U.S. Citizenship and Immigration Services

Non-Precedent Decision of the Administrative Appeals Office

MATTER OF B-C-, INC.

DATE: SEPT. 24 2019

APPEAL OF TEXAS SERVICE CENTER DECISION

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

The Petitioner, a professional consulting services company, seeks to employ the Beneficiary as an IT project specialist. It requests classification of the Beneficiary as a skilled worker under the third preference immigrant classification. Immigration and Nationality Act (the Act) section 203(b)(3)(A)(i), 8 U.S.C. § 1153(b)(3)(A)(i). This employment-based 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. The Director of the Texas Service Center subsequently revoked the approval of the petition, concluding that the Petitioner did not establish (a) that a *bona fide* job offer existed; (b) that the Beneficiary had the experience required for the offered job; and (c) that it had the continuing ability to pay the proffered wage from the priority date onward. The Director entered a finding of willful misrepresentation of a material fact against the Petitioner and the Beneficiary, and he invalidated the labor certification.[1]

On appeal, the Petitioner submits additional evidence and asserts that it did not properly receive the notice of intent to revoke (NOIR) outlining all of the grounds for revocation. It also asserts that a *bona fide* job offer existed; that the Beneficiary had the experience required for the offered job; and (c) that it had the continuing ability to pay the proffered wage from the priority date onward. It further asserts that there were no willful misrepresentations made by the Petitioner or the Beneficiary.

Upon *de novo* review, we will withdraw the Director's decision and remand the matter for further proceedings consistent with our opinion and for the entry of a new decision.

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[1] The regulation at 20 C.F.R. § 656.30(d) provides, in pertinent part:

> Invalidation of labor certifications. After issuance, a labor certification may be revoked by ETA using the procedures described in Sec. 656.32. Additionally, after issuance, a labor certification is subject to invalidation by the DHS or by a Consul of the Department of State upon a determination, made in accordance with those agencies' procedures or by a court, of fraud or willful misrepresentation of a material fact involving the labor certification application.

I. THE EMPLOYMENT-BASED IMMIGRATION PROCESS

Employment-based immigration generally follows a three-step process. First, an employer obtains an approved labor certification from the U.S. Department of Labor (DOL).[2] *See* section 212(a)(5)(A)(i) of the Act, 8 U.S.C. § 1182(a)(5)(A)(i). 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 applies 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 A PETITION'S APPROVAL

After granting a petition, USCIS may revoke the petition's approval "at any time" for "good and sufficient cause." Section 205 of the Act, 8 U.S.C. § 1155. If supported by the record, a director's realization that a petition was erroneously approved may justify revocation. *Matter of Ho*, 19 I&N Dec. 582, 590 (BIA 1988).

Good and sufficient cause exists to issue a notice of intent to revoke (NOIR) where the record at the time of the notice's issuance, if unexplained or unrebutted, would have warranted the petition's denial. *Matter of Estime*, 19 I&N Dec. 450, 451 (BIA 1987). Similarly, revocation is proper if the record at the time of the decision, including any explanation or rebuttal evidence provided by a petitioner, warranted a petition's denial. *Id.* at 452.

In this case, the Director issued an NOIR dated February 21, 2019, to the Petitioner's counsel. It detailed the following reasons why the Director intended to revoke the approval of the petition: (a) a *bona fide* job offer never existed; (b) the Beneficiary does not have the experience required for the offered job; (c) the Petitioner does not have the continuing ability to pay the proffered wage from the priority date onward; and (d) the Petitioner and the Beneficiary willfully misrepresented a material fact on the labor certification. The NOIR indicated that the Director intended to invalidate the labor certification based on the willful misrepresentations. The Director also stated that since the Petitioner may not be aware of the derogatory information contained in the NOIR, he was "affording the petitioner an opportunity to rebut that information and present information in its own behalf."[3] The February 21, 2019, NOIR was returned to USCIS by the postal service as undeliverable. The Director issued a notice of revocation (NOR) on April 16, 2019, which mirrored the grounds of revocation detailed in the February 21, 2019, NOIR. The Director indicated in the NOR that it did not receive a response to the February 21, 2019, NOIR from the Petitioner.

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[2] The priority date of a petition is the date the DOL accepted the labor certification for processing, which in this case is March 16, 2017. *See* 8 C.F.R. § 204.5(d).

[3] A petitioner must be afforded an opportunity to review all derogatory information considered by the Director before a decision is rendered. *See* 8 C.F.R. § 103.2(b)(16)(i).

However, on appeal, the Petitioner's counsel states that she never received the February 21, 2019, NOIR. She states that on March 15, 2019, she received an email message from USCIS indicating that the NOIR was returned to USCIS as undeliverable. Counsel indicates that on the same day, she contacted USCIS and requested that the NOIR be resent. On appeal, counsel submits a copy of an NOIR dated November 19, 2018, that was mailed to her by USCIS on April 3, 2019. Counsel also submits the postmarked envelope that contained the NOIR. The November 19, 2018, NOIR does not match the February 21, 2019, NOIR detailed above. Instead, the November 19, 2018, NOIR listed only one ground for revocation: that the Petitioner interviewed the Beneficiary for the offered job, and offered her the job, prior to recruitment for the job. Therefore, the NOIR indicated that the "job was created specifically for [the Beneficiary]" and that USCIS had sent the Petitioner a NOIR "on October 25, 2018, which states the reasons for which we intend to revoke the approval of this Form I-140 petition." The record does not contain an NOIR dated October 25, 2018.

The February 21, 2019, NOIR sufficiently detailed the evidence of the record that, if unexplained and unrebutted, would warrant a denial. However, the record shows that the Petitioner did not receive the February 21, 2019, NOIR. Instead, it received a different NOIR dated November 19, 2018. The November 19, 2018, NOIR did not sufficiently detail the grounds for revocation of the petition's approval. Thus, we will withdraw the Director's decision and remand the matter for issuance of a new NOIR.

On remand, the Director should issue a new NOIR which provides the Petitioner with adequate notice of all proposed grounds for revocation of the approved petition.

III. CONCLUSION

The decision of the Director will be withdrawn. The matter is remanded to the Director for issuance of a new NOIR. Upon receipt of a response to the NOIR, the Director will 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 opinion.

Cite as *Matter of B-C-, Inc.*, ID# 6319672 (AAO Sept. 24, 2019)