U.S. Citizenship and Immigration Services

Non-Precedent Decision of the Administrative Appeals Office

In Re: 22935699

Date: NOV. 21, 2022

Appeal of Nebraska Service Center Decision

Form I-140, Immigrant Petition for Other Worker

The Petitioner, a business engaged in commercial cleaning, seeks to employ the Beneficiary as a commercial cleaner. It requests classification of the Beneficiary as an "other" worker under the third preference immigrant category. Immigration and Nationality Act (the Act) section 203(b)(3)(A)(iii), 8 U.S.C. § 1153(B)(3)(A)(iii). This employment-based "EB-3" immigrant classification allows a U.S. employer to sponsor for lawful permanent residence a noncitizen who is capable of performing unskilled labor that requires less than two years of training or experience and is not of a temporary or seasonal nature.

The Director of the Nebraska Service Center approved the petition, but later revoked that approval following the issuance of two notices of intent to revoke (NOIR). The Director concluded that the Petitioner's responses to the NOIRs reflected that it was no longer in operation and that the Beneficiary's job offer was no longer valid. The matter is now before us on appeal.

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). 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 will withdraw the Director's decision and remand the matter to the Director for the issuance of a new decision.

I. EMPLOYMENT-BASED IMMIGRATION

Employment-based immigration generally follows a three-step process. First, a prospective employer must apply to the U.S. Department of Labor (DOL) for certification that: (1) there are insufficient U.S. workers able, willing, qualified, and available for the offered position; and (2) employment of a noncitizen in the position would 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 an approved labor certification with an immigrant visa petition to U.S. Citizenship and Immigration Services (USCIS). *See* section 204 of the Act, 8 U.S.C. § 1154.

Among other things, 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, however, 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, the erroneous nature of a petition's approval justifies its revocation. *Matter of Ho*, 19 I&N Dec. 582, 590 (BIA 1988) (citation omitted).

USCIS may issue a NOIR if the unexplained and unrebutted record at the time of the notice's issuance would have warranted the filing's denial. *Matter of Estime*, 19 I&N Dec. 450, 451 (BIA 1987). If a NOIR response does not rebut or resolve revocation grounds stated in the notice, USCIS properly revokes a petition's approval. *Id.* at 451-52.

II. ANALYSIS

Following the approval of the petition in February 2018, the Director issued a NOIR in January 2020, indicating that following an investigation, USCIS had discovered that the Petitioner was no longer in operation. The Director requested that the Petitioner submit evidence to establish that it continued to do business. In response, the Petitioner asserted that it had been taken over by another commercial cleaning business, [redacted], in 2018, and that the Beneficiary's job offer still existed through [redacted], a successor-in-interest. The Petitioner further submitted a Form I-485 Supplement J, Confirmation of Bona Fide Job Offer of Request for Job Portability Under INA Section 204(j), executed by the Beneficiary on February 20, 2020.

The Director later issued another NOIR in March 2020 acknowledging the evidence provided by the Petitioner related to the [redacted] "business transfer." However, the Director requested evidence to substantiate that the Beneficiary had been employed with [redacted] since January 2019. Specifically, they requested the Petitioner submit the Beneficiary's 2019 IRS Forms W-2, Wage and Tax Statements, and [redacted] last three months of paystubs to verify its operations. In response, the Petitioner submitted documentation meant to substantiate that [redacted] was doing business, including an unaudited profit and loss statement and an IRS Form 941, Employer's Quarterly Federal Tax Return, from the first quarter of 2020. The Petitioner indicated that the Beneficiary was not yet working for [redacted] because his Form I-485 application had not yet been approved.

As discussed, the Director revoked the approval of the petition, determining the Petitioner's responses to the NOIRs reflected it was no longer in operation; and therefore, that the Beneficiary's job offer was no longer valid. On appeal, the Petitioner contends that it timely responded to the Director's initial NOIR and submitted evidence that it had been acquired by [redacted] The Petitioner further points to the Form I-485 Supplement J it submitted and suggests that the Director did not sufficiently consider the Beneficiary's job portability. The Petitioner asserts that the Beneficiary's paystubs requested in the second NOIR were not relevant, since she was not required to have worked for [redacted] for the job offer to be *bona fide*.

As discussed, the Petitioner asserted in response to the initial NOIR that it had been "taken over" by [redacted] suggesting that the Beneficiary's job offer remained valid through [redacted] as a successor-in-interest. In the second NOIR, the Director merely acknowledged this assertion, but did not properly assess whether the Petitioner had submitted sufficient evidence to establish that [redacted] was a successor-in-interest. Further, in the revocation decision, the Director stated that the "evidence submitted in response to the NOIR establishes that [redacted] took over the [Petitioner] in 2018."

A valid successor-in-interest relationship exists if three conditions are satisfied. *See Matter of Dial Auto Repair Shop, Inc.*, 19 I&N Dec. 481 (Comm'r 1986); 6 *USCIS Policy Manual* E.3, https://www.uscis.gov/policymanual. First, the successor must fully describe and document the transfer and assumption of the ownership of all, or a relevant part of, the predecessor by the successor.[1] Second, the successor must demonstrate that the job opportunity is the same as originally offered on the labor certification. Third, the successor must establish all elements of eligibility as of the priority date, including evidence of the predecessor's ability to pay the proffered wage from the priority date to the date of the ownership transfer, and the successor's ability to pay the proffered wage from the date of the transfer onward. *Id.*

The Director did not sufficiently address whether [redacted] qualified as a successor-in-interest. The Petitioner submitted insufficient supporting documentation to substantiate that it was acquired by [redacted] as claimed. The Petitioner did not provide documentation to establish: 1) a qualifying transfer from the predecessor (the Petitioner) to the successor [redacted]; and 2) the transfer of ownership of the predecessor; the organizational structure of the predecessor prior to the transfer; the current organizational structure of the successor; and the job title, job location, rate of pay, job description, and job requirements for the permanent job opportunity for the Beneficiary. *See* 6 *USCIS Policy Manual* E.3, https://www.uscis.gov/policymanual.

We note that the evidence submitted by the Petitioner leaves substantial uncertainty as to whether this transaction ever took place. For instance, the Petitioner submitted its 2016 IRS Form 1120S, U.S. Income Tax Return for an S Corporation reflecting that it earned $3,855,690 and paid $2,365,789 in salaries and wages during that year. However, in response to the Director's second NOIR, the Petitioner provided a profit and loss statement indicating that [redacted] earned only $334,760.66 during 2019. Likewise, the Petitioner provided an IRS Form 941 from the first quarter of 2020 indicating that [redacted] had paid only $9,305.85 in wages during that quarter. Given the discrepancies in revenue and wages, on remand, the Director should examine whether the documentation submitted to the record establishes that the Petitioner was acquired by [redacted] as asserted. The Petitioner must resolve discrepancies and ambiguities in the record with independent, objective evidence pointing to where the truth lies. *Matter of Ho*, 19 I&N Dec. 582, 591-92 (BIA 1988).

[1] The record must show that the successor not only acquired the predecessor's assets, but also that the successor acquired the essential rights and obligations of the predecessor necessary to carry on the business in the same manner as the predecessor. The successor must continue to operate the same type of business as the predecessor, and the way the business is controlled and carried on by the successor must remain substantially the same as it was before the ownership transfer. 6 *USCIS Policy Manual*, *supra*, at E.3(F)(3).

In addition, the Director also did not sufficiently address whether [redacted] had the ability to pay the proffered wage from the date of the claimed transfer onward.[2] For instance, the Petitioner only submitted an unaudited profit and loss statement relevant to [redacted] and did not provide the required federal tax returns or audited financial statements necessary to establish its ability to pay the proffered wage from the date of its claimed acquisition of the Petitioner through to the time of the adjudication.

The Director also did not sufficiently consider whether the Beneficiary qualified for job portability consistent with section 204(j) of the Act. In order to qualify for portability under section 204(j) of the Act, the adjustment applicant must meet the following eligibility requirements: 1) the applicant is the beneficiary of an approved Form I-140 petition or of a pending petition that is ultimately approved; 2) the petition is filed in the employment-based first, second, or third preference category; 3) the applicant's properly filed adjustment application has been pending with USCIS for 180 days or more at the time USCIS receives the request to port; 4) the new job offer through which the applicant seeks to adjust status is in the same or similar occupational classification as the job specified in the petition; and 5) the applicant submitted a request to port. *See* 7 *USCIS Policy Manual* E.5, https://www.uscis.gov/policymanual.[3]

The Beneficiary's Form I-140, Immigrant Petition for Alien Worker, was approved on February 28, 2018, and she filed a Form I-485, Application to Register Permanent Residence or Adjust Status, on February 26, 2018, which has yet to be adjudicated. In addition, in response to the Director's first NOIR, the Beneficiary submitted a Form I-485 Supplement J indicating her intention to port to [redacted] on February 20, 2020. Since the Beneficiary's Form I-140 had been approved and her Form I-485 had been pending for more than 180 days when she submitted a request for port, the Director should have considered whether she was eligible to port consistent with section 204(j) of the Act.[4]

For the foregoing reasons, we will withdraw the Director's decision and the matter will be remanded for entry to a new decision. On remand, the Director should request any additional evidence deemed warranted to address the noted deficiencies above. 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).

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[2] The regulation at 8 C.F.R. § 204.5(g)(2) states:

> Ability of prospective employer to pay wage. 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. The petitioner must demonstrate this ability at the time the priority date is established and continuing until the beneficiary obtains lawful permanent residence. Evidence of this ability shall be either in the form of copies of annual reports, federal tax returns, or audited financial statements. In a case where the prospective United States employer employs 100 or more workers, the director may accept a statement from a financial officer of the organization which establishes the prospective employer's ability to pay the proffered wage. In appropriate cases, additional evidence, such as profit/loss statements, bank account records, or personnel records, may be submitted by the petitioner or requested by the Service.

[3] The new job offer may be with the same petitioner or with an entirely new employer, including self-employment. Applicants can submit the portability request and evidence with the adjustment application or in any in-person interviews or in response to a request or other notice from USCIS. 7 *USCIS Policy Manual* E.5, https://www.uscis.gov/policymanual.

[4] We note that the portability provision at section 204(j) of the Act does not shield petitions from revocation. *Herrera v. USCIS*, 571 F.3d 881, 883 (9th Cir. 2009). "[I]n order for a petition to 'remain' valid [for portability purposes], it must have been valid from the start." *Id.* at 887.

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