U.S. Citizenship and Immigration Services

Non-Precedent Decision of the Administrative Appeals Office

In Re: 22457192

Date: AUG. 04, 2022

Appeal of Texas Service Center Decision

Form I-140, Immigrant Petition for Skilled Worker

The Petitioner, a beauty supply company, seeks to employ the Beneficiary as a bookkeeping clerk. 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 Texas Service Center initially approved the petition, but subsequently revoked the approval on notice, concluding that the record did not establish that the Petitioner made a *bona fide* job offer to the Beneficiary because of an undisclosed familial relationship between the Beneficiary and one of the Petitioner's owners. In addition, the Director determined that the Petitioner willfully misrepresented material facts on the labor certification.

On appeal, the Petitioner contends, contrary to the Director's determination, that there is no familial relationship between the Beneficiary and its owners. The Petitioner asserts that the totality of the evidence establishes that it made a *bona fide* job offer to the Beneficiary and that the finding of willful misrepresentation was unwarranted.

We review the questions in this matter *de novo*. *Matter of Christo's Inc.*, 26 I&N Dec. 537, 537 n.2 (AAO 2015). The Petitioner bears the burden of proof 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). Upon *de novo* review, we will remand this case to the Director 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.

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 will withdraw the Director's decision and remand the matter for further consideration and entry of a new decision.

A. Bona Fide Job Offer

In the revocation decision, the Director discussed an undisclosed familial relationship between one of the Petitioner's owners and the Beneficiary and indicated that the record did not establish that the Petitioner made a *bona fide* job offer to the Beneficiary or that the job was clearly open to any U.S. worker. 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* 20 C.F.R. § 656.17(l).[1]

The Director's determination that there was a "familial relationship" was based on a review of a nonimmigrant visa application the Beneficiary submitted to the U.S. Department of State when she

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

> (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

applied for a student visa in 2013. The Director noted that she had identified the Petitioner's owner and president, [redacted] as her contact in the United States.

On appeal, the Petitioner asserts that there is and never has been any familial relationship between its owner and the Beneficiary, and that they are not related in any way by blood or through marriage. The nonimmigrant visa application the Director reviewed identified [redacted] as a "friend" of the Beneficiary. The Beneficiary stated in an affidavit submitted in response to the NOIR that she was strongly encouraged to identify a U.S. contact on her visa application, that she did not personally know anyone residing in the United States, and that she provided [redacted] name, as he was acquainted with her mother. She acknowledges that she was subsequently acquainted with him and has kept in touch with him on occasion during her time in the United States.

The Petitioner indicates that it did not check "yes" to the question about familial relationships at Part C.9 of the labor certification because the relationship between its owner and the Beneficiary did not represent a familial relationship required to be disclosed. It therefore asserts that the labor certification and the *bona fide* nature of the job offer should not be called into question on this basis.

The DOL requires the disclosure of any familial relationships between the noncitizen and the owners, stockholders, partners, corporate officers, and incorporators by marking "yes" to question at Part C.9 on the labor certification. DOL guidance states that a familial relationship includes any relationship established by blood, marriage, or adoption, even if distant. For example, the guidance indicates that a familial relationship includes cousins of all degrees, aunts, uncles, grandparents, and grandchildren as well as relationships established through marriage, such as in-laws and stepfamilies. DOL, Office of Foreign Labor Certification, "OFLC Frequently Asked Questions and Answers," at https://www.foreignlaborcert.doleta.gov/faqsanswers.cfm).

Here, the record supports the Petitioner's claim that the Beneficiary does not have a familial relationship with its owner that would require a "Yes" response on Part C.9 of the labor certification. While the Petitioner's owner and the Beneficiary confirm that they were acquainted prior to the filing

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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.

of the application, the Director did not have an appropriate basis for concluding that they had a relationship that would need to be disclosed at part C.9 of the labor certification.

In addition, a familial relationship is only one factor to be considered among multiple other factors when determining whether the Petitioner made a *bona fide* job offer. These other factors include, but are not limited to, whether a noncitizen: is in a position to control or influence hiring decisions regarding the offered position; incorporated or founded the company; has an ownership interest in the company; is involved in the management of the company; sits on its board of directors; is one of a small group of employees; has qualifications matching specialized or unusual job duties or requirements stated in the labor certification; and is so inseparable from the sponsoring employer because of his or her pervasive presence that the employer would be unlikely to continue in operation without the noncitizen. *Modular Container*, 1991 WL 223955 at 8-10. The DOL adopted the holding in *Modular Container* at 20 C.F.R. § 656.17(1).

A petition may be approved only after an investigation of the facts in each case to ensure that the facts stated in the petition, which necessarily includes the labor certification, are true. Section 204(b) of the Act, 8 U.S.C. § 1154(b). USCIS is responsible for reviewing the Form I-140, and the labor certification is incorporated into the Form I-140 by statute and regulation. *See* section 203(b)(3)(C) of the Act, 8 U.S.C. § 1153(b)(3)(C); 8 C.F.R. § 204.5(a)(2); 8 C.F.R. § 103.2(b)(i). USCIS is only required to approve an employment-based immigrant visa petition when it determines that the facts stated in the petition, which incorporates the labor certification, are true, and the foreign worker is eligible for the benefit sought. Section 204(b) of the Act, 8 U.S.C. § 1154(b).

Here, the Director incorrectly concluded that a familial relationship existed between the Petitioner's owner and the Beneficiary. Further, the Director did not consider other factors beyond the alleged familial relationship to determine whether the Petitioner made a *bona fide* job offer. *See Modular Container*, 1991 WL 223955 at 8-10. Therefore, we will withdraw the decision and remand the matter for further consideration of whether a *bona fide* job offer was made by the Petitioner.

B. Willful Misrepresentation of a Material Fact

A finding of willful misrepresentation of material fact against a petitioner or beneficiary requires the following elements:

- The petitioner or beneficiary procured, or sought to procure, a benefit under U.S. immigration laws;
- The petitioner or beneficiary made a false representation;
- The false representation was willfully made;
- The false representation was material; and
- The false representation was made to a U.S. government official.

See 8 *USCIS Policy Manual* J.2(B), https://www.uscis.gov/policy-manual.

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 a formal finding of willful misrepresentation of a material fact against the Petitioner in the notice of revocation after determining that the Petitioner misrepresented its relationship to the Beneficiary by checking "No" at Part C.9 of the labor certification. However, the Director did not specifically articulate how the Petitioner's answer to question C.9 represented a willful misrepresentation of a material fact. As noted, the DOL instructions do not indicate that the relationship between the Beneficiary and [redacted] (which appears to be that of family friends or acquaintances) is a familial relationship that required a "Yes" response at Part C.9 of the labor certification.

For this reason, we will withdraw the Director's determination that the Petitioner willfully misrepresented a material fact.

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 *bona fide* nature of the job offer. The Director may issue a new NOIR if warranted and request any additional relevant evidence, including evidence of the Petitioner's continuing ability to pay the proffered wage,[2] and allow the Petitioner reasonable time to respond. Upon receipt of all evidence, the Director will review the entire record and enter 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, September 12, 2019) and continuing until the Beneficiary obtains lawful permanent residence. The record contains a copy of only the Petitioner's 2019 federal income tax return.