U.S. Citizenship and Immigration Services

Non-Precedent Decision of the Administrative Appeals Office

In Re: 22628853

Date: NOV. 4, 2022

Appeal of Texas Service Center Decision

Form I-140, Immigrant Petition for an Advanced Degree Professional

The Petitioner, which described itself as a manufacturing/import/export business, sought to employ the Beneficiary as "director, product marketing" under the second-preference, immigrant classification for members of the professions with advanced degrees or their equivalents. Immigration and Nationality Act (the Act) section 203(b)(2)(A), 8 U.S.C. § 1153(b)(2)(A). This employment-based "EB-2" immigrant classification allows a U.S. employer to sponsor a professional with an advanced degree for lawful permanent resident status.

The Director of the Texas Service Center revoked the petition's approval, concluding that the record did not establish that the Petitioner had the continuing ability to pay the proffered wage; and a *bona fide* job offer existed.[1] The Director entered findings of willful misrepresentation of material facts against the Petitioner. The matter is now before us on appeal.[2]

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). The Administrative Appeals Office (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). Upon *de novo* review, we will dismiss the appeal.

I. THE EMPLOYMENT-BASED IMMIGRATION PROCESS

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).[3] *See* section 212(a)(5) of the Act, 8 U.S.C. § 1182(a)(5). By approving the labor certification, DOL certifies that there are insufficient U.S. workers who are able, willing, qualified, and available for the offered position and that employing a

[1] At any time before a beneficiary obtains lawful permanent residence, U.S. Citizenship and Immigration Services 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 in and of itself justify its revocation. *Matter of Ho*, 19 I&N Dec. 582, 589 (BIA 1988).

[2] The Director found that the Beneficiary should be deemed an affected party in accordance with USCIS Policy Memorandum PM-602-0152, *Guidance on Notice to, and Standing for, AC21 Beneficiaries about I-140 Approvals Being Revoked After Matter of V-S-G- Inc.* (Nov. 11, 2017), http://www.uscis.gov/laws/policy-memoranda.

[3] The priority date of a petition is the date the DOL accepted the labor certification for processing, which in this case was May 21, 2007. *See* 8 C.F.R. § 204.5(d).

noncitizen in the position will not adversely affect the wages and working conditions of domestic workers similarly employed. *See id.* Second, the employer files an immigrant visa petition with U.S. Citizenship and Immigration Services (USCIS) with the certified labor certification. *See* section 204 of the Act, 8 U.S.C. § 1154. Third, upon approval of the petition, a noncitizen may apply for an immigrant visa abroad, or if eligible, adjust status in the United States to lawful permanent resident. *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). Here, the Director relied on the regulation at 8 C.F.R. § 205.2 by providing proper notice to the Petitioner and Beneficiary and giving both an opportunity to offer evidence in support of the petition and in opposition to the ground of revocation listed in the Notice of Intent to Revoke (NOIR).

II. ABILITY TO PAY THE PROFFERED WAGE

The Director concluded in the Notice of Revocation (NOR) that the Petitioner did not establish its continuing ability to pay the proffered wage from the petition's priority date onward. The proffered wage is $29.34 an hour or $61,027.20 per year.

The regulation at 8 C.F.R. § 204.5(g)(2) states in pertinent part:

> *Ability of prospective employer to pay wage.* Any petition filed by or 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. 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 determining a petitioner's ability to pay, we first examine whether it paid a beneficiary the full proffered wage each year from a petition's priority date. If a petitioner did not pay a beneficiary the full proffered wage, we next examine whether it had sufficient annual amounts of net income or net current assets to pay the difference between the proffered wage and the wages paid, if any. If a petitioner's net income or net current assets are insufficient, we may also consider other evidence of its ability to pay the proffered wage.[4]

In response to the 2016 NOIR, the Petitioner submitted Forms 1120S, U.S. Income Tax Return for an

[4] Federal courts have upheld our method of determining a petitioner's ability to pay a proffered wage. *See, e.g., River St. Donuts, LLC v. Napolitano*, 558 F.3d 111, 118 (1st Cir. 2009); *Tongatapu Woodcraft Haw., Ltd. v. Feldman*, 736 F.2d 1305, 1309 (9th Cir. 1984); *Estrada-Hernandez v. Holder*, 108 F. Supp. 3d 936, 942-946 (S.D. Cal. 2015); *Rizvi v. Dep't of Homeland Sec.*, 37 F. Supp. 3d 870, 883-84 (S.D. Tex. 2014), *aff'd*, 627 Fed. App'x 292, 294-295 (5th Cir. 2015).

S Corporation, for 2007, 2008, 2009 and 2010.[5] According to these tax filings, the total payment of salaries and wages for each year was less than the prevailing wage offered to the Beneficiary. The record therefore does not establish the Petitioner's ability to pay the proffered wage based on the wages it paid to the Beneficiary. In addition, in response to the NOIR, the Petitioner indicated that the tax returns do not show sufficient net income to pay the prevailing wage offered to the Beneficiary. Instead, the Petitioner stated that although it did not have sufficient net income to pay the prevailing wage, it did have substantial net assets to pay the prevailing wage from the priority date in 2007 through the date the Petitioner dissolved in 2010.

As an alternate means of determining a petitioner's ability to pay the proffered wage, USCIS may review its net current assets. Net current assets are the difference between a petitioner's current assets and current liabilities.[6] A corporation's year-end current assets are shown on Schedule L, lines 1 through 6. Its year-end current liabilities are shown on lines 16 through 18. If the total of a corporation's end-of-year net current assets and the wages paid to the beneficiary (if any) are equal to or greater than the proffered wage, the petitioner is expected to be able to pay the proffered wage using those net current assets. The Petitioner's tax returns state end-of-year net current assets/liabilities as follows:

- $302,055 in 2007;
- $744,745 in 2008;
- $886,673 in 2009; and,
- $805,388 in 2010.

Therefore, for the years 2007 through 2010 the Petitioner had sufficient net current assets to pay the difference between the annual proffered wage and the amounts it paid to the Beneficiary. We will therefore withdraw this portion of the decision since the Petitioner established its continuing ability to pay the proffered wage from the petition's priority until the Petitioner was dissolved in 2010.

III. BONA FIDE JOB OFFER

In the NOR, the Director determined that the record does not establish that the Petitioner made a *bona fide* job offer to the Beneficiary. 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-INA-228, 1991 WL 223955, at 7 (BALCA 1991) (en banc); *see also* 20 C.F.R. § 656.17(l).[7]

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[5] The Petitioner indicated that it dissolved in 2010 and the Beneficiary ported after his I-485 was pending for more than 180 days. Therefore, the Petitioner must show the ability to pay from the priority date in 2007 to the date the Petitioner dissolved in 2010.

[6] Current assets consist of items having (in most cases) a life of one year or less, such as cash, marketable securities, inventory, and prepaid expenses. Joel G. Siegel & Jae K. Shim, *Barron's Dictionary of Accounting Terms* 117 (3d ed. 2000). Current liabilities are obligations payable (in most cases) within one year, such as accounts payable, short-term notes payable, and accrued expenses (such as taxes and salaries). *Id.* at 118.

[7] The regulation at 20 C.F.R. § 656.17(l) states in pertinent part:

The labor certification filed with this petition indicated that the Petitioner seeks to employ the Beneficiary as a director, product marketing. Both the Form I-140 and labor certification were signed by the Petitioner's owner and president, [redacted] The Director referenced a telephone interview conducted by USCIS officials with [redacted] regarding this petition and the Beneficiary. The Director noted that during that discussion, the Petitioner stated, in part, that he did not know the Beneficiary and he never filed any immigration documentation on the Beneficiary's behalf. Although the Petitioner claims he never had this phone conversation with immigration officers, the record indicated that the immigration officers verified his personal information at the commencement of the phone call. Government documents are entitled to a presumption of regularity. *Matter of P-N-*, 8 I&N Dec. 456, 458 (BIA 1959). On appeal, the Beneficiary claims that this is an unexplained misunderstanding since [redacted] does not recall speaking to immigration officers in 2014. The Director discussed this statement in the decision and explained how it did not overcome the Director's concerns. On appeal, the Petitioner did not provide any additional evidence. Where proven facts give equal support to each of two inconsistent inferences, judgment as matter of law must go against the party bearing the burden of proof. *Pennsylvania R. Co. v. Chamberlain*, 288 U.S. 333, 338–39 (1933).

The Director also noted that [redacted] statement contradicts statements made by the Beneficiary when he was interviewed at a field office in March 2014 regarding his I-485, Adjustment of Status Application. At the time of the Beneficiary's interview, he stated that he was in contact with [redacted] and the Petitioner expressed his continued intention to hire the Beneficiary in the job offered. On appeal, the Beneficiary states that his statements are "actually consistent with [redacted] sworn statements" but did not provide any explanation or evidence to corroborate this claim. The Petitioner must resolve this inconsistency in the record with independent, objective evidence pointing to where the truth lies. *Matter of Ho*, 19 I&N Dec. 582, 591-92 (BIA 1988). Moreover, the Beneficiary does not explain how the Petitioner would still have the intention to employ him in the job offered in 2014 since the Petitioner dissolved four years earlier in 2010.

(l) Alien influence and control over job opportunity. If the employer is a closely held corporation or partnership in which the alien has an ownership interest, or if there is a familial relationship between the stockholders, corporate officers, incorporators, or partners, and the alien, or if the alien is one of a small number of employees, the employer in the event of an audit must be able to demonstrate the existence of a bona fide job opportunity, i.e., the job is available to all U.S. workers, and must provide to the Certifying Officer, the following supporting documentation:

(1) A copy of the articles of incorporation, partnership agreement, business license or similar documents that establish the business entity;

(2) A list of all corporate/company officers and shareholders/partners of the corporation/firm/business, their titles and positions in the business' structure, and a description of the relationships to each other and to the alien beneficiary;

(3) The financial history of the corporation/company/partnership, including the total investment in the business entity and the amount of investment of each officer, incorporator/partner and the alien beneficiary; and

(4) The name of the business' official with primary responsibility for interviewing and hiring applicants for positions within the organization and the name(s) of the business' official(s) having control or influence over hiring decisions involving the position for which labor certification is sought.

(5) If the alien is one of 10 or fewer employees, the employer must document any family relationship between the employees and the alien.

In addition, on appeal, the Beneficiary referenced a letter submitted from prior counsel that confirmed the Petitioner retained counsel to pursue a labor certification for the position of director, product marketing. The Beneficiary stated that this letter indicated a *bona fide* job offer and the Petitioner's knowledge of the Beneficiary. However, the letter from prior counsel does not state that the labor certification was prepared for the I-140 petition on behalf of the Beneficiary.

In the NOR, the Director also outlined several discrepancies in the recruitment process for the Form I-140 filed on behalf of the Beneficiary. On appeal, the Beneficiary stated that "USCIS no longer takes issue with the recruitment conducted in this case. The matter was fully addressed by Petitioner in response to the last NOIR." However, this statement is not accurate since the Director's decision outlines several issues with the recruitment process and the Beneficiary did not provide any evidence to overcome these concerns. Again, the Petitioner must resolve these inconsistencies in the record with independent, objective evidence pointing to where the truth lies. *Matter of Ho*, 19 I&N Dec. 582, 591-92 (BIA 1988).

In sum, the Petitioner has not established that the job offer was *bona fide*.

IV. WILLFUL MISREPRESENTATION OF A MATERIAL FACT

The Director entered findings of willful misrepresentation of material facts against the Petitioner and the Beneficiary, and he invalidated the labor certification. Section 212(a)(6)(C)(i) of the Act, 8 U.S.C. § 1182(a)(6)(C)(i), states that "in general – any alien, who by fraud or willfully misrepresenting a material fact, seeks (or has sought to procure, or who has procured) a visa, other documentation, or admission to the United States or other benefit provided under the Act is inadmissible."

A misrepresentation is an assertion or manifestation that is not in accord with the true facts. For an immigration officer to find a willful and material misrepresentation of fact, he or she must determine that (1) the petitioner or beneficiary made a false representation to an authorized official of the U.S. government, (2) the misrepresentation was willfully made, and (3) the fact misrepresented was material. *See Matter of M-,* 6 I&N Dec. 149 (BIA 1954); *Matter of Kai Hing Hui,* 15 I&N Dec. 288, 289 (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 Healy and Goodchild*, 17 I&N Dec. 22, 28 (BIA 1979). A "material" misrepresentation is one that "tends to shut off a line of inquiry relevant to the alien's eligibility." *Matter of Ng,* 17 I&N Dec. 536, 537 (BIA 1980). Any alien who seeks an immigration benefit by fraud or willfully misrepresenting a material fact is ineligible for a visa or admission to the United States. *See* section 212(a)(6)(C)(i) of the Act. A misrepresentation is willful if it is "deliberately made with knowledge of [its] falsity." *Matter of S- and B-C-*, 9 I&N Dec. 436, 445 (BIA 1960; A.G. 1961); *see also Matter of Kai Hing Hui*, 15 I&N Dec. 288, 289-90 (BIA 1975) (noting that, unlike fraud, a finding of willfulness does not require an "intent to deceive"). 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).

As detailed above, the Director made formal findings of willful misrepresentation of material facts against the Petitioner and the Beneficiary in his NOR based on the following: the telephone call between USCIS officials and the Petitioner's president and the signatory of the Form I-140 where he

stated he did not know the Beneficiary and never filed any immigration documents on his behalf; the Beneficiary's interview with the field office where he stated that the Petitioner was in contact with [redacted] and confirmation that he would employ him in the job offered; a misrepresentation in the recruitment process for the labor certification; and a misrepresentation of the total individuals employed by the Petitioner.

On appeal, the Beneficiary focuses solely on the telephone call between the USCIS officials and [redacted] and he contends that this was not willful misrepresentation but was instead confusion since the phone call was made four years after the Petitioner's dissolution, and [redacted] misunderstood the nature of the call. In addition, the Beneficiary states that since the Petitioner dissolved, and [redacted] changed his address and number, it is possible USCIS "misidentified" the Petitioner. However, on appeal, the Beneficiary does not submit any evidence to corroborate this claim.

Since on appeal the Beneficiary does not discuss the other issues presented by the Director, we deem the issue of willful misrepresentation waived. *See, e.g.*, *Matter of M-A-S-*, 24 I&N Dec. 762, 767 n.2 (BIA 2009). We therefore affirm the Director's findings of willful misrepresentation of a material fact against the Petitioner and the Beneficiary.

V. CONCLUSION

We conclude that the Director properly revoked the approval of the petition because the record does not establish that the job offer was *bona fide* and the Petitioner did not overcome the Director's findings of willful misrepresentation of material facts against the Petitioner. The facts in the petition are not true, as required by section 204(b) of the Act, and the Petitioner does not realistically intend to employ the Beneficiary in accordance with the terms and conditions set forth in the labor certification, as required by section 204(a)(1)(F) of the Act. We further conclude that the Director properly found that the Petitioner and the Beneficiary willfully misrepresented material facts on the labor certification. The appeal will be dismissed for these reasons, with each considered an independent and alternative basis for the decision.

It is the Petitioner or Applicant's burden to establish eligibility for the immigration benefit sought. Section 291 of the Act, 8 U.S.C. § 1361; *Matter of Skirball Cultural Ctr.*, 25 I&N Dec. 799, 806 (AAO 2012). Here, the burden has not been met.

ORDER: The appeal is dismissed.