U.S. Citizenship and Immigration Services

Non-Precedent Decision of the Administrative Appeals Office

In Re: 00079481

Date: DEC. 23, 2021

Appeal of Nebraska Service Center Decision

Form I-140, Immigrant Petition for a Professional

The Petitioner, a newspaper publisher, sought to permanently employ the Beneficiary as an assistant editor. It requested his classification as a professional under the third-preference immigrant category. *See* 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" immigrant classification allows a U.S. employer to sponsor a foreign national with a bachelor's degree for lawful permanent resident status.

The petition was initially approved by the Texas Service Center. More than eight years later, however, the Director of the Nebraska Service Center revoked the approval. Based on sworn statements signed by the Petitioner's president the Director concluded that the record did not establish the company's required intention to employ the Beneficiary in the offered position at the time of the petition's approval. The Director also found fraud or willful misrepresentation of a material fact by the Petitioner regarding the filing of the petition and the associated labor certification.

On appeal, the Petitioner's president recants his statements and asserts that the company intended to permanently employ the Beneficiary.

Upon *de novo* review, we will dismiss the appeal because the Petitioner has not established its intent to permanently employ the Beneficiary in the proffered position. In addition, we determine that the Petitioner has not established its continuing ability to pay the proffered wage of the instant Beneficiary, as well as the proffered wages of the beneficiaries of its other Form I-140 petitions, between the priority date of this petition and the date of its initial approval. The appeal will be dismissed on this ground as well.

I. LAW

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). *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 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.

Before a beneficiary obtains lawful permanent resident status, however, USCIS may revoke a petition's approval "at any time" for "good and sufficient cause." Section 205 of the Act, 8 U.S.C. § 1155. At issue here is whether good and sufficient cause justified the petition's revocation.[1]

II. ANALYSIS

A. The Petitioner's Intention to Employ the Beneficiary

USCIS properly issues a notice of intent to revoke (NOIR) a petition's approval where the record as of the NOIR's issuance, if unexplained and unrebutted, would have warranted the petition's denial. *See Matter of Estime*, 19 I&N Dec. 450, 451 (BIA 1987). Similarly, USCIS may revoke a petition's approval where the record as of revocation, including any explanation or rebuttal evidence provided by a petitioner, justified the petition's denial. *Id.* at 452.

In this case, the Director's NOIR, dated August 20, 2015, advised the Petitioner of two affidavits that its president signed before Department of Homeland Security (DHS) officers on April 10, 2015. One affidavit denied the Petitioner's filing of the petition for the Beneficiary, stating that an unauthorized person signed the president's name on the Form I-140, Petition for Alien Worker. The other stated that the Petitioner never hired or paid the Beneficiary any salary.

The Director properly issued the NOIR. The Petitioner's denial that the petition was properly filed on behalf of the Beneficiary indicated that the company did not intend to permanently employ him in the offered position. *See* section 204(a)(1)(F) of the Act (stating that a petitioner must be "desiring and intending to employ" a foreign national in the United States). Therefore, as of the NOIR's issuance, the unexplained, unrebutted record would have warranted the petition's denial. After receiving the Petitioner's response to the NOIR and determining that it did not overcome the grounds for revocation, the Director issued a decision on November 23, 2015, revoking the petition's approval and invalidating the labor certification

On appeal, the Petitioner's president acknowledges signing the affidavits. But he states that the DHS officers "dictated" their contents to him and asked him to identify the signature on the Form I-140 without showing him the document's entire contents. He now contends that he signed the Form I-140 and that the Petitioner intended to employ the Beneficiary in the offered position. The Petitioner also

[1] The record indicates that the Beneficiary left the Petitioner's employ after the petition's approval and sought adjustment of status based on a job offer with another company. *See* section 204(j) of the Act (requiring a petition to "remain valid" if a beneficiary's adjustment application is not adjudicated within 180 days, and he or she obtains a new job in the same or similar occupation for which the petition was filed). If USCIS mistakenly approved the petition, however, this "portability" provision does not preclude the petition's revocation. *See, e.g., Herrera v. USCIS*, 571 F.3d 881, 887 (9th Cir. 2009) (finding that to "remain" valid under section 204(j) of the Act, a petition "must have been valid from the start").

submits copies of tax and payroll records as evidence of its employment of the Beneficiary from before the labor certification's filing in October 2003 until after the petition's approval in April 2007.[2]

The record supports the statements of the Petitioner's president on appeal. USCIS records indicate that he previously told law enforcement officers that he signed a Form I-140 for a different foreign national whom the Petitioner did not intend to employ. The president's prior disclosure suggests his credibility in this matter, along with the fact that the president discussed multiple petitions with the officers.

However, as we informed the Petitioner in our notice of intent to dismiss (NOID) its appeal, issued on March 13, 2017, additional evidence casts doubt on the president's claim that the company intended to permanently employ the Beneficiary. On December 27, 2000, almost seven years before the filing of the Form I-140 petition in 2007 and prior to filing the labor certification in 2003, public records indicate the Petitioner's corporate dissolution. *See* NY Department of State, Division of Corporations, Entity Information, at https://www.dos.ny.gov/corps/bus_entity_search.html (previously visited Apr. 27, 2017, and last visited Sept. 1, 2021).

Upon dissolution, a New York corporation's existence terminates, and it "shall carry on no business except for the purpose of winding up its affairs." N.Y. Bus. Corp. Law § 1005(a)(1). Thus, because the Petitioner did not exist after December 27, 2000, the record as of the petition's approval did not establish its intention to employ the Beneficiary after that date.[3]

In response to our NOID, the Petitioner's president asserts that the dissolution did not prevent the corporation's continued operations. As evidence of the Petitioner's continued business, the president submits additional copies of tax returns filed in the company's name after its termination.

The post-dissolution tax returns indicate that the president continued to do business in the Petitioner's name. Nevertheless, the corporation remained dissolved. The filing of tax returns in the Petitioner's name (the record includes copies of some federal and New York State tax returns filed in the Petitioner's name after the corporation's dissolution in 2000) did not resurrect the corporation. Rather, by acting on behalf of the dissolved corporation, the president effectively became a sole proprietor, assuming personal liability for any incurred business obligations. *See, e.g., Long Oil Heat, Inc. v. Polsinelli*, 11 N.Y.S. 3d 277, 278 (N.Y. App. Div. 2015) (holding a corporation's former officer personally liable for debts incurred in the corporation's name after its dissolution).

---

[2] The record shows that the Petitioner filed a Form I-129, Petition for a Nonimmigrant Worker, on behalf of the Beneficiary in June 2003, which was approved in March 2004, that the Beneficiary's nonimmigrant visa status was extended in 2006, and that the Beneficiary claims to have continued to work for the Petitioner until porting to another employer in February 2008.

[3] The Director's NOIR did not cite the Petitioner's corporate dissolution as a ground for revocation. *See Matter of Arias*, 19 I&N Dec. 568, 570 (BIA 1988) (holding that a revocation must be grounded upon the factual allegations in a notice of intent to revoke). Our NOID, however, notified the Petitioner of the derogatory information and afforded it an opportunity to respond. We may therefore base revocation of the petition's approval on the Petitioner's corporate dissolution. *See Betancur v. Roark*, No. 10-11131-RWZ, 2012 WL 4862774, *9 (D. Mass. Oct. 15, 2012) (holding that our request for evidence or notice of intent to dismiss "cures" a prior, deficient notice of intent to revoke).

As our NOID states, a dissolved corporation may retroactively restore its business privileges by paying outstanding state taxes and fees. N.Y. Tax Law § 203-a(7). In response to the NOID, however, the Petitioner's president did not submit evidence of the company's intention to reinstate its corporate privileges. Rather, the president states that after the Petitioner ceased operations in 2008 "it could not activate the record with [New York's] department of state."

Furthermore, as discussed in our NOID, public records indicate that in 2006 the Petitioner's president established a new corporation – [redacted] – with the same address as the Petitioner and himself as chief executive officer. Copies of deposited weekly paychecks to the Beneficiary from 2003 to 2008 indicate his employment by the Petitioner from 2003 through March 2006, but that the new corporation issued his paychecks from 2006 to 2008. These later paychecks also drew from a different bank account than indicated on the Petitioner's paychecks. While the petition represents future employment, offered to the Beneficiary upon approval of lawful permanent residence, the corporate dissolution of the Petitioner in 2000 and the new corporation's payments to the Beneficiary indicate that, as of both the petition's filing and approval in 2007, the Petitioner did not intend to permanently employ him. Rather, the payments combined with the dissolution indicate that the Petitioner's president intended the new corporation to permanently employ the Beneficiary.[4]

Thus, for the foregoing reasons the record does not establish the Petitioner's intention to employ the Beneficiary in the offered position at the time of the petition's approval. We will therefore affirm the Director's decision on this issue.

B. Fraud or Willful Misrepresentation of a Material Fact

As previously discussed, we find the Petitioner's explanation for the conflicting affidavits concerning his previous employment of the Beneficiary and his intent to employ him in the proffered position to be plausible. Therefore, we will withdraw the Director's finding of fraud or willful misrepresentation of a material fact against the Petitioner.

---

[4] To establish as successor-in-interest relationship between the Petitioner and [redacted] it must be established that the new entity acquired the essential rights and obligations needed to continue the Petitioner's business. *See Matter of Dial Auto Repair Shop, Inc.*, 19 I&N Dec. 481, 482-83 (Comm'r 1986) (explaining how a "successor in interest" may use a preceding entity's labor certification). *Dial Auto* discussed three factors that must be considered in determining whether a valid successor-in-interest relationship exists between the labor certification employer and the Form I-140 petition employer. As interpreted and refined by USCIS in the subsequent Memorandum from Donald Neufeld, Acting Associate Director, Domestic Operations, USCIS, HQ 70/6.2, *Successor-in-Interest Determinations in Adjudication of Form I-140 Petitions*; *Adjudicators Field Manual (AFM) Update to Chapter 22.2(b)(5) (AD09-37)* (August 6, 2009), http://www.uscis.gov/legal-resources/policy-memoranda (Neufeld Memorandum), which revised the Adjudicator's Field Manual, the three factors that must be demonstrated by a petitioner claiming to be the successor-in-interest to the labor certification employer are the following: (1) the job opportunity offered by the petitioner must be the same as that originally offered on the labor certification; (2) the petitioner must establish its eligibility for the immigration benefit in all respects, including the eligibility of the labor certification employer such as its ability to pay the proffered wage as of the date the labor certification application was filed with the DOL; and (3) the petitioner must fully describe and document the transfer of ownership from the labor certification employer and its assumption by the petitioner. In this case only the third factor is at issue.

C. The Petitioner's Ability to Pay the Proffered Wage

Although unaddressed by the Director, the record as of the petition's approval did not establish the Petitioner's ability to pay the proffered wage. An application or petition that fails to comply with the technical requirements of the law may be denied by the AAO even if the Service Center does not identify all of the grounds for denial in the initial decision. *See Spencer Enterprises, Inc. v. United States*, 229 F. Supp. 2d 1025, 1043 (E.D. Cal. 2001), *aff'd*, 345 F.3d 683 (9th Cir. 2003); *see also Soltane v. DOJ*, 381 F.3d 143, 145 (3d Cir. 2004) (noting that the AAO conducts appellate review on a *de novo* basis). Although in this case the Director did not identify the ability to pay issue as a ground for denial in the NOIR or in the revocation decision, this omission was cured by the AAO in its notice of intent to dismiss (NOID) the appeal, to which the Petitioner had the opportunity to respond with additional evidence.[5]

A petitioner must demonstrate its continuing ability to pay a proffered wage from a petition's priority date[6] until the beneficiary obtains lawful permanent residence. 8 C.F.R. § 204.5(g)(2). Evidence of ability to pay must include copies of annual reports, federal income tax returns, or audited financial statements. *Id.*

In this case, the labor certification states the proffered wage of the assistant editor position is $27,000 per year. The petition's priority date is October 31, 2003. The petition was approved on April 25, 2007.

In determining a petitioner's ability to pay the proffered wage, USCIS first examines whether the beneficiary was employed and paid by the petitioner during the period following the priority date. A petitioner's submission of documentary evidence that it employed the beneficiary at a salary equal to or greater than the proffered wage for the time period in question, when accompanied by a form of evidence required in the regulation at 8 C.F.R. § 204.5(g)(2), may be considered proof of the petitioner's ability to pay the proffered wage.

In this case the record at the time of the petition's approval indicated that the Beneficiary had worked for the Petitioner since before the priority date. The record included copies of Forms W-2, Wage and Tax Statements, for the years 2003-2006 which showed that the wages paid to the Beneficiary exceeded the proffered wage in the years 2005 and 2006,[7] but were less than the proffered wage in 2003 and 2004. At the time of the petition's approval in 2007, therefore, the record did not establish the Petitioner's continuing ability to pay the proffered wage from the priority date of October 31, 2003, onward based on wages paid to the Beneficiary. Moreover, the record did not include any form of required evidence as specified in 8 C.F.R. § 204.5(g)(2) – whether an annual report, or a federal income tax return, or an audited financial statement – for any pertinent year between the petition's priority date in 2003 and its approval date in 2007.

---

[5] We may revoke a petition's approval on grounds omitted from a NOIR if we notify the affected party of the grounds and afford it a reasonable opportunity to respond. *See Betancur v. Roark, supra.*

[6] The priority date of an employment-based immigrant petition is the date the underlying labor certification was filed with the DOL, in this case October 31, 2003. *See* 8 C.F.R. § 204.5(d).

[7] In response to the Director's subsequent NOIR the Petitioner submitted copies of Forms W-2 for the years 2007 and 2008 indicating that the wages paid to the Beneficiary exceeded the proffered wage in those years as well.

If a petitioner does not establish that it has paid the beneficiary an amount equal to or above the proffered wage from the priority date onward, USCIS will examine the net income and net current assets figures recorded on the petitioner's federal income tax return(s), annual report(s), or audited financial statements(s). If either of these figures, net income or net current assets, equals or exceeds the proffered wage or the difference between the proffered wage and the amount paid to the beneficiary in a given year, the petitioner would ordinarily be considered able to pay the proffered wage during that year. However, when a petitioner has filed other I-140 petitions it must establish that its job offer is realistic not only for the instant beneficiary, but also for the beneficiaries of its other I-140 petitions (I-140 beneficiaries). A petitioner's ability to pay the proffered wage is an essential element in evaluating whether a job offer is realistic. *See Matter of Great Wall*, 16 I&N Dec. 142 (Acting Reg'l Comm'r 1977). Accordingly, a petitioner must demonstrate its ability to pay the combined proffered wages of the instant beneficiary and every other I-140 beneficiary from the priority date of the instant petition until the other I-140 beneficiaries obtain lawful permanent resident status. *See Patel v. Johnson*, 2 F. Supp. 3d 108, 124 (D. Mass. 2014) (upholding our denial of a petition where a petitioner did not demonstrate its ability to pay multiple beneficiaries).[8]

In our NOID issued on March 13, 2017, we stated that USCIS records indicated the Petitioner had two other Form I-140 petitions pending at the time of this petition's priority date in 2003.[9] The Petitioner was advised to submit evidence of the proffered wages of the other two beneficiaries, any wages paid to them, whether the beneficiaries obtained lawful permanent residence, or whether their petitions were denied withdrawn, or revoked. The Petitioner was also advised to submit copies of its annual reports, or federal income tax returns, or audited financial statements for the years spanning the petition's priority date in 2003 to its approval date in 2007.

In its response to our NOID the Petitioner did not submit any evidence pertaining to its other two I-140 petitions pending on this petition's priority date. Nor did it submit copies of any annual report, federal income tax return, or an audited financial statement for the years 2003-2007. In connection with another proceeding the Petitioner previously submitted copies of its federal income tax returns for 2003, 2005, and 2006. But no such documents have been submitted for 2004 and 2007. Thus, the record still contains no evidence regarding the Petitioner's other proffered wage obligations between the priority date and the approval date of the instant petition, and lacks regulatory required evidence prescribed by 8 C.F.R. § 204.5(g)(2) for 2004 and 2007. The regulation at 8 C.F.R. § 103.2(b)(14) provides that the "[f]ailure to submit requested evidence that precludes a material line of inquiry shall be grounds for denying the benefit request."

We also note that the lack of a federal income tax return for 2004 makes it impossible for us to determine whether the Petitioner had net income or net current assets sufficient to cover the difference between the Beneficiary's proffered wage and the wages paid to the Beneficiary that year, much less

---

[8] The Petitioner's ability to pay the proffered wage of another I-140 beneficiary is not considered:

- After the other beneficiary obtains lawful permanent residence;
- If an I-140 petition filed on behalf of the other beneficiary has been withdrawn, revoked, or denied without a pending appeal or motion; or
- Before the priority date of the I-140 petition filed on behalf of the other beneficiary.

[9] The pending I-140 petitions were identified by the receipt numbers [redacted] and [redacted]

any additional shortfall that may have existed with regard to the other two I-140 beneficiaries. As for 2003, the other year in which the wages paid to the Beneficiary were below his proffered wage, the lack of evidence regarding the Petitioner's other two I-140 beneficiaries likewise makes it impossible to determine whether the Petitioner was able to meet its proffered wage obligations that year.

For the reasons discussed above the Petitioner has not established its continuing ability to meet its proffered wage obligations from the petition's priority date of October 31, 2003, through its approval date of April 25, 2007.

III. CONCLUSION

The record does not establish the Petitioner's intention to employ the Beneficiary in the offered position at the time the petition was approved in 2007. In addition, the Petitioner has not established its continuing ability to pay the proffered wages of the instant Beneficiary and its other I-140 beneficiaries from the priority date of this petition onward. The appeal will be dismissed for these reasons, with each considered an independent and alternative basis for the decision.

ORDER: The appeal is dismissed.