U.S. Citizenship and Immigration Services

Non-Precedent Decision of the Administrative Appeals Office

In Re: 37140370

Date: MAR. 11, 2025

Appeal of Texas Service Center Decision

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

The Petitioner, a donut shop with two employees, sought to employ the Beneficiary as a donut baker. It requested classification of the Beneficiary under the third-preference, immigrant classification for other workers. Immigration and Nationality Act (the Act) section 203(b)(3)(A)(i), 8 U.S.C. § 1153(b)(3)(A)(i). This employment-based category allows a U.S. business to sponsor a foreign national for lawful permanent resident status based on a job offer requiring less than two years of training or experience.

After initially approving the Form I-140, Immigrant Petition for Alien Worker (petition), the Texas Service Center Director revoked the petition's approval. The Director concluded that the Petitioner did not establish that it made a bona fide job offer that was open to available U.S. workers. The Director also found that the Petitioner willfully misrepresented a material fact in claiming that the job offer was open and available to U.S. workers. The matter is now before us on appeal pursuant to 8 C.F.R. § 103.3.

The Petitioner bears the burden of proof to demonstrate eligibility by a preponderance of the evidence. *Matter of Chawathe*, 25 I&N Dec. 369, 375-76 (AAO 2010). We review the questions in this matter de novo. *Matter of Christo's, Inc.*, 26 I&N Dec. 537, 537 n.2 (AAO 2015). Upon de novo review, we will withdraw the Director's decision and remand the matter for entry of a new decision consistent with the following analysis.

Before we discuss the merits of the appeal, below, we will address a threshold issue. A petitioner must sign their benefit request. *See* 8 C.F.R. § 103.2(a)(2). An appeal is a benefit request. *See* 8 C.F.R. § 1.2. In this case, the signature on Form I-290B, Notice of Appeal or Motion, is visibly different from other examples of the Petitioner's president's signature in the record. Given this disparity, it does not appear that the Petitioner personally signed Form I-290B. On remand, the Petitioner must provide additional corroboration to verify the signature.

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.

At 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, a petition's erroneous approval may justify its revocation. *Matter of Ho*, 19 I&N Dec. 582, 590 (BIA 1988). USCIS properly issues a notice of intent to revoke (NOIR) a petition if the unrebutted and unexplained record would have warranted the filing's denial. *Matter of Estime*, 19 I&N Dec. 450, 451 (BIA 1987). USCIS properly revokes a petition's approval if a petitioner does not respond to a properly issued NOIR, or their NOIR response does not overcome all alleged revocation grounds. *Id.*at 451-52.

II. ANALYSIS

In this petition, and on its accompanying labor certification, the Petitioner attested to its intent to permanently employ the Beneficiary in the full-time job of donut baker. The labor certification states that the offered job requires completion of high school or a foreign equivalent, and five months of experience in the job offered. The proffered wage for the position is $21,000 a year.

On June 26, 2019, USCIS interviewed the Beneficiary in connection with her Form I-485, Application to Register Permanent Residence or Adjust Status. Based on information revealed during this interview, the Director issued a NOIR on May 5, 2022, stating:

> During this interview, [the Beneficiary] admitted that there was a prior arrangement made between the petitioner and [the Beneficiary] to be hired at the petitioner's business and for the Beneficiary to hire the owner of [the Petitioner]'s spouse … at the beneficiary's [donut shop] company… It appears that the petitioner intends to employ the beneficiary outside the terms of the labor certification, as the petitioner signed under oath that the job offer was open and available to U.S. citizens. However, the petitioner and beneficiary had prearranged the beneficiary's hiring… Further, it appears that the petitioner misrepresented that the job was open and available to U.S. workers, as the job was created to sponsor the beneficiary because the beneficiary had sponsored the petitioner's spouse, which is material to whether the beneficiary is eligibility for the requested benefit.

The Director properly issued the NOIR.

Consistent with policy and regulations, the NOIR notified the Petitioner that a response must be received within 30 days (33 days if the notice was received by mail). *See* 8 C.F.R. §§ 205.2, 246.1. *See also* 1 *USCIS Policy Manual* E.(10)(D), www.uscis.gov/policy-manual. However, during the

coronavirus (COVID-19) pandemic, USCIS issued guidance that a response to a NOIR would be accepted if filed within 60 days of the unfavorable decision. Based on this extended deadline, the Petitioner's response to the Director's May 5, 2022, NOIR was due on or before July 7, 2022, which includes the 60-day period plus three days for mailing.

On August 22, 2024, having received no response to the NOIR, the Director revoked the petition's approval. The Director concluded that, because of the prearranged hiring, the Petitioner had not established that it made a bona fide job offer to the Beneficiary, or that it desires and intends to employ the Beneficiary in the offered position. The Director also found that the Petitioner willfully misrepresented a material fact in signing the declaration on the labor certification stating that the job opportunity has been and clearly is open to any U.S. worker.

On appeal, the Petitioner asserts that the prearranged employment does not negate the existence of a bona fide job offer. The Petitioner further asserts that there was no misrepresentation in declaring that the job opportunity was open and available to U.S. workers because it complied with all DOL regulations to obtain the labor certification. The Petitioner submits additional evidence, including a copy of its NOIR response, its response to a DOL audit of the underlying labor certification, and copies of the Beneficiary's Internal Revenue Service (IRS) Forms W-2, Wage and Tax Statements.

We note that the Petitioner's NOIR response is dated August 2, 2022, nearly one month after the July 7, 2022 deadline for a response. We further note that the Petitioner incorrectly states in its response that the deadline is August 9, 2022, which is beyond the authorized 60-day extension period granted during the COVID-19 pandemic. Because the Petitioner's response to the NOIR was untimely, the Director did not consider the response and properly issued the notice of revocation.[1] *Matter of Estime*, 19 I&N Dec. 450 at 451-52.

As noted above, the Director revoked the petition's approval on three grounds: 1) that the Petitioner did not make a bona fide job offer as the job was not open and available to U.S. workers; 2) that the Petitioner has a prearranged commitment to hire the Beneficiary, and; 3) that the Petitioner willfully misrepresented that the job was open and available to U.S. workers. Upon review, we will withdraw the Director's findings and remand the matter for further review and entry of a new decision, consistent with our discussion below.

A. Bona Fide Job Opportunity

An employer filing a labor certification must attest that "the job opportunity has been and is clearly open to any U.S. worker." 20 C.F.R. § 656.10(c)(8). This attestation "infuses the recruitment process with the requirement of a bona fide job opportunity; not merely a test of the job market." *Matter of Modular Container Sys., Inc.,* 89-INA-228, 1991 WL 223955, at 7 (BALCA 1991) (en banc). The petitioner has the burden of establishing that a *bona fide* job opportunity exists when it is asked to show that the job is clearly open to U.S. workers. *See Matter of Amger Corp.*, 87-INA-545 (BALCA 1987); *see also* 8 U.S.C. § 1361; 20 C.F.R. § 656.17(l).

[1] The record does not include proof of delivery of the NOIR response, such as a mailing label with tracking information or an envelope. Therefore, it is unclear whether the Petitioner ever mailed the NOIR response or whether USCIS ever received it. However, if the response was untimely, the Director need not have considered it.

The term "bona fide job opportunity" generally refers to a job's availability to U.S. workers. The Director concluded that, at the time the petition was filed, the offered position was not open and available to U.S. workers. However, the Director's use of the term "bona fide job offer" as a ground for revocation is a misstatement. In our discussion of this matter, we will refer to this ground as a "bona fide job opportunity."

As noted above, on this petition and on the accompanying labor certification, the Petitioner attested to its intent to permanently employ the Beneficiary in the full-time job of donut baker. The Director revoked the petition's approval because the Petitioner had prearranged to hire the Beneficiary and willfully misrepresented that a bona fide job opportunity exists. On appeal, the Petitioner asserts that the prearrangement does not establish that the job opportunity was not bona fide. We agree.

Because of the design of the labor certification process, every petitioner who files a labor certification has already identified a foreign national that they wish to hire prior to the required recruitment. The Petitioner's identification of the Beneficiary prior to the required recruitment, or even its employment of the Beneficiary in the offered job, does not indicate that the job is not open to U.S. workers. Rather, it indicates that the Petitioner followed DOL regulations after identifying an alien for the position. *See, e.g.,* 20 C.F.R. § 656.17.

On appeal, the Petitioner submits its response to a DOL conducted audit of its application which includes copies of the pre-filing recruitment efforts and results for the position of donut baker. The Petitioner advertised for the position of donut baker in the newspaper and online with the state workforce agency. In the report of recruitment results, the Petitioner states that "no applicant was rejected because no one applied for this job." Because the record does not support the conclusion that the job opportunity was not clearly open to U.S. workers, we will withdraw this finding. However, additional evidence submitted on appeal casts doubt about the Petitioner's intent to employ the Beneficiary in the offered position on a permanent and full-time basis.

B. 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 Matter of Izdebska*, 12 I&N Dec. 54, 55 (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 appeal and in its NOIR response, the Petitioner states that the prearrangement of employment with the Beneficiary was due to "difficult circumstances" as "both of them wanted and needed someone to work as a baker **for some time so that they can seek a different and better job, business or career**...To pursue such a goal in their lives, they need a baker for their own store **temporally**." (Emphasis added.) These statements cast doubt on the permanent nature of the offered position. Rather, these statements tend to indicate that the offered position is temporary or for a limited period of time.

Other evidence in the record casts further doubt on the Petitioner's declaration on the labor certification and the petition that the job opportunity is for full-time, permanent employment. On appeal, the Petitioner states, "After August 2019, [it] no longer needed [the Beneficiary's] service, and [was] no longer interested in sponsoring her." The Petitioner submits IRS Form W-2 that it issued to the Beneficiary in 2018 and 2019, as well as pay records from January 2018 to December 2019. The records demonstrate that the Petitioner paid the Beneficiary $1,800 each month beginning in July 2018 and ending in August 2019. A petitioner must establish eligibility for a requested benefit as of a petition's filing and continuing throughout its adjudication. 8 C.F.R. § 103.2(b)(1). The Petitioner's statement that it no longer needed the Beneficiary's services one year after she began employment casts doubt on the Petitioner's intention to permanently employ her as a donut baker.

On remand, the Director may wish to issue a new NOIR outlining the deficiencies above, requesting additional independent objective evidence in support that it had a full-time permanent position in the job offered available for the beneficiary, and allowing the Petitioner an opportunity to respond.

C. Willful Misrepresentation of a Material Fact

The Director also found the Petitioner's willful misrepresentation of the offered job's availability to U.S. workers. Misrepresentations are willful if they are "deliberately made with knowledge of their falsity." *Matter of Valdez*, 27 I&N Dec. 496, 498 (BIA 2018) (citations omitted). A misrepresentation is material when it has a "natural tendency to influence, or [be] capable of influencing, the decision of the decision-making body to which it was addressed." *Id.*

As noted above, the record does not support the conclusion that the job opportunity was not clearly open to U.S. workers. Therefore, the Director's finding of willful misrepresentation of a material fact against the Petitioner is withdrawn. However, the record includes evidence that was not before the Director. On remand, the Director should review the Petitioner's evidence, including evidence submitted on appeal, to determine whether the Petitioner correctly represented the permanent and full-time nature of the job opportunity on the labor certification and in the petition.

D. The Beneficiary's Qualifying Experience

The regulation at 8 C.F.R. § 204.5(l)(3) provides:

> (ii) *Other documentation—*
>
> > (A) *General.* Any requirements of training or experience for skilled workers, professionals, or other workers must be supported by letters from trainers or employers giving the name, address, and title of the trainer or employer, and a description of the training received or the experience of the alien.

Although not addressed by the Director, the Petitioner should have an opportunity to address information that casts doubt on the Beneficiary's claimed employment experience. On the labor certification, the Beneficiary claims to have been employed as a donut baker with [redacted] from January 12, 2016 to July 13, 2016. In support of this experience, the Petitioner submitted

a "Certificate of Employment" dated March 10, 2019. The letter is signed by [redacted], president of [redacted]

A review of the record reveals that the Beneficiary has a familial relationship with the author of the employment experience letter. On the petition, the Beneficiary lists her spouse as [redacted]

To be probative, a document must generally provide: (1) the nature of the affiant's relationship, if any, to the affected party; (2) the basis of the affiant's knowledge; and (3) a specific - rather than merely conclusory - statement of the asserted facts based on the affiant's personal knowledge. *Matter of Chin*, 14 I&N Dec. 150, 152 (BIA 1972); *see also* 8 C.F.R. § 103.2(b)(2)(i) (requiring affidavits in lieu of unavailable required evidence from "persons who are not parties to the petition who have direct personal knowledge of the event and circumstances"); *Matter of Kwan*, 14 I&N Dec. 175, 176-77 (BIA 1972); *Iyamba v. INS*, 244 F.3d 606, 608 (8th Cir. 2001); *Dabaase v. INS*, 627 F.2d 117, 119 (8th Cir. 1980). While a petitioner may submit a letter or affidavit that contains hearsay or biased information, as may be the case here, such factors will affect the weight to be accorded the evidence in an administrative proceeding. *See Matter of D-R-*, 25 I&N Dec. 445, 461 (BIA 2011) (citations omitted). Probative evidence beyond a letter or affidavit may be required to resolve inconsistencies or discrepancies in the record. *See Matter of Ho*, 19 I&N Dec. 582, 591-92 (BIA 1988). Ultimately, to determine whether a petitioner has established eligibility for a requested benefit by a preponderance of the evidence, USCIS must examine each piece of evidence - both individually and within the context of the entire record - for relevance, probative value, and credibility. *Matter of Chawathe*, 25 I&N Dec. 369, 376 (AAO 2010).

On remand the Director should further consider the Beneficiary's qualifications for the offered position, and may wish to request additional independent evidence to verify the claimed experience based on the relationship between the letter's author and the Beneficiary.

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 the entry of a new decision consistent with the foregoing analysis.