U.S. Citizenship and Immigration Services

Non-Precedent Decision of the Administrative Appeals Office

MATTER OF W-E-, INC.

DATE: JULY 2, 2018

APPEAL OF NEBRASKA SERVICE CENTER DECISION

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

The Petitioner, a company engaged in retail food and liquor sales and distribution, sought to employ the Beneficiary as a market development consultant. It requested classification of the Beneficiary as a skilled worker under the third preference immigrant classification. Immigration and Nationality Act (the Act) section 203(b)(3)(A)(i), 8 U.S.C. § 1153(b)(3)(A)(i). This employment-based immigrant classification allows a U.S. employer to sponsor a foreign national for lawful permanent resident status to work in a position that requires at least two years of training or experience.

The Director of the Nebraska Service Center initially approved the petition. After receiving a request to allow the Beneficiary to work for a new employer pursuant to section 204(j) of the Act, the Director, citing issues found in a site visit to the Beneficiary's new employer, revoked the petition's approval. The Director also denied a subsequent motion to reopen and reconsider.

Upon *de novo* review we will withdraw the Director's decision and remand this matter for further proceedings consistent with the following decision.

I. LAW

Employment-based immigration generally follows a three-step process. First, an employer must obtain an approved labor certification from 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. Section 212(a)(5)(A)(i)(I)-(II) of the Act. Second, the employer may file 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.

After granting a petition, USCIS may revoke the petition's approval "at any time" for "good and sufficient cause." Section 205 of the Act, 8 U.S.C. § 1155. If supported by the record, a director's realization that a petition was erroneously approved may justify revocation. *Matter of Ho*, 19 I&N Dec. 582, 590 (BIA 1988).

Good and sufficient cause exists to issue a notice of intent to revoke (NOIR) where the record at the time of the notice's issuance, if unexplained or unrebutted, would have warranted the petition's denial. *Matter of Estime*, 19 I&N Dec. 450, 451 (BIA 1987). Similarly, revocation is proper if the record at the time of the decision, including any explanation or rebuttal evidence provided by a petitioner, warranted a petition's denial. *Id.* at 452.

II. REVOCATION

In this case, as detailed below, the NOIR and revocation of the petition's approval were not issued in accordance with established case law. After initially approving the petition, the Director issued a NOIR advising the Petitioner that a site visit indicated that the Beneficiary was not working in a same or similar occupation to the one listed on the petition, as required by section 204(j) of the Act. The Director also advised the Petitioner that there was evidence of fraud and "general willful misrepresentation." Although the NOIR advised that a site visit found fraud and inconsistencies regarding the Beneficiary's new employment, it did not sufficiently advise the Petitioner of the specific contradictory information between the old and new employment. Therefore, the NOIR was not properly issued, as it was based on derogatory information that was not made available to the Petitioner. *See Estime*, 19 I&N Dec. at 452 (concluding that "where the petitioner is unaware and has not been advised of derogatory evidence, revocation of the visa petition cannot be sustained"). The decision to revoke approval of a petition may not be sustained where the NOIR was not properly issued. *See id.*

In addition to the concerns with the NOIR, the resulting revocation decision was not fully developed. After receiving the Petitioner's NOIR response, the Director revoked the petition's approval, finding that the Beneficiary's new employment was not in a similar occupational classification and that the "petition involves a fraudulent reporting of duties." However, the Director did not analyze or examine the evidence and arguments provided in the Petitioner's NOIR response, and the revocation decision did not explain how the information concerning whether the Beneficiary's new job was in a same or similar occupation was grounds for revoking the approval of the underlying I-140 petition. Moreover, the decision did not state the basis for the finding of fraud and "general willful misrepresentation" or against whom the findings were made. For an immigration officer to find a willful and material misrepresentation in visa petition proceedings, he or she must determine: 1) that the petitioner or beneficiary made a false representation to an authorized official of the United States government; 2) that the misrepresentation was willfully made; and, 3) that the fact misrepresented was material. *See Matter of M-*, 6 I&N Dec. 149 (BIA 1954); *Matter of L-L-*, 9 I&N Dec. 324 (BIA 1961); *Kai Hing Hui*, 15 I&N Dec. 288 (BIA 1975).

Because of the deficiencies in the NOIR and revocation decision, we will withdraw the decision of the Director and remand the matter for further consideration. In addition to revisiting the issues already identified, the Director should also review the evidence provided regarding the Beneficiary's education and experience, as the record does not appear to demonstrate the Beneficiary's qualifications for the proffered position.

III. ELIGIBILITY ISSUES

A. Beneficiary's Education

On the labor certification, the Petitioner stated that the proffered position requires the minimum education of an associate's degree in any field and 24 months of experience in the job offered and that no alternate combination of education and experience is acceptable. The Petitioner also stated at Section J of the labor certification that the Beneficiary completed an associate's degree with a major field of study in marketing at the [redacted] in [redacted] India in 1983. The Beneficiary signed the labor certification at Section L, attesting under penalty of perjury that the information at Section J was true and correct.

As evidence of the Beneficiary's degree, the Petitioner provided a statement of marks for the [redacted] The statement of marks shows that the Beneficiary took examinations in mathematics, physics, and chemistry during his two years at the [redacted] from 1981 to 1983. However, the Petitioner did not provide a diploma establishing that the Beneficiary has an associate's degree, as required by the labor certification. Moreover, the statement of marks does not reflect that the Beneficiary completed examinations or coursework in marketing; therefore it does not support the claims at Section J of the labor certification that the Beneficiary possesses an associate's degree with a major field of study in marketing. The Petitioner must resolve this discrepancy in the record with independent, objective evidence pointing to where the truth lies. *Matter of Ho*, 19 I&N Dec. 582, 591-92 (BIA 1988).

The related academic evaluation of the statement of marks from [redacted] reflects that the Beneficiary completed two years of study from 1981 to 1983 at [redacted] The evaluator opined that Beneficiary had completed two years of course work in the [redacted] bachelor of science program and "satisfied requirements substantially similar to those required toward the completion of at least an Associate's Degree at an accredited institution of higher education in the United States." However, the evaluator did not contend that the statement of marks establishes that the Beneficiary has an associate's degree, as required by the labor certification. Moreover, the evaluator did not indicate that the Beneficiary completed classes or examinations in marketing or conclude that his major field of study at [redacted] was marketing, as claimed at Section J of the labor certification. Therefore, the academic evaluation does not establish that the Beneficiary has the minimum education for the proffered position, as required at Section H of the labor certification, or that he has the actual education claimed at Section J of the labor certification.

As a result of these issues, on remand the Director must address whether the Petitioner has provided sufficient evidence to establish that Beneficiary has the minimum education of an associate's degree, as required by the labor certification, and that he has an associate's degree with a major in marketing, as the Petitioner and Beneficiary claimed at Section J of the labor certification.

B. Beneficiary's Experience

On remand, the Director also must consider whether the record establishes that the Beneficiary has the minimum experience for the proffered position required on the labor certification. On the labor certification, the Petitioner stated that the proffered position requires 24 months of qualifying experience in the proffered position of marketing manager. The Petitioner claimed that the Beneficiary has this experience because he worked as a market development consultant for 20 hours per week at [redacted] in [redacted] California from April 28, 2003, to January 29, 2007.

In support of a beneficiary's claimed qualifying experience, a petitioner must submit letters from employers. 8 C.F.R. § 204.5(g)(1); 8 C.F.R. § 204.5(l)(3)(ii)(A). If required evidence is unavailable, a petitioner must demonstrate unavailability before USCIS will accept alternative proof. 8 C.F.R. § 103.2(b)(2)(i). Here, the record lacks required evidence of the Beneficiary's qualifying experience with M.D. Association Inc. and does not establish its unavailability. Because the record lacks the regulatory required evidence, it does not appear to demonstrate the Beneficiary's possession of the minimum experience required for the offered position.[1]

Moreover, the Petitioner specified that although the Beneficiary gained his qualifying experience over a period of approximately 45 months from April 28, 2003, to January 29, 2007, he worked on a part-time basis for 20 hours each week. However, unless a petitioner specifies on the labor certification that prior qualifying experience may be part-time, it must establish that the qualifying experience was full-time. *C.f., Matter of Boodell & Domanskis, LLC*, BALCA 2012-PER-01275 (May 11, 2016) (finding that the labor certification employer did not need to establish the applicant's qualifying experience was full-time when it had specified on the labor certification that experience could be part-time). As the claimed part-time experience otherwise falls short of a full two years (i.e., 48 months), for this additional reason it would not be sufficient to establish that the Beneficiary has at least two years of full-time, qualifying experience, as required on the labor certification. Consequently, on remand, the Director should consider whether or not the petition was properly approved based on the Beneficiary's claimed qualifying experience.

IV. WHETHER THE BENEFICIARY IS AN AFFECTED PARTY

Although normally not the case, under certain circumstances described below, a beneficiary may be considered to be an affected party in immigrant petition revocation proceedings. Section 204(j) of the Act, 8 U.S.C. § 1154(j). *See Matter of V-S-G- Inc.*, Adopted Decision 2017-06 (AAO Nov. 11, 2017). Under the portability provision of section 204(j) of the Act, approved petitions may remain valid under certain conditions even after eligible beneficiaries change jobs or employers. A

[1] The record contains letters for other purported employers, but this employment was not recorded on the labor certification. The absence of this other claimed employment from the labor certification lessens the credibility of the evidence and facts asserted. *See Matter of Leung*, 16 I&N Dec. 2530 (BIA 1976).

beneficiary of a valid visa petition, whose application for adjustment of status remains pending for at least 180 days, may "port" the petition to a new job if that job is in the same or similar occupational classification as the position offered in the petition. Thus, even though the petitioner for the visa classification and its beneficiary are no longer in an employment relationship, the underlying petition may remain valid for purposes of the beneficiary's adjustment of status application.

In *Matter of V-S-G- Inc.*, we held that "[b]eneficiaries of valid employment-based immigrant visa petitions who are eligible to change jobs or employers and who have properly requested to do so [under section 204(j)], are 'affected parties' under DHS regulations for purposes of revocation proceedings. . . ." *Matter of V-S-G- Inc.*, Adopted Decision 2017-06 at *1. Here, the Petitioner asserts that the Beneficiary is eligible for portability but the Director did not determine whether the Beneficiary had properly ported and thus should be treated as an affected party in the revocation proceedings.

On remand, prior to issuing a new NOIR, the Director should determine whether the Beneficiary properly ported under section 204(j) of the Act. This determination involves considering whether the Beneficiary's adjustment of status application had been pending for at least 180 days at the time of the request to port. *See* 8 C.F.R. § 245.25(a)(2). It also involves considering whether USCIS received sufficient notice of the Beneficiary's new job and whether the job is in "the same or similar occupational classification" as the position offered in the petition. *Id.*; *see also* USCIS Policy Memorandum PM-602-0152, *Guidance on Notice to, and Standing for, AC21 Beneficiaries about I-140 Approvals Being Revoked After Matter of V-S-G- Inc.* (Nov. 11, 2017), http://www.uscis.gov/laws/policy-memoranda.

If the Beneficiary is found to have properly ported, the Director will issue a new NOIR to the Petitioner and the Beneficiary. If the Beneficiary did not properly port, the Director should issue a new NOIR to the Petitioner only. Upon receipt of a timely response(s) to a new NOIR, the Director should review the entire record and enter a new decision.

V. CONCLUSION

Based on the foregoing, we remand this matter to the Director to determine the Beneficiary's eligibility to participate in revocation proceedings as an affected party, and to advise the affected party (or parties) of all deficiencies in the petition through issuance of a new NOIR.

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

Cite as *Matter of W-E-, Inc.*, ID# 1345803 (AAO July 2, 2018)