U.S. Citizenship and Immigration Services

Non-Precedent Decision of the Administrative Appeals Office

In Re: 19525490

AUG. 24, 2022

Appeal of Nebraska Service Center Decision

Form I-140, Immigrant Petition for Alien Workers

The Petitioner, an authorized dealer of cellular phones, seeks to employ the Beneficiary as a market research analyst. It requests classification of the Beneficiary as a member of the professions under the third preference immigrant classification. Immigration and Nationality Act (the Act) 203(b)(3)(A)(ii), 8 U.S.C. § 1153(b)(3)(A)(ii). This employment-based immigrant classification allows a U.S. employer to sponsor a member of the professions for lawful permanent resident status.

The petition was initially approved. The Director of the Nebraska Service Center subsequently revoked the approval of the petition. On appeal, the Petitioner submits additional evidence and asserts that the Director erred in concluding that the Petitioner did not have a bona fide job offer and the Beneficiary did not have the qualifying experience as required by the position.

The 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). It is the Petitioner's burden to establish eligibility for the requested benefit by a preponderance of the evidence. See 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 withdraw the Director's decision and remand the matter to the Director.

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). 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 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. PROCEDURAL HISTORY

The instant petition was approved in December 2018. USCIS conducted a site visit in September 2019. The Director issued a notice of intent to revoke (NOIR) in December 2020.

In the NOIR, the Director stated that the site visit revealed inconsistencies regarding the Beneficiary's claimed employment history and experience, as well as the job offered. The Director noted that the Beneficiary's responses to the interview questions exposed additional inconsistencies regarding her work experience. The Director stated that both the Petitioner and the Beneficiary misrepresented the Beneficiary's work experience, knowledge, and skills. In response to the NOIR, the Petitioner stated that the Beneficiary is not fluent in English and there was no Korean language interpreter during the site visit interview and the Beneficiary "probably misunderstood" the questions. The Petitioner also submitted affidavits attesting to the accuracy of the Beneficiary's work experience.

In the revocation decision, the Director repeated the same statements above and concluded that the record did not establish that the Petitioner's job offer was realistic at the time of the filing of the petition, as well as at the time of the site visit; and that the Petitioner and the Beneficiary misrepresented the Beneficiary's work experience, knowledge, and skills in order to obtain a favorable decision on the Form I-140.

On appeal, the Petitioner provides further details and context for the conversations that took place during the site visit and explains the reasons for miscommunication and misunderstandings. The Petitioner also submits additional evidence relevant to the issues raised in the Director's revocation decision.

III. ANALYSIS

Upon review of the record in its totality, we conclude the Director did not sufficiently explain the specific reasons for the revocation as required under 8 C.F.R. § 205.2(c) or provide sufficient notice and opportunity for the Petitioner to rebut grounds of revocation under 8 C.F.R. § 205.2(b). Further, the Director did not sufficiently address the evidence submitted in response to the NOIR.

The Director did not sufficiently explain the specific reasons for the revocation as required under 8 C.F.R. § 205.2(c). For example, the Director stated that USCIS has reviewed the memorandum from the U.S. Consulate and discrepancies have been found within the record and that the material discrepancies do not demonstrate that the Petitioner's job offer was realistic. Then the Director discussed USCIS' site visit and it is not clear whether material discrepancies noted by the U.S. Consulate were based on USCIS site visit or another event, and what those discrepancies were.

Further, the Director did not provide sufficient notice and opportunity for the Petitioner to rebut the grounds of revocation under 8 C.F.R. § 205.2(b). Specifically, in revoking the petition, the Director states that "USCIS has revoked this I-140 petition due to intentional and willful misrepresentation of the job offer and work experience in order to obtain a favorable adjudicative decision on an immigration benefit." While the Director mentioned in the NOIR that the Petitioner and the Beneficiary misrepresented the Beneficiary's work experience, knowledge, and skills in order to obtain a favorable decision on the Form I-140, the Director did not properly make a finding of willful and material misrepresentation and did not provide sufficient notice for the Petitioner to rebut the finding.[1]

We also note that in the decision, the Director did not address some of the assertions made by the Petitioner and the evidence submitted in response to the NOIR. For example, in the NOIR response, the Petitioner stated that the Beneficiary is not proficient in English and during the site visit, a Korean language interpreter was not provided for the Beneficiary, which may have led to her misunderstanding some of the questions. In the decision, the Director did not address the interpreter issue raised by the Petitioner. In the NOIR response, the Petitioner also addressed the perceived discrepancies in the Beneficiary's responses on her nonimmigrant visa application and submitted an affidavit from the Beneficiary explaining her responses on the nonimmigrant visa application. However, in the decision, the Director did not discuss the Petitioner's and the Beneficiary's assertions and did not provide reasons why the assertions and the evidence submitted were unsatisfactory. Furthermore, while the Director acknowledged that the Petitioner indicated on the labor certification that experience in the alternate position of accountant is acceptable for the position offered, the Director did not explain why the Beneficiary's four years of experience as an accountant was not sufficient to meet the 12-month experience requirement. Accordingly, we will withdraw the Director's

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[1] To find a willful and material misrepresentation of fact, an immigration officer 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).

Accordingly, for an immigration officer to find a willful and material misrepresentation in visa petition proceedings, they 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.

decision and remand the case for the Director to further consider the record and sufficiently discuss the evidence and explain why it does not establish eligibility. We further note that the Petitioner submits additional evidence on appeal. Because the evidence is directly relevant and the Director has not had a chance to review the new evidence, it is appropriate to remand the matter so that the Director can make the initial determination about the significance and weight of the new evidence.

ORDER: The Director's decision is withdrawn. The matter is remanded for the entry of a new decision consistent with the foregoing analysis.