U.S. Citizenship and Immigration Services

Non-Precedent Decision of the Administrative Appeals Office

In Re: 22678615

OCT. 25, 2022

Appeal of Texas Service Center Decision

Form I-140, Immigrant Petition for Professional or Skilled Worker

The Petitioner, an information technology company, seeks to employ the Beneficiary as a programmer analyst. It requests a third preference classification of the Beneficiary as a skilled worker or professional.[1] Immigration and Nationality Act (the Act) 203(b)(3)(A)(i) and (ii), 8 U.S.C. § 1153(b)(3)(A)(i) and (ii). These employment-based immigrant classifications allow a U.S. employer to sponsor an individual for lawful permanent resident status.

The petition was initially approved. The Director of the Texas Service Center subsequently revoked the approval of the petition. The Director concluded: (1) the job opportunity listed on the labor certification was not bona fide; (2) the labor certification contained inconsistent requirements for the offered position; and (3) the Petitioner has not demonstrated that it has the continuing ability to pay the proffered wage. The Director also concluded that both the Petitioner and the Beneficiary misrepresented the location of the offered position. The matter is now before us on the Beneficiary's appeal. Although normally not the case, under certain circumstances described below a beneficiary may be considered to be an affected party in immigrant petition revocation proceedings.

The AAO reviews the questions in this matter de novo. See *Matter of Christo's Inc.*, 26 I&N Dec. 537, 537 n.2 (AAO 2015). It is the Beneficiary's burden to establish eligibility for the requested benefit by a preponderance of the evidence. See Section 291 of the Act, 8 U.S.C. § 1361; Matter of Chawathe, 25 I&N Dec. 369, 375 (AAO 2010). Upon de novo review, we will withdraw the Director's decision and remand the matter to the Director.

I. THE BENEFICIARY AS AN AFFECTED PARTY

U.S. Citizenship and Immigration Services (USCIS) regulations do not generally allow a beneficiary to appeal a petition's revocation. See 8 C.F.R. § 103.3(a)(l)(iii)(B) (stating that a beneficiary is not an "affected party" with legal standing in a proceeding). However, certain "portability-eligible" beneficiaries of revoked 1-140 visa petitions are treated as affected parties in revocation proceedings.

[1] USCIS revised the Form I-140 as of January 6, 2010, and separated the professional (now box "e") and skilled worker (now box "f") categories, which requires the Petitioner to select one category or the other for consideration. Previously, and at the time of filing the instant petition, the two categories were combined into one box (box "e").

Section 204(j) of the Act, 8 U.S.C. § 1154(j). See Matter of V-S-G-Inc., Adopted Decision 2017-06 (AAO Nov. 11, 2017). Under the portability provision of section 204(j) of the Act, approved petitions may remain valid under certain conditions even after eligible beneficiaries change jobs or employers. A beneficiary of a valid visa petition, whose application for adjustment of status remains pending for at least 180 days, may "port" the petition to a new job if that job is in the same or a similar occupational classification as the position offered in the petition. See 8 C.F.R. § 245.25(a)(2)(i). Thus, even though the petitioner for the visa classification and its beneficiary are no longer in an employment relationship, the underlying petition may remain valid for purposes of the beneficiary's adjustment of status application.

In this case, the immigrant visa petition (Form I-140) was initially approved in July 2006. The Beneficiary filed two adjustment of status applications (Form I-485), in September and October 2007, and they are still open and pending. The Director issued the initial notice of intent to revoke (NOIR) to the Petitioner in August 2016.[2] However, in January 2019, the Director issued a second NOIR to both the Petitioner and the Beneficiary after determining the Beneficiary's standing in the revocation proceeding.[3] The Director issued the revocation decision to both the Petitioner and the Beneficiary, which states, "The beneficiary was found to be eligible to receive notices and, therefore, was granted the opportunity to respond in revocation proceedings, . . . in accordance with the findings in the adopted decision in Matter of V-S-G-, Inc. . . . ." Therefore, the Beneficiary is considered an affected party in these revocation proceedings.

II. 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). 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.

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

[2] According to Wyoming Secretary of State Business Division's website, the Petitioner was dissolved in April 2012. In the decision, the Director erroneously stated that the Petitioner's response to the first NOIR was received in September 2016. However, the record contains a response from the Beneficiary in 2016 stating that the Petitioner went out of business in 2012 and therefore, the Beneficiary was responding to the NOIR.

[3] In the second NOIR, the Director stated that in July 2016, USCIS received a written request from the Beneficiary to port and has made a favorable determination.

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.

III. ANALYSIS

A. Bona fide job offer

Upon review of the record in its totality, we conclude that the Beneficiary has established by a preponderance of the evidence that the Petitioner made a bona fide job offer. The record demonstrates that the Petitioner followed the Department of Labor (DOL)'s guidance to indicate its headquarters as the job location on the labor certification and included a clarifying statement that the position would be at various unanticipated client sites across the United States.[4] Accordingly, we will withdraw the Director's finding that the Petitioner did not demonstrate that it made a bona fide job offer to the Beneficiary.

B. Willful misrepresentation

The Director also concluded that both the Petitioner and the Beneficiary made willful misrepresentations regarding the location of the job. In particular, the Director stated that the Petitioner misrepresented the location of its business operations and the job offer, and the Beneficiary misrepresented his "intent to engage in the employment arrangement as attested to on the labor certification as he never lived or worked in Wyoming." Upon review, we will withdraw the Director's conclusion regarding willful misrepresentation for the Petitioner and the Beneficiary and remand the petition for further review and to provide sufficient explanation of the grounds for willful misrepresentation.

While we acknowledge the Director's concerns regarding the actual job location, we note that the Director did not sufficiently explain the basis to support the finding of willful misrepresentation. 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

[4] See the DOL's Employment and Training Administration - Field Memorandum No. 48-94 (May 16, 1994) § 10 -- which provided that "[a]pplications involving job opportunities which require the [noncitizen] beneficiary to work in various locations throughout the U.S. that cannot be anticipated should be filed with the local Employment Service office having jurisdiction over the area in which the employer's main or headquarters office is located." See also [redacted] (BALCA Sept. 3, 2009), the Board indicated that for roving employees, the employer's main or headquarters office was the proper designation for place of employment.

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).

Accordingly, for an immigration officer to find a willful and material misrepresentation in visa petition proceedings, they must determine: 1) that the petitioner or beneficiary made a false representation to an authorized official of the United States government; 2) that the misrepresentation was willfully made; and 3) that the fact misrepresented was material. See Matter of M-, 6 I&N Dec. 149 (BIA 1954); Matter of L-L-, 9 I&N Dec. 324 (BIA 1961); Matter of Kai Hing Hui, 15 I&N Dec. at 288.

Here, the Director noted the inconsistencies in the record and the findings from the investigative interviews and concluded that the Petitioner misrepresented its business operations. However, the Director did not apply the willful misrepresentation of a material fact elements as outlined above in analyzing the factors to support the finding of willful misrepresentation. Furthermore, while the Director stated that the Beneficiary misrepresented his "intent" to engage in the employment arrangement as indicated on the labor certification, the Director did not elaborate on how he determined the Beneficiary's "intent." The Director's finding of willful misrepresentation of material facts against the Beneficiary is neither specific nor well grounded. On appeal, the Beneficiary asserts that he did not misrepresent any of his work locations or his addresses on any of the forms he filed with any of the government agencies. Accordingly, we will withdraw the Director's findings of willful misrepresentation by the Petitioner and the Beneficiary and remand this matter to the Director for further consideration and a proper analysis of the willful misrepresentation issue against the Petitioner and the Beneficiary.[5]

C. Inconsistencies regarding job requirements

In the decision, the Director stated that the Petitioner indicated inconsistent job requirements on the labor certification and also was unable to determine whether the specific requirements on the labor certification meet the classification of a professional because the Petitioner did not submit the requested information. On appeal, the Beneficiary asserts that the petition was properly filed under the third preference category as the position requires either a U.S. bachelor's degree or the foreign equivalent or at least two years training or experience. He further asserts that the labor certification supports the petition as the position requires "more than two years training or experience."

The Petitioner checked box "e" in Part 2 of the Form I-140, which is for either a professional or a skilled worker. As we noted earlier, at the time of filing the instant petition, the professional and skilled worker categories were combined into one box (box "e"). The record indicates that the Director initially approved the petition under the "professional" category.[6] However, the approval notice sent to the Petitioner did not indicate the specific category, rather it listed the sections of the law for both

[5] We recognize that that the Director raised significant if somewhat speculative concerns. While not sufficiently developed for purposes of this visa petition, the Director is not barred from further inquiry, investigation, or the development of questions for consular processing or adjustment of status proceedings. See Matter of O, 8 I&N Dec. 295 (BIA 1959) (stating that the immigrant visa petition is not the appropriate stage of the process for questions regarding admissibility).

[6] Under the classification section of the petition, the immigration services officer checked the box next to the section of the law for the professional category.

the skilled worker category (section 203(b)(3)(A)(i) of the Act) and the professional category (section 203(b)(3)(A)(ii) of the Act).

In the labor certification and in the letter submitted in support of the petition, the Petitioner stated that the position requires a bachelor's degree or a foreign equivalent in computer science, math, engineering, or the related fields (business administration, accounting, commerce, or finance) and nine months of experience in the job offered. The Petitioner checked "no" for the question in H.8 of the labor certification asking whether there is an alternate combination of education and experience that is acceptable. However, in the addendum section of the labor certification for H.14, "Specific skills or other requirements," the Petitioner explained that it would also accept a suitable combination of education, experience, and training equivalent to a bachelor's degree and stated that it routinely accepts 3 years of professional experience for each year of coursework at the bachelor's level.[7] The Petitioner included the same requirement of combination of education, experience, and training in the support letter.

Here, as the Petitioner explained, both the labor certification and the support letter indicate that the Petitioner accepts alternatives to a four-year U.S. bachelor's degree in the form of experience and training, therefore, it is reasonable to presume that the Petitioner intended to classify the Beneficiary as a skilled worker.[8] As the Director has not evaluated the evidence under the skilled worker classification, we will remand for the Director to determine whether the Beneficiary qualifies as a skilled worker.

D. Ability to pay

To be eligible for the classification it requests for the beneficiary, a petitioner must establish, among other things, that it has the ability to pay the proffered wage stated in the labor certification. As provided in the regulation at 8 C.F.R. § 204.5(g)(2):

> The petitioner must demonstrate this ability at the time the priority date is established and continuing until the beneficiary obtains lawful permanent residence. Evidence of this ability shall be either in the form of copies of annual reports, federal tax returns, or

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[7] The rule which equates three years of experience to one year of education applies to non-immigrant H-1B petitions, not to immigrant petitions. See 8 CFR § 214.2(h)(4)(iii)(D)(5).

[8] The regulation at 8 C.F.R. § 204.5(l)(3)(ii)(C) states, in pertinent part:

> If the petition is for a professional, the petition must be accompanied by evidence that the [beneficiary] holds a United States baccalaureate degree or a foreign equivalent degree . . . . Evidence of a baccalaureate degree shall be in the form of an official college or university record showing the date the baccalaureate degree was awarded and the area of concentration of study.

There is no provision in the statute or the regulations that would allow a beneficiary to qualify under section 203(b)(3)(A)(ii) of the Act with anything less than a full baccalaureate degree from a college or university. Where the analysis of the beneficiary's credentials relies on a combination of work and/or multiple lesser degrees, the result is the "equivalent" of a bachelor's degree rather than a single-source "foreign equivalent degree." In order to have education equating to a bachelor's degree under section 203(b)(3)(A)(ii) of the Act, the beneficiary must have a single degree that is the "foreign equivalent degree" to a United States baccalaureate degree from a college or university. A beneficiary must also meet all of the education, training, experience, and other requirements of the labor certification as of the petition's priority date. See *Matter of Wing's Tea House*, 16 I&N Dec. 158, 159 (Acting Reg'l. Comm'r 1977).

> audited financial statements. In a case where the prospective United States employer employs 100 or more workers, the director may accept a statement from a financial officer of the organization which establishes the prospective employer's ability to pay the proffered wage. In appropriate cases, additional evidence, such as profit/loss statements, bank account records, or personnel records, may be submitted by the petitioner or requested by [USCIS].

The priority date of the petition is December 29, 2005. The Beneficiary states that he worked for the Petitioner until May 10, 2009, when he ported to a new employer.[9] Therefore, the Petitioner must demonstrate that it had the ability to pay from 2005 until May 2009.[10] The Director concluded that the Petitioner has not demonstrated that it has the ability to pay the proffered wages.

In determining a petitioner's ability to pay the proffered wage, USCIS first examines whether the beneficiary was employed and paid by the petitioner during the period following the priority date. A petitioner's submission of documentary evidence that it employed the beneficiary at a salary equal to or greater than the proffered wage for the time period in question, when accompanied by a form of evidence required in the regulation at 8 C.F.R. § 204.5(g)(2), may be considered proof of the petitioner's ability to pay the proffered wage.

Here, the record contains the copies of the Beneficiary's Internal Revenue Service (IRS) Form W-2, Wage and Tax Statements, for the years 2005–2009 demonstrating the Petitioner paid the Beneficiary more than the proffered wage for the years in question.[11] While acknowledging that the Petitioner paid the Beneficiary more than the proffered wages, the Director stated, "doubt has been cast on the documents submitted" and requested corroborating evidence in the form of official IRS transcripts for the relevant years. However, the Director did not sufficiently explain the reasons why a "doubt has been cast" and did not identify inconsistencies in the evidence provided necessitating corroborating evidence. Accordingly, we will withdraw the Director's finding that the Petitioner did not demonstrate that it had the ability to pay the Beneficiary and remand the matter to the Director to provide full analysis of the evidence submitted and to discuss whether any inconsistencies contained in the evidence submitted in support of the Petitioner's ability to pay and why a doubt was cast on the evidence.

IV. CONCLUSION

For the reasons discussed above, we are withdrawing the Director's decision on all grounds and remanding the case to the Director for further review and to provide sufficient explanation of the grounds for willful misrepresentation against the Petitioner and the Beneficiary, as well as the Petitioner's ability to pay. Furthermore, the Director should evaluate the evidence for the skilled

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[9] The record contains a written request to port to a new employer submitted in August 2009 by the Beneficiary pursuant to section 106(c) of the American Competitiveness in the Twenty-First Century Act of 2000 (AC21), now section 204(j) of the Act. The job offer letter from the new employer is dated May 12, 2009.

[10] USCIS policy does not permit petitioners to prorate proffered wages in the years of priority date. However, the Petitioner must establish by a preponderance of evidence that it has the continuing ability to pay the proffered wage until the Beneficiary ported to another similar employment in May 2009.

[11] 2009 wages are prorated until the Beneficiary ported to a new employer.

worker classification and whether the Beneficiary is qualified as a skilled worker. The Director may request any additional evidence considered pertinent to the new determination and any other issues.

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