intend to employ him full-time and permanently pursuant to the terms of the accompanying labor certification. See *Ho*, 19 I&N Dec. at 591-92 (holding that a petitioner must resolve inconsistencies in the record by independent, objective evidence). The record therefore does not establish the petitioner's intention to permanently employ the beneficiary on a full-time basis pursuant to the accompanying labor certification.

Conclusion

The record establishes the beneficiary's qualifications for the offered position. We will therefore withdraw the Director's contrary conclusion. However, the record does not establish the petitioner's continuing ability to pay the proffered wage. We will therefore affirm the Director's revocation of the petition's approval on this ground. The record at the time of the revocation also does not establish the petitioner's intent to permanently employ the beneficiary on a full-time basis pursuant

to the accompanying labor certification.

The appeal will be dismissed for the reasons stated above, with each considered an independent and alternative basis for dismissal. As in visa petition proceedings, a petitioner in visa revocation proceedings bears the burden of establishing eligibility for the immigration benefit sought. Section 291 of the Act, 8 U.S.C. § 1361; *Ho*, 19 I&N Dec. at 589. Here, that burden has not been met on all grounds.

ORDER: The Director's decision is withdrawn in part, and the appeal is dismissed. The petition's approval remains revoked.