U.S. Citizenship and Immigration Services

Non-Precedent Decision of the Administrative Appeals Office

In Re: 3322388

Date: DEC. 12, 2019

Appeal of Texas Service Center Decision

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

The Petitioner, describing itself as an import company, seeks to temporarily employ the Beneficiary as its vice president in the United States under the L-1A nonimmigrant classification for intracompany transferees. *See* Immigration and Nationality Act (the Act) section 101(a)(15)(L), 8 U.S.C. § 1101(a)(15)(L).

The Director of the Texas Service Center denied the petition on multiple grounds, concluding the Petitioner did not establish that: (1) the Beneficiary's former foreign employer was doing business; (2) the Beneficiary was employed abroad for one continuous year in the three preceding his entry into the United States as a nonimmigrant; and (3) the Beneficiary would be employed in a managerial or executive capacity in the United States. In addition, the Director stated that they had made "a finding of fraud and misrepresentation because the petitioner has not submitted evidence to overcome the derogatory information [referenced by the Director in a Notice of Intent to Deny (NOID)]."

On appeal, the Petitioner contends that the Director erred in assessing the submitted evidence. The Petitioner states that the Director improperly focused on evidence of its operations in the United States when concluding that the foreign employer was not doing business. Further, the Petitioner points to pay records and a foreign employer support letter and asserts that this demonstrates that the Beneficiary was employed abroad in a managerial or executive capacity for one continuous year during the three year period prior to her entry into the United States. The Petitioner also contends that the Director determined that the Beneficiary would not act as a manager or executive in the United States without properly analyzing the evidence.

Upon *de novo* review, we agree with the Petitioner that the Director did not sufficiently analyze the submitted evidence in its denial decision; therefore, we will withdraw the decision and remand it for the entry of a new decision. Notwithstanding our withdrawal of the Director's decision, we find that the record as presently constituted contains anomalies and inconsistencies regarding whether: (1) the foreign employer is doing business; (2) the Beneficiary was employed abroad for one continuous year in the three preceding her entry into the United States; and (3) the Beneficiary would be employed in a managerial or executive capacity in the United States. As such, we will remand the matter for further consideration consistent with this decision.

I. LAW

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.* The petitioner must also establish that the beneficiary's prior education, training, and employment qualify him or her to perform the intended services in the United States. 8 C.F.R. § 214.2(l)(3).

II. BASES FOR REMAND

As discussed, the Director of the Texas Service Center denied the petition on multiple grounds and concluded that the Petitioner had committed fraud and misrepresentation; however, with respect to each ground of denial, we conclude that the Director did not provide sufficient analysis.

A. Doing Business

In concluding that the Beneficiary's former foreign employer was not doing business consistent with the regulations, the Director focused on an internet search and stated that "[United States Citizenship and Immigration Services (USCIS)] was unable to locate a website for the entity." Further, the Director pointed to a U.S. Department of State memorandum and a site visit conducted in 2015 to the Petitioner's asserted office in [redacted] New York and concluded that it "was not doing business in the United States." Likewise, the Director rejected a submitted Petitioner lease agreement and tax records from 2017 stating that "the visa was originally obtained by submitting falsified documentation."

We find the reasoning of the Director insufficient with respect to whether the foreign employer was, and is, doing business. For instance, the Director referred the lack of a website; however, it is not clear whether this was in reference to the Petitioner or the foreign employer, and the decision did not explain why this demonstrates that the foreign employer was not doing business as of the date the petition was filed. Likewise, the Director also refers to the Petitioner's lease agreement, tax documentation, and a site visit conducted to its office in 2015. However, it is not clear how this evidence is relevant to the foreign employer's business operations. In fact, in the denial decision, the Director listed submitted evidence relevant to the foreign employer's operations such as contracts, invoices, shipping documentation, purchase orders and other such documentation relevant to the foreign employer, but does not discuss this documentation when analyzing whether the foreign employer was doing business as of the date the petition was filed.

As such, we remand this issue for consideration of the evidence relevant to the foreign employer's operations to determine whether the foreign employer was doing business in a regular, systematic, and continuous fashion. 8 C.F.R. § 214.2(l)(14)(ii)(A) and 8 C.F.R. § 214.2(l)(1)(ii)(H).

B. Employment Abroad

Furthermore, the Director determined that the Petitioner did not establish that the Beneficiary had been employed for one continuous year in the three preceding her entry into the United States as a nonimmigrant. In making this conclusion, the Director pointed to a previous Form I-140, Immigrant Petition for an Alien Worker, that had been denied "due to fraud" and indicated that a 2012 foreign payroll roster and payment certificates appeared to be a "false representation because the evidence of the record does not show that the payment certificates are authentic." Upon review, we conclude that the Director's analysis of this issue lacks sufficient explanation. For instance, although we acknowledge that the Petitioner did have a previous Form I-140 petition denied for fraud and a Form I-129 petition revoked, the Director did not sufficiently explain why this led to the specific conclusion in this matter that the Beneficiary's foreign payroll documentation was not "authentic."

Therefore, we remand this issue to the Director for reconsideration and a fuller explanation as to whether the Petitioner established that the Beneficiary was employed for one continuous year in the three preceding her entry into the United States as a nonimmigrant.

C. Employment in the United States

Likewise, in concluding the Beneficiary would not act in a managerial or executive capacity in the United States, the Director did not provide any explanation for his decision. The Director did not provide sufficient analysis in making this conclusion, such as a discussion of the Beneficiary's duties, the Petitioner's staffing levels, the duties of her asserted subordinates, or other such relevant evidence. When examining the managerial or executive capacity of a given beneficiary, the Director must review the petitioner's description of the job duties. We note that a petitioner's description of the job duties must clearly describe the duties to be performed by the beneficiary and indicate whether such duties are in a managerial or executive capacity. *See* 8 C.F.R. § 214.2(l)(3)(ii). Beyond the required description of the job duties, the Director should examine the company's organizational structure, the duties of a beneficiary's subordinate employees, the presence of other employees to relieve a beneficiary from performing operational duties, the nature of the business, and any other factors that will contribute to understanding a beneficiary's actual duties and role in a business. Accordingly, the Director should examine and discuss evidence regarding the Beneficiary's job duties along with evidence of the nature of the Petitioner's business, its staffing levels, and its organizational structure.

For these reasons, we remand this issue to the Director for analysis of the relevant factors above and for a determination as to whether the Beneficiary would act in a managerial or executive capacity in the United States.

D. Fraud or Willful Misrepresentation of a Material Fact

Lastly, the Director stated in the denial decision that it had made "a finding of fraud and misrepresentation because the petitioner has not submitted evidence to overcome the derogatory information [referenced by the Director in a Notice of Intent to Deny (NOID)]." Again, we conclude that the Director did not set forth sufficient reasons for these conclusions.

Both fraud[1] and misrepresentation[2] require analysis of various factors not adequately addressed by the Director in the decision. For instance, the Director did not analyze or discuss, in the case of fraud, whether the Petitioner or Beneficiary acted with knowledge of the falsity of the submitted evidence or assertions; and with the intent to deceive an immigration officer. Similarly, in the case of misrepresentation, the Director did not provide analysis of the listed factors; namely, whether: 1) the petitioner or beneficiary made a false representation to an authorized official of the United States government; 2) the misrepresentation was willfully made; and 3) the fact misrepresented was material. *See Matter of M-*, 6 I&N at Dec. 149; *Matter of L-L-*, 9 I&N at Dec. 324; Matter *of Kai Hing Hui*, 15 I&N Dec. at 288. The Director only indicated that the Petitioner did not overcome the derogatory information, but did not sufficiently discuss why and did not provide sufficient reasoning as to why the Petitioner's, or Beneficiary's, assertions amounted to fraud and/or misrepresentation consistent with law.

For these reasons, we remand the issue of fraud and misrepresentation to the Director for further consideration and analysis consistent with this decision.

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

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[1] The terms "fraud" and "misrepresentation" are not interchangeable. Unlike a finding of fraud, a finding of material misrepresentation does not require an intent to deceive or that the officer believes and acts upon the false representation. *See Matter of Kai Hing Hui*, 15 I&N Dec. 288 (BIA 1975). A finding of fraud requires a determination that the alien 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).

[2] 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.