U.S. Citizenship and Immigration Services

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

In Re: 34673202

Date: FEB. 18, 2025

Appeal of Nebraska Service Center Decision

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

The Petitioner, a former provider of moving services, sought to employ the Beneficiary as a "packer." The company requested his classification under the employment-based, third-preference immigrant visa category as an "other worker." *See* Immigration and Nationality Act (the Act) section 203(b)(3)(A)(iii), 8 U.S.C. § 1153(b)(3)(A)(ii). Businesses may sponsor aliens for U.S. permanent residence in this category to work in jobs requiring less than two years of training or experience. 8 C.F.R. § 204.5(l)(2) (defining the term "other worker").

After first granting the filing, the Director of the Nebraska Service Center revoked the petition's approval. The Director concluded that, at the time of the petition's approval, the Petitioner did not demonstrate its required intent to employ the Beneficiary in the offered job. The Director also found insufficient evidence of the company's required ability to pay the job's proffered wage and its willful misrepresentation of material facts. On appeal, the Beneficiary[1] contends that the Director disregarded and misevaluated evidence and, before revoking the petition's approval, did not notify him of the ability-to-pay ground.

As the affected party in these revocation proceedings, the Beneficiary bears the burden of demonstrating eligibility for the requested benefit by a preponderance of the evidence. *See Tongatapu Woodcraft Hawaii, Ltd. v. Feldman*, 736 F.2d 1305, 1308 (9th Cir. 1984); *Matter of Ho*, 19 I&N Dec. 582, 589 (BIA 1988) (citation omitted). Exercising de novo appellate review, *see Matter of Christo's, Inc.*, 26 I&N Dec. 537, 537 n.2 (AAO 2015), we conclude that the record supports the Director's revocation decision based on insufficient evidence of the Petitioner's intent to employ the Beneficiary in the offered job at the time of the filing's approval. We will therefore dismiss the appeal.

[1] USCIS does not generally accept filings from beneficiaries because they are not "affected parties" with standing in petition proceedings. 8 C.F.R. § 103.3(a)(1)(iii)(B). The Beneficiary, however, qualifies for "portability" under section 204(j) of the Act, 8 C.F.R. § 1154(j), and has properly requested to "port" to a new employer. *See Matter of V-S-G- Inc.*, Adopted Decision 2017-06 (AAO Nov. 11, 2017) (holding that, if beneficiaries in revocation proceedings qualify for portability and properly request to port, USCIS will treat them as affected parties).

## I. LAW

Immigration as an other – or "unskilled" – worker generally follows a three-step process. First, a prospective employer must obtain certification from the U.S. Department of Labor (DOL) that: there are insufficient U.S. workers able, willing, qualified, and available for an offered job; and an alien's permanent employment in the position would not harm wages and working conditions of U.S. workers with similar jobs. Section 212(a)(5)(A)(i) of the Act, 8 U.S.C. § 1182(a)(5)(A)(i).

Second, an employer must submit a DOL-approved labor certification with an immigrant visa petition to U.S. Citizenship and Immigration Services (USCIS). Section 204(a)(1)(F) of the Act. Among other things, USCIS determines whether an alien beneficiary meets the requirements of a DOL-certified position and a requested immigrant visa category. 8 C.F.R. § 204.5(l)(3)(ii)(D).

Finally, if USCIS approves a petition, a beneficiary 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.

But, "at any time" before a beneficiary obtains permanent residence, USCIS may revoke a petition's approval for "good and sufficient cause." Section 205 of the Act, 8 U.S.C. § 1155. A petition's erroneous approval may justify its revocation. *Matter of Ho*, 19 I&N Dec. at 590.

USCIS properly issues a notice of intent to revoke (NOIR) a petition's approval if the record at the time of the NOIR's issuance would have warranted the petition's denial. *Herrera v. USCIS*, 571 F.3d 881, 886 (9th Cir. 2009); *Matter of Estime*, 19 I&N Dec. 450, 451 (BIA 1987). The Agency properly revokes a petition if a petitioner does not timely submit a NOIR response or the response does not overcome the revocation grounds. *Matter of Estime*, 19 I&N Dec. at 451-52.

## II. FACTS

The record shows that the Beneficiary most recently came to the United States in November 2018 as a dependent of his spouse. His spouse had nonimmigrant E-1 investor visa status allowing her to operate a frozen yogurt store in the United States. *See* 101(a)(15)(E) of the Act, 8 C.F.R. § 1101(a)(15)(E).

The Beneficiary, who previously worked as an executive director of a nonprofit organization in South Korea, stated that his family wanted to stay in the United States. So, in January 2019, he paid a South Korean agency $10,000 to help him find an employer willing to sponsor him for U.S. permanent residence. The agency found the Petitioner, which offered the Beneficiary the packer job.

The Petitioner filed the labor certification application for the job in February 2019. DOL approved the application about three months later. The labor certification states that the offered job – which involves packing, stacking, sealing, and loading containers and packages at the Petitioner's worksite in [redacted] – pays $21,736 a year and requires no education, training, or experience.

The Petitioner filed its petition in August 2019. About two weeks after the company timely responded to a request for additional evidence (RFE) of its business operations in November 2019, the Director

approved the petition. The following month, the Beneficiary filed an application for adjustment of status.

In March 2022, while the Beneficiary's adjustment application remained pending, the Director mailed the Petitioner a NOIR. The NOIR stated that USCIS officers visited the company's worksite in April 2021. The officers reported finding no company employees or signs there. They stated that "the building appeared abandoned." Neighboring business owners told the officers that they did not believe a moving business ever operated at the building.[2] The officers visited the residence of the Petitioner's owner in the same city, but he was not home. The property's owner stated that the company owner went to a hospital in December 2020 and had not returned. The officers' calls to the company owner's phone numbers went unanswered.

The NOIR also noted the suspension of the Petitioner's corporate privileges in October 2019[3] and the revocation of its household goods carrier permit in February 2020. *See* Cal. Rev. & Tax. Code § 23301 (allowing the state to suspend the "corporate powers, rights and privileges" of any domestic corporate taxpayer for failure to pay certain taxes and penalties). Also, the Petitioner's labor certification reflects the company's employment of two people. But the NOIR noted that the company's Form I-140, Immigrant Petition for Alien Worker, quarterly payroll tax returns for the first two quarters of 2019, and payroll journal report for the last two quarters of 2018 listed only one employee: the Petitioner's owner.

The NOIR alleged that the Petitioner "is not a viable business operating at the address" listed on the petition and labor certification. The Director stated: "This calls into question the validity of the job offer and the labor certification at the time of filing, as material facts appear to have been misrepresented."

The Beneficiary's June 2022 NOIR response[4] included an affidavit from him. He stated that, as he told a USCIS officer at an October 2020 interview regarding his adjustment application, the company intended to employ him in the offered job and he intended to work for the company once he obtained U.S. permanent residence. *See Matter of Rajah*, 25 I&N Dec. 127, 132 (BIA 2009) ("An alien is not required to have been employed by the certified employer prior to adjustment of status.")

The Beneficiary stated that he was "very surprised, almost shocked" when he received the March 2022 NOIR from the Petitioner's former counsel.[5] The Beneficiary said that, once he received permanent residence, he had always intended to work for the company and that he did not misrepresent any material facts. After learning from the NOIR of USCIS' inability to reach the Petitioner's owner, the Beneficiary stated that he contacted the company's "agent." In a separate affidavit, the agent stated

[2] On appeal, the Beneficiary submits an affidavit from a man who states that he remembers a moving business at the address. The Beneficiary states that he did not know of the man until after the deadline for the NOIR response had expired.
[3] The NOIR stated the suspension of the Petitioner's corporate status in November 2019. But online government information states that the suspension took effect the prior month. *See* Cal. Sec'y of State, "Business Search," bizfileonline.sos.ca.gov/search/business.
[4] At that time, because of the COVID-19 pandemic, USCIS had extended deadlines for responding to NOIRs and other notices. *E.g.*, "USCIS Announces End of COVID-Related Flexibilities" (Mar. 23, 2023), www.uscis.gov/newsroom.
[5] The Beneficiary had not yet gained permission under *V-S-G-* to be treated as an affected party in the revocation proceedings. USCIS therefore did not mail the NOIR to him.

that he last met the company's owner at the end of 2019. The agent said the owner "had very serious health issues and had been hospitalized." He said the owner was being treated for a "bronchial problem" and used a portable oxygen cylinder to breathe. The owner told the agent that he could not run his company from the hospital and asked the agent to "take over the business for him." The agent said he agreed and moved the company's sign to the agent's office in the same city. The agent also told the Beneficiary that the agent had moved the company's trucks and garage equipment to another city address. The Petitioner's prior counsel notified USCIS of the company's address change in November 2020.

The agent stated that, eventually, he could no longer reach the Petitioner's owner at the hospital and lost contact with him. The agent said that he had heard that the owner had died from the COVID-19 virus and other illnesses. About to retire, the agent said he closed the petitioning business at the end of 2020.[6] The Petitioner's former counsel stated that he unsuccessfully tried to contact the company's owner but the agent told him that the owner had died after undergoing COVID-19 hospitalization in late 2020.

About the same time as responding to the NOIR, the Beneficiary asked for USCIS' permission to port to a new employer and work in the same offered job. The Agency granted his request in March 2023. The Director revoked the petition's approval in July 2024. This timely appeal followed.

## III. ANALYSIS

### A. Ability to Pay the Proffered Wage

A petitioner must demonstrate its continuing ability to pay an offered job's proffered wage, from a petition's priority date until a beneficiary obtains U.S. permanent residence. 8 C.F.R. § 204.5(g)(2). This petition's priority date is February 20, 2019, the date DOL accepted the Petitioner's labor certification application for processing. *See* 8 C.F.R. § 204.5(d) (explaining how to determine a petition's priority date). As previously indicated, USCIS approved the petition in November 2019. Thus, the Petitioner had to demonstrate its ability to pay the annual proffered wage of $21,736 in 2019, the year of the petition's priority date.

The Director concluded that the Petitioner did not demonstrate its ability to pay. The Director found that the company employed only its owner in 2019 and that, based on a copy of its 2018 federal income tax return, it lacked sufficient net income or net current assets to pay both its owner and the Beneficiary.

As the Beneficiary argues, however, the Director did not properly notify the company of this revocation ground. Unless a petition is automatically revoked under 8 C.F.R. § 205.1, USCIS must provide a petitioner with advance notice of the proposed revocation grounds. 8 C.F.R. § 205.2(a), (b). "The petitioner . . . must be given the opportunity to offer evidence in support of the petition . . . and in opposition to the grounds alleged for revocation of the approval." 8 C.F.R. § 205.2(b). Further, a NOIR "must include a specific statement not only of the facts underlying the proposed action, but also

[6] Because the Beneficiary's adjustment application has remained pending for more than 180 days, the termination of the Petitioner's business did not automatically revoke the petition's approval. *See* 8 C.F.R. § 205.1(a)(3)(iii)(D).

of the supporting evidence." *Matter of Estime*, 19 I&N Dec. at 451-52. "Where a notice of intention to revoke is based on an unsupported statement or an unstated presumption, or where the petitioner is unaware and has not been advised of derogatory evidence, revocation of the visa petition cannot be sustained." *Id.* at 451.

Like the revocation decision, the Director's NOIR discussed evidentiary discrepancies regarding the Petitioner's number of employees. But the NOIR did not discuss the company's 2018 net income and net current asset amounts or allege its inability to pay the proffered wage. Thus, the Director did not provide the Petitioner with advance notice of this revocation ground. Also, the NOIR did not state all the underlying facts upon which the Director relied to revoke the petition's approval on this ground.

For the foregoing reasons, the Director improperly revoked the petition's approval based on insufficient evidence of the Petitioner's ability to pay the proffered wage. We will therefore withdraw this revocation ground.

B. Intent to Employ in the Offered Job

To sponsor an alien worker for U.S. permanent residence, a business must be "desiring and intending to employ [the alien] within the United States." Section 204(a)(1)(F) of the Act. A petitioner must intend to employ a beneficiary under the terms and conditions of an accompanying labor certification. *See Matter of Izdebska*, 12 I&N Dec. 54, 55 (Reg'l Comm'r 1966) (affirming a petition's denial where, contrary to the accompanying labor certification, a petitioner did not intend to employ a beneficiary as a domestic worker on a full-time, live-in basis). A petitioner must demonstrate eligibility "at the time of filing the benefit request and . . . through adjudication." 8 C.F.R. § 103.2(b)(1).

On the Form I-140 and its accompanying labor certification, the Petitioner attested to its intent to employ the Beneficiary full-time as a packer at its [redacted] worksite. The Director, however, found that the Petitioner's corporate suspension prevented the company from conducting business as of October 1, 2019, more than a month before the petition's approval. The Director concluded that, at the time of the petition's approval, the company neither intended nor had the ability to permanently employ the Beneficiary in the offered job.

On appeal, the Beneficiary incorrectly asserts that "USCIS bears the burden of establishing eligibility for revocation by a preponderance of the evidence." As previously indicated, "the burden of proof in visa petition revocation proceedings properly rests with the petitioner." *Matter of Ho*, 19 I&N Dec. at 589. "[O]nce the [immigration service] has produced some evidence to show cause for revoking the petition, the [petitioner] still bears the ultimate burden of proving eligibility." *Tongatapu*, 736 F.2d at 1308. The Petitioner did not file this appeal, and, under *V-S-G-*, we treat the portability-eligible Beneficiary as an affected party in these revocation proceedings. Thus, he must demonstrate eligibility for the requested benefit by a preponderance of the evidence.

The Beneficiary contends that USCIS based its decision "on mere suspicion or conjecture rather than substantial and probative evidence." For example, he states that USCIS "assumed" that he did not intend to permanently work for the Petitioner because he did not work for the company in a temporary status during the immigration process.

We recognize that the Beneficiary need not have worked for the Petitioner before obtaining permanent residence. *See Matter of Rajah*, 25 I&N Dec. at 132. His decision to postpone his employment with the company until after becoming a permanent resident does not necessarily demonstrate a lack of intent to eventually work for the company on a permanent basis.

But the Beneficiary has not sufficiently demonstrated the Petitioner's intent or ability to employ him in the offered job after the suspension of its corporate privileges in October 2019.[7] The Petitioner's payroll tax returns for the first two quarters of 2019 and its payroll journal report for the last two quarters of 2018 indicate that the company employed only its owner during those periods. The company's agent attested that, when he last met with the owner "[a]t the end of 2019," the owner "had very serious health issues and had been hospitalized." The agent stated: "[H]e was being treated for a bronchial problem and was using a portable medical oxygen cylinder." Thus, the record does not establish that, at the time of the petition's approval, the Petitioner had sufficient staffing, or that its owner was healthy enough, to continue the company's business operations.

The Petitioner's 2018 federal income tax return indicates that the company operated a profitable business that year. The tax return reports revenues of more than $950,000, net income of more than $45,000, salaries and wage payments of more than $650,000, and the owner's receipt of $120,000 in officer compensation. But other evidence of record conflicts with the tax return information. As previously indicated, the company's payroll tax returns for the first two quarters of 2019 and its payroll journal report for the last two quarters of 2018 indicate that it employed only its owner, casting doubt on the $650,000 it purportedly paid in salaries and wages that year. Also, contrary to the information on the tax return, a copy of the owner's 2018 IRS Form W-2, Tax and Wage Statement, indicates that the company paid him only $30,000 that year. These discrepancies cast doubt on the authenticity and accuracy of the company's 2018 federal income tax return. *See Matter of Ho*, 19 I&N Dec. at 591 (requiring petitioners to resolve inconsistencies with independent, objective evidence pointing to where the truth lies).

The Beneficiary argues that, in their affidavits, the Petitioner's agent and prior counsel state the company's continued operations through the end of 2020. The record, however, lacks sufficient independent objective evidence to support the claimed business operations at the time of the petition's approval in November 2019. As previously indicated, the state suspended the Petitioner's corporate privileges in October 2019 and revoked its household goods carrier permit in February 2020. Also, tax and payroll records indicate that in 2018 and 2019 the company employed only its owner, whom the agent described as sick and requiring "hospitalization." Additional evidence of the company's business operations include only one $400 moving agreement, four invoices in 2018 and 2019 totaling $545.53, and a 2018 insurance payment receipt for $171.37. These materials are insufficient to support the statements of the Petitioner's agent and prior counsel that the company continued to operate until the end of 2020 and would have had available full-time work for the Beneficiary. The evidence does

[7] The suspension deprived the company of its ability to "legally do business." Cal. Franchise Tax Bd., "My business is suspended," www.ftb.ca.gov/help/business. During the suspension, the Petitioner has not been able to legally sell, transfer, or exchange real property in California, and other parties could void contracts that they made with the Petitioner during the suspension period. *See Ctr. for Self-Improvement & Cmty. Dev. v. Lennar Corp.*, 173 Cal. App. 4th 1543, 1552 (Cal. Ct. App. 2009). The suspension also deprived the company of its abilities to: bar another business from adopting its corporate name; borrow money; execute notes; or sell stock. *Id.* (citations omitted). At the time of the petition's approval, these legal disabilities limited the company's ability to conduct its business.

not demonstrate the company's continued operations beyond October 2019 or its intent or ability to permanently employ the Beneficiary in accordance with the terms of the labor certification.

The Beneficiary contends that most of the Petitioner's business documents were "lost" due its owner's death. The company's agent, however, stated that he "took over the business" in early 2020. If, as the agent stated, the Petitioner continued operating until the end of 2020 and employed three people, the Beneficiary has not explained why the agent has not provided him with copies of the company's 2020 tax returns, payroll records, bills, invoices, or employee affidavits. The Beneficiary also has not explained why the company, if continuing to do business beyond October 2019, did not pay its outstanding taxes or penalties, and revive its corporate status. *See* Cal. Rev. & Tax. Code § 23305.

For the foregoing reasons, the Beneficiary has not established that, at the time of the petition's approval, the Petitioner had the ability and intent to employ him in the offered job. We will therefore affirm the revocation of the petition's approval on this ground.

C. The Alleged Misrepresentations

Misrepresentations are willful if they are "deliberately made with knowledge of their falsity." *Matters of Valdez*, 27 I&N Dec. 496, 498 (BIA 2018) (citations omitted). A misrepresentation is material when it has a "natural tendency to influence, or [be] capable of influencing, the decision of the decision-making body to which it was addressed." *Id.* (citation omitted). Because of potential consequences to aliens and their petitioning employers, we must "closely scrutinize" the factual bases of material misrepresentation findings. *Matter of Y-G-*, 20 I&N Dec. 794, 797 (BIA 1994).

As previously indicated, during the revocation process, a petitioner "must be given the opportunity to offer evidence in support of the petition . . . and in opposition to the grounds alleged for revocation of the approval." 8 C.F.R. § 205.2(b). A NOIR "must include 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. at 451-52. A revocation can only be grounded upon, and a petitioner need only respond to, the factual allegations specified in a NOIR. *Matter of Arias*, 19 I&N Dec. 568, 570 (BIA 1988). "Where a notice of intention to revoke is based on an unsupported statement or an unstated presumption, or where the petitioner is unaware and has not been advised of derogatory evidence, revocation of the visa petition cannot be sustained." *Matter of Estime*, 19 I&N Dec. at 451.

The Director's NOIR discussed: USCIS' site visit to the Petitioner's worksite; the suspension of the company's corporate privileges; the revocation of its household goods carrier permit; and discrepancies in its number of employees. The NOIR stated that "material facts appear to have been misrepresented." But the notice did not specify which material facts were allegedly misrepresented, which pieces of evidence supported the alleged misrepresentations, or who made them. The Director found that the Petitioner misrepresented its location, "active [business] status," and intent to employ the Beneficiary in the offered job. But, because the NOIR did not provide adequate advance notice to the company of these specific alleged falsehoods, we will withdraw the misrepresentation findings.

## IV. CONCLUSION

The Director improperly revoked the petition's approval based on insufficient evidence of the Petitioner's ability to pay and the company's alleged misrepresentations of material facts. The Beneficiary, however, did not demonstrate the company's intent to employ him in the offered job at the time of the petition's approval. We will therefore affirm the petition's revocation.

**ORDER:** The appeal is dismissed.