U.S. Citizenship and Immigration Services

Non-Precedent Decision of the Administrative Appeals Office

MATTER OF S-A- LLC

DATE: Aug. 13, 2019

APPEAL OF NEBRASKA SERVICE CENTER DECISION

PETITION: FORM I-140, IMMIGRANT PETITION FOR ALIEN WORKER

The Petitioner, an operator of a restaurant, seeks to employ the Beneficiary as a marketing specialist. It requests his classification under the third-preference, immigrant category as a professional. Immigration and Nationality Act (the Act) section 203(b)(3)(A)(ii), 8 U.S.C. § 1153(b)(3)(A)(ii). This employment-based, "EB-3" category allows a U.S. business to sponsor a foreign national for lawful permanent resident status to work in a job requiring at least a bachelor's degree.

After initially granting the filing, the Director of the Nebraska Service Center revoked the petition's approval. The Director found that the record did not demonstrate the Petitioner's employment of the Beneficiary in the offered position.

On appeal, the Petitioner asserts that it demonstrated its employment of the Beneficiary in the offered position. It contends that the Director improperly focused on another employee's misidentification of the Beneficiary during an immigration officer's visit to the restaurant.

Upon *de novo* review, we will withdraw the Director's decision and remand the matter for entry of a new decision.

I. EMPLOYMENT-BASED IMMIGRATION

Immigration as a professional generally follows a three-step process. To permanently fill a position in the United States with a foreign worker, a prospective employer must first obtain certification from the U.S. Department of Labor (DOL). *See* section 212(a)(5)(A)(i) of the Act, 8 U.S.C. § 1182(a)(5)(A)(i). DOL approval signifies that insufficient U.S. workers are able, willing, qualified, and available for an offered position, and that employment of a foreign national will not harm wages and working conditions of U.S. workers with similar jobs. *Id.*

If the DOL approves a position, an employer must next submit the 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 beneficiary meets the requirements of a DOL-certified position and the requested classification. If USCIS grants a petition,

a foreign national may finally 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 resident status, however, USCIS may revoke a petition's approval for "good and sufficient cause." Section 205 of the Act, 8 U.S.C. § 1155. USCIS may issue a notice of intent to revoke (NOIR) if the unexplained and unrebutted record would have warranted the petition's denial. *Matter of Estime*, 19 I&N Dec. 450, 451 (BIA 1987). The Agency may revoke a petition's approval if a petitioner's NOIR response does not overcome the alleged revocation grounds. *Id.* at 452.

II. THE NOTICE OF INTENT TO REVOKE

USCIS must give a petitioner an opportunity to submit evidence supporting a petition and opposing its proposed revocation. 8 C.F.R. § 205.2(b). An 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. "Where a notice of intention to revoke is based on an unsupported statement or an unstated presumption, or where the petitioner is unaware and has not been advised of derogatory evidence, revocation of the visa petition cannot be sustained." *Id.* at 452.

Here, the Director's NOIR stated that, after a USCIS officer interviewed the Beneficiary regarding his application for adjustment of status:

> it was determined the beneficiary does not qualify for the position of marketing specialist, and could not provide evidence of working or being paid the proffered wage. Evidence from the interview also determined the petitioner only had 2 employees; neither of which was the beneficiary. Information from a site visit of the beneficiary's work, determined none of the people at that location knew the beneficiary by name or photograph. One employee advised that the beneficiary was a sushi cook, but had quit. The beneficiary could not provide any evidence of his work product as a marketing specialist.

Although asserting the Beneficiary's lack of qualifications for the offered position, the NOIR did not specify facts or evidence supporting the assertion. The labor certification states the position's only job requirement as a U.S. bachelor's degree, or a foreign equivalent degree, in business administration, business, or economics. As of the NOIR's issuance, the record contained documentation indicating that the Beneficiary's bachelor of business administration degree from South Korea equates to a U.S. bachelor's degree in the same field. The NOIR did not state any contrary facts or evidence. We therefore cannot sustain revocation of the petition's approval based on the Beneficiary's alleged lack of qualifications.

The NOIR also asserted that the Beneficiary's 2018 adjustment interview revealed the Petitioner's employment of only two people. But the notice did not specify evidence supporting that assertion or explain how the claim would have warranted the petition's denial. On the Form I-140, Immigrant Petition for Alien Worker, and the accompanying labor certification, the Petitioner stated its employment of 26 people. A copy of a 2015 federal income tax return listed the Petitioner's payment

of more than $300,000 in salaries and wages. Internal USCIS reports also do not support the Petitioner's employment of only two people. A USCIS officer's written summary of the Beneficiary's adjustment interview suggests that the NOIR may have confused the Petitioner's number of employees with its number of owners. The summary refers to the Beneficiary's statement that "he does not know how many employees are employed with [the Petitioner]," but that the company had two owners. Also, an immigration officer reported that, when she entered the Petitioner's restaurant, "multiple employees were inside" and that, during the visit, she spoke to at least three of them. Thus, the record does not support the NOIR's allegation that the Petitioner had only two employees. The record also does not explain how the claim would have merited the petition's revocation.

The remainder of the NOIR alleged facts indicating that the Petitioner did not currently employ the Beneficiary in the offered position or at the proffered wage rate. Until a beneficiary obtains lawful permanent residence, however, a petitioner need not employ him or her in an offered position or at a proffered wage rate. A labor certification employer must certify only that it "will be able to place the alien on the payroll *on or before the date of the alien's proposed entrance into the United States.*" 20 C.F.R. § 656.10(c)(4) (emphasis added). A petitioner is not required to employ a beneficiary in the job offered during the pendency of the immigration petition. Thus, even if true, the Petitioner's alleged non-employment of the Beneficiary would not have warranted the petition's denial.

For the foregoing reasons, the NOIR did not specify facts and evidence supporting revocation of the petition's approval. We cannot affirm a revocation based on a deficient NOIR. "A decision to revoke approval of a visa petition can only be grounded upon, and the petitioner is only obliged to respond to, the factual allegations specified in the notice of intention to revoke." *Matter of Arias*, 19 I&N Dec. 568, 570 (BIA 1988). Because of the deficient NOIR, we are remanding the matter to the Director to further develop the record. If the Director finds that a new NOIR is warranted, he may issue a new notice in accordance with the above stated case law, addressing any issues that are identified upon further review.

III. CONCLUSION

The NOIR did not specify facts or evidence supporting the revocation of the petition's approval. We will withdraw the Director's decision and remand this case for further consideration.

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

Cite as *Matter of S-A- LLC*, ID# 4197380 (AAO Aug. 13, 2019)