U.S. Citizenship and Immigration Services

Non-Precedent Decision of the Administrative Appeals Office

In Re: 23040417

Date: MAY 26, 2023

Appeal of Texas Service Center Decision

Form I-140, Immigrant Petition for Other Worker

The Petitioner, a provider of financial services, seeks to permanently employ the Beneficiary as an office clerk. The company requests his classification under the third-preference, immigrant visa category for "other workers." *See* Immigration and Nationality Act (the Act) section 203(b)(3)(A)(iii), 8 U.S.C. § 1153(b)(3)(A)(iii). This category allows prospective U.S. employers to sponsor noncitizens for lawful permanent residence to perform work requiring less than two years of training or experience. *Id.*

After initially granting the filing, the Director of the Texas Service Center revoked the petition's approval. The Director concluded that, on the accompanying certification from the U.S. Department of Labor (DOL), the Petitioner concealed the fraternal relationship between its principal and the Beneficiary. On appeal, the Petitioner asserts that, despite the relationship, the job was open to U.S. workers and the company treated the Beneficiary like another noncitizen it simultaneously sponsored for a job in the same occupation.

In these revocation proceedings, the Petitioner bears the burden of demonstrating eligibility for the requested benefit by a preponderance of evidence. *See Matter of Ho*, 19 I&N Dec. 582, 589 (BIA 1988). Exercising de novo appellate review, *see Matter of Christo's, Inc.*, 26 I&N Dec. 537, 537 n.2 (AAO 2015), we conclude that, because the petition misstates a fact bearing on a statutory labor certification requirement, the Director properly revoked the filing's approval. We will therefore dismiss the appeal.

I. LAW

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

Second, an employer must submit an approved labor certification with an immigrant visa petition to USCIS. Section 204(a)(1)(F) of the Act, 8 U.S.C. § 1154(a)(1)(F). 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)(3)(ii)(D), (4).

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 cause." Section 205 of the Act, 8 U.S.C. § 1155. If supported by sufficient evidence, the erroneous nature of a petition's approval justifies its revocation. *Matter of Ho*, 19 I&N Dec. 582, 590 (BIA 1988).

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

II. ANALYSIS

USCIS approves a petition if "the facts stated in [it] are true" and the beneficiary qualifies for the requested immigrant visa category. Section 204(b) of the Act. A petition includes its supporting evidence - including a labor certification. 8 C.F.R. § 103.2(b)(1). Thus, USCIS cannot approve a petition if the facts stated on an accompanying labor certification are untrue.

Part C.9 of the accompanying labor certification application asked the Petitioner: "[I]s there a familial relationship between the owners, stockholders, partners, corporate officers, or incorporators, and the alien?" The limited liability company checked the box marked "No."

In a later interview with a USCIS officer regarding his application for adjustment of status, the Beneficiary disclosed that his younger biological brother is the Petitioner's principal/sole owner. In response to the Director's NOIR, the company conceded the relationship's existence. Prior counsel, who prepared the labor certification application, stated that he knew of the family relationship. But he said that he did not carefully read part C.9 of the application and therefore did not realize that the section asked a question about the relationship.

The Director correctly found that the labor certification misrepresents the family relationship between the Petitioner's principal and the Beneficiary. Thus, the facts stated in the petition are untrue. *See* section 204(b) of the Act. As indicated above, DOL must certify that "there are not sufficient workers who are able, willing, qualified . . . and available" for an offered position. Section 212(a)(5)(A)(i)(I) of the Act. A family relationship between an employer's principal and a sponsored noncitizen creates a presumption that an offered position is not clearly available to U.S. workers. *See* 20 C.F.R. § 656.17(l) (requiring a labor certification employer to demonstrate the bona fides of a job opportunity if a family relationship exists between an employer's principal and the alien). Therefore, under section 204(b) of the Act, the Director properly revoked the petition's approval based on the misrepresentation at part C.9 of the labor certification.

The Director further found that, because of the initially undisclosed family relationship, the Petitioner did not demonstrate the offered position's availability to U.S. workers. On appeal, the company contends that, despite the concealed relationship, the job opportunity was bona fide.

USCIS, however, lacks authority to determine the bona fides of a job opportunity. Congress authorized DOL - not USCIS - to determine the availability of an offered position to U.S. workers. *See* section 212(a)(5)(A)(i)(I) of the Act. "[D]eterminations vested by statute with one agency are not normally subject to horizontal review by a sister entity, absent congressional authorization to that effect." *Madany v. Smith*, 696 F.2d 1008, 1012 (D.C. Cir. 1983). Thus, DOL - not USCIS - must determine the bona fides of the Petitioner's job opportunity. The Director's findings and the Petitioner's arguments regarding the bona fides of the job opportunity exceed the scope of these proceedings. If the Petitioner seeks a determination of the offered position's availability to U.S. workers on the true facts, the company must contact DOL. *See Matter of Gen. Elec. Co.*, 2011-PER-01818, *3 (BALCA Apr. 15, 2014) (stating that DOL has discretion to retroactively amend the contents of an approved labor certification application to allow an error's correction) (citation omitted).

The Petitioner asserts that, during the labor certification proceedings, the "bona fide job offer [was] tested by DOL's audit of the employer's recruitment process." But DOL did not determine the position's availability to U.S. workers under the true, relevant facts. The Petitioner's NOIR response included a copy of the audit notice that DOL sent the company. The notice requests documentary proof of the Petitioner's compliance with DOL regulations regarding recruitment of U.S. workers for the offered position. But the notice does not question the relationship between the company's principal and the Beneficiary. Thus, the record indicates that DOL did not know of 20 C.F.R. § 656.17(l)'s applicability to the Petitioner's filing and the potential effect of the concealed family relationship on the bona fides of the job opportunity. The record therefore does not support DOL's proper, statutory determination of the offered position's availability to U.S. workers.

III. CONCLUSION

The petition misstates a fact bearing on a statutory labor certification requirement. The Director therefore properly revoked the filing's approval.

ORDER: The appeal is dismissed.