



**U.S. Citizenship
and Immigration
Services**

**Non-Precedent Decision of the
Administrative Appeals Office**

In Re: 25487589

Date: SEP. 28, 2023

Appeal of Nebraska Service Center Decision

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

The Petitioner, a provider of healthcare services, sought to employ the Beneficiary as a therapy supervisor. The company requested her classification under the second-preference, immigrant category as a member of the professions holding an advanced degree or its equivalent. *See* Immigration and Nationality Act (the Act) section 203(b)(2)(A), 8 U.S.C. § 1153(b)(2)(A).

The Director of the Nebraska Service Center revoked the approval of the petition, concluding that the record did not establish the job offer was bona fide. The matter is now before us on the Beneficiary's appeal.¹ 8 C.F.R. § 103.3.

The affected party 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. EMPLOYMENT BASED IMMIGRATION

Immigration as an advanced degree professional usually follows a three-step process. First, to permanently fill a position in the United States with a foreign worker, a prospective employer must obtain certification from the U.S. Department of Labor (DOL). *See* section 212(a)(5) of the Act, 8 U.S.C. § 1182(a)(5). If DOL approves a position, an employer must next submit the certified labor application with an immigrant visa petition to U.S. Citizenship and Immigration Services (USCIS). Section 204 of the Act, 8 U.S.C. § 1154. Finally, if USCIS grants a petition, a designated noncitizen

¹ Beneficiaries generally cannot file appeals in visa petition proceedings. 8 C.F.R. § 103.3(a)(1)(iii)(B) (stating that beneficiaries are not "affected parties" for the purposes of filing an appeal or motion). However, U.S. Citizenship and Immigration Services (USCIS) treats beneficiaries as affected parties if they are eligible to "port" under section 204(j) of the Act, 8 U.S.C. § 1154(j), and properly request to do so. Thus, a beneficiary becomes "an affected party" with legal standing in a revocation proceeding when, as here, USCIS makes a favorable determination that they are eligible to port. *Matter of V-S-G- Inc.*, Adopted Decision 2017-06, *14 (AAO Nov. 11, 2017); USCIS Policy Memorandum PM 602-0152, *Guidance on Notice to, and Standing For, AC21 Beneficiaries about I-140 Approvals Being Revoked after Matter of V-S-G- Inc.* (Nov. 11, 2017), <https://www.uscis.gov/laws-and-policy/policy-memoranda>.

may apply abroad for an immigrant visa or, if eligible, for adjustment of status in the United States. *See* section 245 of the Act, 8 U.S.C. § 1255.

DOL, however, has already determined that the United States lacks sufficient physical therapists and that employment of noncitizens in these “Schedule A” positions will not harm the wages or working conditions of U.S. workers in similar positions. 20 C.F.R. § 656.5. Thus, DOL authorizes USCIS to adjudicate Schedule A labor certification applications for physical therapists in immigrant visa petition proceedings. 20 C.F.R. § 656.15(a). In this matter, USCIS therefore rules not only on the petition, but also on its accompanying labor certification application. *See* 20 C.F.R. § 656.15(e) (describing USCIS’s labor certification determinations in Schedule A proceedings as “conclusive and final”).

USCIS may revoke a petition’s approval for “good and sufficient cause” and may do so “at any time” before a beneficiary obtains lawful permanent residence. Section 205 of the Act, 8 U.S.C. § 1155; 8 C.F.R. 205.2(a). If supported by the record, the erroneous nature of a petition’s approval justifies its revocation. *Matter of Ho*, 19 I&N Dec. at 590.

The petitioner must be given notice of USCIS’ intent to revoke the prior approval of the petition and the opportunity to submit evidence in rebuttal, before USCIS may proceed 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 Esteime*, 19 I&N Dec. 450, 451 (BIA 1987). If a petitioner’s NOIR response does not resolve or rebut alleged revocation grounds, USCIS properly revokes a petition’s approval. *Id.* at 451-52.

II. ANALYSIS

At issue in this case is whether the Director properly revoked the approval of the petition. For the reasons discussed below, we conclude that the NOIR did not contain a sufficiently specific statement of the facts underlying the proposed revocation or a discussion of the supporting evidence, in accordance with 8 C.F.R. § 205.2(b) and (c) and *Matter of Esteime*. Further, the ultimate grounds for revocation do not adequately explain why the Director concluded that the job offer was not bona fide and that the petition was therefore erroneously approved. Accordingly, we will withdraw the Director’s decision and remand the matter for further consideration, issuance of a new NOIR, and entry of a new decision.

A. Background

The Petitioner submitted a Schedule A application, asserting its proposed employment of the Beneficiary as a therapy supervisor under the U.S. Government’s Standard Occupational Classification (SOC) Code for physical therapists (29-1123). *See* 20 C.F.R. § 656.5(a)(1) (describing Group I of Schedule A as including persons who will be employed as physical therapists and who possess all the qualifications necessary to take the physical therapist licensing examination in the state in which they proposed to practice physical therapy).

DOL defines a physical therapist as:

a person who applies the art and science of physical therapy to the treatment of patients with disabilities, disorders, and injuries to relieve pain, develop or restore function, and maintain performance, using physical means, such as exercise, massage, heat, water, light and electricity, as prescribed by a physician (or a surgeon).

20 C.F.R. § 656.5(a)(3)(i).

The job duties of the therapy supervisor position offered by the Petitioner are:

Supervise staff; supervise patient care services; quality control and quality program management; education and monitoring of current trend in therapy; implementation of policies and procedures; staff evaluation; cooperation and collaboration with other departments; budget management; goal attainment; compliance with regulations and sound healthcare practices; and reimbursement monitoring.

The Petitioner filed the petition on March 3, 2016, with evidence that the Beneficiary met the minimum educational and experience requirements indicated on the accompanying labor certification. Specifically, the record demonstrates the Beneficiary has the foreign equivalent of a bachelor's degree in physical therapy, more than five years of progressive post-baccalaureate work experience as a physical therapist, and a physical therapy license issued by the State of Illinois. Before filing the petition and its accompanying Schedule A application, the Petitioner obtained a determination of the prevailing wage for the offered position of therapy supervisor. *See* 20 C.F.R. § 656.15(b)(1) (requiring employers seeking to employ Schedule A workers to comply with DOL's prevailing wage regulations at 20 C.F.R. §§ 656.40, 656.41). The Director approved the petition on March 10, 2016.

B. Notice of Intent to Revoke and Revocation

On April 4, 2022, the Director issued a NOIR. The Director observed that the DOL's prevailing wage determination (PWD) classified the offered position under the SOC code 11-9111 ("Medical and Health Services Managers") after considering the job duties, education, training, and experience requirements. The Director also noted that the Petitioner had requested on the PWD application that the position be classified under the SOC code for physical therapists (29-1123). The NOIR quotes portions of the Occupational Outlook Handbook's summaries for both "medical and health services managers" and "physical therapists." The Director noted that it "appears that the position would not require a physical therapy licensure in order to perform the duties of the position" and that "merely requiring licensure does not automatically qualify the position as a Schedule A designation." However, the Director did not further analyze the duties or affirmatively conclude that the duties of the offered position do not correspond to those of a Schedule A physical therapist as defined at 20 C.F.R. § 656.5(a)(3)(i).

Rather, the Director went on to address "the validity of the offered position of *Physical Therapy Supervisor*" as the sole basis for the proposed revocation. In fact, after appearing to suggest that the position's supervisory and administrative duties may prevent it from being designated as a Schedule A physical therapist position, the NOIR primarily focused on whether the job offer was for a bona fide supervisory position. Specifically, the remainder of the analysis in the NOIR focused on the Petitioner's statement that the offered position would supervise one employee. The Director, noting

that “USCIS has considered the relevance of the Physical Therapy Supervisor position in conjunction with the way the petitioner conducts business,” stated:

In comparing the extensive administrative duties and oversight of employees described in the job duties . . . , providing one-on-one supervision does not seem feasible for a company employing over one hundred (100) employees. USCIS questions the company’s hierarchy as it appears the position supervises only one subordinate with duties of administrative tasks.

The Director emphasized that the Petitioner, by signing the employer declaration on the labor certification, declared that the information furnished in the job opportunity is true and correct. The Director further stated “it appears the petitioner may have misrepresented the job opportunity by embellishing the responsibilities of the position and the supervisory title in order to make the duties more appealing as a second preference filing in order to procure a visa.” The Director concluded by noting that “it appears more likely than not, the record does not establish the job opportunity is a bona fide job offer.” The approval of the petition was ultimately revoked for the reasons stated in the NOIR as neither the Petitioner nor Beneficiary submitted a response within the timeframe allowed.

On appeal, counsel for the Beneficiary contends that “the revocation is not based on any new facts or evidence, but merely on conjecture and speculation regarding the nature of the position described in the original petition.”

C. Basis for Remand

We conclude that both the NOIR and the revocation decision lacked an explanation as to what specific statutory or regulatory requirements the Petitioner did not satisfy and therefore do not support the Director’s conclusion that there was good and sufficient cause for the revocation. Further, the NOIR and notice of revocation lack adequate factual support for the Director’s determination that the Petitioner misrepresented the supervisory nature of the offered position; the Director’s speculative statement that it “does not seem feasible” for the company to have a supervisory position with only one subordinate does not suffice. The NOIR did not provide the affected parties with sufficient notice and explanation of any specific facts that raised concerns regarding the bona fide nature of the job offer.

An officer must fully explain the reasons for denying a visa petition to allow the affected party a fair opportunity to contest the decision and to allow us an opportunity for meaningful appellate review. *See* 8 C.F.R. § 103.2(a)(1)(i); *see also Matter of M-P-*, 20 I&N Dec. 786 (BIA 1994) (finding that a decision must fully explain the reasons for denying a motion to allow the respondent a meaningful opportunity to challenge the determination on appeal). Here for the reasons discussed, the NOIR and the revocation decision were both inadequate. Accordingly, the Director’s decision is withdrawn.

However, the facts presented in the record raise questions as to whether the job offered qualifies for designation as a Schedule A physical therapist position, concerns that were touched on but not fully developed in the Director’s NOIR. Therefore, we cannot sustain the appeal and will remand the matter to the Director for further consideration.

As noted, the DOL's PWD classified the offered position solely under the medical and health services manager SOC code (11-9111) after considering the duties, education, experience, and licensure requirements the Petitioner provided. The record reflects that the Petitioner incorrectly stated on the labor certification at part F, Prevailing Wage Information, that DOL had classified the job as a physical therapist position (29-1123). DOL regulations do not require a Schedule A physical therapist position to fall under a specific SOC code; therefore the SOC code provided on the PWD is not a determinative factor in evaluating whether an offered position qualifies for Schedule A designation. However, the record shows that the Petitioner provided misleading and inaccurate information at Part 7 of the labor certification, an action that warrants further review.

We also acknowledge the Beneficiary's assertions on appeal that some employers require medical and health services managers to possess and maintain clinical licenses. Her statement implies that some health service manager positions may therefore qualify for Schedule A designation as physical therapists. However, like the SOC code, a licensure requirement is not a determinative factor. Rather, a petitioner must demonstrate a beneficiary's proposed employment as a "physical therapist" under 20 C.F.R. § 656.5(a)(1) and the duties of the offered position must correspond to the definition of the term "physical therapist" at 20 C.F.R. § 656.5(a)(3)(i).

On remand, the Director is instructed to review the record, including the Beneficiary's appeal, and to issue a new NOIR. In reviewing whether the position qualifies for Schedule A designation, the Director should examine the position's proposed duties to determine whether the Petitioner offered the Beneficiary employment as a "physical therapist" as defined at 20 C.F.R. § 656.5(a)(3)(i). If supported by the record, the Director may also notify the affected parties of any additional potential grounds for revocation. Any new NOIR must explain include "a specific statement not only of the facts underlying the proposed action, but also of the supporting evidence." *Estime*, 19 I&N Dec. at 451. If the proposed revocation will be based on any derogatory information from outside the record of proceedings, the Director must provide the affected parties with notice of such information. 8 C.F.R. § 103.2(b)(16)(i).

III. CONCLUSION

For the reasons discussed above, we will remand this case for further consideration of whether the Petitioner and the Beneficiary met all eligibility requirements, including, but not limited to, the Schedule A designation requirements applicable to physical therapists. The Director is instructed to issue a new NOIR in accordance with the requirements of 8 C.F.R. § 205.2(b) and (c) and *Matter of Estime*. Following the affected parties' 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.