U.S. Citizenship and Immigration Services

Non-Precedent Decision of the Administrative Appeals Office

In Re: 02525377

Date: JUL. 28, 2022

Appeal of Nebraska Service Center Decision

Form I-140, Immigrant Petition for Other Worker

The Petitioner, a food and side dish catering service, seeks to employ the Beneficiary as a Korean cook. It requests classification of the Beneficiary as an unskilled worker under the third preference employment-based immigrant visa category. Immigration and Nationality Act (the Act) section 203(b)(3)(A)(iii), 8 U.S.C. § 1153(b) (3)(A)(iii). This immigrant visa category allows a U.S. employer to sponsor a foreign national for lawful permanent resident status to work in a position that requires less than two years of training or experience.

After the filing's initial grant, the Director of the Nebraska Service Center revoked the petition's approval. The Director concluded that the Petitioner did not provide sufficient documentary evidence that the Beneficiary possessed the minimum employment experience required for the offered position. The Director also found that the Petitioner and the Beneficiary willfully misrepresented the Beneficiary's qualifying experience and invalidated the labor certification.

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 withdraw the Director's decision and remand the matter for reconsideration.

I. EMPLOYMENT-BASED IMMIGRATION

Employment-based immigration generally follows a three-step process. To permanently fill a position in the United States with a foreign worker, a prospective employer must first obtain certification from the U.S. Department of Labor (DOL). *See* section 212(a)(5) of the Act, 8 U.S.C. § 1182(a)(5). DOL approval signifies that insufficient U.S. workers are able, willing, qualified, and available for a position. *Id*. Labor certification also indicates that the employment of a foreign national will not harm wages and working conditions of U.S. workers with similar jobs. *Id*.

If DOL approves a position, an employer must next submit the certified labor application with an immigrant visa petition to U.S. Citizenship and Immigration Services (USCIS). *See* section 204 of the Act, 8 U.S.C. § 1154. Among other things, USCIS considers whether a beneficiary meets the requirements of a certified position and a requested immigrant visa classification. If USCIS approves

the petition, a foreign national may finally 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.

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).

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. THE BENEFICIARY'S QUALIFYING EXPERIENCE

The petition in this case was filed August 29, 2016. The accompanying labor certification indicates that the offered position requires 12 months of experience as a Korean cook. The initial evidence included a letter dated December 21, 2015, from [redacted] owner of [redacted] Restaurant in [redacted] South Korea, where the Beneficiary asserts that she was employed as a Korean cook from March 9, 2004 to December 12, 2006. The petition was approved on September 1, 2016.

In July 2018, the Director sent the Petitioner a NOIR stating that new evidence provided to USCIS presented conflicting information with the petition. The Director informed the Petitioner that investigators interviewed [redacted] the Beneficiary's purported former employer, and found that [redacted] stated that she had no record or knowledge of the Beneficiary's employment at her restaurant and did not sign any letter of employment to verify the Beneficiary's employment.

In response to the NOIR the Petitioner submitted additional evidence to support the Beneficiary's claimed employment experience. The evidence included a statement from [redacted] The statement explained that: she did not provide accurate information to investigators during her interview because she did not recognize the Beneficiary by her legal name; the interview took place during a busy hour of her business; and she was concerned that the interview might be part of a scam to obtain private information about her or her employees. The NOIR response also included: a statement from [redacted]

[redacted] daughter asserting that she has personal knowledge of the Beneficiary's employment at her mother's restaurant; a statement from the Beneficiary asserting that she changed her legal name and that she was paid in cash for her employment with [redacted]; and evidence that the notary whose seal appeared on the employment letter was an officially registered notary.

The Director revoked the approval of the petition. In the decision, the Director referenced the same conflicting information and addressed the Petitioner's response to the NOIR, stating, "USCIS is in receipt of your claims in response to the aforementioned NOIR," without further analysis or discussion.

The Director's decision to revoke the petition's approval is deficient, as it does not sufficiently explain the reasons for revocation. When revoking approval of a petition, a director has an affirmative duty to explain the specific reasons for the revocation; this duty includes informing a petitioner why the evidence did not to satisfy its burden of proof pursuant to section 291 of the Act. *See* 8 C.F.R. § 103.3(a)(1)(i). The Director's decision in this case does not explain why the information provided in response to the NOIR was insufficient or how it failed to satisfy its burden of proof regarding eligibility for the benefit sought.

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. Here, the Director did not discuss or analyze the evidence submitted in response to the NOIR to determine that a false representation was made, or that the misrepresentation was willful. Therefore, the Director's finding of fraud and willful misrepresentation against the Petitioner and the Beneficiary, and the invalidation of the labor certification is withdrawn.

Although not mentioned in the NOIR or the Director's revocation, additional adverse information casts doubt on the Beneficiary's claimed employment experience. A review of a nonimmigrant visa application that the Beneficiary completed shows that the Beneficiary applied for and was granted a B-1/B-2 visitor visa in September 2006, during her claimed employment with [redacted] Restaurant. On that nonimmigrant visa application, the Beneficiary listed her present employer as a real estate lease business. The information directly contradicts the Beneficiary's claim to have been employed as a Korean cook with [redacted] Restaurant from March 2004 to December 2006, the only qualifying experience claimed in this petition and on the labor certification.

This discrepancy casts further doubt on the Beneficiary's claim of prior employment experience. The Petitioner must resolve these inconsistencies with independent, objective evidence pointing to where the truth lies. *Matter of Ho*, 19 I&N Dec. 582, 591-92 (BIA 1988). Unresolved material inconsistencies may lead us to reevaluate the reliability and sufficiency of other evidence submitted in support of the requested immigration benefit. *Id.*

Considering the above discussed deficiencies, we are withdrawing the Director's revocation and remanding the petition to allow the Petitioner an opportunity to address the additional deficiencies identified above. On remand, the Director may wish to issue a new NOIR outlining the deficiencies above and allow the Petitioner an opportunity to respond. The Director must state how the record fails to demonstrate eligibility for the classification sought under the pertinent regulatory scheme. If the Director seeks to make a finding of willful material misrepresentation against either the Petitioner, the Beneficiary, or both, the Director should set forth any allegations in the NOIR and allow the Petitioner an opportunity to respond to the alleged willful misrepresentation and articulate the basis for the finding(s) in accordance with the above-referenced case law.

III. ABILITY TO PAY THE PROFFERED WAGE

Also not discussed in the NOIR, is whether the Petitioner has established its continuing ability to pay the proffered wage. To be eligible for the classification it requests for the beneficiary, a petitioner must establish that it has the ability to pay the proffered wage stated on the labor certification. As provided in the regulation at 8 C.F.R. § 204.5(g)(2):

> 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 a case where the prospective United States employer employs 100 or more workers, the director may accept a statement from a financial officer of the organization which establishes the prospective employer's ability to pay the proffered wage. In appropriate cases, additional evidence, such as profit/loss statements, bank account records, or personnel records may be submitted by the petitioner or requested by [USCIS].

In determining ability to pay, USCIS examines whether a petitioner paid a beneficiary the full proffered wage each year from a petition's priority date. If a petitioner did not annually pay the full proffered wage, USCIS next examines whether it generated sufficient annual amounts of net income or net current assets to pay any difference between the proffered wage and wages paid. If net income and net current assets are insufficient, USCIS may consider other factors affecting a petitioner's ability to pay a proffered wage. *See Matter of Sonegawa,* 12 I&N Dec. 612, 614-15 (Reg'l Comm'r 1967).[1]

[1] 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); *Estrada-Hernandez v. Holder*, 108 F. Supp. 3d 936, 942-43 (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 (5th Cir. 2015).

The accompanying labor certification has a priority date of January 31, 2016.[2] The record reflects that the Petitioner is a food and side dish catering service, established in 2015 and employing two individuals. The labor certification states the annual proffered wage of the offered position of Korean cook as $31,200.

Here, the record includes the Petitioner's federal income tax return, Internal Revenue Service Form 1120S, for 2015, its state quarterly tax returns for 2015, and its unaudited income statement for a six-month period through June 30, 2016.[3]

In view of the unavailability of evidence of the Petitioner's net income and net current assets in the year of the priority date, specifically the Petitioner's 2016 tax return, we cannot determine that the Petitioner has established its continuing ability to pay the proffered wage. On remand, the Director may request regulatory prescribed evidence and any other documentation deemed relevant at his discretion in determining the Petitioner's ability to pay the proffered wage.

IV. CONCLUSION

For the reasons discussed above, we will remand this case to the Director for further consideration. If the Director issues a new NOIR, the content of that notice and the consideration of any evidence submitted by the Petitioner should comply with the requirements of 8 C.F.R. § 205.2(b) and (c) and *Matter of Estime*. The Director shall then issue a new decision.

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

[2] The petition's priority date is the date the DOL accepted the accompanying labor certification application for processing. *See* 8 C.F.R. § 204.5(d) (explaining how to determine a petition's priority date).

[3] Where a petitioner relies on financial statements to demonstrate its ability to pay the proffered wage, the financial statements must be audited. *See* 8 C.F.R. § 204.5(g)(2). Unaudited financial statements are the unsupported representations of management. The unsupported representations of management are not credible evidence and are insufficient to demonstrate the Petitioner's ability to pay the proffered wage. The Petitioner must support its assertions with relevant, probative, and credible evidence. *See Matter of Chawathe*, 25 I&N Dec. 369, 376 (AAO 2010).