U.S. Citizenship and Immigration Services

Non-Precedent Decision of the Administrative Appeals Office

In Re: 22516857

Date: SEP. 12, 2022

Appeal of Nebraska Service Center Decision

Form I-140, Immigrant Petition for Skilled Worker

The Petitioner, a restaurant business, seeks to employ the Beneficiary as a foreign specialty cook. It requests classification of the Beneficiary as a skilled worker under the third preference immigrant classification. Immigration and Nationality Act (the Act) section 203(b)(3)(A)(i), 8 U.S.C. § 1153(b)(3)(A)(i). This employment-based "EB-3" immigrant classification allows a U.S. employer to sponsor a foreign national for lawful permanent resident status to work in a position that requires at least two years of training or experience.

The petition was initially approved. However, the Director of the Nebraska Service Center subsequently revoked the approval on the ground that a bona fide job offer open to U.S. workers did not exist. Furthermore, the Director found that the Petitioner willfully misrepresented a material fact by failing to disclose the familial relationship between the Petitioner's owner and the Beneficiary on the labor certification.

On appeal, the Petitioner acknowledges the familial relationship between the Petitioner and the Beneficiary, but asserts that the proffered position was nevertheless a bona fide job offer open to U.S. workers. The Petitioner further asserts that there was no willful misrepresentation of a material fact on the labor certification regarding the familial relationship between the Petitioner and the Beneficiary.

The AAO reviews 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 case for further action, consideration, and entry of a new decision in accordance with below.

I. LAW

Immigration as a skilled worker usually follows a three-step process. First, the prospective employer must obtain a labor certification approval from the U.S. Department of Labor (DOL) to establish that there are not sufficient U.S. workers who are available for the offered position. Section 212(a)(5) of the Act, 8 U.S.C. § 1182(a)(5). DOL approval signifies that insufficient U.S. workers are able, willing, qualified, and available for a position. Id. Labor certification also indicates that the employment of a foreign national will not harm wages and working conditions of U.S. workers with similar jobs. Id. Second, the employer must submit the approved labor certification with an immigrant visa petition to U.S. Citizenship and Immigration Services (USCIS). Section 204 of the Act, 8 U.S.C. § 1154. The

immigrant visa petition must establish that the foreign worker qualifies for the offered position, that the foreign worker and the offered position are eligible for the requested immigrant classification, and that the employer has the ability to pay the proffered wage. See 8 C.F.R. § 204.5.[1] Finally, if USCIS approves the immigrant visa petition, the foreign worker may apply for an immigrant visa abroad or, if eligible, for adjustment of status in the United States. Section 245 of the Act, 8 U.S.C. § 1255.

At any time before a beneficiary obtains lawful permanent residence, however, USCIS may revoke a petition's approval for "good and sufficient cause." Section 205 of the Act, 8 U.S.C. § 1155. If supported by the record, a petition's erroneous approval may justify its revocation. See Matter of Ho, 19 I&N Dec. 582, 590 (BIA 1988). By regulation this revocation authority is delegated to any USCIS officer who is authorized to approve an immigrant visa petition "when the necessity for the revocation comes to the attention of [USCIS]." 8 C.F.R. § 205.2(a). USCIS must give the petitioner notice of its intent to revoke the prior approval of the petition and the opportunity to submit evidence in opposition thereto, before proceeding with written notice of revocation. See 8 C.F.R. § 205.2(b) and (c).

II. ANALYSIS

The Petitioner is a restaurant that was established in 2003 and specializes in east Indian food. The instant petition was filed with USCIS on August 1, 2007, accompanied by a labor certification that was filed with the DOL on June 11, 2007, and certified on June 15, 2007. The petition was approved on March 9, 2009. However, on September 1, 2020, the Director issued a notice of intent to revoke (NOIR) the approval, pointing to contradictory information revealed during the Beneficiary's consular interview with the U.S. Department of State. The Director explained that the Beneficiary provided a written statement that the Petitioner's owner, [redacted] is the Beneficiary's maternal uncle. As such, the Petitioner incorrectly answered "No" to the compound question at section C.9 of the labor certification, which reads:

> 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, partners, corporate officers, or incorporators and the alien?

The Director also explained that the Beneficiary's previous visa applications and his written statement indicated he did not have the work experience required under the labor certification. The Director gave the Petitioner an opportunity to respond to the derogatory information and establish that the Beneficiary met the requirements of the labor certification, and that the Petitioner did not make willful misrepresentations on the labor certification.

On March 21, 2022, the Director revoked the petition concluding the Petitioner did not demonstrate by a preponderance of the evidence that the proffered position was a bona fide job offer open to U.S. workers. The Director further found that the Petitioner's failure to disclose its owner's familial relationship with the Beneficiary in response to the question at C.9 of the labor certification constituted a willful material misrepresentation.

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[1] These requirements must be satisfied by the priority date of the immigrant visa petition. See 8 C.F.R. § 204.5(g)(2), Matter of Wing's Tea House, 16 I&N Dec. 158, 159 (Act. Reg'l Comm'r 1977). For petitions that require a labor certification, the priority date is the date on which the DOL accepted the labor certification application for processing. See 8 C.F.R. § 204.5(d). In this case, the priority date is June 11, 2007.

Upon review, we will withdraw the Director's findings and remand the matter to the Director to determine whether the Petitioner has demonstrated that the Beneficiary qualifies for the EB-3 classification as a skilled worker, and whether he meets the specific requirements of the labor certification.

A. Bona Fide Job Offer

A petition may be approved 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). 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).

The petitioner has the burden of establishing that a bona fide job opportunity exists when it is asked to show that the job is clearly open to U.S. workers. See Matter of Amger Corp., 87-INA-545 (BALCA 1987); see also 8 U.S.C. § 1361; 20 C.F.R. § 656.17(l). A labor certification employer must attest that "[t]he job opportunity has been and is clearly open to any U.S. worker." 20 C.F.R. § 656.10(c)(8). This attestation "infuses the recruitment process with the requirement of a bona fide job opportunity: not merely a test of the job market." Matter of Modular Container Sys., Inc., 89-INA-228, 1991 WL 223955, at 7 (BALCA 1991) (en banc); see 20 C.F.R. § 656.17(l).

In order to assess whether a bona fide job offer may be at issue, section C.9 of the labor certification asks, "Is the employer a closely held corporation ... in which the alien has an ownership interest, or is there a familial relationship between the owners, stockholders, partners, corporate officers, incorporators, and the alien?" The Petitioner checked "No" in response to this question, indicating that there is no relationship between the Beneficiary and the owners, stockholders, partners, corporate officers, or incorporators. However, the correct answer to the question at C.9 was "Yes" since the Petitioner's owner is the Beneficiary's uncle.

On appeal, the Petitioner asserts that at the time of filing the labor certification in 2007, the Petitioner answered section C.9 correctly. The Petitioner asserts the DOL did not have a clear definition of 'familial relationship' until July 28, 2014,[2] and in 2007, the definition of 'family' was limited to persons related by 'blood', instead of by 'marriage'. Citing 8 C.F.R. § 213a.2(b)(2), which relates to affidavits of support that would be submitted on behalf an intending immigrant to overcome the public charge inadmissibility, the Petitioner applies its limited definition of 'relative', ". . . husband, wife, father, mother, child, adult son, adult daughter, brother, or sister" as the definition of 'familial relationship' for section C.9 of the labor certification. However, we find that the Petitioner's citation to 8 C.F.R. § 213a.2(b)(2) for the definition of familial relationship is misplaced. This regulation does not relate to

[2] On July 28, 2014, the DOL's Office of Foreign Labor Certification provided guidance for the PERM Program definition of familial relationship when responding to question C.9 of the labor certification, "A familial relationship includes any relationship established by blood, marriage, or adoption, even if distant. For example, cousins of all degrees, aunts, uncles, grandparents and grandchildren are included. It also includes relationships established through marriage, such as in-laws and step-families." *U.S. Dep't of Labor,* Employment & Training Administration, Office of Foreign Labor Certification, OFLC Frequently Asked Questions and Answers, PERM Program, https://www.foreignlaborcert.doleta.gov/faqsanswers.cfm (accessed September 1, 2022).

foreign labor certifications submitted to the DOL; and instead, the regulation relates to affidavits of support for employment-based intending immigrants seeking an immigrant visa under section 203(b) of the Act.

At the time the Petitioner completed the labor certification in 2007, familial relationship was defined by case law. In Matter of Sunmart, 374, 2000-INA-93 (BALCA May 15, 2000), the Board of Alien Labor Certification Appeals (BALCA) found that a relationship invalidating a bona fide job offer may arise where the beneficiary is related to the petitioner by "blood" or it may "be financial, by marriage, or through friendship." At the time the Petitioner completed the labor certification in 2007, the DOL had provided guidance that relationships by marriage could invalidate a bona fide job offer and should be disclosed on the labor certification. See id. Therefore, the correct answer to the question at C.9 of the labor certification was "Yes".

The DOL regulation at 20 C.F.R. § 656.17(1), alien influence and control over job opportunity, makes clear that the intention behind the inquiry at line C.9 of the labor certification is to ensure that a job opportunity is open to all workers by identifying any relationships, business or familial, that might affect job availability. As BALCA explained in Matter of Modular Container Systems, Inc., 89-INA-228, 1991 WL 223955, *7 (BALCA 1991) (en banc),

> [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.

While a familial relationship between the petitioner and the beneficiary does not establish a bar to labor certification, it does present the question of whether the job opportunity is bona fide. See 20 C.F.R. §§ 656.10(c)(8), 656.17(1); Matter of Modular Container Systems, Inc., 89-INA-228, 1991 WL 223955 at *7. In order to determine whether a bona fide job opportunity exists in situations where the beneficiary has a familial relationship with the petitioner depends on "whether a genuine determination of need for alien labor can be made by the employer corporation and whether a genuine opportunity exists for American workers to compete for the opening." Id. at *7. DOL adopted the holding in Matter of Modular Container Systems, Inc. at 20 C.F.R. § 656.17(l).

To determine the bona fides of a job opportunity, we must consider multiple factors, including but not limited to, whether a foreign national: is in a position to control or influence hiring decisions regarding an offered position; is related to corporate directors, officers, or employees; incorporated or founded a company; has an ownership interest in the company; is involved in the management of the company; sits on its board of directors; is one of a small group of employees; and has qualifications matching specialized or unusual job duties or requirements stated on an accompanying labor certification; is so inseparable from the sponsoring employer because of the foreign national's pervasive presence and personal attributes that the employer would unlikely continue in operation without the noncitizen; and whether the employer complied with DOL regulations and otherwise acted in good faith. Id. at *8-10.

The Director's revocation decision found "that the position was not open to any U.S. worker and this was not a bona fide [sic] job opportunity." The Director explained that the Petitioner's failure to disclose the familial relationship on the labor certificate may have affected the outcome of the labor certification

process. The Director noted that while a familial relationship is not an automatic disqualification from approval of the labor certification, without details of the Petitioner's relationship to the Beneficiary, DOL would not have conducted a closer inspection of the job offer to ascertain whether it was truly a bona fide job opportunity open to U.S. workers. However, the Director did not address the lack of bona fides in the NOIR, and did not request evidence relating to the bona fides of the job opportunity.

While the Petitioner confirmed its owner is the Beneficiary's maternal uncle, the Petitioner asserts its lack of disclosure of its relationship with the Beneficiary does not automatically invalidate the labor certification, and the Beneficiary was offered a bona fide job opportunity since the Petitioner conducted a proper and fair recruitment for U.S. workers in 2007. With the NOIR reply, the Petitioner submitted an affidavit from its owner explaining the nature of its business, the need for a specialty cook, and the recruitment process. However, the Director did not address this evidence in the decision.

We find that the Director's revocation decision was based, in part, on issues that were not addressed in the NOIR. The Director must fully inform the Petitioner of all factors that contributed to the revocation decision in order to effectively provide the Petitioner with an opportunity to rebut the grounds for revocation. The Director's decision did not provide analysis of the evidence submitted for the bona fides of the job offer.

With the appeal, the Petitioner submits recruitment materials, including the recruitment documents for this job offer, recent job advertisements, and recent letters from Indian restaurant owners in the [redacted] area explaining the challenges for hiring specialty cooks. This new evidence may be considered by the Director on remand.

We will withdraw the Director's finding that the job offer was not bona fide and remand for the Director to consider the new evidence submitted on appeal and issue a new NOIR.

B. Willful Misrepresentation of a Material Fact

A misrepresentation is an assertion or manifestation that is not in accord with the true facts. For an immigration officer to find a willful and material misrepresentation of fact, he or she must determine that (1) the petitioner or beneficiary made a false representation to an authorized official of the U.S. government, (2) the misrepresentation was willfully made, and (3) the fact misrepresented was material. See Matter of M-, 6 I&N Dec. 149 (BIA 1954); Matter of Kai Hing Hui, 15 I&N Dec. 288, 289 (BIA 1975). The term "willfully" means knowing and intentionally, as distinguished from accidentally, inadvertently, or in an honest belief that the facts are otherwise. See Matter of Healy and Goodchild, 17 I&N Dec. 22, 28 (BIA 1979). A "material" misrepresentation is one that "tends to shut off a line of inquiry relevant to the alien's eligibility." Matter of Ng, 17 I&N Dec. 536, 537 (BIA 1980). Any alien who seeks an immigration benefit by fraud or willfully misrepresenting a material fact is ineligible for a visa or admission to the United States. See section 212(a)(6)(C)(i) of the Act.

Here, the Director found that the Petitioner willfully misrepresented a material fact by incorrectly answering "No" to the question at section C.9 of the labor certification, "Is the employer a closely held corporation ... in which the alien has an ownership interest, or is there a familial relationship between the owners, stockholders, partners, corporate officers, incorporators, and the alien?" As noted above, the record reflects a familial relationship between the Petitioner's owner and the Beneficiary.

However, the Director's finding of willful misrepresentation of a material fact against the Petitioner did not adequately analyze the facts and apply the law. In the section of the revocation decision addressing willful misrepresentation of a material fact, the Director stated only that, "as the [P]etitioner has made false statements on the labor certification, the record shows willful misrepresentation of a material fact. Therefore, this office declines the withdrawal request as the [P]etitioner willfully misrepresented a material fact and the petition should not have been approved as there is no bona fide job offer."

In the NOIR reply and with the appeal, the Petitioner submitted an affidavit from its owner explaining that at the time he completed the labor certification in 2007, he did not believe he had a familial relationship with the Beneficiary because under his Indian culture, a person is considered 'family' if related by 'blood', not by 'marriage'. As noted above, this evidence was not addressed in the Director's decision.

The Petitioner's owner indicates he answered the labor certification questions truthfully and correctly to the best of his knowledge and in good faith, believing he was not related to the Beneficiary due to their relationship being a result of his marriage to the Beneficiary's mother's sister. However, as stated above, at the time the Petitioner completed the labor certification in 2007, the DOL had provided guidance that relationships by marriage could invalidate a bona fide job offer and should be disclosed on the labor certification. Matter of Sunmart, 374, 2000-INA-93 (BALCA May 15, 2000). The Petitioner appears to suggest that its response was made in a good faith belief over the Petitioner's confusion as to what degree of familial relationship needed to be disclosed to DOL. However, case law provided guidance that a relationship by marriage is relevant to DOL making a labor certification decision. See id.

On appeal, the Petitioner's counsel also introduces a letter from a certified Hindu and Indu interpreter explaining that once a woman is married, she takes her husband's family as her true family, and her paternal relatives are considered her true relatives, with in-laws and non-blood relatives being more distant and remote relatives. The Petitioner claims this is an expert opinion supporting the Petitioner's understanding of 'familial relationship'. However, while the AAO may, in its discretion, use as advisory opinion statements submitted as expert testimony, the AAO is not required to accept or may give less weight to any opinion that is not in accord with other information or is in any way questionable. Matter of Caron International, 19 I&N Dec. 791 (Comm'r. 1988); Matter of Sea, Inc., 19 I&N Dec. 817 (Comm'r 1988). See also Matter of D-R-, 25 I&N Dec. 445 (BIA 2011) (expert witness testimony may be given different weight depending on the extent of the expert's qualifications or the relevance, reliability, and probative value of the testimony). While the Petitioner submitted a certificate indicating the interpreter is certified by the Supreme Court of Nevada to interpret Hindi and Urdu, there is no evidence or indication that the interpreter is an expert in the Petitioner's owner's culture. Therefore, the interpreter's opinion offered on appeal will only be allotted minimal probative value.

The Petitioner's owner further explained that English is not his first language, and it was an error in his understanding of the question when he completed the labor certification, therefore, the omission of the relationship between the Petitioner and the Beneficiary was not a willful misrepresentation. However, the Petitioner's argument is not persuasive. The Petitioner's owner completed and signed both the labor certification and the Form I-140 petition, declaring under the penalty of perjury that the information on them, and the evidence submitted with each, were true and correct.

The Petitioner also submitted two letters from community members attesting to the Petitioner's owner's good moral character. Such attestations as to the owner's good moral character are not relevant to whether the Petitioner willfully misrepresented material facts on the labor certification in 2007.

Although we agree with the Director that by not marking "Yes" to this question, the Petitioner shut off a line of inquiry by the DOL relevant to the Beneficiary's eligibility for the labor certification and this immigration benefit, we do not find that the Director sufficiently explained the reasoning for the finding for willful misrepresentation of a material fact. The Director ultimately failed to separate and analyze the elements of willful misrepresentation of a material fact or to discuss those elements within the context of the relevant factors that contributed to the finding of willful misrepresentation based on a complete review of the Petitioner's evidence.

C. Beneficiary's Experience

Although not discussed by the Director in the decision, the record does not establish that the Beneficiary has the requisite work experience stated in the labor certification. The labor certification was filed on June 11, 2007. The labor certification states that the offered position requires 24 months of experience in the offered job of foreign specialty restaurant cook, and no alternate experience is accepted. The duties and required skills for the offered position are stated as:

> Prepare, season & cook soups, meats, vegetables, desserts or other specialty items in restaurant according to east Indian cuisine recipes.

On the labor certification, the Petitioner asserts that the Beneficiary gained experience as a cook with [redacted] in India from September 1, 2003 to June 1, 2006. The Petitioner submitted a letter from [redacted] in support of the Beneficiary's experience.

In the NOIR, the Director questioned the petition's approval on the ground that the Beneficiary did not have the requisite two years of qualifying experience. The Director identified inconsistencies in the Beneficiary's employment history as claimed in the labor certification and supporting evidence, with the information indicated on the Beneficiary's previous nonimmigrant visa applications and in the Beneficiary's statements made during his consular interview. Specifically, on three previous nonimmigrant visa applications submitted in support of the Beneficiary's prior B1/B2 visa requests on November 25, 2010, July 13, 2011, and May 6, 2014, under the work experience sections, he did not list his work history with [redacted] Also, during the consular interview, the Beneficiary stated under oath that he was not a cook, but instead was a gym owner.

In response to the NOIR, the Petitioner explained that the Beneficiary unintentionally omitted his work experience from his previous visa applications since he worked more than one job, and he relied on the travel agency to fill out the forms. The Petitioner submitted statements from both the Beneficiary and his wife, stating that the error in omitting his employment history on his nonimmigrant visa applications was not intentional, as the Beneficiary was applying for a visitor nonimmigrant visa and believed employment history to be unimportant.

The Petitioner further explained that the Beneficiary's written statement about his lack of experience as a cook was inaccurate, and the Beneficiary only made the written statement because he felt pressured

by the consular officer to make the statement and the Beneficiary suffers from a brain injury which caused confusion when making the statement. In support of the Beneficiary's work experience, the Petitioner submitted the Beneficiary's statement; the Beneficiary's wife's statement; affidavits from the [redacted] owner, co-workers and customers; menu and photographs of [redacted] and the Beneficiary's medical documentation.

The Director did not address the Beneficiary's work experience in the decision. The Director will have an opportunity to review the Beneficiary's work experience on remand, and issue a new NOIR to address any concerns.

In adjudicating immigration benefit requests, USCIS regularly reviews affidavits, testimonials, and letters from both laypersons and recognized experts. To be probative, a document must generally provide: (1) the nature of the affiant's relationship, if any, to the affected party; (2) the basis of the affiant's knowledge; and (3) a specific, rather than merely conclusory, statement of the asserted facts based on the affiant's personal knowledge. Matter of Chin, 14 I&N Dec. 150, 152 (BIA 1972); see also 8 C.F.R. § 103 .2(b)(2)(i) (requiring affidavits in lieu of unavailable required evidence from "persons who are not parties to the petition who have direct personal knowledge of the event and circumstances"); Matter of Kwan, 14 I&N Dec. 175, 176-77 (BIA 1972); Iyamba v. INS, 244 F.3d 606,608 (8th Cir. 2001); Dabaase v. INS, 627 F.2d 117, 119 (8th Cir. 1980). A petitioner may submit a letter or affidavit that contains hearsay or biased information, but such factors will affect the weight to be accorded the evidence in an administrative proceeding. See Matter of D-R-, 25 I&N Dec. 445, 461 (BIA 2011). Probative evidence beyond a letter or affidavit may be considered when submitted to resolve inconsistencies or discrepancies in the record. See Matter of Ho, 19 I&N Dec. 582, 591-92 (BIA 1988). Ultimately, to determine whether a petitioner has established eligibility for a requested benefit by a preponderance of the evidence, USCIS must examine each piece of evidence, both individually and within the context of the entire record, for relevance, probative value, and credibility. Matter of Chawathe, 25 I&N Dec. 369, 376 (AAO 2010).

Here, the Petitioner relies on testimonial evidence from the Beneficiary's former employer, co-workers, and customers to establish the Beneficiary's claimed employment experience, without providing independent, objective evidence in support of this testimony. The statements attest to the Beneficiary's work experience and full time hours at [redacted] However, the statements also explain that the Beneficiary does not have any independent evidence of his work with [redacted] because he was paid in cash. Also, some of the testimonial evidence are from persons with the same family name as the Beneficiary, [redacted] Any relation of the affiants to the Beneficiary would be relevant when evaluating this testimonial evidence. The Petitioner's claim that the Beneficiary does not have any independent, objective evidence of his previous employment, combined with the inconsistencies in the record as to the Beneficiary's work experience, casts doubt about the Beneficiary's employment experience.

Based on conflicting information from the Beneficiary's previous nonimmigrant applications and his written statement during his consular interview, further independent, objective evidence is required. The record does not include the Beneficiary's income or payroll records, or any other independent, objective evidence to corroborate his claimed employment. Although the Beneficiary asserts that his employment history was omitted on the visa application because he did not complete the forms and believed the information to be unimportant, it appears that one of the applications may have been submitted on a date

when the Beneficiary claims to be employed at [redacted] May 6, 2014, thereby casting further doubt on his assertions. The Petitioner must resolve inconsistencies with independent, objective evidence pointing to where the truth lies. Matter of Ho, 19 I&N Dec. at 591-92. Unresolved material inconsistencies may lead us to reevaluate the reliability and sufficiency of other evidence submitted in support of the requested immigration benefit. Id. It is the Petitioner's burden to establish eligibility for the immigration benefit sought. Section 291 of the Act, 8 U.S.C. § 1361; Matter of Skirball Cultural Ctr., 25 I&N Dec. 799, 806 (AAO 2012).

As the inconsistencies in the record have not been resolved, the Petitioner has not established with independent, objective evidence that the Beneficiary possesses the required 24 months of experience in the offered position, as required by the labor certification. Accordingly, we will remand this matter for further consideration, based on the entire record of proceedings.

D. Ability to Pay

Although not discussed by the Director, the record, as currently constituted, does not establish the Petitioner's continuing ability to pay the proffered wage from the priority date of the petition onward. 8 C.F.R. § 204.5(g)(2). In this case, the labor certification states the proffered wage is $10.94 per hour ($22,755 per year for a 40 hour work week), and the priority date is June 11, 2007.

In determining a petitioner's ability to pay the proffered wage, USCIS first examines whether the beneficiary was employed and paid by the petitioner during the period following the priority date. A petitioner's submission of documentary evidence that it employed the beneficiary at a salary equal to or greater than the proffered wage for the time period in question, when accompanied by a form of evidence required in the regulation at 8 C.F.R. § 204.5(g)(2), may be considered proof of the petitioner's ability to pay the proffered wage.

If a petitioner does not establish that it has paid the beneficiary an amount equal to or above the proffered wage from the priority date onward, USCIS will examine the net income and net current assets figures recorded on the petitioner's federal income tax return(s), annual report(s), or audited financial statements(s). If either of these figures, net income or net current assets, equals or exceeds the proffered wage or the difference between the proffered wage and the amount paid to the beneficiary in a given year, the petitioner would ordinarily be considered able to pay the proffered wage during that year. [3]

If net income and net current assets are insufficient, USCIS may consider other relevant factors, such as the number of years the petitioner has been in business, the size of its operations, the growth of its business over time, its number of employees, the occurrence of any uncharacteristic business expenditures or losses, its reputation within its industry, or whether a beneficiary will replace a current

[3] If a petitioner has filed immigrant visa petitions on behalf of multiple beneficiaries, the petitioner must establish that it has had 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 approval where the petitioner did not demonstrate its ability to pay the combined proffered wages of multiple beneficiaries). Petitions filed on behalf of other beneficiaries are considered from the priority date of each petition (not including any year prior to the priority date of the petition being reviewed on appeal) until the present or until the other beneficiary obtains lawful permanent residence. Petitions that have been withdrawn or denied are not considered in this analysis.

employee or outsourced service. See Matter of Sonegawa, 12 I&N Dec. 612, 614-15 (Reg'l Comm'r 1967).

Here, there is no evidence that the petitioner has ever employed the Beneficiary; therefore, the Petitioner must demonstrate that its net income or net current assets equals or exceeds the proffered wage from the priority date onward. The Petitioner submitted a copy of its 2007 federal income tax return. The return demonstrates the Petitioner's ability to pay the Beneficiary's proffered wage for the priority year, 2007, as the Petitioner's net income for 2007 was $234,419.

However, the record does not contain financial documentation demonstrating the Petitioner's continued ability to pay the Beneficiary's proffered wage for the years 2008 onward.

Therefore, we will remand this case for the Director to request the submission of regulatory required evidence from the Petitioner, as specified in 8 C.F.R. § 204.5(g)(2), for the years 2008 onward. The Director may also request any other evidence that may be deemed necessary to determine the Petitioner's eligibility for the requested immigration benefit.

III. CONCLUSION

For the reasons discussed above, we will remand this case to the Director for further consideration of the Petitioner's eligibility for the immigration benefit it seeks on behalf of the Beneficiary. The Director may issue a new NOIR in accordance with the requirements of 8 C.F.R. § 205.2(b) and (c) and Matter of Estime. Following the Petitioner's response to the NOIR, or the expiration of the time period to respond, the Director shall issue a new decision.

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