U.S. Citizenship and Immigration Services

Non-Precedent Decision of the Administrative Appeals Office

In Re: 24483864

Date: AUG. 10, 2023

Appeal of Texas Service Center Decision

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

The Petitioner, a frozen specialty food manufacturer, seeks to employ the Beneficiary as a production helper. It requests classification of the Beneficiary as an unskilled worker under the third preference immigrant classification. Immigration and Nationality Act (the Act) section 203(b)(3)(A)(iii), 8 U.S.C. § 1153(b)(3)(A)(iii). 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 less than two years of training or experience.

The Director of the Texas Service Center revoked the approval of the petition, concluding that the Petitioner had misrepresented its relationship with the Beneficiary in the labor certification. The matter is now before us on appeal. 8 C.F.R. § 103.3.

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

Employment-based immigration generally follows a three-step process. First, a prospective employer must obtain certification from the U.S. Department of Labor (DOL). Section 212(a)(5)(A) of the Act, 8 U.S.C. § 1182(a)(5)(A). DOL approval signifies that insufficient U.S. workers are able, willing, qualified, and available for a position and that the employment of a noncitizen will not harm wages and working conditions of U.S. workers with similar jobs. *Id*.

Second, an employer must submit the certified labor application with an immigrant visa petition for to U.S. Citizenship and Immigration Services (USCIS). Section 204(a)(1)(F) of the Act, 8 U.S.C. § 1154(a)(1)(F). Among other things, USCIS determines whether a noncitizen beneficiary meets the requirements of a certified position and whether the position meets the requirements of the requested immigrant visa category. Third, if USCIS approves the petition, a noncitizen may apply for an immigrant visa abroad or, if eligible, adjustment of status in the United States. Section 245 of the Act, 8 U.S.C. § 1255.

However, USCIS may revoke its approval of an immigrant visa petition "at any time" for "good and sufficient cause." Section 205 of the Act, 8 U.S.C. § 1155. The realization that a petition was approved in error may be good and sufficient cause for revoking its approval. *Matter of Ho*, 19 I&N Dec. 582, 590 (BIA 1988).

USCIS may issue a notice of intent to revoke (NOIR) a petition's approval if the unexplained and unrebutted record at the time of the notice's issuance would have warranted the filing's denial. *Matter of Estime*, 19 I&N Dec. 450, 451 (BIA) 1987). The NOIR provides the opportunity to submit evidence in support of the petition and in opposition to the alleged grounds for revocation. 8 C.F.R. § 205.2(b). If the NOIR response does not rebut or resolve revocation grounds stated in the notice, USCIS properly revokes a petition's approval. *Matter of Estime*, 19 I&N Dec. at 451-52.

II. ANALYSIS

A. Relationship Between Petitioner and Beneficiary

The issue on appeal is whether the Petitioner willfully misrepresented its relationship with the Beneficiary in the labor certification. In order to support a finding of willful misrepresentation, the record must show that the party procured or sought to procure a benefit under U.S. immigration laws, that they made a false representation, that the false representation was made willfully, that the false representation was material, and that the false representation was made to a U.S. government official. *See Matter of Y-G-*, 20 I&N Dec. 794, 796-797 (BIA 1994); *Xing Yang v. Holder*, 770 F.3d 294, 303 (4th Cir. 2014). *See generally* 8 *USCIS Policy Manual* J.2(b), https://www.uscis.gov/policy-manual.

The record indicates, and the Petitioner does not dispute, that it sought an immigrant visa, which is a benefit under U.S. immigration laws, and that the representations in question were made to U.S. government officials, including USCIS, DOL, and the U.S. Department of State (DOS). Therefore, the remaining issues are whether the Petitioner made a false representation, and if so, whether the representation was made willfully and whether it was material.

In the present case, DOS refused the Beneficiary's immigrant visa after her consular interview, finding that the $37,000 the Beneficiary paid to a visa broker in connection with the petition constituted improper commerce under 20 C.F.R. § 656.12(b), which states that if employers and beneficiaries are represented by the same attorney, employers must pay all of the attorney fees related to the labor certification. Because the Beneficiary's attorney was hired through the visa broker, DOS found that she had improperly paid attorney fees that should have been paid by the Petitioner. After refusing the visa, DOS returned the petition to USCIS for possible revocation.

The Director's NOIR and revocation state that the Petitioner misrepresented its relationship with the Beneficiary by answering "no" to question C.9 of the labor certification form. This question asks the following:

> Is the employer a closely held corporation, partnership, or sole proprietorship in which the alien has an ownership interest, or is there a familial relationship between the owners, stockholders, corporate officers, incorporators, or partners, and the alien?

The Director found that the improper commerce between the parties constituted a familial relationship which should have been disclosed at question C.9, and that answering "no" to that question was therefore willful misrepresentation of a material fact. On appeal, the Petitioner states that the visa broker fees were not improper commerce because the Beneficiary only paid for costs associated with the Form I-140, Petition for Alien Worker,[1] rather than the labor certification, and because the Petitioner and Beneficiary were represented by different attorneys for labor certification purposes. It further states that no familial relationship exists between the Beneficiary and the Petitioner. Upon review, we will withdraw the Director's finding of material misrepresentation against the Petitioner.

DOL guidance states that a familial relationship, for the purposes of question C.9, includes all relationships established by blood, marriage, or adoption, however distant.[2] In this instance, the Director does not explain how the possible improper commerce between the parties constitutes a relationship established by blood, marriage, or adoption. The record does not indicate that the Petitioner and Beneficiary have a familial relationship that would need to be disclosed at question C.9 of the labor certification. The Petitioner's answer to C.9 was not a false representation. We will therefore withdraw the Director's finding of willful misrepresentation against the Petitioner.

Because the lack of a familial relationship is dispositive in this case, we decline to reach the issue of whether the visa broker fees constituted improper commerce. *See INS v. Bagamasbad*, 429 U.S. 24, 25 (1976) ("courts and agencies are not required to make findings on issues the decision of which is unnecessary to the results they reach").

B. Ability to Pay

Beyond the decision of the Director, we note that the record does not establish the Petitioner's continuing ability to pay the proffered wage of $8.28 an hour. The regulation at 8 C.F.R. § 204.5(g)(2) states that a petitioner must establish that it has the ability to pay the beneficiary the proffered wage from the priority date[3] onward. Documentation of the ability to pay shall be in the form of copies of annual reports, federal tax returns, or audited financial statements. In cases where a petitioner employs 100 or more workers, USCIS may accept a statement from a financial officer of the petitioner which establishes its ability to pay the proffered wage. *Id.*

In the Form I-140, the Petitioner listed its gross income as $261,124,987 and did not answer the question requesting its net income. It also stated that it employs 220 workers. The Petitioner also submitted a letter from its chief financial officer (CFO) stating that the Petitioner has "roughly 220 full-time employees at any given time throughout the year" and is able to pay all of their wages. The

[1] It is noted that the contract between the Beneficiary and the visa broker states that the Beneficiary would have received a partial refund if her labor certification were rejected, which indicates that the Beneficiary was paying for services related to the labor certification.

[2] U.S. Dep't of Labor, OFLC Frequently Asked Questions and Answers, https://www.foreignlaborcert.doleta.gov/faqsanswers.cfm (click on the "Familial Relationships" link) (last visited Aug. 10, 2023).

[3] The "priority date" of a petition is the date the underlying labor certification is filed with DOL. 8 C.F.R. § 204.5(d). The Petitioner must establish that all eligibility requirements for the petition have been satisfied as of the priority date, which in this instance is June 14, 2017.

CFO's letter does not provide any financial information supporting the Petitioner's ability to pay the proffered wage. The Petitioner did not submit any other documentation of its finances or workforce.

USCIS records indicate that the Petitioner has filed dozens of I-140 petitions for other beneficiaries. Where a petitioner has filed Form I-140 petitions for multiple beneficiaries, it must demonstrate that its job offer to each beneficiary is realistic and that it has the ability to pay the proffered wage to each beneficiary. *See* 8 C.F.R. § 204.5(g)(2); *see also Patel v. Johnson*, 2 F. Supp 3d 108, 124 (D. Mass. 2014) (upholding our denial of a petition where a petitioner did not demonstrate its ability to pay multiple beneficiaries). The Petitioner here must therefore establish its ability to pay not only the Beneficiary, but also the beneficiaries of the other petitions that were pending or approved as of the Beneficiary's priority date, as well as those filed after the priority date.[4] Because the record does not address the issue of the Petitioner's other I-140 filings, the Petitioner has not met its evidentiary burden.

While a statement from a financial officer may be accepted as evidence of ability to pay in lieu of one of the primary forms of evidence at 8 C.F.R. § 204.5(g)(2), in this instance the statement provided does not suffice to establish the Petitioner's continuing ability to pay. On remand, the Director should issue a new NOIR requesting a list of all Form I-140 petitions that were pending or approved as of, or filed after, the priority date of the current petition. The Petitioner should document the receipt numbers, names of beneficiaries, priority dates, and proffered wages of these other petitions, and indicate the status of each petition and the date of any status change (i.e., pending, approved, withdrawn, revoked, denied, on appeal or motion, beneficiary obtained lawful permanent residence). If applicable, the Petitioner may also submit proof of any wages it paid applicable beneficiaries in relevant years and materials supporting the factors stated in *Matter of Sonegawa*, 12 I&N Dec. 612, 614-15 (Reg'l Comm'r 1967).[5] The Director should also request the Petitioner's annual reports, federal tax returns, or audited financial statements from the priority date onward. 8 C.F.R. § 204.5(g)(2).

III. CONCLUSION

For the above reasons, we will remand this matter for further consideration and the issuance of a new NOIR and decision. The Director may request any additional evidence considered relevant to the new determination and any other issues.

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[4] The Petitioner's ability to pay the proffered wage of one of the other I-140 beneficiaries is not considered:

- After the other beneficiary obtains lawful permanent residence;
- If an I-140 petition filed on behalf of the other beneficiary has been withdrawn, revoked, or denied without a pending appeal or motion;
- Before the priority date of the I-140 petition filed on behalf of the other beneficiary; or
- In any year when the Petitioner has paid the Beneficiary a salary equal to or greater than the proffered wage.

[5] USCIS may consider relevant factors such as the number of years the petitioner has been in business, the size of its operations, the growth of its business over time, its number of employees, the occurrence of any uncharacteristic business expenditures or losses, its reputation within its industry, or whether a beneficiary will replace a current employee or outsourced service. *Id.*

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