U.S. Citizenship and Immigration Services

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

In Re: 1415360

Date: JUN. 29, 2022

Appeal of Nebraska Service Center Decision

Form I-140, Immigrant Petition for Skilled Worker

The Petitioner, an operator of a clinic, sought to employ the Beneficiary as a medical records technician. The company requested her classification under the third-preference, immigrant visa category for skilled workers. *See* Immigration and Nationality Act (the Act) section 203(b)(3)(A)(i), 8 U.S.C. § 1153(b)(3)(A)(i).

After initially granting the filing, the Director of the Nebraska Service Center revoked the petition's approval and dismissed the Petitioner's combined motions to reopen and reconsider. The Director concluded that, contrary to Department of Homeland Security (DHS) regulations and policy, the Petitioner did not demonstrate that an authorized representative of the company signed the petition.

In revocation proceedings, the Petitioner bears the burden of establishing eligibility for the requested benefit by a preponderance of evidence. *See Matter of Ho*, 19 I&N 582, 589 (BIA 1988) (citation omitted) (discussing the burden of proof); *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.[1]

## I. EMPLOYMENT-BASED IMMIGRATION

Immigration as a skilled worker generally follows a three-step process. First, a prospective employer must obtain U.S. Department of Labor (DOL) certification that: (1) there are insufficient U.S. workers able, willing, qualified, and available for an offered position; and (2) employment of a noncitizen in the position will not harm wages and working conditions of U.S. workers with similar jobs. *See* section 212(a)(5) of the Act, 8 U.S.C. § 1182(a)(5).

Second, an employer must submit a labor certification with an immigrant visa petition to U.S. Citizenship and Immigration Services (USCIS). *See* section 204 of the Act. Among other things,

[1] While the Petitioner challenges the revocation of the petition's approval, the company states that it no longer intends to employ the Beneficiary in the offered position. The company asserts the Beneficiary's potential eligibility for lawful permanent residence based on her receipt of a job offer from another U.S. employer in an occupational classification similar to the position stated in the petition. *See* section 204(j) of the Act, 8 U.S.C. § 1154(j) (allowing eligible beneficiaries in long-pending cases to "port" to new jobs without requiring their new employers to file petitions).

USCIS determines whether a noncitizen beneficiary meets the requirements of a DOL-certified position and a requested immigrant visa category. 8 C.F.R. § 204.5(l).

Finally, if USCIS approves a petition, a beneficiary 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.

"[A]t any time" before a beneficiary obtains lawful permanent residence, USCIS may revoke a petition's approval for "good and sufficient cause." Section 205 of the Act, 8 U.S.C. § 1155. If supported by a record, the erroneous nature of a petition's approval justifies its revocation. *Matter of Ho*, 19 I&N Dec. at 590.

Upon the occurrence of certain events, revocations happen automatically. *See* 8 C.F.R. § 205.1(a)(3)(iii). Otherwise, USCIS must notify petitioners of proposed, revocation grounds and allow the prospective employers reasonable opportunities to submit rebuttal evidence and argument. 8 C.F.R. § 205.2.

USCIS properly issues a notice of intent to revoke (NOIR) a petition's approval if the unexplained and unrebutted record at the time of the notice's issuance would have warranted the petition's denial. *Matter of Estime*, 19 I&N Dec. 450, 451 (BIA 1987). If a petitioner's NOIR response does not overcome stated revocation grounds, USCIS properly revokes a petition's approval. *Id.* at 451-52.

## II. THE SIGNATURES ON THE PETITION AND LABOR CERTIFICATION

A petitioner must sign a petition, certifying the truth and accuracy of the filing's contents under penalty of perjury. 8 C.F.R. § 103.2(a)(2). Also, USCIS will not adjudicate a petition unless the prospective employer signed the original, accompanying labor certification. 20 C.F.R. § 656.17(a)(1).

The Petitioner's Form I-140 and accompanying labor certification indicate that they bear the signatures of the company's president. But, citing "significant similarities" between the documents' signatures and those of prior counsel, the Director's NOIR alleged that prior counsel improperly signed the president's name on the Form I-140 and labor certification. The NOIR stated that, after the petition's approval, an immigration officer faxed the Petitioner's president a copy of the Form I-140 page containing his purported signature. In a telephone conversation shortly after the fax transmission, he reportedly told the officer that the mark resembled his signature. Without confirming the signature's authenticity, however, the president ended the conversation, saying he wanted to consult prior counsel.

USCIS rejects benefit requests bearing improper signatures. 1 *USCIS Policy Manual* B(2), https://www.uscis.gov/policy-manual. If the Agency accepts a benefit request and later determines the signature on it to be deficient, USCIS denies the benefit. *Id.* Thus, if an unauthorized representative of the Petitioner signed the Form I-140, the petition would have been improperly filed and erroneously approved.

The NOIR's allegations, however, would not have warranted the petition's denial for a defective signature. The NOIR states: "A thorough analysis of the record indicates significant similarities in signatures between the attorney of record . . . and the signatory." Administrative agencies may question the authenticity of documents and other materials containing obvious defects or "readily

identifiable hallmarks of fraud." *Matter of O-M-O-*, 28 I&N Dec. 191, 193-95 (BIA 2021). But contrary to the NOIR's description, the signatures of prior counsel and those on the Form I-140 in the president's name visibly differ. For example, the names of both prior counsel and the president contain the letter "a." In the signatures in the president's name, the letter resembles a printed "a." In prior counsel's mark, however, the letter is virtually illegible. The record therefore does not support the NOIR's allegations of similar signatures. *See Matter of Estime*, 19 I&N Dec. at 452 (holding that the immigration service cannot sustain a petition's revocation "based on an unsupported statement").

Also, the NOIR does not explain USCIS' "thorough analysis" of the signatures. Thus, the NOIR contains conclusory observations, lacking "good and sufficient cause" for the notice's issue. *See Matter of Arias*, 19 I&N Dec. 568, 570-71 (BIA 1988). The notice also questions the signatures in the president's name based on "confirmation from [prior counsel] that he signed documents associated with other petitions to facilitate speedy processing." But the NOIR does not state evidence supporting its assertion that prior counsel confirmed his signing of documents in other petitions. *See Matter of Estime*, 19 I&N Dec. at 451-52 (stating that a NOIR "must include a specific statement not only of the facts underlying the proposed action, but also of the supporting evidence"). Thus, based on these deficiencies, the NOIR as presently constituted would not have warranted the petition's denial.

Additionally, USCIS must provide a petitioner "with a written notification of the decision that explains the specific reasons for the revocation." 8 C.F.R. § 205.2(c). As the Petitioner argues on appeal, the Director's March 2017 decision does not specify the grounds for revoking the petition's approval. The decision states: "The issues addressed in the [NOIR] are a matter of record. As stated in the [NOIR], it appears the approval of the petition should be revoked. In view of the above, USCIS has revoked this I-140 petition." Contrary to 8 C.F.R. § 205.2(c), the decision does not explain whether the Director found the petition to be improperly signed and filed. The decision also does not indicate the Director's consideration of the Petitioner's NOIR response. For the foregoing reasons, we will withdraw the Director's decision.

As currently constituted, the Director's NOIR and decision do not support the petition's revocation. The record, however, does not establish that the Petitioner's president signed the petition as indicated on the Form I-140. The NOIR alleged similarities between signatures in the president's name and those of prior counsel. But the Director did not notify the Petitioner of inconsistencies in the signatures in the president's name.

In a May 2016 letter, the Petitioner's president purportedly stated that "I signed and sponsored" the Beneficiary for the offered position.[2] But the record does not explain inconsistent signatures in the

[2] The May 2016 letter also purportedly states the Petitioner's desire to withdraw the petition. At that time, a petitioner's "written notice of withdrawal" automatically revoked the approval of an employment-based petition. 8 C.F.R. § 205.1(a)(3)(iii)(C) (2015). Because the matter remains pending on appeal, however, the letter does not result in automatic revocation. Rather, we must generally apply the rules in place at the time of our review. *See, e.g., Thorpe v. Housing Authority of City of Durham*, 393 U.S. 268, 281-82 (1969) (concluding that an appellate body must apply the law as it exists at the time it renders its decision, including changes in a federal administrative regulation). Effective January 17, 2017, DHS amended the regulation to bar automatic revocations based on withdrawals submitted 180 days or more after petitions' approvals or after the filings of applications for adjustment of status by corresponding beneficiaries. *See* 8 C.F.R. § 205.1(a)(3)(iii)(C). We must apply the amended regulation because the rulemaking did not clearly dictate otherwise. Nor would application of the amended regulation result in "manifest injustice." *See Thorpe*, 393 U.S. at 282. The

president's name. *See Matter of Ho*, 19 I&N Dec. at 591 (requiring a petitioner to resolve inconsistencies with independent, objective evidence pointing to where the truth lies). The signatures in the president's name on the Form I-140, accompanying labor certification, support letters of July 11, 2007, and his individual federal income tax return for 2006 are similar. The signatures on these documents all resemble the president's printed name. Also, the signatures in the president's name on the Forms I-290B (Notices of Appeal or Motion), May 2016 letter, and the Petitioner's federal income tax return for 2007 resemble each other. These signatures all appear to be in cursive writing from the same hand. But the signatures on the documents in the first group visibly differ from those on the materials in the second group. *See Matter of O-M-O-*, 28 I&N Dec. at 193-95 (allowing administrative agencies to question the authenticity of materials containing obvious defects). The inconsistent signatures cast doubt on whether the president signed all the documents of record and authorized the petition's filing.

The Director did not notify the Petitioner of the inconsistent signatures in the name of its president. We will therefore remand the matter. On remand, the Director should issue a new NOIR describing the discrepancies. To determine whether the I-140 petition was properly filed, the Director should ask the Petitioner to explain the inconsistencies and demonstrate that its president signed the Form I-140 and accompanying labor certification as indicated on the forms and in the May 2016 letter.

## III. ABILITY TO PAY THE PROFFERED WAGE

Although unaddressed by the Director, the Petitioner also did not establish its required ability to pay the proffered wage of the offered position. A petitioner must demonstrate its continuing ability to pay a proffered wage, from a petition's priority date until a beneficiary obtains lawful permanent residence. 8 C.F.R. § 204.5(g)(2). Evidence of ability to pay must generally include copies of annual reports, federal tax returns, or audited financial statements. *Id.*

In determining ability to pay, USCIS examines whether a petitioner paid a beneficiary the full proffered wage each year, beginning with the year of a petition's priority date. If a petitioner did not annually pay the full proffered wage or did not pay a beneficiary at all, USCIS considers whether the business generated annual amounts of net income or net current assets sufficient to pay any differences between the proffered wage and wages paid. If net income and net current assets are insufficient, USCIS may consider other factors affecting a petitioner's ability to pay a proffered wage. *See Matter of Sonegawa*, 12 I&N Dec. 612, 614-15 (Reg'l Comm'r 1967).[3]

The labor certification states the proffered wage of the offered position of medical records technician as $12.85 an hour, or - based on a 40-hour work week - $26,728 a year. The petition's priority date is May 17, 2007, the date DOL accepted the labor certification application for processing. *See* 8 C.F.R. § 204.5(d) (explaining how to determine a petition's priority date).

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Petitioner's purported withdrawal occurred more than seven years after the petition's approval and almost nine years after the Beneficiary's filing of her adjustment application. Thus, under the amended regulation, the Petitioner's withdrawal would not have automatically revoked the petition's approval.

[3] Federal courts have upheld USCIS' 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); *Estrada-Hernandez v. Holder*, 108 F. Supp. 3d 936, 942-43 (S.D. Cal. 2015).

USCIS approved the petition in February 2009. The record, however, shows that, before the approval, the Beneficiary left the Petitioner's employ and sought to "port" to another U.S. business that offered her a position in the same or similar occupational classification. *See* section 204(j) of the Act. The Petitioner therefore must demonstrate its ability to pay the proffered wage from the petition's priority date of May 17, 2007, until February 2, 2008, when the Beneficiary's application for adjustment of status had remained unadjudicated for 180 days. *See* 8 C.F.R. § 245.25(a)(2)(ii)(B)(*2*).

The Petitioner did not submit evidence that it paid the Beneficiary in 2007 or 2008. Thus, based solely on wages paid, the record does not demonstrate the company's ability to pay the proffered wage.

The Petitioner submitted copies of the individual federal income tax return of its president for 2006 and its federal income tax return for 2007. For a variety of reasons, the president's individual tax return does not establish the petitioning corporation's ability to pay the proffered wage. First, the 2006 return does not cover the year of the petition's 2007 priority date or thereafter. Also, the Schedule C, Profit or Loss from Business, that accompanies the president's 2006 return lists income from a business with a different name and address than the Petitioner. Additionally, the Petitioner is a corporation, a separate legal entity from its president. *See, e.g., Matter of Aphrodite Invs. Ltd.*, 17 I&N Dec. 530, 531 (Comm'r 1980) (citation omitted). Thus, in reporting the Petitioner's income on his individual tax return, the president appears to have improperly categorized the business as a sole proprietorship. *See* U.S. Internal Revenue Serv. (IRS), "Sole Proprietorships," https://www.irs.gov/businesses/small-businesses-self-employed/sole-proprietorships (stating that "[a] sole proprietorship is someone who owns an *unincorporated* business") (emphasis added). The 2006 tax return therefore does not reflect the Petitioner's income or demonstrate the company's ability to pay the proffered wage. *See* 8 C.F.R. § 204.5(g)(2) (requiring a Form I-140 petition to show the ability of "the prospective United States employer" to pay the proffered wage).

The Petitioner's 2007 tax return, on IRS Form 1120, U.S. Corporation Income Tax Return, reflects net income of $6,947 and net current assets of $38,087. The net current asset amount exceeds the annual proffered wage of $26,728. The Petitioner therefore appears to have demonstrated its ability to pay in 2007. As previously discussed, however, the signature of the Petitioner's president on the company's 2007 tax return does not resemble his purported marks on his individual return for 2006 and on other documents of record. The inconsistent signatures cast doubt on the authenticity and accuracy of the Petitioner's 2007 return. *See Matter of Ho*, 19 I&N Dec. at 591 (requiring petitioners to resolve inconsistencies with independent, objective evidence pointing to where the truth lies). The Petitioner's tax return therefore does not reliably establish the company's ability to pay the proffered wage in 2007.

Also, the record lacks regulatory required evidence of the Petitioner's ability to pay the proffered wage in 2008. *See* 8 C.F.R. § 204.5(g)(2) (requiring a petitioner to submit copies of annual reports, federal tax returns, or audited financial statements). For this additional reason, the Petitioner did not demonstrate its ability to pay the proffered wage from the petition's priority date until the Beneficiary's adjustment application had remained unadjudicated for 180 days.

On remand, the new NOIR should notify the Petitioner of these evidentiary deficiencies regarding its ability to pay the proffered wage. The company must explain the inconsistent signatures of its president on the tax returns and demonstrate the validity of its 2007 return. The Petitioner must also

provide copies of an annual report, federal tax return, or audited financial statements for 2008. *See* 8 C.F.R. § 204.5(g)(2). The company may submit additional evidence of its ability to pay in relevant years, including proof of any payments it made to the Beneficiary or materials supporting the factors stated in *Sonegawa*.

If supported by the record, the new NOIR may include 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.

## IV. CONCLUSION

As currently constituted, the Director's NOIR and decision do not support revocation of the petition's approval based on the alleged invalid signing of the filing. The Petitioner, however, has not demonstrated that an authorized representative of the company signed the petition or that the business can pay the proffered wage of the offered position.

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