U.S. Citizenship and Immigration Services

Non-Precedent Decision of the Administrative Appeals Office

In Re: 27856994

Date: SEPT. 14, 2023

Appeal of Nebraska Service Center Decision

Form I-140, Immigrant Petition for Alien Workers (Multinational Managers or Executives)

The Petitioner, a mining company, seeks to permanently employ the Beneficiary as its managing director under the first preference immigrant classification for multinational executives or managers. *See* Immigration and Nationality Act (the Act) section 203(b)(1)(C), 8 U.S.C. § 1153(b)(1)(C). This classification allows a U.S. employer to permanently transfer a qualified foreign employee to the United States to work in a managerial or executive capacity.

The Director of the Nebraska Service denied the petition; approved the petition on motion; and then revoked the approval of the petition on notice under 8 C.F.R. § 205.2. The Director cited two grounds for revocation, concluding that the Petitioner did not establish: (1) the existence of a bona fide job offer for the Beneficiary, and (2) that the U.S. employer is doing business. The matter is now before us on 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 withdraw the Director's decision and remand the matter for entry of a new decision consistent with the following analysis.

I. LAW

An immigrant visa is available to a beneficiary who, in the three years preceding the filing of the petition, has been employed outside the United States for at least one year in a managerial or executive capacity, and seeks to enter the United States in order to continue to render managerial or executive services to the same employer or to its subsidiary or affiliate. Section 203(b)(1)(C) of the Act.

The Form I-140, Immigrant Petition for Alien Worker, must include a statement from an authorized official of the petitioning United States employer which demonstrates that the beneficiary has been employed abroad in a managerial or executive capacity for at least one year in the three years preceding the filing of the petition, that the beneficiary is coming to work in the United States for the same employer or a subsidiary or affiliate of the foreign employer, and that the prospective U.S. employer has been doing business for at least one year. *See* 8 C.F.R. § 204.5(j)(3).

The approval of a petition may be revoked at any time for good and sufficient cause. Section 205 of the Act, 8 U.S.C. § 1155. By itself, the director's realization that a petition was incorrectly approved is good and sufficient cause for the issuance of a notice of intent to revoke an immigrant petition. *See Matter of Ho*, 19 I&N Dec. 582, 590 (BIA 1988).

II. ANALYSIS

The petitioner must be given the opportunity to offer evidence in support of the petition or self-petition and in opposition to the grounds alleged for revocation of the approval. 8 C.F.R. § 205.2(b). A decision to revoke approval of a visa petition can only be grounded upon, and the petitioner is only obliged to respond to, the factual allegations specified in the notice of intent to revoke (NOIR). *Matter of Arias*, 19 I&N Dec. 568, 570 (BIA 1988).

In this instance, the notice of revocation raised a serious and significant issue that did not first appear in the NOIR, which we address below. Also, the evidence and information cited in the NOIR itself, relating to the Petitioner's offer to employ the Beneficiary, do not appear to constitute good and sufficient cause for revocation.

In the NOIR, the Director questioned the validity of the job offer, citing the following reasons:

- The Petitioner's gold mine is in [redacted] Arizona, but the Beneficiary has primarily lived in [redacted] Texas since he arrived in the United States in 2015;
- The Beneficiary acknowledged that he worked as a desk clerk at a [redacted] hotel in 2018; and
- The Beneficiary stated, during a May 2018 site visit, that the mining company "is not currently active . . . because of permit issues."

The Petitioner responded to the NOIR with letters and other materials intended to show the continued existence of a bona fide job offer for the Beneficiary. The Petitioner also documented continuing efforts to obtain mining permits, and blamed delays on the U.S. Forest Service, which owns the location of the mine.

The Petitioner has claimed that that the Beneficiary temporarily worked without pay at the [redacted] hotel in order to familiarize himself with hotel operations, because the Petitioner was considering diversifying into the hospitality industry. The owner of the hotel has been described at various times as an acquaintance of the Petitioner's owner and as the Beneficiary's uncle.

The Beneficiary's work at the hotel raises significant questions, but that work took place in 2018, two years after the Petitioner filed the petition in April 2016. It does not necessarily show that the Petitioner did not intend to employ the Beneficiary when it filed the petition, or later at the time of adjustment. The record includes copies of various communications from the Beneficiary, indicating some degree of involvement in the petitioning company over the course of the proceeding. Likewise, the permitting issues that delayed the mine's operation do not appear to discredit the Beneficiary's job offer to an extent that would warrant revocation of the approval.

Nevertheless, the record reveals a major, and potentially disqualifying, issue.

The Petitioner must establish that the prospective United States employer has been doing business for at least one year. 8 C.F.R. § 204.5(j)(3)(i)(D). "Doing business" means the regular, systematic, and continuous provision of goods, services, or both, and does not include the mere presence of an agent or office. 8 C.F.R. § 204.5(j)(2).

A petitioner must meet all eligibility requirements at the time of filing the petition. *See* 8 C.F.R. § 103.2(b)(1). Therefore, the Petitioner must establish that it was doing business at the time of filing, and had been doing business throughout the year immediately before the filing date.

In the NOIR, the Director cited evidence that the Petitioner was "not currently active" as of 2018, but did not raise the issue of whether the Petitioner had been doing business at the time of filing.

In the notice of revocation, the Director indicated that several factors raised questions about the extent of the Petitioner's business activity: The sale of the petitioning company in 2013; the 2019 sale of the site previously identified as the Petitioner's corporate office, where the Beneficiary would work; the Petitioner's subsequent reliance on "a UPS mail locker address" rather than "an actual brick and mortar office building"; and a letter from the Petitioner acknowledging that "we don't have invoices with customers yet, due to the delays in getting the corrected licenses and permits." Not all of these cited factors are relevant to the question of whether the Petitioner had been doing business for at least one year at the time of filing. The 2013 sale of the company is what established the qualifying relationship with the Beneficiary's claimed foreign employer. A company's reliance on a rented mailbox as a mailing address is not necessarily grounds for concern, unless that company specifically claims the mailbox's location as the company's actual, physical place of business, which does not appear to be the case here.

But the last cited factor – the acknowledged lack of "invoices with customers" – points to a potential lack of business activity at the time of filing, and relates to key evidence in the record that leads us to question whether the Petitioner had been doing business for at least one year at the time of filing in April 2016.

The Petitioner incorporated in 2005. The Petitioner, on appeal, states that it "had been actively doing business since 2005, so for eleven (11) years before the petition was filed." As the above-cited regulatory definition shows, however, doing business does not merely entail legal existence as a corporation, and business activity in the company's earliest years does not establish that the Petitioner continued to do business at the time of filing. In a March 2016 letter submitted with the Form I-140 petition, the Petitioner stated that the company "has been dormant for a year due to lack of [a] managing officer in the United States." The record is consistent with that statement.

The record contains copies of the Petitioner's income tax returns from 2009-2012, 2014-2016, and 2018-2019. The only income reported on the 2009-2012 returns is about $2,316 per year in interest. The Petitioner did not report any income from any source on its later income tax returns. Balance sheets from 2015 and the first half of 2016 likewise show that the Petitioner incurred expenses but took in no income during the year immediately preceding the April 2016 filing date. This documented lack of income does not indicate that the Petitioner provided any goods or services during those years.

The Petitioner submitted payroll documents beginning in January 2016, about three months before it filed the petition. None of the submitted tax returns for years before 2016 show salaries paid. The lack of staffing throughout 2015 raises the question of who would have performed the work necessary for the Petitioner to provide goods or services during that year.

The Director issued a request for evidence in August 2017, asking the Petitioner to submit such documents as invoices, sales contracts, and shipping documentation. In response, the Petitioner stated that it "has not been dormant but rather very active." But the activity that the Petitioner documented did not entail the Petitioner's provision of goods or services. The Petitioner submitted copies of invoices from contractors and consultants, dating from June 2015 forward. These invoices do not show that the Petitioner provided any goods or services at that time. Rather, the Petitioner engaged the services of contractors as part of its ongoing attempts to secure mining permits. *Receiving* or *purchasing* goods or services does not fall within the definition of "doing business," and neither does *preparing* to provide goods or services at a later date.

The Petitioner has not met its burden of proof to establish that it had been doing business for a year at the time of filing. But the notice of revocation did not address the lack of income during that year and the absence of employees in 2015. Rather, the Director focused on evidence from other time periods and documentation that has less direct bearing on the issue.

Furthermore, the Director did not raise the issue of doing business in the NOIR. *Arias* does not permit the introduction of a new ground of revocation in the decision notice. Therefore, the Director must issue a new NOIR to allow the Petitioner to address the issue.

Should the Petitioner choose to submit any new information about the company's business activity in 2015-2016 that contradicts the Petitioner's prior documentation, such as new claims of staffing and income-generating activity, the burden will be on the Petitioner not only to corroborate those claims, but also to account for its repeated prior submission of evidence showing no such activity during the relevant year. It is the Petitioner's responsibility to resolve inconsistencies in the record with independent, objective evidence. Attempts to explain or reconcile conflicting information will not suffice unless supported by competent, objective evidence pointing to where the truth, in fact, lies. *Matter of Ho*, 19 I&N Dec. at 591-92. For this reason, newly-written statements claiming business activity not reflected on the 2015 and 2016 tax returns will carry negligible weight and will only serve to raise serious questions of credibility. Any new claim that the Petitioner regularly, continuously, and systematically provided goods or services between April 2015 and April 2016 must be supported by verifiable documentary evidence identifying the goods or services provided, and the parties to whom the Petitioner provided them.

III. CONCLUSION

The February 2023 notice of revocation cannot stand as written, for the reasons discussed above. Nevertheless, the record identifies circumstances that appear to warrant the issuance of a new notice of intent to revoke.

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