U.S. Citizenship and Immigration Services

Non-Precedent Decision of the Administrative Appeals Office

In Re: 30231445

Date: MAR. 6, 2024

Appeal of Texas Service Center Decision

Form I-140, Immigrant Petition for Alien Workers (Other Worker)

The Petitioner, a provider of janitorial services, sought to employ the Beneficiary as an industrial cleaning technician. The company requested his classification under the employment-based, third-preference (EB-3) immigrant visa category as an "other worker." *See* Immigration and Nationality Act (the Act) section 203(b)(3)(A)(iii), 8 U.S.C. § 1153(b)(3)(A)(iii). U.S. businesses may sponsor noncitizens in this category to permanently work in jobs requiring less than two years of training or experience. *Id.*

After initially granting the filing, the Director of the Texas Service Center revoked the petition's approval and dismissed the Beneficiary's following motion to reopen.[1] The Director concluded that he mistakenly approved the petition, as the evidence did not demonstrate the Petitioner's required intent to employ the Beneficiary in the offered job. On appeal, the Beneficiary contends that the Director required the Petitioner to meet non-regulatory criteria and overlooked evidence of its intent to employ the Beneficiary in the job.

In these revocation proceedings, the Petitioner bears the burden of demonstrating eligibility for the requested benefit by a preponderance of the evidence. *Matter of Ho*, 19 I&N Dec. 582, 589 (BIA 1988) (citation omitted). Exercising de novo appellate review, *see Matter of Christo's, Inc.*, 26 I&N Dec. 537, 537 n.2 (AAO 2015), we conclude that, contrary to the offered job's stated duties, the company did not establish its intent to employ the Beneficiary at industrial worksites. We will therefore dismiss the appeal.

I. LAW

Immigration as an other - or unskilled - worker generally follows a three-step process. First, a prospective employer must obtain certification from the U.S. Department of Labor (DOL) that: there are insufficient U.S. workers able, willing, qualified, and available for an offered job; and a noncitizen's

[1] Beneficiaries usually cannot file motions or appeals in petition proceedings because they are not "affected parties." *See* 8 C.F.R. § 103.3(a)(1)(iii)(B). In petition revocation proceedings, however, U.S. Citizenship and Immigration Services (USCIS) treats beneficiaries as affected parties if they, like the Beneficiary here, qualify for "portability" under section 204(j) of the Act, 8 U.S.C. § 1154(j), and properly notified USCIS of their intent to "port" to a new job or employer. *See Matter of V-S-G- Inc.*, Adopted Decision 2017-06 (AAO Nov. 11, 2017).

permanent employment in the job would not harm wages and working conditions of U.S. workers with similar jobs. Section 212(a)(5)(A)(i) of the Act, 8 U.S.C. § 1182(a)(5)(A)(i).

Second, an employer must submit an approved labor certification with an immigrant visa petition to USCIS. Section 204(a)(1)(F) of the Act, 8 U.S.C. § 1154(a)(1)(F). Among other things, the Agency determines whether a noncitizen beneficiary meets the requirements of a DOL-certified position and a requested immigrant visa category. 8 C.F.R. § 204.5(l)(3)(ii)(D), (4).

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 resident status, 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 a record, an erroneous approval may justify a petition's revocation. *See Matter of Ho*, 19 I&N Dec. at 590.

USCIS properly issues a notice of intent to revoke (NOIR) a petition's approval if the unrebutted or unexplained 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). The Agency properly revokes a petition's approval if a party does not timely respond to a NOIR or the response does not overcome the revocation grounds. *Id.* at 452.

II. FACTS

The Petitioner filed the accompanying labor certification application in April 2016 and the petition in April 2017. At that time, the Beneficiary - a South Korean native and citizen - lived in the United States in nonimmigrant student visa status, studying for a master's degree in theology. With the petition, he filed an application for adjustment of status. *See* 8 C.F.R. § 245.2(a)(2)(i)(B) (allowing concurrent filings of adjustment applications and certain employment-based immigrant visa petitions).

Eleven days after the petition's filing, USCIS approved it. In April 2018, with his adjustment application still pending, the Beneficiary began working for the Petitioner. In March 2019, USCIS issued the Petitioner a NOIR, to which the company timely responded. About two months later, with the Beneficiary's adjustment application pending for almost two years, he notified USCIS of his plans to work in the same job for a different employer. *See* section 204(j) of the Act (allowing a petition to remain valid after a beneficiary switches jobs or employers if the beneficiary filed an adjustment application that has remained unadjudicated for at least 180 days and the new job is in the same or similar occupation as the one stated in the petition).

In March 2020, USCIS found the Beneficiary eligible to port. The following month, the Director revoked the petition's approval, and the Beneficiary timely filed a motion to reopen. After the motion's dismissal, he filed this appeal.

III. ANALYSIS

A business may file an immigrant visa petition if it is "desiring and intending to employ [a noncitizen] within the United States." Section 204(a)(1)(F) of the Act. A petitioner must generally intend to employ a beneficiary under the terms and conditions of an accompanying labor certification. *See Matter of Izdebska*, 12 I&N Dec. 53, 54 (Reg'l Comm'r 1966) (affirming a petition's denial where, contrary to the accompanying labor certification, the petitioner did not intend to employ the beneficiary as a domestic worker on a full-time, live-in basis).

On the Form I-140, Immigrant Petition for Alien Workers, and the accompanying labor certification, the Petitioner stated its intent to permanently employ the Beneficiary full-time as an industrial cleaning technician. The documents indicate that he would work at the company's main office.

The Director's NOIR, however, notes that the labor certification describes the offered job as "[p]erform[ing] heavy cleaning at industrial work sites." The labor certification and Form I-140 also list the Petitioner's office address and the job's primary worksite as the same residential address, the former home of the company's president/sole owner. The NOIR asks the Petitioner to explain how the Beneficiary would perform industrial cleaning services at the residential address and to provide documentary evidence, including: copies of the company's quarterly federal payroll taxes for 2017; contracts between itself and customers; and any evidence demonstrating its engagement in industrial janitor services at its office.

The Director properly issued the NOIR. The Beneficiary's proposed work at a *residential* address cast significant doubt on the Petitioner's stated intent to employ him as an *industrial* cleaning technician. Thus, without explanation, the inconsistent worksite would have warranted the petition's denial. *See Matter of Estime*, 19 I&N Dec. at 451.

In response to the NOIR, the Petitioner's president stated that the company filed the petition because it intended to employ the Beneficiary in the offered job. As soon as the Beneficiary obtained an employment authorization document, *see* 8 C.F.R. § 274a.12(c)(9) (allowing adjustment applicants to apply for employment authorization), the president stated that the Beneficiary began working for the company in the offered job. As proof of his employment, the Petitioner submitted copies of its paystubs to him from April 2018 to December 2018.

The Director, however, noted that neither the president's letter nor the Beneficiary's paystubs established his work at industrial sites or the Petitioner's intent to employ him at such sites. The company also submitted copies of a customer's payment checks to the Petitioner from March 2018 to December 2018. But the Director noted that the checks do not reflect payments from an industrial customer. Like the Petitioner's office address, the customer's address on the checks constituted a residential address. Thus, the record supports the Director's revocation of the petition's approval, as the Petitioner did not demonstrate its intent to employ the Beneficiary at industrial worksites under the labor certification's terms.

On motion, the Director found additional evidence from the Beneficiary insufficient to demonstrate the Petitioner's intent to employ him in the offered job at industrial worksites. The Beneficiary submitted copies of an agreement and a related affidavit indicating the Petitioner's role as a

subcontractor to another company. The evidence also included a copy of a building entry card that the Beneficiary had purportedly used to enter a customer cleaning site.

The Director noted that the motion's evidence stems from 2018 and therefore does not establish the Petitioner's intent to employ the Beneficiary at industrial worksites at the time of the petition's priority date in April 2016. *See* 8 C.F.R. § 204.5(d) (explaining how to determine a petition's priority date). The Beneficiary also submitted a copy of a spreadsheet listing the Petitioner's purported customers in 2015 and 2016. As the Director found, however, without independent, corroborating evidence of the purported customers' relationships to the Petitioner at that time, the spreadsheet's information is unreliable. The Beneficiary also submitted copies of invoices to the Petitioner from a purported cleaning supplier. But the Director correctly found that these invoices do not demonstrate the Petitioner's possession of sufficient customers with industrial sites to employ the Beneficiary in the full-time offered job.

On appeal, the Beneficiary contends that the Director miscited case law. First, the Director cited a precedential case for the proposition that a job offer's bona fides is an essential element in evaluating the offer's realisticness. *See Matter of Great Wall*, 16 I&N Dec. 142, 144-45 (Acting Reg'l Comm'r 1977). The Beneficiary argues that, unlike the Director, the Regional Commissioner in *Great Wall* did not require evidence of the petitioner's "existing projects or transaction details" to demonstrate a realistic job offer. The Beneficiary states:

> The Director basically came up with [his] own additional requirements that the petitioner had to prove its financial ability in connection with its intent to employ the alien on [a] bona fide job offer despite the petitioner['s] full[] compli[ance] with the requirements to show its ability to pay the proffered wage.

Because the Petitioner demonstrated its ability to pay the proffered wage, the Beneficiary contends that the company's "job offer was . . . bona fide in its financial aspect of the petitioner's eligibility."

The facts of *Great Wall*, however, distinguish it from this case. *Great Wall* holds that the immigration service:

> must consider the merits of the petitioner's job offer, so that a determination can be made whether the job offer is realistic and whether the wage offer can be met, as well as determine whether the alien meets the minimum requirements to perform the offered job satisfactorily.

Matter of Great Wall, 16 I&N Dec. at 145. There, the specific issue was the petitioner's ability to pay the proffered wage. *Id.* at 142. In contrast, the issue here is whether the Petitioner's job offer is realistic, specifically whether the company had the ability to employ the Beneficiary at industrial worksites as stated in the offered job's duties. Because *Great Wall* focuses on a different issue, its requirements differ from those of the Director in this case. Here, the Director appropriately sought evidence of the Petitioner's ability to assign the Beneficiary to industrial worksites at the time of the petition's filing. Thus, the Director did not again ask the company to demonstrate its financial ability to pay the proffered wage. Rather, the Director required the Petitioner to establish its ability to assign

full-time work to the Beneficiary in the offered job as described on the labor certification. Thus, the Director appropriately cited *Great Wall* to support his conclusion.

The Beneficiary also claims that the Director miscited *Matter of Izdebska*, 12 I&N Dec. 53 (Reg'l Comm'r 1966). The Beneficiary contends that, unlike the petitioner in *Izdebska*, the Petitioner here complied with the terms of its labor certification.

The Director cited *Izdebska* for the proposition that a petitioner must intend to employ a beneficiary under the terms and conditions of an accompanying labor certification. *See Matter of Izdebska*, 12 I&N Dec. at 54. There, the Regional Commissioner affirmed a petition's denial because, contrary to the accompanying labor certification, the petitioner admitted that he did not intend to employ the beneficiary in the offered job on a full-time, live-in basis. *Id.* Here, the record does not support the Beneficiary's contention that the Petitioner intended to employ him under the terms of the labor certification. The labor certification states that the offered job involves cleaning industrial worksites. But the certification and the petition list the Beneficiary's primary proposed worksite as the company president's former home address. The Beneficiary has neither explained the inconsistent worksite nor demonstrated the Petitioner's ability to employ him at industrial worksites at the time of the filings of the labor certification and petition.

The Beneficiary contends that, because the labor certification application did not instruct the Petitioner on how to indicate his proposed work in the offered job at yet-to-be-assigned customer locations, the company appropriately listed its president's former home address as the primary worksite. *See Matter of HealthAmerica*, 2006-PER-0001, *20 (BALCA July 16, 2006) (en banc) (holding that "notions of fundamental fairness and due process" apply to the labor certification process). The Petitioner contends that it complied with DOL policy, which states:

> Applications involving job opportunities which require the beneficiary to work in various locations throughout the U.S. that cannot be anticipated should be filed . . . [in] the area in which the employer's main or headquarters office is located.

DOL Employment and Training Administration Field Memorandum 48-94, #10 (May 16, 1994).

The Beneficiary's argument does not persuade us. First, the DOL regulation at 20 C.F.R. § 656.11(b) - promulgated in 2007 - supersedes *HealthAmerica*'s holding. *See, e.g., Matter of Volvo Grp. N. Am.*, 2012-PER-00317, **3-4 (BALCA Apr. 10, 2015). Second, the Beneficiary omits the second part of the DOL policy. The policy further states that "the employer should indicate [on the labor certification application] that the alien will be working at various unanticipated locations throughout the U.S." *Id.* Thus, contrary to the Beneficiary's argument, the Petitioner did not comply with DOL policy, as the company did not indicate on the labor certification that he would work at various unanticipated locations.

Finally, the Beneficiary asks us to consider equities purportedly favoring him, including: his role as an "essential employee" of his current employer; and "extreme hardship" that the petition's revocation would purportedly cause him and his family. But neither the Act, regulations, case law, nor USCIS policy allow us to consider such factors in deciding the Beneficiary's appeal. Thus, we lack authorization to consider the equitable factors.

III. CONCLUSION

The Beneficiary has not demonstrated the Petitioner's intent to employ him in the offered job at industrial worksites as indicated in the job's duties. We will therefore affirm the petition's revocation.

ORDER: The appeal is dismissed.