U.S. Citizenship and Immigration Services

Non-Precedent Decision of the Administrative Appeals Office

In Re: 21340608

Date: AUG. 10, 2022

Appeal of Nebraska Service Center Decision

Form I-140, Immigrant Petition for Multinational Manager or Executive

The Petitioner, a structural design firm, seeks to permanently employ the Beneficiary as chief executive officer (CEO). The company requests his classification under the first-preference, immigrant visa category as a multinational executive. *See* Immigration and Nationality Act (the Act) section 203(b)(1)(C), 8 U.S.C. § 1153(b)(1)(C).

The Director of the Nebraska Service Center first granted the petition. But, after two of the Petitioner's shareholders alleged the Beneficiary's violation of state law in obtaining purported control of the company, the Director revoked the filing's approval. The Director concluded that the Petitioner did not demonstrate the claimed, qualifying relationship between the company and the Beneficiary's foreign employer.

On appeal, the Petitioner asserts that the shareholders and the Director misunderstood California corporate law and that the shareholders now agree that the Beneficiary validly controls the company.

The Petitioner bears the burden of establishing eligibility for the requested benefit by a preponderance of evidence. *See Matter of Ho*, 19 I&N Dec. 582, 589 (BIA 1988) (discussing the burden of proof in petition revocation proceedings); *see also Matter of Chawathe*, 25 I&N Dec. 369, 375 (AAO 2010) (discussing the standard of proof). 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. MULTINATIONAL MANAGERS AND EXECUTIVES

Petitioners for multinational managers or executives must demonstrate that the entities have been doing business for at least one year and would employ noncitizen beneficiaries in the United States in managerial or executive capacities. Section 203(b)(1)(C) of the Act; 8 C.F.R. § 204.5(j)(3)(i)(D), (5). Petitioners must also establish that, in the three years before the beneficiaries' nonimmigrant admissions to the United States, the petitioners, their affiliates, or their subsidiaries employed the noncitizens abroad for at least one year in managerial or executive capacities. Section 203(b)(1)(C) of the Act; 8 C.F.R. § 204.5(j)(3)(i)(B), (C).

Upon approvals of their petitions, multinational managers and executives may apply for immigrant visas either at U.S. consulates abroad or, if eligible, through the "adjustment of status" process in the United States. *See* section 245(a) of the Act, 8 U.S.C. § 1255(a).

"[A]t any time" before beneficiaries obtain lawful permanent residence, however, U.S. Citizenship and Immigration Services (USCIS) may revoke petition approvals for "good and sufficient cause." Section 205 of the Act, 8 U.S.C. § 1155. Erroneous approvals of petitions justify their revocations. *Matter of Ho*, 19 I&N Dec. at 590.

USCIS properly issues notices of intent to revoke (NOIRs) petition approvals if the unrebutted or unexplained records at the time of the notices' issuances would have warranted the petitions' denials. *Matter of Estime*, 19 I&N Dec. 450, 451 (BIA 1987). If petitioners' NOIR responses do not overcome the stated revocation grounds, USCIS properly revokes petitions' approvals. *Id.* at 451-52.

II. THE CLAIMED, QUALIFYING RELATIONSHIP

A petitioner for a multinational manager or executive must demonstrate that it is the same employer, or a subsidiary or affiliate of another entity, that employed the Beneficiary abroad. 8 C.F.R. § 204.5(j)(3)(C).

The Petitioner claims that it is an affiliate of the business that employed the Beneficiary in China. The term "affiliate" includes "[o]ne of two subsidiaries both of which are owned and controlled by the same parent or individual." 8 C.F.R. § 204.5(j)(2). The term "subsidiary," in turn, means an entity of which a parent directly or indirectly owns more than half and controls the entity. *Id.*

The Petitioner claims that, although the Beneficiary owns only 49% of the petitioning California corporation's stock, he controls the company through voting agreements with other shareholders. *See Matter of Hughes*, 18 I&N Dec. 289, 293 (Comm'r 1982) (stating that control of an entity "may be *de facto* by reason of control of voting shares through partial ownership and by possession of proxy votes").

After the petition's approval, the Director received a letter from an attorney representing two of the Petitioner's shareholders who purportedly held 51% of the corporation's stock. The shareholders requested the petition's withdrawal. The letter states: "It has come to the attention of the majority shareholders of [the Petitioner] that the entity they own was being used for fraudulent purposes" by the Beneficiary. The letter contends that, under California corporate law, the Beneficiary invalidly obtained voting rights to additional shares without their transfer to him.

Until a beneficiary obtains lawful permanent residence based on a petition, a petitioner may withdraw an approved filing. 8 C.F.R. § 103.2(b)(6). The Director, however, did not acknowledge the petition's withdrawal. Rather, based on the letter's allegations, she issued a NOIR questioning the claimed affiliation between the Petitioner and the Beneficiary's foreign employer.[1]

[1] On appeal, the Petitioner asserts that the withdrawal request was "legally inoperative," as "[a] petition that is withdrawn 180 days or more after its approval . . . remains approved unless its approval is revoked on other grounds." 8 C.F.R.

In response to the NOIR, the shareholders reversed their position, asking USCIS to refrain from revoking the petition. They said they requested the withdrawal during a "very distress[ed] situation when [the Beneficiary] was trying to exercise his voting right to make drastic management changes that [were] not appropriate in business practice in [the] U.S." Contrary to the shareholders' request, however, the Director revoked the petition's approval, finding that the Petitioner did not demonstrate the Beneficiary's legal control of the company.

The record as currently constituted, however, does not support the Director's revocation of the petition's approval. First, in finding that the Beneficiary did not legally gain control of the Petitioner, the Director appears to have cited the wrong section of the California Corporations Code. The Director found that, in acquiring the purported voting rights to shares beyond the 49% that he allegedly owns, the Beneficiary violated Cal. Corp. Code § 706(a). In their withdrawal request, however the shareholders alleged the Beneficiary's violation of Cal. Corp. Code § 400(b). The Director did not consider that provision, which requires all shares in the same class to have the same voting rights. Rather, the Petitioner cites Cal. Corp. Code § 706(a) on appeal for the proposition that shareholders may legally make voting agreements regarding their shares.

Also, the record contains unresolved discrepancies regarding the Petitioner's number of authorized shares. *See Matter of Ho*, 19 I&N Dec. at 591 (requiring petitioners to resolve inconsistencies of record with independent, objective evidence pointing to where the truth lies). The purchase agreements that the Petitioner submitted state the company's "authorized capital stock" as 500 shares. Yet, the Petitioner claims - and the supplemental agreements and the stock ledger show - the company's issuance of 1,500 total shares. Stock that a California corporation issues beyond its authorized amount is void. *See Tulare Savs. Bank v. Talbot*, 131 Cal. 45, 48 (Cal. 1900). Thus, these evidentiary discrepancies cast additional doubt on the company's claimed qualifying relationship with the Beneficiary's foreign employer. *See Matter of Ho*, 19 I&N Dec. at 591 (requiring a petition to resolve inconsistencies of record with independent, objective evidence pointing to where the truth lies).

For the foregoing reasons and because the Director did not notify the Petitioner of the additional deficiencies, we will withdraw the revocation decision and remand the matter. On remand, the Director should issue a new NOIR informing the company of the insufficient evidence of the claimed, qualifying relationship.

If supported by the record, the new NOIR may include any additional, potential grounds of revocation. The Director, however, must afford the Petitioner 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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§ 205.1(a)(3)(iii)(C). That regulation, however, prevents only automatic revocations of such withdrawn petitions. Although not subject to automatic revocation, petitions can still be withdrawn more than 180 days after their approvals. *See* Proposed Rule for Retention of EB-1, EB-2, & EB-3 Immigrant Workers, 80 Fed. Reg. 81900, 81916 (Dec. 31, 2015) (explaining that, although generally continuing to be valid for "portability" under section 204(j) of the Act, 8 U.S.C. § 1154(j), and certain status extension purposes, a petition withdrawn more than 180 days after its approval "cannot on its own serve as the basis for obtaining an immigrant visa or adjustment of status as there is no longer a *bona fide* employment offer related to the petition").

If the Director finds that the Beneficiary legally gained control of the Petitioner, the petition withdrawal request by the two shareholders would be ineffective, as they did not control the company at the time of the request, and the Director should enter a new decision. In contrast, if the Director finds the Beneficiary's purported control of the Petitioner to be invalid, she should acknowledge the unretractable withdrawal. *See* 8 C.F.R. § 103.2(b)(6); *see also* Final Rule for Changes in Processing Procedures for Certain Applications & Petitions, 56 Fed. Reg. 1455, 1458 (Jan. 11, 1994) (describing a withdrawal as "definitive" and stating that "a petitioner who withdraws a case and later changes his or her mind again may refile a new . . . petition").

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