U.S. Citizenship and Immigration Services

Non-Precedent Decision of the Administrative Appeals Office

MATTER OF A-A-S-

DATE: DEC. 5, 2017

MOTION ON ADMINISTRATIVE APPEALS OFFICE DECISION

PETITION: FORM I-140, IMMIGRANT PETITION FOR ALIEN WORKER

The Petitioner, a physician, seeks an immigrant visa petition as a member of the professions holding an advanced degree as set forth in section 203(b)(2) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(2). In addition, he seeks a "national interest" waiver from the requirement of a job offer by a U.S. employer. Section 203(b)(2)(B)(ii) of the Act provides that such a waiver shall be afforded to a physician who meets several conditions, including that the individual will work in an area with a shortage of health care professionals.

The California Service Center approved the Form I-140, Immigrant Petition for Alien Worker. However, the Director of the Texas Service Center subsequently revoked the approval of the immigrant petition, finding that the Petitioner did not establish that he had an employer-employee relationship with as he attested at the time of filing. The Director further concluded that the Petitioner willfully misrepresented his intention of seeking employment with The Petitioner appealed the matter to us, and we dismissed the appeal.[1]

The matter is now before us on a joint motion to reopen and reconsider. With the motion, the Petitioner submits a brief and additional evidence, asserting that he did not engage in willful misrepresentation of material fact in presenting the petition. Upon review, we will deny the motion to reconsider, and we will grant the motion to reopen in part and deny it in part.

I. LAW

A motion to reopen is based on documentary evidence of new facts, and a motion to reconsider is based on an incorrect application of law or policy. The requirements of a motion to reopen are located at 8 C.F.R. § 103.5(a)(2), and the requirements of a motion to reconsider are located at 8 C.F.R. § 103.5(a)(3).

With respect to the eligibility requirements for a national interest waiver, section 203(b) of the Act sets out this sequential framework:

[1] *See Matter of A-A-S-*, ID# 462626 (AAO June 22, 2017).

(2) Aliens who are members of the professions holding advanced degrees or aliens of exceptional ability. –

(A) In general. – Visas shall be made available . . . to qualified immigrants who are members of the professions holding advanced degrees or their equivalent or who because of their exceptional ability in the sciences, arts, or business, will substantially benefit prospectively the national economy, cultural or educational interests, or welfare of the United States, and whose services in the sciences, arts, professions, or business are sought by an employer in the United States.

(B) Waiver of job offer –

(i) National interest waiver. Subject to clause (ii), the Attorney General[2] may, when the Attorney General deems it to be in the national interest, waive the requirements of subparagraph (A) that an alien's services in the sciences, arts, professions, or business be sought by an employer in the United States.

(ii) Physicians working in shortage areas or veteran facilities.

(I) In general. The Attorney General shall grant a national interest waiver pursuant to clause (i) on behalf of any alien physician with respect to whom a petition for preference classification has been filed under subparagraph (A) if –

(aa) the alien physician agrees to work full time as a physician in an area or areas designated by the Secretary of Health and Human Services as having a shortage of health care professionals or at a health care facility under the jurisdiction of the Secretary of Veterans Affairs; and

(bb) a Federal agency or a department of public health in any State has previously determined that the alien physician's work in such an area or at such facility was in the public interest.

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[2] Pursuant to section 1517 of the Homeland Security Act of 2002 ("HSA"), Pub. L. No. 107-296, 116 Stat. 2135, 2311 (codified at 6 U.S.C. § 557 (2012)), any reference to the Attorney General in a provision of the Act describing functions that were transferred from the Attorney General or other Department of Justice official to the Department of Homeland Security by the HSA "shall be deemed to refer to the Secretary" of Homeland Security. *See also* 6 U.S.C. § 542 note (2012); 8 U.S.C. § 1551 note (2012).

The implementing regulations at 8 C.F.R. § 204.12 specify that a physician must agree to work full time for an aggregate of five years, and set forth the evidentiary requirements to establish eligibility for the national interest waiver. Specifically, as relevant here, the provisions at 8 C.F.R. § 204.12(c)(1) provide that a petitioner must submit evidence with the petition relating to his intended employment arrangement, either as "an employee" or through his "own practice." If the physician will be an employee, he is required to submit a full-time employment contract covering the required five year period of clinical medical practice, or an employment commitment letter from a veterans' facility. The contract or letter must have been issued and dated within six months prior to the date the petition is filed. 8 C.F.R. § 204.1(c)(1)(i). Alternatively, if the physician will establish his own practice, he must provide a sworn statement committing to the full-time practice of clinical medicine for the required period, and describing the steps he has taken or intends to actually take to establish the practice. 8 C.F.R. § 204.1(c)(1)(ii).

II. ANALYSIS

A. Procedural Background

As outlined in our previous decision, the Petitioner filed the Form I-140 petition in September 2007, stating that he intended to work full-time in a clinical medical practice for an aggregate of five years as an employee of [redacted] He provided a copy of a full-time employment contract, dated November 14, 2006, signed by his brother, [redacted] on behalf of [redacted] In November 2009, the Director approved the petition.

The Petitioner held H-1B status authorizing his employment with [redacted] when he filed the instant petition.[3] In October 2013, U.S. Citizenship and Immigration Services (USCIS) revoked the H-1B petition finding that the Petitioner was the sole owner and member of [redacted] and therefore, the company did not establish that it was a U.S. employer having an employer-employee relationship with the Petitioner as is required by H-1B regulations and labor condition application attestations.

Upon revocation of the H-1B petition, the Director sent a Notice of Intent to Revoke (NOIR) the instant petition. The Director explained that the Petitioner had stated he would be an employee of [redacted] in accordance with 8 C.F.R. § 204.12(c)(1)(i), and that because USCIS had determined that no such employment relationship exists, the Form I-140 petition would be revoked. The Director also found that the Petitioner "willfully misrepresented his intention of seeking employment with [redacted] when he submitted an employment contract with [redacted] signed by an unauthorized signatory."

The Petitioner responded to the NOIR, and the Director subsequently revoked the approval of the Form I-140. On appeal, we upheld the Director's decision, affirming her determination that the Petitioner had not proven his eligibility as an employee of [redacted] under 8 C.F.R. § 204.12(c)(1)(i). Specifically, we found that the Petitioner had not demonstrated an employer-employee relationship

[3] The Petitioner was the Beneficiary of a Form I-129 Petitioner for Nonimmigrant Worker, Notice of Approval [redacted] filed by [redacted]

with [redacted] at the time of filing because he did not establish that the company would exercise control over his work. We also noted that the Petitioner had not provided an employment contract that was dated and issued within six months prior to filing the petition and valid for the required five year period, or established that he was an "employee" of [redacted] at the time of filing. In addition, in response to the Petitioner's argument that he "could have just as easily" presented the required evidence to show self-employment under 8 C.F.R. § 204.12(c)(1)(i), we explained that he had not provided such evidence and therefore did not establish that he met the initial filing requirements for the immigration benefit, either as an employee or as a self-employed worker.

Lastly, we determined that the Petitioner had "not met his evidentiary burden of proving that he did not willfully misrepresent material facts." Specifically, we found the evidence insufficient to support the Petitioner's contention that [redacted] was authorized to sign on behalf of [redacted] and therefore that submission of a contract signed by him was not a willful misrepresentation.

In the brief accompanying the motion, the Petitioner does not contest our findings regarding his eligibility for a physician national interest waiver. The sole issue the Petitioner addresses on motion is whether he willfully misrepresented his intention of seeking employment with [redacted] through submission of an employment contract signed by an unauthorized signatory. Accordingly, we will limit our analysis to that issue.

On motion, the Petitioner argues that he did not engage in willful misrepresentation of material fact because he had a good faith belief in "the legality of his delegating signing authority as he did, and the legality of the employer/employee arrangement presented." He maintains that [redacted] "a company director, was always, and continues to be, authorized to sign on behalf of [redacted]." The Petitioner further contends that he followed the advice of previous counsel, [redacted] in drafting [redacted] company operating agreement and his employment contract. Furthermore, the Petitioner asserts that the record shows that both he and [redacted] had a sincere and genuine "belief as to the legality of appointing [redacted] to sign on behalf of the company." He cites to *Matter of Tijam*, 22 I&N Dec. 408, 425 (BIA 1998) and *Matter of Healy and Goodchild*, 17 I&N Dec. 22, 28 (BIA 1979) which define the term "willfully" as knowing and intentionally, as distinguished from accidentally, inadvertently, or in an honest belief that the facts are otherwise.

B. Motion to Reopen

In support of his motion to reopen, the Petitioner offers new evidence to support the contention that [redacted] was authorized to sign the employment contract on behalf of [redacted] In part, he provides an affidavit in which he specifically attests that he, in his capacity as sole member and principal of [redacted] had designated [redacted] a director, to be an authorized signor. The motion also includes a resubmitted affidavit from [redacted] indicating that she previously represented the Petitioner with respect to this petition. She further attests: "We included [the Petitioner's] contract with [redacted] to provide appropriate medical services, with [redacted] signing on behalf of the company, as an authorized agent of the company, as authorized by [the Petitioner] as the company head." Lastly, [redacted] states that "simply because the claimed relationship did not

meet a legal definition of employer/employee" was not a basis to conclude that the Petitioner willfully misrepresented a material fact.

On motion, the Petitioner also offers his [redacted] Forms W-2, Wage and Tax Statements, from 2007 through 2016. While the evidence does not establish his eligibility as an employee of [redacted] under 8 C.F.R. § 204.12(c)(1)(i), we find the new evidence, taken together with documentation already in the record, sufficient to demonstrate that the Petitioner did not engage in willful misrepresentation by providing a contract signed by [redacted] Accordingly, we withdraw the finding of willful misrepresentation of material fact with respect to this petition.[4]

C. Motion to Reconsider

The Petitioner's arguments in his motion to reconsider are limited to the finding of willful misrepresentation which, as discussed above, we are withdrawing based on new evidence. Accordingly, the motion to reconsider is moot. Regardless, the arguments on motion do not establish that our appellate findings were based on an incorrect application of the law, regulation, or USCIS policy, nor does the motion demonstrate that our latest decision was erroneous based on the evidence before us at the time of the decision.

III. CONCLUSION

The Petitioner's motion does not demonstrate that our previous decision was based on an incorrect application of law or policy, and it does not establish that he meets the requirements of 8 C.F.R. § 204.12(c)(1)(i) to demonstrate his eligibility for a physician national interest waiver. However, the finding of willful material misrepresentation of material fact relating to this petition is withdrawn.

ORDER: The motion to reopen is granted in part and denied in part.

FURTHER ORDER: The motion to reconsider is denied.

Cite as *Matter of A-A-S-*, ID# 800888 (AAO Dec. 5, 2017)

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[4] Our finding relates only to the petition before us, and we make no determination regarding evidence of willful misrepresentation of a material fact in any other proceedings involving the Petitioner. Willful misrepresentation of a material fact in other proceedings may render the Petitioner inadmissible to the United States. "Any [foreign national] 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 [the Act] is inadmissible." Section 212(a)(6)(C) of the Act. In the context of this visa petition, our determination is a "finding of fact" and not an admissibility determination.