U.S. Citizenship and Immigration Services

Non-Precedent Decision of the Administrative Appeals Office

MATTER OF S-M-C-, INC.

DATE: JULY 30, 2019

APPEAL OF NEBRASKA SERVICE CENTER DECISION

PETITION: FORM I-140, IMMIGRANT PETITION FOR ALIEN WORKER

The Petitioner, a provider of information technology (IT) consulting services, seeks to employ the Beneficiary as a systems engineer. It requests her classification under the third-preference immigrant category as a professional. *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, "EB-3" category allows a U.S. business to sponsor a foreign national for lawful permanent resident status to work in a job requiring at least a bachelor's degree.

After initially granting the filing, the Director of the Nebraska Service Center revoked the petition's approval. The Director concluded that the accompanying certification from the U.S. Department of Labor (DOL) did not support the requested immigrant classification.

On appeal, the Petitioner submits additional evidence and asserts that counsel's office inadvertently requested the wrong immigrant classification on the Form I-140, Immigrant Petition for Alien Worker. The Petitioner argues that, by refusing its request to amend the classification, the Director abused her discretion and violated U.S. Citizenship and Immigration Services (USCIS) policy.

Upon *de novo* review, we will dismiss the appeal.

I. EMPLOYMENT-BASED IMMIGRATION

Immigration as a professional 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 DOL certification. *See* section 212(a)(5)(A)(i) of the Act, 8 U.S.C. § 1182(a)(5)(A)(i). DOL approval signifies that insufficient U.S. workers are able, willing, qualified, and available for an offered position, and that 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 labor certification with an immigrant visa petition to USCIS. *See* section 204 of the Act, 8 U.S.C. § 1154. Among other things, USCIS determines whether a beneficiary meets the requirements of a DOL-certified position and the requested classification. If USCIS grants a 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.

"[A]t any time" before a beneficiary obtains lawful 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, the erroneous nature of a petition's approval justifies its revocation. *Matter of Ho*, 19 I&N Dec. 582, 590 (BIA 1988).

USCIS may issue a notice of intent to revoke (NOIR) if the unexplained and unrebutted record would have warranted a petition's denial. *Matter of Estime*, 19 I&N Dec. 450, 451 (BIA 1987). The Agency may revoke a petition's approval if a petitioner's NOIR response does not overcome the stated revocation grounds. *Id.* at 451-52.

II. THE VALIDITY OF THE LABOR CERTIFICATION

Unless accompanied by an application for Schedule A designation or documentation of a beneficiary's qualifications for a shortage occupation, a petition for a professional must include a valid, individual labor certification. 8 C.F.R. § 204.5(l)(3)(i). The job-offer portion of a labor certification for a professional "must demonstrate that the job requires the minimum of a baccalaureate degree." *Id.* When evaluating the minimum job requirements of an offered position, USCIS may neither ignore a certification term, nor impose additional requirements. *See, e.g., Madany v. Smith*, 696 F.3d 1008, 1015 (D.C. Cir. 1983) (holding that "DOL bears the authority for setting the *content* of the labor certification") (emphasis in original).

Here, the accompanying labor certification states the primary requirements of the offered position of systems engineer as a U.S. bachelor's degree or a foreign equivalent degree in computer science, IT, or a related field, and three years of experience as a systems analyst, systems engineer, or a related occupation.[1] The labor certification also states that, in lieu of a bachelor's degree and three years of experience, the Petitioner will accept three years of college or university education, and five years of experience.

The Director properly issued the NOIR. Contrary to 8 C.F.R. § 204.5(l)(3)(i), the labor certification does not demonstrate that the offered position requires at least a bachelor's degree. A U.S. bachelor's degree usually reflects four years of college or university study. *Matter of Shah*, 17 I&N Dec. 244, 245 (Reg'l Comm'r 1977). The Petitioner's labor certification, however, indicated the company's alternate acceptance of only three years of post-secondary education. Because the labor certification stated the position's minimum requirements as less than a U.S. baccalaureate or a foreign equivalent degree, the certification does not support the requested professional classification. The unexplained and unrebutted record therefore would have warranted the petition's denial.

[1] The petition refers to the offered position as "systems engineer," but the labor certification identifies the job as "senior systems analyst." For purposes of this decision, we will assume that the petition and labor certification describe the same job opportunity and will use the position title of systems engineer.

The Petitioner's NOIR response stated that counsel's office inadvertently checked the wrong immigrant classification box on the Form I-140. The Petitioner submitted an amended form requesting the Beneficiary's reclassification as a "skilled worker." *See* section 203(b)(3)(i) of the Act (authorizing immigrant visas to qualified foreign nationals capable of performing work requiring at least two years of training or experience).

A petitioner "may not make material changes to a petition that has already been filed in an effort to make an apparently deficient petition conform to [USCIS] requirements." *Matter of Izummi*, 22 I&N Dec. 169, 175 (Assoc. Comm'r 1998). Before the issuance of a decision, however, a petitioner may request correction of an immigrant classification resulting from a clerical error. USCIS' website cautions petitioners that, "[a]lthough you may request that we change the visa classification to correct a clerical error in Part 2 of the form [I-140], we will make the final determination about whether to change the visa classification based on everything in your case." USCIS, "Petition Filing and Processing Procedures for Form I-140, Immigrant Petition for Alien Worker," https://www.uscis.gov/forms/petition-filing-and-processing-procedures-form-i-140-immigrant-petition-alien-worker (last visited June 18, 2019). The website also advises petitioners to check their Form I-140 receipt notices to ensure that the notices state correct immigrant categories and, if not, to call USCIS "immediately." *Id.* The website therefore indicates that USCIS allows a classification change only before the issuance of a decision and only for inadvertent misclassifications. The policy does not allow a petitioner to use a single petition to seek approvals in multiple visa categories.

Here, the record indicates that the Petitioner did not request to change the immigrant classification until USCIS issued the NOIR. The Agency's initial approval of the petition constituted a decision on the benefit request. *See* 8 C.F.R. § 103.2(b)(19) "*Notification of decision*" (requiring USCIS to notify a petitioner of an approval or denial). USCIS' website states: "We cannot change the visa category if we have already made a decision on your Form I-140." "Petition Filing and Processing Procedures for Form I-140, Immigrant Petition for Alien Worker," *supra*. Agency policy therefore did not allow the Director to grant the Petitioner's post-approval request to amend the immigrant classification.

Also, the record does not establish the inadvertent, clerical nature of the misclassification. Although USCIS sent the Petitioner receipt and approval notices indicating the petition's requested immigrant classification, the company did not inform the Agency of the error until the NOIR notified it that the labor certification did not appear to support the requested classification. The Petitioner submitted a declaration by counsel stating that "[t]his clearly was a typographical error." But the declaration neither details how the error occurred, nor explains why counsel did not notice or report the misclassification until after the NOIR's issuance.

On appeal, the Petitioner asserts that USCIS's policy of barring post-decision reclassification requests "most certainly refers [only] to denied cases, as it would be disingenuous to contend [that] a case approved[,] but later questioned, could not be amended when the Service made the initial error of approval." USCIS' policy is not "disingenuous," however. The "initial error" was the Petitioner's request for the wrong immigrant classification on the Form I-140. USCIS' erroneous approval merely delayed the error's discovery. Also, the plain language of the Agency's policy bars classification changes after decisions. By listing immigrant classifications requested by

corresponding petitions, Form I-140 receipt notices allow petitioners to detect and report misclassifications *before* USCIS issues decisions. In addition, the Agency's consideration of post-decision reclassification amendments could encourage fraudulent requests and prove administratively burdensome.

The Petitioner also argues that, instead of initially approving the petition, USCIS should have issued a written request for additional evidence (RFE) regarding the Agency's concerns about the requested immigrant classification. The record, however, indicates that USCIS did not notice the misclassification until *after* the petition's approval. A director's realization that she erred in granting a petition may be good and sufficient cause for the approval's revocation. *Matter of Ho*, 19 I&N Dec. at 590. The Director therefore properly issued the NOIR.

The Petitioner further argues that USCIS "arbitrarily and capriciously" refused to amend the requested classification, disregarding Agency policy and not explaining its decision. But, by considering the timing of the Petitioner's request and whether the company demonstrated the inadvertent, clerical nature of the misclassification, the Director's decision applied USCIS policy. The decision noted that the Petitioner did not request classification change until after receiving the NOIR. The decision also indicated that the timing of the change request suggests that the Petitioner intended to seek professional classification of the Beneficiary, as indicated on both the petition's receipt and approval notices. The decision therefore complied with USCIS policy and sufficiently explained the reasons for the denial of the request to change classifications.

III. CONCLUSION

The record on appeal does not establish the accompanying labor certification's support of the petition's requested immigrant classification. We will therefore affirm the revocation of the petition's approval. Contrary to section 291 of the Act, 8 U.S.C. § 1361, the Petitioner did not meet its burden of demonstrating eligibility for the requested benefit.

ORDER: The appeal is dismissed.

Cite as *Matter of S-M-C-, Inc.*, ID# 5033099 (AAO July 30, 2019)