U.S. Citizenship and Immigration Services

Non-Precedent Decision of the Administrative Appeals Office

In Re: 8324348

Date: APR. 29, 2020

Appeal of Texas Service Center Decision

Form I-140, Immigrant Petition for Skilled Worker

The Petitioner seeks to employ the Beneficiary as a wholesale buyer, rental cars. It requests classification of the Beneficiary as a skilled worker under the third preference immigrant category. 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 foreign national 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 denied the petition and entered a finding of willful misrepresentation of a material fact against the Beneficiary. In these proceedings, it is the Petitioner's burden to establish eligibility for the requested benefit. Section 291 of the Act, 8 U.S.C. § 1361. Upon *de novo* review, we will withdraw the Director's decision and we will withdraw his finding of willful misrepresentation of a material fact against the Beneficiary. We will remand the matter for further proceedings consistent with our opinion and for the entry of a new decision.

I. THE EMPLOYMENT-BASED IMMIGRATION PROCESS

Employment-based immigration generally follows a three-step process. First, an employer obtains an approved labor certification from the U.S. Department of Labor (DOL).[1] *See* section 212(a)(5)(A)(i) of the Act, 8 U.S.C. § 1182(a)(5)(A)(i). 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 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 applies 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.

[1] The priority date of a petition is the date the DOL accepted the labor certification for processing, which in this case is March 15, 2018. *See* 8 C.F.R. § 204.5(d).

II. WILLFUL MISREPRESENTATION OF A MATERIAL FACT

The Director denied the petition and entered a finding of willful misrepresentation of a material fact against the Beneficiary based on discrepancies on the labor certification, in the advertisements for the offered job, and in the letters submitted to the record verifying the Beneficiary's prior experience. Specifically, the Petitioner indicated on the labor certification that the Beneficiary did not have a relationship to the Petitioner. Part C.9. of the labor certification asks, "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, incorporators, and the alien?" The Petitioner checked 'No' in response to this question, indicating that there is no relationship between the Beneficiary and the owners, stockholders, partners, corporate officers, or incorporators of the Petitioner. However, the Director noted in his decision that the Beneficiary is listed as the Petitioner's registered agent and manager in the Florida corporate records database.[2] Further, the Director noted that the Petitioner's December 2017 newspaper advertisements for the offered job contained the wrong address for the Petitioner, and that the job descriptions contained in the Beneficiary's experience letters and the Petitioner's description of the duties of the offered job are "verbatim to one another." Thus, the Director determined that by "making the above claims," the Beneficiary willfully made a material misrepresentation.

As outlined by the Board of Immigration Appeals, a material misrepresentation requires that the petitioner willfully make 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 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, they 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.

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[2] 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, *7 (BALCA Jul. 16, 1991) *(en banc)*; *see* 20 C.F.R. § 656.17(l). A relationship between a petitioner and a beneficiary triggering concerns about the *bona fides* of a job opportunity "is not only of the blood; it may also be financial, by marriage, or through friendship." *Matter of Sunmart 374*, 2000-INA-93, 2000 WL 707942, *3 (BALCA May 15, 2000). If a petitioner knowingly misrepresented the *bona fides* of a job opportunity, USCIS may invalidate a labor certification after its issuance. *See* 20 C.F.R. § 656.30(d) (authorizing USCIS invalidation upon a finding of "fraud or willful misrepresentation of a material fact involving the labor certification").

Here, the Director erred in determining that the Beneficiary willfully made a material misrepresentation at Part C.9 on the labor certification, as the Petitioner, and not the Beneficiary, was responsible for completing the entry at Part C.9.[3] We note that the Petitioner has established that it disclosed the relevant relationship to DOL during an audit of the labor certification. The Petitioner submitted the audit materials to USCIS in response to the NOID. The Petitioner's audit response to DOL stated that the Beneficiary is the marketing and general manager of the Petitioner. The audit response also included its electronic Articles of Organization showing that the Beneficiary is its registered agent. Thus, even if the Director had determined that the Petitioner's answer at Part C.9. of the labor certification was false and was willfully made, it was not material to the *bona fides* of the job opportunity due to the Petitioner's disclosure of the relationship to the DOL during the labor certification audit. The Petitioner did not shut off a line of inquiry which is relevant to the Beneficiary's eligibility for the requested visa classification. *See Matter of Ng*, 17 I&N Dec. at 537. The DOL determined after the audit that, despite the relationship between the Petitioner and the Beneficiary, the position of wholesale buyer, rental cars, was a *bona fide* job opportunity open to U.S. workers.

Further, errors in the Petitioner's advertisements for the offered position cannot serve as the basis for a finding of willful misrepresentation against the Beneficiary, as the Beneficiary was not responsible for their content.[4] Additionally, in the NOID, the Director expressed doubts about the evidence submitted in support of the Beneficiary's qualifying experience. The Petitioner submitted an explanation and documents supporting the Beneficiary's experience in response to the NOID. In his decision, the Director determined that the Beneficiary willfully misrepresented his employment history, but he does not appear to have reviewed the documentation submitted by the Petitioner in response to the NOID. The Director's decision does not clearly indicate whether the denial was based on the Beneficiary's lack of qualifying experience for the offered job.

For the reasons detailed above, we will withdraw the Director's denial of the petition and we will withdraw his finding of material misrepresentation against the Beneficiary. We will remand the matter to the Director for further consideration.

III. ABILITY TO PAY

The record does not contain regulatory-required evidence of the Petitioner's ability to pay the proffered wage from the priority date on March 15, 2018, and continuing until the beneficiary obtains lawful permanent residence.[5] The regulation at 8 C.F.R. § 204.5(g)(2) requires that "[e]vidence of this ability shall be either in the form of copies of annual reports, federal tax returns, or audited financial statements."

The record does not contain regulatory-prescribed evidence of the Petitioner's ability to pay for 2018. Without this regulatory-required evidence, we cannot affirmatively find that the Petitioner has the

[3] The Director does not appear to have reviewed the documentation submitted by the Petitioner in response to a notice of intent to deny (NOID) regarding this issue. On appeal, the Petitioner disputes that the relationship was reportable at Part C.9.

[4] The Director does not appear to have reviewed the documentation submitted by the Petitioner in response to the NOID regarding this issue.

[5] The annual proffered wage is $63,981.

continuing ability to pay the proffered wage from the priority date. On remand, the Director should request such regulatory-required evidence and allow the Petitioner reasonable time to respond.

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