U.S. Citizenship and Immigration Services

Non-Precedent Decision of the Administrative Appeals Office

In Re: 5849040

Date: JAN. 29, 2020

Appeal of Nebraska Service Center Decision

Form I-140, Immigrant Petition for Skilled Worker

The Petitioner seeks to employ the Beneficiary as a cook specializing in Chinese cuisine. The company requests his classification under the third-preference, immigrant category for skilled workers. *See* Immigration and Nationality Act (the Act) section 203(b)(3)(A)(i), 8 U.S.C. § 1153(b)(3)(A)(i).

After initially granting the filing, the Director of the Nebraska Service Center revoked the petition's approval. The Petitioner appeals from the revocation.

The Director did not adequately notify the Petitioner of the revocation grounds or sufficiently explain them in the decision. We will therefore withdraw the decision and remand the matter for entry of a new decision consistent with the following analysis.

I. EMPLOYMENT-BASED IMMIGRATION

Immigration as a skilled worker 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. *Id.* DOL certification also indicates that employment of a foreign national will not harm wages and working conditions of U.S. workers with similar jobs. *Id.*

If 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 a requested visa 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.

II. THE REVOCATION

"[A]t any time" before a beneficiary obtains lawful 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 the record, the erroneous nature of a petition's approval justifies its revocation. *Matter of Ho*, 19 I&N Dec. 581, 590 (BIA 1988).

Unless a ground of automatic revocation applies, USCIS must notify a petitioner of a filing's proposed revocation. 8 C.F.R. §§ 205.2(a), (b). "The petitioner . . . must be given the opportunity to offer evidence in support of the petition . . . and in opposition to the grounds alleged for revocation of the approval." 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. 450, 452 (BIA 1987). USCIS properly issues an NOIR if, as of the notice's mailing, the unexplained and unrebutted record would have warranted the petition's denial. *Id.* at 451.

Similarly, USCIS properly revokes a petition's approval if the evidence or arguments of a petitioner's NOIR response do not overcome the stated revocation grounds. *Matter of Estime*, 19 I&N Dec. at 452. USCIS "shall provide the petitioner . . . with a written notification that explains the specific reasons for the revocation." 8 C.F.R. § 205.2(c).

Here, the NOIR informed the Petitioner that the Beneficiary's 2012 application for a U.S. visitor's visa identified the company's president/sole shareholder as the Beneficiary's contact person in the country and his "friend." The NOIR also noted the Beneficiary's later submission of USCIS applications stating that, after his arrival in the United States, he lived with the Petitioner's president/sole shareholder. The NOIR alleged that the petition, which was filed in 2015, did not demonstrate the *bona fides* of the job opportunity. *See* 20 C.F.R. § 656.10(c)(8) (requiring an employer to certify that "[t]he job opportunity has been and is clearly open to U.S. workers").

The NOIR validly questioned the *bona fides* of the Petitioner's job opportunity. A pre-existing relationship between a beneficiary and a principal of a petitioning company casts doubt on a position's *bona fides* if the association renders the petitioner's hiring of a qualified U.S. applicant unlikely. *Matter of Modular Container Sys., Inc.*, 89-INA-228, slip op. at *7 (BALCA July 16, 1991) (*en banc*). A questionable relationship between a beneficiary and a petitioner "is not only of the blood; it may also be financial, by marriage, or through friendship." *Matter of Sunmart 374*, 2000-INA-93, slip op. at *4 (BALCA May 15, 2000).

The NOIR and the revocation decision, however, did not sufficiently relate the *bona fides* of the job opportunity to a revocation ground. The documents cited 20 C.F.R. § 656.30(d), which authorizes USCIS to invalidate a labor certification after its issuance upon a finding of fraud or willful misrepresentation of a material fact involving the labor certification application. But the NOIR did not specifically allege the application's willful misrepresentation of the job opportunity's *bona fides*.

Similarly, the decision questioned the *bona fides* of the job opportunity without specifying the certification's misrepresentation of the issue or invalidating the certification.[1]

Both the NOIR and the revocation decision cited the Petitioner's negative response to question in part C.9 of the labor certification application. The corporation indicated that the Beneficiary did not have an ownership interest in it or a family relationship to its stockholder, officer, or incorporator. Despite citing the C.9 response, however, neither document alleged the Beneficiary's ownership interest in the Petitioner or a family relationship between him and its president/sole shareholder. The record therefore does not explain the relevance of the C.9 response in these proceedings.

In addition, the NOIR alleged an inconsistency between the labor certification and the Beneficiary's prior visa application. The labor certification stated the Beneficiary's employment in China from 1999 to 2012 as a cook. In contrast, the visa application purportedly identified his occupation in China as a "worker" and described his duties as "operating chemical[s]." The NOIR asserted that the record did not establish the Beneficiary's possession of the minimum experience required for the offered position of cook: two years in the job offered. *See Matter of Ho*, 19 I&N Dec. at 591 (requiring a petitioner to resolve inconsistencies of record with independent, objective evidence pointing to where the truth lies). The decision, however, stated that "the beneficiary appears to have misrepresented his work experience." The record therefore does not indicate whether the Director concluded that: the Petitioner did not establish the Beneficiary's qualifications for the offered position; the Beneficiary willfully misrepresented his qualifying experience on the labor certification application; or both. *See* 8 C.F.R. § 205.2(c) (requiring USCIS to "provide the petitioner . . . with a written notification that explains the *specific* reasons for the revocation") (emphasis added).

Contrary to regulations and case law, neither the NOIR nor the decision adequately explained the revocation grounds. We will therefore withdraw the decision and remand the matter. On remand, the Director should review the entire record, including evidence the Petitioner submits on appeal.

If the record would not have warranted the petition's approval, the Director should issue a new NOIR specifying all proposed revocation grounds and explaining how evidence supports each one. If considering the *bona fides* of the job opportunity, the Director's analysis should use the factors listed in *Modular Container*, 89-INA-228 slip op. at **8-10. Consistent with *Modular Container*, a new NOIR alleging non-availability of the offered position to U.S. workers should also request the Petitioner to identify the company official(s) responsible for interviewing and selecting applicants for the job. *Id.* at *8 (requiring an adjudicator to consider whether a foreign national "is in the position to control or influence hiring decisions" regarding the job opportunity).

If a new NOIR alleges a willful misrepresentation of a material fact involving the labor certification application, the notice must specify the fact at issue, explain how it was allegedly misrepresented, and propose invalidation of the certification on that basis. The Director should also afford the

[1] Skilled worker petitions generally require valid, individual labor certifications. 8 C.F.R. § 204.5(l)(3)(i). A willful misrepresentation of a material fact on this accompanying labor certification therefore could lead to the certification's invalidation and the petition's revocation for lack of a valid certification.

Petitioner a reasonable opportunity to respond to a new NOIR. Upon receipt of a timely response, the Director should then review the entire record and enter a new decision.

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