U.S. Citizenship and Immigration Services

Non-Precedent Decision of the Administrative Appeals Office

In Re: 2878770

Date: DEC. 10, 2019

Appeal of Vermont Service Center Decision

Form I-129, Petition for Nonimmigrant Worker (L-1A)

The Petitioner,[1] a real estate investment, management, and development business, seeks to temporarily employ the Beneficiary as its senior portfolio manager under the L-1A nonimmigrant classification for intracompany transferees. Immigration and Nationality Act (the Act) section 101(a)(15)(L), 8 U.S.C. § 1101(a)(15)(L).

The Director of the Vermont Service Center revoked the approval of the petition, concluding that the record did not establish, as required, that: (1) the Petitioner is doing business as defined in the regulations; (2) the Beneficiary's foreign employer is doing business; (3) the Beneficiary was employed abroad in a managerial or executive capacity; and (4) the Beneficiary would be employed in the United States in a managerial or executive capacity. In the notice of intent to revoke (NOIR), the Director stated that U.S. Citizenship and Immigration Services (USCIS) intended to revoke the approval "with a finding of fraud." In the revocation order, the Director referenced the NOIR, and stated that the grounds for revocation had not been overcome. However, the Director did not articulate a finding of fraud or willful misrepresentation of a material fact.

On appeal, the Petitioner does not contest the revocation of the approval, but emphasizes that "nowhere in the [NOIR] or Decision is there any specific allegation of falseness, fraud or material misrepresentation." The Petitioner maintains that the decision leaves unresolved whether a finding of fraud was confirmed, and states that it filed the appeal for the sole purpose of requesting that any fraud finding be "expressly deleted."

The burden of proof to establish eligibility for the benefit sought remains with the petitioner in revocation proceedings. Section 291 of the Act, 8 U.S.C. § 1361; *Matter of Cheung*, 12 I&N Dec. 715 (BIA 1968); and *Matter of Estime*, 19 I&N Dec. 450, 452, n.1 (BIA 1987). Upon *de novo* review, we will dismiss the appeal, as the Petitioner concedes that it did not establish that it meets all eligibility requirements for the requested classification. The revocation of the approval of the petition will remain undisturbed. Further, we conclude that the Director did not, in fact, make a finding of fraud or willful misrepresentation of a material fact and that the record does not support such a finding.

[1] We are sending this decision to the Petitioner's address of record, with a courtesy copy to [redacted] Public records show that the Petitioner registered the new address with the Florida Division of Corporations in March 2019.

I. LEGAL FRAMEWORK

To establish eligibility for the L-1A nonimmigrant visa classification, a qualifying organization must have employed the beneficiary "in a capacity that is managerial, executive, or involves specialized knowledge," for one continuous year within three years preceding the beneficiary's application for admission into the United States. Section 101(a)(15)(L) of the Act. In addition, the beneficiary must seek to enter the United States temporarily to continue rendering his or her services to the same employer or a subsidiary or affiliate thereof in a managerial or executive capacity. *Id.*

Under USCIS regulations, the approval of an L-1A petition may be revoked on notice under six specific circumstances. 8 C.F.R. § 214.2(l)(9)(iii)(A). To properly revoke the approval of a petition, a director must issue a notice of intent to revoke that contains a detailed statement of the grounds for the revocation and the time period allowed for rebuttal. 8 C.F.R. § 214.2(l)(9)(iii)(B).

II. ANALYSIS

As noted, the approval of this petition was revoked after the Director identified four independent and alternative grounds of ineligibility. Further, the Director's NOIR and revocation decision suggested, but did not expressly state, that a finding of fraud or material misrepresentation may be warranted. We will discuss these issues separately below.

A. Revocation of the Approved Petition

In the NOIR, the Director advised the Petitioner that the evidence of record was insufficient to show that the Petitioner and its Canadian subsidiary (the Beneficiary's foreign employer) were doing business as defined in the regulations, and insufficient to demonstrate that the Beneficiary has been employed abroad and would be employed in the United States, in a managerial or executive capacity as defined at section 101(a)(44) of the Act. The Director advised the Petitioner of the evidentiary deficiencies in the record and provided a list of suggested documentation that may assist in overcoming the grounds for revocation.

The record reflects that the Petitioner did not submit a timely response to the NOIR, which was mailed to the company address stated on the petition.[2] Therefore, the Director determined that the Petitioner had not overcome the deficiencies discussed in the NOIR and revoked the approval of the petition.

On appeal, the Petitioner does not contest the revocation of the approval based on the merits of the petition, and even states that "[l]ooking at the grounds for revocation in 8 CFR 214.2(l)(9)(iii)(A) a good case could be made that subsection 5 'Approval of the petition involved gross error' may have been the case." We, therefore, consider these uncontested issues to be abandoned. *See Sepulveda v. U.S. Att'y Gen.*, 401 F.3d 1226, 1228 n. 2 (11th Cir. 2005); *see also, Hristov v. Roark*, No. 09–CV–27312011, 2011 WL 4711885 at *1, *9 (E.D.N.Y. Sept. 30, 2011) (the court found the plaintiff's claims to be abandoned as he failed to raise them on appeal to the AAO).

[2] The Petitioner submitted a late response, advised the Director that it did not receive the NOIR in a timely fashion because it had moved to a new location, and requested additional time to respond. The Director did not grant the request for additional time.

Accordingly, we will affirm the revocation of the petition's approval and dismiss the appeal.

B. Fraud or Willful Misrepresentation

The remaining issue pertains to the Petitioner's request that any finding of fraud made by the Director be "expressly deleted." We find that the Director did not make a finding of fraud or willful misrepresentation of a material fact, nor did the decision provide an analysis to support such a finding.

Any foreign person 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. *See* section 212(a)(6)(C)(i) of the Act, 8 U.S.C. § 1182(a)(6)(C)(i).

A finding of fraud requires a determination that the alien or petitioner made a false representation of a material fact with knowledge of its falsity and with the intent to deceive an immigration officer. Furthermore, the false representation must have been believed and acted upon by the officer. *See Matter of G-G-*, 7 I&N Dec. 161 (BIA 1956).

As outlined by the Board of Immigration Appeals, a material misrepresentation requires that one willfully makes 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 Tijam*, 22 I&N Dec. 408, 425 (BIA 1998); *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, he or she 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.

Here, the Director indicated an intent to revoke the approval of the petition with a "finding of fraud" but did not address why the facts of this case support such a finding based on the elements of fraud or willful misrepresentation of a material fact. In fact, both the NOIR and the revocation decision contain a single reference to an intent to make a finding of fraud, and no other mention of fraud or misrepresentation.

The NOIR advised the Petitioner that the proposed revocation was based, in part, on statements the Beneficiary had made during her interview when she applied for an L-1 visa at the U.S. consulate in [redacted] and on further inquiries conducted by the consulate. Specifically, the NOIR advised the Petitioner of the following:

- [T]he beneficiary stated that she only manages independent contractors and her daily control of their work i[s] nominal in her current role with the foreign entity."
- The Petitioner's CFO, also an owner of its parent company, stated that "the company in Canada is not involved in any traditional business activities," but owns and manages some property. He explained that the company mainly seeks to find new investors for the U.S. enterprise, and engages in administrative support of the U.S. business.

The Director did not draw any connection between the consular interview and subsequent inquiries and the intent to make a finding of fraud. Further, upon review of the record, the statements made by the Beneficiary and the Petitioner's CEO are generally consistent with the statements made in support of the petition. The record reflects that the Petitioner and the foreign entity operate a business that relies primarily on independent contractors. The Petitioner itself indicated that it has one employee and 21 contractors and the Petitioner did not claim that the Canadian entity was structured differently; its organizational chart shows contractors, vendors, and one temporary accounting staff. Therefore, the Beneficiary's statement that she supervises only independent contractors does not lead to a conclusion that the Petitioner misrepresented her job duties or the staffing or structure of the Canadian company to USCIS.

With respect to the nature of the business in Canada, the Petitioner stated in its December 2015 letter in support of the petition that the Canadian entity owns several investment properties and "served as the administration and control division for all three U.S. based [Petitioner] funds." This statement is consistent with the statement the Petitioner's CFO made in response to the consulate's inquiries.

As discussed, the Director's revocation decision did not expressly articulate a finding of fraud or willful misrepresentation of a material fact, but, as noted by the Petitioner, was inconclusive as to whether fraud or misrepresentation was confirmed. We find that the facts of this case do not warrant a finding of fraud or willful misrepresentation against either the Petitioner or the Beneficiary. Therefore, the Director's reference to an "intent to revoke with a finding of fraud" is withdrawn.

III. CONCLUSION

The revocation of the previously approved petition is affirmed for the above stated reasons.

ORDER: The appeal is dismissed.