U.S. Citizenship and Immigration Services

Non-Precedent Decision of the Administrative Appeals Office

In Re: 28127935

Date: SEP. 12, 2023

Appeal of Nebraska Service Center Decision

Form I-140, Immigrant Petition for Alien Workers (National Interest Waiver)

The Petitioner, a veterinarian, seeks classification as a member of the professions holding an advanced degree or, in the alternative, as an individual of exceptional ability in the sciences, arts or business. *See* Immigration and Nationality Act (the Act) section 203(b)(2), 8 U.S.C. § 1153(b)(2). The Petitioner also seeks a national interest waiver of the job offer requirement that is attached to this EB-2 immigrant classification. *See* section 203(b)(2)(B)(i) of the Act, 8 U.S.C. § 1153(b)(2)(B)(i). U.S. Citizenship and Immigration Services (USCIS) may grant this discretionary waiver of the required job offer, and thus of a labor certification, when it is in the national interest to do so.

The Director of the Nebraska Service Center denied the petition, concluding that the Petitioner did not submit all required evidence. 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.

Prior to denying the petition, the Director sent the Petitioner a notice of intent to deny (NOID). In the NOID, the Director noted, "The Instructions for Form I-140, found at www.uscis.gov/forms, require certain evidence be submitted at the time of filing." The Director further informed the Petitioner in the NOID that his Form I-140, Immigrant Petition for Alien Workers, submission "did not include any initial evidence or supporting documentation." The Director then listed various types of evidence that the Petitioner may submit to establish eligibility for the requested benefit, spanning multiple pages; however, the Director did not specifically address Department of Labor ETA Form 750 Part B, Statement of Qualifications of Alien, or ETA Form 9089, Application for Permanent Employment Certification, in the NOID. However, the Director's sole basis for denying the Form I-140 was, "since the [P]etitioner did not submit . . . a properly completed Application for Alien Employment Certification (Form ETA-750B) or Application for Permanent Employment Certification (ETA Form 9089) Parts J, K, and L . . . USCIS must deny the Form I-140 for this reason," rather than addressing the types of evidence the Director listed in the NOID.

On appeal, the Petitioner, who now appears *pro se*, acknowledges that the record did not contain ETA Form 750 Part B and ETA Form 9089 at the time of the Director's decision; however, he asserts that "this omission was due solely and exclusively to the law firm that I had hired, which did not fully comply with its professional obligation." The Petitioner further establishes on appeal that, upon receiving the NOID, he terminated his contract with the attorney who submitted the Form I-140 and he states that he "personally submitted all the evidence required by the examiner on the NOID." However, the Petitioner asserts that the Director erred by not specifying in the NOID that the record omitted ETA Form 750 Part B and ETA Form 9089, and by ultimately denying the Form I-140 solely because of those omissions.

We note that, by regulation, USCIS need not necessarily send a NOID to a petitioner before denying a benefit request that does not, upon submission, contain all required initial evidence or otherwise demonstrate eligibility. 8 C.F.R. § 103.2(b)(8)(ii) (providing that "USCIS in its discretion may deny the benefit request for lack of initial evidence or for ineligibility or request that the missing evidence be submitted within a specified period of time as determined by USCIS"). However, when USCIS sends a NOID to a petitioner as a matter of discretion before denying a benefit request, the process—and purpose—of a NOID is provided by regulation:

> A request for evidence or notice of intent to deny will be communicated by regular or electronic mail and will specify the type of evidence required, and whether initial evidence or additional evidence is required, or the bases for the proposed denial sufficient to give the applicant or petitioner adequate notice and sufficient information to respond.

8 C.F.R. § 103.2(b)(8)(iv). Because the Director denied the Form I-140 for a basis not addressed in the NOID as a basis for the proposed denial, the NOID did not sufficiently give the Petitioner adequate notice and sufficient information to respond to the NOID in a manner that could cure the basis for the proposed denial, as required by 8 C.F.R. § 103.2(b)(8)(iv).

Therefore, we will remand the matter for the entry of a new decision. The Director may request any additional evidence considered pertinent to the new determination regarding the Petitioner's submission of initial evidence and any other issue. As such, we express no opinion regarding the ultimate resolution of this case on remand.

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