U.S. Citizenship and Immigration Services

Non-Precedent Decision of the Administrative Appeals Office

In Re: 11351613

Date: AUG 30, 2022

Appeal of Nebraska Service Center Decision

Form I-140, Immigrant Petition for a Skilled Worker

The Petitioner, a healthcare services provider, sought to employ the Beneficiary as a registered nurse. It requested skilled worker classification for the Beneficiary under the third preference immigrant category. 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 foreign national for lawful permanent resident status to work in a position that requires at least two years of training or experience.

The petition was initially approved, but the approval was subsequently revoked by the Director of the Nebraska Service Center on multiple grounds. Prior to the revocation proceedings the Beneficiary ported to another employer, the Petitioner requested that its petition be withdrawn, and the Director denied the Petitioner's withdrawal request. After the Director's decision to revoke the petition's approval, the Beneficiary filed an appeal with the AAO. After initially rejecting the appeal because it was not filed by the Petitioner, we reopened the appeal on service motion in order to issue a new decision. Although normally not the case, under certain circumstances a beneficiary may be considered an affected party in immigrant petition revocation proceedings.[1]

Upon *de novo* review, we determine that the Director's denial of the Petitioner's withdrawal request was incorrect. Therefore, we will withdraw that decision and grant the Petitioner's request to withdraw the petition.[2] We will also dismiss the Beneficiary's appeal of the revocation decision.

[1] U.S. Citizenship and Immigration Services (USCIS) regulations do not generally allow a beneficiary to appeal a petition's revocation. *See* 8 C.F.R. § 103.3(a)(1)(iii)(B) (stating that a beneficiary is not an "affected party" with legal standing in a proceeding). However, certain "portability-eligible" beneficiaries of revoked I-140 visa petitions are treated as affected parties in revocation proceedings. Section 204(j) of the Act, 8 U.S.C. § 1154(j). *See Matter of V-S-G- Inc.*, Adopted Decision 2017-06 (AAO Nov. 11, 2017). Under the portability provision of section 204(j) of the Act, approved petitions may remain valid under certain conditions even after eligible beneficiaries change jobs or employers. A beneficiary of a valid visa petition, whose application for adjustment of status remains pending for at least 180 days, may "port" the petition to a new job if that job is in the same or similar occupational classification as the position offered in the petition. Thus, even though the petitioner for the visa classification and its beneficiary are no longer in an employment relationship, the underlying petition may remain valid for purposes of the beneficiary's adjustment of status application.

[2] The Petitioner's withdrawal request should be granted.

I. PROCEDURAL HISTORY

The Petitioner filed its I-140 petition on behalf of the Beneficiary to work as a registered nurse in June 2014, and it was initially approved on November 8, 2014. Based on the I-140 petition, the Beneficiary filed applications for adjustment of status (Form I-485) and employment authorization (Form I-765) in April 2015. On July 20, 2016, the Beneficiary (who had been working as a registered nurse at another healthcare facility since 2013) ported to a different employer, where he continued working as a registered nurse. Five days later, on July 25, 2016, the Nebraska Service Center received a letter from the Petitioner (dated July 18, 2016) stating that it had withdrawn its offer of employment to the Beneficiary and requesting that its previously approved I-140 petition be revoked.

In a decision dated July 28, 2017, the Nebraska Service Center denied the "request to withdraw" the petition, stating that because the request was not received within 180 days of the filing of the Beneficiary's I-485 application the I-140 petition remained approved in accordance with the regulation at 8 C.F.R. § 205.1(a)(3)(iii)(C). On September 25, 2017, the Beneficiary filed his Form I-485 Supplement J portability request with the Nebraska Service Center. The Supplement J portability request was approved on May 6, 2019. Two days later, on May 8, 2019, the Nebraska Service Center issued a notice of intent to revoke (NOIR) the approved I-140 petition to both the Petitioner and the Beneficiary. Following the Beneficiary's response to the NOIR based on the determination that he was an affected party in these limited circumstances,[3] the Director issued a decision on July 2, 2019, revoking the petition's approval. The Beneficiary appealed.

II. PETITIONER'S REQUEST TO WITHDRAW PETITION

A. Applicable Law

The regulation at 8 C.F.R. § 103.2(b)(6) states that "[a]n applicant or petitioner may withdraw a benefit request at any time until a decision is issued by USCIS or, in the case of an approved petition, until the person is admitted or granted adjustment or change of status, based on the petition." A petitioner's right to withdraw a visa petition is further enshrined in *Matter of Cintron*, 16 I&N Dec. 9 (BIA 1976), which stated: "Just as any United States citizen or lawful permanent resident may file a visa petition in behalf of an alien, so may he withdraw the petition before a decision has been rendered. The action of the District Director in refusing to consider the petition withdrawn was erroneous."

However, that procedural right to withdraw a petition "at any time" is complicated by section 204(j) of the Act, which allows certain employment-based adjustment of status applicants experiencing delays in the employment-based adjustment of status process some flexibility to change jobs or employers while their Application to Register Permanent Residence or Adjust Status (Form I-485) is pending. In the implementing regulations, USCIS provided that "[a] petition that is withdrawn 180 days or more after its approval, or 180 days or more after the associated adjustment of status application has been filed, *remains approved* unless its approval is revoked on other grounds." 8 C.F.R. § 205.1(a)(iii)(C) (emphasis added).

[3] *See Matter of V-S-G- Inc.*, Adopted Decision 2017-06 (AAO Nov. 11, 2017). The Petitioner did not respond to the NOIR based on its earlier withdrawal.

It follows that if a petition is to "remain approved" under 8 C.F.R. § 205.1(a)(iii)(C) after a withdrawal, then that petition's approval remains subject to revocation. The Secretary's authority to revoke the approval of a petition "at any time" is enshrined in statute and a long-standing and critical function of the United States immigration system. Section 205 of the Act, 8 U.S.C. § 1155, provides that "[t]he Attorney General [now Secretary, Department of Homeland Security] may, at any time, for what he deems to be good and sufficient cause, revoke the approval of any petition approved by him under section 204 [Procedure for Granting Immigrant Status]."

The AAO considered a similar question in *Matter of al Wazzan*, 25 I&N Dec. 359 (2010), where the petitioner had argued that a petition may become valid simply through the passage of 180 days. We disagreed and concluded:

> Considering the statute as a whole, it would severely undermine the immigration laws of the United States to find that a petition is "valid" when that petition was never approved or, even if it was approved, if it was filed on behalf of an alien who was never "entitled" to the requested visa classification. It would be irrational to believe that Congress intended to throw out the entire statutorily mandated scheme regulating immigrant visas whenever that scheme requires more than 180 days to effectuate.

Id. at 367.

It follows that when a petition is "filed on behalf of an alien who was never 'entitled' to the requested visa classification," and that petition was improvidently approved, the petition approval is subject to revocation under section 205 of the Act.

B. Analysis

In denying the Petitioner's request to withdraw the I-140 petition on July 28, 2017, the Director cited the regulation at 8 C.F.R. § 205.1(a)(3)(iii)(C) as the legal basis for the decision. The subject regulation reads as follows:

> **(a) Reasons for automatic revocation.** The approval of a petition or self-petition made under section 204 of the Act and in accordance with part 204 of this chapter is revoked as of the date of approval:
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> * * * *
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> **(3)** If any of the following circumstances occur before the beneficiary's or self-petitioner's journey to the United States commences or, if the beneficiary or self-petitioner is an applicant for adjustment of status to that of a permanent resident, before the decision on his or her adjustment application becomes final:
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> * * * *

(iii) Petitions under section 203(b), other than special immigrant juvenile petitions.

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(C) In employment-based preference cases, upon written notice of withdrawal filed by the petitioner to any officer of USCIS who is authorized to grant or deny petitions, where the withdrawal is filed less than 180 days after approval of the employment-based preference petition, unless an associated adjustment of status application has been pending for 180 days or more. *A petition that is withdrawn 180 days or more after its approval, or 180 days or more after the associated adjustment of status applications has been filed, remains approved unless its approval is revoked on other grounds.* If an employment-based petition on behalf of an alien is withdrawn, the job offer of the petitioning employer is rescinded and the alien must obtain a new employment-based preference petition in order to seek adjustment of status or issuance of an immigrant visa as an employment-based immigrant, unless eligible for adjustment of status under section 204(j) of the Act and in accordance with 8 C.F.R. 245.25.

8 C.F.R. § 205.1(a)(3)(iii)(C) (emphasis added).

This language did not preclude the Petitioner from withdrawing its I-140 petition. In the preamble to the rulemaking, the agency explained the purpose of the regulation, in pertinent part, as follows:

> -- *Retention of employment-based immigrant visa petitions.* To enhance job portability for certain workers with approved Form I–140 petitions in the EB–1, second preference (EB–2), and third preference (EB–3) categories, but who are unable to obtain LPR [legal permanent resident] status due to immigrant visa backlogs, the final rule provides that Form I–140 petitions that have been approved for 180 days or more would no longer be subject to automatic revocation based solely on withdrawal by the petitioner or the termination of the petitioner's business. *See* final 8 CFR 205.1(a)(iii)(C) and (D).

Final Rule, "Retention of EB-1, EB-2, and EB-3 Immigrant Workers and Program Improvements Affecting High-Skilled Nonimmigrant Workers," 81 FR 82398 (Nov. 18, 2016).

The explanatory text further includes the following language:

> In response to comments, the final rule also prevents automatic revocation of approved petitions that are withdrawn or where the business terminates 180 days after an associated adjustment of status application is filed. *See id.* These approved petitions will continue to be valid for priority date retention purposes, unless approval is revoked on other grounds specified in final 8 CFR 204.5(e)(2). They also generally will remain valid for various other purposes under immigration laws including: (1) Job portability under INA section 204(j); (2) extensions of status for certain H–1B nonimmigrant

> workers under sections 104(c) and 106(a) and (b) of AC21; and (3) eligibility for employment authorization in compelling circumstances under final 8 CFR 204.5(p).
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> In addition, the final rule clarifies that an approved Form I–140 petition that is subject to withdrawal or business termination cannot on its own serve as a bona fide employment offer related to the petition. *See* final 8 CFR 205.1(a)(3)(iii)(C) and (D). To obtain an immigrant visa or adjust status, beneficiaries of these petitions must have either new Form I–140 petitions filed on their behalf, or, if eligible for job portability under section 204(j) of the INA, new offers of employment in the same or a similar occupational classification. *See id.*; final 8 CFR 245.25(a)(2).

As the foregoing language explains, the Petitioner in this case was entitled to withdraw its approved I-140 petition, *see Matter of Cintron*. However, the petition "remained approved" for revocation on other grounds. Therefore, we will withdraw the Director's decision of July 28, 2017, which denied the Petitioner's request to withdraw its petition, and grant the withdrawal request.[4]

III. BENEFICIARY'S APPEAL OF REVOCATION DECISION

We will now proceed to the merits of the Director's decision on July 2, 2019, to revoke the I-140 petition's approval on other grounds, and the Beneficiary's appeal of that decision.

A. Applicable 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 aliens in such occupations. The current list of Schedule A occupations includes professional nurses. *Id.* Petitions for Schedule A occupations do not require the 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 in duplicate. *See* 8 C.F.R. § 204.5(a)(2); *see also* 20 C.F.R. § 656.15.

As previously stated, section 205 of the Act, 8 U.S.C. § 1155, provides that "[t]he Attorney General [now Secretary, Department of Homeland Security] may, at any time, for what he deems to be good and sufficient cause, revoke the approval of any petition approved by him under section 204 [Procedure for Granting Immigrant Status]."

B. Analysis

As previously indicated, the petition was initially approved in November 2014, but the approval was revoked in July 2019 on multiple grounds. As one ground for revocation the Director determined that

[4] As previously indicated the Petitioner's withdrawal request should be granted.

the Petitioner failed to establish that it complied with the notice of filing requirement under the regulation at 20 C.F.R. § 656.10(d)(1)(i) because it appeared that the Petitioner was a unionized facility and had a collective bargaining agreement (CBA) with its nurses, but did not post notice of its job opportunity for a registered nurse with the bargaining representative. The Director also determined that even if the Petitioner did not have a CBA with its nurses, in which case the foregoing regulation would not apply, the Petitioner did not provide proper notice of the job opportunity to its employees. The Director found that it was not in accord with the regulation at 20 C.F.R. § 656.10(d)(1)(ii) because the Petitioner's name and address on the notice of filing were inconsistent with name and address appearing on the I-140 petition and the ETA Form 9089, and therefore could have confused the Petitioner's identity and location.[5] As further grounds for revocation, the Director cited contradictions in the Beneficiary's employment history in the documentation of record and the lack of sufficient evidence that the Petitioner had the ability to pay the Beneficiary's proffered wage of $54,101 per year from the priority date of June 24, 2014, onward. Finally, the Director noted that the record did not contain documentary evidence that the Beneficiary qualified for the position of registered nurse in accordance with the requirement(s) in 20 C.F.R. § 656.5(a)(2), though this particular deficiency was not an additional ground for revocation since it had not been mentioned in the NOIR.

On appeal the Beneficiary contests all of the Director's grounds for denial and submits documentary evidence (some of which was already in the record) addressing each of the grounds. In this proceeding it is the Appellant's burden to establish eligibility for the requested benefit. *See* section 291 of the Act, 8 U.S.C. § 1361. To meet this burden the Beneficiary must prove by a preponderance of the evidence that he and the Petitioner qualify for that benefit. *See Matter of Chawathe*, 25 I&N Dec. 369, 376 (AAO 2010).

Upon *de novo* review, we determine that it has not been established that the notice of filing requirements at 20 C.F.R. § 656.10(d)(1)(i) related to collective bargaining are inapplicable to the Petitioner's business and it has not been established that the Petitioner complied with those requirements. Accordingly, we will affirm the Director's revocation decision on that ground.

The subject regulation at 20 C.R.R. § 656.10(d)(1)(i) provides as follows:

> Notice. (1) In applications filed under §§ 656.15 (*Schedule A*) . . . the employer must give notice of the filing of the *Application for Permanent Employment Certification* and be able to document that notice was provided, if requested by the Certifying Officer, as follows:

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[5] We note that the address on the notice of filing was for another medical facility and this might not allow properly for any person to "provide documentary evidence bearing on the application to the Certifying Officer of the Department of Labor." 20 C.F.R. § 656.10(d)(3)(ii). Additionally, *see* DOL FAQ: "If the employer knows where the Schedule A employee will be placed, the employer must post the notice at that work-site(s) where the employee will perform the work and publish the notice internally using in-house media--whether electronic or print--in accordance with the normal internal procedures used by the employer to notify its employees of employment opportunities in the occupation in question." *See* https://foreignlaborcert.doleta.gov/faqsanswers.cfm#q!170 (accessed August 30, 2022). The conflict in address between the posting notice and the ETA Form 9089 raises the question whether the notice was posted in the proper location.

(i) To the bargaining representative(s) (if any) of the employer's employees in the occupational classification for which certification of the job opportunity is sought in the employer's location(s) in the area of intended employment. Documentation may consist of a copy of the letter and a copy of the *Application for Permanent Employment Certification* form that was sent to the bargaining representative.

In the Director's revocation, he addressed the issue of whether the Petitioner is subject to this subsection of the regulation, and resolved the question, as follows:

> In the NOIR, USCIS identified several possible deficiencies in the notice of filing submitted with the petition. First . . . it appears that the petitioner is a unionized facility. USCIS based this assertion on the publicly available online information from the State of Illinois. *See* https://www.illinois.gov/hfs/MedicalProviders/CostReports/2014LongTermCareCostReports/Documents/glencrest_hlthcr_rehab_ctre_2014_0028753.pdf. The report accessed via the cited web address is titled, "State of Illinois Department of Healthcare and Family Services Financial and Statistical Reporting (Cost Report) For Long-Term Care Facilities (Fiscal Year 2014)". The report is for a facility called [redacted] located at [redacted] Avenue in [redacted] Illinois (IDPH License ID number [redacted]), and reported information to the State of Illinois for the time period covering January 1, 2014 through December 31, 2014. Notably, the petition was filed on June 24, 2014 [and lists the same address as the report, which is also listed on the ETA Form 9089]. On page 23 of this document, question number I asks: "Are nursing employees (RN, LPN, NA) represented by a union?" The answer to the question is "Yes". Additionally, page 21 of the document has a section for "Employee Benefits and Payroll Taxes." There are dollar amounts on the list for "Union Health and Welfare" and "Union Pension."
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> The NOIR discussed that if the position for which the petition was filed is a position which is represented by a union, then notice should have been give to the bargaining unit representative(s). *See* 20 C.F.R. § 656.10(d)(1)(i). Moreover, if the position for which the petition was filed is one which is represented by a union, then the prevailing wage determination should have been made according to the collective bargaining agreement. *See* 20 C.F.R. § 656.40(b)(1). In this case, petitioner indicated on the ETA Form 9141, Application for Prevailing Wage Determination, that the position was not covered by a collective bargaining agreement. Instead, the prevailing wage source was stated to be "OES (All Industries)" indicating that the wage was determined as outlined in 20 C.F.R. § 656.40(b)(2) by reviewing the Occupational Employment Statistics Survey published by the United States Department of Labor (DOL).
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> In response to the NOIR, the beneficiary asserts that the position for which the petition was filed is not covered by a collective bargaining agreement, and therefore notice need not be given to a bargaining unit representative, and the prevailing wage determination was based on the correct source. In support of this assertion, the beneficiary relies on his own testimony given in support of his Form I-485, Application to Register Permanent

> Residence or Adjust Status, as well as information from the Department of Labor's Office of Labor-Management Standards (OLMS) website.
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> . . . . .
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> Regarding the printouts from the OLMS website (Exhibit C), the beneficiary asserts that since the petitioner is not found among the list of employers who have filed collective bargaining agreements with the OLMS, then it cannot be the case that there is a collective bargaining agreement for the position.
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> . . . . .
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> USCIS notes that the absence of the petitioner on the list of employers who have filed collective bargaining agreements would, at most, show the petitioner has not filed a collective bargaining agreement with OLMS. . . . .
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> Based on the beneficiary's response to the NOIR, USCIS cannot conclude that the petitioner's notice of filing was proper under 20 C.F.R. § 656.10(d)(1)(i) regarding a bargaining unit. . . . .

On appeal the Beneficiary asserts that the OLMS website, contrary to the Director's determination, "demonstrated the non-existence of any CBA entered into between [the Petitioner] and a union." The Beneficiary submits an excerpt from the OLMS database, available at https://www.dol.gov/olms/regs/compliance/cba/index.htm, providing an alphabetical list of private and public sector CBAs of employers whose names begin with the letters F and G. The Petitioner's name does not appear in that list. According to the Beneficiary, this OLMS database "proves that no CBA had ever been entered between [the Petitioner] and the union referenced in the NOIR and [the revocation decision]."

The Beneficiary's claim is not correct. In fact, the OLMS website acknowledges that there is no obligation to register a CBA with OLMS and that not all CBAs are listed in its alphabetical index. The website states, under the heading "Collective Bargaining File: Online Listings of Private and Public Sector Agreements," the following:

> The CBA file has been maintained since 1947, pursuant to Section 211(a) of the Taft-Hartley Act, which directs the Department of Labor to collect these agreements "for the guidance and information of interested representatives of employers, employees, and the general public."
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> In addition, OLMS accepts and posts CBAs received voluntarily from either the employer or the labor union (or their employees or agents), singly or jointly. However, if either of these parties objects, OLMS will not accept the CBA. As a result, some materials may not be current or available for all major bargaining units.

See https://www.dol.gov/agencies/olms/regs/compliance/cba (accessed August 15, 2022). Thus, the OLMS website specifically indicates that its index of CBAs does not include every CBA in the

country. Accordingly, the Petitioner's absence from the OLMS online listing does not prove that it has no CBA with its nurse employees. Furthermore, as pointed out by the Director in the revocation decision, the publicly available report on the Petitioner by the State of Illinois in 2014, the year the I-140 petition was filed, contained entries by the Petitioner acknowledging that its nurse employees were represented by a union and listing dollar amounts for "Union Health and Welfare" and "Union Pension" contributions.

The information in the State of Illinois report confirms that the Petitioner was unionized and strongly suggests that it had a CBA with its nurse employees when the instant petition was filed. The instant petition and the labor certification list the same address as listed in the report. In view of this compelling evidence, the burden was on the Beneficiary here to prove that no CBA existed between the Petitioner and its nurse employees. In these proceedings, it is the Appellant's burden to establish eligibility for the requested benefit by a preponderance of the evidence. Section 291 of the Act, 8 U.S.C. § 1361; *Matter of Chawathe*, 25 I&N Dec. at 375; *Matter of Skirball Cultural Ctr.*, 25 I&N Dec. 799, 806 (AAO 2012). For the reasons discussed above, the Beneficiary has not met that burden. Therefore, we agree with the Director's determination that the Petitioner's notice of filing for the registered nurse job opportunity should have been posted to the bargaining representative, in accordance with the regulation at 20 C.F.R. § 656.10(d)(1)(i). As the Petitioner did not meet this notice of filing requirement, we agree with the Director's decision to revoke the petition's approval on that ground.

Since our decision on this issue is dispositive of the appeal, we will reserve the other issues discussed in the Director's revocation decision, including whether the Petitioner had the continuing ability to pay the proffered wage from the priority date, and whether the Beneficiary possessed the required state nursing license as of the priority date.[6]

ORDER: The appeal is dismissed.

[6] *See INS v. Bagamashad*, 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"); *see also Matter of L-A-C-*, 26 I&N Dec. 516, 526 n. 7 (BIA 2015) (declining to reach alternative issues on appeal where an applicant is otherwise ineligible).