



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

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

In Re: 20476821

Date: AUG. 26, 2022

Appeal of Texas Service Center Decision

Form I-140, Immigrant Petition for Professional

The Petitioner, a wholesaler and franchiser for a Danish retail furniture chain, seeks to employ the Beneficiary as a regional manager. The company requests his classification under the third-preference, immigrant visa category for professionals. *See* Immigration and Nationality Act (the Act) section 203(b)(3)(A)(ii), 8 U.S.C. § 1153(b)(3)(A)(ii).

The Director of the Texas Service Center denied the petition concluding that because the Petitioner and Beneficiary had a business relationship, the Petitioner's job offer was not *bona fide* because it intends to employ the Beneficiary outside the terms of the labor certification. The Director also made a finding of fraud or willful misrepresentation of a material fact and invalidated the labor certification.

In these proceedings, it is the Petitioner's burden to establish eligibility for the requested benefit by a preponderance of the evidence. Section 291 of the Act, 8 U.S.C. § 1361; *Matter of Chawathe*, 25 I&N Dec. 369, 375 (AAO 2010). We review 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 matter for entry of a new decision.

I. EMPLOYMENT-BASED IMMIGRATION

Immigration as a professional generally follows a three-step process. First, a prospective employer must apply to the U.S. Department of Labor (DOL) for certification that: (1) there are insufficient U.S. workers able, willing, qualified, and available for an offered position; and (2) the employment of a noncitizen in the position won't harm wages and working conditions of U.S. workers with similar jobs. *See* section 212(a)(5) of the Act, 8 U.S.C. § 1182(a)(5). Second, an employer must submit an approved labor certification with an immigrant visa petition to U.S. Citizenship and Immigration Services (USCIS). *See* section 204 of the Act, 8 U.S.C. § 1154. Among other things, USCIS determines whether a beneficiary meets the requirements of a certified position and a requested immigrant visa category. 8 C.F.R. § 204.5(l). Finally, if USCIS approves a petition, a designated noncitizen 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.

II. ANALYSIS

Pursuant to the statutory framework for the granting of immigrant status, any United States employer desiring and intending to employ an alien entitled to immigrant classification under the Act, may file a petition for classification. Section 204(a)(1)(F) of the Act, 8 U.S.C. § 1154(a)(1)(F); *see* 8 C.F.R. § 204.5(c). Such petitions must be accompanied by a labor certification (Form ETA 9089) from the DOL. *See* section 212(a)(5) of the Act, 8 U.S.C. § 1182(a)(5); *see also* 8 C.F.R. § 204.5(l)(3)(i). 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, a 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. *See Matter of Great Wall*, 16 I&N Dec. 142 (Acting Reg'l Comm'r 1977).

Further, the Act requires USCIS to determine eligibility for the visa classification requested. *See* section 204(a)(1)(F) of the Act, 8 U.S.C. § 1154(a)(1)(F). Certain classifications require a labor certification to establish eligibility. *See* section 203(b)(3)(C) of the Act, 8 U.S.C. § 1153(b)(3)(C); 8 C.F.R. § 204.5(a)(2); 8 C.F.R. § 204.5(l)(3)(i). Section 204(b) of the Act allows a petition's approval only after an investigation of the facts in each case to ensure that the facts stated in the petition, which necessarily includes the labor certification, are true. Section 204(b) of the Act, 8 U.S.C. § 1154(b). Thus, the labor certification is not conclusive evidence of eligibility. Instead, it is a precondition to being eligible to file a Form I-140. USCIS is responsible for reviewing the Form I-140, and the labor certification is incorporated into the Form I-140 by statute and regulation. *See* section 203(b)(3)(C) of the Act, 8 U.S.C. § 1153(b)(3)(C); 8 C.F.R. § 204.5(a)(2); 8 C.F.R. § 103.2(b)(i). USCIS is required to approve an employment-based immigrant visa petition only where it is determined that the facts stated in the petition, which incorporates the labor certification, are true and the foreign worker is eligible for the benefit sought. Section 204(b) of the Act, 8 U.S.C. § 1154(b).

In this case, the accompanying labor certification was filed on June 12, 2020. The Petitioner checked "no" to question C.9 on the labor certification: "Is the employer a closely held corporation, partnership, or sole proprietorship in which the alien has an ownership interest, or is there a familial relationship between the owners, stockholders, corporate officers, incorporators, or partners, and the alien?" The Director found that the Petitioner did not disclose a prior business relationship to DOL, and that the relationship calls into question whether the Petitioner's job offer was *bona fide*. In a Notice of Intent to Deny (NOID) the petition, the Director confronted the Petitioner with evidence that its CEO had served as a business point of contact on the Beneficiary's E-2 nonimmigrant visa application. The Director's decision notified the parties that the Beneficiary's 2018 filing of a Uniform Commercial Code (UCC) financial statement form naming the Petitioner as a secured party was further evidence of their close ties. (That financial statement related to a business owned by the Beneficiary and his spouse.) According to the Director, the Beneficiary's use of the Petitioner as a secured party on its financial statement and the naming of the Petitioner's CEO as a "Business Associate" on his

nonimmigrant visa application, constitutes a business relationship that should have been disclosed on question C.9. of the labor certification.

On appeal, the Petitioner argues that they did not fail to disclose a relationship that is contemplated by question C.9. of the labor certification. We agree. The extent to which the parties have a relationship that must be disclosed on question C.9. of the labor certification is a question of fact. Question C.9. contemplates two types of relationships. The instructions to the Form ETA 9089 state that a Petitioner must answer “Yes” or “No,” and further explains that “Closely Held Corporations are corporations that have relatively few shareholders and whose shares are not generally traded in the securities market.” DOL’s published FAQs provide more guidance about when a Petitioner must disclose a relationship and answer “Yes” to question C.9. *See* <https://www.foreignlaborcert.doleta.gov/faqsanswers.cfm> (last visited August 26, 2022). DOL’s form instructions and FAQs guidance do not appear to contemplate a situation such as the one found between the Petitioner, its CEO and the Beneficiary (or his spouse).

The record contains no evidence that the parties are related by blood, marriage, or adoption. The Beneficiary listed the Petitioner’s CEO as a “Business Associate” in his nonimmigrant visa application. Nor does the Beneficiary’s identification of the Petitioner on the UCC financial statement as a secured party indicate the type of scenario contemplated by question C.9. DOL’s guidance suggests that question C.9. contemplates situations where a beneficiary controls a petitioner’s business operations and hiring, such that the labor certification’s job offer is not legitimately open to U.S. workers. Here, neither document supports finding that the Petitioner is a closely-held corporation in which the Beneficiary holds a financial or controlling stake. In fact, no evidence of record shows that the Beneficiary has a stake in the Petitioner’s operations or hiring practices. The Petitioner is a wholesaler and franchiser of an overseas retail furniture store in the United States, and the Beneficiary (with his spouse) operates three of these franchise stores. However, neither the ETA 9089 form instructions nor the DOL FAQs point to this type of arrangement as one that should be specifically disclosed in question C.9. Moreover, the Petitioner did disclose the Beneficiary’s current position, and job duties at his franchises on the labor certification, which appears to have provided the DOL sufficient evidence to audit the recruitment process prior to certifying the labor certification.

Without more, we cannot determine that a finding of fraud and/or willful misrepresentation is appropriate here, and we will accordingly withdraw it.

III. ABILITY TO PAY THE PROFFERED WAGE

The Director’s decision did not address the Petitioner’s ability to pay the proffered wage of the offered position. A petitioner must demonstrate 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 generally include copies of annual reports, federal tax returns, or audited financial statements. *Id.*

The accompanying labor certification states the proffered wage of the offered position of regional manager is \$104,000 a year. The Petitioner does not claim to have employed the Beneficiary and did not submit any evidence of wages it has paid him. The petition included copies of the Petitioner’s 2019 consolidated tax return, and a 2020 quarterly tax statement. The 2019 tax document shows that

the Petitioner generated net income of -\$1,158,197 and net current assets of -\$2,182,540. Therefore, the Petitioner has not submitted sufficient evidence to demonstrate that it has the ability to pay the Beneficiary the proffered wage.

A petitioner must demonstrate its ability to pay a proffered wage “continuing until the beneficiary obtains lawful permanent residence.” 8 C.F.R. § 204.5(g)(2). The record lacks regulatorily required evidence of the Petitioner’s ability to pay for the years 2019, 2020, and 2021. The Petitioner therefore has not demonstrated its *continuing* ability to pay the proffered wage.

The Director did not notify the Petitioner of these evidentiary deficiencies. We will therefore remand the matter. On remand, the Director should request copies the Petitioner’s annual reports, federal tax returns, or audited financial statements for the years 2020 through 2022. The Petitioner may also submit additional evidence of its ability to pay in those years, including proof that it paid wages to applicable beneficiaries or materials supporting the factors stated in *Sonegawa*. See *Matter of Sonegawa*, 16 I&N Dec. at 614-15.

IV. CONCLUSION

Upon review of the entire record, we conclude that the Petitioner has established by a preponderance of the evidence that the job offered to the Beneficiary is *bona fide* and that the Petitioner did not misrepresent his relationship to the Beneficiary on the labor certification. The Petitioner, however, has not demonstrated its ability to pay the proffered wage. The Director should review the evidence to determine if there are any other grounds for denial, and provide the Petitioner a reasonable opportunity to respond.

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