U.S. Citizenship and Immigration Services

Non-Precedent Decision of the Administrative Appeals Office

In Re: 10270757

Date: NOV. 16, 2022

Appeal of Texas Service Center Decision

Form I-140, Immigrant Petition for Skilled Worker

The Petitioner, a jewelry shop, seeks to employ the Beneficiary as a jewelry repairer. The Petitioner seeks to classify the Beneficiary 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).

The Director of the Texas Service Center initially approved the petition, but subsequently revoked the approval on notice, under the provisions of section 205 of the Act, 8 U.S.C. § 1155, and 8 C.F.R. § 205.2. The Director concluded that: (1) there is insufficient evidence to establish that the Beneficiary is qualified for the offered position, and (2) a *bona fide* job offer open to U.S. workers did not exist because of a familial relationship between the Beneficiary and the Petitioner's co-owner. The Director further concluded that the Petitioner willfully misrepresented material facts by failing to disclose this familial relationship on the labor certification, and that the willful misrepresentation, in turn, invalidated the labor certification. The Director also concluded that the Beneficiary misrepresented material facts about his employment experience. The matter is now before us on appeal.

The AAO reviews the questions in this matter *de novo*. *See Matter of Christo's Inc.*, 26 I&N Dec. 537, 537 n.2 (AAO 2015). The burden of proof to establish eligibility for the benefit sought remains with the petitioner in revocation proceedings. Section 291 of the Act, 8 U.S.C. § 1361; *Matter of Cheung*, 12 I&N Dec. 715 (BIA 1968); and *Matter of Estime*, 19 I&N Dec. 450, 452, n.1 (BIA 1987). Upon *de novo* review, we will dismiss the appeal. We will also withdraw the invalidation of the labor certification and the finding of willful misrepresentation of a material fact.

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) 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 (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).

The Board of Immigration Appeals has discussed revocations on notice as follows:

> [A] notice of intention to revoke a visa petition is properly issued for "good and sufficient cause" where the evidence of record at the time the notice is issued, if unexplained and unrebutted, would warrant a denial of the visa petition based upon the petitioner's failure to meet his burden of proof. The decision to revoke will be sustained where the evidence of record at the time the decision is rendered, including any evidence or explanation submitted by the petitioner in rebuttal to the notice of intention to revoke, would warrant such denial.

Matter of Ho, 19 I&N Dec. 582, 590 (BIA 1988) (citing *Matter of Estime*, 19 I&N Dec. 450 (BIA 1987)). By itself, the director's realization that a petition was incorrectly approved is good and sufficient cause for the issuance of a notice of intent to revoke an immigrant petition. *Id.*

II. ANALYSIS

The Petitioner filed ETA Form 9089 on January 19, 2017, and filed the Form I-140 petition on May 4, 2017. The Director approved the petition on May 31, 2017. Subsequently, the Director issued a notice of intent to revoke (NOIR) on August 6, 2019, and revoked the approval of the petition on December 13, 2019.

A. Experience Required for the Position

The Petitioner indicated that the proffered petition requires 24 months of experience in the job offered, as a jewelry repairer, and that experience in an alternate occupation would not be acceptable. On part K of the ETA Form 9089, the Beneficiary claimed to have worked as a jewelry repairer for [redacted] in [redacted], Pakistan on a full-time basis from March 1, 1998 to December 1, 2003, and part-time from January 1, 2004 to January 19, 2017. The Beneficiary claimed that he switched from full-time to part-time employment at [redacted] when he took a full-time job maintaining fuel dispensers for [redacted] also in [redacted]

The Petitioner submitted a letter from [redacted] stating, as above, that the Beneficiary began working full-time for [redacted] in 1997 and indicating that the Beneficiary's "hours were cut down to 20 hours per week" in 2004 after "the gold business went down."[1]

After approving the petition, the Director learned of information from a nonimmigrant visa application which does not corroborate the Beneficiary's claimed employment history. In March 2015 and again in December 2016, the Beneficiary applied for a nonimmigrant visa at the U.S. Consulate in Karachi, Pakistan. On both visa applications, the Beneficiary identified [redacted] as his employer. The Beneficiary answered "no" to the question "[w]ere you previously employed?"

In March 2017, while the ETA Form 9089 was pending at DOL, the Beneficiary filed another application for a nonimmigrant visa. On the 2017 application, he listed both [redacted] and [redacted] as his current employers, specifying that his work for the latter employer was part-time. He again answered "no" when asked about previous employment, and did not indicate that he had ever worked full-time for the jewelry shop.

The Director issued a NOIR, stating "the record of the beneficiary's experience is inconsistent throughout. . . . Therefore, it appears the beneficiary has misrepresented his experience to qualify him for an immigrant benefit." The Director also cited case law, stating: "It is incumbent on the petitioner to resolve any inconsistencies in the record by independent objective evidence, and attempts to explain or reconcile such inconsistencies, absent competent objective evidence pointing to where the truth, in fact, lies, will not suffice." *See Matter of Ho*, 19 I&N Dec. at 591-92. The Director instructed the Petitioner to submit "independent, objective evidence" such as payroll and tax records to establish the Beneficiary's claimed employment with [redacted]

In response, the Petitioner submitted an affidavit in which the Beneficiary asserted that the nonimmigrant visa application form only provided space for one current employer, so he chose to list his primary, full-time employer. The Beneficiary did not explain why he twice answered "no" when asked about previous employment. The Petitioner also submitted a second letter from [redacted] repeating the earlier claims about the Beneficiary's employment, but the Petitioner did not submit contemporaneous documentary evidence of that employment, such as tax or payroll records, as instructed in the NOIR.

The Director revoked the approval of the petition, noting that the Beneficiary had not explained why he did not list earlier employment on his 2015 and 2016 visa applications. The Director also observed that the Petitioner had neither submitted contemporaneous documentation of the Beneficiary's claimed employment with [redacted] nor explained its absence.

On appeal, counsel for the Petitioner repeats prior claims and asserts: "The Beneficiary tried his best to gather evidence and documents from [redacted] [*sic*] and has submitted everything he had access to show compliance with USCIS' request." Assertions of counsel do not constitute evidence. *Matter of Obaigbena*, 19 I&N Dec. 533, 534 n.2 (BIA 1988) (citing *Matter of Ramirez-*

[1] The record reflects confusion over the date of this letter. The letter is on printed letterhead that includes the partial date "200." The writer hand-wrote the numerals "17," with the "1" overlapping the second "0." As a result, the date of the letter appears, at first glance, to read "16th Jan. 2007," but the partially discernible "1" shows that the true date is "16th Jan. 2017," consistent with the submission of ETA Form 9089 three days later.

Sanchez, 17 I&N Dec. 503, 506 (BIA 1980)). The Beneficiary, in his own affidavit, said nothing about attempting to obtain documentation from [redacted] In his second letter, [redacted] did not mention any requests or efforts to obtain such documentation, or explain why such evidence is absent or unavailable. Counsel's unsubstantiated claim also does not account for evidence that the Beneficiary may have already had in his own possession, such as pay receipts and copies of income tax returns.

The record shows that the Beneficiary did not claim employment with [redacted] in 2015 and 2016 on two separate prior visa applications, even though he claims to have been actively working for the company at that time, and he specifically denied any employment prior to his position at [redacted] The Beneficiary changed his claims only after the petitioning U.S. entity began to seek an immigration benefit on his behalf. Given the opportunity to submit documentary evidence of the Beneficiary's claimed employment for [redacted], the Petitioner neither submitted it nor explained its absence. Based on the unresolved inconsistencies in experience, and doubt cast on the experience claimed as a result, the Petitioner has not established that the Beneficiary possesses the two years of required experience in the position offered.

B. Invalidation of the Labor Certification and Willful Misrepresentation

The Petitioner did not disclose a familial relationship on the labor certification. As a result, the Director determined that the record does not establish that the Petitioner made a bona fide job offer to the Beneficiary or that the job was clearly open to any U.S. worker. The Director also determined that the Beneficiary misrepresented his prior experience on the labor certification.

While the record raises serious questions, based on the facts and circumstances of this specific case, we withdraw the Director's finding related to misrepresentation, and we withdraw the invalidation of the labor certification that resulted from that finding.[2] Nevertheless, we agree with the Director's fundamental conclusion that the petition should not have been approved, as the Petitioner has not demonstrated that the Beneficiary has the experience required for the position offered.

For the above reasons, we will dismiss the appeal.

ORDER: The appeal is dismissed.

[2] We recognize that that the Director raised significant concerns. While not sufficiently developed for purposes of this visa petition, the Director is not barred from further inquiry, investigation, or the development of questions for consular processing or adjustment of status proceedings. *See Matter of O*, 8 I&N Dec. 295 (BIA 1959) (stating that the immigrant visa petition is not the appropriate stage of the process for questions regarding admissibility).

A foreign national's misrepresentation of a material fact in a request for an immigration benefit renders him or her inadmissible to the United States. *See* section 212(a)(6)(C)(i) of the Act, 8 U.S.C. § 1158(a)(6)(C)(i). An I-140 petitioner, however, need not establish a beneficiary's admissibility. Rather, the Act authorizes officers of the U.S. Departments of State and Homeland Security to make admissibility findings on applications for: immigrant visas at consulates, *see* section 101(a)(13)(A) of the Act, 8 U.S.C. § 1101(a)(13)(A); admissions at ports of entry, see section 202(a)(1)(B) of the Act, 8 U.S.C. § 1152(a)(1)(B); and adjustments of status at USCIS offices, *see* section 245 of the Act, 8 U.S.C. § 1255.