U.S. Citizenship and Immigration Services

Non-Precedent Decision of the Administrative Appeals Office

In Re: 28077549

Date: AUG. 29, 2023

Appeal of Texas Service Center Decision

Form I-140, Immigrant Petition for Alien Workers (Professional)

The Petitioner, the operator of a retail kiosk that sells cell phones and accessories, seeks to permanently employ the Beneficiary as a market research analyst. The business requests his classification under the employment-based, third-preference (EB-3) immigrant visa category as a professional. *See* Immigration and Nationality Act (the Act) section 203(b)(3)(A)(ii), 8 U.S.C. § 1153(b)(3)(A)(ii). U.S. businesses may sponsor noncitizens for permanent residence in this category to work in jobs requiring at least bachelor's degrees. *Id.*

After the petition's initial grant, the Acting Director of the Texas Service Center revoked the filing's approval. The Director concluded that the Petitioner did not demonstrate its intent to employ the Beneficiary in the offered job and willfully misrepresented the position's duties. On appeal, the Petitioner claims its intent to employ the Beneficiary in the job and contends that insufficient evidence supports the Director's conclusions.

In revocation proceedings, the Petitioner bears the burden of demonstrating eligibility for the requested benefit by a preponderance of the evidence. *See Matter of Ho,* 19 I&N Dec. 582, 589 (BIA 1988) (citation omitted). Exercising de novo appellate review, *see Matter of Christo's, Inc.*, 26 I&N Dec. 537, 537 n.2 (AAO 2015), we conclude that the record does not support the Director's revocation grounds and will therefore withdraw the decision. But, because the Petitioner did not demonstrate its required ability to pay the offered position's proffered wage or the Beneficiary's educational qualifications for the job, we will remand the matter for entry of a new decision.

I. LAW

Immigration as a professional generally follows a three-step process. First, a prospective employer must apply to the U.S. Department of Labor (DOL) for certification that: there are insufficient U.S. workers able, willing, qualified, and available for an offered position; and a noncitizen's employment in the position would not harm wages and working conditions of U.S. workers with similar jobs. Section 212(a)(5)(A)(i) of the Act, 8 U.S.C. § 1182(a)(5)(A)(i).

Second, an employer must submit an approved labor certification with an immigrant visa petition to U.S. Citizenship and Immigration Services (USCIS). Section 204(a)(1)(F) of the Act, 8 U.S.C.

§ 1154(a)(1)(F); 8 C.F.R. § 204.5(l)(3)(i). Among other things, USCIS determines whether a noncitizen beneficiary meets the requirements of a DOL-certified position and a requested immigrant visa category. 8 C.F.R. § 204.5(l)(3)(ii)(C).

Finally, if USCIS approves a petition, a beneficiary 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.

But, "at any time" before a beneficiary obtains permanent residence, 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 a record, a petition's erroneous approval justifies its revocation. *Matter of Ho*, 19 I&N Dec. at 590.

USCIS properly issues a notice of intent to revoke (NOIR) a petition's approval if the unexplained and unrebutted record at the time of the NOIR's issuance would have warranted the filing's denial. *Matter of Estime*, 19 I&N Dec. 450, 451 (BIA 1987). USCIS properly revokes a petition's approval if a petitioner does not timely respond to a NOIR or if the business's response does not overcome the alleged revocation grounds. *Id.* at 451-52.

II. ANALYSIS

A. Intent to Employ the Beneficiary in the Offered Job

A business may file an immigrant visa petition if the petitioner is "desiring and intending to employ [a noncitizen] within the United States." Section 204(a)(1)(F) of the Act. A 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 a petition's denial where, contrary to the accompanying labor certification, the petitioner did not intend to employ the beneficiary as a domestic worker on a full-time, live-in basis).

On the Form I-140, Immigrant Petition for Alien Worker, and the accompanying labor certification, the Petitioner stated its intent to permanently employ the Beneficiary full-time as a market research analyst. As listed on the labor certification, the job's duties involve: "[r]esearching market conditions to determine potential sales of products; gathering information on competitors, prices, sales, and methods of marketing and distribution; and analyzing buying trends, prices of products and budgets."

USCIS initially approved the petition in November 2017, 10 days after its filing. In May 2022, a USCIS officer interviewed the Beneficiary regarding his application for adjustment of status. He told the officer that he began working for the Petitioner in July 2018 in the offered position. The Petitioner operates a small kiosk in a mall. He usually worked at the kiosk only on Fridays and Saturdays, and spent four or five days a week elsewhere, handing out questionnaires and promotional flyers, and researching competitors. He collected data alone and reportedly did not mention his use of any computer programs or analytical or statistical tools in his work.

The interviewing officer found that the Beneficiary's descriptions of his job duties did not match those of the offered position listed on the labor certification. So, in September 2019, USCIS officers visited the mall kiosk, where the Beneficiary appeared to be the sole worker. After identifying themselves and obtaining the Beneficiary's consent, the officers asked him questions about his job. He told them

that he collects data surveys from customers at the kiosk and categorizes the data using a computer spreadsheet program. The Beneficiary stated he then analyzes the data, but he reportedly could not explain how he does that. He looked in the kiosk for a survey or questionnaire to show the officers but was unable to find one. He said that, for the past few weeks, he had been regularly working at the kiosk because another employee had left the company. He said he had been working about 11 hours a day as a salesman/cashier. He showed the officers a computer screen listing about five employees of the business and their schedules that week. The officers reported that the kiosk's business did not appear to require a market research analyst and that the Beneficiary struggled to explain analyses involved in his purported work.

The Director issued a NOIR citing the information above and suggesting that the Petitioner intended to employ the Beneficiary as a salesman/cashier, rather than as a market research analyst. The NOIR states:

> It appears that the petitioner intends to employ the beneficiary outside the terms of the labor certification. Therefore, the evidence does not show that the petitioner made a bona fide job offer to the beneficiary, or that the petitioner desires and intends to employ the beneficiary in the offered position.

A beneficiary need not work for a petitioner in an offered position until they obtain permanent residence. *See, e.g., Matter of Rajah*, 25 I&N Dec. 127, 132 (BIA 2009) ("An alien is not required to have been employed by the certified employer prior to adjustment of status."). Thus, a noncitizen's performance of duties for a petitioner other than those of an offered position does not necessarily undermine the business's intent to employ the beneficiary in the job upon approval of their permanent residence.

The Beneficiary, however, stated the Petitioner's pre-adjustment employment of him in the offered position of market research analyst. Thus, the officers' observations of his sales duties at the kiosk and his purported struggles to describe his analyses and to provide samples of his surveys and questionnaires cast doubt on the Petitioner's intent to employ him in the offered job. The Beneficiary claimed that another employee's departure required him to temporarily operate the kiosk. But the claim lacked supporting evidence, and the NOIR raised enough unexplained and unrebutted doubts to have warranted the petition's denial. *See Matter of Estime*, 19 I&N Dec. at 451. The Director therefore properly sought the petition's revocation based on the Petitioner's intent to the employ the Beneficiary in the offered position.

The Petitioner's NOIR response partly misunderstood USCIS' concerns. The response included evidence addressing the offered job's availability to U.S. workers, commonly called "the bona fides of the *job opportunity*." As discussed above, the NOIR questioned the Petitioner's intent to employ the Beneficiary in the offered position, also known as "the bona fides of the *job offer*."

The Petitioner's NOIR response, however, included evidence addressing the company's intent to employ the Beneficiary in the offered job. The Petitioner claimed that USCIS' concerns were "unreasonable" because the company "actually employed" him in the offered position. The company submitted copies of payroll journals and IRS Forms W-2, Wage and Tax Statements, indicating its employment of him from July 2018 to February 2020. In an affidavit, the Beneficiary stated: "As a

Market Research Analyst, I have conducted surveys through questionnaire ... provided to our customers. After collecting the data, I process the information and prepare a report." The Petitioner submitted purported examples of the Beneficiary's work products, including copies of: surveys; monthly reports; a financial budget; and a market research report.

Also, in an affidavit, the company's president/majority owner, indicated that the Beneficiary worked at the kiosk only temporarily. The president stated: "I requested [him] to do the Cashier job temporarily along with his Research Associate job as our store Cashier quit his job at short notice." Copies of the company's quarterly federal payroll tax returns support the temporary nature of the Beneficiary's operation of the mall kiosk. The tax return for the fourth quarter of 2019 - which began on October 1, shortly after the USCIS officers visited the mall kiosk - shows that the Petitioner employed only the Beneficiary during that three-month period. In other quarters that year, the returns show the company's employment of the Beneficiary and at least two other people.

The Director found that the Petitioner insufficiently demonstrated its claimed intent to employ the Beneficiary in the offered job. The Director stated her consideration of the company's NOIR response. But her decision makes a conclusory finding without discussing the Petitioner's rebuttal evidence in detail. A preponderance of the evidence indicates that the Petitioner intends to employ the Beneficiary in the position offered as a market research analyst. We will therefore withdraw the Director's finding of insufficient evidence of the Petitioner's intent to employ the Beneficiary in the offered job.

B. The Petitioner's Alleged Misrepresentation

A petitioner's willful misrepresentation of a material fact may justify revocation of a petition's approval. USCIS can approve a filing only if "the facts stated in the petition are true." Section 204(b) of the Act. A petition includes any supporting evidence - including a labor certification. 8 C.F.R. § 103.2(b)(1). Thus, USCIS may revoke a petition's approval if material facts stated on an accompanying labor certification are untrue.

The Director concluded that the Petitioner willfully misrepresented the offered position's job duties on the accompanying labor certification. The Director found insufficient evidence that the Beneficiary performed the duties of the offered job listed on the labor certification. Again, however, the Director issued a conclusory finding that did not discuss the company's rebuttal evidence in detail. The Director did not explain why the copies of surveys and reports did not demonstrate the Beneficiary's performance of the offered job's duties,[1] or why the quarterly federal payroll tax records did not support his claimed work at the kiosk on only a temporary basis. Because the record does not support the Director's conclusion as currently constituted, we will withdraw her finding that the Petitioner willfully misrepresented the job's duties.

[1] As noted above, a beneficiary need not work for a petitioner in an offered position until they obtain permanent residence. *See Matter of Rajah*, 25 I&N Dec. at 132.

C. The Required Education

The appeal overcomes the Director's revocation grounds. But the record does not establish the petition's approvability. Unaddressed by the Director's NOIR, the Petitioner did not demonstrate the Beneficiary's educational qualifications for the offered position.

A petitioner must demonstrate a beneficiary's possession of all DOL-certified job requirements of an offered position by a petition's priority date. *Matter of Wing's Tea House*, 16 I&N Dec. 158, 160 (Acting Reg'l Comm'r 1977). This petition's priority date is May 22, 2017, the date DOL accepted the Petitioner's labor certification application for processing. *See* 8 C.F.R. § 204.5(d) (explaining how to determine a petition's priority date).

When assessing a Beneficiary's qualifications, USCIS must examine the job-offer portion of an accompanying labor certification to determine the job's minimum requirements. USCIS may neither disregard certification terms nor impose unstated requirements. *See, e.g., Madany v. Smith*, 696 F.2d 1008, 1015 (D.C. Cir. 1983) (holding that "DOL bears the authority of setting the *content* of the labor certification") (emphasis in original).

The Petitioner's labor certification states the minimum requirements of the offered position of market research analyst as a U.S. bachelor's degree in economics. The labor certification states that the position requires neither training nor experience. The certification also states that the company will not accept "a foreign educational equivalent" of the required degree.

On the labor certification, the Beneficiary attested that, by the petition's priority date, a Pakistani university awarded him a "bachelor of arts in economics." The Petitioner submitted evidence that the school issued the Beneficiary a two-year bachelor of arts degree in 1996 and a two-year master of arts degree in economics in 2001. The company also submitted an independent, professional evaluation of the Beneficiary's foreign educational credentials, concluding that his master's degree equates to a U.S. bachelor's degree in economics.

As the labor certification states, however, the offered position requires a *U.S.* bachelor's degree in economics. In part H.9 of the labor certification, the Petitioner specifically indicated that it would not accept a "foreign educational equivalent" of the required U.S. degree. Thus, the record does not demonstrate the Beneficiary's educational qualifications for the offered position.

The Director did not notify the Petitioner of this evidentiary defect. We will therefore remand the matter. On remand, the Director should issue a new NOIR advising the company of the deficiency and affording the business a reasonable opportunity to respond.

D. Ability to Pay

Also unaddressed by the Director, the Petitioner did not demonstrate its required ability to pay the offered job's proffered wage. A petitioner must establish its continuing ability to pay a proffered wage from a petition's priority date until a beneficiary obtains permanent residence. 8 C.F.R. § 204.5(g)(2). Evidence of ability to pay must generally include copies of annual reports, federal tax returns, or audited financial statements. *Id.*

The Petitioner's labor certification states the proffered wage of the offered position of market research analyst as $34,424 a year. As previously indicated, the petition's priority date is May 22, 2017. USCIS initially approved the petition in November 2017. The company must therefore demonstrate its continuing ability to pay the proffered wage in 2017, the year of the petition's priority date.

The Petitioner submitted a copy of its federal income tax return for 2016. But, contrary to 8 C.F.R. § 204.5(g)(2), the record lacks copies of its annual report, federal tax return, or audited financial statements for 2017. The company therefore did not demonstrate its ability to pay the proffered wage during the year of the petition's priority date.

The Director did not notify the Petitioner of this evidentiary defect. On remand, the Director's new NOIR should therefore advise the company of the deficiency and afford it a reasonable opportunity to respond. The Petitioner must provide regulatory required evidence of its ability to pay the proffered wage in 2017 in the form of an annual report, federal tax return, or audited financial statements. The company may also submit additional evidence of its ability to pay that year, including: proof that it paid the Beneficiary wages; or materials supporting the factors stated in *Matter of Sonegawa*, 12 I&N Dec. 612, 614-15 (Reg'l Comm'r 1967).

If supported by the record, the new NOIR may inform the Petitioner of any other potential revocation grounds beyond the education and ability-to-pay issues. The Director, however, must afford the company a reasonable opportunity to respond to all issues raised on remand. Upon receipt of a timely response, the Director should review the entire record and enter a new decision.

III. CONCLUSION

The record does not support the petition's revocation based on the Petitioner's alleged lack of intent to employ the Beneficiary in the offered position or the company's purported willful misrepresentation of the job's duties. The Petitioner, however, did not demonstrate its ability to pay the proffered wage or the Beneficiary's educational qualifications for the offered job.

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