U.S. Citizenship and Immigration Services

Non-Precedent Decision of the Administrative Appeals Office

In Re: 18032972

DATE: AUGUST 6, 2021

Appeal of Nebraska Service Center Decision

Form I-140, Immigrant Petition for Alien Worker

The Petitioner, a real estate business, seeks to employ the Beneficiary as a real estate stager. It requests "other worker" classification for the Beneficiary 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 resident status a foreign national who is capable of performing unskilled labor that is not temporary or seasonal in nature and requires less than two years of training or experience.

The petition was initially approved. However, the Director of the Nebraska Service Center subsequently revoked the approval on the grounds that the Petitioner and the Beneficiary willfully misrepresented material facts on the labor certification regarding a familial relationship between an employee of the Petitioner and the Beneficiary and the nature of the proffered position, and as a result did not establish that there was a *bona fide* job opportunity open to U.S. workers.

On appeal the Petitioner asserts that the Director's decision was incorrect and that we should reinstate the petition's approval.

Upon *de novo* review, we will withdraw the Director's decision and remand the case for further consideration and the issuance of a new decision.

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). A notice of intent to revoke (NOIR) "is not properly issued unless there is 'good and sufficient cause' and the notice includes a specific statement not only of the facts underlying the proposed action, but also of the supporting evidence." *Matter of Estime*, 19 I&N Dec. 450, 451 (BIA 1987). Per *Matter of Estime*, "[i]n determining what is 'good and sufficient cause' for the issuance of a notice of intention to revoke, we ask whether the evidence of record at the time the notice was issued, if unexplained and unrebutted, would have warranted a denial based on the petitioner's failure to meet his or her burden of proof." *Id.*

II. PROCEDURAL BACKGROUND AND ANALYSIS

The instant petition was filed on November 3, 2016, accompanied by a labor certification that was filed with the DOL on May 27, 2016, and certified in August 2016. The petition was initially approved on June 9, 2017.

On February 21, 2020, the Director issued a notice of intent to revoke (NOIR) the approval. After pointing out that the Petitioner answered "No" to the compound question on page 1, item C.9, of the labor certification reading:

> Is the employer a closely held corporation, partnership, or sole proprietorship in which the alien has an ownership interest, or is there a familial relationship between the owners, stockholders, partners, corporate officers, or incorporators, and the alien?

the Director cited various records indicating that (1) the employer contact identified on the labor certification, [redacted] is the biological half-sister of the Beneficiary and intended to host her in the United States, (2) the Beneficiary's half-sister works for the Petitioner as a buyer's agent, and (3) it appeared that the Petitioner was aware of the familial relationship between the Beneficiary and [redacted] The Director also stated that the proffered position in the labor certification and the petition is actually a janitor, suggested that it was not the same as a real estate stager, and based on the Beneficiary's interview at the U.S. Embassy in [redacted] Ukraine, observed that she had no professional experience in either type of job. The Director termed the foregoing information a misrepresentation of material facts on the labor certification application concerning the familial relationship between the Beneficiary and the petitioning company and the nature of the proffered position, which cast doubt on the *bona fides* of the job offer. The Petitioner was advised of the Director's intention to revoke the petition's approval, and was granted 30 days to offer evidence in opposition to the proposed revocation. No response was received from the Petitioner.

On February 4, 2021, the Director issued a decision revoking the petition's approval. After noting that the NOIR had been issued on February 21, 2020, and that no response had been received, the

Director's revocation decision tracked the language and reasoning of the NOIR. The Director concluded that there was "good and sufficient cause" for revocation because the Petitioner and the Beneficiary willfully misrepresented a material fact on the labor certification in failing to disclose the familial relationship between [redacted] who worked for the Petitioner, and the Beneficiary, as a result of which the DOL could not adequately determine whether the proffered position was a *bona fide* job offer. The Director's decision did not specifically cite the alleged confusion as to the nature of the proffered position in the summation of the "good and sufficient cause" for revocation.

The Petitioner filed a timely appeal.[1] The Petitioner asserts that there was no misrepresentation of a material fact at section C.9 of the labor certification concerning the relationship between the Petitioner and the Beneficiary because the Beneficiary has no ownership interest in the Petitioner and there is no familial relationship between the Petitioner and the Beneficiary. The person with whom the Beneficiary does have a familial relationship, [redacted] is not an owner, stockholder, partner, corporate officer, or incorporator of the Petitioner. Rather, she is as an independent contractor or buyer's agent for the Petitioner, as explained by the Petitioner's owner, [redacted] in a letter dated February 27, 2021. Nor was the nature of the proffered position mischaracterized in the labor certification or the petition, according to the Petitioner. In his letter of February 27, 2021, the Petitioner's president affirms that the proffered position is a real estate stager, notwithstanding the Director's characterization of the job as a janitor, and that it does not require any professional (or other kind) of experience.

Based on the record as a whole, we determine that the Director's revocation decision is flawed. First and foremost, it misconstrues the content of the question at section C.9 of the labor certification, and therefore erroneously concludes that the Petitioner's answer of "No" was a misrepresentation of fact. Section C.9 includes two distinct questions:

1. Is the employer a closely held corporation, partnership, or sole proprietorship in which the alien has an ownership interest?

2. Is there a familial relationship between the owners, stockholders, partners, corporate officers, or incorporators, and the alien?

The answer to question 1 is clearly "No" since the Beneficiary has no ownership interest in the Petitioner, which is wholly owned by [redacted]

The answer to question 2 is also "No" because there is no familial relationship between the Beneficiary and [redacted] the Petitioner's sole owner, corporate officer, and incorporator.

Thus, the Director has not identified any relationship between the Petitioner and the Beneficiary that was misrepresented, or improperly withheld, in the answer on "No" to the question at section C.9 of the labor certification.

[1] In the appeal counsel for the Petitioner asserts that the NOIR of February 21, 2020, was never received, and submits copies of two letters from the Petitioner to USCIS and a notice from USCIS to the Petitioner in support of this claim. We note that counsel's address changed during the year between the issuance of the NOIR in February 2020 and the issuance of the revocation decision in February 2021.

In his letter submitted on appeal the Petitioner's president, [redacted], states that he has no familial relationship with [redacted] either, who works with the Petitioner as an independent contractor and, according to [redacted] recommended her half-sister, the Beneficiary, for the job of real estate stager. In his decision the Director suggested that [redacted]'s foreknowledge of the familial relationship between the independent contractor [redacted] and the Beneficiary, and of the Beneficiary's interest in the proffered position, cast doubt on whether the position was a *bona fide* job opportunity open to U.S. workers as opposed to a job created specifically for the Beneficiary. But this question was not explored in depth, and the evidence discussed by the Director was thin.

As for the Director's characterization of the proffered position as a janitor, not a real estate stager, we assume that this idea came from the categorization of the job on the petition and the labor certification under the SOC Code of 37-2011 and the Occupation Title of "Janitors and Cleaners, Except Maids and Housekeepers." Though the job duties of the "real estate stager" position described in the labor certification (and incorporated into the petition) may include some janitorial-like tasks, the Director did not explain why that fact is relevant in this proceeding. The labor certification does not require experience of any kind to qualify for the job,[2] which is consistent with the petition's request for "other worker" classification. Thus, the Director has not adequately explained why this issue, which seems to boil down to the proper title for proffered position, constitutes a ground for revocation.

III. CONCLUSION

In accord with the foregoing analysis, we will withdraw the Director's decision and remand the case for further consideration. The Director may issue a new NOIR in accordance with the requirements of 8 C.F.R. § 205.2(b) and (c) and *Matter of Estime*. Following the Petitioner's response to the NOIR, or the expiration of the time period for response, the Director shall issue a new decision. The petitioner bears the burden of proof to demonstrate eligibility for the requested immigration benefit by a preponderance of the evidence. Section 291 of the Act; *Matter of Chawathe*, 25 I&N Dec. 369, 375 (AAO 2010).

ORDER: The Director's decision is withdrawn. The matter is remanded for further proceedings, consistent with the foregoing analysis, and the entry of a new decision.

[2] The only job requirements stated on the labor certification are a high school diploma, or a foreign educational equivalent, and proof of the legal right to work permanently in the United States.