



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

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

In Re: 24949990

Date: JUL. 21, 2023

Motion on Administrative Appeals Office Decision

Form I-140, Immigrant Petition for Alien Workers (Advanced Degree)

The Petitioner, a software development company, seeks to employ the Beneficiary as a software engineer. It requests classification of the Beneficiary as a member of the professions holding an advanced degree under the second preference immigrant classification. Immigration and Nationality Act (the Act) section 203(b)(2), 8 U.S.C. § 1153(b)(2). This employment-based classification allows a U.S. employer to sponsor a professional with an advanced degree for lawful permanent resident status.

The Director of the Texas Service Center revoked the approval of the petition, concluding that the record did not establish that the job offer was bona fide or that the Beneficiary had the required education or experience for the offered position. The Director further concluded that the Petitioner and Beneficiary had willfully misrepresented a material fact.

The Beneficiary filed a motion to reopen and reconsider the decision, which was rejected as improperly filed.¹ The Beneficiary then filed a second motion to reopen and reconsider the revocation, which the Director dismissed as untimely. The Beneficiary appealed this decision, and we dismissed the appeal, affirming the Director's decision that the second motion was untimely and that the Beneficiary had not shown that its lateness was reasonable and due to circumstances beyond his control. We further noted that the record did not show that the Beneficiary had sufficient work experience to qualify for the offered position. The matter is now before us on a combined motion to reopen and reconsider. 8 C.F.R. § 103.5(a)(2)-(3).

The affected party bears the burden of proof to demonstrate eligibility by a preponderance of the evidence. *Matter of Chawathe*, 25 I&N Dec. 369, 375-76 (AAO 2010). Upon review, we will grant

¹ Beneficiaries generally cannot file appeals or motions in visa petition proceedings. 8 C.F.R. § 103.3(a)(1)(iii)(B) (stating that beneficiaries are not "affected parties" for the purposes of filing an appeal or motion). However, U.S. Citizenship and Immigration Services (USCIS) treats beneficiaries as affected parties if they are eligible to "port" under section 204(j) of the Act, 8 U.S.C. § 1154(j), and properly request to do so. Thus, a beneficiary becomes an "affected party" with legal standing in a revocation proceeding when, as here, USCIS makes a favorable determination that they are eligible to port. *Matter of V-S-G- Inc.*, Adopted Decision 2017-06, *14 (AAO Nov. 11, 2017); USCIS Policy Memorandum PM 602-0152, *Guidance on Notice to, and Standing for, AC21 Beneficiaries about I-140 Approvals Being Revoked After Matter of V-S-G- Inc.* 5 (Nov. 11, 2017), <https://www.uscis.gov/legal-resources/policy-memoranda>.

the motion to reopen, withdraw the Director's decision, and remand the matter for entry of a new decision consistent with the following analysis. The motion to reconsider will be dismissed as moot.

I. LAW

A. Motions to Reopen and Reconsider

A motion to reconsider must establish that our decision was based on an incorrect application of law or policy and that the decision was incorrect based on the evidence in the record of proceedings at the time of the decision. 8 C.F.R. § 103.5(a)(3). A motion to reopen must state new facts and be supported by documentary evidence. 8 C.F.R. § 103.5(a)(2). A late-filed motion to reopen may be excused at the discretion of USCIS if it is demonstrated that the delay was reasonable and beyond the filer's control. 8 C.F.R. § 103.5(a)(1)(i).

B. Employment-Based Immigrant Petition Process

Employment-based immigration 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). Section 212(a)(5) of the Act, 8 U.S.C. § 1182(a)(5). DOL approval signifies that insufficient U.S. workers are able, willing, qualified, and available for a position. *Id.* Labor certification also indicates that the employment of a noncitizen 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 certified labor application with an immigrant visa petition to USCIS. Section 204 of the Act, 8 U.S.C. § 1154. If USCIS approves the petition, a noncitizen may finally apply for an immigrant visa abroad or, if eligible, adjustment of status in the United States. Section 245 of the Act, 8 U.S.C. § 1255.

However, USCIS may revoke its approval of an immigrant visa petition "at any time" for "good and sufficient cause." Section 205 of the Act, 8 U.S.C. § 1155. The realization that a petition was approved in error may be good and sufficient cause for revoking its approval. *Matter of Ho*, 19 I&N Dec. 582, 590 (BIA 1988). If the revocation will be based on any ground other than those specified in 8 C.F.R. § 205.1, then USCIS must issue a notice of intent to revoke (NOIR) and provide any affected party the opportunity to submit evidence in opposition to the alleged revocation grounds before proceeding with a written notice of revocation (NOR). 8 C.F.R. § 205.2(b) and (c). An NOIR "must include a specific statement not only of the facts underlying the proposed action, but also of the supporting evidence." *Matter of Esteim*, 19 I&N Dec. 450, 451-52 (BIA 1987). Any subsequent NOR may only be based on grounds alleged in the NOIR. *Matter of Arias*, 19 I&N 568, 570 (BIA 1988).

II. ANALYSIS

A. Late-Filed Motion

The first issue in the present motion is whether USCIS, in its discretion, should excuse the lateness of the Beneficiary's second motion to reopen.² The Beneficiary states that his second motion to reopen was untimely due to circumstances beyond his control, namely the amount of time USCIS took to process and reject his first motion. He further contends that this delay was also reasonable and should be excused under 8 C.F.R. § 103.5(a)(1)(i).

The approval of the Form I-140 underlying this motion was revoked on September 8, 2020. Under USCIS flexibilities that were in place at this time, the parties were granted 60 days from the date of the decision to file a motion to reopen or reconsider.³ Since the revocation notice was received by mail, the parties had an additional three days to respond, making the motion filing deadline November 10, 2020. 8 C.F.R. § 103.8(b). The record indicates that the Beneficiary filed a motion to reopen and reconsider the revocation on November 6, 2020. This motion was rejected on December 30, 2020, due to an improperly dated fee payment check. 8 C.F.R. § 103.2(a)(7)(ii)(D) (stating that a benefit request will be rejected if it is not submitted with the correct fee). Therefore, this motion did not retain its filing date. 8 C.F.R. § 103.2(a)(7)(ii). The Beneficiary submitted a second motion to reopen and reconsider on February 5, 2021, 87 days after the filing deadline. The Director concluded that this delay was not due to circumstances beyond the Beneficiary's control and dismissed both motions as untimely. We then affirmed this decision on appeal.

To support his claim that the February 2021 untimely filing should be excused, the Beneficiary submits documentation of COVID-related delays at USCIS facilities at the time he filed his first motion in November 2020. These delays caused filings to be incorrectly rejected for improperly dated checks. The November 2020 motion was rejected after the filing deadline, and therefore any subsequent motion could not be filed timely due to circumstances beyond the Beneficiary's control. The record also indicates that based on his circumstances, the Beneficiary filed the February 2020 motion within a reasonable period of time after receiving the delayed rejection notice.

The new facts provided on motion are sufficient to show that the delay in the Beneficiary's February 2020 motion to reopen was reasonable and due to circumstances beyond his control. 8 C.F.R. § 103.5(a)(1)(i). Therefore, the motion to reopen will be granted.

B. Revocation

The second issue on motion is whether the Director properly revoked the approval of the petition. The NOIR detailed several grounds for the proposed revocation, including:

² While the second motion filing also included a motion to reconsider, there is no legal provision permitting USCIS to excuse such a motion if it is untimely. 8 C.F.R. § 103.5(a)(1)(i).

³ *USCIS Extends Flexibility for Responding to Agency Requests*, Dec. 18, 2020, <https://www.uscis.gov/news/alerts/uscis-extends-flexibility-for-responding-to-agency-requests-2> ("Additionally, we will consider a Form N-336 or Form I-290B received up to 60 calendar days from the date of the decision before we take any action.") (last visited Jul. 10, 2023). Motions must normally be filed within 30 days of the decision, with an additional three days added to the filing period if the decision notice is served by mail. 8 C.F.R. §§ 103.5(a)(1)(i), 103.8(b).

- The Petitioner did not establish its continuing ability to pay the proffered wage;⁴
- The Beneficiary did not have five years of progressive post-baccalaureate experience;⁵
- The Petitioner appeared to be a “job agent” for other companies, so it appeared that it was “not honoring the labor certification;” and
- If the Petitioner failed to overcome the information in the NOIR, the Petitioner may have willfully misrepresented a material fact.⁶

Following receipt of the Petitioner’s response to the NOIR, the Director issued the NOR stating the following grounds for revocation:

- The job offer was not bona fide;⁷
- The Beneficiary did not have the required education for the offered position;
- The Beneficiary did not have the required experience for the offered position; and
- The Petitioner and the Beneficiary willfully misrepresented a material fact.

We conclude that the NOIR was not properly issued in this case. A NOIR is not properly issued unless it includes a specific statement of the facts underlying the proposed action and of the supporting evidence. *Matter of Esteime*, 19 I&N Dec. at 451-52. Before the approval of a petition is revoked, the affected parties must be afforded an appropriate opportunity to offer evidence “in support of the petition . . . and in opposition to the grounds alleged for revocation of the approval.” 8 C.F.R. § 205.2(b). Here, the NOIR did not specifically mention the bona fides of the job offer or allege any discrepancies in the documentation relating to the Beneficiary’s education, but the NOR listed these as grounds for revocation. Similarly, the NOIR did not make any specific allegations about contradictions in the Beneficiary’s employment history and pay, but these reasons were listed in the NOR to support revoking the approval of the petition on the basis of the Beneficiary’s lack of required experience. Because the NOIR did not adequately inform the affected parties of these alleged grounds for

⁴ 8 C.F.R. § 204.5(g)(2) (“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.”).

⁵ The Director stated that the experience letters were insufficient because “[i]t was not stated how the beneficiary’s experience progressed or how his responsibilities increased over time.” 8 C.F.R. § 204.5(k)(2)-(3) (defining an advanced degree professional as a member of the professions who either holds an advanced degree or has a baccalaureate degree followed by at least five years of progressive post-baccalaureate experience in the occupational specialty).

⁶ The NOIR stated, in relevant part:

[I]t has come to the attention of USCIS that the petitioner is owned by or associated with two individuals [who] were arrested on [redacted] 2008 for Fraud or Misuse of Visas under 18 USC 1546 and conspiracy to commit offense or to defraud the U.S. under 10 USC 371. During the course of the investigation it was noted that some of the companies owned by these two individuals were not legitimate companies and that the owner of the petitioner company is the cousin of one of the individuals arrested. Also, the owner of the petitioning company is or was in plea negotiation process for violating 18 USC 1546.

It further stated: “Should you, the petitioner, fail to overcome the above information, USCIS may deny this petition with a finding of fraud or misrepresentation.”

⁷ The Director determined that “the petitioner failed to submit any evidence to show that the petitioner’s recruitment for the offered position in this matter occurred and it complied with the requirements for the recruitment process.”

revocation, the NOIR was not properly issued.

Additionally, the NOIR did not allege willful misrepresentation of a material fact against the Beneficiary; instead, it stated that a potential finding of fraud or willful misrepresentation could be made against the Petitioner. However, in the NOR, the Director entered a finding of willful misrepresentation of material fact against the Beneficiary, stating that the “evidence of record shows the beneficiary misrepresented his employment experience in the ETA Form 9089.” The NOIR did not adequately inform the Beneficiary about a potential finding of willful misrepresentation of a material fact against him.

While we acknowledge the concerns the Director raises in the NOR regarding the bona fides of the job offer, the Beneficiary’s qualifications, and willful misrepresentation of a material fact, they were not properly alleged in the NOIR and so cannot form the basis of the revocation. *Id.* Therefore, we will remand the matter to the Director to issue a new NOIR and decision.

III. CONCLUSION

For the reasons discussed above, we will grant the motion to reopen, withdraw the Director’s decision, and remand this case for further consideration of whether all eligibility requirements have been met. After such consideration, the Director shall issue a new NOIR specifying the facts and evidence supporting the proposed revocation grounds. Following an affected party’s response to the NOIR, or the expiration of the time period to respond, the Director shall review the entire record and issue a new decision.

ORDER: The motion to reopen is granted, and the matter is remanded for the entry of a new decision consistent with the foregoing analysis.

FURTHER ORDER: The motion to reconsider is dismissed.