U.S. Citizenship and Immigration Services

Non-Precedent Decision of the Administrative Appeals Office

In Re: 29885605

Date: JULY 2, 2024

Appeal of Nebraska Service Center Decision

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

The Petitioner, an e-commerce site designer and provider of digital marketing services, sought to employ the Beneficiary as a web developer. The company requested his classification under the employment-based, third-preference (EB-3) immigrant visa category as a "skilled worker." *See* Immigration and Nationality Act (the Act) section 203(b)(3)(A)(i), 8 U.S.C. § 1153(b)(3)(A)(i). This category allows U.S. businesses to sponsor noncitizens for permanent residence to work in jobs requiring at least two years of training or experience. *Id.*

After initially granting the filing, the Director of the Nebraska Service Center revoked the petition's approval. The Director concluded that, at the time of the petition's filing, the Petitioner did not demonstrate the required intent to employ the Beneficiary in the offered job. On appeal, the Beneficiary contends that the record does not support the Director's conclusion and that his eligibility to "port" to a new job bars the petition's revocation.[1]

In these revocation proceedings, the Beneficiary bears the burden of demonstrating eligibility for the requested benefit by a preponderance of the evidence. *Matter of Ho*, 19 I&N Dec. 582, 589 (BIA 1988). Exercising de novo appellate review, *see Matter of Christo's, Inc.*, 26 I&N Dec. 537, 537 n.2 (AAO 2015), we conclude that he has not sufficiently established the Petitioner's intent to employ him in the offered job at the time of the petition's filing. We will therefore dismiss the appeal.

I. LAW

Immigration as a skilled worker generally follows a three-step process. First, a prospective employer must obtain certification from the U.S. Department of Labor (DOL) that: there are insufficient U.S. workers able, willing, qualified, and available for an offered job; and a noncitizen's permanent employment in the job 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).

[1] Beneficiaries generally cannot file appeals. *See* 8 C.F.R. § 103.3(a)(1)(iii)(B) (excluding visa petition beneficiaries as "affected parties"). U.S. Citizenship and Immigration Services (USCIS), however, treats beneficiaries as affected parties if they qualify to port to new jobs under section 204(j) of the Act, 8 U.S.C. § 1154(j), and properly request permission to port. *Matter of V-S-G- Inc.*, Adopted Decision 2017-06, *14 (AAO Nov. 11, 2017).

Second, an employer must submit an approved labor certification with an immigrant visa petition to USCIS. Section 204(a)(1)(F) of the Act, 8 U.S.C. § 1154(a)(1)(F). Among other things, USCIS determines whether a noncitizen 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), (4).

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(a) of the Act, 8 U.S.C. § 1255(a).

"[A]t any time" before a beneficiary obtains permanent residence, however, 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, 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 unexplained and unrebutted 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). If a petitioner does not timely respond to a NOIR or the response does not overcome the listed revocation grounds, USCIS may revoke a petition's approval. *Id.* at 452.

II. FACTS

In April 2017, the Petitioner filed a labor certification application for the Beneficiary in the offered job of web developer. The Beneficiary, a Russian native and citizen, had worked for the U.S. company in the job since May 2015.

In September 2017, while the labor certification application remained pending, another U.S. company bought the division in which the Beneficiary worked. Thereafter, the purchasing company – not the Petitioner – employed him in the offered job until July 2020.

DOL approved the labor certification application in December 2017 in the Petitioner's name, after the other company purchased the division in which the Beneficiary worked. The certification states that the offered job requires no education or training, but at least three years' experience in the job. The certification also states that the job has a proffered wage of $93,600 a year.

In May 2018, while the Beneficiary worked for his division's new owner, the Petitioner filed this petition for him. The petition did not indicate the division's sale or the Beneficiary's new employer. Later the same month, the Beneficiary filed an application for adjustment of status. *See* 8 C.F.R. § 245.2(a)(2)(i)(B) (allowing concurrent filing of certain petitions and adjustment applications). His adjustment application indicated his new employer. USCIS approved the I-140 petition in November 2018, and the Beneficiary's adjustment application remained pending.

In April 2019, a USCIS officer interviewed the Beneficiary regarding his adjustment application. He told the officer of the Petitioner's September 2017 sale of the division where he works and his new employer.

In July 2019, the Beneficiary requested permission to port to the division's owner under section 204(j) of the Act. He stated that he would continue to work for the division's owner as a web developer. At that time, USCIS had approved the Petitioner's I-140 petition for him and his adjustment application had remained unadjudicated for more than 180 days. Thus, he qualified to port to a new job in the same or similar occupational classification as the job for which the petition was filed and properly requested to port. *See* section 204(j) of the Act; *Matter of V-S-G-*, *supra*, at *14. USCIS therefore approved the portability request in September 2019.

In January 2020, with the Beneficiary's adjustment application still pending, USCIS sought to revoke the I-140 petition's approval. Because the Petitioner sold the Beneficiary's division before filing the petition, USCIS questioned the Petitioner's intent to employ him in the offered job at the time of the filing. Rather than issue a NOIR, however, the Director, in April 2020, mistakenly reopened the matter, issued a notice of intent to deny (NOID) the petition, and ultimately denied it in September 2020. The Beneficiary, who qualified for treatment as an affected party based on portability, appealed the denial. USCIS cannot deny an approved petition. *See* 8 C.F.R. § 204.5(n)(3). Thus, in July 2021, we remanded the matter for proper issuance of a NOIR. *See* 8 C.F.R. § 205.2(a); *In Re: 16965330* (AAO July 16, 2021).

On remand, the Director issued a NOIR to both the Petitioner and the Beneficiary. The NOIR stated that the company's sale of the Beneficiary's division before the petition's filing "casts doubt that [the] Form I-140[,Immigrant Petition for Alien Worker,] was filed by the intended employer." The NOIR requested evidence of the Petitioner's intent to employ the Beneficiary in the offered job at the time of the petition's filing.[2]

USCIS received a NOIR response from only the Beneficiary. In July 2023, the Agency revoked the petition's approval. This appeal followed.

III. ANALYSIS

A business may file an immigrant visa petition if it is "desiring and intending to employ [a noncitizen] within the United States." Section 204(a)(1)(F) of the Act. A petitioner must intend to employ a beneficiary under the terms and conditions 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).

[2] The NOIR also sought evidence that the Beneficiary's new employer is the Petitioner's "successor-in-interest" to the purchased division. *See Matter of Dial Auto Repair Shop, Inc.*, 19 I&N Dec. 481, 482-83 (Comm'r 1986) (allowing a company to use another business's labor certification for immigration purposes if the company demonstrates that it is the business's successor). The division owner's successorship to the Petitioner, however, would not resolve this appeal. Even if the division owner established itself as the Petitioner's successor, the petition would still be invalid if the Petitioner did not intend to employ the Beneficiary in the offered job at the time of the petition's filing. Also, as the Director noted, the division's owner has not submitted a new or amended petition to claim successorship. *See generally* 6 *USCIS Policy Manual* E.(3)(A), www.uscis.gov/policy-manual (stating that a claimed successor may "file a new or amended petition if the predecessor has already filed a petition").

In this petition and on its accompanying labor certification, the Petitioner attested to its intent to permanently employ the Beneficiary in the full-time job of web developer. Because the company sold the division in which he worked before the petition's filing, however, the Director concluded that "the record establishes that there was no longer a bona fide job offer with the petitioner."

A petitioner's sale of a division in which a beneficiary worked may indicate that the petitioner no longer intends to, or can, employ them. As the Beneficiary argues, however, a beneficiary need not work in an offered job until after they obtain permanent residence. *See Matter of Rajah*, 25 I&N Dec. 127, 132 (BIA 2009) ("An alien is not required to have been employed by the certified employer prior to adjustment of status.") Thus, the Petitioner's sale of the Beneficiary's division before the petition's filing does not – on its own – demonstrate the company's lack of intent to employ him in the offered job. Rather, the record may contain evidence that, despite the Petitioner's prior sale of the division, the company intended to employ the Beneficiary in the offered job once he obtained permanent residence. We must therefore examine the record further.

The Petitioner's initial filing included a March 2018 letter from a company partner stating the Petitioner's intent to employ the Beneficiary "pursuant to the previously approved Labor Certification and immigrant visa [petition]." On appeal, the Beneficiary contends that the letter, written after the division's September 2017 sale, shows the Petitioner's "clear continuing intention" to employ him in the offered job. He describes the letter's job offer as "prospective," reflecting the company's intent to employ him after he obtains permanent residence.

The letter, however, does not expressly state the Petitioner's intent to employ the Beneficiary after he obtains permanent residence. The letter states: "It is our desire to employ him on a full-time, permanent basis for the foreseeable future." At the time of the letter's submission, the Petitioner had not disclosed its sale of the division in which the Beneficiary worked or his employment by the division's new owner. If a reader is unaware of the Beneficiary's prior change of employment, the letter appears to indicate the Petitioner's continuing employment of him. But, when knowing the Beneficiary's prior change of employer, the letter at the time of filing does not clearly indicate the Petitioner's intent to again employ the Beneficiary in the offered job after he obtains permanent residence. The letter indicates the Petitioner's intent to employ the Beneficiary. But it is unclear when and for how long the Petitioner would again employ him. The letter describes the intended employment as "permanent." But the phrase "for the foreseeable future" suggests temporary employment. Thus, the letter does not sufficiently show the Petitioner's intent to permanently employ the Beneficiary again in the offered job after he obtains permanent residence.

The Beneficiary also argues that, because of the nature of the Petitioner's business, the company needed to hire web developers in the future. He notes that the offered job's duties listed on the labor certification describe the company as "a digital agency who utilizes various software platforms to design and create full functioning ecommerce sites as well as digital marketing solutions for clients." He asserts:

> It is unreasonable to conclude that because a division of the company was transferred, [the Petitioner] no longer needed web developers. As it is clearly central to its business, the company needed web developers and intended to employ [the Beneficiary] in one of its other divisions in that role.

Other evidence, however, casts doubt on the Petitioner's need for the Beneficiary's web development services at the time of the petition's filing. A January 2023 letter from the chief technology officer (CTO) of the division's current owner states that, at the time of the sale, the Petitioner "provided two basic services – web-based internet marketing and branding, and website support and maintenance." The letter states that the Petitioner "made the decision to cease providing web support and focus solely on marketing, branding, and interactive design." The CTO's letter states that his company bought the Petitioner's website support and maintenance division and has continued its operations without interruption. The letter states that, of the eight employees in the division at the time of the sale, three (including the Beneficiary) were website developers. The Petitioner indicated its employment of 12 people at the time of the petition's filing. Thus, after the division's sale, the Petitioner appears to have employed four people. The CTO's letter suggests that the Petitioner needed web developers only in its website support and maintenance division and that, once the company sold the division, it no longer needed them. The record does not demonstrate the Petitioner's ability to employ the Beneficiary in the offered job after the company sold his division.

The Beneficiary submitted evidence of the Petitioner's continued existence after the petition's filing.[3] This evidence shows that the Petitioner could – in theory – employ him in the future. But the limited liability company's (LLC's) continued existence does not specifically show its *intent, or ability, to employ the Beneficiary in the offered job at the time of the petition's filing.* The record, however, does not contain, and the Beneficiary would need to submit, more detail regarding his purported future position and duties with the Petitioner and its ability, after the division's sale, to employ him in the offered job.

In sum, the Petitioner attested to its intent to employ the Beneficiary in the offered job on the labor certification and petition. But the company's sale of his division before the petition's filing indicates that it no longer intended or could employ him in the offered job at the time of the petition's filing. The Beneficiary submits insufficient evidence to overcome the derogatory information and demonstrate the Petitioner's intent and ability to again employ him in the offered job.

Also, some of the Beneficiary's appellate arguments misinterpret the revocation ground. The Director concluded that, at the time of the petition's filing, the Petitioner did not make a "bona fide job offer" to the Beneficiary. The decision indicates that the Director used the term to mean that the company no longer intended to employ the Beneficiary in the offered job. *See* section 204(a)(1)(F) of the Act (allowing U.S. businesses to sponsor noncitizens for permanent residence if the businesses are "desiring and intending" to employ them in the United States). On appeal, the Beneficiary confuses the term "bona fide *job offer*" with the phrase "bona fide *job opportunity*." The term "bona fide job opportunity" generally refers to a job's availability to U.S. workers. *See* 20 C.F.R. § 656.10(c)(8) (requiring labor certification employers to attest that "[t]he job opportunity has been and is clearly open to any U.S. worker"). Thus, the Beneficiary's arguments about the Petitioner's recruitment for the job during the labor certification process and its prior employment of him do not address the revocation ground regarding the Petitioner's prospective intent to employ him in the offered job at the time of the petition's filing.

[3] As of this decision's date, online state information lists the Petitioner as an "active" business. *See* Cal. Sec'y of State, "Business Search," bizfileonline.sos.ca.gov/search/business. But the information indicates that the company neglected to submit a required statement of information in August 2022. *Id.*; *see also* Cal. Code, Corps. 17713.10(a) (allowing the state to suspend an LLC's status if it neglects to timely file an annual statement of information).

Finally, the Beneficiary contends that his eligibility to port bars revocation of the petition's approval. He notes that an approved petition for a portability-eligible beneficiary "shall remain valid." Section 204(j) of the Act. He therefore argues that USCIS cannot revoke the petition.

But a precedent decision of the U.S. Court of Appeals for the Ninth Circuit, which has jurisdiction over the Beneficiary's residence, forecloses his argument. The Ninth Circuit has held that the portability provision does not prevent a petition's revocation. *See Herrera v. USCIS*, 571 F.3d 881, 887 (9th Cir. 2009). The Court found that section 204(j) of the Act preserves a petition's validity "'with respect to [the] new job,' not that the petition shall forevermore remain valid." *Id.* The Court also found that, "in order for a petition to 'remain' valid, it must have been valid from the start." *Id.* The Beneficiary has not sufficiently demonstrated the Petitioner's intent to employ him in the offered job at the time of the filing. Thus, the petition was never valid from the start. The Beneficiary's eligibility to port therefore does not bar the petition's revocation.

IV. CONCLUSION

The Beneficiary has not demonstrated the Petitioner's intent to employ him in the offered job at the time of the petition's filing. We will therefore affirm revocation of the petition's approval.

ORDER: The appeal is dismissed.