U.S. Citizenship and Immigration Services

Non-Precedent Decision of the Administrative Appeals Office

In Re: 13570219

DATE: MAY 25, 2021

Appeal of Nebraska Service Center Decision

Form I-140, Immigrant Petition for an Alien Worker

The Petitioner, a nail salon, sought to employ the Beneficiary as a nail technician. It requested skilled worker classification of the Beneficiary 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 petition was initially approved. However, the Director of the Nebraska Service Center subsequently revoked the approval[1] on the ground that the record does not establish that the Beneficiary met the experience requirement for the job – specifically, two years as a nail technician – as stated in the labor certification that accompanied the petition.

The matter is now before us on the Beneficiary's appeal. Although normally not the case, under certain circumstances described below a beneficiary may be considered to be an affected party in immigrant petition revocation proceedings. In this case, because the Director did not determine the Beneficiary's eligibility to participate in the revocation proceedings, we will withdraw the Director's decision and remand this matter for further proceedings concerning the Beneficiary's standing.

ANALYSIS

U.S. Citizenship and Immigration Services (USCIS) regulations do not generally allow a beneficiary to appeal a petition's revocation. *See* 8 C.F.R. § 103.3(a)(1)(iii)(B) (stating that a beneficiary is not an "affected party" with legal standing in a proceeding). However, certain "portability-eligible" beneficiaries of revoked I-140 visa petitions are treated as affected parties in revocation proceedings. Section 204(j) of the Act, 8 U.S.C. § 1154(j). *See Matter of V-S-G- Inc.*, Adopted Decision 2017-06 (AAO Nov. 11, 2017). Under the portability provision of section 204(j) of the Act, approved petitions may remain valid under certain conditions even after eligible beneficiaries change jobs or employers. A beneficiary of a valid visa petition, whose application for adjustment of status remains pending for

[1] At any time before a beneficiary obtains lawful permanent residence U.S. Citizenship and Immigration Services 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 in and of itself justify its revocation. *Matter of Ho*, 19 I&N Dec. 582, 589 (BIA 1988).

at least 180 days, may "port" the petition to a new job if that job is in the same or a similar occupational classification as the position offered in the petition. *See* 8 C.F.R. § 245.25(a)(2)(i). Thus, even though the petitioner for the visa classification and its beneficiary are no longer in an employment relationship, the underlying petition may remain valid for purposes of the beneficiary's adjustment of status application.

In order to be deemed an affected party in revocation proceedings, a beneficiary must have submitted to USCIS a proper request to port to another employer. As of January 17, 2017, a request to port must be submitted on a Form I-485 Supplement J.[2] *See* USCIS Policy Memorandum PM-602-0152, *Guidance on Notice to, and Standing for, AC21 Beneficiaries about I-140 Approvals Being Revoked After Matter of V-S-G- Inc.* (Nov. 11, 2017), http://www.uscis.gov/laws/policy-memoranda, at 2; *see also* 8 C.F.R. § 245.25(a). A beneficiary's request to port is "proper" when USCIS has evaluated the request and determined, prior to the issuance of a notice of intent to revoke (NOIR) or notice of revocation (NOR), that the beneficiary is indeed eligible to port. *See* USCIS Policy Memorandum PM-602-0152, *supra*, at 5. Thus, a beneficiary becomes an "affected party" with legal standing in a revocation proceeding when USCIS makes a favorable determination that the beneficiary is eligible to port. *Id.*

In this case, the immigrant visa petition (Form I-140) was initially approved on July 20, 2015. The Beneficiary's adjustment of status application (Form I-485) was filed on August 4, 2015, and is still open and pending. The Beneficiary filed an initial request to port, Form I-485 Supplement J (Supplement J) with USCIS on June 8, 2018, and a second Supplement J with USCIS on May 30, 2018.[3] The Director issued a notice of intent to revoke the approved petition (NOIR) on August 8, 2018, which was sent to the Petitioner in care of its former attorney. No action was taken by USCIS after receipt of the Petitioner's response to the NOIR. The Beneficiary filed a third Supplement J with USCIS on February 15, 2019.[4] The Director issued a second NOIR on November 29, 2019, which like the first NOIR was sent to the Petitioner in care of its former attorney. The Petitioner responded to this NOIR as well.

On April 21, 2020, the Director issued the revocation decision, concluding that the record did not establish that the [redacted] in [redacted] Mongolia, was in business during the time frame from 2000 to 2004 when the Beneficiary claims to have gained his experience as a nail technician. As this job was the only one the Beneficiary identified in the labor certification as conferring the requisite experience for the job offered, the Director determined that the record did not establish that the Beneficiary had the requisite two years of experience to qualify for the job under the terms of the labor certification. The Director also stated that "it appears that the [B]eneficiary's claimed experience with [redacted] is a willful misrepresentation of a material fact." However, the Director did not make a specific finding that the Beneficiary willfully misrepresented a material fact.

The Beneficiary filed an appeal.

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[2] The official title is Form I-485 Supplement J, Confirmation of *Bona Fide* Job Offer or request for Job Portability Under INA Section 204(j).

[3] The new employers were identified on the respective forms as [redacted] and as [redacted] both located in [redacted] Illinois.

[4] The new employer was identified on this form as [redacted] in [redacted] Illinois.

The timeline indicated above shows that the Beneficiary submitted two requests to port before the first NOIR was issued, and a third before the second NOIR was issued, and that his I-485 application had been pending well over 180 days before any of the porting requests were submitted. Yet the Director did not address this subject in either of the NOIRs or in the revocation decision. The Director made no determination as to whether the Beneficiary was eligible to port, whether he had properly requested to port, and whether he should be treated as an affected party in the revocation proceedings.

Therefore, we will remand this case for the Director to determine whether the Beneficiary was eligible to port and properly requested to port under section 204(j) of the Act. If the Director concludes that the Beneficiary should be deemed an affected party in accordance with USCIS Policy Memorandum PM-602-0152, the Director shall issue a new NOIR to the Petitioner and the Beneficiary in accordance with the policy memorandum. The Director may wish to revisit the issue of whether or not the Beneficiary willfully misrepresented a material fact with respect to his employment history, and if so, the Director should outline the purported misrepresentation, if any, to allow the Beneficiary the opportunity to properly address the issue.[5] Upon receipt of a timely response to a new NOIR, or the expiration of the response period, the Director shall review the entire record and enter a new decision.

ORDER: The decision of the Director is withdrawn. The matter is remanded for further proceedings consistent with the foregoing decision and for the entry of a new decision. If the new decision is adverse, it shall be certified to us for review.

[5] A misrepresentation is an assertion or manifestation that is not in accord with the true facts. For an immigration officer to find a willful and material misrepresentation of fact, he or she 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).