U.S. Citizenship and Immigration Services

Non-Precedent Decision of the Administrative Appeals Office

In Re: 32466167

Date: AUG. 9, 2024

Appeal of Texas Service Center Decision

Form I-140, Immigrant Petition for Alien Workers (Skilled Worker)

The Petitioner, a designer and printer of customized banners, stickers, and other signage, seeks to employ the Beneficiary as operations manager. The company requests his classification under the employment-based, third-preference (EB-3) immigrant visa category as a "skilled worker." *See* Immigration and Nationality Act (the Act) section 203(b)(3)(A)(i), 8 U.S.C. § 1153(b)(3)(A)(i). Businesses may sponsor noncitizens for U.S. permanent residence in this category to work in jobs requiring at least two years of training or experience. *Id.*

After first granting the filing, the Director of the Texas Service Center revoked the petition's approval. The Director concluded that the Petitioner did not demonstrate its required intent to employ the Beneficiary in the offered job, and that the company and Beneficiary willfully misrepresented a material fact. On appeal, the Petitioner contends that the Director erred by:

- grounding the revocation on allegations excluded from the notice of intent to revoke (NOIR) the petition;
- providing inadequate notice of, or a chance to rebut, the revocation grounds;
- improperly determining the company's intent to employ the Beneficiary; and
- submitting insufficient evidence of the alleged willful misrepresentations.

In revocation proceedings, the Petitioner bears the burden of demonstrating eligibility for the requested benefit by a preponderance of the 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 the NOIR did not support revocation of the petition's approval and will therefore withdraw the Director's decision. As the record contains additional derogatory information, however, we will remand the matter for issuance of a new NOIR and entry of a new decision.

I. LAW

Immigration as a skilled worker generally follows a three-step process. First, a prospective employer must obtain certification from the U.S. Department of Labor (DOL) that: there are insufficient U.S. workers able, willing, qualified, and available for an offered job; and a noncitizen's permanent

employment in the job 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 a DOL-approved labor certification with an immigrant visa petition to U.S. Citizenship and Immigration Services (USCIS). Section 204(a)(1)(F) of the Act. 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(a) of the Act, 8 U.S.C. § 1255(a).

"[A]t any time" before a beneficiary obtains permanent residence, 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 a record, a petition's erroneous approval may justify its revocation. *Matter of Ho*, 19 I&N Dec. at 590.

USCIS properly issues a NOIR if the unexplained and unrebutted record at the time of the notice's issuance would have warranted a petition's denial. *Matter of Estime*, 19 I&N Dec. 450, 451 (BIA 1987). If a petitioner does not timely respond to a NOIR or the business's response does not overcome the stated revocation grounds, USCIS properly revokes a petition's approval. *Id.* at 451-52.

II. ANALYSIS

A. Intent to Employ in the Offered Job

A business may file an immigrant visa petition if it is "desiring and intending to employ [a noncitizen] within the United States." Section 204(a)(1)(F) of the Act. A petitioner must intend to employ a beneficiary under the terms and conditions of an accompanying labor certification. *See Matter of Izdebska*, 12 I&N Dec. 54, 55 (Reg'l Comm'r 1966) (affirming a petition's denial where, contrary to the terms of an accompanying labor certification, a petitioner did not intend to employ a beneficiary as a domestic worker in a full-time, live-in capacity).

The Petitioner's Form I-140, Immigrant Petition for Alien Worker, and accompanying labor certification state the company's intent to permanently employ the Beneficiary full-time as operations manager. The labor certification states that the offered job requires two years of experience "in management or operations from [the] printing industry" and pays $89,502 a year.

The Director's NOIR questioned the Petitioner's intent to employ the Beneficiary in the offered job. The NOIR states that:

> it appeared that the beneficiary is unaware of the duties of the proposed position. . . . In addition, the petitioner knows the beneficiary well before the filing of the [labor certification on] February 10, 2017 and met the beneficiary about 10 years ago when the petitioner sold [a] business to the beneficiary and his spouse in Arizona.

The Director stated: "The beneficiary's purported employment with the petitioner is not a bona fide offer and thus it appears to be only for immigration purposes."

The immigration service must ground NOIRs on factual allegations. *Matter of Arias*, 19 I&N Dec. 568, 570 (BIA 1988). A NOIR "must include 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. at 451-52. Conclusory, speculative, equivocal, or irrelevant observations are insufficient. *Matter of Arias*, 19 I&N Dec. at 570. "Specific, concrete facts are meaningful, not unsupported speculation and conjecture." *Id.* at 570-71.

The Director's NOIR lacks sufficient details and citations to supporting evidence to revoke the petition's approval based on the Petitioner's purported lack of intent to employ the Beneficiary in the offered job. The NOIR indicates that the allegation regarding the Beneficiary's unawareness of the job's duties stems from statements he reportedly made to a USCIS officer at his adjustment of status interview in Phoenix, Arizona. But the NOIR does not specify any of his testimony. The notice does not indicate whether he, for example, stated job duties that conflict with other evidence, could not answer questions about the job's duties, or both.

Regarding the purported prior meeting between the Petitioner's president and the Beneficiary, the NOIR explains that the president reportedly sold the Beneficiary a business about 10 years ago. But the notice does not identify any evidence supporting that factual allegation, or fully explain the allegation's relevance. *See Matter of Estime*, 19 I&N Dec. at 451-52 (requiring a NOIR to "include a specific statement not only of the facts underlying the proposed action, but also of the supporting evidence").

Further, the Director revoked the petition's approval in part because of an alleged discrepancy in the number of applicants for the offered job in labor certification proceedings. The Petitioner's president reportedly told a USCIS officer that 10 people applied for the job, while copies of the company's labor certification recruitment materials indicate that the job attracted no applicants. The NOIR, however, did not mention the alleged inconsistency in the applicants' number. Thus, the decision improperly cites the purported discrepancy. *See Matter of Arias*, 19 I&N Dec. at 570 ("[T]he revocation could only be grounded upon, and the petitioner was only obliged to respond to, those . . . factual allegations [in the NOIR].") Also, the record does not explain how the number of applicants for the offered job relates to the petition's revocation.

The NOIR does not sufficiently allege facts and describe evidence that would have warranted the petition's denial based on the Petitioner's purported non-intent to employ the Beneficiary in the offered job. We will therefore withdraw revocation of the petition's approval on this ground. *Id.* at 452 (stating that the immigration service cannot sustain a revocation if a NOIR "is based on an unsupported statement or an unstated presumption, or where the petitioner is unaware and has not been advised of derogatory evidence").

B. Misrepresentation

The NOIR alleged that the Petitioner and Beneficiary misrepresented a material fact in responding to Question C.9 on the company's labor certification application. The question asks: "Is the employer a closely held corporation, partnership, or sole proprietorship in which the [noncitizen] has an ownership interest, or is there a familial relationship between the owners, stockholders, partners, corporate officers, or incorporators, and the [noncitizen]?" The Petitioner marked the box indicating

"No." The NOIR states that "the petitioner answered 'NO' to C.9 though the petitioner knows the beneficiary very well before the filing of the labor certification."

As the Petitioner argues, however, Question C.9 did not ask if the company's principals knew the Beneficiary. Rather, the question asked if he had an ownership interest in the business or a family relationship to its principals. The NOIR does not assert any evidence that the Beneficiary owned part of the Petitioner or was related to its principals. *See Alfaro v. U.S. Att'y Gen.*, 862 F.3d 1261, 1264 (11th Cir. 2017) (stating that a willful misrepresentation requires a "false representation[] of a material fact made with knowledge of its falsity") (citation omitted). Thus, the NOIR's allegations would not have warranted the petition's denial based on the company's alleged misrepresentation.

For the foregoing reasons, we will withdraw the Director's decision.

C. Remand

The appeal overcomes the revocation of the petition's approval. But the record contains additional derogatory information that may have warranted the petition's denial based on insufficient evidence of the Petitioner's intent to employ the Beneficiary in the offered job.

The record contains details of the Beneficiary's statements at his adjustment interview in October 2018. He reportedly described his proposed duties to a USCIS officer as "advertising product, monitoring sales, and adjusting prices." When asked about performing other duties listed on the labor certification such as "recruiting and training employees" and "evaluat[ing] employee performance," he reportedly stated: "I don't know about that. I am not sure." Also, in a July 2020 telephone interview with a USCIS officer, the Petitioner's president reportedly described the Beneficiary's proposed duties differently, stating that he would be "operating printing machinery and quality inspection." The conflicting descriptions and uncertainty regarding the Beneficiary's proposed duties cast doubt on the company's intent to employ him in the offered job listed on the labor certification. *See Matter of Ho*, 19 I&N Dec. at 591 (requiring a petitioner to resolve inconsistencies with independent, objective evidence pointing to where the truth lies).

Also, at the adjustment interview, the Beneficiary, a South Korean native and citizen, indicated that he did not speak English. The Petitioner submitted evidence of its employment of 27 people during the second quarter of 2022.[1] Thus, the Beneficiary's limited ability to speak English casts doubt on his ability to perform the offered job's duties, including: "[m]anag[ing] printing production activities of the company;" "[d]irect[ing] sales promotions and advertisements;" "[d]irect[ing] personnel functions;" and "[s]upervis[ing] customer relations." *See Matter of Ho*, 19 I&N Dec. at 591 (requiring a petitioner to resolve evidentiary inconsistencies).

In the aggregate, the additional derogatory information – unexplained and unrebutted – casts sufficient doubt on the Petitioner's intent to employ the Beneficiary in the offered job to have warranted the petition's denial. We will therefore remand the matter for issuance of a new NOIR containing the additional derogatory information.

[1] The labor certification does not indicate the offered job's need for knowledge of Korean or any other foreign language.

If supported by the record, the new NOIR may include any other potential revocation grounds. The new notice, however, must detail all potential revocation grounds and afford the company a reasonable opportunity to respond. Upon receipt of a timely response, the Director should review the entire record and enter a new decision.

III. CONCLUSION

The NOIR did not support the revocation grounds. But additional derogatory evidence may have warranted the petition's denial based on the Petitioner's lack of intent to employ the Beneficiary in the offered job.

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