U.S. Citizenship and Immigration Services

Non-Precedent Decision of the Administrative Appeals Office

In Re: 28804738

Date: DEC. 05, 2023

Appeal of Texas Service Center Decision

Form I-140, Immigrant Petition for Alien Workers (Skilled Worker)

The Petitioner, a software solutions provider, seeks to employ the Beneficiary as an AWS cloud solutions architect. It requests classification of the Beneficiary as a skilled worker under the third preference immigrant classification. *See* 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 petition on October 31, 2019. After issuing a notice of intent to revoke (NOIR), the Director revoked the approval of the petition, concluding that the record did not establish that the Petitioner made a bona fide job offer that was open to the public. They also concluded that the Petitioner misrepresented a material fact by not disclosing an existing relationship between the Petitioner's owner and the Beneficiary. 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 matter for entry of a new decision consistent with the following analysis.

I. LAW

The Secretary of Homeland Security "may, at any time, for what he deems to be good and sufficient cause, revoke the approval of any petition .... " Section 205 of the Act, 8 U.S.C. § 1155. By regulation this revocation authority is delegated to any U.S. Citizenship and Immigration Services (USCIS) officer who is authorized to approve an immigrant visa petition. 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 (NOR). See 8 C.F.R. § 205.2(b) and (c). The Board of Immigration Appeals (the Board) has discussed revocations on notice as follows:

> [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. The decision to revoke will be sustained where the evidence of record at the time the decision is rendered, including any evidence or explanation submitted by the petitioner in rebuttal to the notice of intention to revoke, would warrant such denial.[1]

Immigration as a skilled worker usually follows a three-step process. First, the prospective employer must obtain a labor certification approval from the U.S. Department of Labor (DOL) to demonstrate that there are not sufficient U.S. workers who are able, willing, qualified, and available for the offered position. Section 212(a)(5) of the Act, 8 U.S.C. § 1182(a)(5).

Second, the employer must submit the approved labor certification with an immigrant visa petition to USCIS. Section 204 of the Act, 8 U.S.C. § 1154. The immigrant visa petition must establish that the foreign worker qualifies for the offered position, that the foreign worker and the offered position are eligible for the requested immigrant visa category, and that the employer has the ability to pay the proffered wage. *See* 8 C.F.R. § 204.5. These requirements must be satisfied by the priority date of the immigrant visa petition. *See* 8 C.F.R. § 204.5(g)(2); *Matter of Wing's Tea House*, 16 I&N Dec. 158, 159 (Acting Reg'l Comm'r 1977). For petitions that require a labor certification, the priority date is the date on which the DOL accepted the labor certification application for processing. 8 C.F.R. § 204.5(d). In this matter, the priority date is July 18, 2019.

Finally, if USCIS approves the immigrant visa petition, the foreign worker may apply for an immigrant visa abroad or, if eligible, for adjustment of status in the United States. Section 245 of the Act, 8 U.S.C. § 1255.

II. ANALYSIS

At issue is whether the Director properly revoked the approval of the petition. For the reasons discussed below, we will remand the matter.

A. Bona Fide Job Offer

The first issue on appeal is whether, based upon an existing business relationship between the Beneficiary and one of the Petitioner's owners, the Director properly revoked the approval of the petition for lack of a bona fide job offer. In the NOIR, the Director noted that the Petitioner's signatory was interviewed after approval of the petition due to concerns over the validity of the offered position and provided details about the nature of the business relationship.

[1] *Matter of Ho*, 19 I&N Dec. 582, 590 (BIA 1988) (*citing Matter of Estime*, 19 I&N Dec. 450 (BIA 1987)). Upon the proper issuance of a NOIR for good and sufficient cause, the petitioner bears the burden of proving eligibility for the requested immigration benefit. *Id.* at 589. However, a notice of revocation NOR is not valid unless it is based on evidence contained in the record of proceedings. *Matter of Estime*, 19 I&N Dec. at 451-52.

Part C.9 of ETA Form 9089, Application for Permanent Employment Certification, asks the following:

> Is the employer a closely held corporation, partnership, or sole proprietorship in which the alien has an ownership interest, or is there a familial relationship between the owners, stockholders, partners, corporate officers, or incorporators, and the alien?

The Petitioner responded "no" to this question. After reviewing the response to the NOIR, the Director determined that the Petitioner should have responded "yes," and had thus misstated a fact bearing on a labor certification requirement. However, the question posed in Part C.9 does not ask about the type of business relationship presented in this case, so the Petitioner responded correctly.

Based upon their determination regarding the Petitioner's response to Part C.9, the Director further concluded that the Petitioner did not make a bona fide job offer that was open and available to U.S. workers. USCIS, however, lacks authority to determine the bona fides of a job opportunity. Congress authorized DOL - not USCIS - to determine the availability of an offered position to U.S. workers. *See* section 212(a)(5)(A)(i)(I) of the Act. "[D]eterminations vested by statute with one agency are not normally subject to horizontal review by a sister entity, absent congressional authorization to that effect." *Madany v. Smith*, 696 F.2d 1008, 1012 (D.C. Cir. 1983). Thus, DOL - not USCIS - must determine the bona fides of the Petitioner's job opportunity. The Director's conclusions and the Petitioner's arguments regarding the bona fides of the job opportunity exceed the scope of these proceedings. If the Petitioner seeks a determination of the offered position's availability to U.S. workers on the true facts, the company must contact DOL. *See Matter of Gen. Elec. Co.*, 2011-PER-01818, *3 (BALCA Apr. 15, 2014) (stating that DOL has discretion to retroactively amend the contents of an approved labor certification application to allow an error's correction) (citation omitted).

For the above reasons, we withdraw the Director's conclusion on this issue.

B. Willful Misrepresentation of a Material Fact

USCIS will deny a visa petition if the petitioner submits evidence which contains false information. *See* section 204(b) of the Act. A petition includes its supporting evidence - including a labor certification. 8 C.F.R. § 103.2(b)(1). Further, misrepresentation of a material fact may lead to multiple consequences in immigration proceedings. Any noncitizen 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. Section 212(a)(6)(C)(i) of the Act, 8 U.S.C. § 1182(a)(6)(C)(i).

A finding of material misrepresentation requires the following elements: the petitioner procured or sought to procure a benefit under U.S. immigration laws; they made a false representation; and the false representation was willfully made, material to the benefit sought, and made to a U.S. government official. *Id.*; *see generally* 8 *USCIS Policy Manual* J.2(B), https://www.uscis.gov/policymanual. Under Board precedent, a material misrepresentation is one which "tends to shut off a line of inquiry which is relevant to the [noncitizen's] eligibility and which might well have resulted in a proper

determination that he be excluded."[2] A willful misrepresentation requires that the individual knowingly make a material misstatement to a government official for the purpose of obtaining an immigration benefit to which one is not entitled.[3] Material misrepresentation requires only a false statement that is material and willfully made. The term "willfully" means knowing and intentionally, as distinguished from accidentally, inadvertently, or in an honest belief that the facts are otherwise.[4]

The Director stated in the NOIR that since the Petitioner had not disclosed a "familiar" relationship between its owner and the Beneficiary, it had made a willful misrepresentation of material fact. However, as explained above, the Petitioner's response to Part C.9 of the labor certification was, in fact, accurate. We therefore withdraw the Director's determination that the Petitioner willfully misrepresented a material fact.

C. Ability to Pay

A petitioner must establish its ability to pay the proffered wage from the priority date of the petition until the beneficiary obtains lawful permanent residence. 8 C.F.R. § 204.5(g)(2). Evidence of ability to pay must generally include annual reports, federal tax returns, or audited financial statements. *Id.* If a petitioner employs 100 or more workers, USCIS may accept a statement from a financial officer attesting to the petitioner's ability to pay the proffered wage. *Id.* 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. *Id.*

In determining ability to pay, USCIS first determines whether the petitioner paid the beneficiary the full proffered wage each year from the priority date. If the petitioner did not pay the proffered wage in any given year, USCIS next determines whether the petitioner had sufficient net income or net current assets to pay the proffered wage (reduced by any wages paid to the beneficiary).[5]

If net income and net current assets are insufficient, USCIS may consider other relevant factors, such as the number of years the petitioner has been in business, the size of its operations, the growth of its business over time, its number of employees, the occurrence of any uncharacteristic business expenditures or losses, its reputation within its industry, or whether a beneficiary will replace a current employee or outsourced service. *See Matter of Sonegawa*, 12 I&N Dec. 612, 614-15 (Reg'l Comm'r 1967).

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[2] *Matter of S- and B-C-*, 9 I&N Dec. 436, 447 (BIA 1961).

[3] *Sergueeva v. Holder*, 324 Fed. Appx. 76 (2d Cir. 2009) (citing *Matter of Kai Hing Hui*, 15 I&N Dec. 288, 289-90 (BIA 1975).

[4] *See Matter of Healy and Goodchild*, 17 I&N Dec. 22, 28 (BIA 1979).

[5] If a petitioner has filed immigrant visa petitions on behalf of multiple beneficiaries, the petitioner must establish that it has had the ability to pay the proffered wage to each beneficiary. *See Patel v. Johnson*, 2 F.Supp.3d 108, 124 (D. Mass. 2014) (affirming our revocation of a petition approval where the petitioner did not demonstrate its ability to pay the combined proffered wages of multiple beneficiaries). Petitions filed on behalf of other beneficiaries are considered from the priority date of each petition (not including any year prior to the priority date of the petition being reviewed on appeal) until the present or until the other beneficiary obtains lawful permanent residence. Petitions that have been withdrawn or denied are not considered in this analysis.

In this case, the proffered wage is $84,573 and the priority date is July 18, 2019. On the petition, the Petitioner claims to have been established in 2016, employ a single worker, and have a gross annual income of $373,041. The Petitioner does not claim to have employed the Beneficiary.

The record contains the Petitioner's 2018 Internal Revenue Service (IRS) Form 1065, U.S. Return of Partnership Income, showing that it earned a net income of $37,174 and had net current assets of $96,160 in that year. At the time of filing, the Petitioner's 2019 tax returns were not yet available. The Petitioner also submitted its checking account statements for the period from January 2019 through August 2019.

The Director did not address the Petitioner's ability to pay the wage offered to the Beneficiary in their NOIR or revocation decision. On remand, the Petitioner must establish its continuing ability to pay the offered wage from the priority date onward.

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