U.S. Citizenship and Immigration Services

Non-Precedent Decision of the Administrative Appeals Office

In Re: 31282749

Date: JUL. 03, 2024

Appeal of Texas Service Center Decision

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

The Petitioner, an independent school district, seeks to employ the Beneficiary as a secondary school teacher. It requests the Beneficiary's classification 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 Director of the Texas Service Center initially approved the petition, but later revoked the approval on notice. Following a multi-agency government investigation into the recruitment practices of the Petitioner's former executive director of human resources (HR), that individual pled guilty to falsifying immigration documents and was sentenced to 24 months in federal prison. Specifically, the former employee admitted to (1) signing and submitting documents to the U.S. Department of Labor (DOL) falsely attesting that despite the Petitioner's attempts to recruit U.S. workers for open teacher positions, no U.S. workers were found to be qualified, interest or available, and (2) fabricating recruitment reports which contained additional false statements regarding the number of applications received and the reasons for rejecting U.S. applicants.

After receiving the Petitioner's response to a notice of intent to revoke (NOIR), the Director concluded that the record did not establish the Petitioner had a *bona fide* job opportunity to which U.S. workers could apply. The matter is now before us on appeal pursuant to 8 C.F.R. § 103.3.

The Petitioner bears the burden of proof to demonstrate eligibility by a preponderance of the evidence. *Matter of Chawathe*, 25 I&N Dec. 369, 375-76 (AAO 2010). While we conduct de novo review on appeal, *Matter of Christo's, Inc.,* 26 I&N Dec. 537, 537 n.2 (AAO 2015), we conclude that a remand is warranted in this case because the Director's decision is insufficient for review. Specifically, the decision lacks analysis and discussion of relevant evidence the Petitioner submitted in response to the NOIR. Accordingly, we will withdraw the Director's decision and remand the matter for entry of a new decision consistent with the following analysis.

I. LAW

Immigration for noncitizens classified as professionals under section 203(b)(3)(A)(ii) of the Act generally follows a three-step process. First, a prospective employer must apply to DOL for certification that: there are insufficient U.S. workers able, willing, qualified, and available for an offered position; and a noncitizen's 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 an approved labor certification with an immigrant visa petition to U.S. Citizenship and Immigration Services (USCIS). Section 204(a)(l)(F) of the Act, 8 U.S.C. § 1154(a)(l)(F); 8 C.F.R. § 204.5(1)(3)(i). 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(1)(3)(ii)(C). 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.

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).

The Board of Immigration Appeals has determined that "[a] notice of intention to revoke a visa petition is properly issued for "good and sufficient cause" where the evidence of record at the time the notice is issued, if unexplained and unrebutted, would warrant a denial of the visa petition based upon the petitioner's failure to meet his burden of proof. *Matter of Ho*, 19 I&N Dec. 582, 590 (BIA 1988) (citing *Matter of Estime*, 19 I&N Dec. 450 (BIA 1987)).

II. PROCEDURAL HISTORY

The Petitioner filed the underlying labor certification for the offered position of secondary school teacher with DOL on June 25, 2007. In filing the labor certification, the Petitioner's former executive director of HR attested, on behalf of the Petitioner, that the job opportunity was open to any U.S. worker, that it conducted its recruitment for able, willing, qualified, and available U.S. workers between February and April 2007,[1] and that the U.S. workers who applied for the job opportunity were rejected for lawful job-related reasons. DOL approved the labor certification, and USCIS subsequently approved the instant petition on August 27, 2008.

[1] DOL's regulations require an employer to provide its employees notice of the filing of the application for permanent employment certification. *See* 20 C.F.R. § 656.10(d). The employer must also conduct required pre-filing recruitment including placing a job order with the State Workforce Agency and advertisements and prepare a recruitment report. *See* 20 C.F.R. § 656.17(e)-(g).

The Director issued the NOIR in May 2022. In the NOIR, the Director detailed the admissions made by the Petitioner's former executive director of HR in an interview with government officials held in March 2016, and in his guilty plea entered in [redacted] 2017. The Director emphasized that the scope and nature of the former employee's admissions cast doubt on whether the labor certification accompanying this petition, which was signed by the same individual, was valid.

Accordingly, the NOIR requested evidence to establish that the job opportunity was clearly open to any U.S. worker and that U.S. workers who applied for the job opportunity were rejected for lawful job-related reasons. The Director specified that the Petitioner should provide, in part, copies of job posting notices, print advertisements, internet job advertisements, State Workforce Agency (SWA) job orders, and copies of recruitment reports as evidence of its recruitment efforts, along with evidence related to the Beneficiary's ongoing employment with the school district. Following the Petitioner's submission of a timely response to the NOIR, the Director revoked the approval of the petition.

III. ANALYSIS

The sole issue before us on appeal is whether the Director properly revoked the approval of the petition. While the record reflects that the Director issued the NOIR for good and sufficient cause, the revocation decision does not address relevant evidence the Petitioner provided in response to the NOIR. Accordingly, we will withdraw the Director's decision and remand the matter for entry of a new decision.

Under its statutory authority, USCIS must examine the bona fides of a job opportunity to evaluate the merits of a petition filed by an employer "desiring and intending to employ" a foreign worker under the employment-based preference categories that require a labor certification. *See* section 204(a)(1)(F) of the Act. Under sections 204(b) and 212(a)(5)(A)(i) of the Act, USCIS ensures that the facts of the labor certification are true - that there are insufficient workers able, willing, qualified, and available whose employment will not adversely affect the wages and working conditions of similarly employed U.S. workers. Here, the admissions made by the Petitioner's former executive director of HR were sufficient to prompt the Director to inquire about the bona fides of the job offers in other approved petitions with underlying labor certifications signed by the same former employee.

The Director ultimately concluded the Petitioner did not establish that it had a bona fide job opportunity that was truly open to U.S. workers. In reaching this determination, the Director stated that the Petitioner's response to the NOIR included "two advertisements it ran in preparation for the labor certification filing and a report identifying a shortage of teaching professionals in its geographical location." The Director observed that this evidence shows the Petitioner advertised the position and may have complied with some of the recruitment requirements but did not directly address or overcome the concerns raised in the NOIR and the admissions made by its former executive director of HR, who signed the labor certification in this matter.

On appeal, the Petitioner emphasizes that the Director failed to address much of the evidence it submitted in response to the NOIR, emphasizing that it did not merely provide copies of two newspaper advertisements as stated in the revocation decision. The Petitioner summarizes the recruitment-related documentation included with its NOIR response, and notes that the notice of

revocation "makes no reference to . . . specific information provided to substantiate the recruitment process used in 2007."

The Petitioner's assertions are persuasive. The record indicates the Petitioner submitted the following documentation as evidence of pre-filing recruitment efforts for the offered position: copies of two advertisements from the [redacted] *Morning News* (dated February 18 and February 25, 2007); a posting from the [redacted] *Morning News* website (February 18 to March 3, 2007); an SWA job order placed with the Texas Workforce Commission on February 20, 2007; a job posting that appeared on the school district's website beginning in February 2007; draft and final recruitment reports dated May 22, 2007; email correspondence between the Petitioner's former executive director of HR and a law firm; and printouts from an internal HR software program used to track job applicants, which include handwritten notes about why certain applicants were rejected. The Petitioner emphasized that the dates of the various job postings and advertisements correspond to the recruitment information provided on the Beneficiary's labor certification (Form ETA 9089) at Part I, Recruitment Information.

The Petitioner also submitted documentation of the school district's recruitment efforts in relation to other labor certifications filed in 2006, 2008, 2012 and 2013, including additional recruitment reports, job postings, related correspondence, and printouts from its internal human resources software. The Petitioner maintained that the submitted evidence contradicts its former employee's admission that he "never" interviewed U.S. job applicants in connection with any labor certification and that he fabricated all associated recruitment reports.

The Director erred by not addressing this evidence in the notice of revocation. An officer must explain the specific reasons for denying a visa petition. *See* 8 C.F.R. § 103.3(a)(i). This explanation should be sufficient to allow the Petitioner a fair opportunity to contest the decision and to allow us an opportunity for meaningful appellate review. *See, e.g. Matter of M-P-*, 20 I&N Dec. 786 (BIA 1994) (finding that a decision must fully explain the reasons for denying a motion to allow the respondent a meaningful opportunity to challenge the determination on appeal).

Here, the Director's decision acknowledges the Petitioner's submission of two newspaper advertisements and does not address the remainder of the evidence detailed above. While the evidence of record may ultimately be insufficient to establish that there was a bona fide job opportunity available to U.S. workers in this case, the Director's decision did not adequately address the evidence and arguments submitted in response to the NOIR, and therefore did not sufficiently explain why such evidence did not overcome the grounds for revocation. For this reason, we will withdraw the Director's determination and remand the matter for entry of a new decision.

The Petitioner also contests the Director's statement that "it appears that the petitioner intends to employ the beneficiary outside the terms of the labor certification." The Petitioner emphasizes that it endeavored to respond to a claim in the NOIR that there were "inconsistencies" with respect to the Beneficiary's employment with the school district, noting that such inconsistencies were not detailed in the NOIR. It is unclear whether the quoted statement was intended to be a separate determination, unrelated to the determination that the Petitioner did not make a bona fide job offer that was open to U.S. workers. If it was the Director's intent to make a separate ineligibility determination, such determination was not adequately addressed in the NOIR or in the revocation decision.

Finally, we acknowledge the Petitioner's claim that USCIS failed to provide it with sufficient notice of derogatory information of which it was unaware, as required by 8 C.F.R. § 103.2(b)(16)(i). Specifically, the Petitioner references a March 14, 2016, interview with its former director of HR, which the Director mentioned in the NOIR and notice of revocation. The Director noted that, in that interview with government officials, the Petitioner's former employee admitted that he "never interviewed or considered every qualified U.S. citizen applicant" before filing a labor certification and that "all of the recruitment reports he provided" in support of labor certifications were fabricated. The Petitioner maintains that it has "has been provided no direct access by USCIS" to corroborate this admission.

The regulation at 8 C.F.R. § 103.2(b)(16)(i) requires only that a petitioner be "advised of" the derogatory information that may be relied on in an adverse decision. The regulation does not place upon USCIS a requirement to provide "direct access" to such information. Here, the NOIR issued by the Director provided sufficient details regarding the March 14, 2016, interview to apprise the Petitioner of its former employee's statements.

IV. CONCLUSION

The Director's notice of revocation did not address relevant evidence submitted in response to the NOIR. As a result, the revocation decision did not explain why the Petitioner's rebuttal to the NOIR was deficient and afford the Petitioner a reasonable opportunity to provide specific responses on appeal. Accordingly, the Director's decision is withdrawn, and the matter will be remanded to the Director for further consideration and issuance of a new decision.

In that new decision, the Director must consider and address the evidence submitted in response to the NOIR. The Director should also consider the evidence and arguments submitted in support of the Petitioner's appeal and may request any additional evidence considered pertinent to the new decision.

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