U.S. Citizenship and Immigration Services

Non-Precedent Decision of the Administrative Appeals Office

In Re: 19827084

Date: MAY 16, 2022

Appeal of Nebraska Service Center Decision

Form I-140, Immigrant Petition for an Advanced Degree Professional

The Petitioner, a software, services, and internet technologies company, seeks to employ the Beneficiary as a marketing communications manager. It requests classification of the Beneficiary as an advanced degree professional under the second preference immigrant category. Immigration and Nationality Act (the Act) section 203(b)(2), 8 U.S.C. § 1153(b)(2). This employment-based "EB-2" immigrant classification allows a U.S. employer to sponsor a professional with an advanced degree for lawful permanent resident status.

The Director of the Nebraska Service Center initially approved the petition, but subsequently revoked the approval on the ground that the instrument of payment for the filing fee was not honored by the financial institution, which left the filing fee unpaid. On appeal the Petitioner asserts that the filing fee was properly paid and that there was no basis in law for the Director to revoke the approved petition.

In visa petition proceedings the burden is on the petitioner to establish eligibility for the benefit sought. *See Matter of Brantigan*, 11 I&N Dec. 493 (BIA 1966). The petitioner must prove by a preponderance of the evidence that the beneficiary is fully qualified for the benefit sought. *See Matter of Chawathe*, 25 I&N Dec. 369, 376 (AAO 2010). Upon *de novo* review, we will dismiss the appeal.

I. LAW

Employment-based immigration generally follows a three-step process. First, an employer obtains an approved labor certification (ETA Form 9089) 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). By approving the labor certification the DOL certifies that there are insufficient U.S. workers who are able, willing, qualified, and available for the offered position and that employing a foreign national in the position will not adversely affect the wages and working conditions of domestic workers similarly employed. *See* section 212(a)(5)(A)(i)(I)-(II) of the Act. Second, the employer files an immigrant visa petition (Form I-140) with U.S. Citizenship and Immigration Services (USCIS). *See* section 204 of the Act, 8 U.S.C. § 1154. Third, if USCIS approves the petition, the foreign national may 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.

Section 205 of the Act, 8 U.S.C. § 1155, provides that the Secretary of Homeland Security may "for good and sufficient cause, revoke the approval of any petition." By regulation this revocation authority is delegated to any USCIS officer who is authorized to approve an immigrant visa petition "when the necessity for the revocation comes to the attention of [USCIS]." 8 C.F.R. § 205.2(a). USCIS must give the petitioner notice of its intent to revoke the prior approval of the petition and the opportunity to submit evidence in opposition thereto, before proceeding with written notice of revocation. *See* 8 C.F.R. § 205.2(b) and (c).

II. ANALYSIS

The petition in this case was filed on February 9, 2021, and approved one week later, on February 16, 2021. On March 5, 2021, however, the Director sent a Notice of Intent to Revoke (NOIR) to the Petitioner, stating that USCIS intended to revoke the approved petition because either (1) the check or money order submitted as payment was returned by the bank or financial institution, or (2) the credit card submitted as payment was not honored by the financial institution. The Director gave the Petitioner until April 7, 2021, to submit written evidence that the payment method was valid and honored by the financial institution.

The Petitioner did not respond to the NOIR. Therefore, on June 2, 2021, the Director issued a Notice of Revocation. The Director stated that USCIS was revoking the Petitioner's immigration benefit as required by the federal regulation at 8 C.F.R. § 103.2(a)(7)(ii)(D) because the check, money order, or credit card submitted as payment of the filing fee was not honored by the financial institution.

The Petitioner filed a timely appeal on July 30, 2021, accompanied by a brief and additional evidence. Generally, the decision to revoke the approval of a petition will be affirmed, notwithstanding the submission of evidence on appeal, when a petitioner fails to offer a timely explanation or rebuttal to a properly issued notice of intention to revoke. *See Matter of Arias*, 19 I&N Dec. 568, 569 (BIA 1988). We find that the Director issued the NOIR in this case for good and sufficient cause and that the Petitioner did not respond. Accordingly, we will dismiss the appeal.

In the alternative, however, we will consider the Petitioner's arguments on appeal. The Petitioner asserts that the Director committed factual error because the evidence shows that the requisite filing fee of $700 for the Form I-140 petition was paid with a check that was honored by Bank of America. The Petitioner also asserts that the Director committed legal error because the regulation cited as the basis for revocation, 8 C.F.R. § 103.2(a)(7)(ii)(D), does not grant USCIS the authority to revoke an already approved petition. We will address each of these arguments in turn.

In support of its claim to have paid the $700 filing fee, the Petitioner submits a document scan which shows the processing by Bank of America of a $700 check (number [redacted]) from the Petitioner to the U.S. Department of Homeland Security (DHS), "captured" on February 11, 2021, for payment to the U.S. Treasury. The Petitioner also submits a letter from [redacted] Bank of America's [redacted] Transaction Services, dated July 28, 2021, who states that check number [redacted] in the amount of $700 was drawn on the Petitioner's account on February 11, 2021, and made payable to DHS. Supplementing these two documents submitted on appeal, the Petitioner

resubmits a company invoice dated December 2, 2020, submitted with the petition in February 2021, which recorded check number [redacted] to DHS in the "paid amount" of $700.

None of the above documents, however, confirms that the Petitioner's check number [redacted] paid the filing fee of the instant I-140 petition. Neither the invoice, nor the letter from the Bank of America official, nor the document scan of the processed check specifically identifies the petition or the Beneficiary for which the filing fee was being paid. The check itself is dated December 4, 2020, which preceded the filing of the instant petition by more than two months, and it lacks any identifying stamp or other marking from DHS or the U.S. Treasury confirming that it was actually received and deposited by the Government. The record includes a refund letter from USCIS to the Beneficiary, dated June 4, 2021, stating that because the Form I-140 petition "was Revoked for a bounced check" her concurrently filed adjustment of status application (Form I-485) was invalid and the filing fee for that application was being refunded.

It is incumbent upon a petitioner to resolve any inconsistencies in the record by independent objective evidence. Attempts to explain or reconcile such inconsistencies will not suffice without competent evidence pointing to where the truth lies. *See Matter of Ho*, 19 I&N Dec. 582, 591-92 (BIA 1988). For the reasons discussed above, the Petitioner has not reconciled the evidentiary inconsistencies concerning check number 5000135937, and what filing fee it was intended to pay.

As for the Petitioner's claim that the Director had no legal basis to revoke the approved petition under the regulatory provisions of 8 C.F.R. § 103.2(a)(7)(ii)(D), the Petitioner is correct only insofar as the authority to revoke does not derive from that regulation, which reads as follows:

> (7)(ii) A benefit request which is rejected will not retain a filing date. A benefit request will be rejected if it is not:
> . . . . . .
> (D) Submitted with the correct fee(s). If a check or other financial instrument used to pay a fee is returned as unpayable because of insufficient funds, USCIS will resubmit the payment to the remitter institution one time. If the instrument used to pay a fee is returned as unpayable a second time, the filing may be rejected. . . . .

Thus, the regulation at 8 C.F.R. § 103.2(a)(7)(ii)(D) provides for the rejection of petitions or applications that lack the requisite filing fee before they are adjudicated. The instant petition presents a different situation because the petition was adjudicated and approved before USCIS determined that the filing fee was not paid. The regulation at 8 C.F.R. § 103.7(b) states that "USCIS fees will be required as provided in 8 CFR part 106," and the specific regulation in this case is 8 C.F.R. § 106.1(b) and (c), which reads as follows:

> (b) Fees must be remitted from a bank or other institution located in the United States and payable in U.S. currency. . . . .
> (c) If a remittance in payment of a fee or any other matter is not honored by the bank or financial institution on which it is drawn:
> (1) The provisions of 8 C.F.R. § 103.2(a)(7)(ii) apply, no receipt will be issued, and if a receipt was issued, it is void and the benefit request loses its receipt date; and
> (2) If the benefit request was approved, the approval may be revoked upon notice. ....

As the regulation clearly indicates, if a filing fee check is not honored by the bank only after a petition is receipted and approved, as in this case, the petition is void, it loses its receipt date, and its approval may be revoked following notice to the petitioner.

After the instant petition was approved on February 16, 2021, USCIS gave the Petitioner proper notice of its intent to revoke the approval, in accordance with the requirements of 8 C.F.R. § 205.2(b), in the NOIR that was issued on March 5, 2021. Since the Petitioner did not respond to the NOIR, and provided no explanation for its non-response, the Director properly issued the Notice of Revocation, in accordance with the requirements of 8 C.F.R. § 205.2(c), on June 2, 2021. *See Matter of Arias*, 19 I&N Dec. at 569. While the regulation cited as the basis for the decision was not correct, the revocation itself was correct according to the applicable regulatory provisions at 8 C.F.R. § 106.1(b) and (c). Contrary to the Petitioner's contention, therefore, the Director had the authority under applicable regulations to revoke the petition's approval.

III. CONCLUSION

For the reasons discussed above the Petitioner has not overcome the grounds for revocation in the Director's decision. Therefore, we will dismiss the appeal.

ORDER: The appeal is dismissed.