U.S. Citizenship and Immigration Services

Non-Precedent Decision of the Administrative Appeals Office

In Re: 37287349

Date: APR. 21, 2025

Appeal of Service Center Operations (SCOPS) Decision

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

The Petitioner, a restaurant, seeks to employ the Beneficiary as a chef. 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.

SCOPS denied the petition, concluding that the record did not establish that the Petitioner had made a bona fide job offer to the Beneficiary. SCOPS also determined that the Petitioner had not established that the Beneficiary met the minimum requirements for the offered position as described on the labor certification. Finally, SCOPS concluded that the Petitioner willfully misrepresented a material fact on the labor certification. The matter is now before us on appeal pursuant to 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

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 alien qualifies for the offered position, that the alien 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. Finally, if USCIS approves the immigrant visa petition, the alien 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.

"[A]t any time" before a beneficiary obtains lawful permanent residence, USCIS may revoke a petition's approval for "good and sufficient cause." Section 205 of the Act, 8 U.S.C. § 1155. If supported by the record, the erroneous nature of a petition's approval justifies its revocation. See *Matter of Ho,* 19 I&N Dec. 592, 590 (BIA 1988).

USCIS may issue a notice of intent to revoke (NOIR) a petition's approval if the unexplained and unrebutted record at the time of the NOIR's issuance would have warranted the petition's denial. *Matter of Estime,* 19 I&N Dec. 450, 451 (BIA 1987). If a petitioner's NOIR response does not overcome the revocation grounds stated in the notice, USCIS properly revokes a petition's approval. *Id.* at 451-2.

II. ANALYSIS

The Petitioner filed its I-140 petition in November 2020, seeking classification of the Beneficiary as a skilled worker to act as a chef in its Thai restaurant. SCOPS initially approved the petition in April 2022, but after the U.S. Embassy in [redacted] Thailand interviewed the Beneficiary pursuant to his immigrant visa, SCOPS issued a notice of intent to revoke (NOIR) the approval. The NOIR identified two issues as the bases of possible revocation: derogatory information concerning the Beneficiary's employment experience letter in the record, and the willful misrepresentation of a material fact regarding the Petitioner and its owners' familial relationship with the Beneficiary. After consideration of the Petitioner's response to the NOIR, SCOPS revoked the approval of the petition on both of those grounds, while also determining that the Petitioner had not shown that it had made a bona fide job offer to the Beneficiary. As discussed below, we agree in part with SCOPS' conclusions and will dismiss the appeal.

A. Bona Fide Job Offer

The first issue we will address on appeal concerns whether SCOPS properly revoked the approval of the petition for lack of a bona fide job offer. The Director based this determination upon the familial relationship between the Beneficiary and the Petitioner's owner and its manager, respectively his father and his sister.

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 in the negative to this question on the labor certification. In response to the NOIR, the Petitioner did not dispute the familial relationships between its members and the Beneficiary, or that it should have responded in the affirmative to question C.9. Instead, it asserted (through counsel) that it "didn't understand the importance of the familial relationship" when responding to this question. SCOPS determined that this response was insufficient and not supported by the record, and concluded that by failing to disclose the familial relationship, the Petitioner had

foreclosed further inquiry by DOL into whether a bona fide job offer existed in this case, and thus had not made a bona fide job offer to the Beneficiary, justifying a revocation of the petition.

However, USCIS 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. SCOPS' conclusions 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). Therefore, we withdraw SCOPS' conclusion pertaining to this issue.

B. The Beneficiary's Qualification for the Offered Position

A skilled worker must be capable of "performing skilled labor (requiring at least 2 years training or experience)." Section 203(b)(3)(A)(i) of the Act. A petitioner must establish a beneficiary's possession of all DOL-certified job requirements of an offered position by a petition's priority date. *Matter of Wing's Tea House,* 16 I&N Dec. 158, 160 (Acting Reg'l Comm'r 1977).[1] In evaluating a beneficiary's qualifications, USCIS must examine the job-offer portion of an accompanying labor certification to determine a position's minimum requirements. USCIS may neither ignore a certification term, nor impose additional requirements. *See, e.g., Madany* v. *Smith,* 696 F.2d 1008, 1015 (D.C. Cir. 1983) (holding that the "DOL bears the authority for setting the *content* of the labor certification") (emphasis in original).

In this case, Section H of the ETA Form 9089 states that the offered position is for a chef, and the minimum requirement is 36 months of experience in the offered position. There are no acceptable alternate education or experience requirements, but "knowledge of measuring and mixing the ingredients accordingly in preparing traditional Thai recipes and desserts" is a specific skill requirement for the position. In section K of the ETA Form 9089, the Beneficiary stated that he was employed by [redacted] restaurant as a chef from April 27, 2015 to December 30, 2018. He did not claim any other employment experience on the form or elsewhere in the record. To substantiate this claimed experience, the Petitioner submitted a letter signed by S-S-, the owner of the restaurant, confirming the Beneficiary's dates of employment and that he "prepared and cooked meals according to menu."

However, as stated in SCOPS' denial decision, the U.S. consulate in Bangkok, Thailand determined that the Beneficiary had not been employed as a chef as stated in the letter. Specifically, the consulate had received information that the Beneficiary had requested the letter from the restaurant despite never having worked there. Also, a consular officer had spoken with a co-owner of the restaurant who

[1] This petition's priority date is May 11, 2020, the date the DOL accepted the accompanying labor certification application for processing. *See* 8 C.F.R. § 204.5(d) (explaining how to determine a petition's priority date).

initially stated that she had never had an employee with the Beneficiary's first name. In responding to the NOIR, the Petitioner submitted a second letter from S-S-, which SCOPS concluded was insufficient to overcome the discrepancy between the consulate's report and the letters. *Matter of Ho*, 19 I&N Dec. 582, 591-92 (BIA 1988)(finding that the petitioner must resolve discrepancies in the record with independent, objective evidence pointing to where the truth lies).

On appeal, the Petitioner submits a brief and resubmits evidence provided with its initial filing and in response to the NOIR. But the wording of the brief is identical to the Petitioner's NOIR response (aside from the heading and introductory sentence) and thus does not challenge the conclusions reached in SCOPS' decision, particularly those which addressed the NOIR response. We will not consider the same arguments already addressed by SCOPS. *Giday v. INS*, 113 F.3d 230, 234 (D.C. Cir. 1997) (declining to address a "passing reference" to an argument in a brief that did not provide legal support). We agree that this second letter was insufficient to overcome the discrepancies between the consular officer's report and the first experience letter, as it did not constitute independent, objective evidence. The record therefore does not establish that the Beneficiary is qualified for the offered position or for classification as a skilled worker, and the approval of the petition was revoked for good and sufficient cause.

C. The Petitioner's 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 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. 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 [alien'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] The term "willfully" means knowing and intentionally, as distinguished from accidentally, inadvertently, or in an honest belief that the facts are otherwise.[4]

Based upon the Petitioner's response to Part C.9 of the labor certification as discussed above, SCOPS determined that in failing to disclose the familial relationship between the its members and the

[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).

Beneficiary, the Petitioner had willfully misrepresented a material fact. As we stated in the section above, the body of the Petitioner's appeal brief is a word-for-word repetition of its response to SCOPS' NOIR, and as such does not challenge the conclusions reached in the revocation decision, including those related to whether it willfully misrepresented a material fact. We agree with SCOPS' conclusion on this issue, as the Petitioner's response to Part C.9 of Form ETA 9089 meets all of the elements of a willful misrepresentation of a material fact. First, it was done knowingly and intentionally, as by signing both the ETA Form 9089 and the Form I-140 the Petitioner declared, under penalty of perjury, that the application had been reviewed and that the information therein was true and accurate. *See* section 287(b) of the Act, 8 U.S.C. § 1357(b); *see also* 8 C.F.R. § 103.2(a)(2). The signature of the Petitioner's signatory "establishes a strong presumption" they knew and assented to the contents. *See Matter of Valdez*, 27 I&N Dec. 496, 499 (BIA 2018).

Second, the Petitioner's response was a misrepresentation, because it was false and made to a government official for the purpose of obtaining an immigration benefit. While the response was made on a DOL form and submitted to that agency, it was included with and incorporated into the instant immigrant visa petition.

Third, the misrepresentation was material, since the Petitioner's failure to disclose the familial relationship between the Beneficiary and its members closed off a line of inquiry that was relevant to the Beneficiary's eligibility. As indicated above, DOL must certify that "there are not sufficient workers who are able, willing, qualified . . . and available" for an offered position. Section 212(a)(5)(A)(i)(I) of the Act. A family relationship between an employer's principal and a sponsored alien creates a presumption that an offered position is not clearly available to U.S. workers. *See* 20 C.F.R. § 656.17(l) (requiring a labor certification employer to demonstrate the bona fides of a job opportunity if a family relationship exists between an employer's principal and the alien). By misrepresenting the relevant familial relationship, the Petitioner closed off further inquiry by DOL into whether that relationship influenced the job offer's availability to U.S. workers.

Based on the preceding analysis, SCOPS had good and sufficient cause to revoke the approval of the petition under section 204(b) of the Act due to the Petitioner's willful misrepresentation of a material fact.[5]

III. CONCLUSION

SCOPS' conclusion regarding whether the Petitioner made a bona fide job offer to the Beneficiary exceeded the scope of these proceedings, and we withdraw that conclusion. But the approval of the petition was revoked for good and sufficient cause due to the Beneficiary's ineligibility for the offered position and the requested classification, and due to the Petitioner's willful misrepresentation of a material fact. The petition will remain revoked.

[5] The NOIR indicated that the Beneficiary had willfully misrepresented a material fact through his statement in Part K of Form ETA 9089 that he was employed by [redacted] restaurant, but SCOPS' decision did not include that conclusion. Since it appears that the Beneficiary willfully misrepresented a material fact, this issue must be addressed in any future proceeding where his admissibility is an issue.

ORDER: The appeal is dismissed.