U.S. Citizenship and Immigration Services

Non-Precedent Decision of the Administrative Appeals Office

MATTER OF M-H-H-A-, INC.

DATE: JUNE 20, 2019

APPEAL OF NEBRASKA SERVICE CENTER DECISION

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

The Petitioner, a home health care provider, seeks to employ the Beneficiary as a registered nurse. 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 resident status to work in a position that requires at least two years of training or experience.

The Director of the Texas Service Center originally approved the Form I-140, Immigrant Petition for Alien Worker, but later revoked the approval. The matter is now before us on appeal.

Upon *de novo* review, we will remand the matter to the Director for further consideration and the issuance of a new decision.

I. LAW

This petition is for a Schedule A occupation. A Schedule A occupation is one codified at 20 C.F.R. § 656.5(a) for which the Department of Labor (DOL) has determined that there are not sufficient U.S. workers who are able, willing, qualified and available and that the wages and working conditions of similarly employed U.S. workers will not be adversely affected by the employment of aliens in such occupations. The current list of Schedule A occupations includes professional nurses. *Id*. Petitions for Schedule A occupations do not require the petitioner to test the labor market and obtain a certified ETA Form 9089, Application for Permanent Employment Certification (ETA 9089), from the DOL prior to filing the petition with U.S. Citizenship and Immigration Services (USCIS). Instead, the petition is filed directly with USCIS with an uncertified ETA 9089 in duplicate. *See* 8 C.F.R. §§ 204.5(a)(2) and (k)(4); *see also* 20 C.F.R. § 656.15. 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).

II. ANALYSIS

The Director initiated the revocation proceeding by sending the Petitioner a notice of intent to revoke (NOIR) in accordance with 8 C.F.R. § 205.2. In the NOIR the Director noted that on the ETA Form 9089, Application for Permanent Employment Certification, which accompanied the Form I-140, the Petitioner answered "No" to the question at section C.9 which reads as follows:

> Is the employer a closely held corporation, partnership, or sole proprietorship in which the alien has an ownership interest, or is there a familial relationship between the owners, stockholders, partners, corporate officers, incorporators, and the alien?

The Director indicated that it had come to light in the Beneficiary's subsequent consular interview that there is a familial relationship (uncle/niece) between the Petitioner's owner and the Beneficiary,[1] that this fact raised questions about the *bona fides* of the job opportunity for U.S. workers, and that the non-disclosure of the familial relationship in responding to question C.9 was a material misrepresentation of fact which may be grounds for revoking the petition's approval. In the NOIR the Director also stated that he intended to invalidate the labor certification pursuant to 20 C.F.R. § 656.30(D) and that as such it appeared that the petition's approval should be revoked.

A 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* "In 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.*

In this case, the Director did not articulate in the NOIR why she determined there was good and sufficient cause to revoke under the applicable Schedule A regulations. The ETA Form 9089 was submitted to USCIS in support of a petition for a Schedule A occupation, and therefore was not certified by the DOL. Accordingly, there is no labor certification application issued by the Department of Labor to invalidate under 20 C.F.R. § 656.30(d), and invalidation of the labor certification cannot form the basis to revoke the petition. The NOIR also did not state how the record failed to demonstrate eligibility for the Schedule A classification sought. As such, we find that the NOIR was not properly issued, and on that basis alone, the revocation cannot be upheld.

[1] In a later affidavit the Beneficiary's uncle stated that he is actually the Petitioner's corporate financial officer (CFO), not its owner.

Moreover, the Director's decision to revoke the petition's approval was likewise deficient, as it did not sufficiently explain the reasons for revocation. When revoking approval of a petition, a director has an affirmative duty to explain the specific reasons for the revocation; this duty includes informing a petitioner why the evidence did not to satisfy its burden of proof pursuant to section 291 of the Act. 8 C.F.R. § 103.3(a)(1)(i). As noted by the Petitioner on appeal, the Director's decision in this case does not explain why the information provided in response to the NOIR was insufficient or how it failed to satisfy its burden of proof in regards to eligibility for the benefit sought.

Further, it is not clear from the Director's decision whether a finding of willful material misrepresentation was actually made and if it was made, whether the finding pertains to the Petitioner, the Beneficiary, or both. To find a willful and material misrepresentation of fact an immigration officer must determine that (1) the petitioner or beneficiary made a false representation to an authorized official of the U.S. government, (2) the misrepresentation was willfully made, and (3) the fact misrepresented was material. *See Matter of M-,* 6 I&N Dec. 149 (BIA 1954); *Matter of Kai Hing Hui,* 15 I&N Dec. 288, 289 (BIA 1975). The term "willfully" means knowing and intentionally, as distinguished from accidentally, inadvertently, or in an honest belief that the facts are otherwise. *See Matter of Healy and Goodchild*, 17 I&N Dec. 22, 28 (BIA 1979). A "material" misrepresentation is one that "tends to shut off a line of inquiry relevant to the alien's eligibility." *Matter of Ng,* 17 I&N Dec. 536, 537 (BIA 1980).

In light of the above discussed deficiencies, we are withdrawing the Director's revocation. On remand, if the Director determines that a new NOIR is warranted, the Director must state how the record fails to demonstrate eligibility for the Schedule A classification sought under the pertinent regulatory scheme. If the Director makes a finding of willful material misrepresentation against either the Petitioner, the Beneficiary, or both, the Director must articulate the basis for the finding(s) in accordance with the above-referenced case law.

III. CONCLUSION

For the reasons discussed above, we will remand this case to the Director for further consideration.

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

Cite as *Matter of M-H-H-A-, Inc.*, ID# 1522991 (AAO June 20, 2019)