U.S. Citizenship and Immigration Services

Non-Precedent Decision of the Administrative Appeals Office

In Re: 08336098

DATE: JULY 6, 2020

Appeal of Texas Service Center Decision

Form I-140, Immigrant Petition for a Skilled Worker

The Petitioner, a perfume distributor, sought to employ the Beneficiary as warehouse manager. It requested skilled worker classification of the Beneficiary under the third preference immigrant category. Immigration and Nationality Act (the Act) section 203(b)(3)(A)(i), 8 U.S.C. § 1153(b)(3)(A)(i). This employment-based "EB-3" 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 petition was initially approved by the Director of the Nebraska Service Center. However, the Director of the Texas Service Center subsequently revoked the approval[1] on multiple grounds. The Director found that the Petitioner did not establish that the Beneficiary had two years of qualifying experience, as required by the terms of the labor certification and for classification as a skilled worker. The Director also found that the Petitioner did not establish its continuing ability to pay the proffered wage in accordance with the requirements in 8 C.F.R. § 204.5(g)(2).

The matter is now before us on the Beneficiary's appeal. 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. In this case, because the Director did not determine the Beneficiary's eligibility to participate in the revocation proceedings, we will withdraw the Director's decision and remand this matter for further proceedings concerning the Beneficiary's standing.

I. WHETHER THE BENEFICIARY IS AN AFFECTED PARTY

U.S. Citizenship and Immigration Services (USCIS) regulations do not generally allow a beneficiary to appeal a petition's revocation. *See* 8 C.F.R. § 103.3(a)(1)(iii)(B) (stating that a beneficiary is not an "affected party" with legal standing in a proceeding). However, certain "portability-eligible" beneficiaries of revoked I-140 visa petitions are treated as affected parties in 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

[1] At any time before a beneficiary obtains lawful permanent residence U.S. Citizenship and Immigration Services may revoke a petition's approval for "good and sufficient cause." Section 205 of the Act, 8 U.S.C. § 1155. A petition's erroneous approval may in and of itself justify its revocation. *Matter of Ho*, 19 I&N Dec. 582, 589 (BIA 1988).

may remain valid under certain conditions even after eligible beneficiaries change jobs or employers. A beneficiary of a valid visa petition, whose application for adjustment of status remains pending for at least 180 days, [2] 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. In this case it appears that the Beneficiary may have notified USCIS of his intent to port to a new employer before the Director issued the notice of intent to revoke (NOIR) on February 20, 2018.[3] Neither in the NOIR nor in the revocation decision of August 14, 2019, however, did the Director address the subject or make a determination as to whether the Beneficiary was eligible to port and had properly requested to port and thus should be treated as an affected party in the revocation proceedings.

On remand, therefore, the Director shall determine whether the Beneficiary was eligible to port and properly requested to port under section 204(j) of the Act. This determination involves considering whether the Beneficiary's adjustment of status application based on a qualifying petition 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, at 2.[4]

If the Director finds that the Beneficiary should be deemed an affected party in accordance with USCIS Policy Memorandum PM-602-0152, the Director shall issue a new NOIR to the Beneficiary in

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[2] In this case the visa petition (Form I-140) was initially approved on August 1, 2007, and the adjustment of status application (Form I-485) was filed, concurrently with the I-140 petition, on April 23, 2007.

[3] The record includes the copy of a letter from the Beneficiary's attorney to the USCIS field office in [redacted] Florida, dated January 13, 2016, responding to a request for evidence (RFE) in the Beneficiary's Form I-485 application for adjustment of status. Five attachments accompanied the attorney's letter, including a letter from [redacted] in [redacted] Florida, dated January 8, 2016, stating that the position of warehouse manager was offered to the Beneficiary "upon obtaining his green card."

[4] The Policy Memorandum states that:

> As of January 17, 2017, eligible beneficiaries must notify USCIS of their intent to port to new employment by filing a Supplement J to Form I-485, found at https://www.uscis.gov/i-485supj. If the beneficiary ported prior to the implementation of Supplement J, the beneficiary must have affirmatively and properly notified USCIS in writing. USCIS will adjudicate and must make a favorable determination concerning the beneficiary's porting eligibility in order for the beneficiary to be eligible to receive notices of an intent to revoke or of a revocation. These beneficiaries may file an appeal of or a motion on an adverse decision as an affected party.

Id. at 2.

accordance with USCIS Policy Memorandum PM-602-0152. Upon receipt of a timely response to a new NOIR, or the expiration of the response period, the Director shall review the entire record and enter a new decision.

II. CONCLUSION

In accordance with the foregoing analysis, we remand this matter to the Director to determine the Beneficiary's eligibility to participate in revocation proceedings as an affected party.

ORDER: The decision of the Director is withdrawn. The matter is remanded for further proceedings consistent with the foregoing decision and for the entry of a new decision. If the new decision is adverse, it shall be certified to us for review.