U.S. Citizenship and Immigration Services

Non-Precedent Decision of the Administrative Appeals Office

MATTER OF Y-S-C

DATE: JAN. 11, 2018

APPEAL OF NEBRASKA SERVICE CENTER DECISION

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

The Petitioner, a logistics business, seeks to employ the Beneficiary as a market research analyst. It requests classification of the Beneficiary as a professional under the third preference immigrant classification. *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 immigrant classification allows a U.S. employer to sponsor a professional with a baccalaureate degree for lawful permanent resident status.

The petition was initially approved. However, the Director of the Nebraska Service Center subsequently revoked the approval based on a finding that the evidence in the record did not establish that the Beneficiary was performing the duties of a market research analyst, in conformance with the job duties described on the labor certification. The Director concluded that fraud or willful misrepresentation had been committed in the labor certification process, and invalidated the labor certification.

On appeal the Petitioner submits a brief and supporting documentation. The Petitioner asserts that the evidence in the record establishes that it occupies the premises identified on the labor certification as the job location for the proffered position, and that the duties being performed by the Beneficiary in the proffered position are those of a market research analyst.

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

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)(A)(i) of the Act, 8 U.S.C. § 1182(a)(5)(A)(i). By approving the labor certification, 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.

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).

II. ANALYSIS

The labor certification in this case described the job duties to be performed by the Beneficiary in the position of market research analyst and identified the primary worksite location as in California.

In his revocation decision the Director discussed evidence in the record that raised concerns about whether the Beneficiary was employed at the location identified on the labor certification, and indicated that it cast doubt on the *bona fides* of the job offer. These concerns arose from a site visit by USCIS to California – the address identified in the labor certification as the primary worksite for the market research analyst. The site visit revealed that another company – a subsidiary of a South Korean company with which the Petitioner has a contract to provide warehousing and transport services – was located in the premises, and that the Beneficiary was not working at that location. The Director did not reach a final conclusion with respect to the above issues in his revocation decision. Instead, he reviewed the job duties described in the labor certification and in the recruitment postings, stated that they do not correlate with the services the Petitioner provides to under their contract, and indicated he was not persuaded that the Beneficiary is performing the duties of a market research analyst. The Director found that fraud or willful misrepresentation of material facts had been committed with regard to the labor certification application, and invalidated the labor certification.

On appeal the Petitioner acknowledges that the Beneficiary, whom it claims to have employed since October 2012, was transferred from California, to its New Jersey branch office in early 2013. It asserts that the Beneficiary has conducted market research work which resulted in agreements with two other logistics companies in the region to expand business services. The Petitioner contends that it needs a market research analyst to expand its business in the logistics service industry. The Petitioner asserts that the Director ignored the extensive evidence it submitted that not only but also the Petitioner, conducted business and had employees located at California.

The Petitioner states that it is a third party logistics provider whose main client is under a contract signed in September 2012. The subject contract identifies the principal offices of

and the Petitioner as [redacted] and [redacted] respectively, both located in [redacted] California. The contract states that [redacted] business includes manufacturing, marketing, and selling prepared food products, as well as importing and distributing goods from Korea and elsewhere, and that the Petitioner would provide warehousing and logistical services for the storage and transfer of its products. The Petitioner indicates that it has office space in [redacted] facilities in [redacted] and has provided employee affidavits, business invoices, and other documents showing that it conducted operations at that location from 2012 onward. We find that the evidence in the record is sufficient to establish that the Petitioner had an office and employees working in [redacted] warehouse premises at [redacted] California, from 2012 onward.

The Petitioner acknowledges that the Beneficiary was transferred from the above address to another facility in New Jersey in early 2013, and was therefore not working at the "primary worksite" identified in the labor certification on the date it was filed with the DOL, June 26, 2013. As far as the record shows, the Beneficiary is still working at the New Jersey location. A labor certification for a specific job offer is valid only for the particular job opportunity, the alien for whom the certification was granted, and for the *area of intended employment* stated on the [labor certification application]. 20 C.F.R. § 656.30(c)(2). (Emphasis added.) The fact that the Beneficiary is not currently employed at the primary worksite, however, is not persuasive evidence in and of itself that the Petitioner does not intend to employ the Beneficiary at that location in the future. The job offer is prospective and does not require that the Beneficiary be employed at the primary worksite before the Beneficiary is granted lawful permanent residence.

The Director's revocation decision was based on a belief that the Beneficiary is not performing the duties of a market research analyst because the Petitioner is a provider of logistical and warehousing services to [redacted] The Petitioner does not claim that the Beneficiary is performing market research analysis for [redacted] however, and the Director did not solicit specific evidence of the Beneficiary's work product during his time of employment with the Petitioner. Furthermore, since the job offer is prospective, the Beneficiary is not required to perform the duties of the proffered position before being granted lawful permanent residence. Accordingly, the Director's conclusion that the Beneficiary is not performing the duties of a market research analyst lacks evidentiary weight. The revocation decision, therefore, is not well grounded and will be withdrawn.

We also withdraw the finding of fraud or willful misrepresentation of a material fact and the invalidation of the labor certification. The Director stated that fraud or willful misrepresentation of material facts had been found involving the labor certification application, but did not identify any specific instances of fraud or misrepresentation in the revocation decision.[1] The Director did not explain whether the finding of fraud or willful misrepresentation of material facts in the revocation decision related to his finding that the Beneficiary is not performing the duties of a market research

[1] The Director raised the issue of fraud or misrepresentation in the NOIR when noting that the labor certification supporting the petition did not list previous experience with another employer, but this issue was not addressed in the revocation decision.

analyst, or to the Beneficiary's employment at a worksite location not listed in the labor certification, or to the Petitioner's claimed business presence at [redacted] California.

Based on the foregoing analysis, we will remand this case to the Director for further consideration of two issues: (1) whether the Petitioner, given the nature of its business, intends to employ the Beneficiary as a market research analyst, in accord with the job duties described in the labor certification and the "particular job" requirement of 20 C.F.R. § 656.30(c)(2), and (2) whether the Petitioner intends to employ the Beneficiary at the primary worksite location indicated in the labor certification, in accord with the "area of intended employment" requirement of 20 C.F.R. § 656.30(c)(2).

III. CONCLUSION

For all of these reasons, we will withdraw the Director's revocation decision, as well as his finding of fraud or willful misrepresentation of material facts in the labor certification process, and the invalidation of the labor certification. We will remand this case to the Director for further review in accordance with our decision. If deemed necessary, the Director may request additional evidence from the Petitioner. The Director shall then issue a new decision.

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

FURTHER ORDER: The ETA 9089, case number [redacted] is reinstated.

Cite as *Matter of Y-S-C-*, ID# 847779 (AAO Jan. 11, 2018)