



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

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

MATTER OF G-P-C-

DATE: AUG. 12, 2019

APPEAL OF NEBRASKA SERVICE CENTER DECISION

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

The Petitioner, a church, seeks to employ the Beneficiary as director of its education department. It requests her classification under the second-preference immigrant category as a member of the professions holding an advanced degree. *See* Immigration and Nationality Act (the Act) section 203(b)(2)(A), 8 U.S.C. § 1153(b)(2)(A). This employment-based, “EB-2” classification allows a U.S. organization to sponsor a foreign national for lawful permanent resident status to work in a job requiring at least a master’s degree, or a bachelor’s degree followed by five years of experience.

After the filing’s initial grant, the Director of the Nebraska Service Center revoked the petition’s approval. The Director concluded that the Petitioner did not establish its required intention to employ the Beneficiary in the offered position.

On appeal, the Petitioner submits additional evidence of its activities. It argues that it need not employ the Beneficiary until she obtains lawful permanent residence and that the Director did not give it a chance to respond to information supporting the revocation.

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. EMPLOYMENT-BASED IMMIGRATION

Immigration as an advanced degree professional generally follows a three-step process. 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)(A)(i) of the Act, 8 U.S.C. § 1182(a)(5)(A)(i). DOL certification signifies that insufficient U.S. workers are able, willing, qualified, and available for an offered position, and that 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 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 DOL-certified position and the requested classification. If USCIS grants a

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.

“[A]t any time” before a beneficiary obtains lawful permanent resident status, 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, the erroneous nature of a petition’s approval justifies its revocation. *Matter of Ho*, 19 I&N Dec. 582, 590 (BIA 1988).

USCIS may issue a notice of intent to revoke (NOIR) if the unexplained and un rebutted record would have warranted the petition’s denial. *Matter of Estime*, 19 I&N Dec. 450, 451 (BIA 1987). The Agency may revoke a petition’s approval if a petitioner’s NOIR response does not overcome the alleged revocation grounds. *Id.* at 452.

II. INTENT TO EMPLOY IN THE OFFERED POSITION

An organization may file an immigrant petition if it is “desiring and intending to employ [a foreign national] within the United States.” Section 204(a)(1)(F) of the Act. A petitioner must intend to employ a beneficiary under the terms and conditions of an accompanying labor certification. *Matter of Izdebska*, 12 I&N Dec. 54, 55 (Reg’l Comm’r 1966) (affirming a petition’s denial where, contrary to the accompanying labor certification, a petitioner did not intend to employ a beneficiary as a domestic worker on a full-time, live-in basis).

Here, the petition and labor certification state the Petitioner’s intention to permanently employ the Beneficiary as education department director on a full-time basis. But the Director’s NOIR questioned that intent. The NOIR states that a USCIS officer visited the Petitioner’s site, where he spoke to a pastor. The pastor reportedly told the officer that the Beneficiary attends the church and provides educational services without receiving payment in exchange. The NOIR also states that the church did not appear to host activities on weekdays and that USCIS’ site visit “unequivocally demonstrated that the beneficiary does not work at the church.”

These alleged facts, however, would not have warranted the petition’s denial. A petition represents an offer of *future* employment. A petitioner need not employ a beneficiary in an offered position until he or she obtains lawful permanent resident status. Indeed, as previously indicated, a beneficiary of a petition can remain outside the United States until granted an immigrant visa. *See* section 221(a) of the Act, 8 U.S.C. § 1201(a) (authorizing consular officers to issue immigrant visas). The Beneficiary’s volunteer status with the Petitioner therefore constituted insufficient evidence of the church’s lack of intent to later employ her in the offered position.

The NOIR also fails to explain why the alleged lack of weekday activity at the Petitioner’s site during the single site visit would have justified the petition’s denial. It appears that the Director may have been questioning the church’s ability to employ the Beneficiary in the offered position on a full-time basis, but the Director did not discuss her reasoning.

The Petitioner responded to the concerns raised in the NOIR, but the Director then issued a revocation decision based on factual allegations not contained in the NOIR. The decision describes

the Beneficiary's volunteer work at the church as "part time" in nature. The decision also states that the pastor told the USCIS officer that "the beneficiary helps with the youth education on weekends, has no set schedule, and is not even required to show up." A revocation, however, can only stem from, and a petitioner need only respond to, an NOIR's factual allegations. *Matter of Arias*, 19 I&N Dec. 568, 570 (BIA 1988). Here, USCIS did not provide the Petitioner with an opportunity to respond to the additional allegations supporting the revocation decision. *See Matter of Estime*, 19 I&N Dec. at 451-52 (holding that "where the petitioner is unaware and has not been advised of derogatory evidence, revocation of the visa petition cannot be sustained").

For the forgoing reasons, the NOIR does not support the Petitioner's alleged lack of intent to employ the Beneficiary in the offered position. Moreover, the revocation decision was based on factual allegations not contained in the NOIR. As the NOIR was deficient, the revocation decision cannot be affirmed. We will therefore withdraw the Director's decision.

III. ABILITY TO PAY THE PROFFERED WAGE

Although the revocation will be withdrawn, the record indicates that USCIS erroneously approved the petition. The Petitioner did not establish its required 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 include copies of annual statements, federal tax returns, or audited financial statements. *Id.*

Here, the labor certification states the proffered wage of the offered position of education department director as \$43,160 a year. The petition's priority date is August 6, 2012, 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). USCIS approved the petition on April 17, 2014. As of that date, required evidence of the Petitioner's ability to pay the proffered wage in 2014 was not yet available. The Petitioner therefore was required to demonstrate its continuing ability to pay the proffered wage in 2012 and 2013.

Although a non-profit organization is exempt from federal income taxes, the Petitioner submitted a copy of a federal return for 2012. *See* U.S. Internal Revenue Service (IRS), Instructions to IRS Form 990, Return of Organization Exempt From Income Tax, <https://www.irs.gov/instructions/i990#idm140359635205792> (explaining that, depending on their amounts of gross receipts and total assets, nonprofits must file annual information returns or electronic notices) (last visited Aug. 6, 2019). The Petitioner's 2012 tax returns reflect excess revenue sufficient to pay the proffered wage. The Petitioner also submitted a profit-and-loss statement for 2013. The statement, however, does not indicate that an independent auditor reviewed it and attested to its fair presentation of the Petitioner's finances. *See* 8 C.F.R. § 204.5(g)(2) (specifying "*audited* financial statements" as an acceptable form of required evidence) (emphasis added). Thus, the record lacks required evidence of the Petitioner's ability to pay in 2013. As of the petition's approval, the Petitioner therefore did not demonstrate its ability to pay the proffered wage.

Because the Director did not notify the Petitioner of this potential ground of revocation, we will remand the matter.¹ On remand, the Director should issue a new NOIR explaining the deficiency in the Petitioner's evidence. The NOIR should instruct the Petitioner to submit copies of an annual report, federal tax return, or audited financial statement for 2013, and provide the church with a reasonable period to respond. The Petitioner may also submit additional evidence of its ability to pay in 2012 or 2013, including evidence that it paid the Beneficiary during those years or documentation supporting the factors stated in *Matter of Sonogawa*, 12 I&N Dec. 612 (Reg'l Comm'r 1967).

IV. CONCLUSION

The factual allegations of the NOIR do not support the petition's revocation. The record, however, does not demonstrate the approvability of the petition. The new NOIR may include additional, potential grounds of revocation. If supported by sufficient factual allegations, the new NOIR may also reassert that the Petitioner did not demonstrate its intention to employ the Beneficiary in the offered position. Upon receipt of a timely response to the new NOIR, the Director should review the entire record and enter a new decision.

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

Cite as *Matter of G-P-C-*, ID# 4582202 (AAO Aug. 12, 2019)

¹ The Director's NOIR alleges that the Petitioner did not demonstrate its ability to pay the proffered wage. But the NOIR asserts that the church must establish its ability to pay combined proffered wages of this and other immigrant petitions it filed. See *Patel v. Johnson*, 2 F.Supp.3d 108, 124 (D. Mass. 2014) (affirming a petition's revocation where, as of the filing's grant, a petitioner did not demonstrate its ability to pay the combined proffered wages of multiple petitions). USCIS records indicate that, before this petition's priority date, most of the beneficiaries of the Petitioner's other petitions obtained lawful permanent resident status, and USCIS denied the petition for the remaining beneficiary. The Petitioner therefore need only demonstrate its ability to pay the proffered wage of this petition.