U.S. Citizenship and Immigration Services

Non-Precedent Decision of the Administrative Appeals Office

In Re: 16965330

Date: JUL. 16, 2021

Appeal of Nebraska Service Center Decision

Form I-140, Immigrant Petition for Skilled Worker

The Petitioner sought to employ the Beneficiary as a web developer. It requested classification of the Beneficiary under the third-preference, immigrant category as a skilled worker. Immigration and Nationality Act (the Act) section 203(b)(3)(A)(i), 8 U.S.C. § 1153(b)(3)(A)(i). This employment-based category allows a U.S. business to sponsor a foreign national for lawful permanent resident status based on a job offer requiring at least two years of training or experience.

After initially approving the immigrant visa petition, the Director revoked its approval. The Director then determined that the revocation was improper, reopened the matter on a Service motion, and denied the petition. The Director's decision concluded that the Petitioner did not establish that there was a *bona fide* job offer to the Beneficiary when the petition was initially filed.

In these proceedings, it is the Petitioner's burden to establish eligibility for the requested benefit by a preponderance of the evidence. Section 291 of the Act, 8 U.S.C. § 1361; *Matter of Chawathe*, 25 I&N Dec. 369, 375 (AAO 2010). The AAO reviews the questions in this matter *de novo*. *See Matter of Christo's Inc*., 26 I&N Dec. 537, 537 n.2 (AAO 2015). Upon *de novo* review, we will withdraw the Director's decision and remand the matter for entry of a new decision consistent with the following analysis.

I. EMPLOYMENT-BASED IMMIGRATION

Employment-based immigration 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) of the Act, 8 U.S.C. § 1182(a)(5). DOL approval signifies that insufficient U.S. workers are able, willing, qualified, and available for a position. *Id*. Labor certification also indicates that the 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 certified labor application 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 considers whether a beneficiary meets the requirements of a certified position and a requested immigrant visa classification. If USCIS approves

the 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. REVOKING THE APPROVAL OF AN IMMIGRANT VISA PETITION

USCIS may revoke its approval of an immigrant visa petition "at any time" for "good and sufficient cause." Section 205 of the Act, 8 U.S.C. § 1155. Revocations that do not meet the definition of an automatic revocation under 8 C.F.R. § 205.1 may be made only after issuing a notice of intent to revoke (NOIR) the approval of the petition. The NOIR provides the opportunity to submit evidence in support of the petition and in opposition to the alleged grounds for revocation. 8 C.F.R. § 205.2(b). A NOIR is issued for "good and sufficient cause" if the record of proceeding at the time of issuance would warrant the denial of the petition. *Matter of Estime*, 19 I&N Dec. 450, 451 (BIA 1987). Similarly, the approval of the petition is properly revoked if the record (including any response to the NOIR) warrants the denial of the petition. *Id.* at 452; *see also Matter of Ho*, 19 I&N Dec. 582, 590 (BIA 1988) (the realization that a petition was approved in error may be good and sufficient cause for revoking its approval). If the approval of the petition is revoked, the director must provide the petitioner with a written decision that explains the specific reasons for the revocation. 8 C.F.R. § 205.2(c). Petitioners may appeal revocations on notice to the AAO. *See* 8 C.F.R. § 205.2(c).

III. ANALYSIS

Following the initial approval of the petition, in an interview with the Beneficiary for his Form I-485, Application to Register Permanent Residence or Adjust Status, it came to USCIS' attention that the Beneficiary was no longer employed with the Petitioner, and that the Petitioner transferred its business to another entity several months prior to the filing of the petition. The Director determined that the Petitioner's job offer to the Beneficiary was therefore not valid and revoked the approval of the petition. However, the Petitioner was not provided notice and opportunity to respond and overcome the grounds for revocation. Realizing the error, the Director reopened the matter on Service motion and issued a notice of intent to deny (NOID) to the Petitioner and the Beneficiary. In the NOID, the Director stated that the Petitioner was no longer in business and informed both parties of the need to establish that the job offer was valid at the time the petition was filed. Counsel for the Petitioner responded to the NOID with evidence that the Petitioner remained in business, however the Director issued a decision denying the petition.

We find that the Director erred in issuing the NOID and denying the petition. In order to issue an unfavorable decision in this case, the Director was required to issue a notice of intent to revoke the petition's approval pursuant to Section 205 of the Act. The Service motion reopened the revocation proceeding, not the adjudication of the initial petition. Once an immigrant visa petition has been approved, it must be revoked, not denied. *See* 8 C.F.R. § 204.5(n)(3). Because the Director improperly issued a NOID rather than a NOIR, we will withdraw the Director's decision to follow the requirements of 8 C.F.R. § 205.2(b) and *Matter of Estime*.

IV. SUCCESSOR-IN-INTEREST

In the remanded proceeding, the Director will need to determine whether the Petitioner is a successor-in-interest to the entity that filed the labor certification. A U.S. employer may file an immigrant visa

petition if it is "desiring and intending to employ [a foreign national] 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 specified in an accompanying labor certification. *Matter of Izdeska*, 12 I&N Dec. 54, 55 (Reg'l Comm'r 1966) (affirming a petition's denial where, contrary to the terms of the accompanying labor certification, the petitioner did not intend to employ the beneficiary as a domestic worker on a full-time, live-in basis).

In the NOID, the Director advised that, "In an interview with USCIS on April 8, 2019, the Beneficiary stated that the [Petitioner] was absorbed by [his current employer] in September 2017, prior to filing the petition. As the Petitioner was no longer in business, a *bona fide* job offer did not exist with the petitioning entity as of the time of filing."

In response to the NOID and on appeal, the Beneficiary provides evidence to establish that the Petitioner was a valid and operating business at the time of filing and remains in good standing to date. As the record demonstrates that the Petitioner was continuing to do business from the time of filing the petition, the relevant inquiry is whether a valid successor-in-interest relationship exists and when that relationship was created.

A valid successor-in-interest relationship exists if three conditions are satisfied. *See Matter of Dial Auto Repair Shop, Inc*., 19 I&N Dec. 481 (Comm'r 1986). First, the successor must fully describe and document the transfer and assumption of the ownership of the predecessor by the successor. Second, the successor must demonstrate that the job opportunity is the same as originally offered on the labor certification. Third, the successor must establish by a preponderance of the evidence that it is eligible for the immigrant visa in all respects. *Id*.

Following his I-485 interview, the Beneficiary provided a letter from his current employer to explain its relationship with the Petitioner as follows:

- The Petitioner's business involved two services – web-based internet marketing and branding, and website development and support.
- The Petitioner decided to focus on marketing and branding and eliminate the website development division, which included the Beneficiary.
- Through an informal agreement, the Petitioner transferred the assets of the website development division, including seven employees, to it, the Beneficiary's current employer.

A second letter states that the Beneficiary began employment with the new employer on March 11, 2019.

The record does not include documents of the transfer and assumption of the ownership of the Petitioner by the new entity. Nor is the record clear when the transfer occurred and whether it occurred before the petition was filed or while the petition was pending. The Director's NOID did not request this evidence and the decision does not address whether a valid successor-in-interest relationship may exist.

The Director did not consider all of the evidence in the record or apply the three-prong test of *Matter of Dial Auto*. On remand, the Director may wish to issue a NOIR outlining these issues, and allow the

Petitioner an opportunity to respond. The Director must state how the record fails to demonstrate eligibility for the classification sought under the pertinent regulatory scheme.

The Director may wish to request additional evidence, if deemed appropriate, and analyze the record to determine whether the business transaction between the Petitioner and the Beneficiary's current employer creates a valid successor-in-interest relationship. The Director should consider whether the Petitioner has established each of the conditions of *Matter of Dial Auto*, including whether the job opportunity offered by the Petitioner is the same as the job opportunity originally offered on the labor certification, and whether the Petitioner has established eligibility for the immigrant visa in all respects.[1] *See Matter of Dial Auto*, 19 I&N Dec. at 482. The Director should also consider the 2009 USCIS memorandum that provided a definition for "successor-in-interest" and guidance on amendment filing procedures. Memorandum from Donald Neufeld, Acting Associate Director, Domestic Operations, USCIS, HQ 70/6.2, *Successor-in-interest Determinations in Adjudication of Form I-140 Petitions; Adjudicator's Field Manual (AFM) Update to Chapter 22.2(b)(5) (AD09-37)* (Aug. 6, 2009), http://www.uscis.gov/legal-resources/policy-memoranda (Neufeld Memorandum).

V. CONCLUSION

The Director erred in attempting to deny the previously approved immigrant visa petition. Instead, in the Director must comply with the requirements for revoking the prior approval of a petition. The matter is remanded for the issuance of a NOIR that complies with the requirements of 8 C.F.R. § 205.2 and *Matter of Estime*. The NOIR should also address the discussion in this decision about successors-in-interest. The Director shall then issue a 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.

[1] The successor must prove the predecessor's ability to pay the proffered wage as of the priority date and until the date of transfer of ownership to the successor. In addition, the successor must establish its ability to pay the proffered wage from the date of transfer of ownership forward. *See* 8 C.F.R. § 204.5(g)(2).