



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

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

In Re: 32917024

Date: SEP. 11, 2024

Appeal of Texas Service Center Decision

Form I-140, Immigrant Petition for Alien Workers (Skilled Worker)

The Petitioner, a landscaping business, seeks to employ the Beneficiary as a landscape foreman. It requests classification of the Beneficiary under the third-preference, immigrant classification for skilled workers. Immigration and Nationality Act (the Act) section 203(b)(3)(A)(i), 8 U.S.C. § 1153(b)(3)(A)(i). This employment-based category allows a U.S. business to sponsor a foreign national for lawful permanent resident status based on a job offer requiring at least two years of training or experience.

After initially approving the Form I-140, Immigrant Petition for Alien Worker (petition), the Texas Service Center Director revoked the petition's approval. The Director concluded that the Petitioner did not demonstrate that a bona fide job offer exists because there is a familial relationship between the Petitioner and the Beneficiary. The Director also found that the Petitioner willfully misrepresented the bona fide nature of the job offer, which is a material fact. The Director dismissed a subsequent motion to reconsider. The matter is now before us on the Petitioner's appeal. 8 C.F.R. § 103.3.

The Petitioner bears the burden of proof to demonstrate eligibility by a preponderance of the evidence. *Matter of Chawathe*, 25 I&N Dec. 369, 375-76 (AAO 2010). We review the questions in this matter de novo. *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 consistent with the following analysis.

## I. LAW

To permanently fill a position in the United States with a foreign worker, a prospective employer must first obtain certification from the U.S. Department of Labor (DOL). *See* 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.*

If DOL approves a position, an employer must next submit the certified labor application 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 considers whether a beneficiary meets the requirements of a certified position and a requested immigrant visa classification. If USCIS approves

the petition, a foreign national may finally 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.

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. *Matter of Ho*, 19 I&N Dec. 582, 590 (BIA 1988). USCIS properly issues a notice of intent to revoke (NOIR) a petition if the un rebutted and unexplained record would have warranted the filing's denial. *Matter of Esteime*, 19 I&N Dec. 450, 451 (BIA 1987). The Agency properly revokes a petition's approval if a petitioner does not respond to a properly issued NOIR, or their NOIR response does not overcome all alleged revocation grounds. *Id.* at 451-52.

## II. ANALYSIS

### A. Bona Fide Job Offer

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 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<sup>1</sup> for any immigrant petition later based on the labor certification, the 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. The bona fides of the job opportunity are essential elements in evaluating whether a job offer is realistic. *See Matter of Great Wall*, 16 I&N Dec. 142 (Acting Reg'l Comm'r 1977).

A labor certification application must represent an offer of "[p]ermanent, full-time work." 20 C.F.R. § 656.3 (defining the term "employment"). Similarly, the requested immigrant visa classification of skilled worker requires the performance of "skilled labor (requiring at least 2 years training or experience), *not of a temporary or seasonal nature.*" Section 203(b)(3)(A)(i) of the Act (emphasis added).

The Petitioner cannot establish the offered position as a bona fide job opportunity based solely on its stated intent to employ the Beneficiary in the offered position once he obtains lawful permanent resident status. It must provide evidence establishing the existence of a valid job offer as of the petition's priority date. "In ... visa petition proceedings the Service must consider the merits of the

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<sup>1</sup> The "priority date" of a petition is the date the underlying labor certification is filed with the DOL. *See* 8 C.F.R. § 204.5(d). The Petitioner must establish that all eligibility requirements for the petition have been satisfied as of the priority date, which in this case is June 29, 2017.

petitioner's job offer, so that a determination can be made whether the job offer is realistic." *Matter of Great Wall*, 16 I&N Dec. at 145.

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).

The labor certification in this case was filed on June 29, 2017 for the offered position of "Landscape Foreman." The job duties of the offered position as stated on the labor certification are:

Plan, organize and direct crew engaged in tree & lawn services such as pruning, stump grinding/chipping, mowing/blowing, core aeration, seeding, mulching and planting. Review contracts to determine service, machine, workforce requirements. Inform potential customers regarding methods, material and price ranges. Prepare estimates according to labor, material and machine costs.

The labor certification and the petition list the work location for the offered position as   Connecticut" and no additional work sites are listed. On the petition (in Part 6, Question 5), the Petitioner indicated that the offered position is full-time.

The Petitioner in this matter is a landscaping business with nine employees. The Petitioner checked "yes" 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?"

In this petition, the Beneficiary's brothers are the owners of the business sponsoring him for lawful permanent resident status. The accompanying labor certification fully discloses the familial relationship between the Petitioner and the Beneficiary.

After approving the petition in 2018, the Director sent the Petitioner a NOIR stating that a review of the filing indicated that the Petitioner may have misrepresented the Beneficiary's eligibility for the requested benefit. The Director noted that the familial relationship between the Petitioner and the Beneficiary casts doubt as to whether the Petitioner made a bona fide job offer to the Beneficiary. Further, because this fact is material, in signing the labor certification and the petition, the Director noted that the Petitioner may have willfully made a false representation.

In response to the NOIR, to establish that a bona fide job offer exists, the Petitioner submitted evidence of its recruitment for the offered position, including a job order placed with the state workforce agency, newspaper and internet advertisements, an internal posting notice, and a report of recruitment results explaining that no resumes were received in response to the Petitioner's recruitment efforts. The Petitioner also submitted its tax and payroll records in support of its owner's statement that the Beneficiary has never had an ownership interest in, or any influence and control over the business.

After receiving the Petitioner's response to the NOIR the Director revoked the petition's approval. The Director determined that the Petitioner did not establish that its job offer to the Beneficiary is bona fide and entered a finding of willful misrepresentation of a material fact against the Petitioner.

Although the Director acknowledged receipt of the Petitioner's response to the NOIR he did not address or analyze that evidence or explain why it was not sufficient to overcome the reasons for revocation. The Director noted that the payroll records list multiple employees with the same last name as the Beneficiary and the Petitioner's owners, but he did not explain the relevance of this fact. The Director stated, "The evidence in the record indicates that the petitioner intends to employ the beneficiary outside the terms of the labor certification." However, he does not explain further what about the Beneficiary's proposed employment does not match the terms of the labor certification. Nor does the Director identify the Petitioner's specific misrepresentation or what information in the petition and underlying labor certification is "false."

When revoking approval of a petition, a director has an affirmative duty to explain the specific reasons for the revocation; this duty includes informing a petitioner why the evidence did not to satisfy its burden of proof pursuant to section 291 of the Act. *See* 8 C.F.R. § 103.3(a)(1)(i). The Director's decision in this case does not explain why the information provided in response to the NOIR was insufficient or how it failed to satisfy its burden of proof regarding eligibility for the benefit sought.

Similarly, the Director's decision dismissing the Petitioner's subsequent motion to reconsider also notes payroll records listing multiple employees with the same last name but does not explain the relevance of this fact. Nor does it analyze or address other evidence in the record. The Director states, "While determining whether the job is subject to the alien's influence and control, USCIS has evaluated the totality of the employer's circumstances, using the Modular Container systems criteria."<sup>2</sup> However, neither the NOR, nor the motion decision, analyzes the factors of *Modular Container* based on the evidence in the record or the documents the Petitioner submitted to demonstrate that the job opportunity is not subject to the Beneficiary's influence and control.

Considering the above discussed deficiencies and following our review of the record, we are withdrawing the Director's revocation and the finding of willful misrepresentation against the Petitioner. However, we cannot affirmatively conclude that the Petitioner has established eligibility for the requested benefit because additional adverse information, not mentioned in the NOIR or the Director's revocation, casts doubt on the Beneficiary's claimed education and employment experience.

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<sup>2</sup> The Director references *Matter of Modular Container Sys., Inc.*, 89-INA-228, 1991 WL 223955, \*7 (BALCA Jul. 16, 1991) (*en banc*). The DOL adopted the holding in *Modular Container* at 20 C.F.R. § 656.17(l) (listing supporting documentation that may be submitted to demonstrate the level of "influence and control over the job opportunity" where a familial relationship exists between an employer and a foreign worker).

## B. The Beneficiary's Qualifications

The accompanying labor certification in this case states that the offered position of landscape foreman requires a bachelor's degree, or foreign educational equivalent, in business administration or business management, and 36 months of experience in the job offered. In the alternative, the Petitioner will accept "one year of college level education in business administration/management" and 12 years of experience in the job offered. Experience in an alternate occupation is not accepted.

On the labor certification the Beneficiary claimed to have "one and one half years of college level education in business administration" as of 2006. He also claimed experience with two companies as a landscape foreman: 1) [redacted] from January 1, 2012 to June 29, 2017 (approximately five years, six months); and 2) [redacted] from November 20, 2004 to December 15, 2007 (approximately three years, one month). The labor certification also lists the Beneficiary's employment as a "section supervisor" for the government of Honduras, from August 1996 to March 2003. The job duties are stated as, "Supervised other employees in the administration of taxes section. Managed customer complaints and requests. Processed customs tariff payments."

The initial evidence submitted with the petition included the Beneficiary's high school diploma and university transcripts for studies from 1998 to 2006. The evidence also included an evaluation of the Beneficiary's academic credentials and work experience. The evaluation states that the Beneficiary "completed at least one and one half years of specialized courses in his area of concentration, Business Administration, as well as in other related subjects."

The evaluation also states that the Beneficiary has "at least eighteen years of specialized training and work experience in Business Management, and related areas." The experience includes:

- Section Supervisor with [redacted] from August 1996 to March 2003.
- Gardener with [redacted] from November 2004 to December 2007.
- Self-employed owner of a transportation company, from May 2008 to the date of the evaluation, June 26, 2017.
- Supervisor/Foreman with [redacted] from January 2012 to the date of the evaluation, June 26, 2017.

The initial evidence also included letters from the Beneficiary's previous employers. A certificate of employment, signed February 17, 2018, attests to the Beneficiary's experience with [redacted] from January 1, 2012 to June 29, 2017. The letter does not state the Beneficiary's job title but lists his duties as, "Controlling weeds, managing staff, planting and transplanting, preparing materials and teams, driving a vehicle to move tools and product, preparing the soil for planting natural grass and plants, and fertilizing, fumigating and pruning decorative plants and fruit trees."

A certificate, signed March 5, 2008, attests to the Beneficiary's experience with [redacted] [redacted] from November 20, 2004 to December 15, 2007. The letter does not state the Beneficiary's job title but lists his duties as, "Green space layout, replantation, weed control, fertilizing program management, phytosanitary and aesthetic pruning, tree cutting, agricultural

machinery and equipment management, and truck driving when moving the equipment and materials used in the working area.”

A certificate, signed December 17, 2010, attests to the Beneficiary’s employment with [REDACTED] as “national asset manager,” from August 1, 1996 to March 28, 2003. The letter does not describe the Beneficiary’s job duties.

At the outset we note that the record does not demonstrate that the Beneficiary possesses 12 years of experience in the offered position of landscape foreman, as required by the labor certification. The Beneficiary’s employment as national asset manager with the government of Honduras is not in the offered position of landscape foreman. Further, the certificate describing the Beneficiary’s experience with [REDACTED] does not establish that this experience was in the offered position of landscape foreman. The description of the duties does not indicate that the Beneficiary managed or directed staff in their duties, or that he managed or reviewed work requirements, both key elements of the job duties of the offered position as described on the labor certification. Further, the Beneficiary’s employment with [REDACTED] overlaps with his claimed college level studies, casting doubt, without further evidence, on whether his employment was full-time.

Additionally, the information in the record is inconsistent with a nonimmigrant visa application that the Beneficiary submitted in 2016. In his prior nonimmigrant visa application, the Beneficiary stated that he completed his university education from June 1998 to June 2003. This is inconsistent with the Beneficiary’s claim to have completed his college level studies in 2006. The Beneficiary also lists his current employment in August 2016 as assistant sales manager with [REDACTED]. The Beneficiary also listed his previous employment as pharmacy assistant with [REDACTED] from February 1, 2009 to February 1, 2011. The inconsistencies in the Beneficiary’s employment history cast doubt as to his possession of the required education and 12 years of experience for the offered position. The Petitioner must resolve these inconsistencies with independent, objective evidence pointing to where the truth lies. *Matter of Ho*, 19 I&N Dec. 582, 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.*

Because we cannot affirmatively find that the Beneficiary possesses the education and experience required for the offered position, we will remand the matter to the Director for further consideration. On remand, the Director may wish to issue a new NOIR outlining the deficiencies above, requesting additional independent objective evidence in support, and allowing the Petitioner an opportunity to respond. The Director must state how the record fails to demonstrate eligibility for the classification sought under the pertinent regulatory scheme. If the Director makes a finding of willful material misrepresentation against either the Petitioner, the Beneficiary, or both, the Director must articulate the basis for the finding(s) in accordance with the above-referenced case law.

In a new NOIR, the Director may also wish to request evidence to establish the Petitioner’s continuing ability to pay the offered wage of \$81,806 per year. The record includes the Petitioner’s federal income tax returns for 2017 through 2020, as well as bank statements and payroll records. However, to be eligible for the classification it requests for the Beneficiary, the Petitioner must establish that it has the ability to pay the proffered wage stated on the labor certification from the June 2017 priority date and continuing until the beneficiary obtains lawful permanent residence. 8 C.F.R. § 204.5(g)(2)

### III. CONCLUSION

For the reasons discussed above, the Director's revocation and finding of willful misrepresentation of a material fact against the Petitioner are withdrawn. We will remand this case to the Director for further consideration of the Petitioner's eligibility for the requested benefit, including the Beneficiary's qualifications for the offered position and the Petitioner's continuing ability to pay the proffered wage. If the Director issues a new NOIR, the content of that notice and the consideration of any evidence submitted by the Petitioner should comply with the requirements of 8 C.F.R. § 205.2(b) and (c) and *Matter of Esteime*. The Director shall then 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.