U.S. Citizenship and Immigration Services

Non-Precedent Decision of the Administrative Appeals Office

In Re: 23092369

Date: MAR. 27, 2023

Appeal of Texas Service Center Decision

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

The Petitioner, describing itself as a home health agency, seeks to employ the Beneficiary as a registered nurse. It requests classification of the Beneficiary as a skilled worker under the third preference immigrant classification. Immigration and Nationality Act (the Act) section 203(b)(3)(A)(i), 8 U.S.C. § 1153(b)(3)(A)(i). This employment-based immigrant classification allows a U.S. employer to sponsor a noncitizen for lawful permanent resident status to work in a position that requires at least two years of training or experience.

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 there was no bona fide job offer open to U.S. workers. 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 sustain the appeal.

I. LAW

This petition is for a Schedule A occupation. A Schedule A occupation is one codified at 20 C.F.R. § 656.5(a) for which the Department of Labor (DOL) has determined that there are not sufficient U.S. workers who are able, willing, qualified and available and that the wages and working conditions of similarly employed U.S. workers will not be adversely affected by the employment of noncitizens in such occupations. The current list of Schedule A occupations includes professional nurses. *Id.* Petitions for Schedule A occupations do not require a petitioner to test the labor market and obtain a certified ETA Form 9089, Application for Permanent Employment Certification, from the DOL prior to filing the petition with U.S. Citizenship and Immigration Services (USCIS). Instead, the petition is filed directly with USCIS with an uncertified ETA 9089. *See* 8 C.F.R. § 204.5(a)(2); *see also* 20 C.F.R. § 656.15. If USCIS approves the petition, the noncitizen applies 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 denied the petition in June 2019, but later approved the petition in December 2019 after the Petitioner filed a motion to reopen and reconsider. Thereafter, the Director revoked the approval of the petition in December 2021 following the issuance of a notice of intent to revoke (NOIR). The Director concluded the Petitioner did not establish that the position was "open to the public[1]" and that there was a bona fide job offer. 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 sustain the appeal.

In the revocation decision, the Director emphasized that there was an undisclosed familial relationship between the owner of the Petitioner and the Beneficiary that left uncertainty as to whether the job offer was bona fide. To assess whether a bona fide job offer may be at issue, 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 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 her and its owners, stockholders, partners, corporate officers, or incorporators.

In the notice of intent to revoke (NOIR), the Director stated that "it was found that there is an existing familial relationship that was not disclosed between the beneficiary and the petitioner." The Director pointed to evidence indicating that the owner of the Petitioner and the Beneficiary's spouse were both members of the board of directors of a church, as reflected in records from the Texas Secretary of State. In response to the NOIR, the Petitioner maintained that, although her husband and the owner of the Petitioner used to attend the same church, she had no familial relationship with the owner of the Petitioner and contended her husband and the owner of the Petitioner had never met.

[1] As noted above, the current petition is for a Schedule A occupation not requiring the Petitioner to test the labor market. Instead, the petition was filed directly with USCIS with an uncertified ETA 9089. *See* 8 C.F.R. § 204.5(a)(2); *see also* 20 C.F.R. § 656.15.

The Director revoked the approval of the petition, emphasizing that the Beneficiary's husband indicated in a non-immigrant visa application that he was a minister at the church for which he also acted as a member of the board of directors, along with the owner of the Petitioner. The Director concluded that this contradicted the Beneficiary's assertion that her husband and the owner of the Petitioner had never met. The Director determined that the provided evidence was insufficient to establish that there was no familial relationship between the owner of the Petitioner and the Beneficiary, and that therefore, "it is not evident that the position in question was open to the public and that a bona fide job offer existed." The Director further stated that the record was insufficient to establish that the position was posted for others to apply.

On appeal, the Petitioner asserts that the Director erred in determining that there was a familial relationship between the Beneficiary and the Petitioner's owner and maintains that she has no ownership interest in the company.

The record does not support the Director's determination that the Petitioner's owner had a familial relationship with the Beneficiary that would require a "Yes" response at section C.9 of the labor certification.[2] While the record indicates that the Petitioner's owner and the Beneficiary may have been acquainted prior to the filing of the labor certification, the Director did not provide an appropriate basis for concluding that they had a familial relationship that required disclosure at section C.9 of the Form ETA 9089.[3] Further, the Director's assertions that the position was not "open to the public" that the position was not "posted for others to apply" are erroneous given that this is a petition for a Schedule A occupation that does not require a test of the labor market. We conclude, therefore, that there was no "good and sufficient cause" to revoke the approval of the petition, as required by section 205 of the Act.

For these reasons, we will withdraw the decision of the Director and reinstate the approval of the petition. The Petitioner has established eligibility for the benefit sought.

ORDER: The appeal is sustained.

[2] The record also does not indicate that the Beneficiary has any ownership interest in the Petitioner.

[3] 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.