U.S. Citizenship and Immigration Services

Non-Precedent Decision of the Administrative Appeals Office

MATTER OF P-, INC.

DATE: MAR. 24, 2017

APPEAL OF TEXAS SERVICE CENTER DECISION

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

The Petitioner, a convenience store, seeks to permanently employ the Beneficiary in the United States as a store manager. It requests classification of the Beneficiary as a skilled worker under the third preference immigrant category. *See* Immigration and Nationality Act (the Act) section 203(b)(3)(A)(i), 8 U.S.C. § 1153(b)(3)(A)(i). This classification allows a U.S. employer to sponsor a foreign national with at least two years of training or experience for lawful permanent resident status.

The Director of the Texas Service Center initially approved the petition, but subsequently issued a notice of intent to revoke (NOIR) the petition's approval. The Director revoked the petition's approval and the Petitioner appealed the revocation to our office. On appeal, we remanded the case to the Director for entry of a new decision. The Director subsequently issued a notice of intent to deny (NOID) and ultimately denied the petition.

The matter is now before us on appeal. The Petitioner asserts that it established eligibility and that the Director erred in denying the petition.

Upon *de novo* review, we will remand the matter to the Director for entry of a new decision.

I. LEGAL FRAMEWORK

Employment-based immigration is generally a three-step process. First, an employer must obtain an approved labor certification from the U.S. Department of Labor (DOL).[1] *See* section 212(a)(5)(A)(i) of the Act, 8 U.S.C. § 1182(a)(5)(A)(i). As required by statute, an ETA Form 9089, Application for Permanent Employment Certification (labor certification), approved by the DOL, accompanies the petition. By approving the labor certification, the DOL certified that there are insufficient U.S. workers who are able, willing, qualified, and available for the offered position. Section 212(a)(5)(A)(i)(I) of the

[1] The priority date of a petition is the date the DOL accepted the labor certification for processing. *See* 8 C.F.R. § 204.5(d). A petitioner must establish the elements for the approval of the petition at the time the priority date is established and continuing until the beneficiary obtains lawful permanent residence. *See* 8 C.F.R. §§ 204.5(g)(2), 103.2(b)(1), (12); *see also Matter of Wing's Tea House*, 16 I&N Dec. 158, 159 (Acting Reg'l Comm'r 1977); *Matter of Katigbak*, 14 I&N Dec. 45, 49 (Reg'l Comm'r 1971).

Act. The DOL also certified that the employment of a foreign national in the position will not adversely affect the wages and working conditions of domestic workers similarly employed. Section 212(a)(5)(A)(i)(II) of the Act.

Next, U.S. Citizenship and Immigration Services (USCIS) must approve an immigrant visa petition. *See* section 204 of the Act, 8 U.S.C. § 1154. Finally, the foreign national must 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.

II. REVOCATION OF PETITION'S APPROVAL

Section 205 of the Act, 8 U.S.C. § 1155, provides that "[t]he Attorney General [now Secretary, Department of Homeland Security], may, at any time, for what he deems to be good and sufficient cause, revoke the approval of any petition approved by him under section 204." The realization by the Director that the petition was approved in error may be good and sufficient cause for revoking the approval. *See Matter of Ho,* 19 I&N Dec. 582, 590 (BIA 1988).

The regulation at 8 C.F.R. § 205.2 states:

> (a) *General.* Any Service officer authorized to approve a petition under section 204 of the Act may revoke the approval of that petition upon notice to the petitioner on any ground other than those specified in § 205.1 when the necessity for the revocation comes to the attention of this Service.
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> (b) *Notice of intent.* Revocation of the approval of a petition of self-petition under paragraph (a) of this section will be made only on notice to the petitioner or self-petitioner. The petitioner or self-petitioner must be given the opportunity to offer evidence in support of the petition or self-petition and in opposition to the grounds alleged for revocation of the approval.
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> (c) *Notification of revocation.* If, upon reconsideration, the approval previously granted is revoked, the director shall provide the petitioner or the self-petitioner with a written notification of the decision that explains the specific reasons for the revocation. The director shall notify the consular officer having jurisdiction over the visa application, if applicable, of the revocation of an approval.

A NOIR may be considered to have been properly issued when it is issued for "good and sufficient cause" when the evidence of record at the time of issuance, if unexplained and unrebutted, would warrant a denial of the visa petition based upon a petitioner's failure to meet the burden of proof. *See Matter of Arias*, 19 I&N Dec. 568 (BIA 1988) and *Matter of Estime*, 19 I&N Dec. 450 (BIA 1987).

III. DISCUSSION

In this case the Petitioner filed the labor certification with the DOL on May 28, 2010 (priority date). The Petitioner next filed the Form I-140 petition, requesting classification as a skilled worker, and the Director initially approved the petition. The Director subsequently issued a NOIR stating that a review of the record indicated that the petition had been approved in error. Specifically, the Director noted that the Petitioner answered "No" to question C.9. of the labor certification which asks "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 informed the Petitioner that publicly available information showed that the Beneficiary and the Petitioner's sole owner were business partners in a separate entity. The Director stated that because of this relationship the Petitioner's answer of "No" to question C.9. could be considered willful misrepresentation of material fact and could result in the invalidation of the labor certification. The Director also noted in the NOIR that the record did not establish the Petitioner's ability to pay the proffered wage in 2011 or 2012.

Subsequent to the NOIR and the Petitioner's response, the Director revoked the petition's approval reiterating the findings presented in the NOIR and invalidated the labor certification based on a finding of willful misrepresentation of a material fact. The Petitioner appealed the revocation. On appeal, we issued a notice of intent to dismiss informing the Petitioner that we uncovered additional derogatory information during our review regarding the Beneficiary's prior experience and the relationship between the Beneficiary and the Petitioner's owner. After reviewing the entire record, including the Petitioner's response to our notice, we found: 1) that the Director's NOIR raised improper grounds for revocation, and 2) that the record at the time of revocation did not support a finding of willful material misrepresentation or the resulting invalidation of the labor certification. As such, we withdrew the Director's decision revoking the petition's approval and reinstated the validity of the underlying labor certification. However, because the record did not otherwise establish eligibility for the benefit sought, we remanded the case to the Director for reissuance of the NOIR and entry of a new decision based on the evidence of record. We noted specifically that the record did not establish: 1) the Petitioner's ability to pay the proffered wage from the priority date to the date of the Form I-140 approval, 2) that the Beneficiary had the required experience, and 3) that a *bona fide* job opportunity existed.

When the petition was remanded to the Director, the petition's prior approval was reinstated. Because the petition's approval was reinstated, the Director was instructed to properly reissue a NOIR and then enter a new decision based on a complete review of the record. However, the Director instead issued a NOID and then ultimately denied the petition. USCIS cannot deny an approved petition. Rather, the Director must follow the regulations found at 8 C.F.R. § 205.2 and pertinent case law to properly revoke a petition's approval. In as much as the Director did not properly revoke the instant petition's approval, we remand the petition to the Director for issuance of a new NOIR discussing the issues noted in our previous remand and entry of a new decision based on the evidence of record.

IV. CONCLUSION

In visa petition proceedings, it is the petitioner's burden to establish eligibility for the immigration benefit sought. Section 291 of the Act, 8 U.S.C. § 1361.

ORDER: The decision of the Director, Texas Service Center, is withdrawn. The matter is remanded to the Director, Texas Service Center, for further proceedings consistent with the foregoing opinion and for the entry of a new decision.

Cite as *Matter of P-, Inc.*, ID# 142248 (AAO Mar. 24, 2017)