U.S. Citizenship and Immigration Services

**Non-Precedent Decision of the Administrative Appeals Office**

In Re: 33359549

Date: SEP. 20, 2024

Appeal of Texas Service Center Decision

Form I-140, Immigrant Petition for Other Worker

The Petitioner, a convenience store with two employees, sought to employ the Beneficiary as a convenience store sales associate. It requested classification of the Beneficiary under the third-preference, immigrant classification for other workers. Immigration and Nationality Act (the Act) section 203(b)(3)(A)(i), 8 U.S.C. § 1153(b)(3)(A)(i). This employment-based category allows a U.S. business to sponsor a foreign national for lawful permanent resident status based on a job offer requiring less than two years of training or experience.

After initially approving the Form I-140, Immigrant Petition for Alien Worker (petition), the Texas Service Center Director revoked the petition's approval. The Director concluded that the Petitioner did not demonstrate that a bona fide job offer exists because its business is no longer operating at the intended work location, and it no longer intends to employ the Beneficiary. The Director also found that the Petitioner willfully misrepresented the bona fide nature of the job offer as permanent, full-time employment, which is a material fact. The matter is now before us on the Petitioner's appeal. 8 C.F.R. § 103.3.

The Petitioner bears the burden of proof to demonstrate eligibility by a preponderance of the evidence. *Matter of Chawathe*, 25 I&N Dec. 369, 375-76 (AAO 2010). We review the questions in this matter de novo. *Matter of Christo's, Inc.*, 26 I&N Dec. 537, 537 n.2 (AAO 2015). Upon de novo review, we will dismiss the appeal.

## I. LAW

Employment-based immigration generally follows a three-step process. First, an employer obtains an approved labor certification (ETA Form 9089) from the U.S. Department of Labor (DOL). *See* section 212(a)(5) of the Act, 8 U.S.C. § 1182(a)(5). By approving the labor certification, the DOL certifies that there are insufficient U.S. workers who are able, willing, qualified, and available for the offered position and that employing a foreign national in the position will not adversely affect the wages and working conditions of domestic workers similarly employed. *See* section 212(a)(5)(A)(i)(I)-(II) of the Act. Second, the employer files an immigrant visa petition with U.S. Citizenship and Immigration Services (USCIS). *See* section 204 of the Act, 8 U.S.C. § 1154. Third, if USCIS approves the petition,

the foreign national 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.

Employment-based immigrant visa petitions "shall remain valid" for certain beneficiaries who obtain new job offers from the same or different employers. Section 204(j) of the Act, 8 U.S.C. § 1154(j). To qualify for job portability, a beneficiary must have filed an application for adjustment of status that remained unadjudicated for at least 180 days, and their new job offer must be in the same or similar occupational classifications as the job stated in their petition. *Id.*

Under 8 C.F.R. § 245.25(a)(2)(ii)(B), if a beneficiary's immigrant petition is pending when the beneficiary notifies USCIS of a new job offer on Form I-485 Supplement J, and such notification is made at least 180 days after the date the beneficiary filed an adjustment of status application, the following conditions apply to the adjudication of the petition:

> *(1)* Adjudication of the pending petition shall be without regard to the requirement in 8 C.F.R. § 204.5(g)(2) to continuously establish the ability to pay the proffered wage after filing and until the beneficiary obtains lawful permanent residence; and
>
> *(2)* The pending petition will be approved if it was eligible for approval at the time of filing and until the beneficiary's adjustment of status application has been pending for 180 days unless approval of the qualifying immigrant visa petition at the time of adjudication is inconsistent with a requirement of the Act or another applicable statute.

At 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 the record, a petition's erroneous approval may justify its revocation. *Matter of Ho*, 19 I&N Dec. 582, 590 (BIA 1988). USCIS properly issues a notice of intent to revoke (NOIR) a petition if the unrebutted and unexplained record would have warranted the filing's denial. *Matter of Estime*, 19 I&N Dec. 450, 451 (BIA 1987). The Agency properly revokes a petition's approval if a petitioner does not respond to a properly issued NOIR, or their NOIR response does not overcome all alleged revocation grounds. *Id.*at 451-52.

## II. ANALYSIS

The labor certification in this case was filed on April 29, 2019, for the offered position of convenience store sales associate. At the time the labor certification was filed, the Petitioner stated that it was operating a convenience store with two employees. Shortly after filing the labor certification, the business was sold in [redacted] 2019. Following DOL approval of the labor certification, and after the sale of the business, the Petitioner filed the petition with USCIS on February 6, 2020.[1] The Petitioner indicated on the petition that the offered position is permanent and full-time.

[1] The Beneficiary concurrently filed a Form I-485, Application to Register Permanent Residence or Adjust Status, on February 10, 2020.

After approving the petition in March 2020, the Director sent the Petitioner a NOIR stating that a review of the filing indicated that the Petitioner may have misrepresented the bona fides of the job offer. The Director stated that USCIS conducted a site visit to the work location listed on the labor certification and the petition in March 2021. The site visit revealed that the Petitioner sold its convenience store business to a new owner in 2019 and ceased operating at that work location upon sale. Because this fact is material, in signing the petition in February 2020, the Director noted that the Petitioner may have willfully made a false representation. The Director requested evidence that the Petitioner continues to do business and intends to employ the Beneficiary in the offered position, as well as evidence to establish that the Petitioner made a bona fide job offer to the Beneficiary under the terms of the labor certification.

In response to the NOIR, the Petitioner submitted a statement from its president. The Petitioner's president stated, "In [redacted] 2019, [the Petitioner] sold the gas station/convenience store to the owner of the real estate ... From that point, [the Petitioner] ceased providing goods and services to the public. [The Petitioner], however, legally exists; it is simply inactive."

The Petitioner's president further stated, "[The Petitioner] no longer does business. However, it is our understanding that [the Beneficiary] has been offered a position doing similar type of work ... [The Beneficiary] aims to assume this occupation [Store Sales Associated] under I-140 job portability rules."

The Petitioner submitted evidence of its recruitment for the offered position, including a job order placed with the state workforce agency, newspaper advertisements, an internal posting notice, and a report of recruitment results explaining that no resumes were received in response to its recruitment efforts. The Petitioner also submitted its state issued business licenses and permits issued in 2018, and its utility bill for the period October to November 2018.

Also included with the NOIR response was a Form I-485 Supplement J, signed by the Beneficiary, with supporting evidence, requesting job portability under section 204(j) of the Act.

After receiving the Petitioner's response to the NOIR the Director revoked the petition's approval. The Director determined that the Petitioner did not establish that its job offer to the Beneficiary was bona fide and entered a finding of willful misrepresentation of a material fact against the Petitioner.

On appeal, the Petitioner does not submit additional evidence or a brief. In describing the basis for the appeal, the Petitioner asserts that it was still operating at the time the labor certification was filed and its job offer to the Beneficiary was bona fide at that time. The Petitioner states, "Though the employer later stopped operations, if bona fide job offer is measured as of the priority date, then the Service Center Director's finding is erroneous and should be withdrawn." The Petitioner further states that the Director erred in not considering the Beneficiary's eligibility for job portability under section 204(j) of the Act.

A. Bona Fide Job Offer

Pursuant to the statutory framework for the granting of immigrant status, any United States employer desiring and intending to employ an alien entitled to immigrant classification under the Act may file

a petition for classification. Section 204(a)(1)(F) of the Act, 8 U.S.C. § 1154(a)(1)(F); *see* 8 C.F.R. § 204.5(c). Such petitions must be accompanied by a labor certification from the DOL. *See* section 212(a)(5) of the Act, 8 U.S.C. § 1182(a)(5); *see also* 8 C.F.R. § 204.5(l)(3)(i). The Petitioner must intend to employ a beneficiary under the terms and conditions of an accompanying labor certification. *See Matter of Izdebska*, 12 I&N Dec. 54, 55 (Reg'l Comm'r 1966) (affirming denial where, contrary to an accompanying labor certification, a petitioner did not intend to employ a beneficiary under the terms of the labor certification); s*ee also Matter of Sunoco Energy Dev. Co.*, 17 I&N Dec. 283, 284 (Reg'l Comm'r 1979) (affirming a petition's denial under 20 C.F.R. § 656.30(c)(2) where the labor certification did not remain valid for the intended geographic area of employment). Because the filing of a labor certification establishes a priority date[2] for any immigrant petition later based on the labor certification, the petitioner must establish that the job offer was realistic as of the priority date and that the offer remained realistic for each year thereafter, until the beneficiary obtains lawful permanent residence. The bona fides of the job opportunity are essential elements in evaluating whether a job offer is realistic. *See Matter of Great Wall*, 16 I&N Dec. 142 (Acting Reg'l Comm'r 1977).

The Petitioner cannot establish the offered position as a bona fide job opportunity based solely on its stated intent to employ the Beneficiary in the offered position once he obtains lawful permanent resident status. It must provide evidence establishing the existence of a valid job offer as of the petition's priority date. "In … visa petition proceedings the Service must consider the merits of the petitioner's job offer, so that a determination can be made whether the job offer is realistic." *Matter of Great Wall*, 16 I&N Dec. at 145.

Section 204(b) of the Act allows a petition's approval only after an investigation of the facts in each case to ensure that the facts stated in the petition, which necessarily includes the labor certification, are true. Section 204(b) of the Act, 8 U.S.C. § 1154(b).

As noted above, the Petitioner's job offer must be realistic as of the priority date *and remain realistic for each year thereafter*. The Petitioner's president stated in the NOIR response that it ceased operations of its convenience store when it sold the business in [redacted]2019.[3] Therefore, at the time the petition was filed in February 2020, the Petitioner's job offer was no longer realistic.

Additionally, in signing and filing the petition in February 2020, after its business ceased operating, the Petitioner misrepresented its intention to offer full-time, permanent employment to the Beneficiary. As the Director noted in the NOIR and notice of revocation, the Petitioner answered yes to the following questions in Part 6 of the Form I-140:

- Question 4. Is this a full-time position?
- Question 6. Is this a permanent position?

---

[2] The "priority date" of a petition is the date the underlying labor certification is filed with the DOL. *See* 8 C.F.R. § 204.5(d). The Petitioner must establish that all eligibility requirements for the petition have been satisfied as of the priority date, which in this case is April 29, 2019.

[3] A labor certification is only valid for the particular job opportunity stated on the application form. 20 C.F.R. § 656.30(c). If the petitioner is a different entity than the labor certification employer, then it must establish that it is a successor-in-interest to that entity. *See Matter of Dial Auto Repair Shop, Inc.*, 19 I&N Dec. 481 (Comm'r 1986). The Petitioner here has not asserted that the new owner of the convenience store is a successor to the labor certification employer. Nor does the record include any documentation of the purported sale of the Petitioner to a new owner.

The Petitioner has not provided independent, objective evidence establishing that, at the time the petition was filed in February 2020, it was conducting business and intending to offer full-time, permanent employment to the Beneficiary as a convenience store sales associate. Therefore, we agree with the Director that the Petitioner's job offer was not bona fide. We further agree that the Petitioner's answers to the questions in Part 6 of the Form I-140 were misrepresentations of material facts in this matter.

B. Job Portability

In response to the NOIR and on appeal, the Petitioner indicates that the Beneficiary has a new employment offer from a different U.S. employer. An adjustment of status applicant may affirmatively demonstrate to USCIS, on Form I-485 Supplement J that he or she has a new offer of employment from a different U.S. employer in the same or similar occupational classification, provided that the application to adjust status has been pending for 180 days or more, and the qualifying immigrant visa petition has already been approved or is subsequently approved. *See generally*, 8 C.F.R. § 245.25(a). A pending immigrant petition will be approved if it was eligible for approval at the time of filing and until the applicant's adjustment of status has been pending for 180 days, unless approval of the qualifying immigrant visa petition at the time of adjudication is inconsistent with a requirement of the Act or another applicable statute. 8 C.F.R. § 245.25(a)(2)(B)(2).

The regulation at 8 C.F.R. § 204.5(e)(5) provides:

> A petition filed under section 204(a)(1)(F) of the Act for an alien shall remain valid with respect to a new employment offer as determined by [U.S. Citizenship and Immigration Services (USCIS)] under section 204(j) of the Act and 8 C.F.R. § 245.25. An alien will continue to be afforded the priority date of such petition if the requirements of paragraph (e) of this section are met.

In order to "remain valid with respect to a new employment offer" under the portability provision, a petition must also have been "valid" to begin with. *Matter of Al Wazzan,* 25 I&N Dec. 359, 365 (AAO 2010). For portability purposes, the term "valid" means that USCIS must have "approved" the petition and that the beneficiary must have "entitled" to the requested visa classification. *Id.*, at 367.

As discussed above, the record does not establish that the Petitioner was operating its business and intending to offer the Beneficiary employment at the time the Form I-140 was filed. In order for the Beneficiary to benefit from the Act's job portability provisions, the pending Form I-140 must be approved, and it may only be approved if the record shows that the Petitioner's job offer was bona fide. *See* 8 C.F.R. § 245.25(a)(2)(B)(*1*).

## III. CONCLUSION

The record does not establish that the Petitioner's job offer was bona fide. The Director's finding of willful misrepresentation of a material fact against the Petitioner is supported by the record and upheld. It is the Petitioner's burden to establish eligibility for the immigration benefit sought. Section 291 of the Act, 8 U.S.C. § 1361; *Matter of Skirball Cultural Ctr.*, 25 I&N Dec. 799, 806 (AAO 2012). Here, the burden has not been met.

**ORDER:** The appeal is dismissed.