U.S. Citizenship and Immigration Services

Non-Precedent Decision of the Administrative Appeals Office

In Re: 9016467

Date: AUG. 06, 2020

Appeal of Texas Service Center Decision

Form I-140, Immigrant Petition for Other Worker

The Petitioner seeks to employ the Beneficiary as a home health aide. It requests classification of the Beneficiary as an unskilled worker under the third preference immigrant classification. Immigration and Nationality Act (the Act) section 203(b)(3)(A)(iii), 8 U.S.C. § 1153(b)(3)(A)(iii). This employment-based immigrant classification allows a U.S. employer to sponsor a foreign national for lawful permanent resident status to work in a position that requires less than two years of training or experience.

The Director of the Texas Service Center revoked the approval of the petition based on "[i]mproper payment by the employer including payment of the employer's attorney fees." The matter is now before us on appeal.

In these proceedings, it is the Petitioner's burden to establish eligibility for the requested benefit. Section 291 of the Act, 8 U.S.C. § 1361. Upon *de novo* review, we will withdraw the Director's decision and remand the matter to the Director for the entry of a new decision.

I. THE EMPLOYMENT-BASED IMMIGRATION PROCESS

Employment-based immigration generally follows a three-step process. First, an employer obtains an approved labor certification from the U.S. Department of Labor (DOL).[1] *See* section 212(a)(5)(A)(i) of the Act, 8 U.S.C. § 1182(a)(5)(A)(i). 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 applies 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.

[1] The priority date of a petition is the date the DOL accepted the labor certification for processing, which in this case is August 13, 2014. *See* 8 C.F.R. § 204.5(d).

II. REVOCATION OF A PETITION'S APPROVAL

After granting a petition, USCIS may revoke the petition's approval "at any time" for "good and sufficient cause." Section 205 of the Act, 8 U.S.C. § 1155. If supported by the record, a director's realization that a petition was erroneously approved may justify revocation. *Matter of Ho*, 19 I&N Dec. 582, 590 (BIA 1988).

Good and sufficient cause exists to issue a notice of intent to revoke (NOIR) where the record at the time of the notice's issuance, if unexplained or unrebutted, would have warranted the petition's denial. *Matter of Estime*, 19 I&N Dec. 450, 451 (BIA 1987). Similarly, revocation is proper if the record at the time of the decision, including any explanation or rebuttal evidence provided by a petitioner, warranted a petition's denial. *Id.* at 452.

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. For purposes of this paragraph (b), payment includes, but is not limited to, monetary payments; wage concessions, including deductions from wages, salary, or benefits; kickbacks, bribes, or tributes; in kind payments; and free labor.

The regulation at 20 CFR § 656.12(c) further states:

> Evidence that an employer has sought or received payment from any source in connection with an application for permanent labor certification or an approved labor certification, except for a third party to whose benefit work to be performed in connection with the job opportunity would accrue, based on that person's or entity's established business relationship with the employer, shall be grounds for investigation under this part or any appropriate Government agency's procedures, and may be grounds for denial under § 656.32, revocation under § 656.32, debarment under § 656.31(t), or any combination thereof.

Part I.e.23 of the labor certification asks, "Has the employer received any kind of payment for the submission of this application?" The Petitioner answered, "No" to this question. The Director issued the NOIR on October 12, 2018. It stated that the Beneficiary "confessed to having paid $36,000 to a Korean immigration broker in conjunction with the petition." The Director stated that he intended to revoke the approval of the petition based on "[i]mproper payment by the employer including payment of the employer's attorney fees." The NOIR stated that having the immigration agents prepare and

file the labor certification for the Petitioner solely using funds paid the Beneficiary violates the regulation at 20 C.F.R. § 656.12(b). It further stated that the Petitioner's failure to disclose the improper payment on the labor certification constitutes fraud or willful misrepresentation of a material fact. The NOIR sufficiently detailed the evidence of the record that, if unexplained and unrebutted, would warrant a denial. The Petitioner, through counsel, timely responded to the NOIR with significant evidence to rebut the ground of revocation, including the Petitioner's retainer agreement with its counsel; copies of the checks written by the Petitioner to its counsel for recruitment services; invoices and checks written by the Petitioner to pay for advertisements; invoice and check written by the Petitioner to pay its counsel for preparation of the labor certification; the Petitioner's bank statements; an explanation of the Petitioner's business and the role of staffing agencies and immigration agencies in its recruitment and hiring process; and an explanation of the Beneficiary's recruitment.

The Director issued a notice of revocation (NOR) on October 2, 2019, stating that "[i]mproper payment by the employer including payment of the employer's attorney fees" formed the single basis for the revocation. The Director noted the Petitioner's response to the NOIR but did not detail or analyze any of the evidence that was submitted in that response. It is unclear whether the Director considered all of the evidence submitted in response to the NOIR. Therefore, we will withdraw the Director's decision and remand the matter for entry of a new decision analyzing the information provided in response to the NOIR.

Further, the Director noted in the NOR that "USCIS may also revoke this Form I-140 with a finding of fraud or willful misrepresentation of a material fact" against the Petitioner. However, he did not include that formal finding in his grounds of revocation, and it is not clear if the finding was entered against the Petitioner. If the Director entered a finding of fraud or willful misrepresentation of a material fact against the Petitioner, we will also withdraw this finding.

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