U.S. Citizenship and Immigration Services

Non-Precedent Decision of the Administrative Appeals Office

In Re: 07648852

Date: SEP. 19, 2022

Appeal of Texas Service Center Decision

Form I-140, Immigrant Petition for Other Worker

The Petitioner seeks to employ the Beneficiary as a poultry meat cutter. 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 noncitizen for lawful permanent resident status to work in a position that requires less than two years of training or experience.

Although the Director of the Texas Service Center initially granted the petition, the Director revoked the approval of the petition, concluding that the record did not establish the Petitioner's continuing ability to pay the proffered wage and that the job offer is *bona fide*. The Director also based the petition's revocation on derogatory information concerning the Petitioner's *bona fide* job offer. On appeal, the Petitioner reasserts that it has the ability to pay the proffered wage and that the job offer is *bona fide*, and argues that the Director rejected the Petitioner's supporting evidence without offering an analysis of the submitted documentation.

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). This office 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 case for further consideration.

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 noncitizen 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) with the certified labor certification. *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).

II. ANALYSIS

At issue in this case is whether the Director properly revoked the approval of the petition. We conclude that the Director did not provide an adequate analysis to explain the bases for the revocation and therefore precluded a meaningful opportunity for the Petitioner to challenge the adverse decision.

The Director approved the petition in 2017. After the Beneficiary attended a visa interview at the Nashville field office, USCIS performed site visits at the Petitioner's residence and place of employment. Those site visits resulted in adverse information prompting the Director to issue a notice of intent to revoke (NOIR) the petition's approval in February of 2019.

In the NOIR, the Director informed the Petitioner that based on the Beneficiary's sworn statement in his visa interview, it appeared that the Beneficiary paid recruitment costs in connection with the labor certification process in violation of 20 C.F.R. § 656.12. The Director further noted that the Beneficiary's history of employment in executive-level positions cast doubt on his claimed intent to work as a poultry meat cutter.[1] In addition, the Director observed that the record did not contain sufficient evidence of the Petitioner's continuing ability to pay the proffered wage from the priority date onward. *See* 8 C.F.R. § 204.5(g)(2). The Director also stated that based on the Beneficiary's background and contradictory sworn statements, it appeared that the Beneficiary misrepresented his intent to occupy the offered position, thereby warranting a finding of fraud or willful misrepresentation and the invalidation of the labor certification pursuant to 20 C.F.R. § 656.30(d).

In response to the NOIR, the Petitioner submitted numerous documents, including the Beneficiary's sworn statement; a letter from the Petitioner's vice chairman and chief financial officer; contractual documentation, invoices, and payment receipts between the Petitioner and [redacted] for services related to the filing of the labor certification and the Beneficiary's Form I-140, Immigrant Petition for Alien Worker and Form I-485, Application to Register Permanent Residence or Adjust Status; an "Agreement to Work" signed by the Beneficiary; copies of gas station receipts and photos demonstrating the Beneficiary's presence at the Petitioner's worksite; a transcript of the Beneficiary's interview with USCIS; and contractual documentation between the Beneficiary and the Beneficiary's migration agent based in South Korea. The Petitioner also submitted documentation in support of its

[1] If USCIS finds reason to doubt an assertion stated in the petition, USCIS may reject that assertion. *See, e.g.*, section 204(b) of the Act, 8 U.S.C. § 1154(b); *Anetekhai v. INS*, 876 F.2d 1218, 1220 (5th Cir. 1989); *Lu-Ann Bakery Shop, Inc. v. Nelson*, 705 F. Supp. 7, 10 (D.D.C. 1988); *Systronics Corp. v. INS*, 153 F. Supp. 2d 7, 15 (D.D.C. 2001).

ability to pay the proffered wage, including audited financial statements, quarterly tax returns, and a list of all Form I-140 petitions it filed from 2016-2017.

In the notice of revocation (NOR), the Director determined that the Petitioner had not resolved the inconsistencies in the record regarding the Beneficiary's intent to work in the proffered position, and that it failed to provide probative documentation to establish that there was no improper payment by the Beneficiary involving the labor certification. The Director concluded that the Petitioner did not establish that the proffered position was a *bona fide* job offer based on the derogatory information noted in the NOIR. The Director also determined that the Petitioner has not established it ability to pay the proffered wage.

On appeal, the Petitioner asserts that instead of addressing its arguments and the evidence submitted in response to the NOIR, the Director simply rejected or ignored the evidence of record and deemed such submissions "not relevant." The Petitioner contends it submitted sufficient evidence to overcome the Director's concerns in the NOIR regarding the *bona fides* of the job offer, as well as evidence to establish that it has sufficient net income to pay the proffered wage. In the alternative, the Petitioner asserts that it has submitted sufficient evidence to demonstrate its ability to pay under the totality of the circumstances.

We conclude that the Director's NOR is deficient, as it does not sufficiently explain the reasons for revocation. When revoking the 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 NOR 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.

For example, the Petitioner submitted a four-page sworn statement from the Beneficiary outlining his *bona fide* intention to work in the proffered position and clarifying the nature of payments made to a migration agent. Although the Director acknowledged the submission of this statement, he did not discuss the contents of this statement or explain why this statement was insufficient to refute the inconsistencies noted in the NOIR. On appeal, the Petitioner asserts that a case cited by the Director in questioning the whether the job offer is *bona fide* specifically observes, "Consideration may also be given to the [noncitizen's] own declaration regarding his intended employment," among other factors related to intent to engage in a particular profession. *See Matter of Semerjian*, 11 I&N Dec. 751, 754 (Reg'l Comm'r 1966). Here, the Director did not analyze or consider the Beneficiary's statement, and provided no explanation as to why such evidence was discounted.

The Director also disregarded additional documentation, including gas receipts and photos which placed the Beneficiary at the Petitioner's location and the Beneficiary's signed "Agreement to Work," which outlined the requirements and benefits of the offered position. The Director declined to review the work agreement because it was not dated and, despite acknowledging their submission, declined

to discuss or evaluate the receipts and photos submitted in support of the Beneficiary's presence at the Petitioner's worksite.[2]

The Petitioner also submitted a transcription of the Beneficiary's interview with USCIS officers, which it claims clarifies the inconsistencies regarding the Beneficiary's *bona fide* intention to work and the questions of improper payments raised in the NOIR. The Director rejected the transcription as self-serving because the transcription was based on the Beneficiary's own recording of the interview.[3] The Director declined to review the transcription, as well as other submitted documentation, and the decision does not explain why the information provided in response to the NOIR was insufficient with regard to the issue of a *bona fide* job offer.

Regarding its ability to pay, the Petitioner submitted audited financial statements in response to the NOIR as well as additional materials in support of the factors discussed in *Matter of Sonegawa*, 12 I&N Dec. 612, 614-15 (Reg'l Comm'r 1967), which permits USCIS to consider the totality of the circumstances affecting a petitioner's ability to pay the proffered wage. Although the Petitioner asserted that the audited financial statements demonstrate its ability to pay the proffered wage, it requested that the Director alternatively consider the totality of the circumstances in evaluating its ability to pay. The record reflects that the Petitioner provided assertions and evidence pertaining to the number of years it has conducted business, its number of employees, the growth of its business, and documentation in support of the high turnover rate of its workforce, which is primarily composed of unskilled workers. The Director, however, disregarded this evidence and instead focused solely on the audited financial statements when assessing the Petitioner's ability to pay the proffered wage.

Finally, it is not clear from the Director's NOR whether a finding of fraud or willful misrepresentation of a material fact was actually made and if it was made, whether the finding pertains to the Petitioner, the Beneficiary, or both. To find fraud, an immigration officer must determine that (1) the petitioner or beneficiary procured, or sought to procure, a benefit under U.S. immigration laws; (2) the petitioner or beneficiary made a false representation; (3) the false misrepresentation was willfully made; (4) the false misrepresentation was material; (5) the false misrepresentation was made to an authorized official of the U.S. government; (6) the false representation was made with the intent to deceive a U.S. government official authorized to act upon the request (generally an immigration or consular officer); and (7) the U.S. government official believed and acted upon the false representation by granting the benefit. *See* 8 *USCIS Policy Manual* J.2(C), https://www.uscis.gov/policymanual.

To find a willful misrepresentation of material fact, an immigration officer must determine that (1) the petitioner or beneficiary procured, or sought to procure, a benefit under U.S. immigration laws; (2) the petitioner or beneficiary made a false representation; (3) the false misrepresentation was willfully made; (4) the false misrepresentation was material; and (5) the false misrepresentation was made to an authorized official of the U.S. government. *See* 8 *USCIS Policy Manual* J.2(B), https://www.uscis.gov/policymanual; *see also Matter of M-,* 6 I&N Dec. 149 (BIA 1954); *Matter of*

[2] After acknowledging the submission of the Beneficiary's sworn statement and additional documentation, the Director stated: "While these factors may be taken into consideration regarding the beneficiary's intent to accept employment as a Poultry Meat Cutter." This incomplete statement does not reflect an analysis of the evidence provided, and the Director does not further clarify why such evidence was insufficient elsewhere in the NOR.

[3] On appeal, the Petitioner argues that the Director's rejection of this evidence, which was transcribed by a third-party transcription company, was erroneous, and submits a CD with audio recording of the interview.

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).

In the NOIR, the Director informed the Petitioner that it intended to revoke the petition's approval with a finding of fraud or willful misrepresentation of a material fact. In response, the Petitioner contested the Director's determination and provided evidence to refute this determination. The NOR does not address the Petitioner's response to this issue and does not specifically articulate whether a finding of fraud or willful misrepresentation of a material fact was made.

In light of the above discussed deficiencies, we are withdrawing the Director's NOR, and we will remand this matter to the Director for further consideration of the Petitioner's eligibility for the immigration benefit it seeks on behalf of the Beneficiary. On remand, the Director may wish to issue a new NOIR, and allow the Petitioner an opportunity to respond. If the Director makes a finding of fraud or willful material misrepresentation of a material fact against either the Petitioner, the Beneficiary, or both, the Director must articulate the basis for the finding(s) in accordance with the above-referenced case law.

III. CONCLUSION

For the reasons discussed above, we will remand this case to the Director for further consideration.

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