



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

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

MATTER OF H-F-, INC.

DATE: JUNE 27, 2016

APPEAL OF TEXAS SERVICE CENTER DECISION

PETITION: FORM I-140, IMMIGRANT PETITION FOR ALIEN WORKER

The Petitioner, a poultry processing company, seeks to employ the Beneficiary as a poultry processing worker. It requests classification of the Beneficiary as an unskilled worker under the third preference immigrant classification. *See* 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 foreign national for lawful permanent resident status to work in a position that requires no training or experience.

The Director, Texas Service Center, approved the petition, but after further consideration concluded that the Petitioner had not established that a *bona fide* job offer existed. After issuing a notice of intent to revoke and giving the Petitioner an opportunity to respond, the Director invalidated the labor certification and revoked the approval of the petition.

The matter is now before us on appeal. The Petitioner asserts that the Director did not fully consider its response to the notice of intent to revoke. Upon *de novo* review, we will withdraw the Director's decision and remand the case for further proceedings.

I. LAW AND ANALYSIS

A. The Employment-Based Immigrant Visa Process

The employment-based immigrant visa process consists of three parts. First, the U.S. employer must obtain a labor certification, which the U.S. Department of Labor (DOL) processes. *See* 20 C.F.R. § 656, *et seq.* The employer initiates its request for a labor certification by filing an ETA Form 9089, Application for Permanent Employment Certification (labor certification), with DOL. The labor certification sets forth: the position's job duties; the position's education, experience, and other special requirements; the required wage; and the position's work location(s). In addition, as part of the labor certification, a beneficiary attests to his or her education and experience. The date the labor certification is filed becomes the "priority date" for the immigrant visa petition. 8 C.F.R. § 204.5(d). The priority date of the current petition is June 6, 2008.

The DOL's role in certifying the labor certification is set forth at section 212(a)(5)(A)(i) of the Act, 8 U.S.C. § 1182(a)(5)(A)(i). Its approval of the labor certification affirms that, "there are not sufficient

[U.S.] workers who are able, willing qualified” to perform the offered position where the beneficiary will be employed, and that the employment of the beneficiary will not “adversely affect the wages and working conditions of workers in the United States similarly employed.” *Id.* The labor certification is valid for 180 days from the date of its approval by DOL.

In the second step of the process, a petitioner files a Form I-140, Immigrant Petition for Alien Worker, with U.S. Citizenship and Immigration Services (USCIS) within the 180-day validity period. *See* 20 C.F.R. § 656.30(b)(1), 8 C.F.R. § 204.5. The agency then examines whether a petitioner can establish its ability to pay the proffered wage; whether the education and/or experience required for the offered position matches that required by the visa classification; and whether a beneficiary has the required education, training, and experience for the offered position. *See* section 203(b)(3)(A)(ii) of the Act, 8 U.S.C. § 1153(b)(3)(A)(ii); 8 C.F.R. § 204.5.

B. The *Bona Fide* Nature of the Job Offer

The issue before us is whether the Petitioner has established that a *bona fide* job opportunity exists. Under 20 C.F.R. §§ 626.20(c)(8) and 656.3, the petitioner has the burden when asked to show that a valid employment relationship exists and that a *bona fide* job opportunity is available to U.S. workers. *See Matter of Amger Corp.*, 87-INA-545 (BALCA 1987). USCIS must consider the merits of the petitioner’s job offer to determine whether the job offer is realistic. *See Matter of Great Wall*, 16 I&N Dec. 145 (Acting Reg’l Comm’r 1977).

The Director approved the petition on July 20, 2009. On September 3, 2015, the Director issued a notice of intent to revoke (NOIR). The Director stated that an investigation by the U.S. Department of State (DOS) consular office had revealed that the Beneficiary’s sister paid the company that filed the petition on behalf of the Petitioner “a large nonstandard fee of \$25,000 to prepare the petition.” The Director also noted that a close friend of the Beneficiary had assisted with the transaction. The Director stated that “[l]arge, nonstandard fees are commonplace in the poultry industry as a part of a scheme by petitioners to accept payment from beneficiaries and require them to work off the debt.” The Director stated that “payment for consideration and the incurring of debt in exchange for consideration results in the job not being available to all U.S. workers and the petition being invalid.” The Director concluded that the Petitioner had “misrepresented the job offer as being open to all U.S. workers.”

The Regulation at 20 C.F.R. § 656.12(b) states that “[a]n employer must not seek or receive payment of any kind for any activity related to obtaining permanent labor certification, including payment of the employer’s attorneys’ fees, whether as an incentive or inducement to filing, or as a reimbursement for costs incurred in preparing or filing a permanent labor certification application” At Line I.e.23. of the labor certification the Petitioner affirmed that it had not “received payment of any kind for the submission of this application.”

(b)(6)

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The NOIR specifically requested that the Petitioner submit the following documentation:

- A sworn affidavit from the third party who filed the petition for the Petitioner;
- A sworn affidavit from the Petitioner attesting to any and all amounts received personally or on behalf of the Petitioner in return for consideration of the Beneficiary for employment;
- A sworn affidavit from a financial officer of the Petitioner attesting to any and all amounts received personally or on behalf of the Petitioner in return for consideration of the Beneficiary for employment; and,
- Evidence sufficient to demonstrate that the job was open to all U.S. workers.

In response to the NOIR, the Petitioner submitted a statement from [REDACTED] who filed the petition for the Petitioner. [REDACTED] explained that the fees paid by the Beneficiary's sister covered both legal fees and "landing and resettlement" fees. [REDACTED] affirmed that none of the money paid on behalf of the Beneficiary was used for the labor certification process. The Petitioner also submitted the following documentation:

- Copies of the labor certification Recruitment Report, newspaper advertisements, and other recruitment efforts made by the Petitioner;
- A copy of a recruitment agreement between the Beneficiary and the third party that filed the petition;
- A copy of a June 3, 2015, letter from a friend of the Beneficiary attesting that she had helped pay the Beneficiary's legal fees and other fees in full;
- A copy of an "Unskilled Labor Sponsorship Agreement" between the Petitioner and the third party that they hired to file the petition; and,
- Letters dated September 30, 2015, from the Petitioner's CEO and from the Human Resources/Safety Manager explaining the difficulties the company had experienced in getting applicants for open positions and describing their use of a third party to help find suitable candidates. Both representatives of the Petitioner state that they "did not require or demand, and did not receive, any payment of any kind or in any amount from [the Beneficiary]."

The revocation concludes that the Petitioner did not "adequately resolve the inconsistencies noted above;" however, the only inconsistency described in the NOIR concerned the claim that the fees included "landing and resettlement." The Director noted that the Beneficiary's friend's letter said fees were "legal fees," while counsel said fees included optional amounts for airport pickup, temporary housing, driving school, and numerous other expenses not related to legal fees. The Director stated that "no probative evidence of the delivery of any of these specific services was submitted." Despite the varied classification of the fees, we do not find this to be an inconsistency. The individual who paid the fees did not indicate that any fees were paid for the labor certification process. Further, evidence of the delivery of "landing and resettlement" services would be unavailable where the Beneficiary never arrived in the United States.

The Director's decision lists the documentation submitted by the Petitioner in response to the NOIR. However, we note that the NOR only discusses two of the documents, counsel's statement and the

statement from the Beneficiary's friend. It is unclear whether the Director considered all evidence submitted in response to the NOIR. Therefore, we will remand the case to the Director for full consideration of the Petitioner's response to the notice of intent to revoke.

C. The Petitioner's Ability to Pay the Proffered Wage

Although not considered by the Director, we independently note that the Petitioner has not established its continuing ability to pay the proffered wage as of the priority date. *See* 8 C.F.R. § 204.5(g)(2). In general, 8 C.F.R. § 204.5(g)(2) requires annual reports, federal tax returns, or audited financial statements as evidence of a petitioner's ability to pay the proffered wage. The record only contains a copy of the Petitioner's "Combined/Consolidated Balance Sheets" dated December 27, 2008. The source of these photocopies is not identified.

The regulation further provides: "In a case where the prospective United States employer employs 100 or more workers, the director *may* accept a statement from a financial officer of the organization which establishes the prospective employer's ability to pay the proffered wage." (Emphasis added.) The record contains a June 24, 2009, letter from the Petitioner's human resources representative who stated that the company employs 400 workers and had net income of over \$311,000 in 2008. However, given the record as a whole, we find that USCIS need not exercise its discretion to accept the letter from the human resources representative. USCIS records indicate that the Petitioner has filed over 55 Form I-140 petitions since 2009. Consequently, USCIS must also take into account the Petitioner's ability to pay the Beneficiary's wages in the context of its overall recruitment efforts. Presumably, the Petitioner has filed and obtained approval of the labor certifications on the representation that it requires all of these workers and intends to employ them upon approval of the petitions. Therefore, it is incumbent upon the Petitioner to demonstrate that it has the ability to pay the wages of all of the individuals it is seeking to employ. Accordingly, the Petitioner must establish that it has had the continuing ability to pay the combined proffered wages to each beneficiary from the June 6, 2008, priority date of the instant petition. *See Patel v. Johnson*, 2 F.Supp.3d 108 (D. Mass. 2014); *see also Great Wall*, 144-145 (Acting Reg'l Comm'r 1977). The evidence in the record does not document the priority date, proffered wage and wages paid to each beneficiary, whether any of the other petitions have been withdrawn, revoked, or denied, and whether any of the other beneficiaries have obtained lawful permanent residence.

III. CONCLUSION

We determine that the Director did not consider the Petitioner's complete response to the NOIR. In view of the foregoing, the Director's notice of revocation is withdrawn. The petition is remanded to the Director, who may request any additional evidence considered pertinent. Similarly, the Petitioner may provide additional evidence within a reasonable period of time to be determined by the Director. Upon receipt of all the evidence, the Director will review the entire record and enter a new decision.

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ORDER: The decision of the Director, Texas Service Center, is withdrawn. The matter is remanded to the Director, Texas Service Center, for further proceedings consistent with the foregoing opinion and for the entry of a new decision.

Cite as *Matter of H-F-, Inc.*, ID# 17658 (AAO June 27, 2016)