U.S. Citizenship and Immigration Services

Non-Precedent Decision of the Administrative Appeals Office

In Re: 24445161

Date: MAR. 22, 2023

Appeal of Texas Service Center Decision

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

The Petitioner, a manufacturer and seller of tires, seeks to employ the Beneficiary as a computer support specialist. It requests his classification under the third preference, immigrant category as a professional. Immigration and Nationality Act (the Act) section 203(b)(3)(A)(ii), 8 U.S.C. § 1153(b)(3)(A)(ii). This employment-based immigrant classification allows a U.S. employer to sponsor a professional with a baccalaureate degree for lawful permanent resident status.

The Director of the Texas Service Center initially approved the Form I-140, Immigrant Petition for Alien Workers, but subsequently revoked the approval on notice, concluding that the Petitioner willfully misrepresented material facts. The matter is now before us on appeal.

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

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: (1) there are insufficient U.S. workers able, willing, qualified, and available for an offered position; and (2) the employment of a noncitizen in the position will not harm wages and working conditions of U.S. workers with similar jobs. *See* section 212(a)(5) of the Act, 8 U.S.C. § 1182(a)(5).[1]

Second, an employer must submit an approved labor certification with an immigrant visa petition to U.S. Citizenship and Immigration Services (USCIS). *See* section 204 of the Act, 8 U.S.C. § 1154. Among other things, USCIS determines whether a noncitizen beneficiary meets the requirements of a certified position and a requested immigrant visa category. 8 C.F.R. § 204.5(l). USCIS also assesses

[1] The priority date of a petition is the date the DOL accepted the labor certification for processing. *See* 8 C.F.R. § 204.5(d). The priority date of the submitted labor certification in this case is December 1, 2017.

the petition to ensure that the position offered is the same or similar to the position that the DOL certified. *See generally* 6 *USCIS Policy Manual* E.6(A), https://www.uscis.gov/policy-manual.

Finally, if USCIS approves a petition, a designated noncitizen 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 opportunity to submit evidence in opposition thereto, before proceeding with written notice of revocation. *See* 8 C.F.R. § 205.2(b) and (c).

The Board of Immigration Appeals has determined that "[a] notice of intention to revoke a visa petition is properly issued for "good and sufficient cause" where the evidence of record at the time the notice is issued, if unexplained and unrebutted, would warrant a denial of the visa petition based upon the petitioner's failure to meet his burden of proof." *Matter of Ho*, 19 I&N Dec. 582, 590 (BIA 1988) (citing *Matter of Estime*, 19 I&N Dec. 450 (BIA 1987)). 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. *Id.*

II. ANALYSIS

The Director initially approved the petition in July 2018, but later revoked the approval in September 2021 following the issuance of a notice of intent to revoke (NOIR). In the revocation decision, the Director emphasized that the Petitioner did not disclose a familial relationship between an owner of the Petitioner and the Beneficiary in the labor certification; namely, it did not disclose in the labor certification that an owner of the Petitioner was the father-in-law of the Beneficiary. The Director indicated that section C.9 of the labor certification asks, "Is the employer a closely held corporation … in which the alien has an ownership interest, or is there a familial relationship between the owners, stockholders, partners, corporate officers, incorporators, and the alien?" The Director pointed to the fact that the Petitioner checked "No" in response to this question, attesting that the Beneficiary has no ownership interest in the company and that there was no familial relationship between him and its owners, stockholders, partners, corporate officers, or incorporators.

The Director concluded the Petitioner willfully misrepresented material facts, and further stated that it did not establish "each adjudicative element to establish eligibility for the requested benefit." On appeal, the Petitioner contends that the Director did not sufficiently consider the evidence submitted

in response to the NOIR and applied an "arbitrary definition" of familial relationship not supported by regulations or USCIS policy.

At issue here is whether the Director properly revoked the approval of the petition based on the stated grounds. For the reasons discussed below, we will withdraw the Director's decision and remand the matter for further consideration and entry of a new decision.

First, the Director did not clearly articulate how the Beneficiary was ineligible for the benefit sought, and therefore, how the petition was approved in error. Typically, an undisclosed familial relationship is relevant to whether the Petitioner's job offer to the Beneficiary is bona fide. The Director only vaguely stated that the Petitioner had not "satisfied each adjudicative element to establish eligibility for the requested benefit." However, the Director did not clearly articulate why the petition was incorrectly approved, which bases for eligibility the Petitioner did not establish, and why it had good and sufficient cause to revoke the approval of the immigrant petition. As such, any future Director's decision should clearly identify why the petition was approved in error and clearly discuss the bases upon which the Petitioner did not meet their burden of proof for eligibility.

Further, if the Director chooses to revoke the approved petition on the basis of a lack of a bona fide job offer, they should sufficiently analyze this issue based on applicable law and policy. A labor certification employer must attest that "[t]he job opportunity has been and is clearly open to any U.S. worker." 20 C.F.R. § 656.10(c)(8). This attestation "infuses the recruitment process with the requirement of a bona fide job opportunity: not merely a test of the job market." *Matter of Modular Container Sys., Inc.*, 89-INA-228, 1991 WL 223955, at 7 (BALCA 1991) (en banc); *see* 20 C.F.R. § 656.17(l). The DOL requires the disclosure of any familial relationships between the noncitizen and the owners, stockholders, partners, corporate officers, and incorporators at section C.9 on the labor certification. Published DOL guidance on this issue states that a familial relationship includes any relationship established by blood, marriage, or adoption, even if distant. For example, the guidance indicates that a familial relationship includes cousins of all degrees, aunts, uncles, grandparents, and grandchildren as well as relationships established through marriage, such as in-laws and stepfamilies. *See* DOL, Office of Foreign Labor Certification, "OFLC Frequently Asked Questions and Answers," at https://www. foreignlaborcert.doleta.gov/faqsanswers.cfm.

In addition, even if the record established a familial relationship, it would represent only one factor to be considered among multiple other factors when determining whether the Petitioner made a bona fide job offer. The other factors include, but are not limited to, whether the noncitizen affiliated with the Petitioner is in a position to control or influence hiring decisions regarding the offered position; incorporated or founded the company; has an ownership interest in the company; is involved in the management of the company; sits on its board of directors; is one of a small group of employees; has qualifications matching specialized or unusual job duties or requirements stated in the labor certification; and is so inseparable from the sponsoring employer because of his or her pervasive presence that the employer would be unlikely to continue in operation without the noncitizen. *Modular Container*, 1991 WL 223955 at 8-10. The DOL adopted the holding in *Modular Container* at 20 C.F.R. § 656.17(1). As such, to the extent the Director revokes the approved petition on the basis of a lack of a bona fide job offer to the Beneficiary, they should fully address and consider all applicable factors beyond the alleged familial relationship to determine whether the Petitioner made a bona fide

job offer. *Id.* We will not make a determination on the totality of the circumstances regarding the bona fides of the job offer here, in the first instance, as that is in the Director's purview.

Furthermore, the Director did not sufficiently discuss and analyze the assertions and evidence submitted by the Petitioner in response to the NOIR. For example, in response to the NOIR, the Petitioner submitted an affidavit from the Beneficiary's acknowledged father-in-law stating that he was previously a minority shareholder of the company, but that he transferred his shares to another owner in April 2021 and no longer had any ownership interest in the company. Further, the father-in-law of the Beneficiary asserted that he had no influence over the Petitioner's job offer and the filing of the labor certification and petition. However, the Director's decision includes no discussion as to what statements or documentation were provided by the Petitioner in response to the NOIR, nor any analysis related to its response to the NOIR. Therefore, in any future decision, the Director should acknowledge and specifically discuss the assertions and evidence provided by the Petitioner in response to the NOIR, including the contentions now articulated on appeal. Any subsequent decision by the Director should sufficiently analyze all elements of willful misrepresentation of a material fact, if applicable.[2]

III. CONCLUSION

For the reasons discussed above, we will withdraw the Director's decision and remand this case for further consideration of whether the Petitioner and the Beneficiary meet all eligibility requirements, including, but not limited to, the bona fide nature of the job offer and whether the Petitioner willfully misrepresented material facts. After further consideration of the issues addressed in this decision, the Director shall issue a new NOIR in accordance with the applicable provisions. Following the Petitioner's response to the NOIR, or the expiration of the time period to respond, the Director shall issue a new decision.

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

[2] A finding of willful misrepresentation of material fact against a petitioner or beneficiary requires the following elements:

- The petitioner or beneficiary procured, or sought to procure, a benefit under U.S. immigration laws;
- The petitioner or beneficiary made a false representation;
- The false representation was willfully made;
- The false representation was material; and
- The false representation was made to a U.S. government official.

See Matter of Y-G-, 20 I&N Dec. 794, 796 (BIA 1994), *see also Matter of Kai Hing Hui,* 15 I&N Dec. 288, 289-90 (BIA 1975), *see generally* 8 *USCIS Policy Manual*, *supra*, at J.2(B).