U.S. Citizenship and Immigration Services

Non-Precedent Decision of the Administrative Appeals Office

In Re: 34814976

Date: FEB. 21, 2025

Appeal of Texas Service Center Decision

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

The Petitioner, an operator of fast-food restaurants, seeks to employ the Beneficiary as a "crew member." The company requests his classification under the employment-based, third-preference (EB-3) immigrant visa category as an "other worker." *See* Immigration and Nationality Act (the Act) section 203(b)(3)(A)(iii), 8 U.S.C. § 1153(b)(3)(A)(iii). Businesses may sponsor aliens for U.S. permanent residence in this category to work in jobs requiring less than two years of training or experience. *See* 8 C.F.R. § 204.5(l)(2) (defining the term "other worker").

After first granting the petition in 2021, the Director of the Texas Service Center revoked the filing's approval in 2024. The Director concluded that she mistakenly approved the petition because the Petitioner did not demonstrate its required intent to employ the Beneficiary in the offered job on a permanent basis. The Director also found that the company willfully misrepresented its compliance with a U.S. Department of Labor (DOL) regulation barring the company's receipt of payment for the filing of the accompanying labor certification.

On appeal, the Petitioner contends that the Director overlooked evidence of the job offer's validity. The company also asserts that the Director violated its and the Beneficiary's constitutional due process rights and that the Director's purported "affirmative misconduct" estopped the petition's revocation.

In these 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 id.*, we conclude that insufficient evidence supports the Director's misrepresentation finding and that she did not explain her specific reasons for determining that the company lacked intent to employ the Beneficiary in the offered job. We will therefore withdraw the Director's decision and remand the matter for entry of a new decision consistent with the following analysis.

I. LAW

Immigration as an other – or "unskilled" – worker generally follows a three-step process. First, a prospective employer must obtain DOL certification that: there are insufficient U.S. workers able, willing, qualified, and available for an offered job; and an alien's permanent employment in the position

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, 8 U.S.C. § 1154(a)(1)(F). Among other things, USCIS determines whether an alien 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).

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 of the Act, 8 U.S.C. § 1255.

But, "at 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. A petition's erroneous approval may justify its revocation. *Matter of Ho*, 19 I&N Dec. at 590.

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

II. ANALYSIS

A. Facts

The Petitioner filed its application for labor certification in this matter in July 2020. The company attested that it would employ the Beneficiary, an Uzbekistani native and citizen, as a crew member at one of its restaurants on a permanent, full-time basis. The company also attested that it had not received "payment of any kind" in exchange for the labor certification application's submission. DOL certified the application in June 2021, and the Petitioner filed this petition in September 2021. That same month, USCIS approved the filing.

About a year later, a USCIS officer interviewed the Beneficiary regarding his application for adjustment of status. *See* 8 C.F.R. § 245(a)(2)(B) (if visas are immediately available, allowing aliens to concurrently file adjustment applications with petitions). According to the officer's notes, the Beneficiary – a former programmer with a U.S. master of science degree in computer information sciences – stated that he applied for the offered fast-food job "[t]o get a green card [U.S. permanent residence]." He told the officer that he could not find work in his field that would lead to U.S. permanent residence.

After the Beneficiary's adjustment interview, USCIS further investigated his job offer. In January 2023, an officer telephoned the Petitioner's human resources administrator, who had signed both the labor certification and petition for the company. The administrator told the officer that the company used another firm to recruit the Beneficiary for the offered job. The recruiting firm also reportedly recommended a law firm that prepared and filed the labor certification application and petition. The

administrator stated that neither the recruiting firm nor the Beneficiary paid the Petitioner. The administrator also stated that the Petitioner did not pay the recruiting firm or counsel for their services.

The following month, a USCIS officer telephoned the Beneficiary. He stated that he had learned of the recruiting firm from a friend and found the Petitioner's offered job on the firm's website. Evidence shows that he paid the recruiting firm total fees of $19,260 for: providing immigration consulting services; coordinating his placement with the Petitioner; and filing the petition and his adjustment application.

The Beneficiary stated that he began working for the Petitioner in the offered job in August 2022, upon approval of his application for employment authorization. *See* 8 C.F.R. § 274a.12(c)(9) (allowing adjustment applicants to apply for permission to work in the United States). The company first paid him $8.42 an hour, the proffered wage stated on the labor certification and petition. But, at the time of the telephone interview in February 2023, he said that he earned $11 an hour. A copy of his May 2020 written and signed agreement with the recruiting firm indicates that he promised to work full-time for the Petitioner for at least one year.

On April 2024, the Director issued a NOIR to the Petitioner, recounting the above information. After reviewing the company's timely response, the Director revoked the petition's approval the following month.

B. The Petitioner's Due Process Claims Are Unavailing

The federal government cannot deprive a person "of life, liberty, or property, without due process of law." U.S. Const. amend. V. The Petitioner contends that USCIS deprived it and the Beneficiary of due process by purportedly delaying the petition's approval and then revoking it. The company states:

> The government has severely harmed [the Petitioner and Beneficiary] with its delays, and this is a borderline, if not already, an unconstitutional denial of due process to have them wait this long, only to, years later, re-open questions that have already been answered to the satisfaction of USCIS.

Case law forecloses the Beneficiary's due process claim. The U.S. Court of Appeals for the Fourth Circuit, which has jurisdiction over the residences of both the Beneficiary and the Petitioner, has held that a beneficiary of a revoked immigrant visa petition lacks a constitutionally protected interest in the petition's approval. *Diomande v. Gonzales*, 247 Fed.Appx. 450, 451 (4th Cir. 2007).

The Petitioner's due process claim also fails. To prevail on it, the company needed to show that the petition's revocation resulted in "prejudice," meaning that the purported due process violation likely affected the proceeding's results. *See Ayala-Osegueda v. Garland*, 92 F.4th 220, 236 n.11 (4th Cir. 2024). The Petitioner has not sufficiently explained how the purported delayed approval and revocation would have likely affected the proceeding's results. Thus, the Petitioner's due process claim does not demonstrate the requisite prejudice.

C. We Lack Jurisdiction Over the Petitioner's Estoppel Claim

The Petitioner also argues that its and the Beneficiary's reliance on the petition's initial approval equitably estopped the filing's revocation. The company contends that USCIS engaged in "affirmative misconduct." The Petitioner states: "This NOIR is a clear example of affirmative misconduct by USCIS . . . the Government's reckless misleading of [the Beneficiary]."

Courts invoke the equitable estoppel doctrine to help parties who, in good faith and to their detriments, relied on others' representations. *Casa de Maryland v. U.S. Dep't of Homeland Sec.*, 924 F.3d 684, 705 (4th Cir. 2019). Estoppel against the federal government requires a showing of "affirmative misconduct." *Keener v. E. Assoc'd Coal Corp.*, 954 F.2d 209, 214 n.6 (4th Cir. 1992) (indicating that "affirmative misconduct" would require "lying" to an applicant as opposed to "misleading" them or engaging in "malicious" conduct).

As part of an administrative agency, however, we lack authority to apply the equitable estoppel doctrine. *See Matter of O-R-E-*, 28 I&N Dec. 330, 336 (BIA 2021). Federal courts may estop USCIS, but we cannot. *Id.* Thus, we cannot consider the Petitioner's estoppel argument.

D. The Record Does Not Support the Petitioner's Alleged Misrepresentation

Unless accompanied by an application for Schedule A designation, an other-worker petition must include an individual labor certification from DOL. 8 C.F.R. § 204.5(l)(3)(i). USCIS may deny a petition that includes an invalid labor certification. *See Matter of Sunoco Energy Dev. Co.*, 17 I&N Dec. 283, 284 (Reg'l Comm'r 1979) (affirming a petition's denial where, contrary to a DOL regulation, the petitioner did not intend to employ the beneficiary in the geographic area stated on the labor certification).

The Director found that the Petitioner misrepresented a material fact on the accompanying labor certification. Question I.e.23 of the labor certification asked the company: "Has the employer received payment of any kind for the submission of this application?" The company checked the box marked "No." The Petitioner signed both the labor certification and the petition, declaring under penalty of perjury that it read and reviewed the filings and that their contents were true and accurate.

Misrepresentations are willful if they are "deliberately made with knowledge of their falsity." *Matters of Valdez*, 27 I&N Dec. 496, 498 (BIA 2018) (citations omitted). A misrepresentation is material when it has a "natural tendency to influence, or [be] capable of influencing, the decision of the decision-making body to which it was addressed." *Id.* (citation omitted). A signature on an immigration application establishes "a strong presumption" that the signatory knew the application's contents and assented to them. *Id.* at 499.

Question I.e.23 on the labor certification relates to a DOL labor certification regulation. Under 20 C.F.R. § 656.12(b), an employer generally cannot "seek or receive payment of any kind for any activity related to obtaining permanent labor certification, including payment of the employer's attorneys' fees."

The Director's NOIR alleged that, in response to Question I.e.23 on the labor certification application, the Petitioner willfully concealed its receipt of payment for the application's preparation and filing. The Director asserted that, contrary to 20 C.F.R. § 656.12(b), an attorney who prepared and filed the labor certification application received payment from the money the Beneficiary paid to the recruiting firm.

The record, however, is unclear regarding the Petitioner's purported regulatory violation. The applicable regulation also states:

> 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.

20 C.F.R. § 656.12(b). The record does not demonstrate that the attorney who reportedly prepared and filed the Petitioner's labor certification represented both the company and the Beneficiary. The labor certification lists no preparer, nor did a preparer sign the certification. A copy of the written, signed agreement between the Beneficiary and the recruiting firm states that the firm would "recommend counsel to the Employer." But the agreement does not state that the firm would pay an attorney to file and prepare the labor certification application. The agreement states that the recruiting firm would:

- Receive $5,000 upon the agreement's execution and the Beneficiary's placement with the Petitioner;
- Pay Form I-140 legal and filing fees of $7,730 within 30 days of receiving an invoice from counsel;
- Receive $2,470 upon I-140 approval;
- Receive $1,500 once he obtains employment authorization;
- Receive $1,500 once he obtain U.S. permanent residence.

Further, the recruiting firm's services listed in the agreement do not involve preparing or filing the labor certification application. The record also lacks direct evidence that an attorney received payment to prepare and file the Petitioner's certification.

Under these circumstances, the record lacks sufficient evidence that the Petitioner violated 20 C.F.R. § 656.12(b) or willfully concealed its receipt of payment for any labor certification activity. We will therefore withdraw the Director's contrary finding.

E. The Director Did Not Explain the Specific Reasons for Revoking the Petition Based on the Petitioner's Intent

A business may file an immigrant visa petition if it is "desiring and intending to employ [an alien] within the United States." Section 204(a)(1)(F) of the Act. A petitioner must intend to employ a beneficiary under the terms 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 accompanying labor certification, the petitioner did not intend to employ the beneficiary as a domestic worker on a full-time, live-in basis).

For labor certification purposes, the term "employment" means "[p]ermanent, full-time work." 20 C.F.R. § 656.3. "Permanent" employment consists of work of "indefinite duration" and excludes a job with a limited employment term. *Matter of Albert Einstein Med. Ctr.*, 2009-PER-00379, *64, *69 (BALCA Nov. 21, 2011) (*en banc*).

The Director's written decision recites the facts contained in the NOIR verbatim, including: the Beneficiary's statements at his adjustment interview; the statements of the Petitioner's human resources administrator; the Beneficiary's later sworn statement; and his signed, written agreement with the recruiting firm. But the decision does not analyze those facts or state a conclusion drawn from them.

When revoking a petition's approval, "the director shall provide the petitioner or the self-petitioner with a written notification of the decision that explains the specific reasons for the revocation." 8 C.F.R. § 205.2(c). The Director's decision does not explain the specific reasons for revoking the Petitioner's petition based on the company's purported lack of intent to employ the Beneficiary in the offered job. The decision not only violated the regulation but also prevented the Petitioner from effectively responding to the revocation ground and us from effectively reviewing the decision. We will therefore withdraw the petition's revocation on this ground and remand the matter.

On remand, if the Director continues to believe that the Petitioner lacked the required intent to employ the Beneficiary in the offered job on a permanent basis, the Director should issue a new decision explaining the specific reasons for revoking on this ground. The Director should discuss evidence and facts that she believes support the revocation ground and/or explain why the Petitioner's evidence is insufficient.

If the Director wishes to alter allegations or rely on new facts or others unmentioned in the NOIR, the Director must issue a new NOIR. *See Matter of Arias*, 19 I&N Dec. 568, 570 (BIA 1988) (stating that a revocation can only be grounded upon, and a petitioner need only respond to, the factual allegations stated in a NOIR). If supported by the record, a new NOIR may also include new revocation grounds.

III. CONCLUSION

The record does not support the petition's revocation based on the Petitioner's alleged concealment of a labor certification-related payment. The Director did not sufficiently explain her conclusion that the company lacked 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.