



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

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

In Re: 25053313

Date: MAY 5, 2023

Appeal of Nebraska Service Center Decision

Form I-140, Immigrant Petition for Other Worker

The Petitioner, a transportation company, seeks to permanently employ the Beneficiary as a truck driver. The company requests his classification under the third-preference, immigrant visa category for “other workers.” *See* Immigration and Nationality Act (the Act) section 203(b)(3)(A)(iii), 8 U.S.C. § 1153(b)(3)(A)(iii). This category allows a prospective U.S. employer to sponsor a noncitizen for lawful permanent residence to perform unskilled labor.

The Director of the Nebraska Service Center denied the petition. The Director concluded that the Petitioner did not demonstrate its required ability to pay the offered position’s proffered wage. On appeal, the Petitioner argues that the Director did not consider a totality of the circumstances, including temporary harm to the company’s business from the COVID-19 pandemic.

The Petitioner bears the burden of demonstrating eligibility for the requested benefit by a preponderance of evidence. *Matter of Chawathe*, 25 I&N Dec. 369, 375-76 (AAO 2010). Exercising de novo, appellate review, *see Matter of Christo’s, Inc.*, 26 I&N Dec. 537, 537 n.2 (AAO 2015), we will withdraw the Director’s decision for consideration of additional evidence that should now be available. We will also remand the matter for entry of a new decision consistent with the following analysis.

**I. LAW**

Immigration as an “other worker” generally follows a three-step process. First, a prospective employer must obtain U.S. Department of Labor (DOL) certification that: (1) there are insufficient U.S. workers able, willing, qualified, and available for an offered position; and (2) permanent employment of a noncitizen in the position would not harm wages and working conditions of U.S. workers with similar jobs. Section 212(a)(5)(A)(i) of the Act, 8 U.S.C. § 1182(a)(5)(A)(i).

Second, an employer must submit an approved labor certification with an immigrant visa petition to U.S. Citizenship and Immigration Services (USCIS). Section 204(a)(1)(F) of the Act, 8 U.S.C. § 1154(a)(1)(F). Among other things, USCIS determines whether a noncitizen beneficiary meets the requirements of a DOL-certified position and a requested immigrant visa category. 8 C.F.R. § 204.5(l)(3)(ii)(D), (4).

Finally, if USCIS approves a petition, a beneficiary 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

### A. Ability to Pay the Proffered Wage

A petitioner must demonstrate its continuing ability to pay an offered position’s 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 a business’s annual reports, federal tax returns, or audited financial statements. *Id.*

In determining ability to pay, USCIS examines whether a petitioner paid a beneficiary the full proffered wage each year, beginning with the year of a petition’s priority date. If a petitioner did not annually pay the full proffered wage or did not pay a beneficiary at all, USCIS considers whether the business generated annual amounts of net income or net current assets sufficient to pay any differences between the proffered wage and the wages paid. If net income and net current assets are insufficient, USCIS may consider other factors affecting a petitioner’s ability to pay a proffered wage. *See Matter of Sonegawa*, 12 I&N Dec. 612, 614-15 (Reg’l Comm’r 1967).<sup>1</sup>

The Petitioner’s accompanying labor certification states the proffered wage of the offered position of truck driver as \$50,315 a year. The petition’s priority date is October 15, 2020, the date DOL accepted the labor certification application for processing. *See* 8 C.F.R. § 204.5(d) (explaining how to determine a petition’s priority date).

At the time of the appeal’s filing in October 2022, regulatory required evidence of the Petitioner’s ability to pay the proffered wage in 2022 was not yet available. Copies of the company’s federal tax returns or audited financial statements for 2022 should now be available and would constitute an additional factor to consider in a totality-of-the-circumstances analysis under *Sonegawa*. We will therefore withdraw the Director’s decision and remand the matter. On remand, the Director should ask the Petitioner to provide copies of its federal tax return or audited financial statements for 2022 and afford the company a reasonable opportunity to respond.

### B. The Required Experience

Although unaddressed by the Director, the Petitioner has not demonstrated the Beneficiary’s qualifying experience for the offered position.

A petitioner must demonstrate a beneficiary’s possession of all DOL-certified, job requirements of an offered position by a petition’s priority date. *Matter of Wing’s Tea House*, 16 I&N Dec. 158, 160 (Acting Reg’l Comm’r 1977). When assessing a beneficiary’s qualifications, USCIS must examine the job-offer portion of an accompanying labor certification to determine a petition’s minimum

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<sup>1</sup> Federal courts have upheld USCIS’ method of determining a petitioner’s ability to pay a proffered wage. *See, e.g., River St. Donuts, LLC v. Napolitano*, 558 F.3d 111, 118 (1st Cir. 2009).

requirements. USCIS may neither ignore a certification term nor impose unstated requirements, as “DOL bears the authority for setting the *content* of the labor certification.” *Hoosier Care, Inc. v. Chertoff*, 482 F.3d 987, 990 (7th Cir. 2007) (quoting *Madany v. Smith*, 696 F.2d 1008, 1015 (D.C. Cir. 1983)) (emphasis in original).

The Petitioner’s labor certification states the minimum requirements of the offered position of truck driver as one year of experience “in the job offered.” Experience in the job offered means experience performing an offered position’s duties as listed on a labor certification. *See Matter of Symbioun Techs., Inc.*, 2010-PER-01422, \*3 (BALCA Oct. 24, 2011). The Petitioner’s labor certification states that the offered job requires neither education nor training. The company also indicated that it will not accept experience in a related occupation. Further, part H.14 of the labor certification, “Specific skills or other requirements,” states: “IL CDL or within 60 days from employment,” indicating the job’s requirement of an Illinois commercial driver’s license or an ability to obtain one within 60 days of the start of employment.

On the labor certification, the Beneficiary attested that, by the petition’s priority date, he gained more than three years of full-time, qualifying experience in Poland. He stated that a furniture store employed him as a truck driver from September 1997 to July 2001.<sup>2</sup>

As proof of qualifying experience, a petitioner must submit a letter from a beneficiary’s former employer. 8 C.F.R. § 204.5(l)(3)(ii)(A). The letter must include the employer’s name, title, and address, and a description of the beneficiary’s experience. *Id.*

The Petitioner submitted an “employment certification” from the purported owner of the store that employed the Beneficiary in Poland. Contrary to 8 C.F.R. § 204.5(l)(3)(ii)(A), however, the certification does not state the Beneficiary’s former job duties and thus does not sufficiently describe his experience. The Petitioner therefore has not demonstrated the Beneficiary’s possession of qualifying experience “in the job offered.” Also, contrary to 8 C.F.R. § 103.2(b)(3), the certification lacks “a full English translation,” as the claimed employer’s name on the English translation that the Petitioner provided appears to remain untranslated from Polish to English.

The Director did not notify the Petitioner of these evidentiary deficiencies. We will therefore remand the matter. On remand, in addition to asking for 2022 financial documents, the Director should inform the company that it must submit additional evidence establishing the Beneficiary’s possession of at least one year of experience “in the job offered” and a full English translation of the purported employer’s certification.

If supported by the record, the Director may notify the Petitioner of any additional, potential denial grounds. The Director, however, must afford the company a reasonable opportunity to respond to all issues raised on remand. Upon receipt of a timely response, the Director should review the entire record and enter a new decision.

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<sup>2</sup> The Beneficiary also listed more recent employment experience on the labor certification. But the recent experience does not indicate his work in the offered position.

### III. CONCLUSION

Documentation of the Petitioner's finances in 2022 should now be available for further consideration of the company's ability to pay the proffered wage. The record also lacks sufficient evidence of the Beneficiary's qualifying experience for the offered position.

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