U.S. Citizenship and Immigration Services

Non-Precedent Decision of the Administrative Appeals Office

In Re: 20495568

Date: SEP. 09, 2022

Appeal of Nebraska Service Center Decision

Form I-140, Petition for Multinational Managers or Executives

The Petitioner, describing itself as a consultancy on clinical medical trials, seeks to permanently employ the Beneficiary as its chief executive officer in the United States under the first preference immigrant classification for multinational executives or managers. Immigration and Nationality Act (the Act) section 203(b)(1)(C), 8 U.S.C. § 1153(b)(1)(C).

The instant petition was approved; however, the Director of the Nebraska Service Center later revoked the approved petition. United States Citizenship and Immigration Service (USCIS) investigating officers conducted a site visit at the Petitioner's office location and the Beneficiary's home, and thereafter issued a notice of intent to revoke (NOIR) to which the Petitioner responded. Following the Petitioner's response, the Director determined that the Petitioner did not demonstrate that it was doing business as defined by the regulations and that it had the ability to pay the Beneficiary's proffered wage. The Director further concluded that the Petitioner was "not a viable and independent business entity," and therefore, the Beneficiary "cannot be employed in a managerial or executive capacity."

On appeal, the Petitioner contends the Director overlooked evidence, including corporate tax returns documentation, invoices, and other corroborating evidence, it contends establishes that it has been doing business. Similarly, the Petitioner asserts that it has demonstrated it had ability to pay the Beneficiary's proffered wage, stating that the Director did not sufficiently consider documentary evidence showing that it paid his proffered wage for several years. The Petitioner further contends that the Director improperly concluded that it is not a viable business entity and that it would not employ the Beneficiary in a managerial capacity.

Upon *de novo* review, we will withdraw the Director's decision and remand the matter for further action and entry of a new decision.

I. LEGAL FRAMEWORK

An immigrant visa is available to a beneficiary who, in the three years preceding the filing of the petition, has been employed outside the United States for at least one year in a managerial or executive

capacity, and seeks to enter the United States in order to continue to render managerial or executive services to the same employer or to its subsidiary or affiliate. Section 203(b)(1)(C) of the Act.

The Form I-140, Immigrant Petition for Alien Worker, must include a statement from an authorized official of the petitioning United States employer which demonstrates that the beneficiary has been employed abroad in a managerial or executive capacity for at least one year in the three years preceding the filing of the petition, that the beneficiary is coming to work in the United States for the same employer or a subsidiary or affiliate of the foreign employer, and that the prospective U.S. employer has been doing business for at least one year. *See* 8 C.F.R. § 204.5(j)(3).

Section 205 of the Act states: "The Secretary of Homeland Security may, at any time, for what he deems to be good and sufficient cause, revoke the approval of any petition approved by him under section 204. Such revocation shall be effective as of the date of approval of any such petition."

Regarding the revocation on notice of an immigrant petition under section 205 of the Act, the Board of Immigration Appeals has stated:

> In *Matter of Estime*, . . . this Board stated that a notice of intention to revoke a visa petition is properly issued for "good and sufficient cause" where the evidence of record at the time the notice is issued, if unexplained and unrebutted, would warrant a denial of the visa petition based upon the petitioner's failure to meet his burden of proof. The decision to revoke will be sustained where the evidence of record at the time the decision is rendered, including any evidence or explanation submitted by the petitioner in rebuttal to the notice of intention to revoke, would warrant such denial.

Matter of Ho, 19 I&N Dec. 582, 590 (BIA 1988) (quoting *Matter of Estime*, 19 I&N Dec. 450 (BIA 1987)).

II. FACTS AND PROCEDURAL HISTORY

The Petitioner, established in 2014, filed the petition in October 2017 stating that it "represents a network of [redacted]...in eighteen countries" and provides professional services to medical companies during clinical trials, including site visits, local regulatory and financial support, training, recruitment and hiring, documentation preparation, among other services. The Form I-140, Immigrant Petition for Alien Worker filed on behalf of the Beneficiary was approved by the Nebraska Service Center on January 17, 2019.

Following the approval of the petition, USCIS investigating officers conducted a site visit to the Petitioner's asserted business location and interviewed the Beneficiary at his home in February 2020. As a result of this site visit and interview, the Director issued a NOIR in December 2020. In the NOIR the Director emphasized that when the investigating officers visited the Petitioner's business suite there were no personnel present and no signage in the lobby of the office building identifying the Petitioner. The Director further noted that an individual from a neighboring suite working for another company told the investigating officers that he "rarely saw anyone" at the Petitioner's suite location.

Thereafter, the investigating officers proceeded to visit the Beneficiary's residence where he invited them into his home for an interview. The NOIR stated that in this interview the Beneficiary acknowledged that all three of his employees worked part-time while working for other companies. The NOIR further indicated the Beneficiary stated that his only two clients were owned by two of his current employees and that one of the Petitioner's three employees was his father-in-law. The NOIR explained the Beneficiary emphasized that his father-in-law had been very helpful to him and his family by being his client and he was not currently looking for other clients.

As a result of this information, the NOIR stated that there was question as to whether the Petitioner was doing business and a "viable and independent business entity." The Director pointed to the information collected in the site visit and interview with the Beneficiary, emphasizing that its only two clients were owned by its employees, it shared the same address as its two clients, and the Beneficiary was related to the owner of one of the Petitioner's clients. The Petitioner later responded to the NOIR in March 2021 submitting rebuttals to the Director's observations in the NOIR and additional documentary evidence.

The Director later revoked this approved petition on August 18, 2021, and in the revocation decision, largely reiterated the information it had collected from the site visit and interview with the Beneficiary at his residence. The Director acknowledged submitted statements from the Petitioner's office neighbors and clients, but dismissed this evidence, stating that these statements and affidavits were "self[-]serving" and had "very limited weight."

The Director concluded the Petitioner did not establish that it was doing business, pointing to an expired business license and tax receipt document in had submitted in response to the NOIR. Further, the Director determined that the Petitioner did not demonstrate it had the ability to pay the Beneficiary's wage, emphasizing that its corporate tax returns from 2018, 2019, and 2020 reflected a net profit of less than his proffered wage. The Director also stated that the evidence provided by the Petitioner did not overcome the "notable inconsistencies" disclosed in the interview with the Beneficiary at his home in February 2020. The Director concluded that the Petitioner was not "a viable and independent business entity," and as a result, the "the beneficiary cannot be employed by the petitioner in a managerial or executive capacity."

III. ANALYSIS

Upon review, the Director did not sufficiently consider the Petitioner's response to the NOIR, nor the totality of the evidence submitted on the record, when revoking the approved petition. Further, the Petitioner submits additional evidence on appeal relevant to the Director's conclusions and the bases of revocation.

As noted, the Director concluded that the submitted evidence did not establish that the Petitioner was doing business as defined by the regulations.[1] In making this conclusion, the Director pointed only to an expired business license submitted by the Petitioner. Although this discrepancy raises some question as to the Petitioner's operations, this conclusion overlooks other substantial evidence it

[1] "Doing business," is defined as the regular, systematic, and continuous provision of goods and/or services. 8 C.F.R. § 204.5(j)(2).

submitted relevant to demonstrating whether it was doing business, such as annual corporate tax returns, federal and state quarterly payroll returns, invoices, contracts, leases, bank records, letters from clients, amongst other evidence. Further, the Petitioner submits additional evidence on appeal relevant to demonstrating that it is doing business. The Director's decision did not sufficiently consider all the evidence on the record related to whether the Petitioner was doing business.

Further, the Director determined the Petitioner did not demonstrate that it had the ability to pay the Beneficiary's proffered wage.[2] In doing so, the Director emphasized that its corporate tax returns from 2018, 2019, and 2020 reflected a net profit of less than his proffered wage. However, this conclusion on the part of the Director did not sufficiently consider provided evidence indicating that the Petitioner paid the Beneficiary's proffered wage during the year the petition was filed through to 2020. In determining a petitioner's ability to pay the proffered wage, we first examine whether it paid a beneficiary the full proffered wage each year from a petition's priority date. Therefore, the Director did not sufficiently consider the submitted evidence relevant to whether the Petitioner had paid the Beneficiary's proffered wage.

Lastly, the Director concluded that the Petitioner "is not a viable and independent business entity," and therefore, that "the beneficiary cannot be employed by the petitioner in a managerial or executive capacity." Again, this determination on the part of the Director does not properly consider the totality of the evidence submitted. For instance, as discussed, the Petitioner submitted substantial documentary evidence relevant to its business operations that were not discussed and analyzed by the Director. In addition, the Director did not sufficiently analyze the assertions set forth by the Petitioner in the NOIR response and the additional evidence submitted at that time. The Director also did not sufficiently articulate why the Petitioner did not establish that the Beneficiary was acting in a managerial capacity as of the date of the NOIR response, or thereafter.[3] For example, the Director's decision did not properly analyze the Beneficiary's duties, its staffing, or other typical evidence considered when determining whether he was acting in a managerial capacity as claimed.[4] In addition,

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[2] The regulation at 8 C.F.R. § 204.5(g)(2) states in pertinent part:

> Ability of prospective employer to pay wage. Any petition filed by or for an employment-based immigrant which requires an offer of employment must be accompanied by evidence that the prospective United States employer has the ability to pay the proffered wage. The petitioner must demonstrate this ability at the time the priority date is established and continuing until the beneficiary obtains lawful permanent residence. Evidence of this ability shall be either in the form of copies of annual reports, federal tax returns, or audited financial statements.

In determining a petitioner's ability to pay the proffered wage, we first examine whether it paid a beneficiary the full proffered wage each year from a petition's priority date. If a petitioner did not pay a beneficiary the full proffered wage, we next examine whether it had sufficient annual amounts of net income or net current assets to pay the difference between the proffered wage and the wages paid, if any. If a petitioner's net income or net current assets are insufficient, we may also consider other evidence of its ability to pay the proffered wage. Federal courts have upheld our 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); *Tongatapu Woodcraft Haw., Ltd. v. Feldman*, 736 F.2d 1305, 1309 (9th Cir. 1984); *Estrada-Hernandez v. Holder*, 108 F. Supp. 3d 936, 942-946 (S.D. Cal. 2015); *Rizvi v. Dep't of Homeland Sec.*, 37 F. Supp. 3d 870, 883-84 (S.D. Tex. 2014), *aff'd*, 627 Fed. App'x 292, 294-295 (5th Cir. 2015).

[3] The Petitioner only asserts that the Beneficiary was, and would be, employed in a managerial capacity.

[4] When examining the managerial capacity of a given beneficiary, we will review the petitioner's description of the job duties. The petitioner's description of the job duties must clearly describe the duties to be performed by the beneficiary

the Petitioner submits additional evidence on appeal relevant to whether the Beneficiary was acting, and would act, in a managerial capacity.

As our review is limited to the evidence on the record at the time of the Director's adjudication, the Director is the more appropriate party to consider this new evidence and its impact on the Beneficiary's eligibility. Therefore, we will withdraw the Director's decision and remand this matter for consideration of the new evidence and the entry of a new decision. *See Matter of Soriano*, 19 I&N Dec. 764 (BIA 1988); *Matter of Obaigbena*, 19 I&N Dec. 533 (BIA 1988).

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

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and indicate whether such duties are in a managerial capacity. 8 C.F.R. § 204.5(j)(5). To be eligible as a multinational manager, the Petitioner must show that the Beneficiary will perform the high-level responsibilities set forth in the statutory definition at section 101(a)(44)(A)(i)-(iv) and (B)(i)-(iv) of the Act. If the record does not establish that the offered position meets all four of these elements, we cannot conclude that it is a qualifying managerial position.

If the Petitioner establishes that the offered position meets all elements set forth in the statutory definition, the Petitioner must prove that the Beneficiary will be *primarily* engaged in managerial duties, as opposed to ordinary operational activities alongside its other employees. *See Family Inc. v. USCIS*, 469 F.3d 1313, 1316 (9th Cir. 2006). In determining whether a given beneficiary's duties will be primarily managerial, we consider the Petitioner's description of the job duties, the company's organizational structure, the duties of a beneficiary's subordinate employees, the presence of other employees to relieve the beneficiary from performing operational duties, the nature of the business, and any other factors that will contribute to understanding a beneficiary's actual duties and role in a business.