U.S. Citizenship and Immigration Services

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

In Re: 27460470

Date: JUL. 12, 2023

Appeal of Texas Service Center Decision

Form I-140, Immigrant Petition for Alien Worker (Multinational Managers or Executives)

The Petitioner, an importer and distributor of international food products, seeks to permanently employ the Beneficiary as its operations director under the first preference immigrant classification for multinational executives or managers. *See* Immigration and Nationality Act (the Act) section 203(b)(l)(C), 8 U.S.C. § 1153(b)(1)(C). This classification allows a U.S. employer to permanently transfer a qualified foreign employee to the United States to work in an executive or managerial capacity.

The Director of the Texas Service Center denied the petition on multiple grounds concluding that the record did not establish that the Petitioner has a qualifying relationship with the Beneficiary's foreign employer, that it had been doing business for at least one year at the time of filing, and that it had the ability to pay the Beneficiary's proffered wage. The Director further determined that the Petitioner did not establish that the Beneficiary had been employed abroad in a managerial or executive capacity for at least one year in the three years preceding the filing of the petition, and that he would be employed in a managerial or executive capacity in the United States. Finally, the Director concluded that both the Petitioner and Beneficiary had willfully misrepresented facts that are material to eligibility for the requested classification. The matter is now before us on appeal. 8 C.F.R. § 103.3.

The Petitioner bears the burden of proof to demonstrate eligibility by a preponderance of the evidence. *Matter of Chawathe*, 25 I&N Dec. 369, 375-76 (AAO 2010). We review the questions in this matter de novo. *Matter of Christo's, Inc.*, 26 I&N Dec. 537, 537 n.2 (AAO 2015). Upon de novo review, we will dismiss the appeal.

## I. LAW

Section 203(b)(1)(C) of the Act makes an immigrant visa available to a beneficiary who, in the three years preceding the filing of the petition, has been employed outside the United States for at least one year in a managerial or executive capacity, and seeks to enter the United States in order to continue to render managerial or executive services to the same employer or to its subsidiary or affiliate.

The Form I-140, Immigrant Petition for Alien Worker, must include a statement from an authorized official of the petitioning United States employer which demonstrates that the beneficiary has been employed abroad in a managerial or executive capacity for at least one year in the three years preceding

the filing of the petition, that the beneficiary is coming to work in the United States for the same employer or a subsidiary or affiliate of the foreign employer, and that the prospective U.S. employer has been doing business for at least one year. *See* 8 C.F.R. § 204.5(j)(3). In addition, a petition for a multinational manager or executive must be accompanied by evidence that the prospective United States employer has the ability to pay the proffered wage from the time the petition is filed and continuing through adjudication. *See* 8 C.F.R. § 204.5(g)(2).

## II. ANALYSIS

As noted, the Director denied the petition on multiple independent and alternative grounds, and further determined that both the Petitioner and Beneficiary had willfully misrepresented facts that are material to eligibility for the requested benefit. Prior to the decision, the Director issued a notice of intent to deny (NOID) to allow the Petitioner an opportunity to address the deficiencies in its initial evidence, and to rebut derogatory information of which it may have been unaware. *See* 8 C.F.R. § 103.2(b)(8) and (b)(16)(i). The record reflects that the Petitioner did not submit a response to the Director's NOID.

On appeal, the Petitioner submits a statement and additional supporting evidence. The Petitioner asserts that the evidence of record is sufficient to demonstrate that all eligibility requirements for the requested classification have been satisfied. The Petitioner also briefly addresses the Director's separate finding of willful misrepresentation, noting that all previously submitted documents were "true and correct." The Petitioner does not contest the Director's determination that it did not submit a response to the NOID issued on May 18, 2022. For the reasons discussed below, we will dismiss the appeal.

### A. Qualifying Relationship

The Director denied the petition, in part, based on a determination that the Petitioner did not establish that it maintains a qualifying relationship with the Beneficiary's claimed foreign employer. To establish a "qualifying relationship," the Petitioner must show that the Beneficiary's foreign employer and the proposed U.S. employer are the same employer (a U.S. entity with a foreign office) or related as a "parent and subsidiary" or as "affiliates." *See* § 203(b)(1)(C) of the Act; *see also* 8 C.F.R. § 204.5(j)(2) (providing definitions of the terms "affiliate" and "subsidiary").

Although the Petitioner indicates that it is a subsidiary of the foreign entity [redacted], it has consistently stated that both entities are owned by the same individual, [redacted]. If adequately documented in the record, common ownership and control by the same individual would indicate an affiliate relationship as defined at 8 C.F.R. § 204.5(j)(2).

As evidence of the foreign entity's ownership, the Petitioner submitted an "Individual Establishment Registration Certificate" issued by the Saudi Arabian Ministry of Commerce and Industry which indicates that the business is owned by [redacted] however, the English-language translation that accompanies the original document in the Arabic language does not include the required certifications from the translator. *See* 8 C.F.R. § 103.2(b)(3).

With respect to the petitioning U.S. employer, the Petitioner provided copies of its certificate of filing, a certificate of formation, and a copy of its bylaws, all dated in April 2016. None of these documents provides information regarding the ownership of the U.S. corporation.

Although the Director issued a NOID affording the Petitioner an opportunity to provide additional evidence in support of the claimed qualifying relationship between the two companies, the Petitioner did not submit a response to that notice. Accordingly, the Director concluded that the Petitioner did not submit sufficient evidence to establish a qualifying relationship between the U.S. and foreign entities.

On appeal, the Petitioner maintains that the previously submitted Individual Establishment Registration Certificate establishes that [redacted] is the sole owner of the foreign entity. It also asserts that he "owns 51% interest in the U.S. business." It resubmits the foreign entity's registration certificate with a slightly revised English translation, which like the previous version, lacks the translator's certifications required by the regulation at 8 C.F.R. § 103.2(b)(3). The Petitioner also resubmits its certificate of formation and corporate bylaws emphasizing that these documents "clearly identify" [redacted] as its president.

We agree with the Director's determination that the Petitioner did not establish its qualifying relationship with the Beneficiary's claimed foreign employer because it did not submit evidence that documents the Petitioner's ownership and control. Neither the certificate of formation nor the company bylaws identify the company's shareholders, the total number of shares issued, the exact number issued to any given shareholder, and the subsequent percentage ownership and its effect on corporate control. Without full disclosure of all relevant documents, we are unable to determine the elements of ownership and control. *See, e.g., Matter of Siemens Med. Sys., Inc.*, 19 I&N Dec. 362 (Comm'r 1986).

Contrary to the Petitioner's claim on appeal, the fact that the Petitioner's claimed majority or sole shareholder is named as the company's president on the certificate of formation and company bylaws is not sufficient to establish that this individual has a controlling ownership interest in the company. Further, the Petitioner has made inconsistent claims regarding its president's ownership interest in the U.S. company which have not been resolved through independent, objective evidence. Accordingly, the Petitioner has not established the required qualifying relationship with the Beneficiary's claimed foreign employer and the appeal will be dismissed for this reason.

B. Ability to Pay

Any petition filed for an employment-based immigrant, which requires an offer of employment must be accompanied by evidence that the prospective United States employer has the ability to pay the proffered wage. A petitioner must demonstrate this ability at the time the priority date is established and continuing until the beneficiary obtains lawful permanent residence. 8 C.F.R. § 204.5(g)(2). To establish its ability to pay, a petitioner must submit copies of its annual reports, federal tax returns, or audited financial statements. *Id.*

The Petitioner stated on the Form I-140 that it had offered the Beneficiary an annual salary of $36,000. However, it did not submit annual reports, federal tax returns, or audited financial statements in

support of the Form I-140 and therefore did not meet the evidentiary requirement set forth in the regulations. In the NOID, the Director advised the Petitioner of this deficiency and allowed the Petitioner an opportunity to supplement the record with this required initial evidence, noting that it must establish its ability to pay dating back to the March 2017 filing date. As noted, the Petitioner did not respond to the NOID and the Director therefore denied the petition on this additional ground.

On appeal, the Petitioner states:

> The regulations, with the heading, "Retention of EB-1, EB-2 and EB-3 Immigrant Workers and program Improvements Affecting High-Skilled Nonimmigrant Workers," become effective on January 17, 2017.
>
> According to the new regulations, is that I-140 petitions remain valid for the sponsored employee (beneficiary) to use in order to adjust status to lawful permanent resident. . . or apply for an immigrant visa . . . if the sponsoring employer goes out of business or withdraws the petition 180 days after USCIS approved the petition or 180 days after the employee submitted an adjustment application.

The Petitioner indicates that it is providing "a copy of the current status of the U.S. business" as evidence of its ability to pay. The attached evidence includes copies of the Petitioner's monthly bank statements for the 2021 and 2022 and its profit and loss statement and balance sheet for 2022, both of which are unaudited.

Where, as here, a petitioner has been put on notice of a deficiency in the evidence and has been given an opportunity to respond to that deficiency, we will not accept evidence offered for the first time on appeal. *Matter of Soriano*, 19 I&N Dec. 764 (BIA 1988); *Matter of Obaigbena*, 19 I&N Dec. 533 (BIA 1988). Further, we note that even if we considered the new evidence, it would not establish the Petitioner's ability to pay at the time of filing through adjudication.

In its statement on appeal, the Petitioner appears to be referring to the automatic revocation provisions at 8 C.F.R. § 205.1(a)(3)(iii)(C) and (D), which state that if a sponsoring employer withdraws an immigrant petition or terminates its business 180 days or more after an associated adjustment of status application has been filed, the petition "remains approved" and the beneficiary may remain eligible for adjustment of status under section 204.5(j) of the Act and in accordance with 8 C.F.R. § 245.25.

Under section 204.5(j) of the Act, employment-based immigrant visa petitions "shall remain valid" for certain beneficiaries who obtain new job offers from the same or different employers. Under 8 C.F.R. § 245.25(a)(2)(ii)(B)(*1*), if a beneficiary's immigrant petition is pending when the beneficiary notifies USCIS of a new job offer on Form I-485 Supplement J, and such notification is made at least 180 days after the date the beneficiary filed an adjustment of status application, the adjudication of the pending petition shall be without regard to the requirement in 8 C.F.R. § 204.5(g)(2) to continuously establish the ability to pay the proffered wage after filing and until the beneficiary obtains lawful permanent residence.

However, the Petitioner did not withdraw the petition or terminate its business more after the Beneficiary's adjustment of status application had been pending for more than 180 days, nor does the

record reflect that the Beneficiary notified USCIS of a new job offer on Form I-485 Supplement J. The provisions at 8 C.F.R. § 245.25 do not apply based on the facts presented here and the Petitioner must establish its ability to pay from the time of filing through adjudication. Even if 8 C.F.R. § 245.25(a)(2)(ii)(B)(*1*) were applicable, the Petitioner would still need to establish that it had the ability to pay the proffered wage at the time of filing this petition in 2017.

A petitioner cannot satisfy the ability to pay requirement without submitting copies of its annual reports, federal tax returns, or audited financial statements. 8 C.F.R. § 204.5(g)(2). The Petitioner has not submitted this required initial evidence and the Director properly denied the petition on this basis. For this additional reason, the appeal will be dismissed.

C. Doing Business and Willful Misrepresentation

To establish eligibility for this classification, the Petitioner must establish that the prospective U.S. employer has been doing business for at least one year at the time of filing. 8 C.F.R. § 204.5(j)(3)(i)(D). Doing business means the regular, systematic and continuous provision of goods and/or services and does not include the mere presence of an agent or office. *See* 8 C.F.R. § 204.5(j)(2).

The Petitioner filed the Form I-140 on March 7, 2017, and therefore must demonstrate that it had been doing business as defined in the regulations since March 2016. The Petitioner stated on the Form I-140 that it was established "5/2016." It provided a copy of its Certificate of Formation filed with the Texas Secretary of State on April 7, 2016, eleven months prior to filing the petition, and a commercial lease agreement dated May 16, 2016. The Petitioner stated on the Form I-140 that it had six employees and gross annual income of approximately $278,000, but did not provide supporting evidence corroborating that the company was staffed and occupying the premises described in the lease agreement, nor did it provide supporting evidence showing that it was operating as an importer and distributor of food products as stated in the petition.

In the NOID, the Director emphasized that the initial evidence that the Petitioner had been established for only 11 months at the time of filing, and therefore did not support a determination that the company had been doing business for one year as required. The Director further noted that, although the Petitioner submitted a lease agreement, the address provided on that agreement [redacted] Texas) did not match the address provided on the Form I-140. Specifically, the Petitioner provided a mailing address in [redacted] Texas and indicated that this address would also serve as the Beneficiary's work location.

The Director also provided notice that USCIS had determined the [redacted] Texas address the Petitioner provided was for a UPS Store location and therefore could not serve as the Petitioner's commercial location or as the Beneficiary's worksite. The Director further advised the Petitioner that USCIS had conducted an administrative investigation and had contacted the individual who had ostensibly executed the submitted commercial lease agreement on behalf of the lessor, [redacted] This individual "denied executing the contract and further stated that he was not familiar with either the petitioner, the beneficiary or any related offices or employees of the petitioner." As noted, the Petitioner did not respond to the NOID. Accordingly, the Director determined that it did not establish that it had been doing business for at least one year at the time of filing, as required by 8 C.F.R. § 204.5(j)(3)(i)(D). Further, the Director denied the petition with a

finding of willful misrepresentation of a material fact based on the unrebutted derogatory information regarding the Petitioner's lease agreement and addresses.

On appeal, the Petitioner asserts that the company is "fully operational" and submits evidence that includes its corporate bank statements for 2021 and 2022, evidence that it maintained liability insurance during this same period, and a copy of its unaudited profit and loss statement for 2022. As noted, the Petitioner has been put on notice of a deficiency in the evidence, was given an opportunity to respond to that deficiency, and did not avail itself of that opportunity. We will not accept evidence offered for the first time on appeal. *Soriano*, 19 I&N Dec. 765; *Obaigbena*, 19 I&N Dec. 533.

The Petitioner also appears to suggest that the regulations governing automatic revocation and job portability, already discussed above, exempt it from establishing that it meets the regulatory requirement at 8 C.F.R. § 204.5(j)(3)(i)(D). The Petitioner has misconstrued the applicability of these regulations. Even if the record reflected that the Beneficiary had filed a Form I-485 Supplement J with USCIS, the Petitioner would still need to establish that this petition was eligible for approval at the time of filing and until the beneficiary's adjustment of status application had been pending for 180 days under 8 C.F.R. § 245.25(a)(2)(ii)(B)(*2*). There is no provision that would exempt the Petitioner from establishing that it had been doing business for at least one year. As noted by the Director, the Petitioner was incorporated only eleven months prior to the filing of this petition and did not satisfy this requirement. The Petitioner has not submitted evidence to overcome this conclusion.

Finally, the Petitioner's president briefly addresses the Director's separate finding that the Petitioner had willfully misrepresented material facts relevant to this eligibility requirement. Specifically, he states that "[a]ll the supporting documents I have submitted were true and correct regarding my lease contract. Our business is no longer leasing the commercial property in question." Regarding the Petitioner's use of a UPS Store address on the Form I-140, the Petitioner asserts that the [redacted] Texas address was "a mailing address" that the Petitioner also no longer uses.

As outlined by the Board of Immigration Appeals, a material misrepresentation requires that one willfully makes a material misstatement to a government official for the purpose of obtaining an immigration benefit to which one is not entitled. *Matter of Kai Hing Hui*, 15 I&N Dec. 288, 289-90 (BIA 1975). The term "willfully" means knowing and intentionally, as distinguished from accidentally, inadvertently, or in an honest belief that the facts are otherwise. *See Matter of Tijam*, 22 I&N Dec. 408, 425 (BIA 1998); *Matter of Healy and Goodchild*, 17 I&N Dec. 22, 28 (BIA 1979). To be considered material, the misrepresentation must be one which "tends to shut off a line of inquiry which is relevant to the alien's eligibility, and which might well have resulted in a proper determination that he be excluded." *Matter of Ng*, 17 I&N Dec. 536, 537 (BIA 1980).

Accordingly, for an immigration officer to find a willful and material misrepresentation in visa petition proceedings, he or she must determine: 1) that the petitioner or beneficiary made a false representation to an authorized official of the United States government; 2) that the misrepresentation was willfully made; and 3) that the fact misrepresented was material. *See Matter of M-*, 6 I&N Dec. 149 (BIA 1954); *Matter of L-L-*, 9 I&N Dec. 324 (BIA 1961); Matter *of Kai Hing Hui*, 15 I&N Dec. at 288.

As explained in the NOID, a USCIS administrative investigation revealed that the Petitioner submitted a lease agreement in support of the petition that was ostensibly signed by the Beneficiary (on behalf

of the Petitioner) and by another individual on behalf of the landlord, who denied any knowledge of the agreement or knowledge of the Petitioner or Beneficiary. While the Petitioner now claims that it no longer leases the [redacted] Texas premises described in the agreement, this explanation does not overcome the unrebutted derogatory information in the record or the Director's determination that the lease agreement was not a legitimate document that truly and correctly described the Petitioner's commercial location. The Petitioner's maintenance of a commercial premises from which to operate its trading company is material to the issue of whether it was doing business. Therefore, we will not disturb the Director's finding of willful misrepresentation.

D. Reserved Issues

As discussed above, the Petitioner has not established that it has a qualifying relationship with the Beneficiary's claimed foreign employer, that it has the ability to pay the proffered wage, and that it was doing business for at least one year at the time it filed the petition, nor has it overcome the Director's separate finding of willful misrepresentation. As these issues are dispositive of the appeal, we will not address the additional grounds for denial, specifically whether the Petitioner established that the Beneficiary was employed abroad, and would be employed in the United States, in a managerial or executive capacity, and whether he was employed abroad for at least one year in the three years preceding the filing of the petition. *See INS v. Bagamasbad*, 429 U.S. 24, 25 (1976) (finding it unnecessary to analyze additional grounds when another independent issue is dispositive of the appeal).

## III. CONCLUSION

The record does not demonstrate that the Petitioner and Beneficiary satisfy the eligibility requirements for the requested multinational manager or executive classification. Accordingly, the appeal will be dismissed for the above stated reasons, with each considered as an independent and alternate basis for the decision.

**ORDER:** The appeal is dismissed.