U.S. Citizenship and Immigration Services

Non-Precedent Decision of the Administrative Appeals Office

In Re: 17513997

DATE: JULY 27, 2021

Appeal of Nebraska Service Center Decision

Form I-140, Immigrant Petition for a Skilled Worker

The Petitioner, a dental laboratory, seeks to employ the Beneficiary as an operations manager. It requests classification of the Beneficiary as a skilled worker 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 residence to work in a position that requires at least two years of training or experience.

The petition was initially approved. However, the Director of the Nebraska Service Center subsequently revoked the approval on the grounds that (1) the Petitioner did not fully explain, and resolve evidentiary discrepancies about, the business and personal relationship between its owner/chief executive officer (CEO) and the Beneficiary, (2) the Beneficiary claimed to be performing duties for the Petitioner that were outside the scope of the job duties described in the petition, and (3) the Beneficiary made misrepresentations about his business plans in the United States to obtain E2 nonimmigrant ("treaty investor") status and additional misrepresentations on the labor certification underlying the instant I-140 petition.

On appeal the Petitioner asserts that the Director did not adequately analyze the evidence in the record, and made erroneous determinations of misrepresentation against the Beneficiary. The Petitioner requests that the revocation decision be rescinded.

Upon *de novo* review, we will withdraw the Director's decision and remand the case for further consideration, including the issue of whether the Petitioner can establish its ability to pay the proffered wage.

I. LAW

Employment-based immigration generally follows a three-step process. First, an employer obtains an approved labor certification (ETA Form 9089) from the U.S. Department of Labor (DOL). *See* section 212(a)(5) of the Act, 8 U.S.C. § 1182(a)(5). By approving the labor certification, the 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. *See* section 212(a)(5)(A)(i)(I)-(II) of the Act. Second, the employer files 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.

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). A notice of intent to revoke (NOIR) "is not properly issued unless there is 'good and sufficient cause' and the notice includes a specific statement not only of the facts underlying the proposed action, but also of the supporting evidence." *Matter of Estime*, 19 I&N Dec. 450, 451 (BIA 1987). Per *Matter of Estime*, "[i]n determining what is 'good and sufficient cause' for the issuance of a notice of intention to revoke, we ask whether the evidence of record at the time the notice was issued, if unexplained and unrebutted, would have warranted a denial based on the petitioner's failure to meet his or her burden of proof." *Id.*

II. ANALYSIS

The instant petition was filed on November 13, 2017, accompanied by a labor certification that was filed with the DOL on May 31, 2017, and certified in September 2017. The petition was approved on November 22, 2017. The record indicates that the Beneficiary began working for the Petitioner in the proffered position of operations manager in March 2018.

A. Revocation Process

In January 2020 the Director issued a notice of intent to revoke (NOIR) the petition's approval. The NOIR discussed additional information received by USCIS indicating that the Petitioner's owner/CEO knew the Beneficiary prior to the filing of the I-140 petition in 2017 and had previously tried to help the Beneficiary obtain legal status in the United States. This included support for the E2 nonimmigrant visa which the Beneficiary successfully obtained in 2015, with which the Beneficiary operated a small company called [redacted], described in the E2 visa application as "a full service dental laboratory." The NOIR mentioned that the Beneficiary provided contract labor services for the Petitioner – "fabricat[ing] crown and bridge dental restorations" – before becoming an employee in March 2018. The NOIR noted that the Beneficiary's position was listed on the Petitioner's website as "Operations Manager/Cosmetic & High Aesthetics Division Specialist" which did not match the job title on the petition and the labor certification, which was simply operations manager. The NOIR also noted the Beneficiary's acknowledgement in an adjustment of status interview that he operated his business out of his home and had no employees, which was not consistent with earlier statements in connection with his E2 visa application that he had signed a commercial lease, bought equipment, and planned to hire two employees. According to the Director, it appeared that the Beneficiary misrepresented his business plans to acquire E2 status, and appeared to misrepresent his experience

with [redacted] on the labor certification insofar as one of the job duties was described as "[m]ake hiring and firing decisions and train staff."[1] Finally, the Director stated that it appeared the offered position "has been altered to qualify the [B]eneficiary specifically due to the relationship with the owner."

In response to the NOIR the Petitioner submitted a brief from counsel and additional evidence in the form of declarations from its owner/CEO, its human resources manager, and the Beneficiary; tax records documenting the Beneficiary's income from his own company, [redacted] and from the Petitioner, as well his wife's compensation from [redacted] for accounting services; the Beneficiary's job search efforts prior to his E2 visa in 2015 and his offer of employment from the Petitioner in 2017; the Petitioner's organizational chart and website page identifying the Beneficiary's position in the company; and some relevant case law. The Petitioner asserted that its owner/CEO and the Beneficiary did not know each other before 2015, and that the owner's assistance to the Beneficiary in obtaining status in the United States, including his E2 visa, was supportive rather than violative of U.S. law and policy. The Petitioner claimed that the Beneficiary made no misrepresentations in his E2 visa application or in the labor certification underlying the I-140 petition. While acknowledging that the Beneficiary's business had not developed as successfully as forecast in the E2 visa application, and that the Beneficiary had not yet hired a technician or a receptionist and opted to operated out of his home, the record nonetheless showed that the business was operational, earning some money, and, according to the Petitioner, compliant with the rules and regulations applicable to E2 visas. Reiterating its assertion that the Petitioner's owner/CEO and the Beneficiary had no longstanding business or personal relationship because they only met in 2015, the Petitioner maintained that the proffered position was clearly open to U.S. workers. Furthermore, the Petitioner asserted that the Beneficiary had not worked outside the scope of his role and title as operations manager since his hiring in March 2018. The Petitioner maintained that the Beneficiary has not functioned as an anesthesiologist, though he may be present in an operational capacity to oversee procedures performed other employees, and that the Beneficiary's website identification as "Operations Manager/Cosmetic & High Aesthetics Division Specialist" is meant to highlight his field of specialty as well as his job title.

In the revocation decision, issued on November 17, 2020, the Director stated that although the record indicated the Petitioner's owner/CEO and the Beneficiary did not meet until 2015, the Petitioner had not explained their relationship to the person who introduced them, [redacted] The decision did not explain the relevance of [redacted]'s prior relationship to the Petitioner's owner/CEO and/or the Beneficiary in this proceeding. The Director also indicated that the role played by the Petitioner's owner/CEO in getting the Beneficiary's business started with his E2 visa might make him liable for any default judgment entered against the entity, but once again failed to explain what relevance this speculation had to the instant proceeding. The decision quoted excerpts from the declarations of the Petitioner's owner/CEO and the Beneficiary which, in the Director's view, contradicted each other with respect to the scope of the former's influence in hiring decisions. The Director stated that the declaration of the Petitioner's human resources manager did not address "the [B]eneficiary's claim" that he was performing functions beyond his stated job duties as operations manager, but no confirmed claim of this nature was cited in the decision, or in the foregoing NOIR.

[1] The full description of the Beneficiary's experience with [redacted] is described in section K of the labor certification as follows: "Responsible for overall management and operation of dental laboratory business. Make hiring and firing decisions and train staff. Monitor inventory and suppliers to ensure timely ordering and delivery of required equipment and supplies. Direct and manage day-to-day activities related to constructing dental products and providing services."

The declaration of the human resources manager stated that the Beneficiary performed ceramic dental technician work for the Petitioner when operating as [redacted] in a contract labor relationship with the Petitioner prior to being hired as its operations manager. As for the Beneficiary's E2 visa application and approval, the Director stated that the Beneficiary provided no evidence that he was complying with local zoning ordinances in operating his business out of his home. The Director also indicated that the Beneficiary's shift to a home-based business and performance of significant non-managerial functions cast doubt on his intent to invest a substantial amount of capital in a *bona fide* enterprise that he would develop and direct, as required for E2 visa holders under applicable regulations. Once again, however, the decision did not explain the relevance of these observations to the instant petition for skilled worker classification. Finally, the Director reiterated that the Beneficiary stated at his adjustment of status interview that he planned to hire a technician and a receptionist for [redacted] but had not done so and merely contracted with his wife to perform accounting work.

The Director concluded that "[a]fter a review of the evidence and response [to the NOIR], it is still the position of USCIS that the [B]eneficiary made misrepresentations to acquire E2 status, and further made misrepresentations on his ETA-9089. In view of the above, USCIS has revoked this I-140 petition."

On appeal we agree with the Petitioner's basic position that the revocation decision is not well grounded in the facts or the law. As pointed out in our discussion of the decision, the Director makes a number of factual and legal references – primarily with respect to the Beneficiary's business under his E2 treaty investor visa – whose relevance is not clearly articulated with regard to the instant petition for skilled worker classification. Even if there are some inconsistencies or discrepancies in the record, the Director does not explain why they are of sufficient magnitude to warrant revocation of the previous approval. The decision states broadly that the Beneficiary "made misrepresentations in his ETA-9089," but does not identify any specific examples thereof in the labor certification. While the Director expressed doubt in the NOIR that the Beneficiary's job duties with [redacted] included hiring and firing decisions and training staff, as claimed in the labor certification (section K), the Director does not return to this subject in the revocation decision. Most importantly, the Director's decision does not identify the statutory and/or regulatory basis for the revocation of the petition's previous approval.

Since the revocation decision is not adequately explained, we will remand this matter to the Director for further consideration. The Director may issue a new NOIR in accordance with the requirements of 8 C.F.R. § 205.2(b) and (c) and *Matter of Estime*. Following the Petitioner's response to the NOIR, or the expiration of the time period for response, the Director shall issue a new decision.

B. Petitioner's Ability to Pay the Proffered Wage

To be eligible for the classification it requests for the beneficiary, a petitioner must establish that it has the ability to pay the proffered wage stated in the labor certification. As provided in the regulation at 8 C.F.R. § 204.5(g)(2):

> The petitioner must demonstrate this ability at the time the priority date is established and continuing until the beneficiary obtains lawful permanent residence. Evidence of this ability shall be either in the form of copies of annual reports, federal tax returns, or

> audited financial statements. In a case where the prospective United States employer employs 100 or more workers, the director may accept a statement from a financial officer of the organization which establishes the prospective employer's ability to pay the proffered wage. In appropriate cases, additional evidence, such as profit/loss statements, bank account records, or personnel records, may be submitted by the petitioner or requested by [USCIS].

As indicated in the above regulation, the Petitioner must establish its continuing ability to pay the proffered wage from the priority date[2] of the petition onward. In this case the proffered wage is $47,050 per year and the priority date is May 31, 2017.

In determining a petitioner's ability to pay the proffered wage, USCIS first examines whether the beneficiary was employed and paid by the petitioner during the period following the priority date. A petitioner's submission of documentary evidence that it employed the beneficiary at a salary equal to or greater than the proffered wage for the time period in question, when accompanied by a form of evidence required in the regulation at 8 C.F.R. § 204.5(g)(2), may be considered proof of the petitioner's ability to pay the proffered wage.

In this case, the documentary evidence shows that the Beneficiary has been employed by the Petitioner since March 2018 and that his gross compensation was $32,441.21 in 2018 and $45,339.71 in 2019. Thus, the Petitioner has not established its ability to pay the proffered wage of $47,050 per year based on wages paid to the Beneficiary from the priority date of May 31, 2017, onward.

If a petitioner does not establish that it has paid the beneficiary an amount equal to or above the proffered wage from the priority date onward, USCIS will examine the net income and net current assets figures recorded on the petitioner's federal income tax return(s), annual report(s), or audited financial statements(s). If either of these figures, net income or net current assets, equals or exceeds the proffered wage or the difference between the proffered wage and the amount paid to the beneficiary in a given year, the petitioner would ordinarily be considered able to pay the proffered wage during that year. However, when a petitioner has filed other I-140 petitions it must establish that its job offer is realistic not only for the instant beneficiary, but also for the beneficiaries of its other I-140 petitions (I-140 beneficiaries). A petitioner's ability to pay the proffered wage is an essential element in evaluating whether a job offer is realistic. *See Matter of Great Wall*, 16 I&N Dec. 142 (Acting Reg'l Comm'r 1977). Accordingly, a petitioner must demonstrate its ability to pay the combined proffered wages of the instant beneficiary and every other I-140 beneficiary from the priority date of the instant petition until the other I-140 beneficiaries obtain lawful permanent resident status. *See Patel v. Johnson*, 2 F.Supp. 3d 108, 124 (D.Mass. 2014) (upholding our denial of a petition where a petitioner did not demonstrate its ability to pay multiple beneficiaries).[3]

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[2] The "priority date" of an employment-based immigrant petition is the date the underlying labor certification application is filed with the DOL. *See* 8 C.F.R. § 204.5(d).

[3] The Petitioner's ability to pay the proffered wage of one of the other I-140 beneficiaries is not considered:

- After the other beneficiary obtains lawful permanent residence;
- If an I-140 petition filed on behalf of the other beneficiary has been withdrawn, revoked, or denied without a pending appeal or motion; or
- Before the priority date of the I-140 petition filed on behalf of the other beneficiary.

In this case USCIS records show that the Petitioner has filed multiple I-140 petitions. Therefore, it must establish that its net income or net current assets year by year are sufficient to meet its proffered wage obligations to the instant Beneficiary and all of its other I-140 beneficiaries. When the instant petition was filed (and initially approved) in November 2017, the Petitioner submitted a copy of its 2016 federal income tax return, which was the most recently filed return. No federal tax return, annual report, or audited financial statement has been submitted for any subsequent year. Thus, the record does not include any type of required regulatory evidence for the priority date year of 2017 or succeeding years. Nor does the record include any evidence of the Petitioner's proffered wage obligations and wages paid to its other I-140 beneficiaries. Accordingly, the current record does not establish the Petitioner's continuing ability to pay the proffered wage(s) of the instant Beneficiary and its other I-140 beneficiaries from the priority date of May 31, 2017, onward.

In any new NOIR to be issued on remand, therefore, the Director shall include a request that the Petitioner submit at least one type of required evidence, as specified in 8 C.F.R. § 204.5(g)(2), for each year from the priority date year of 2017 to the revocation year of 2020, as well as evidence of its proffered wage obligations and wages paid to all of its I-140 beneficiaries, as previously discussed, from the priority date of May 31, 2017, to the date of revocation in November 2020.

III. CONCLUSION

For the reasons discussed above, we will remand this case for the Director to issue a new NOIR in accordance with the requirements of 8 C.F.R. § 205.2(b) and (c) and *Matter of Estime*. Following the Petitioner's response to the NOIR, or the expiration of the time period for response, the Director shall issue a new decision.

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