U.S. Citizenship and Immigration Services

Non-Precedent Decision of the Administrative Appeals Office

In Re: 19391648

Date: JUL. 26, 2022

Appeal of Nebraska Service Center Decision

Form I-140, Immigrant Petition for Skilled Worker

The Petitioner, a locksmith services provider, seeks to employ the Beneficiary as a locksmith. It requests classification of the Beneficiary as a skilled worker 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 "EB-3" immigrant classification allows a U.S. employer to sponsor a foreign national for lawful permanent residence to work in a position that requires at least two years of training or experience.

The Director of the Nebraska Service Center initially approved the petition but subsequently revoked the approval on notice. In the revocation decision, the Director questioned whether the Petitioner had made a *bona fide* job offer that was "clearly open and advertised to any U.S. worker." The Director concluded that "the evidence suggests there was an agreement of employment prior to the filing of the I-140 petition and that employment with the petitioner is dependent on the approval of the beneficiary's [Form I-485, Application to Register Permanent Residence or Adjust Status]."

On appeal, the Petitioner contests the revocation decision, maintaining that it extended a *bona fide* job offer to the Beneficiary. The Petitioner emphasizes that an employment agreement between a petitioner and beneficiary "is the underlying premise of all employment-based sponsored green card applications" and that there is no statutory or regulatory requirement that the Beneficiary commence employment with the Petitioner prior to the approval of such application.

In these proceedings, it is the Petitioner'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. 369, 375 (AAO 2010). This office reviews the questions in this matter *de novo*. *See 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 case for further consideration.

I. EMPLOYMENT-BASED IMMIGRATION

Employment-based immigration generally follows a three-step process. First, an employer obtains an approved labor certification (ETA Form 9089) 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 (Form I-140) 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.

A labor certification employer must attest that "[t]he job opportunity has been and is clearly open to any U.S. worker." 20 C.F.R. § 656.10(c)(8). This attestation "infuses the recruitment process with the requirement of a bona fide job opportunity: not merely a test of the job market." *Matter of Modular Container Sys., Inc.*, 89-INA228, 1991 WL 223955, *7 (BALCA 1991) (*en banc*); *see* 20 C.F.R. § 656.17(l).

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.*

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 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 Estime*. Further, the ultimate grounds for revocation, as stated in the revocation decision, were not adequately raised in the NOIR. 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 regulation at 8 C.F.R. § 204.5(l)(3)(ii)(B) states that to qualify for skilled worker classification:

> ... the petition must be accompanied by evidence that the [beneficiary] meets the educational, training or experience, and any other requirements of the individual labor certification ... The minimum requirements for this classification are at least two years of training or experience.

This petition for skilled worker classification was filed on August 1, 2017. The accompanying certified labor certification for a locksmith position required two years of experience as a locksmith and listed no training or educational requirements. The labor certification indicates that the Beneficiary exceeded the experience requirement by virtue of his employment as a locksmith at [redacted] in [redacted] South Korea from May 2005 until November 2008. Documentary evidence relating to that claimed employment was submitted with the petition, which was initially approved on August 9, 2017.

B. Notice of Intent to Revoke and Revocation

On April 6, 2021, the Director issued a NOIR which provided the following explanation of the proposed grounds for revocation:

> After a review of the evidence submitted, it appears that the beneficiary may not be currently employed as a locksmith with the petitioner and may not have the required job-related experience as described on the ETA 9089 labor certificate. Furthermore, it appears that the beneficiary may be the owner and operator of his own restaurant business and is not currently employed as a locksmith with the petitioner.
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> In view of the above, it appears that the approval of the petition should be revoked.

The record reflects that the Petitioner disclosed on the labor certification and on the Form I-140 that the Beneficiary was in the United States in E-2 treaty investor status, a nonimmigrant classification that authorizes his employment to direct and develop a U.S. enterprise in which he has invested. *See* section 101(a)(15)(E)(ii) of the Act, 8 U.S.C. §1101(a)(15)(E)(ii). The Director did not cite to any statute or regulation requiring that the Petitioner establish that it already employed the Beneficiary in the job offered, or otherwise explain why the approval of the petition may be revoked on this basis.

The NOIR also lacked an explanation as to how the Director concluded that "it appears that the beneficiary . . . may not have the required job-related experience." Although the Director indicated that he reached this determination based on the evidence submitted with the petition, the record reflects that the Director had reviewed information that the Beneficiary had provided on a Form DS-156, Nonimmigrant Visa Application, and DS-157, Supplemental Nonimmigrant Visa Application, submitted to the U.S. Consulate in Seoul, South Korea, in August 2008. The information provided on that application did not corroborate his claimed employment as a locksmith.

The Director is obligated to not only provide notice of any derogatory information that is discovered outside of the record of proceedings but must make that derogatory information part of the record along with any rebuttal provided by the Petitioner. 8 C.F.R. § 103.2(b)(16)(i). The Director's failure to do so in this case constitutes error.

In response to the NOIR, the Petitioner asserted that there is no requirement that it employ the Beneficiary at the time the Form I-140 is filed. In this regard, the Petitioner emphasized that the *USCIS Policy Manual*'s guidance on adjustment of status applications states that an adjudicating officer reviewing an employment-based application "should determine that the applicant is either

employed by the petitioner or the job offer still exists."[1] The Petitioner submitted a Form I-485, Supplement J, Confirmation of Bona Fide Job Offer or Request for Job Portability (Supplement J), signed by the Petitioner and the Beneficiary, which indicates both parties' intent for the Beneficiary to work in the job offered upon the approval of his Form I-485. The Petitioner's response to the NOIR also included affidavits from both the Petitioner and the Beneficiary, indicating their shared understanding that the Beneficiary would commence employment with the Petitioner upon such approval. The Beneficiary explained his reasons for maintaining his E2 nonimmigrant status while awaiting the adjudication of his application to adjust status, noting that there is a degree of uncertainty in the application process and he did not want to risk jeopardizing his valid immigration status.

Finally, the Petitioner resubmitted an employment certificate from [redacted] indicating that the Beneficiary had acquired more than three years of experience as a locksmith between 2005 and 2008.

In the revocation decision, the Director acknowledged that "it is true that there is no requirement or standard that states the beneficiary must be currently employed with the petitioner." Nevertheless, the Director determined that the Beneficiary's intent to accept employment with the Petitioner only upon obtaining lawful permanent residence status "raises the question on whether or not the job was open and advertised to any qualified U.S. applicants." The Director indicated that the approval was being revoked because "the evidence suggests there was agreement of employment prior to the filing of the petition and that employment with the petitioner is dependent on the approval of the beneficiary's I-485."

The NOIR in this matter did not provide the Petitioner with sufficient notice that the *bona fide* nature of the job offer was in question or explain the specific facts that raised this concern. Further, the revocation decision did not acknowledge the Petitioner's submission of the Form I-485 Supplement J or adequately address its arguments that neither the regulations nor the *USCIS Policy Manual* require a petitioner to employ the beneficiary of an immigrant petition prior to approval of a Form I-485. In addition, the revocation decision did not address the Beneficiary's qualifications for the job offered, despite the inclusion of that issue as a potential basis for revocation in the NOIR. An officer must fully explain the reasons for denying a visa petition to allow the Petitioner a fair opportunity to contest the decision and to allow us an opportunity for meaningful appellate review. *See* 8 C.F.R. § 103.3(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 and the matter will be remanded. On remand, the Director is instructed to review the record and issue a new NOIR, which must 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 derogatory information from outside the record of proceedings, the Director must provide the Petitioner with notice of such information. 8 C.F.R. § 103.2(b)(16)(i).

[1] *See* 7 *USCIS Policy Manual* A.6(B)(3), https://ww.uscis.gov/policy-manual/volume-7-part-a-chapter-6.

As noted, the Director reviewed a nonimmigrant visa application which contains information regarding the Beneficiary's prior employment that is inconsistent with the information provided on the labor certification and the employment certificate from his claimed prior employer. Based on this information, there are valid concerns regarding whether the Beneficiary has the required experience in the job offered. However, the Petitioner was not provided with adequate notice of those concerns in the NOIR. In addition, USCIS conducted a site visit at the proposed worksite and interviewed the Petitioner's president prior to issuing the NOIR. If information obtained during these post-adjudicative actions raised questions regarding the *bona fide* nature of the job offer, the Director must provide the Petitioner with a specific statement of facts supporting those concerns.

III. CONCLUSION

For the reasons discussed above, we will remand this case for further consideration of whether the Petitioner and the Beneficiary meet all eligibility requirements, including, but not limited to, the Beneficiary's qualifications, the *bona fide* nature of the job offer, and the Petitioner's continuing ability to pay the proffered wage.[2] 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 Petitioner's 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 further consideration and the entry of a new decision consistent with the foregoing analysis.

[2] The regulation at 8 C.F.R. § 204.5(g)(2) requires evidence of the Petitioner's ability to pay the proffered wage from the priority date (in this case, March 27, 2017) and continuing until the Beneficiary obtains lawful permanent residence. The record contains a copy of only the Petitioner's 2016 federal income tax return.