U.S. Citizenship and Immigration Services

Non-Precedent Decision of the Administrative Appeals Office

In Re: 23118469

Date: JAN. 10, 2023

Appeal of Texas Service Center Decision

Form I-140, Immigrant Petition for Skilled Worker

The Petitioner, a dry cleaning and laundry services business, seeks to employ the Beneficiary as an alterations tailor. It requests classification of the Beneficiary as a skilled worker under the third preference immigrant classification. Immigration and Nationality Act (the Act) section 203(b)(3)(A)(i), 8 U.S.C. § 1153(b)(3)(A)(i). This employment-based immigrant classification allows a U.S. employer to sponsor a noncitizen for lawful permanent resident status 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 Form I-140, Immigrant Petition for Skilled Worker, but subsequently revoked the approval on notice concluding there was no bona fide job offer open to U.S. workers. Furthermore, the Director found that the Petitioner willfully misrepresented a material fact by failing to disclose a relationship between the Petitioner's owner and the Beneficiary on the labor certification. The matter is now before us on appeal. 8 C.F.R. § 103.3.

The Petitioner bears the burden of proof to demonstrate eligibility by a preponderance of the evidence. *Matter of Chawathe*, 25 I&N Dec. 369, 375-76 (AAO 2010). We review the questions in this matter de novo. *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 entry of a new decision consistent with the following analysis.

I. LAW

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 beneficiary 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).

The Board of Immigration Appeals has determined that "[a] notice of intention to revoke a visa petition is properly issued for "good and sufficient cause" where the evidence of record at the time the notice is issued, if unexplained and unrebutted, would warrant a denial of the visa petition based upon the petitioner's failure to meet his burden of proof. *Matter of Ho*, 19 I&N Dec. 582, 590 (BIA 1988) (citing *Matter of Estime*, 19 I&N Dec. 450 (BIA 1987)). By itself, the director's realization that a petition was incorrectly approved is good and sufficient cause for the issuance of a notice of intent to revoke an immigrant petition. *Id.*

II. ANALYSIS

The Director initially approved the petition in February 2018, then revoked the petition's approval in April 2022 for the following reasons, with each identified as an independent ground for revocation:

- The Petitioner did not establish the existence of a bona fide job offer; and
- The Petitioner misrepresented a material fact relating to a familial relationship between the Beneficiary and its owner.

At issue in this case is whether the Director properly revoked the approval of the petition based on the stated grounds. 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).

To assess whether a *bona fide* job offer may be at issue, section C.9 of the labor certification asks, "Is the employer a closely held corporation ... in which the alien has an ownership interest, or is there a familial relationship between the owners, stockholders, partners, corporate officers, incorporators, and the alien?" The Petitioner checked "No" in response to this question, attesting that the Beneficiary has no ownership interest in the company and there is no familial relationship between the Beneficiary and its owners, stockholders, partners, corporate officers, or incorporators.

In the notice of intent to revoke (NOIR), the Director acknowledged the Petitioner's "No" response at section C.9 of the labor certification. The Director advised that further investigation by the USCIS Dallas, Texas Field Office (including a site visit and interviews with the Beneficiary and her spouse) "uncovered a familial relationship that was not disclosed to the U.S. DOL during the labor certification process." The Director specified that the familial relationship in question was between the Beneficiary's spouse and the Petitioner's sole owner, observing that they are the co-owners and managing members of [redacted] a company established in Texas in 2011. Although the Director characterized the relationship as "familial," the NOIR also cited *See Matter of Sunmart* 374, 2000-INA-93 (BALCA May 15, 2000), and stated that "[a] relationship invalidating a *bona fide* job offer may arise where the beneficiary is related to the petitioner by blood or the relationship may be financial, by marriage, or through friendship."

In response to the NOIR, the Petitioner maintained that it truthfully responded "No" to section C.9 of the labor certification, noting that neither the Beneficiary nor her spouse has ever had an ownership interest in the petitioning company or any familial relationship with the Petitioner's owner. The Petitioner emphasized that the Director mistakenly focused on the ownership of a different business entity [redacted] The Petitioner did not contest that its owner and the Beneficiary's spouse co-own that business. However, it emphasized that this business relationship, and the fact that the Beneficiary was acquainted with the Petitioner's owner, did not require a "Yes" response to section C.9 of the labor certification. Finally, the Petitioner noted that the fact that it "had a pre-existing business relationship with the Beneficiary's spouse while conducting recruitment for a hard-to-fill position does not negate the bona fides of the job offer." The Petitioner provided copies of the Beneficiary's IRS Forms W-2, Wage and Tax Statement, as evidence of her ongoing employment with the company from 2018 to 2021.

The Director revoked the approval of the petition, emphasizing that the Petitioner "failed to provide copies of job posting notices, print advertisements, internet job advertisements, recruitment reports, job applications, or workers interviewed" in response to the NOIR.[1] The Director acknowledged the Petitioner's assertion that the Beneficiary has no ownership interest in the petitioning company and no familial relationship with its sole owner. However, the Director determined there is nevertheless evidence of an existing relationship between the Beneficiary, her spouse and the Petitioner's owner, again referencing the ownership of a different entity, [redacted] The Director also continued to characterize this relationship as "familial" in the notice of revocation.

In response to the Petitioner's contention that the NOIR mistakenly focused on the ownership of [redacted] the Director stated that USCIS conducted a site visit at that business in August 2021 and found the Beneficiary working there, rather than at the Petitioner's location. The Director indicated that the Beneficiary informed the immigration officer that her spouse was "working at 'HER' other location" on the day of the site visit, specifying that he was working at the Petitioner's address. The Director concluded that the evidence did not show that the Petitioner made a bona fide job offer to the Beneficiary or that it intended to employ her in the offered position. The Director did not acknowledge or discuss the evidence of the Petitioner's ongoing employment of the Beneficiary.

[1] The record reflects that the NOIR included only a general request for "evidence to establish a bona fide job offer existed" and "evidence to show that the petitioner did not misrepresent the material fact as described in this notice."

On appeal, the Petitioner asserts that the Director erred by determining that there is a familial relationship between the Beneficiary and the Petitioner and maintains that the Beneficiary has no ownership interest in the petitioning company and no familial relationship, by blood or marriage, with its sole owner. Further, the Petitioner emphasizes that even if USCIS applies *Matter of Summart* and finds that nearly any type of pre-existing relationship between a petitioner and beneficiary is relevant, such relationship would not automatically invalidate the bona fide nature of the job opportunity where a petitioner has complied with DOL regulations while pursuing labor certification. The Petitioner submits documentation related to its recruitment efforts in support of the appeal.

The DOL requires the disclosure of any familial relationships between the noncitizen and the owners, stockholders, partners, corporate officers, and incorporators at section C.9 on the labor certification. As emphasized by the Petitioner on appeal, published DOL guidance on this issue 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. *See* DOL, Office of Foreign Labor Certification, "OFLC Frequently Asked Questions and Answers," at https://www. foreignlaborcert.doleta.gov/faqsanswers.cfm).

The record does not support the Director's determination that the Petitioner has a familial relationship with its owner that would require a "Yes" response at section C.9 of the labor certification. The record also does not indicate that the Beneficiary has any ownership interest in the Petitioner. While the record indicates that the Petitioner's owner and the Beneficiary were acquainted prior to the filing of the labor certification, the Director did not provide an appropriate basis for concluding that they had a relationship that required disclosure at section C.9 of the Form ETA 9089.

In addition, even if the record established a familial relationship, it would represent 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).

Here, the Director made a conclusory determination that a familial relationship existed between the Petitioner's owner and the Beneficiary, which is not supported by the record. Further, the Director did not fully address the Petitioner's NOIR response or 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. We will not make a totality of the circumstances determination regarding the bona fides of the job offer here, in the first instance, as that is in the Director's purview.

Further, the record reflects that the Director raised potentially derogatory information in the notice of revocation that were not addressed in the NOIR, specifically details regarding the August 2021 site visit conducted by USCIS and statements made by the Beneficiary and her spouse in connection with

that investigation. *See* 8 C.F.R. § 103.2(b)(16)(i). The decision also indicates that the Director revoked the approval, in part, based on the Petitioner's failure to submit evidence of its recruitment efforts that was not specifically requested in the NOIR. A revocation can only be grounded upon, and the petitioner is only obliged to respond to, the allegations in the notice of intent to revoke. *Matter of Arias*, 19 I&N Dec. 568 (BIA 1988). As noted, the Petitioner has submitted evidence of its recruitment efforts in support of the appeal and the record contains evidence of the Beneficiary's ongoing employment with the company which has not yet been considered by the Director.

For these reasons, 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 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).

As detailed above, the Director made a formal finding of willful misrepresentation of a material fact after determining that the Petitioner misrepresented its relationship to the Beneficiary by checking "No" at section C.9 of the labor certification. However, the Director did not specifically articulate how the Petitioner's response to section 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 the Petitioner's owner (who appears to have a business relationship with the Beneficiary's spouse) is a familial relationship that required a "Yes" response at section C.9 of the labor certification.

Accordingly, we will withdraw the Director's determination that the Petitioner willfully misrepresented a material fact on the labor certification.

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. After further consideration of the issues addressed in this decision, the Director may either issue a new NOIR in accordance with the applicable provisions or process the case in accordance with the claims and the evidence in the record.

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