U.S. Citizenship and Immigration Services

Non-Precedent Decision of the Administrative Appeals Office

In Re: 29346045

Date: JUNE 2, 2025

Appeal of Nebraska Service Center Decision

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

The Petitioner, a designer and marketer of small modular nuclear reactors, seeks to employ the Beneficiary as a project controls specialist (financial controls specialist). The company requests her classification under the employment-based, second-preference (EB-2) immigrant visa category as a member of the professions holding an "advanced degree." *See* Immigration and Nationality Act (the Act) section 203(b)(2)(A), 8 U.S.C. § 1153(b)(2)(A). U.S. businesses may sponsor aliens for U.S. permanent residence in this category to work in jobs requiring at least bachelor's degrees followed by five years of progressive experience in the specialties. *See* 8 C.F.R. § 204.5(k)(2) (defining the term "advanced degree").

After first granting the filing, Service Center Operations (SCOPS) revoked the petition's approval. SCOPS concluded that it erroneously approved the petition because the Petitioner did not demonstrate its intent to employ the Beneficiary in the job described on the accompanying certification from the U.S. Department of Labor (DOL). On appeal, the Petitioner contends that the labor certification supports the Beneficiary's current position, stating that changes in the offered job's wages, duties, and experience requirements are immaterial.

In these revocation proceedings, the Petitioner bears the burden of demonstrating eligibility for the requested benefit by a preponderance of the evidence. *See Matter of Ho*, 19 I&N Dec. 582, 589-90 (BIA 1988). Exercising de novo appellate review, *see Matter of Christo's, Inc.*, 26 I&N Dec. 537, 537 n.2 (AAO 2015), we conclude that, based on the changes to the offered job, SCOPS properly revoked the petition's approval. We will therefore dismiss the appeal.

I. LAW

Immigration as an advanced degree professional generally follows a three-step process. First, a prospective employer must obtain DOL certification that: there are insufficient U.S. workers able, willing, qualified, and available for an offered position; and an alien's employment in the position will not harm wages or working conditions of U.S. workers with similar jobs. *See* section 212(a)(5)(D) of the Act, 8 U.S.C. § 1182(a)(5)(D).

Second, an employer must submit a DOL-approved labor certification with an immigrant visa petition to U.S. Citizenship and Immigration Services (USCIS). *See* section 204(a)(1)(F) of the Act, 8 U.S.C. § 1154(a)(1)(F). Among other things, USCIS determines whether an alien beneficiary meets the requirements of a DOL-certified position and a requested immigrant visa category. 8 C.F.R. § 204.5(k)(3); *Matter of Wing's Tea House*, 16 I&N Dec. 158, 160 (Acting Reg'l Comm'r 1977).

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.

"[A]t any time" before a beneficiary obtains permanent residence, 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, a petition's erroneous approval may justify its revocation. *See Matter of Ho*, 19 I&N Dec. at 590.

USCIS properly issues a notice of intent to revoke (NOIR) a petition if the unexplained and unrebutted record at the time of the NOIR's issuance would have warranted the petition's denial. *Matter of Estime*, 19 I&N Dec. 450, 451 (BIA 1987). If a petitioner does not respond to a NOIR or does not overcome the alleged revocation grounds, USCIS properly revokes a petition's approval. *Id.* at 451-52.

II. ANALYSIS

A. The Petitioner's Intent to Employ the Beneficiary in the Offered Job

A business may file an immigrant visa petition if it is "desiring and intending to employ [an alien] 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 of an accompanying labor certification. *See Black Constr. Corp. v. INS*, 746 F.2d 503, 504 (9th Cir. 1984); *Matter of Sunoco Energy Dev. Co.*, 17 I&N Dec. 283, 284 (Reg'l Comm'r 1979); *Matter of Romano*, 12 I&N Dec. 731, 732 (Reg'l Comm'r 1968); *Matter of Izdebska*, 12 I&N Dec. 54, 55 (Reg'l Comm'r 1966).

The Petitioner's labor certification lists the offered job as project control specialist 3 (PCS 3) and states its proffered wage as $109,522.47 a year. The labor certification indicates that the job requires a U.S. bachelor's degree, or a foreign equivalent degree, in economics, construction management, project management, accounting, or business administration. All acceptable fields of study must include "an emphasis in economic-related subjects."

Also, the labor certification states that the job requires at least five years of progressively responsible experience in a project planning/scheduling or project controls organization. Part H.14 of the certification - "Specific skills or other requirements" - details additional duties and skills the experience requirement entails.

In a letter accompanying the petition, however, the Petitioner's vice president of human resources stated that, about a month before the petition's August 2022 filing, the Beneficiary received a "promotion." Unlike the labor certification, the letter and the Form I-140, Immigrant Petition for Alien Workers, do not describe the offered job as PCS 3, with a proffered annual wage of $109,522.47.

Rather, the letter and the petition state the job as PCS 4, with a proffered wage of $123,926.43. The job described in the petition has the same educational requirements as the one listed on the labor certification. But the Petitioner stated that the Beneficiary's new job requires not five but *eight* years of progressively responsible experience in a project planning/scheduling or project controls organization *or accounting/law firm*. The Beneficiary's new job includes the same job duties as listed on the labor certification. But the new job has additional duties.

Based on the new job title, duties, proffered wages, and experience requirements, SCOPS issued a NOIR and, after reviewing the Petitioner's response, revoked the petition's approval. SCOPS concluded that the Petitioner did not demonstrate its intent to employ the Beneficiary in the offered job certified by DOL.

Precedential case law supports SCOPS' NOIR issuance and revocation of the petition's approval. In *Sunoco Energy*, the Regional Commissioner affirmed a petition's denial where the petitioner intended to employ the beneficiary in a geographic area not listed on the labor certification. *Matter of Sunoco Energy Dev. Co.*, 17 I&N Dec. at 284. *Romano* affirmed the denial of a petition for a live-in maid, in part, because the petitioner did not demonstrate his intent to employ the beneficiary in all the duties described in the accompanying labor certification. *Matter of Romano*, 12 I&N Dec. at 732. Similarly, *Izdebska* affirmed the denial of a petition for a domestic worker where, contrary to the terms of the accompanying labor certification, the petitioner did not demonstrate his intent to employ the beneficiary on a permanent full-time live-in basis. *Matter of Izdebska*, 12 I&N Dec. at 54. Also, the U.S. Court of Appeals for the Ninth Circuit, which has jurisdiction over the Petitioner's location, has held that, even where DOL issued accompanying labor certifications, the immigration service may deny petitions if their offered jobs are temporary in nature. *Black Constr. Corp.*, 746 F.2d at 504; *see also* 20 C.F.R. § 656.3 (defining the term "employment," for labor certification purposes, to require "[p]ermanent, full-time work"). These precedential decisions indicate that changes in an offered job's duties or intended length of employment may warrant a petition's denial or revocation.

Moreover, as previously indicated, USCIS lacks authority to determine an offered job's minimum requirements. Congress specifically delegated DOL to determine whether U.S. workers are able, willing, qualified, and available for a job and that an alien's permanent employment in the role would not harm wages or working conditions of U.S. workers similarly employed. *See* section 212(a)(5)(A)(i), (D) of the Act. "[D]eterminations vested by statute with one agency are not normally subject to horizontal review by a sister entity, absent congressional authorization to that effect." *Madany v. Smith*, 696 F.2d 1008, 1012 (D.C. Cir. 1983).

On appeal, the Petitioner contends that the offered job's wages, duties, and requirements "had evolved over the passage of time." The record, however, does not support that contention. The Petitioner indicated that - less than a year after the labor certification application's filing and before the petition's submission - the company promoted the Beneficiary to a new position. Thus, the record does not demonstrate the offered job's evolution over time.

Also, Congress has enacted a "portability" provision to address negative effects of long-delayed adjustment applications on beneficiaries. *See* section 204(j) of the Act. Under the portability provision, certain petitions remain valid if their beneficiaries change jobs or employers. Section 204(j) of the Act. To qualify, beneficiaries' adjustment applications must have remained unadjudicated for

at least 180 days and the aliens' new jobs must remain in the same or similar occupational classification as the one listed in their petitions. *Id.* The Petitioner has neither claimed nor demonstrated the portability provision's applicability to the Beneficiary.

The Petitioner also notes that, under USCIS policy, some changes to an offered job do not warrant a petition's denial or revocation. Agency policy states that a petition needs a new labor certification only if there has been a "*material* change in the job opportunity covered by the original permanent labor certification." 6 *USCIS Policy Manual* E.(6)(D)(1), www.uscis.gov/policy-manual (emphasis added). The Petitioner argues that changes to the Beneficiary's offered job are immaterial because: both jobs fall under the same Standard Occupational Classification (SOC) code[1]; the new job's annual salary is only $14,403.96 higher than the old one's; neither job has managerial nor supervisory duties; the training and educational requirements remain the same; and the Beneficiary would spend only 15% to 20% of her time on the new job's additional duties.

The precedential case law discussed above, however, has more legal authority than USCIS policy. "The Policy Manual does not create any substantive or procedural right or benefit that is legally enforceable by any party against the United States or its agencies or officers or any other person." *USCIS Policy Manual*, "About the Policy Manual," www.uscis.gov/policy-manual.

The Petitioner further notes that, in an online "Questions and Answers" section in 2009 discussing Form I-140 petitions, USCIS stated:

> When determining whether the job opportunity is the same as the job opportunity originally offered on the labor certification, adjudicators will examine the job duties of the position to determine if the job is still the same. Changes in job title, and other ancillary changes such as a change in computer software used in the job are not in and of themselves disallowed. Further, changes in the wage offered due to wage increases that have occurred over the passage of time do not impact the determination as to whether the job is the same.

The online answer, however, specifically addresses "successorships-in-interest." Successors seek to use other businesses' labor certifications for the same aliens and must demonstrate, in part, that, except for the new employers, the offered jobs remain the same as listed on the certifications. *See Matter of Dial Auto Repair Shop, Inc.*, 19 I&N Dec. 481, 482-83 (Comm'r 1986); *see generally* 6 *USCIS Policy Manual* E.(3)(F)(1). The Petitioner does not claim to be a successor in interest. This guidance therefore does not apply to the company's case.

In successor-in-interest situations, USCIS compares a beneficiary's proposed job with a new employer to the original offered job's requirements stated on the labor certification from DOL. Here, the Petitioner effectively proposes to change the DOL-certified minimum requirements of its offered job. As previously discussed, USCIS lacks authority to determine a job's minimum requirements. *See* section 212(a)(5)(A)(i), (D) of the Act (authorizing DOL to certify a permanent job intended for an alien).

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[1] To collect, calculate, and disseminate data, federal agencies use the SOC system to classify workers into occupational categories. *See* U.S. Bureau of Lab. Stat., "Standard Occupational Classification," www.bls.gov/soc/.

Also, the Petitioner's new experience requirement would cause the job to exceed the Specific Vocational Preparation (SVP) level assigned to the occupation.[2] Thus, by DOL regulation, the company would have to demonstrate that the requirements arise from "business necessity," establishing that the job's duties and requirements bear "a reasonable relationship to the occupation in the context of the employer's business and are essential to perform the job in a reasonable manner." 20 C.F.R. § 656.17(h)(1). As USCIS lacks authority and expertise to enforce the DOL regulation, allowing the Petitioner to change the job-offer requirement would permit the company to evade the DOL rule.

For the foregoing reasons, the Petitioner cannot change the offered job and has not demonstrated its intent to employ the Beneficiary in the offered position.

B. The Beneficiary's Experience

Even if we could allow the Petitioner to change the offered job, the company has not demonstrated that the Beneficiary would meet the new position's experience requirements. A petitioner must demonstrate a beneficiary's possession of all job requirements by a petition's priority date. *Matter of Wing's Tea House*, 16 I&N Dec.at 160. This petition's priority date is August 26, 2021, the date DOL accepted the labor certification application for processing. *See* 8 C.F.R. § 204.5(d) (explaining how to determine a petition's priority date).

As previously indicated, the Petitioner states that the current offered job of PCS 4 requires eight years of post-baccalaureate experience. On the labor certification, the Beneficiary attested that, by the petition's priority date and before beginning work for the Petitioner in July 2017, she gained about six years of qualifying experience, from June 2011 to July 2017. Also, copies of the Beneficiary's academic documentation indicates her master's degree's issuance in 2011.

A petitioner cannot rely on experience that a beneficiary gained with it, unless the experience was in a substantially different job than the offered one or the petitioner demonstrates the impracticality of training a U.S. worker for the job. 20 C.F.R. § 656.17(i)(3). The Petitioner has not claimed to rely on experience the Beneficiary gained with it, nor has it demonstrated one of the conditions required under 20 C.F.R. § 656.17(i)(3). Thus, the record does not establish that the Beneficiary would meet the experience requirements of the new offered job.

SCOPS did not inform the Petitioner of this evidentiary defect. Thus, in any future filings in this matter, the company must demonstrate how the Beneficiary would meet the new offered job's experience requirements.

[2] The term "SVP" means "the amount of lapsed time required by a typical worker to learn the techniques, acquire the information, and develop the facility needed for average performance in a specific job-worker situation." DOL, "An Explanation of SVP," www.dol.gov/sites/dolgov/files/ETA/oflc/pdfs/An%20Explanation%20of%20SVP.pdf.

III. CONCLUSION

Because of the Petitioner's changes to the offered job, SCOPS properly revoked the petition's approval for lack of company intent to employ the Beneficiary consistent with the accompanying labor certification.

ORDER: The appeal is dismissed.