U.S. Citizenship and Immigration Services

Non-Precedent Decision of the Administrative Appeals Office

MATTER OF H-K-E-(O-)I- LTD.

DATE: FEB. 1, 2016

APPEAL OF CALIFORNIA SERVICE CENTER DECISION

PETITION: FORM I-129CW, PETITION FOR A CNMI-ONLY NONIMMIGRANT TRANSITIONAL WORKER

The Petitioner states on the Form I-129CW that it is a hotel and casino. It seeks to temporarily employ the Beneficiaries under the CNMI-Only Transitional Worker (CW-1) nonimmigrant classification. *See* 48 U.S.C. § 1806(d). The CW-1 visa classification allows employers in the Commonwealth of the Northern Mariana Islands (CNMI) to apply for permission to temporarily employ foreign nonimmigrant workers who are otherwise ineligible to work under other nonimmigrant worker categories.

The Director, California Service Center, denied the petition in this matter, concluding that the Petitioner had not established that it was an eligible employer engaged in legitimate business as required by 8 C.F.R. § 214.2(w)(4)(i) and as defined by 8 C.F.R. § 214.2(w)(1)(vi). The Director further stated that the petition is denied on a discretionary basis under 8 C.F.R. § 214.2(w)(21). The matter is now before us on appeal.

On appeal, the Petitioner claims, among other things, that it is an eligible employer engaged in legitimate business. Upon *de novo* review, we find that the Petitioner has not established that it was an eligible employer engaged in legitimate business and, therefore, the appeal will be dismissed.[1]

I. ELIGIBLE EMPLOYER

A. Legal Framework

The regulations specify that to be eligible to petition for a CW-1 nonimmigrant worker, a petitioner must be an eligible employer, which means, *inter alia*, that the employer must be engaged in "legitimate business." 8 C.F.R. § 214.2(w)(4)(i).

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[1] We conduct appellate review on a *de novo* basis. *Matter of Simeio Solutions, LLC*, 26 I&N Dec. 542 (AAO 2015); *see also* 5 U.S.C. § 557(b) ("On appeal from or review of the initial decision, the agency has all the powers which it would have in making the initial decision except as it may limit the issues on notice or by rule."); *Dor v. INS*, 891 F.2d 997, 1002 n.9 (2d Cir. 1989). Unless the law requires a different degree of proof, we apply the preponderance of the evidence standard as specified in *Matter of Chawathe*, 25 I&N Dec. 369, 375-76 (AAO 2010).

The term "legitimate business" is defined at 8 C.F.R. 214.2(w)(1)(vi) as follows:

> *Legitimate business* means a real, active, and operating commercial or entrepreneurial undertaking which produces services or goods for profit, or is a governmental, charitable or other validly recognized nonprofit entity. The business must meet applicable legal requirements for doing business in the CNMI. A business will not be considered legitimate if it engages directly or indirectly in prostitution, trafficking in minors, or any other activity that is illegal under Federal or CNMI law. [The Department of Homeland Security] will determine whether a business is legitimate.

The CW-1 program was intended to address the needs of legitimate businesses. 48 U.S.C. § 1806(d)(5)(A); 8 C.F.R. § 214.2(w)(1)(vi). As a matter of discretion, the Department of Homeland Security (DHS) determines whether a petitioner filing a CW-1 petition is a legitimate business. 48 U.S.C. § 1806(d)(5)(A); 8 C.F.R. § 214.2(w)(1)(vi). With regard to the level of criminal activity or proof that should render a petitioning employer ineligible, DHS noted in the promulgation of the final rule that a conviction is not required for the direct or indirect illegal activity provision to be applied. 76 Fed. Reg. 55,501, 55,509 (Sept. 7, 2011).

B. Analysis

Upon *de novo* review, we conclude that the record does not establish that the Petitioner is an eligible employer engaged in legitimate business. Our finding is based on the record in its entirety, including the Assessment of Civil Money Penalty (Assessment) issued by the U.S. Department of Treasury, Financial Crimes Enforcement Network (FinCEN) and the First Amended Non Prosecution Agreement (the NPA).

1. FinCEN's Assessment

On June 3, 2015, FinCEN determined that the Petitioner was a "financial institution" and a "casino" within the meaning of the Bank Secrecy Act (BSA) and its implementing regulations.[2] FinCEN further found that the Petitioner "willfully violated the BSA's program and reporting requirements from 2008 through the present." Specifically, FinCEN stated the following in its Assessment:

> [redacted] (a) failed to develop and implement an anti-money laundering program, 31 U.S.C. § 5318(h) and 31 C.F.R. § 1021.210; (b) failed to report transactions involving currency in amounts greater than $10,000, in violation of 31 U.S.C § 5313 and 31 C.F.R. § 1021.311; and (c) failed to detect and adequately

[2] Under the BSA, 31 U.S.C. §§ 5311-5314, 5316-5332, and its implementing regulations at 31 C.F.R. Chapter X (formerly 31 C.F.R. Part 103), FinCEN may bring an enforcement action for violations of the reporting, recordkeeping, or other requirements of the BSA.

> report suspicious activities and transactions in a timely manner, in violation of 31 U.S.C. § 5318(g) and 31 C.F.R. § 1021.320.
>
> . . . .
>
> FinCEN has determined that [redacted] willfully violated the program and reporting requirements of the Bank Secrecy Act and its implementing regulations, as described in this ASSESSMENT, and that grounds exist to assess a civil money penalty for these violations. 31 U.S.C. § 5321 and 31 C.F.R. § 1010.820.
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> FinCEN has determined that the penalty in this matter will be $75 million.[3]

On appeal, the Petitioner asserts that the alleged illegal conduct was not occurring when this petition was submitted; but rather, it purportedly occurred prior to filing this petition. However, FinCEN's Assessment states that the Petitioner "willfully violated the BSA program and reporting requirements from 2008 through the **present**" (emphasis added). Notably, the instant petition was filed on November 4, 2013, and the Assessment is dated June 3, 2015. Further, the Petitioner has not submitted evidence to establish that it has since been in compliance with the BSA. "[G]oing on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings." *In re Soffici*, 22 I&N Dec. 158, 165 (Comm'r 1998) (citing *Matter of Treasure Craft of Cal.*, 14 I&N Dec. 190 (Reg'l Comm'r 1972)).

The Petitioner must establish eligibility at the time of filing the nonimmigrant visa petition and must continue to be eligible for the benefit through adjudication. 8 C.F.R. § 103.2(b)(1). Based on (a) FinCEN's assessment that "the Petitioner willfully violated the BSA's program and reporting requirements" and (b) the lack of evidence counteracting or contradicting that finding, we conclude that the Petitioner engaged in activities that are illegal under federal law. Thus, the Petitioner was not an eligible employer engaged in legitimate business at the time the instant petition was filed, at the time the petition was adjudicated, and during the requested employment validity period.

2. The NPA

The NPA, dated July 23, 2015, states that the Petitioner "admits and stipulates that the facts set forth in the Statement of Facts. . . are true and accurate." The Statement of Facts in the NPA provides the following:

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[3] On appeal, the Petitioner asserts that "the FinCEN assessment is also flawed as the NPA demonstrates that the assessment is unreasonable." However, the issue in this proceeding is not whether an assessment of $75 million was reasonable, but whether the Petitioner has engaged in any activities that are illegal under federal or CNMI law. Here, the Petitioner has not provided evidence that rebuts FinCEN's finding that the Petitioner willfully violated the BSA's program and reporting requirements.

> [The Petitioner] did not adequately implement a system of internal controls reasonably designed to ensure compliance with BSA's requirements for filing CTR [Currency Transaction Report for Casinos] or SAR [Suspicious Activity Report by Casinos] forms. [The Petitioner] did not fully identify and disclose all individuals involved in or actually conducting the transactions and did not include Social Security Numbers or Tax ID numbers on the CTR forms. Furthermore, from October 1, 2009 through April 25, 2013, [the Petitioner] did not file approximately 3,640 CTRs, even those CTR forms that were prepared by its employees, causing a total of approximately $138 million in transactions to not be filed.

On appeal, the Petitioner claims that the indictment against the Petitioner was dismissed without prejudice and that "it cannot be denied that a dismissal without prejudice is a favorable resolution for [the Petitioner]." However, we note that the indictment was dismissed after filing the NPA. The NPA specifically states:

> In consideration of [the Petitioner]'s entry into this Agreement and its commitment to: (a) accept and acknowledge responsibility for its conduct, as described in the Statement of Facts; (b) cooperate with the Office and the IRS-CI; (c) make the payment specified in this Agreement[4]; (d) comply with the federal criminal laws of the United States (as provided herein in Paragraph 10); and (e) otherwise comply with all of the terms of this Agreement, the Office shall not criminally prosecute [the Petitioner], or any past or current shareholder, officer, director, or employee of [the Petitioner] relating to the conduct described in the Second Superseding Indictment and Statement of Facts. The Office shall move to dismiss the Second Superseding Indictment (and all underlying Indictments) without prejudice, subject to the right of the Office to initiate a criminal prosecution in the event of a material breach of [the Petitioner]'s obligations under this Agreement as described herein.

Notably, the NPA reserved the right of the U.S. Attorney for the Northern Mariana Islands "to initiate a criminal prosecution in the event of a material breach of [the Petitioner]'s obligations under this agreement." Moreover, the NPA states that the Petitioner will be under a "Supervision Period" for three years from the date of the agreement. Therefore, dismissal of the indictment pursuant to the NPA does not absolve the Petitioner from the "alleged" BSA violations; instead, the indictment is dismissed without prejudice, in exchange for the Petitioner accepting and acknowledging responsibility for its conduct, promising to pay the total forfeiture amount, and cooperating and complying with the terms of the NPA.

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[4] The Petitioner agreed to pay a total of $3,036,969.12 to the United States and agreed that this amount is "treated as a penalty paid to the United States government for all purposes, including tax purposes."

On August 21, 2015, the United States filed a civil forfeiture suit against the Petitioner for $2.5 million ($536,169.12 had already been seized by the United States).

On appeal, the Petitioner also asserts that it is not a financial institution subject to the BSA. However, the NPA contains the Petitioner's admission to the Statement of Facts that it ran a casino that had gross annual gaming revenues in excess of $1 million; that casinos are required to comply with the BSA; and that the Petitioner did not, in fact, comply with the BSA requirements.[5] Therefore, the representations made by the Petitioner in the NPA contradict the assertion made by the Petitioner to us that it is not subject to the BSA.[6] Further, as noted above, FinCEN determined that the Petitioner was a "financial institution" and a "casino" within the meaning of the BSA and its implementing regulations and that the Petitioner was required to comply with the BSA. The Petitioner does not provide evidence establishing that FinCEN's assessment is legally incorrect.

In conclusion, the Petitioner admitted in the NPA that it was subject to the BSA and that it failed to comply with the BSA. Thus, the Petitioner engaged in activities that are illegal under federal law. Therefore, we cannot conclude that the Petitioner was an eligible employer engaged in legitimate business at the time the petition was filed and when the petition was adjudicated.

II. CONSTITUTIONAL CLAIMS

A. Due Process

On appeal, the Petitioner claims that it was denied due process because the Director did not issue a request for evidence (RFE) or a notice of intent to deny (NOID) addressing all of the grounds for denial. With respect to a constitutional due process challenge, we have no authority to entertain constitutional challenges to a USCIS action or inaction. *Cf. Matter of Salazar-Regino*, 23 I&N Dec. 223, 231 (BIA 2002) (the Board of Immigration Appeals lacks authority to rule on constitutionality of statutes it administers).

Even if we had the authority to entertain constitutional challenges, the Petitioner has not shown that any violation of the regulations resulted in "substantial prejudice" to the petitioning company or the Beneficiaries. *See De Zavala v. Ashcroft*, 385 F.3d 879, 883 (5th Cir. 2004) (holding that a foreign national "must make an initial showing of substantial prejudice" to prevail on a due process challenge).

First, there is no indication that the Director erred in not issuing an RFE or NOID in this matter. The regulations governing RFEs and NOIDs clearly indicate that the issuance of an RFE or NOID is purely discretionary and that the Director may instead deny a benefit request when eligibility has not

[5] Under the BSA, the term "financial institution" may include a casino or gaming establishment as well as "any other business designated by the Secretary whose cash transactions have a high degree of usefulness in criminal, tax, or regulatory matters." 31 U.S.C. § 5312(a)(2)(X) and (Z).

[6] The NPA states that the Petitioner will not be criminally prosecuted in consideration of its commitment to accept and acknowledge responsibility for its conduct as described in the Statement of Facts. The Petitioner agreed not to make any statement contradicting the Statement of Facts or its representations in the NPA. The NPA further reports that any such contradictory statement made by the Petitioner shall constitute a violation of the NPA and the Petitioner shall be subject to prosecution or the Supervision Period shall be extended.

been established. *See* 8 C.F.R. § 103.2(b)(8). More specifically, the regulation at 8 C.F.R. § 103.2(b)(8)(i) states that a petition will be denied "[i]f the record evidence establishes ineligibility." The regulation does not state that the evidence of ineligibility must be irrefutable. Where evidence of record indicates that a basic element of eligibility has not been met, it is appropriate for the Director to deny the petition without issuing an RFE or NOID. *See* 8 C.F.R. § 103.2(b)(8)(iii).

Second, even if the Director had erred as a procedural matter in not issuing an RFE or NOID, it is not clear what remedy would be appropriate beyond the appeal process itself. The Petitioner has in fact supplemented the record on appeal, and therefore it would serve no useful purpose to remand the case to afford the Petitioner yet another additional opportunity to supplement the record with new evidence. That is also true here where we have already issued an RFE requesting additional evidence and provided the Petitioner with an additional opportunity to supplement the record on appeal.

Finally, the Petitioner's assertion is tantamount to an attempt to shift the evidentiary burden in this proceeding from the Petitioner to USCIS. Such an assertion is without merit. The burden to establish eligibility in this matter remains solely with the Petitioner. Section 291 of the Act, 8 U.S.C. § 1361. When "any person makes application for a visa or any other document required for entry, or makes application for admission, . . . the burden of proof shall be upon such person to establish that he is eligible" for such benefit. Section 291 of the Act, 8 U.S.C. § 1361; *see also Matter of Treasure Craft of Cal.*, 14 I&N Dec. 190 (Reg'l Comm'r 1972). If a petitioner wishes to submit additional evidence, not previously provided, it may file a new petition for USCIS to consider, or it may file a motion to reopen, motion to reconsider, or an appeal as a forum for that new evidence. Again, the Petitioner in this matter chose to file an appeal and was given additional opportunities on appeal and in response to our RFE to submit supplemental evidence and address the identified grounds of ineligibility.

B. Equal Protection

In response to our RFE, the Petitioner also claims that the Director violated the equal protection clause by approving another CW petition ( ) filed by the Petitioner, subsequent to denying the instant petition. In support of this assertion, the Petitioner submitted copies of Form I-797A, Notices of Action, dated February 26, 2015, with receipt number The Petitioner asserts that "treat[ing] similarly situated aliens disparately violates [the] equal protection clause."

We again note that we have no authority to entertain constitutional challenges to a USCIS action or inaction. *Cf. Matter of Salazar-Regino*, 23 I&N Dec. at 231. Even if we did, the Petitioner has not established that the CW petition (was approved subsequent to the denial of the instant petition. Our review of USCIS electronic records shows that USCIS approved the petition (on February 5, 2013, with a validity date ending January 31, 2014. The instant petition was denied on December 8, 2014. Therefore, the other petition ( ) expired almost a year before the instant petition was denied. Moreover, the documents

submitted by the Petitioner in response to our RFE are notices that the file was transferred on February 26, 2015. They are not notices of a decision in that matter.

Even if that petition had been approved subsequent to denial of the instant petition, we note that we are not required to approve petitions where eligibility has not been demonstrated, merely because of prior approvals that may have been erroneous. *See Matter of Church Scientology Int'l*, 19 I&N Dec. 593, 597 (Comm'r 1988). It would be "absurd to suggest that [USCIS] or any agency must treat acknowledged errors as binding precedent." *Sussex Eng'g, Ltd. v. Montgomery*, 825 F.2d 1084, 1090 (6th Cir. 1987).

A prior approval does not compel the approval of a subsequent petition or relieve the Petitioner of its burden to provide sufficient documentation to establish current eligibility for the benefit sought. A prior approval also does not preclude USCIS from denying an extension of an original visa petition based on a reassessment of eligibility for the benefit sought. *See Tex. A&M Univ. v. Upchurch*, 99 F. App'x 556 (5th Cir. 2004). Furthermore, our authority over the service centers is comparable to the relationship between a court of appeals and a district court. Even if a service center director had approved the nonimmigrant petition on behalf of a beneficiary, we would not be bound to follow the contradictory decision of a service center. *See La. Philharmonic Orchestra v. INS*, 44 F. Supp. 2d 800, 803 (E.D. La. 1999).

Importantly, it appears that the Petitioner provided inaccurate information to USCIS with regard to the prior petition by claiming that it was an employer engaged in legitimate business, yet thereafter, acknowledging in the NPA that it had not complied with the BSA. The prior petition would likely have been denied had USCIS known this information at the time it adjudicated that benefit request.

Finally, the Petitioner has not submitted evidence to establish that the facts of the instant petition are analogous to the other petition. We note again that "going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings." *In re Soffici*, 22 I&N Dec. at 165 (citing *Matter of Treasure Craft of Cal.*, 14 I&N Dec. 190). "[I]t is incumbent upon the petitioner to resolve the inconsistencies by independent objective evidence." *Matter of Ho*, 19 I&N Dec. 582, 591 (BIA 1988). Any attempt to explain or reconcile such inconsistencies will not suffice unless the Petitioner submits competent objective evidence pointing to where the truth lies. *Id.* at 591-92.

III. CONCLUSION

We find that the evidence in the record of proceeding does not establish that the Petitioner was an eligible employer engaged in legitimate business as required under 8 C.F.R. § 214.2(w)(4)(i) at the time the petition was filed continuing through the adjudication of this petition. As this basis for

denial is dispositive of the Petitioner's eligibility for the benefit sought, we need not and will not address at this time any additional issues in the record of proceeding.[7]

In visa petition proceedings, it is the Petitioner's burden to establish eligibility for the immigration benefit sought. Section 291 of the Act, 8 U.S.C. § 1361; *Matter of Otiende*, 26 I&N Dec. 127, 128 (BIA 2013) (citing *Matter of Brantigan*, 11 I&N Dec. 493, 495 (BIA 1966)). Here, that burden has not been met.[8]

ORDER: The appeal is dismissed.

Cite as *Matter of H-K-E-(O-)I- Ltd.*, ID# 13386 (AAO Feb. 1, 2016)

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[7] The regulations provide that the affected party must explain in writing why oral argument is necessary. 8 C.F.R. § 103.3(b)(1). Furthermore, USCIS has the sole authority to grant or deny a request for oral argument and will grant argument only in cases involving unique factors or issues of law that cannot be adequately addressed in writing. *See* 8 C.F.R. § 103.3(b)(2). In this instance, the Petitioner has not identified unique factors or issues of law to be resolved that were not articulated in writing. In fact, the Petitioner set forth no specific reasons why oral argument should be held. Moreover, the written record of proceeding fully represents the facts and issues in this matter, and there is no explanation why any facts or issues in this matter, whether novel or not, have not and cannot be adequately addressed in writing. Consequently, the request for oral argument is denied.

[8] This decision does not prejudice or otherwise prevent the Petitioner from filing a new CW petition on behalf of the Beneficiaries or other individuals, especially if the facts and circumstances have since changed such that eligibility for the immigration benefit can be established, including that the Petitioner can demonstrate that it is now an eligible employer engaged in legitimate business.