U.S. Citizenship and Immigration Services

Non-Precedent Decision of the Administrative Appeals Office

In Re: 15757576

DATE: APR. 15, 2021

Appeal of Texas Service Center Decision

Form I-140, Immigrant Petition for a Professional

The Petitioner, a miscellaneous retail store, seeks to employ the Beneficiary as a market research analyst. It requests classification of the Beneficiary as a professional under the third preference immigrant category. Immigration and Nationality Act (the Act) section 203(b)(3)(A)(ii), 8 U.S.C. § 1153(b)(3)(A)(ii). This employment-based "EB-3" immigrant classification allows a U.S. employer to sponsor a professional with a baccalaureate degree for lawful permanent resident status.

The Director of the Texas Service Center denied the petition on the grounds that (1) the Petitioner did not establish that the proffered position was a *bona fide* job opportunity open to U.S. workers and (2) the Petitioner willfully misrepresented a material fact on the labor certification regarding the relationship between its president and the Beneficiary.

On appeal the Petitioner asserts that the Director's decision was incorrect on both grounds.

Upon *de novo* review, we will withdraw the Director's decision and remand the case for further consideration.

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 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.

II. PROCEDURAL BACKGROUND AND ANALYSIS

The instant petition was filed on September 27, 2019, accompanied by a labor certification that was filed with the DOL on January 25, 2019, and approved by the DOL on August 12, 2019. The Director issued a notice of intent to deny (NOID) on January 13, 2020. After pointing out that the Petitioner answered "No" to the compound question on page 1, item C.9, of the labor certification reading:

> 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 Director cited (1) USCIS records indicating that the Petitioner's owner, [redacted] was the beneficiary of a previous Form I-140 petition filed by [redacted] a business owned by [redacted], and (2) records showing that the Beneficiary listed [redacted] as his sibling on a nonimmigrant visa application he filed in August 2015. According to the Director, the Petitioner should have revealed the relationship between [redacted] and the Beneficiary to the DOL. The failure to do so, in the Director's view, cut off a potential line of inquiry regarding the proffered position which could have affected the outcome of the labor certification, and cast doubt on whether the proffered position was a *bona fide* job offer open to U.S. workers. The Director also stated that it intended to enter a finding of willful misrepresentation of material fact against the Petitioner and the Beneficiary based on their signatures on the petition and/or the labor certification attesting to the truth and correctness of their contents, as well as the Petitioner's answer of "No" to the question at C.9 of the labor certification.

In response to the NOID Petitioner's counsel submitted a letter asserting that the question at C.9 of the labor certification was correctly answered "No" because the Beneficiary has no ownership interest in the petitioning entity, which is owned 100% by [redacted] and because there is no "familiar relationship" between the Petitioner's owner and the Beneficiary. The letter further stated that the Beneficiary, who was the owner/operator of his own business at the time the labor certification was approved and the instant petition filed, is not in a position to control or influence a hiring decision for the proffered position and is not so important that the Petitioner could not continue in business without him. Documentation was submitted that confirms [redacted]'s sole ownership of the Petitioner.

In denying the petition on February 25, 2020, the Director indicated that the Petitioner had not overcome the grounds for denial as explained in the NOID. The Director quoted the response of Petitioner's counsel concerning the answer of "No" at C.9 of the labor certification, which read as follows:

> There is NO familiar relationship between the owner, stockholders, corporation officers, incorporators, or partners, and the alien. Consequently, "NO" is [the] proper and true answer for the question on Section C.9 of ETA Form 9089. There is no question/requirement to disclose the fact the [B]eneficiary's brother filed [the] immigration petition on behalf of the owner of the sponsoring company on ETA Form 9089. Therefore, there is NO misrepresentation of the [P]etitioner on ETA Form 9089.

> The [P]etitioner, [redacted] is 100% owned by [redacted] and the [B]eneficiary has no familiar relationship with [redacted]

The Director stated that the assertions of counsel do not constitute evidence, citing *Matter of Obaigbena*, 19 I&N Dec. 533, 534 (BIA 1988), and *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980), and reiterated his statement in the NOID that "the undisclosed relationship between the [P]etitioner and the [B]eneficiary cut off a potential line of inquiry" by the DOL "which could have affected the outcome of the labor certification." The Director went on to state that:

> The [P]etitioner's relationship to the [B]eneficiary casts doubt on whether the [P]etitioner put forth a good faith effort to recruit U.S. workers when the [P]etitioner was seeking to hire someone with whom they have a relationship. A relationship invalidating a *bona fide* job offer may arise where the [B]eneficiary is related to the [P]etitioner by "blood" or it may "be financial, by marriage, or through friendship." *Matter of Sunmart* 374, 00-INA-93 (BALCA May 15, 2000).

The Director concluded as follows:

> It appears that the [P]etitioner intends to employ the [B]eneficiary outside the terms of the labor certification. Therefore, the evidence does not show that the [P]etitioner made a *bona fide* job offer to the [B]eneficiary, or that the [P]etitioner desires and intends to employ the [B]eneficiary in the offered position.

Furthermore, the Director found that the Petitioner willfully misrepresented a material fact on the labor certification by answering "No" to the previously quoted question at C.9. The Director stated that:

> USCIS and DOS records reveal that [redacted] (owner of the petitioning employer) is related to the [B]eneficiary. By claiming on ETA Form 9089 that there is no relationship between itself and the [B]eneficiary, the [P]etitioner willfully made a false representation, and it is material to whether the [B]eneficiary is eligible for the requested benefit.

While finding that the Petitioner willfully misrepresented a material fact on the labor certification, no such finding was made against the Beneficiary.

The appeal brief of Petitioner's counsel asserts that the Director's decision was faulty because it did not properly consider the totality of the circumstances, including the factors listed in *Modular Container Systems, Inc.* 1989-INA-228 (BALCA July 16, 1991) (*en banc*), incorporated in the regulations at 20 C.F.R. § 656.71(l), in determining whether there was a *bona fide* job offer. Though

the nine factors of *Modular Container*[1] and the text of 20 C.F.R. § 656.17(l)[2] were included in the Director's decision, they were not the focus of the Director's analysis. The Petitioner's appeal brief addresses all nine of the *Modular Container* factors and asserts that only one applies to the Beneficiary (number 7, since he would be one of a small number of employees). Petitioner's counsel reiterates his previous contention in response to the NOID that the answer of "No" to the question at C.9 on the labor certification was correct because the Beneficiary has neither an ownership interest in the Petitioner nor a "familiar relationship" with its owner.

The Director's decision is fundamentally flawed because it misconstrues the content of the compound question at C.9 of the labor certification, and therefore misinterprets the Petitioner's answer thereto. There are two distinct questions at C.9 of the labor certification:

1. Is the employer a closely held corporation, partnership, or sole proprietorship in which the alien has an ownership interest?

2. Is there a familial relationship between the owners, stockholders, partners, corporate officers, or incorporators, and the alien?

The answer to question 1 is clearly "No" since the Beneficiary has no ownership interest in the Petitioner, which is wholly owned by [redacted]

The answer to question 2 also appears to be "No" because there is no evidence of any familial relationship between the Beneficiary and the Petitioner's owner, [redacted]

The Director focuses on the fact that the Beneficiary's brother [redacted] owns a business, [redacted] that filed a Form I-140 petition on behalf of [redacted] Thus, it appears likely that the Petitioner's owner [redacted] and the Beneficiary already knew each other at the time the instant petition was filed. The familial relationship, however, was between the Beneficiary and [redacted] not between the Beneficiary and [redacted] The Director cites no documentary evidence of a familial relationship between the Beneficiary and the Petitioner's owner, and Petitioner's counsel asserts there is none.[3] As previously indicated, the Director discounts the statement by Petitioner's counsel in

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[1] The factors include whether the beneficiary: (1) is in a position to control or influence hiring decisions regarding the job for which labor certification is sought; (2) is related to corporate directors, officers, or employees; (3) was an incorporator or founder of the company; (4) has an ownership interest in the company; (5) is involved in the management of the company; (6) is on the board of directors; (7) is one of a small number of employees; (8) has qualifications for the job that are identical to specialized or unusual job duties and requirements stated in the application; and (9) is so inseparable from the sponsoring employer because of his or her pervasive presence and personal attributes that the employer would be unlikely to continue in operation with the alien. *Id.*

[2] The regulation reads as follows: **Alien influence and control over job opportunity.** If the employer is a closely held corporation or partnership in which the alien has an ownership interest, or if there is a familial relationship between the stockholders, corporate officers, incorporators, or partners, and the alien, or if the alien is one of a small number of employees, the employer in the event of an audit must be able to demonstrate the existence of a bona fide job opportunity, *i.e.*, the job is available to all U.S. workers, and must provide to the Certifying Officer, the following supporting documentation: [five categories listed] . . . . *Id.*

[3] In the response to the NOID and in the appeal brief Petitioner's counsel stated that there is no "familiar" relationship between the Beneficiary and the Petitioner's owner. It would appear that counsel meant no "family" relationship between

response to the NOID that the Petitioner's owner and the Beneficiary are not related on the ground that the assertions of counsel do not constitute evidence.

In short, the Director has not identified any relationship between the Petitioner and the Beneficiary that was improperly withheld on the labor certification. Item C.9 on the labor certification requires the disclosure of any ownership or familial relationship between the Petitioner and the Beneficiary. It does not require the disclosure of other types of relationships, though they may be the subject of further investigation by the DOL in the labor certification process. While the Director's decision also stated that a relationship invalidating a *bona fide* job offer may arise where the [B]eneficiary is related to the [P]etitioner by "blood" or it may "be financial, by marriage, or through friendship," citing *Matter of Sunmart* 374, 00-INA-93 (BALCA May 15, 2000), the Director did not properly analyze whether a relationship between the Petitioner's owner and the Beneficiary based on financial ties, friendship, or some other connection undermined the *bona fides* of the proffered position as a job offer open to U.S. workers. The Petitioner attested on ETA Form 9089 that the position has been and was clearly open to U.S. workers.

For the reasons discussed above, we will withdraw the Director's determination that the Petitioner did not establish that the proffered position was a *bona fide* job opportunity open to U.S. workers based on the Petitioner's C.9 response, and remand the case for further consideration of this issue in light of the foregoing discussion.

Likewise, we will withdraw the Director's finding that the Petitioner willfully misrepresented a material fact on the labor certification, since that finding is built entirely on the incorrect conclusion that the Petitioner willfully provided a false answer to the question at C.9.

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).

According to the Director, USCIS and nonimmigrant visa records show that the Petitioner's owner, [redacted] is "related to" the Beneficiary. The records discussed by the Director, however, do not confirm any familial relationship between those two individuals, and the Petitioner denies any family relationship between those two individuals. The Director's statement that the Petitioner "willfully made a false representation" by "claiming on the [labor certification] that there is no relationship between itself and the [B]eneficiary" is clearly incorrect because the Petitioner did not assert "no

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the two, since no claim is made that the Petitioner's owner and the Beneficiary were not familiar with one another before the instant petition was filed.

relationship" between [redacted] and the Beneficiary. Rather, it stated at C.9 that the Beneficiary had no ownership interest in the Petitioner and had no familial relationship with its owner, which does not preclude some other type of relationship such as friendship, a financial tie, or simply being acquainted with one another.

Thus, the Director's finding that the Petitioner willfully misrepresented a material fact in the labor certification is not supported by his analysis of the Petitioner's answer to the question at C.9. This issue will be remanded for further consideration as well.

III. CONCLUSION

In accord with the foregoing analysis, we will withdraw the Director's decision and remand the case for further consideration of whether the proffered position is a *bona fide* job offer open to U.S. workers and whether the Petitioner willfully misrepresented a material fact on the labor certification, as well as any other issue the Director may deem relevant. At his discretion the Director may request additional evidence from the Petitioner. After receipt of the Petitioner's response, or the expiration of the response period, the Director shall issue a new decision.

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