U.S. Citizenship and Immigration Services

Non-Precedent Decision of the Administrative Appeals Office

In Re: 34845094

Date: MAR. 17, 2025

Appeal of Texas Service Center Decision

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

The Petitioner, a real estate investment company, seeks to employ the Beneficiary as a real estate manager. The company requests her classification under the employment-based, third-preference (EB-3) immigrant visa category as a "skilled worker." Immigration and Nationality Act (the Act) section 203(b)(3)(A)(i), 8 U.S.C. § 1153(b)(3)(A)(i). Businesses may sponsor noncitizens for U.S. permanent residence in this category to work in jobs requiring at least two years of training or experience. *Id.*

After first granting the petition, the Director of the Texas Service revoked its approval. The Director concluded that the Petitioner did not demonstrate its required ability to pay the offered job's proffered wage or the Beneficiary's qualifying experience for the job. The Director also found insufficient evidence of the job's availability to U.S. workers and that the accompanying certification from the U.S. Department of Labor (DOL) willfully conceals a "familial" relationship between the Beneficiary and one of the company's owners. The Director dismissed the Petitioner's following combined motions to reopen and reconsider as untimely.

On appeal, the Petitioner contends that the Director neglected to notify it or the Beneficiary of the Director's intent to revoke the petition or allow them a chance to respond before the decision.

In 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). Exercising de novo appellate review, *see Matter of Christo's, Inc.*, 26 I&N Dec. 537, 537 n.2 (AAO 2015), we conclude that the Director properly notified the company of her intent to revoke the petition's approval and properly dismissed the company's motions as untimely. We will therefore dismiss the appeal.

I. LAW

Immigration as a skilled worker generally follows a three-step process. First, a prospective employer must obtain DOL certification that: 1) there are insufficient U.S. workers able, willing, qualified, and available for an offered job; and 2) a noncitizen's 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 a DOL-approved labor certification with an immigrant visa petition to U.S. Citizenship and Immigration Services (USCIS). Section 204(a)(1)(F) of the Act. Among other things, USCIS determines whether a noncitizen beneficiary meets the requirements of a DOL-certified job 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(a) of the Act, 8 U.S.C. § 1255(a).

II. ANALYSIS

A. Facts

The Petitioner filed this petition in April 2016. The Director approved it the following month. In May 2020, the Director mailed the company a notice of intent to revoke (NOIR) the approval. The NOIR alleged the revocation grounds on which the petition's approval was ultimately revoked.

USCIS records show that neither an attorney nor an authorized representative represented the Petitioner during the petition proceedings. So, the Director mailed the NOIR to the Petitioner at the address the company last listed in the approved petition. Later that month, the U.S. Postal Service returned the notice to USCIS as "undeliverable." USCIS received no NOIR response from the Petitioner. In August 2021, the Agency mailed a revocation decision to the company at the same address listed on the NOIR.

In April 2023, the Petitioner filed its combined motions to reopen and reconsider before the Director. The motions indicated that, since the petition's approval in 2016, the company had changed its address and thus did not immediately receive the 2020 NOIR or the 2021 revocation decision.[1] The company stated that it learned of the petition's revocation after the Beneficiary contacted a U.S. senator's office seeking information about her adjustment of status application. In May 2024, USCIS dismissed the company's motions as untimely.

A. The NOIR's Validity

"[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. A petition's erroneous approval may justify its revocation. *Matter of Ho*, 19 I&N Dec. at 590.

Unless a petition's approval is automatically revoked under 8 C.F.R. § 205.1, USCIS must notify a petitioner of the proposed revocation grounds. 8 C.F.R. § 205.2(a), (b). "The petitioner . . . must be

[1] The Petitioner's annual reports indicate that it changed its address between April 2016 and March 2017. *See* Fla. Dep't of State, Div. of Corps., "Search Records," https://dos.fl.gov/sunbiz/search/. Also, the record shows the Petitioner's relocation to a site within the same "metropolitan statistical area" as its prior address. Thus, the company's labor certification and the offered job's prevailing wage remain valid for the new area of intended employment. *See* 20 C.F.R. § 656.3 (defining the term "area of intended employment").

given the opportunity to offer evidence in support of the petition . . . and in opposition to the grounds alleged for revocation of the approval." 8 C.F.R. § 205.2(b). USCIS must also provide a petitioner with a written decision explaining the specific reasons for the revocation. 8 C.F.R. § 205.2(c).

USCIS properly issues a NOIR if the evidence 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 timely respond to a NOIR or if its response does not overcome the alleged revocation grounds, the Agency may revoke the petition. *Id.* at 450-51. Even if a petitioner does not respond to a NOIR, we cannot sustain a revocation based on a NOIR containing an unsupported statement or an unstated presumption. *Id.* at 452.

On appeal, the Petitioner contends that the NOIR's allegations would not have warranted the petition's denial. We will therefore first review the NOIR's alleged revocation grounds.

1. The Beneficiary's Experience

A petitioner must demonstrate that a beneficiary met an offered job's experience requirements by a petition's priority date. *Matter of Wing's Tea House*, 16 I&N Dec. 158, 160 (Acting Reg'l Comm'r 1977). This petition's priority date is October 9, 2015, the date DOL accepted the Petitioner's labor certification application for processing. *See* 8 C.F.R. § 204.5(d) (explaining how to determine a petition's priority date).

The Petitioner's labor certification states that the offered job of real estate manager requires at least two years' experience "in the job offered." The company indicated on the labor certification application that it would not accept experience in an alternate occupation. Unless a labor certification specifies otherwise, qualifying experience means full-time experience. *Matter of Boodell & Domanskis, LLC*, 2012-PER-01275, *3 (BALCA May 11, 2016).

On the labor certification application, the Beneficiary attested that, by the petition's priority date, she gained more than three years of full-time, qualifying experience. She stated that [redacted] LLC, a U.S. real estate company, employed her as a real estate manager from March 2008 to April 2011. The application form instructed her to list all her employment for the prior three years and any other qualifying experience. She listed neither recent employment nor any other qualifying experience.

To demonstrate qualifying experience, a petitioner must submit a letter from a beneficiary's former employer. 8 C.F.R. § 204.5(l)(3)(ii)(A). The letter must include an employer's name, title, and address, and describe a beneficiary's experience. *Id.* Consistent with the regulation, the Petitioner submitted a letter from Pacific confirming the Beneficiary's claimed employment.

The NOIR, however, alleged discrepancies in the Beneficiary's claimed employment at [redacted] An unsuccessful 2009 petition for her by [redacted] Inc., a former company she founded, contained copies of IRS Forms W-2, Wage and Tax Statements, showing [redacted]

employment of her in 2008 and 2009.[2] [redacted] petition also contained an organizational chart indicating the company's employment of the Beneficiary in December 2008. Further, her 2009 adjustment application included a Form G-325A, Biographic Information, on which she indicated [redacted] employment of her from June 2004 through the form's filing in July 2009. Her resume in this petition indicates her employment by [redacted] from February 2005 to February 2015. The NOIR also noted online government information indicating the Beneficiary's service as an officer in three other companies during her claimed tenure with [redacted] from March 2008 to April 2011. *See* Fla. Dep't of State, *supra*, https://dos.fl.gov/sunbiz/search/.

The discrepancies in the Beneficiary's employment dates and her service as an officer of three other companies cast doubt on her claimed full-time qualifying experience with [redacted] from March 2008 to April 2011. *See Matter of Ho*, 19 I&N Dec. at 591 (requiring a petitioner to resolve inconsistencies with independent, objective evidence pointing to where the truth lies).

On appeal, the Petitioner cites evidence that the Beneficiary has had a U.S. real estate sales license since 2008 and provides an "agent production and inventory report" listing her sales. The report indicates that, from October 2012 to October 2021, she sold more than $6.6 million worth of real estate. The company contends that the report demonstrates the Beneficiary's qualifying experience from October 2012 until the petition's priority date in October 2015. The report does not identify her employers but indicates that, during that three-year period, she sold more than $2.4 million in real estate.

But evidence of the Beneficiary's real estate licensure and sales are insufficient to establish her claimed qualifying full-time experience. Her permission to sell real estate since 2008 does not demonstrate her claimed experience in the offered job of real estate manager. The labor certification states that the offered job involves overseeing maintenance, managing operations, administrating properties, and acting as a liaison between "onsite managers" and tenants. The job's duties exclude real estate sales. *See Matter of Symbioun Techs., Inc.*, 2010-PER-01422, *4 (BALCA Oct. 24, 2011) (stating that "'experience in the job offered' is experience performing the key duties of the job opportunity, specifically those listed [on the labor certification]"). The report indicates that the Beneficiary sold real estate, and its title suggests that she worked as a real estate "agent." But, contrary to the labor certification's requirement, the report does not demonstrate her work in the offered job of real estate manager.

Also, the Beneficiary's purported work from October 2012 to October 2015 does not support her claimed qualifying experience from March 2008 to April 2011. If she worked in the offered job after April 2011, the Petitioner has not explained why she omitted that employment from the labor certification application. *See Matter of Leung*, 16 I&N Dec. 12, 14 (Distr. Dir. 1976), *disapproved of on other grounds by Matter of Lam*, 16 I&N Dec. 432, 434 (BIA 1978) (disbelieving an adjustment applicant's claim of qualifying experience at a business he omitted as a former employer on his labor certification application).

[2] Although omitted from the NOIR, the 2009 petition also contains copies of [redacted] quarterly state payroll tax returns for 2008 and 2009, indicating the company's employment of the Beneficiary during both of those entire years.

Further, the agent production and inventory report is unreliable. The record does not identify the report's source. Thus, the Petitioner has not demonstrated the report's authenticity or accuracy.

For the foregoing reasons, the record does not establish the Beneficiary's qualifying experience for the offered job. Thus, the NOIR's allegations would have warranted the petition's denial on this ground.

2. Ability to Pay the Proffered Wage

A petitioner must also demonstrate its continuing ability to pay an offered job's proffered wage, from a petition's priority date until a beneficiary obtains permanent residence. 8 C.F.R. § 204.5(g)(2). Evidence of ability to pay must generally contain copies of a petitioner's annual reports, federal tax returns, or audited financial statements. *Id.*

When assessing ability to pay, USCIS examines whether a petitioner paid a beneficiary the full proffered wage each year, beginning with the year of the petition's priority date. 6 *USCIS Policy Manual* E.4(C)(1), www.uscis.gov/policy-manual. If a petitioner did not pay the full proffered wage or did not pay a beneficiary at all, USCIS considers whether the business generated annual amounts of net income or net current assets sufficient to pay any differences between the proffered wage and the wage paid. 6 *USCIS Policy Manual* E.4(C)(2). If net income and net current assets are insufficient, the Agency may consider other factors potentially affecting a petitioner's ability to pay a proffered wage. *Matter of Sonegawa*, 12 I&N Dec. 612, 614-15 (Reg'l Comm'r 1967); *see also* 6 *USCIS Policy Manual* E.4(C)(3).[3]

The Petitioner's labor certification states the proffered wage of the offered real estate manager job as $61,485 a year. As previously indicated, the petition's priority date is October 9, 2015. At the time of the petition's filing in April 2016, regulatory required evidence of the Petitioner's ability to pay in 2016 was not yet available. We will therefore consider the company's ability to pay in only 2015, the year of the petition's priority date.

The Petitioner did not submit any evidence that it employed the Beneficiary in 2015. Thus, based solely on wages, the company has not demonstrated its ability to pay the proffered wage.

The Petitioner provided a copy of its federal income tax return for 2015. The return reflects net income of $91,395 and net current assets of -$1,640,213. The net income amount exceeds the annual proffered wage of $61,485. The Petitioner's tax return therefore appears to demonstrate the company's ability to pay the proffered wage.

The NOIR, however, noted that USCIS obtained records from the revenue department of the Petitioner's home state. The state records list the company's total wage payments for the final three quarters of 2015 as $28,613.50. The Petitioner's tax return states that the company paid $152,369 in salaries and wages for the entire year. Doubting that the Petitioner paid the remaining wages of

[3] Federal courts have upheld USCIS' method of determining a petitioner's ability to pay a proffered wage. *See, e.g., River St. Donuts, Inc. v. Napolitano*, 558 F.3d 111, 118 (1st Cir. 2009); *see also United States v. Jimenez*, 972 F.3d 1183, 1193 (11th Cir. 2020) (discussing evidence needed to demonstrate a petitioner's ability to pay).

$123,755 in the first quarter of 2015, USCIS found the information on the company's tax return to be unreliable. *See Matter of Ho*, 19 I&N Dec. at 591 (requiring petitioners to resolve inconsistencies of record).

On appeal, as evidence of its ability to pay the proffered wage in 2015, the Petitioner cites materials indicating its ownership of 22 real estate properties and copies of its bank statements at that time. But the Petitioner does not explain the apparent wage-payment discrepancy between its 2015 tax return and the state revenue records. Nor does the company otherwise demonstrate the reliability of its tax return for that year. Also, real estate is not considered available to pay a proffered wage because it can take more than a year to convert real property into cash. *See* Jae K. Shim, Joel G. Siegel, Nick Dauber, *Barron's Dictionary of Accounting Terms* (6th ed. 2014) (defining the term "current asset"). Further, the company has not demonstrated that its 2015 tax return did not already reflect its bank account funds as part of its current assets.

The Petitioner has not demonstrated its ability to pay the proffered wage. The NOIR therefore would have also warranted the petition's denial based on this revocation ground.

3. The Offered Job's Availability

Congress assigned DOL to make determinations regarding jobs' availability to U.S. workers. *See* section 212(a)(5)(A)(i)(I) 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). We will therefore withdraw this revocation ground.

4. Misrepresentations

Misrepresentations are willful if they are "deliberately made with knowledge of their falsity." *Matters of Valdez*, 27 I&N Dec. 496, 498 (BIA 2018). 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." *United States v. Boffil-Rivera*, 607 F.3d 736, 741 (11th Cir. 2010); *Matters of Valdez*, 27 I&N Dec. at 498.

Question C.9 of the Petitioner's labor certification application, in relevant part, asked the company: "[I]s there a familial relationship between the owners, stockholders, partners, corporate officers, or incorporators, and the alien?" The Petitioner checked the box marked: "No." The NOIR notes that online government records identify the Beneficiary and a member of the petitioning limited liability company as co-owners of a firm in 2010 and 2011, before the labor certification application's filing.

Contrary to the Director's finding, the record does not indicate that the Petitioner's response to Question C.9 on the labor certification application misrepresented a fact. The question asked about a family relationship between the Beneficiary and the company's principals. Evidence that she previously owned a business with one of the Petitioner's members does not constitute a family relationship. The record otherwise lacks evidence of such a relationship between the Beneficiary and the company's principals. Thus, the record does support the misrepresentation finding.

Regarding the Beneficiary's misrepresentation, the Director cited the discrepancies indicating that, contrary to the Beneficiary's attestation on the labor certification, she did not work full-time for [redacted] from March 2008 to April 2011.

The Forms W-2 and other employment records are strong evidence that the Beneficiary worked for Multinvestments, rather than [redacted], in 2008 and 2009, and that she willfully misrepresented her employment by [redacted] from March 2008 to April 2011. The Petitioner has offered no other explanation for the contrary evidence. We will therefore affirm the Director's misrepresentation finding against the Beneficiary.

The NOIR's allegations regarding the Beneficiary's qualifying experience and the Petitioner's ability to pay the proffered wage would have warranted the petition's denial. The Director therefore properly issued the NOIR. We will next review the Director's dismissal of the company's motions as untimely.

B. The Untimely Motions

USCIS must generally receive motions to reopen and reconsider within 33 days of the mailed denials or dismissals that preceded them. *See* 8 C.F.R. §§ 103.5(a)(1)(i), 103.8(b). The Agency may excuse a late-filed motion to reopen "where it is demonstrated that the delay was reasonable and was beyond the control of the applicant or petitioner." 8 C.F.R. § 103.5(a)(1)(i).

The Petitioner concedes that its combined motions to reopen and reconsider were untimely. USCIS issued the revocation decision in August 2021; the company filed its motions more than a year and a half later, in April 2023. No provision allows USCIS to excuse a late-filed motion to reconsider. We will therefore affirm the Director's dismissal of the company's motion to reconsider as untimely.

The Petitioner, however, contends that USCIS did not mail the NOIR or revocation decision to the company's proper address. The Petitioner asserts that the Agency's error was beyond the company's control and should excuse its late-filed motion to reopen. The Petitioner argues that, after receiving the returned NOIR as undeliverable, USCIS should have located the company's current address on its home state's corporation website and remailed the notice to the company. The Petitioner's motion to reopen contained this argument. The motion also included a copy of an e-mail message from the U.S. Senator's office to the Beneficiary, notifying her of the petition's revocation and attaching a copy of the decision.

The Director's decision on the Petitioner's motions should have addressed the company's argument for excusing its late-filed motion to reopen. *See Tan v. U.S. Att'y Gen.*, 446 F.3d 1369, 1374 (11th Cir. 2006) (quotation omitted) (requiring an agency to "consider the issues raised"). But, contrary to the applicable regulation, the company has not demonstrated that its delay in filing the motion was "reasonable." *See* 8 C.F.R. § 103.5(a)(1)(i). As previously indicated, the Petitioner filed the motion in April 2023. The copy of the e-mail message notifying the Beneficiary of the petition's revocation, however, bears a June 2022 date. The Petitioner has not explained the reasonableness of its ten-month delay in filing the motions after learning of the petition's revocation.

Also, contrary to the Petitioner's argument, regulations did not require the Director, after receiving the returned NOIR as undeliverable, to find the company's new address and remail the notice to it. We

acknowledge that USCIS must notify a petitioner of the Agency's intent to revoke and any revocation decision. 8 C.F.R. § 205.2(b), (c). But "[r]outine service consists of mailing the notice by ordinary mail addressed to the affected party and [their] attorney or representative of record at [their] last known address." 8 C.F.R. § 103.8(a)(1). "Service by mail is complete upon serving." 8 C.F.R. § 103.8(b).

By mailing the NOIR and the revocation decision to the Petitioner at its last known address, USCIS complied with the applicable regulations. The company's address on the NOIR and revocation decision matches the last address the company listed on its petition. Upon mailing the notices to the last known address, USCIS completed the required services. *See Wah Yuet (USA) Inc. v. Ashcroft*, No. CV 04-9145 CAS (SSx), 2006 WL 8430892, *7 (C.D. Cal. Apr. 13, 2006) (affirming USCIS' service of a NOIR to a petitioner at its last known address rather than at its then-current address).

The Petitioner also asserts the Beneficiary's eligibility to "port" to a new job. *See* section 204(j) of the Act. The company therefore contends that USCIS erred by not mailing the NOIR and the revocation decision to the Beneficiary.

Because beneficiaries are not "affected parties" with standing in petition proceedings, *see* 8 C.F.R. § 103.3(a)(1)(iii)(B), USCIS generally does not send notices to beneficiaries. But the Agency treats beneficiaries in revocation proceedings as affected parties if they qualify for portability and properly requested to port. *Matter of V-S-G- Inc.*, Adopted Decision 2017-06, *10 (AAO Nov. 11, 2017). Under the Act's portability provision, petitions for beneficiaries who have filed adjustment applications that have remained unadjudicated for at least 180 days "shall remain valid," if the beneficiaries change jobs or employers and their new jobs are in the same or similar occupational classifications as listed in their petitions. Section 204(j) of the Act; *see also Kurapati v. U.S. Bureau of Citizenship & Immigration Servs.*, 775 F.3d 1255, 1258 (11th Cir. 2014) .

The Petitioner asserts the Beneficiary's portability qualifications. At the time of the NOIR's issuance in 2020, her petition was in revocation proceedings, and her adjustment application had remained pending for more than 180 days since its filing in May 2016. Contrary to *V-S-G-*, however, the Petitioner has not demonstrated the Beneficiary's proper request to port. *See Matter of V-S-G-*, *supra*, at *10 (allowing portability-eligible beneficiaries to participate in revocation proceedings if they "*have properly requested to port*") (emphasis added). To request portability, beneficiaries must file Forms I-485 Supplement J, Confirmations of Valid Job Offers or Requests for Job Portability under INA Section 204(j), asking to port to a new job. 8 C.F.R. § 245.25(a). USCIS records show the Beneficiary's filing of a Form I-485 Supplement J in July 2019. But, on the form, she did not request portability to a new job. Rather, she indicated that she would work for the Petitioner under its original job offer. USCIS records do not indicate that she filed any later Forms I-485 Supplement J.

Because the Beneficiary had not requested to port, she did not qualify for treatment as an affected party in these revocation proceedings. USCIS therefore need not have mailed her the NOIR or the revocation decision.

For the foregoing reasons, USCIS mailed the NOIR and the revocation decision to the Petitioner at the proper address. The Director therefore properly dismissed both of the company's motions as untimely.

III. CONCLUSION

The Director properly issued the NOIR and dismissed the Petitioner's combined motions as untimely. We will therefore affirm revocation of the petition's approval.

ORDER: The appeal is dismissed.