U.S. Citizenship and Immigration Services

Non-Precedent Decision of the Administrative Appeals Office

In Re: 14907047

Date: OCT. 1, 2021

Appeal of Texas Service Center Decision

Form I-140, Immigrant Petition for Professional

The Petitioner, a provider of financial consulting services, seeks to employ the Beneficiary as an accountant. The company requests his classification under the third-preference, immigrant category for professionals. *See* Immigration and Nationality Act (the Act) section 203(b)(3)(A)(ii), 8 U.S.C. § 1153(b)(3)(A)(ii).

After initially granting the filing, the Director of the Texas Service Center revoked the petition's approval. The Director concluded that the Petitioner and Beneficiary falsely concealed family relationships between the Beneficiary and the company's principals and that the Petitioner didn't demonstrate the required availability of the offered position to U.S. workers. The Director also dismissed the Petitioner's following motion to reopen, finding that the company didn't demonstrate that its delay in filing the untimely motion was reasonable and beyond its control.

In revocation proceedings, the Petitioner bears the burden of establishing eligibility for the requested benefit by a preponderance of evidence. *See Matter of Ho*, 19 I&N Dec. 582, 589 (BIA 1988) (citation omitted) (discussing the burden of proof); *see also Matter of Chawathe*, 25 I&N Dec. 369, 375 (AAO 2010) (discussing the standard of proof). Upon *de novo* review, we will dismiss the appeal.

I. EMPLOYMENT-BASED IMMIGRATION

Immigration as a professional generally follows a three-step process. First, a prospective employer must apply to the U.S. Department of Labor (DOL) for certification that: (1) there are insufficient U.S. workers able, willing, qualified, and available for an offered position; and (2) the employment of a noncitizen in the position won't harm wages and working conditions of U.S. workers with similar jobs. *See* section 212(a)(5) of the Act, 8 U.S.C. § 1182(a)(5).

Second, an employer must submit an approved labor certification with an immigrant visa petition to U.S. Citizenship and Immigration Services (USCIS). *See* section 204 of the Act, 8 U.S.C. § 1154. Among other things, USCIS determines whether a noncitizen beneficiary meets the requirements of a certified position and a requested immigrant visa category. 8 C.F.R. § 204.5(l).

Finally, if USCIS approves a petition, a noncitizen 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 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 a record, the erroneous nature of a petition's approval justifies its revocation. *Matter of Ho*, 19 I&N Dec. at 590.

USCIS may issue a notice of intent to revoke (NOIR) a petition if the unexplained and unrebutted record at the time of the NOIR's issuance 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's NOIR response doesn't overcome stated revocation grounds. *Id.* at 451-52.

II. FACTS

In September 2018, the Director mailed a NOIR to the Petitioner at its address of record. Since the petition's approval in November 2007, the company had relocated. But the Petitioner hadn't put its new address into the record.

Consistent with Department of Homeland Security (DHS) regulations, the NOIR allowed the Petitioner 33 days to respond to the notice. *See* 8 C.F.R. § 103.2(b)(8)(iv) (allowing a maximum of 30 days to respond to a notice of intent to deny); *see also* 8 C.F.R. § 103.8(b) (adding three additional days of response time when USCIS serves notice by mail). USCIS didn't receive a response within the 33-day period. The Director therefore mailed a written decision to the Petitioner in November 2018, revoking the petition's approval for the grounds alleged in the NOIR.

Shortly after the revocation, the U.S. Postal Service returned the decision to USCIS as undeliverable. The postal service marked the decision's unopened envelope as "attempted not known" and "unable to forward." The postal service didn't similarly return the NOIR that USCIS previously mailed to the Petitioner at the same address.

In April 2020, the Petitioner moved to reopen the revocation proceedings. The Petitioner stated that it didn't learn of the petition's revocation until the prior month, when USCIS notified the company of the Agency's intention to deny the Petitioner's requested extension of the Beneficiary's H-1B nonimmigrant work visa status. *See* section 214, n.5 of the Act, 8 U.S.C. § 1184, n.5 (allowing H-1B extensions beyond the normal six-year admission period for eligible beneficiaries of approved Form I-140 petitions). The Director denied the motion as untimely.[1]

On appeal, the Petitioner doesn't challenge the revocation grounds or findings. Rather, the company asserts that USCIS revoked the petition's approval without adequate notice and should have excused the company's untimely filing of the motion to reopen.

[1] The motion decision mistakenly states that the Petitioner had to file the motion within 15 days of the petition's revocation. By regulation, the Petitioner had 33 days in which to file the motion: 30 days from the petition's revocation, plus an additional three days because USCIS served the revocation decision by mail. *See* 8 C.F.R. §§ 103.5(a)(1), 103.8(b). The Petitioner doesn't allege that the misstatement prejudiced the company.

III. NOTICE OF THE REVOCATION

Unless a petition's approval is subject to "automatic revocation" under 8 C.F.R. § 205.1, USCIS must notify a petitioner of the Agency's intention to revoke a petition. 8 C.F.R. § 205.2(a), (b). "The petitioner . . . must be 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). Also, if USCIS ultimately decides to revoke a petition's approval, a director must provide a petitioner "with a written notification of the decision that explains the specific reasons for the revocation." 8 C.F.R. § 205.2(c).

The Petitioner contends that USCIS provided inadequate notice because the company didn't receive the Director's NOIR or revocation decision. The Petitioner therefore argues that USCIS violated regulations and improperly revoked the petition's approval.

Even if a petitioner doesn't receive a NOIR and revocation decision, however, USCIS provides sufficient notice if the Agency followed relevant regulations and met "due process" expectations. *See Matter of Nevilo Cardenas*, 28 I&N Dec. 68, 71 (BIA 2020) (citation omitted) (finding that, where "actual notice" of a scheduled hearing in removal proceedings wasn't accomplished, "constructive notice" sufficed); *see also* U.S. Const. amend. V (providing that no person shall "be deprived of life, liberty, or property, without due process of law").

The record shows that, pursuant to 8 C.F.R. § 205.2(b), the Director mailed written notice of the petition's proposed revocation to the Petitioner. Also, under 8 C.F.R. §§ 103.2(b)(8)(iv), 103.8(b), the Director afforded the Petitioner at least 33 days to respond to the NOIR. In addition, under 8 C.F.R. § 205.2(c), the Director issued a written decision explaining the reasons for revocation. The record therefore establishes USCIS' compliance with relevant regulations. Also, the Petitioner hasn't demonstrated that it has any additional expectations of due process. Most courts have found that noncitizens lack protectable, constitutional interests in immigrant visa petitions. *See Mantena v. Johnson*, 809 F.3d 721, 736 (2d Cir. 2015) (noting "the doubts cast by many courts on the liberty and property interests implicated in an immigrant visa"). The record therefore also demonstrates that USCIS provided the Petitioner with sufficient due process protections.

The Petitioner asserts that USCIS should have sent both the NOIR and the revocation decision to the company's current address. The Petitioner argues that, before USCIS issued the NOIR in September 2018 and the revocation decision in November 2018, the company's July 2016 petition to extend the Beneficiary's H-1B visa status informed the Agency of the company's new address. The Petitioner further notes that the postal service's return of the unopened, revocation decision in December 2018 notified USCIS of the invalidity of the company's prior address.

Under USCIS policy, however, each benefit request creates its own, separate record of proceeding. *See USCIS Policy Manual*, Vol. 1, Part E, Ch. 2, https://www.uscis.gov/policy-manual/volume-1-part-e-chapter-2 (last visited Sep. 16, 2021) (defining the term "record of proceeding" as "the organized, official materials constituting the record of any application, petition, hearing, or other proceeding before USCIS"). When adjudicating a petition, USCIS must review that filing's record of proceeding. *See* 8 C.F.R. § 103.2(b)(16)(ii) (stating that a "determination of statutory eligibility shall be based only on information contained *in the record of proceeding*") (emphasis added). USCIS needn't review records of other proceedings. Thus, if the Petitioner wanted USCIS to know its current address

regarding this petition, it had to submit the address into the petition's record. The Petitioner could have accomplished that by mail, by going online, or by calling a USCIS toll-free, telephone number. *See* DHS, "Ombudsman Update: Change of Address with USCIS," http://www.dhs.gov/files/publications/gc_1305649739320.shtm (last visited Sep. 16, 2021). But "[i]t is the sole responsibility of the applicant/petitioner to ensure USCIS has the correct address information on file." *Id.* As the Director found, "The petitioner is responsible to provide notification to USCIS when the company's address changes and specifically for each petition filed." Thus, USCIS didn't violate regulations or policy by mailing the NOIR and the revocation decision to the Petitioner's last address of record.

For the foregoing reasons, USCIS adequately notified the Petitioner of the petition's revocation. We will next consider whether the Agency should have excused the company's untimely filing of its motion to reopen.

IV. THE UNTIMELY FILING OF THE MOTION TO REOPEN

The Petitioner moved to reopen the revocation proceedings in April 2020, more than a year after the revocation of the petition's approval in November 2018. A petitioner must generally file a motion to reopen within 33 days of the service of an adverse decision by mail. 8 C.F.R. §§ 103.5(a)(1), 103.8(b). USCIS, however, has discretion to excuse an untimely filing of a motion to reopen if a petitioner demonstrates "that the delay was reasonable and beyond [its] control." 8 C.F.R. § 103.5(a)(1).

The Petitioner asserts that its delay in filing the motion to reopen was reasonable because the company submitted the motion within 33 days of learning of the petition's revocation. The Petitioner also contends that the filing delay was beyond its control because USCIS should have sent both the NOIR and the revocation decision to the company's current address.

As previously discussed, however, regulations and USCIS policy required the Petitioner to keep the Agency informed of the company's address on each of its pending benefit requests. Thus, USCIS didn't err in mailing the NOIR and the revocation decision to the Petitioner's last address of record. Because the Petitioner bore responsibility for updating its address in this petition's record, the company hasn't demonstrated that the motion's untimely filing was beyond its control. The Petitioner therefore hasn't established that USCIS should have excused the company's untimely filing of the motion to reopen.

The Petitioner further asserts that its inability to respond to the NOIR will result in "[e]xtreme and exceptional hardship" to it and the Beneficiary. The Petitioner states that, not only will the Beneficiary lose his basis for immigrating to the United States, but the company will suffer "a big financial loss" in having to replace "a well-qualified long-term employee."

In determining whether to excuse an untimely motion to reopen, however, the regulation at 8 C.F.R. § 103.5(a)(1) doesn't permit USCIS to consider hardship. We are unaware of any other provision allowing acceptance of the untimely filing based on hardship. The Petitioner's additional argument therefore is unavailing.

For the foregoing reasons, the Petitioner hasn't demonstrated that the untimely filing of the motion to reopen merited pardoning.

V. CONCLUSION

The record doesn't support the Petitioner's claims that USCIS revoked the petition's approval without adequate notice and should have excused the company's untimely filing of its motion to reopen. We will therefore affirm the revocation of the petition's approval and the motion's dismissal.

ORDER: The appeal is dismissed.