U.S. Citizenship and Immigration Services

Non-Precedent Decision of the Administrative Appeals Office

In Re: 19134914

Date: JUL. 19, 2022

Appeal of Nebraska Service Center Decision

Form I-140, Immigrant Petition for Other Worker

The Petitioner seeks to employ the Beneficiary as an Asian specialty cook. It requests classification of the Beneficiary under the third preference employment-based immigrant visa category. Immigration and Nationality Act (the Act) section 203(b)(3)(A)(iii), 8 U.S.C. § 1153(b) (3)(A)(iii). This immigrant visa category allows a U.S. employer to sponsor a foreign national for lawful permanent resident status to work in a position that requires less than two years of training or experience.

The petition was initially approved. The Director of the Nebraska Service Center subsequently revoked the approval of the petition. On appeal, the Petitioner asserts that the Director's decision is without merit and requests to reverse the revocation, stating that the reasons for revocation were not clearly and fully stated, nor supported by fact or law.

The AAO reviews the questions in this matter de novo. See *Matter of Christo's Inc.*, 26 I&N Dec. 537, 537 n.2 (AAO 2015). It is the Beneficiary's burden to establish eligibility for the requested benefit by a preponderance of the evidence. See Section 291 of the Act, 8 U.S.C. § 1361; Matter of Chawathe, 25 I&N Dec. 369, 375 (AAO 2010). Upon de novo review, we will withdraw the Director's decision and remand the matter to the Director.

I. LAW

Employment-based immigration generally follows a three-step process. First, an employer obtains an approved labor certification from the U.S. Department of Labor (DOL). See section 212(a)(5) of the Act, 8 U.S.C. § 1182(a)(5). By approving the labor certification, the DOL certifies that there are insufficient U.S. workers who are able, willing, qualified, and available for the offered position and that employing a foreign national in the position will not adversely affect the wages and working conditions of domestic workers similarly employed. See section 212(a)(5)(A)(i)(I)-(II) of the Act. Second, the employer files an immigrant visa petition with U.S. Citizenship and Immigration Services (USCIS). See section 204 of the Act, 8 U.S.C. § 1154. Third, if USCIS approves the petition, the foreign national 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). 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 Estime, 19 I&N Dec. 450, 451 (BIA 1987). Per Matter of Estime, "[i]n determining what is 'good and sufficient cause' for the issuance of a notice of intention to revoke, we ask whether the evidence of record at the time the notice was issued, if unexplained and unrebutted, would have warranted a denial based on the petitioner's failure to meet his or her burden of proof." Id.

To be eligible for the classification it requests for the beneficiary, a petitioner must establish, among other things, that it has the ability to pay the proffered wage stated in the labor certification. As provided in the regulation at 8 C.F.R. § 204.5(g)(2):

> The petitioner must demonstrate this ability at the time the priority date is established and continuing until the beneficiary obtains lawful permanent residence. Evidence of this ability shall be either in the form of copies of annual reports, federal tax returns, or audited financial statements. In a case where the prospective United States employer employs 100 or more workers, the director may accept a statement from a financial officer of the organization which establishes the prospective employer's ability to pay the proffered wage. In appropriate cases, additional evidence, such as profit/loss statements, bank account records, or personnel records, may be submitted by the petitioner or requested by [USCIS].

II. PROCEDURAL HISTORY

The instant petition was filed with USCIS in March 2018, accompanied by a labor certification that was filed with the DOL in September 2016, and certified in September 2017. The petition was approved in March 2018. However, the Director issued a NOIR in May 2020.

In the NOIR, the Director pointed out that the Petitioner answered "No" to the question at section C.9 of the labor certification, which reads:

> 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, partners, corporate officers, or incorporators and the alien?

The Director cited to Matter of Sunmart 374, 2000-INA-93 (BALCA, May 15, 2000) stating that "a relationship triggering concerns about the bona fides of a job opportunity 'is not only of the blood; it may also be financial, by marriage, or through friendship.'" The Director stated that during an

adjustment interview, the Beneficiary said that he has known the Petitioner's owner for many years, and he used to work for him at the restaurant owned by the Petitioner's spouse. The Director further stated that the Beneficiary indicated that he found out about the job by being contacted by the Petitioner's owner and he did not undergo a formal hiring process. The Director then made a note of the distance between the Beneficiary's residence and the Petitioner, and stated that it is unlikely that the Beneficiary actually drives that far to get to work. The Director cited Matter of Silver Dragon Chinese Restaurant, 19 I&N Dec. 401 (Comm. 1986) stating that if the Beneficiary's true relationship in the petitioning business is not apparent in the labor certification proceedings, it causes the certifying officer to fail to examine more carefully whether the position was clearly open to qualified U.S. workers and whether U.S. workers were rejected solely for lawful job-related reasons.

In response to the NOIR, the Petitioner stated that it has correctly answered the question at section C.9 of the labor certification and the DOL has audited and approved the labor certification. The Petitioner further stated that the Beneficiary has no ownership interest in the petitioning restaurant, and he is not related to the owner of the Petitioner by blood or marriage.[1] The Petitioner submitted statements from its owner and the Beneficiary and asserted that the proffered position was a bona fide job offer and that there was no misrepresentation of any material fact regarding the familial relationship between the Petitioner and the Beneficiary. With respect to the part-time working arrangements, the Petitioner submitted a statement from the Beneficiary in which he stated that he briefly worked for the Petitioner in 2018 to gain familiarity and that he and his family intend to move to where the Petitioner is located after he obtains his legal permanent residence.

In the revocation decision, the Director repeated the same statements above. The Director noted that in response to the NOIR, the Petitioner stated that a familial relationship does not exist between the Petitioner and the Beneficiary. Then the Director characterized this as "self-serving statement" and stated that the Director will continue to rely on the Beneficiary's statements provided during the adjustment interviews to revoke the approval of the petition.

On appeal, the Petitioner emphasizes that it has fully complied with the DOL's audits, and the DOL has certified the labor certification. The Petitioner also states that the NOIR and the Director's revocation decision contain incorrect factual statements. The Petitioner states that the restaurant where the Petitioner's owner and the Beneficiary had worked is owned by the Beneficiary's spouse and not the spouse of the Petitioner's owner as stated by the Director, and notes that the Beneficiary's sworn statement provided during his interview reflects this correctly.[2] The Petitioner adds that the fact that the Petitioner and the Beneficiary worked together previously does not invalidate the properly approved petition. The Petitioner reiterates that the Beneficiary has no ownership interest nor control in the petitioning corporation.

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[1] The Petitioner distinguished Matter of Silver Dragon Chinese Restaurant, 19 I&N Dec 401 (Comm. 1986), which was cited by the Director in the NOIR, by pointing out that the beneficiary in that case had an interest in the petitioning business.

[2] On appeal, the Petitioner submits a broker agreement the Beneficiary's wife entered into for the sale of her restaurant. Furthermore, the public records contained in the Texas Comptroller of Public Accounts website reflect the Beneficiary's wife as the registered agent for the restaurant where the Beneficiary and the Petitioner's owner had worked. Available at https://mycpa.cpa.state.tx.us/coa/coaSearchBtn#.

III. ANALYSIS

Upon review of the record in its totality, we conclude the Director did not sufficiently explain the specific reasons for the revocation as required under 8 C.F.R. § 205.2(c) and the Director made incorrect statements. For example, the Director misconstrues the content of the question at section C.9 of the labor certification, and erroneously concludes that the Petitioner's answer of "No" was incorrect. As noted above, section C. 9 includes two distinct questions; one, whether the Beneficiary has an ownership, and two, whether there is a familial relationship. The Petitioner explained in response to the NOIR that the Beneficiary does not have any ownership interest in the Petitioner, and that while the Petitioner and the Beneficiary have known each other, they do not have a familial relationship. The Petitioner also submitted a statement from the Beneficiary stating that he and the Petitioner's owner had worked together in the past at the Beneficiary's wife's restaurant as chefs. The Beneficiary also explained the circumstances surrounding his part-time employment with the Petitioner in 2018. However, in revoking the petition, the Director stated that the Petitioner's statement is "self-serving" and that USCIS will continue to rely on the evidence provided from the interviews to revoke the petition, without further discussing the evidence submitted in response to the NOIR.[3]

Further, the Director's decision contains statements inconsistent with the information contained in the Beneficiary's sworn statement. Specifically, the Beneficiary and the Petitioner's owner worked together at the Beneficiary's spouse's restaurant, and not at the Petitioner's spouse's restaurant. Moreover, the Director cites to Matter of Silver Dragon Chinese Restaurant and Matter of Sunmart but does not sufficiently explain how those cases are applicable to the instant case. Accordingly, we will withdraw the Director's decision and remand the case for the Director to further consider the record and sufficiently discuss the evidence and explain why it does not establish eligibility.[4]

In addition, we note that the record, as currently constituted, does not establish the Petitioner's continuing ability to pay the proffered wage from the priority date of the petition onward.[5] 8 C.F.R. § 204.5(g)(2). In this case, the proffered wage is $21,986 per year and the priority date is September 27, 2016.

In determining a petitioner's ability to pay the proffered wage, USCIS first examines whether the beneficiary was employed and paid by the petitioner during the period following the priority date. A petitioner's submission of documentary evidence that it employed the beneficiary at a salary equal to or greater than the proffered wage for the time period in question, when accompanied by a form of

[3] The Board of Immigration Appeals (the Board) has held that testimony should not be disregarded simply because it is "self-serving." See Matter of S-A-, 22 I&N Dec. 1328, 1332 (BIA 2000). However, the Board further stated: "We not only encourage but require the introduction of corroborative testimonial and documentary evidence, where available." Id.; see also, Matter of Y-B-, 21 I&N Dec. 1136 (BIA 1998) (noting that there is a greater need for corroborative evidence when the testimony lacks specificity, detail, or credibility).

[4] We recognize that that the Director raised significant if somewhat speculative concerns. While not sufficiently developed for purposes of this visa petition, the Director is not barred from further inquiry, investigation, or the development of questions for consular processing or adjustment of status proceedings. See Matter of O, 8 I&N Dec. 295 (BIA 1959) (stating that the immigrant visa petition is not the appropriate stage of the process for questions regarding admissibility).

[5] The "priority date" of an employment-based immigrant petition is the date the underlying labor certification application is filed with the DOL. See 8 C.F.R. § 204.5(d).

evidence required in the regulation at 8 C.F.R. § 204.5(g)(2), may be considered proof of the petitioner's ability to pay the proffered wage.

According to the Beneficiary, he "briefly" worked for the Petitioner "[a]bout 40 hrs, every two weeks" and received payments about "$400-$440 gross pay" for every two weeks. The record contains pay stubs for the period of September 1, 2018, through October 15, 2018, showing that the Petitioner paid the Beneficiary $11 per hour. However, we are unable to ascertain the exact period of time the Petitioner employed the Beneficiary. Furthermore, the Petitioner has not submitted any IRS Form W-2, Wage and Tax Statements, for the years it employed the Beneficiary to demonstrate the total annual pay the Beneficiary received from it. Therefore, the Petitioner has not established its ability to pay the proffered wage from the priority date onward based on wages paid to the Beneficiary.

If a petitioner does not establish that it has paid the Beneficiary an amount equal to or above the proffered wage from the priority date onward, USCIS will examine the net income and net current assets figures recorded on the petitioner's federal income tax return(s), annual report(s), or audited financial statements(s). If either of these figures, net income or net current assets, equals or exceeds the proffered wage or the difference between the proffered wage and the amount paid to the beneficiary in a given year, the petitioner would ordinarily be considered able to pay the proffered wage during that year.

The Petitioner has submitted a copy of an amended 2016 federal income tax return that was prepared in March 2018, but has not submitted the original 2016 tax return that it filed. Therefore, we are unable to compare the information contained in the original and the amended 2016 federal income tax returns. Furthermore, the record does not contain tax returns for 2017 and onward. The Petitioner also has not submitted any annual reports and audited financial statements for the priority date year of 2016 or any subsequent year. Without the necessary financial documentation, we are unable to determine the Petitioner's continuing ability to pay the Beneficiary's proffered wage based on its net income or net current assets from the priority date of September 27, 2016, onward.

Therefore, we will remand this case for the Director to request the submission of regulatory required evidence from the Petitioner, as specified in 8 C.F.R. § 204.5(g)(2), for the priority date year of 2016 and any subsequent year(s) in the Director's discretion. The Director may also request any other evidence that may be deemed necessary to determine the Petitioner's eligibility for the requested immigration benefit.

IV. CONCLUSION

For the reasons discussed above, we will remand this case to the Director for further consideration of the Petitioner's eligibility for the immigration benefit it seeks on behalf of the Beneficiary.

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