U.S. Citizenship and Immigration Services

Non-Precedent Decision of the Administrative Appeals Office

In Re: 28456709

Date: OCT. 31, 2023

Appeal of Texas Service Center Decision

Form I-140, Immigrant Petition for Alien Workers (Multinational Managers or Executives)

The Petitioner, a tobacco retailer, seeks to permanently employ the Beneficiary as its general manager under the first preference immigrant classification for multinational executives or managers. *See* Immigration and Nationality Act (the Act) section 203(b)(l)(C), 8 U.S.C. § 1153(b)(1)(C). This classification allows a U.S. employer to permanently transfer a qualified foreign employee to the United States to work in an executive or managerial capacity.

The Director of the Texas Service Center denied the petition on multiple grounds, concluding that the record did not establish that the Petitioner had been doing business for at least one year at the time of filing, that it had the ability to pay the Beneficiary's proffered wage, and that it has a qualifying relationship with the Beneficiary's foreign employer. The Director further determined that the Petitioner did not establish that the Beneficiary had been employed abroad in a managerial or executive capacity for at least one year in the three years preceding the filing of the petition, and that he would be employed in a managerial or executive capacity in the United States. Finally, the Director concluded that both the Petitioner and Beneficiary had willfully misrepresented facts that are material to eligibility for the requested classification. 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 dismiss the appeal.

I. LAW

Section 203(b)(1)(C) of the Act makes an immigrant visa available to a beneficiary who, in the three years preceding the filing of the petition, has been employed outside the United States for at least one year in a managerial or executive capacity, and seeks to enter the United States in order to continue to render managerial or executive services to the same employer or to its subsidiary or affiliate.

The Form I-140, Immigrant Petition for Alien Worker, must include a statement from an authorized official of the petitioning United States employer which demonstrates that the beneficiary has been employed abroad in a managerial or executive capacity for at least one year in the three years preceding

the filing of the petition, that the beneficiary is coming to work in the United States for the same employer or a subsidiary or affiliate of the foreign employer, and that the prospective U.S. employer has been doing business for at least one year. *See* 8 C.F.R. § 204.5(j)(3). In addition, a petition for a multinational manager or executive must be accompanied by evidence that the prospective United States employer has the ability to pay the proffered wage from the time the petition is filed and continuing through adjudication. *See* 8 C.F.R. § 204.5(g)(2).

II. ANALYSIS

As noted, the Director denied the petition on multiple independent and alternative grounds, and further determined that both the Petitioner and Beneficiary had willfully misrepresented facts that are material to eligibility for the requested benefit. Prior to the decision, the Director issued a request for evidence (RFE) to allow the Petitioner an opportunity to address the deficiencies in its initial evidence.

A. Doing Business

To establish eligibility for this classification, the Petitioner must establish that the prospective U.S. employer has been doing business for at least one year at the time of filing. 8 C.F.R. § 204.5(j)(3)(i)(D). Doing business means the regular, systematic and continuous provision of goods and/or services and does not include the mere presence of an agent or office. *See* 8 C.F.R. § 204.5(j)(2).

The Petitioner filed the Form I-140 in December 2018, and therefore must demonstrate that it had been doing business as defined in the regulations since December 2017. The Petitioner provided a copy of its Certificate of Formation filed with the Texas Secretary of State on [redacted] 2018, and a commercial lease agreement dated [redacted] 2018. The Petitioner stated on the Form I-140 that it had an estimated total of five employees and estimated gross annual income of $650,052, but did not provide supporting evidence corroborating that the company was staffed and occupying the premises described in the lease agreement. Further, the Petitioner did not provide supporting evidence showing that it was operating as a tobacco retailer as stated in the petition.

In the RFE, the Director noted that the Petitioner did not submit any supporting evidence to demonstrate it has been doing business for at least one year prior to the petition's filing. In response, the Petitioner stated that it had not yet commenced operations at the time of filing and would provide evidence of its U.S. business operations since 2019. In support, the Petitioner submitted copies of its IRS Forms 1120, U.S. Corporation Income Tax Return, for 2020 and 2021.

In denying the petition, the Director noted the absence of evidence demonstrating that the Petitioner had been doing business from December 2017 through December 2018 as required by the regulations. Accordingly, the Director determined that it did not establish that it had been doing business for at least one year at the time of filing, as required by 8 C.F.R. § 204.5(j)(3)(i)(D).

On appeal, the Petitioner again asserts that although the company was formed in 2018, its first year of operations was 2019. It submitted copies of its business permits from 2018 to 2024, and referred to its previously submitted federal tax returns for 2020 and 2021. The Petitioner does not address or contest the Director's determination that it did not establish that it had been doing business for at least one year at the time of filing pursuant to 8 C.F.R. § 204.5(j)(3)(i)(D).

Although the Petitioner claims that it began providing its tobacco retail services in 2019 and currently continues to provide such services, it has not provided evidence to establish that it has been engaged in tobacco retail sales since December 2017, one year prior to the instant petition's date of filing. The Petitioner must support its assertions with relevant, probative, and credible evidence. *See Matter of Chawathe*, 25 I&N Dec. at 376. Although the Petitioner offered evidence demonstrating its continued corporate existence up to the present date, this factor is not in question and does not address the issue of whether it had been doing business for at least one year prior to the filing of the petition. 8 C.F.R. § 204.5(j)(3)(i)(D). Likewise, the tax documents that represent the business activities of the Petitioner do not establish that the Petitioner engaged and will continue to engage in the provision of goods or services on a regular, systematic, and continuous basis. 8 C.F.R. § 204.5(j)(2). The Petitioner has not submitted evidence to overcome this conclusion.

For the above stated reasons, we agree with the Director's determination that the Petitioner did not establish that it had been doing business for at least one year at the time of filing, as required by 8 C.F.R. § 204.5(j)(3)(i)(D).

B. Ability to Pay

Any petition filed for an employment-based immigrant, which requires an offer of employment must be accompanied by evidence that the prospective United States employer has the ability to pay the proffered wage. A petitioner must demonstrate this ability at the time the priority date is established and continuing until the beneficiary obtains lawful permanent residence. 8 C.F.R. § 204.5(g)(2). To establish its ability to pay, a petitioner must submit copies of its annual reports, federal tax returns, or audited financial statements. *Id.*

The Petitioner stated on the Form I-140 that it had offered the Beneficiary an annual salary of $50,000. However, it did not submit annual reports, federal tax returns, or audited financial statements in support of the petition and therefore did not meet the evidentiary requirement set forth in the regulations. In the RFE, the Director advised the Petitioner of this deficiency and allowed the Petitioner an opportunity to supplement the record with this required initial evidence, noting that it must establish its ability to pay dating back to the December 13, 2018 priority date.

In response, the Petitioner submitted copies of its federal tax returns for 2020 and 2021, copies of its bank statements for 2022, and a copy of the Beneficiary's personal tax return for 2021.

In denying the petition, the Director acknowledged receipt of this evidence, but noted that because the Petitioner filed this petition in December 2018, it must show its ability to pay the Beneficiary's wage from that date onward. The Director determined that the Petitioner did not submit documentation sufficient to demonstrate its ability to pay the Beneficiary's proffered wage during 2018, the year the petition was filed, or 2019. On appeal, the Petitioner asserts that it demonstrated its ability to pay, emphasizing that the Director did not afford evidentiary weight to its 2020 and 2021 federal tax returns and 2022 bank statements.[1]

[1] The Petitioner erroneously asserts that its federal tax returns for the calendar years 2020 and 2021, filed on March 21, 2021, and March 16, 2022, respectively, reflect its income for 2019 and 2020.

The regulation explicitly states that "the petitioner must demonstrate [the] ability [to pay] at the time the priority date is established and continuing until the beneficiary obtains lawful permanent residence" and that "evidence of this ability shall be either in the form of copies of annual reports, federal tax returns, or audited financial statements." Here, the Petitioner has not submitted copies of its annual reports, federal income tax returns or audited financial statements for 2018, the year the petition was filed, or for 2019, and in fact affirms on appeal that it "did not file an Income Tax report in 2019 because there were no earnings from December 13 – December 31, 2018."

The Petitioner did not establish that it had the continuing ability to pay the proffered wage from the priority date onward. For this additional reason, the appeal will be dismissed.

C. Willful Misrepresentation

The final issue to be addressed is the Director's finding that the Petitioner and the Beneficiary willfully misrepresented information regarding the Beneficiary's work experience which is material to his eligibility for the benefit sought.

Section 212(a)(6)(C) of the Act provides:

> Misrepresentation. - (i) In general. - Any alien who, by fraud or willfully misrepresenting a material fact, seeks to procure (or has sought to procure or has procured) a visa, other documentation, or admission into the United States or other benefit provided under this Act is inadmissible.

As outlined by the Board of Immigration Appeals, a material misrepresentation requires that one willfully makes a material misstatement to a government official for the purpose of obtaining an immigration benefit to which one is not entitled. *Matter of Kai Hing Hui*, 15 I&N Dec. 288, 289-90 (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 Tijam*, 22 I&N Dec. 408, 425 (BIA 1998); *Matter of Healy and Goodchild*, 17 I&N Dec. 22, 28 (BIA 1979). 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).

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

The Petitioner claims that the Beneficiary was employed in India as the general manager of its foreign affiliate, [redacted] since 2012. The Director advised the Petitioner that no evidence was submitted to corroborate the Beneficiary's claimed foreign employment, and further advised that USCIS records contradicted that claim, noting that the Beneficiary entered the United States in 2005

on a B-2 visa (Temporary Visitor for Pleasure) and never departed.[2] The Director further advised the Petitioner that in contrast to its claims regarding the Beneficiary's foreign employment, the Beneficiary stated on his Form I-485, Application to Register Permanent Residence or Adjust Status, that he had been employed in the United States by the Petitioner as its general manager since August 2011.

The Director also noted discrepancies in the Beneficiary's country of birth, noting that despite documentation in the record demonstrating he was born in India, the Form I-140 listed the Beneficiary's place of birth as Zimbabwe and his Form I-485 listed his place of birth as Canada.[3] In the RFE, the Director requested clarification of these inconsistencies.

In response, the Petitioner claimed that the supporting letter from the foreign entity's president and the foreign entity's organizational chart, previously submitted in support of the petition, demonstrate the Beneficiary's employment abroad in a managerial capacity since 2012. The Petitioner further claimed that the claimed start date of the Beneficiary's U.S. employment of August 2011 listed on the Beneficiary's Form I-485 was a typographical error.

The Director denied the petition with a finding of willful misrepresentation of a material fact based on the unrebutted derogatory information regarding the Beneficiary's foreign employment. On appeal, the Petitioner briefly addresses the issues raised by the Director.

Regarding the Beneficiary's B-2 visa, the Petitioner states as follows:

> [O]ne very important requirement for the B2 Visa is proving that you have binding ties with your home country in the form of property, family, or a permanent job. Therefore, it is questionable the beneficiary was issued a B2 Visa if he had no job or income to return to after his visit to the U.S. Perhaps your office should investigate the Consular who allegedly approved this B2 Visa.

The Petitioner further claimed that travel records from 2005 have been purged and that "USCIS is making false allegations without merit." Regarding the citizenship discrepancies, the Petitioner affirms on appeal that the Beneficiary is a citizen of India.

Upon review, we will not disturb the Director's finding of willful misrepresentation.

The Beneficiary indicated on both his Form I-485 and Form G-325A, Biographic Information supplement to his Form I-485 application that that he has been employed in the United States as the general manager of the Petitioner since August 2011. As previously noted, however, the Petitioner was not established until [redacted] of 2018. In contrast, the Petitioner maintains that the Beneficiary was employed abroad in a managerial capacity by its Indian affiliate since 2012. The Petitioner must

[2] USCIS records show that the Beneficiary entered the United States on a visitor visa on September 26, 2005, and USCIS records do not demonstrate that the Beneficiary departed the United States prior to the filing of the instant petition on December 13, 2018.

[3] The Beneficiary also misrepresented his immigration status as L-1 on the Form I-485, and further misrepresented his date of last arrival as August 10, 2016, despite USCIS records showing no record of his departure from the United States since he first arrived in 2005.

resolve these inconsistencies in the record with independent, objective evidence pointing to where the truth lies. *Matter of Ho*, 19 I&N Dec. 582, 591-92 (BIA 1988). Upon review, we conclude that the Petitioner's assertions on appeal have not rebutted substantial evidence of willful misrepresentation of material facts by itself and the Beneficiary.

USCIS records indicate that the Beneficiary was present in the United States since 2005 without departing, and the Petitioner does not offer evidence to refute this determination. Rather, the Petitioner claimed that the Beneficiary had at least one continuous year of full-time employment abroad with a qualifying organization within the three years preceding the filing of the petition in a managerial capacity in an effort to procure a visa for employment of the Beneficiary under the first preference immigrant classification for multinational executives or managers. *See* section 203(b)(1)(C) of the Act, 8 U.S.C. § 1153(b)(1)(C). Further, the Petitioner falsely and willfully represented that the Beneficiary was the general manager for the foreign organization since 2012, and this statement is material to the Petitioner's requested benefit. Part 8 of the Form I-140 states in pertinent part, "I certify, under penalty of perjury, that I have reviewed this petition, I understand all of the information contain in, and submitted with, my petition, and all of this information is complete, true, and correct." By signing its name under this declaration, the Petitioner took legal responsibility for the truth and accuracy of any evidence submitted in support of the petition. We agree with the Director's determination that the Petitioner made a willful misrepresentation of material fact to USCIS.

Moreover, in light of the contradictory information presented and lack of independent, objective evidence regarding the Beneficiary's work experience as detailed above, the statements made by the Beneficiary on the Form I-485 and Form G-325A were not correct and constitute a false representation. The Beneficiary signed the Form I-485 petition attesting to the veracity of the claims in his supporting documentation, and in signing the Form G-325A, the Beneficiary acknowledged that "[s]evere penalties are provided by law for knowingly and willingly falsifying or concealing a material fact." The Beneficiary willfully misrepresented material facts regarding his employment history, which is material to whether he meets the minimum requirements of the offered position. Because the Petitioner was not established until 2018, the Beneficiary's false attestations on the Form I-485 and the Form G-325A supplement submitted in support of his Form I-485 application regarding the commencement of his employment with the Petitioner in 2011 constitute a false representation on the face of a written petition. This finding of willful material misrepresentation shall be considered in any future proceeding where the Beneficiary's admissibility is an issue.

D. Reserved Issues

As discussed above, the Petitioner has not established that it was doing business for at least one year at the time it filed the petition and that it has the ability to pay the proffered wage, nor has it overcome the Director's separate finding of willful misrepresentation. As these issues are dispositive of the appeal, we decline to reach and hereby reserve the Petitioner's appellate arguments regarding the remaining issues raised by the Director. *See INS v. Bagamasbad*, 429 U.S. 24, 25 (1976) ("courts and agencies are not required to make findings on issues the decision of which is unnecessary to the results they reach"); *see also Matter of L-A-C-*, 26 I&N Dec. 516, 526 n.7 (BIA 2015) (declining to reach alternative issues on appeal where an applicant is otherwise ineligible).

III. CONCLUSION

The record does not demonstrate that the Petitioner and Beneficiary satisfy the eligibility requirements for the requested multinational manager or executive classification. Accordingly, the appeal will be dismissed for the above stated reasons, with each considered as an independent and alternate basis for the decision.

ORDER: The appeal is dismissed.