U.S. Citizenship and Immigration Services

Non-Precedent Decision of the Administrative Appeals Office

In Re: 10892744

Date: SEPT. 2, 2020

Appeal of Nebraska Service Center Decision

Form I-140, Immigrant Petition for Skilled Worker

The Petitioner seeks to employ the Beneficiary as a cook, Thai specialty. It requests her classification under the third-preference, immigrant 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). This employment-based, "EB-3" category allows a U.S. business to sponsor a foreign national for lawful permanent resident status based on a job offer requiring at least two years of training or experience.

After the filing's initial grant, the Director of the Nebraska Service Center revoked the petition's approval. The Director concluded that the Petitioner did not provide sufficient documentary evidence that the Beneficiary possessed the minimum employment experience required for the offered position. The Director also concluded "that the information about [the Beneficiary's qualifying experience] was obtained and submitted through fraud or willful misrepresentation."

In these proceedings, it is the Petitioner's burden to establish eligibility for the requested benefit. Section 291 of the Act, 8 U.S.C. § 1361. Upon de novo review, we will withdraw the decision of the Director. The matter is remanded for the entry of a new decision consistent with the foregoing analysis.

I. EMPLOYMENT-BASED IMMIGRATION

Employment-based immigration generally follows a three-step process. To permanently fill a position in the United States with a foreign worker, a prospective employer must first obtain certification from the U.S. Department of Labor (DOL). See section 212(a)(5) of the Act, 8 U.S.C. § 1182(a)(5). DOL approval signifies that insufficient U.S. workers are able, willing, qualified, and available for a position. Id. Labor certification also indicates that the employment of a foreign national will not harm wages and working conditions of U.S. workers with similar jobs. Id.

If DOL approves a position, an employer must next submit the certified labor application 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 considers whether a beneficiary meets the requirements of a certified position and a requested immigrant visa classification. If USCIS approves

the petition, a foreign national may finally 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.

Section 205 of the Act, 8 U.S.C. § 1155, provides that the Secretary of Homeland Security may "for good and sufficient cause, revoke the approval of any petition." By regulation this revocation authority is delegated to any USCIS officer who is authorized to approve an immigrant visa petition "when the necessity for the revocation comes to the attention of [USCIS]." 8 C.F.R. § 205.2(a). USCIS must give the petitioner notice of its intent to revoke the prior approval of the petition and the opportunity to submit evidence in opposition thereto, before proceeding with written notice of revocation. See 8 C.F.R. § 205.2(b) and (c). A notice of intent to revoke (NOIR) "is not properly issued unless there is 'good and sufficient cause' and the notice includes a specific statement not only of the facts underlying the proposed action, but also of the supporting evidence." Matter of Estime, 19 I&N Dec. 450, 451 (BIA 1987). Per Matter of Estime, "[i]n determining what is 'good and sufficient cause' for the issuance of a notice of intention to revoke, we ask whether the evidence of record at the time the notice was issued, if unexplained and unrebutted, would have warranted a denial based on the petitioner's failure to meet his or her burden of proof." Id.

II. ANALYSIS

The petition in this case was filed June 16, 2017. The accompanying labor certification indicates that the offered position requires 24 months of experience as a cook, Thai specialty. The initial evidence included a letter from [redacted] supervisor at [redacted] restaurant in [redacted] Thailand, where the Beneficiary asserts that she was employed as a Thai cook from January 2008 until June 2010. The petition was approved on June 23, 2017.

In August 2019, the Director sent the Petitioner a NOIR stating that new evidence provided to USCIS presented conflicting information with the petition. The Director noted the following inconsistencies:

1. In attempting to locate and verify the Beneficiary's past employer, [redacted] it was revealed that the business address provided is a residential building with no apparent restaurant at that location, and
2. During questioning by officers [during a site visit to the Beneficiary's home], the Beneficiary revealed that past tax returns listed her as a server with an income above the DOL's prevailing wage for a cook.

The Director stated further that, "based on the conflicting information, it appears that the Beneficiary's letter of experience may have been fabricated and the Beneficiary misrepresented a material fact involving the labor certification." The NOIR directed the Petitioner to respond as follows:

> Please provide a written explanation from the previous employer . . . explaining the discrepancy in the given employment period. The letter should reaffirm the actual employment period along with details about the position(s) held and the associated job duties and periods. Submit independent objective evidence that corroborates the identified period of employment, the existence of the business and the position held.

In response to the NOIR the Petitioner submitted a statement from [redacted], the owner of [redacted] explaining that the restaurant changed its address in 2013, and reaffirming the Beneficiary's work experience from 2008 to 2010. To corroborate the existence of the restaurant the Petitioner also submitted [redacted]'s business registration demonstrating its existence since 1992; its lease from 2016 to 2018; a 2019 utility invoice, and; numerous photographs of the restaurant, its dishes and online reviews. To further corroborate that Beneficiary's experience, the Petitioner submitted a letter from the Beneficiary's acquaintance of more than 15 years attesting to her employment as a cook, Thai specialty with [redacted]. In addition, the Petitioner submitted a statement asserting that tips are shared among all employees, and a statement from the Beneficiary's tax preparer, asserting that, although he is not an accountant, he assisted the Beneficiary in preparing her taxes and he erred in claiming the Beneficiary was a "server" on her tax return.

The Director revoked the approval of the petition. In the decision, the Director referenced the same conflicting information and addressed the Petitioner's response to the NOIR, stating:

> The evidence provided by the [P]etitioner is insufficient as it does not clarify and substantiate the [B]eneficiary's previously claimed work experience . . . Additionally, the [P]etitioner has not provided tax statements and pay statements from this time period to support the [B]eneficiary's work experience . . . Also, the evidence provided regarding [redacted] restaurant does not support the time period of the [B]eneficiary's claimed work experience.

The Director's decision to revoke the petition's approval is deficient, as it does not sufficiently explain the reasons for revocation. When revoking approval of a petition, a director has an affirmative duty to explain the specific reasons for the revocation; this duty includes informing a petitioner why the evidence did not to satisfy its burden of proof pursuant to section 291 of the Act. See 8 C.F.R. § 103.3(a)(1)(i). The Director's decision in this case does not explain why the information provided in response to the NOIR was insufficient or how it failed to satisfy its burden of proof regarding eligibility for the benefit sought.

Further, it is not clear from the Director's decision whether a finding of willful material misrepresentation was made and if it was made, whether the finding pertains to the Petitioner, the Beneficiary, or both. To find a willful and material misrepresentation of fact an immigration officer 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).

Although not mentioned in the NOIR or the Director's revocation, additional adverse information casts doubt on the Beneficiary's claimed employment experience. A review of a nonimmigrant visa application that the Beneficiary completed shows that the Beneficiary applied for and was granted a

F-1 (Academic Student) visa in 2010. On that nonimmigrant visa application, the Beneficiary listed her present employment as "legal officer of registration and identification card section" with the Department of Provincial Administration in [redacted] Thailand. The only previous employment that the Beneficiary listed on the application was as "inspective officer" for the [redacted] City Hall from July 2005 to July 2007.

A further review of the record also reveals that the Beneficiary may have concealed a familial relationship between herself and the author of the original employment experience letter, supervisor [redacted] During an interview with USCIS officers, the Beneficiary provided a sworn statement attesting that she did not know [redacted] prior to her employment with [redacted] and that her spouse does not know [redacted] However, a review of USCIS records and other nonimmigrant visa applications indicates that the Beneficiary's spouse is a relative of [redacted] This discrepancy casts further doubt on the Beneficiary's claim of prior employment experience. The Petitioner must resolve these inconsistencies with independent, objective evidence pointing to where the truth lies. Matter of Ho, 19 I&N Dec. 582, 591-92 (BIA 1988). Unresolved material inconsistencies may lead us to reevaluate the reliability and sufficiency of other evidence submitted in support of the requested immigration benefit. Id.

Considering the above discussed deficiencies, we are withdrawing the Director's revocation and remanding the petition to allow the Petitioner an opportunity to address the additional deficiencies identified above. On remand, the Director may wish to issue a new NOIR outlining the deficiencies above, and allowing the Petitioner an opportunity to respond. The Director must state how the record fails to demonstrate eligibility for the classification sought under the pertinent regulatory scheme. If the Director makes a finding of willful material misrepresentation against either the Petitioner, the Beneficiary, or both, the Director must articulate the basis for the finding(s) in accordance with the above-referenced case law.

III. CONCLUSION

For the reasons discussed above, we will remand this case to the Director for further consideration.

If the Director issues a new NOIR, the content of that notice and the consideration of any evidence submitted by the Petitioner should comply with the requirements of 8 C.F.R. § 205.2(b) and (c) and Matter of Estime. The Director shall then issue a new decision.

ORDER: The decision of the Director is withdrawn. The matter is remanded for the entry of a new decision consistent with the foregoing analysis.