U.S. Citizenship and Immigration Services

Non-Precedent Decision of the Administrative Appeals Office

In Re: 22737622

Date: NOV. 10, 2022

Appeal of Nebraska Service Center Decision

Form I-140, Immigrant Petition for Professional Worker

The Petitioner, a restaurant, seeks to employ the Beneficiary as a public relations specialist. It requests classification of the Beneficiary as a professional worker under the third preference employment-based immigrant visa category. Immigration and Nationality Act (the Act) section 203(b)(3)(A)(ii), 8 U.S.C. § 1153(b)(3)(A)(ii).

The Director of the Nebraska Service Center initially approved the petition but subsequently revoked that approval on notice. The Director concluded that the Beneficiary paid costs associated with the preparation of the labor certification application in violation of 20 C.F.R. § 656.12. The Petitioner subsequently filed a combined motion to reopen and reconsider, which the Director granted but ultimately affirmed the decision to revoke the petition after determining that the Petitioner's new evidence and legal arguments were insufficient to overcome the basis for revocation. The matter is now before us on appeal.

On appeal, the Petitioner asserts that it reimbursed the Beneficiary for all costs and did not violate the regulation at 20 C.F.R. § 656.12(b) relating to "Improper Commerce and Payment" during the labor certification process. The Petitioner also disputes the applicability of 20 C.F.R. § 656.12(b) to the facts presented here and asserts that the delay in issuance of a notice of intent to revoke (NOIR) violated principles of fundamental fairness and due process.

We review the questions in this matter *de novo*. *Matter of Christo's Inc.*, 26 I&N Dec. 537, 537 n.2 (AAO 2015). In this proceeding, the petitioner bears the burden of proof to establish eligibility for the requested benefit by a preponderance of the evidence. Section 291 of the Act, 8 U.S.C. § 1361; *Matter of Chawathe*, 25 I&N Dec. 369, 375 (AAO 2010). Upon *de novo* review, we will dismiss the appeal.

I. LAW

A. Employment Based Immigration

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) of the Act, 8 U.S.C. § 1182(a)(5). 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 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.

B. Revoking an Approved Immigrant Petition

At any time before a beneficiary obtains lawful permanent resident status, 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 the record, a petition's erroneous approval justifies its revocation. *Matter of Ho*, 19 I&N Dec. at 590.

USCIS properly issues a notice of intent to revoke a petition's approval if the unexplained and unrebutted record at the time of the NOIR's issuance would have warranted the petition's denial. *Matter of Estime*, 19 I&N Dec. 450, 451 (BIA 1987). The NOIR provides the opportunity to submit evidence in support of the petition and in opposition to the alleged grounds for revocation. 8 C.F.R. § 205.2(b). If a petitioner does not submit a NOIR response or the response does not overcome the stated revocation grounds, USCIS properly revokes the petition's approval. *Estime*, 19 I&N Dec. at 452. If the approval of the petition is revoked, the director must provide the petitioner with a written decision that explains the specific reasons for the revocation. 8 C.F.R. § 205.2(c).

II. ANALYSIS

A. Improper Commerce and Payment in the Labor Certification Process

The regulation at 20 C.F.R. § 656.12(b) states:

> An employer must not seek or receive payment of any kind for any activity related to obtaining permanent labor certification, including payment of the employer's attorneys' fees, whether as an incentive or inducement to filing, or as a reimbursement for costs incurred in preparing or filing a permanent labor certification application, except when work to be performed by the alien in connection with the job opportunity would benefit or accrue to the person or entity making the payment, based on that person's or entity's established business relationship with the employer. An alien may pay his or her own costs in connection with a labor certification, including attorneys' fees for representation of the alien, except that where the same attorney represents both the alien and the employer, such costs shall be borne by the employer.

A payment to an employer "undermines the labor certification process by potentially corrupting the search for qualified U.S. workers and creating serious doubt as to whether the employer is offering a bona fide job opportunity and making it available for U.S. workers." DOL, *Final Rule on Labor*

Certifications for the Permanent Employment of Aliens, 72 Fed. Reg. 27904, 27919 (May 17, 2007). DOL's intent in implementing this provision of the 2007 Final Rule was "to make it clear that employers who submit applications for permanent labor certification do so with the full understanding that the costs they incur for the preparation and filing of the application and obtaining permanent labor certification are to be exclusively borne by the employer." *Id.*

B. Procedural History

The Petitioner's labor certification was filed in November 2015 and certified by DOL in June 2016. The Petitioner marked "No" on the ETA Form 9089 at Section I, Part E.23, which states "Has the employer received payment of any kind for the submission of this application?" As noted, the Director initially approved the Form I-140 filed in October 2016.

The Director issued the NOIR on January 11, 2022, and advised the Petitioner of the following information:

> The beneficiary was interviewed by USCIS during which she admitted to paying all fees for her labor certification. USCIS also interviewed [redacted] who signed the ETA Form 9089 in part N. Employer Declaration. [redacted] indicated that [s]he "didn't pay any fees and was not billed" by the preparer for the labor certification or petition.[1]

The Director informed the Petitioner that the Beneficiary's "payment of labor certification, legal and advertising fees without the employer being charged any fee violates 20 C.F.R. § 656.12." The Petitioner was provided with 30 days to submit evidence in support of the petition and in rebuttal to the proposed grounds for revocation.

In response, the Petitioner provided a statement and evidence showing that, on January 14, 2022, it reimbursed the Beneficiary in the amount of $13,300, which is the amount she had previously paid to the immigration consultant who prepared the labor certification, Form I-140 and Form I-485.[2] The Petitioner maintained that, based on this evidence that the Beneficiary had been reimbursed, there was no violation of 20 C.F.R. § 656.12(b) and the approval of the petition should be affirmed. The Petitioner's response also included an affidavit from the Beneficiary, who confirmed that the Petitioner reimbursed her for all costs billed to her by the immigration consultant in connection with her case.

In the revocation decision, the Director acknowledged the evidence that the Petitioner had reimbursed the Beneficiary upon receipt of the NOIR. However, the Director observed that "there is no provision in the regulations for reimbursement after the fact, therefore the record indicates the beneficiary paid all fees related to her labor certification process."

As noted, the Petitioner subsequently filed a combined motion to reopen and reconsider. The Petitioner's evidence on motion included sworn declarations from both [redacted] and the Beneficiary,

[1] USCIS interviewed the Beneficiary in February 2018 in connection with her Form I-485, Application to Register Permanent Residence or Adjust Status. The Petitioner's owner, [redacted] was interviewed by USCIS during a March 2020 site visit.

[2] The itemized invoice from the immigration consultant indicated the Beneficiary was charged $5990 for the labor certification (a $2500 down payment, $990 in advertising costs, and $2,500 due upon approval of the labor certification).

who both stated that, on or around April 15, 2014, they entered an oral agreement concerning the Beneficiary's immigration process. Specifically, both parties state that when the Petitioner initially offered the Beneficiary a position, the Petitioner "clearly promised" the Beneficiary that, after six months of satisfactory job performance, it would submit a labor certification on her behalf. In addition, both declarations state that the parties agreed that the Beneficiary would pay for all costs associated with the labor certification in advance and the Petitioner would reimburse her "later on."

The Director affirmed his decision to revoke the approval of the petition, noting that the sworn declarations from the Petitioner and Beneficiary were insufficient based on both parties' previous admissions that the Beneficiary had paid all fees related to the labor certification. The Director emphasized that neither the Beneficiary nor the Petitioner made any mention of an existing oral agreement or any intention for the Petitioner to reimburse the Beneficiary when interviewed by USCIS and that the Petitioner did not claim the existence of such an agreement when it submitted its response to the NOIR.

C. Discussion

On appeal, the Petitioner disputes the Director's determination that the sworn declarations submitted on motion were insufficient to establish its existing intention to reimburse the Beneficiary for the costs associated with the labor certification. The Petitioner suggests that it was "impossible" to disclose the existence of the agreement sooner because neither party was specifically asked whether the Beneficiary would be reimbursed for payment of costs, and if so, under what terms. The Petitioner maintains that its certification on the ETA Form 9089 that it received no payments in connection with the labor certification was justified because of the prior oral agreement made in April 2014 and based on its actual reimbursement payment made to the Beneficiary in January 2022.

The Petitioner's assertion that it was reasonable to inform USCIS of the existence of the claimed oral agreement for the first time on motion is not persuasive. Both the Beneficiary and Petitioner's representative were clearly asked to clarify who paid for the costs associated with the preparation and filing of the labor certification (including advertisement fees) in 2018 and 2020, respectively. There was no indication in either of their responses that the Beneficiary expected to be reimbursed, or that the Petitioner intended to reimburse her, for any costs. We agree with the Director's determination that the introduction of an alleged longstanding oral agreement between the two parties, under which the Petitioner would reimburse the Beneficiary "later on," was inconsistent with their previous statements and therefore insufficient to overcome the Director's determination that there was a violation of 20 C.F.R. § 656.12(b). Further, we cannot overlook the fact that such reimbursement did not occur until immediately after USCIS notified the Petitioner of its intent to revoke the approval of the petition, more than six years after the filing of the labor certification and nearly eight years after the parties allegedly entered the agreement.

We further agree with the Director that, regardless of whether there was in fact an existing oral agreement between the parties, the regulations do not include a provision that would allow an employer to reimburse a beneficiary for the costs of the labor certification at some undisclosed later date. The DOL Final Rule implementing those regulations contains ample support for a determination that employers are expected to pay such costs as they are incurred. Specifically, it states, "[t]o the extent the [beneficiary] who is the subject of the labor certification application and, later, the immigrant

petition, is financially involved in the application process directly or indirectly, this involvement casts suspicion on the integrity of the process and the existence of a bona fide job opportunity." 72 Fed. Reg. 27904, 27920 (May 17, 2007).

On appeal, the Petitioner further contends that the regulation at 20 C.F.R. § 656.12(b) requires employers to pay all labor certification costs only when both parties are represented by the same attorney, and that the Director's revocation decision reflects a "misunderstanding" of this regulation. The Petitioner maintains that since the labor certification was prepared by a registered immigration consultant, and neither party hired an attorney in connection with the matter, the regulation is inapplicable.

The Petitioner's claim, which is based on an incomplete reading of 20 C.F.R. § 656.12(b), is not persuasive. The Petitioner relies on the following passage: "An alien may pay his or her own costs in connection with a labor certification, including attorneys' fees for representation of the alien, except that where the same attorney represents both the alien and the employer, such costs shall be borne by the employer." The quoted language provides that a beneficiary is free to retain counsel to represent his or her interests in the labor certification process and also to assume responsibility for those costs unless both the beneficiary and the employer are represented by the same attorney.[3] Regardless of whether an attorney is retained by one or both parties, the regulation, when read as a whole, clearly indicates that the employer's costs of preparing and filing the labor certification must be borne by the employer. The Beneficiary's decision to hire an immigration consultant instead of an attorney does not exempt the Petitioner from any responsibility for paying the employer costs associated with its labor certification.

Finally, the Petitioner contends on appeal that the Director "clearly violated the due process under the USA Constitution because your office failed to send the inten[t] to revoke notice within 180 days or any other reasonable period after the date of your conducted I-485 interview."

The Petitioner has not supported its claim that a notice of intent to revoke must be issued within a designated timeframe. 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." (Emphasis added).

Further, while the Petitioner claims a violation of due process, there are no due process rights implicated in the adjudication of an immigrant petition. *See Azizi v. Thornburgh*, 908 F.2d 1130, 1134 (2d Cir. 1990) (explaining that the Fifth Amendment protects against the deprivation of property rights granted to immigrants without due process; however, petitioners do not have an inherent property right in an immigrant visa). In addition, even where due process rights are implicated, an individual must show prejudice to establish a violation. *See generally*, *Garcia-Villeda v. Mukasey*, 531 F.3d 141, 149 (2d Cir. 2008). Here, prior to the revocation, the Petitioner was afforded an opportunity to rebut the derogatory information regarding the Beneficiary's payment of all costs associated with the labor certification. It also had the opportunity to rebut the derogatory information on motion and on appeal.[4]

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[3] *See* 72 Fed. Reg. 27904, 27920.

[4] It is the Petitioner's burden to establish eligibility for the immigration benefit sought. Section 291 of the Act, 8 U.S.C. § 1361; *Matter of Skirball Cultural Ctr.*, 25 I&N Dec. 799, 806 (AAO 2012).

We have complied with 8 C.F.R. § 103.2(b)(16)(i). *See Hassan v. Chertoff*, 593 F.3d at 789 (USCIS did not violate 8 C.F.R. § 103.2(b)(16)(i) or due process where applicant had notice of derogatory information and opportunity to respond).

III. CONCLUSION

The Petitioner has not met its burden to establish by a preponderance of the evidence that it filed the labor certification in compliance with 20 C.F.R. § 656.12(b). The approval of the petition was properly revoked on this basis. Accordingly, the appeal will be dismissed.

ORDER: The appeal is dismissed.