U.S. Citizenship and Immigration Services

Non-Precedent Decision of the Administrative Appeals Office

In Re: 16154123

Date: NOV. 8, 2022

Appeal of Texas Service Center Decision

Form I-140, Immigrant Petition for Skilled Worker

The Petitioner seeks to employ the Beneficiary as a bookkeeping clerk 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). This employment-based category allows a U.S. business to sponsor a foreign national with at least two years of training or experience for lawful permanent resident status. The Texas Service Center Director initially approved the Form I-140, Immigrant Petition for Alien Workers (petition), then revoked that approval after issuing two notices of intent to revoke (NOIR). The matter is now before us on appeal. The Petitioner bears the burden of proof to demonstrate eligibility by a preponderance of the evidence. Section 291 of the Act; *Matter of Chawathe*, 25 I&N Dec. 369, 375 (AAO 2010). We review the questions in this matter *de novo*. *Matter of Christo's Inc.*, 26 I&N Dec. 537, 537 n.2 (AAO 2015). Upon *de novo* review, we conclude that a remand is warranted in this case.

I. LAW

Immigration as a skilled worker usually follows a three-step process. First, to permanently fill a position in the United States with a foreign worker, a prospective employer must obtain certification from the U.S. Department of Labor (DOL) on an ETA Form 9089 (labor certification). *See* section 212(a)(5) of the Act, 8 U.S.C. § 1182(a)(5). If the DOL approves a position, an employer must next submit the certified labor application with an immigrant visa petition to U.S. Citizenship and Immigration Services (USCIS). Section 204 of the Act, 8 U.S.C. § 1154. If USCIS grants a petition, a designated noncitizen may finally apply abroad for an immigrant visa or, if eligible, for 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. USCIS may issue 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 the stated revocation grounds, USCIS may revoke a petition's approval. *Id.* at 451–52.

II. ANALYSIS

The Director initially approved the petition in March 2016, then revoked the petition's approval in August 2020 for the following bases, with each identified as an independent ground:

- The Petitioner did not demonstrate the Beneficiary possessed the required experience;
- The Beneficiary misrepresented her work experience;
- The Petitioner did not establish a *bona fide* job offer existed; and
- The Petitioner misrepresented a material fact relating to a familial relationship.

The Director further invalidated the DOL labor certification based on these issues. However, the record does not sufficiently support any of the above bases for revoking the petition's approval for the reasons discussed below.

A. Beneficiary's Experience

The regulation at 8 C.F.R. § 204.5(l)(3)(ii)(B) states that to qualify for the skilled worker classification:

> [T]he petition must be accompanied by evidence that the [beneficiary] meets the educational, training or experience, and any other requirements of the individual labor certification . . . . The minimum requirements for this classification are at least two years of training or experience.

The Petitioner filed the labor certification supporting this petition in August 2014 and the petition in November 2015, each listing the position as a bookkeeping clerk. On the labor certification, the Petitioner and the Beneficiary indicated the experience that qualified her for the position occurred between 1995 and 2002 in a foreign country. The Petitioner supported the Beneficiary's experience claim with a document titled Certificate of Employment issued in July 2014. That document reflects the Beneficiary worked as a bookkeeping clerk listing the Department as the [redacted] Water Supply Construction Office from May 1995 to February 2002 in a full-time capacity, it listed her duties, and the document contains a customary seal from the issuing authority, but it is not accompanied by a signature or text reflecting the author's name. Responding to a February 2016 request for evidence, the Petitioner provided a second experience letter that was nearly identical to the first letter, except the new letter contained a printed name and physical signature from the letter's author.

After initially accepting this evidence as sufficient and approving the petition in March 2016, the Director issued the two NOIRs on the same date, in part, requesting additional material to demonstrate the Beneficiary possessed the required experience before the Petitioner filed the labor certification. Responding to the NOIRs, the Petitioner provided a third experience letter verifying her employment at [redacted] Water Resources Corporation as a bookkeeping clerk for the same timeframe identified in the initial letters.

1. Possession of the Required Experience

The second and third experience letters satisfied the requirements for this type of evidence listed 8 C.F.R. §§ 204.5(g)(1), (l)(3)(ii)(A). In the Director's final revocation notice, when reviewing a "Certificate of Income" that listed the Beneficiary's "Home Address," the Director raised the issue that it was unlikely the Beneficiary traveled approximately two and a half hours each way to commute from her residential address listed on the third experience letter to the location of the work identified on the labor certification. The Director rejected this claimed fact as they did not "believe it to be true." We note the Director did not inquire where the Beneficiary physically resided when she accrued the experience at [redacted] Water Resources Corporation. In other words, it is possible the Beneficiary listed her home address on the Certificate of Income, but that was not the actual address where she resided.

More importantly, this adverse information was not contained in either NOIR and the Director did not offer the Petitioner an opportunity to address it before revoking the petition's approval. The Board of Immigration Appeals (BIA) determined that "[a] decision to revoke approval of a visa petition can only be grounded upon . . . the factual allegations specified in the notice of intention to revoke." *Matter of Arias*, 19 I&N Dec. 568, 570 (BIA 1988). Good and sufficient cause to revoke an approved petition means the evidence in the record at the time of the decision, including explanatory and rebuttal evidence, warrants a denial based on a petitioner's failure to sustain his or her burden of proof. *Matter of R. I. Ortega*, 28 I&N Dec. 9, 10 (BIA 2020) (citing *Estime*, 19 I&N Dec. at 451–52). A "notice of intention to revoke must include a specific statement of the facts and evidence underlying the proposed action, and the petitioner must be given an opportunity to counter such facts and evidence." *Id.* at 570 n.4 (BIA 1988). "Where a notice of intention to revoke is [served and] . . . the petitioner is unaware and has not been advised of derogatory evidence, revocation of the visa petition cannot be sustained. *Estime*, 19 I&N Dec. at 452.

In the interest of due process and fairness, petitioners must be afforded the appropriate opportunity to advocate for and demonstrate eligibility. Including adverse reasons in a final revocation notice that were not detailed within an NOIR is not a proper method to revoke a petition's approval. *Estime*, 19 I&N Dec. at 452; *R. I. Ortega*, 28 I&N Dec. at 10. In the same manner that filing parties must adhere to the process and procedural requirements specified in the Act and the regulations, so must we as government representatives. "If men must turn square corners when they deal with the government, it cannot be too much to expect the government to turn square corners when it deals with them." *Niz-Chavez v. Garland*, 141 S. Ct. 1474, 1486 (2021).

Here, the Director's decision did not comply with the regulation or other requirements pertaining to revoking a petition's approval. And we withdraw their determination as it relates to whether the Beneficiary possessed the required work experience to qualify for the offered position.

2. Misrepresentation Relating to the Beneficiary's Work Experience

As part of the Director's determination that the Petitioner and the Beneficiary misrepresented a material fact within the petition filing, they decided conflicting information existed between her work experience location listed on the labor certification when compared to the third experience letter. The labor certification reflects the Beneficiary worked in [redacted] South Korea while the Director's decision reflects the third experience letter "states that she worked in [redacted] Korea."

The Director was incorrect about the Beneficiary's work location as represented in the third experience letter. There are three experience letters in the record. The author of the first two letters did not state the Beneficiary worked in [redacted] South Korea. Instead, they indicated the Beneficiary worked under the Department of [redacted] Water Supply Construction Office. They do not state the location of the office where the Beneficiary worked, nor do they reflect whether that office is still located in the city where it was situated when she worked there from 1995 through 2002.

The third experience letter reflects the Beneficiary worked for the [redacted] Water Resources Corporation, but it also does not reveal the location where she performed the work she relies on as previous experience. Like some other adverse information, the Director did not include this allegation in either NOIR, and it should not serve as a basis to revoke the petition's approval without affording the Petitioner an opportunity to address the issue. As a result, the record does not support the Director's allegation that the Beneficiary misrepresented a material fact relating to her work experience, and we withdraw this determination.

B. Job Opportunity *Bona Fides*

Under the *bona fides* of the job offer concept, the Director revoked the petition's approval on two primary bases. The first basis was the likelihood that the Beneficiary would not work for the petitioning organization and the second was associated with a familial relationship between the Beneficiary's spouse and the petition's signatory. Regarding the first basis, within the Director's NOIR and revocation notices, they stated:

> In reviewing the evidence in the record, the beneficiary appears to be the owner and president of [redacted] which appears to be a restaurant. This was indicated by the ETA Form 9089 and also listed on the beneficiary's Form G-325A. Also, according to the web site for the Georgia Secretary of State, the beneficiary is shown to be the President and owner of this company. The beneficiary is shown to have been operating this company since its incorporation, June 8, 2010. It does not appear that the beneficiary will be an employee for the petitioning company.[1]

Responding to one of the NOIRs, the Petitioner noted the Beneficiary organized and registered [redacted] in 2010 and she operated that business while on her nonimmigrant treaty investor's visa. The Beneficiary operated the business from 2010 through 2014 when she handed the organization over to another individual, and she ceased operating the company. [redacted] dissolved after another person took over the organization from the second owner. Also within the NOIR response, the Petitioner claimed the Beneficiary has been working for them since 2018. As is evidenced in the above quote, the Director failed to respond to these claims in the final revocation notice. As such we withdraw the Director's determination that this case lacks a *bona fide* job offer on this basis.

The remaining basis the Director relied on in determining no *bona fide* job offer existed was the possible relationship between the Beneficiary's spouse and the individual who formed and registered

[1] The NOIR did not contain this exact quote, but it does include this same allegation.

the petitioning organization, [redacted] Pertaining to this relationship, the Director noted the following in the revocation notice:

- According to various USCIS records and databases, [redacted] has been associated with the Beneficiary's husband since 2008;
- [redacted] is a possible relative of the Beneficiary's husband;
- Both [redacted] and the Beneficiary's husband listed the same residential address on previous applications;
- The labor certification failed to disclose this familial relationship between the parties;
- A relationship invalidating a *bona fide* job offer may arise where the beneficiary is related to the petitioner by blood or the relationship may be financial, by marriage, or through friendship. *See Matter of Sunmart* 374, 00-INA-93 (BALCA May 15, 2000);
- A material issue in this case is whether the Petitioner deliberately misrepresented its relationship to the Beneficiary and whether the job offer was open and available to all qualified U.S. workers; and
- By claiming the Petitioner made a *bona fide* job offer, the Petitioner willfully made a false representation, and it is material to whether the Beneficiary is eligible for the requested benefit.

The Petitioner responded to the relationship allegation in one of the NOIR responses in which they denied any familial relationship between any of the parties. The Petitioner explained that the Beneficiary's spouse and [redacted] were acquaintances, and because her spouse did not have any family in the United States, he listed [redacted] information when he entered the country. Again, the Director's final revocation notice did not address the information the Petitioner provided in the NOIR response to rebut the agency's allegations and we withdraw the Director's finding that the Petitioner misrepresented a material fact on this basis.

In instances such as this, it is appropriate to apply a totality of the circumstances approach to decide whether a personal or familial friendship has the potential to impact whether a *bona fide* job opportunity exists. A DOL appellate authority has stated: "In order to determine whether a *bona fide* job opportunity exists, the Board [Board of Alien Labor Certification Appeals (BALCA)] must weigh the totality of the circumstances, considering [several factors]." *Matter of Apex Logistics Int'l, Inc.*, 2013-PER-03390, at *3 (BALCA May 11, 2018). It further made reference to another BALCA decision (*Matter of MMB Stucco, LLC*, 2011-PER-01881 (Aug. 30, 2016)) that cited to the PERM final rule noting that no single factor is controlling.

We observe the Director's final revocation decision characterized the relationship a familial one instead of a friendship. Additionally, the Beneficiary has been working for the petitioning organization for several years and in response to the NOIR they provided evidence that they made a good faith effort in the recruitment process. However, the Director did not address this claim and evidence in the decision to revoke the petition's approval.

Further, the Beneficiary no longer operates [redacted] nor has she since 2014. Even though the Petitioner provided evidence to support those claims, the Director did not address the claims or the evidence in the revocation notice. We will not make a totality of the circumstances decision here, in the first instance, when that is in the Director's purview. If the Director determines it is necessary, they may perform such an analysis on remand. Ultimately, we are withdrawing what appears to be

the two main bases the Director relied on to determine there was a lack of a *bona fide* job offer associated with this petition filing.

C. Labor Certification Invalidation

Although the Director's revocation decision reflects they were invalidating the labor certification according to 20 C.F.R. § 656.30(d), neither the record nor USCIS systems reflect whether they took any action to notify DOL of the invalidation action. If on remand the Director determines the labor certification should no longer be invalidated, they should take the necessary steps to remove any confusion about the labor certification's status in the physical record, within USCIS systems, as well as with DOL.

III. CONCLUSION

The Director did not properly revoke the approved petition as the final revocation notice contained adverse elements not included in the NOIR. This did not afford the Petitioner the opportunity of addressing the issues presented in the final revocation. Additionally, the final revocation notice did not address some rebuttal claims and evidence the Petitioner provided, and we noted above other errors on the Director's part. We will therefore remand the matter to the Director to either issue a new NOIR in accordance with the applicable provisions or to process the case in accordance with the claims and the evidence in the record. The Director should also take steps to rectify the invalidated labor certification's status, if necessary.

ORDER: The decision of the Director is withdrawn. The matter is remanded for further proceedings consistent with the foregoing opinion and for the entry of a new decision, which, if adverse to the Petitioner, shall be certified to us for review.