

II. The petitioner will not pay the beneficiary a wage that meets or exceeds the required minimum wage

USCIS cannot approve a visa petition that is based on an illegal or otherwise invalid employment agreement. See *Matter of I- Corp.*, Adopted Decision 2017-02 (AAO Apr. 12, 2017). To prevent a potential conflict with the Fair Labor Standards Act (FLSA), USCIS must ensure that a beneficiary will not be paid a wage that is less than the minimum required wage under state or Federal law, whichever is higher, before approving an employment-based immigrant visa petition.

The central issue here is whether the petitioner established that it will pay the beneficiary a wage that meets or exceeds the required minimum wage as mandated by the FLSA of 1938, Pub. L. No. 75-718, 52 Stat. 1060 (codified as amended at 29 U.S.C. Section 201-219). The FLSA provides for Federal minimum wage requirements for employers. 29 U.S.C. Section 206. When Federal and state minimum wage laws differ, an employer must pay a wage that meets or exceeds the minimum required wage of whichever requirement is higher. See 29 U.S.C. Section 218(a).

The expressed policy of the FLSA is to eliminate labor conditions “detrimental to the maintenance of the minimum standard of living necessary for health, efficiency, and general well-being of workers,” including that which “constitutes an unfair method of competition in commerce.” 29 U.S.C. Section 202. Such detrimental working conditions include the payment of a wage below that set by the FLSA as the minimum wage. See 29 U.S.C. Section 206.

The right to a minimum wage under the FLSA cannot be waived by agreement between an employee and his or her employer. *Brooklyn Sav. Bank v. O’Neil*, 324 U.S. 697 (1945). Contractual understandings or agreements which effectively circumvent or evade the protections of the FLSA are invalid and unenforceable.

In this case, USCIS notes that the Federal minimum wage applicable at the time of filing the labor certification and Form I-140 was \$7.25. [FN] The State of Maryland set a higher minimum wage, mandating \$11.75 in 2021 (the time of filing the labor certification) and \$11.75 in 2022 (the time of filing Form I-140. [FN] For 2021, the State of Maryland set a higher minimum wage, mandating \$11.75. [FN]

Because Maryland's minimum wage is higher than the Federal minimum, the higher \$11.75 standard applies. When Federal and state minimum wage laws differ, an employer must pay a wage that meets or exceeds the minimum required wage of whichever requirement is higher. 29 U.S.C. Section 218(a).

As mentioned above, the offered wage is \$23,691.00, as represented on the labor certification and Form I-140.

Therefore, since the offered wage is below the State of Maryland's minimum wage (annualized at \$24,440.00 based upon a 40-hour work week), the beneficiary's proposed salary would violate state minimum wage protections, and thus the offer of employment would be invalid under the FLSA.

As the petitioner has not established, by a preponderance of the evidence, that it will pay to beneficiary the required minimum wage, USCIS cannot approve the petition. The truth is to be determined not by the quantity of evidence alone but by its quality. USCIS examines each piece of evidence for relevance, probative value, and credibility, both individually and within the context of the totality of the evidence, to determine whether the fact to be proven is probably true. See Matter of Chawathe, 25 I&N Dec. at 376.

Doubt cast on any aspect of the petitioner's evidence may lead to a reevaluation of the reliability and sufficiency of the remaining evidence offered in support of the visa petition. It is incumbent upon the petitioner to resolve any inconsistencies in the record by submitting independent objective evidence, and attempts to explain or reconcile such inconsistencies, absent competent objective evidence pointing to where the truth, in fact, lies, will not suffice. Matter of Ho, 19 I&N Dec. at 591.

USCIS may reject a fact stated in the petition if it does not believe it to be true. Section 204(b) of the INA; see also Anetekhai v. I.N.S., 876 F.2d 1218, 1220 (5th Cir. 1989); Lu-Ann Bakery Shop, Inc. v. Nelson, 705 F. Supp. 7, 10 (D.D.C. 1988); Systronics Corp. v. INS, 153 F. Supp. 2d 7, 15 (D.D.C. 2001).

Please submit independent, objective evidence to explain the above-noted discrepancies and inconsistencies and establish that the petitioner will pay the beneficiary the required minimum wage.

PLACE THE ATTACHED COVERSHEET AND THIS ENTIRE LETTER ON TOP OF YOUR RESPONSE. SUBMISSION OF EVIDENCE WITHOUT THE COVERSHEET AND THIS LETTER WILL DELAY PROCESSING OF YOUR CASE AND MAY RESULT IN A DENIAL.

Sincerely,



Mary Elizabeth Brennan Seng
Acting Director, Texas Service Center
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