U.S. Citizenship and Immigration Services

Non-Precedent Decision of the Administrative Appeals Office

In Re: 12088782

DATE: DEC. 14, 2020

Appeal of Nebraska Service Center Decision

Form I-140, Immigrant Petition for an Alien Worker

The Petitioner, a jewelry business, seeks to employ the Beneficiary as a jewelry setter. It requests classification for the Beneficiary as an "other worker" under the third preference immigrant category. Immigration and Nationality Act (the Act) section 203(b)(3)(A)(iii), 8 U.S.C. § 1153(b)(3)(A)(iii). This employment-based "EB-3" immigrant classification allows a U.S. employer to sponsor for lawful permanent resident status a foreign national who is capable of performing unskilled labor that requires less than two years of training or experience and is not of a temporary or seasonal nature.

The petition was initially approved, but the Director of the Nebraska Service Center subsequently revoked the approval. The Director determined that the evidence of record did not establish that the Beneficiary had the requisite experience to meet the minimum requirements of the labor certification. The Director also found fraud or willful misrepresentation of a material fact in the application for labor certification and therefore invalidated the labor certification.[1]

On appeal the Petitioner asserts that the documentation of record is sufficient to establish that the Beneficiary has the requisite experience to meet the terms of the labor certification and qualify for other worker classification, and that there is no analytical basis for the Director's finding of fraud or willful misrepresentation of a material fact in the labor certification application.

Upon de novo review, we will withdraw the Director's decision. We will remand the case for further consideration and the issuance of a new decision.

I. LAW

Employment-based immigration generally follows a three-step process. First, an employer obtains an approved labor certification (ETA Form 9089) from the U.S. Department of Labor (DOL). See section 212(a)(5) of the Act, 8 U.S.C. § 1182(a)(5). 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

[1] The regulation at 20 C.F.R. § 656.30(d) provides that USCIS may invalidate a labor certification based on a finding of fraud or willful misrepresentation of a material fact involving the application for labor certification.

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 (Form I-140) 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 may apply 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.

Section 205 of the Act 8 U.S.C. § 1155, provides that the Secretary of Homeland Security may "for good and sufficient cause, revoke the approval of any petition." By regulation this revocation authority is delegated to any USCIS officer who is authorized to approve an immigrant visa petition "when the necessity for the revocation comes to the attention of [USCIS]." 8 C.F.R. § 205.2(a). USCIS must give the petitioner notice of its intent to revoke the prior approval of the petition and the opportunity to submit evidence in opposition thereto, before proceeding with written notice of revocation. See 8 C.F.R. § 205.2(b) and (c). A notice of intent to revoke (NOIR) "is not properly issued unless there is 'good and sufficient cause' and the notice includes a specific statement not only of the facts underlying the proposed action, but also of the supporting evidence." Matter of Estime, 19 I&N Dec. 450, 451 (BIA 1987). Per Matter of Estime, "[i]n determining what is 'good and sufficient cause' for the issuance of a notice of intention to revoke, we ask whether the evidence of record at the time the notice was issued, if unexplained and unrebutted, would have warranted a denial based on the petitioner's failure to meet his or her burden of proof." Id.

II. ANALYSIS

As previously indicated, the Petitioner requests classification of the Beneficiary as an "other worker." The regulation at 8 C.F.R. § 204.5(l)(3)(ii)(D) states that:

> If the petition is for an unskilled (other) worker, it must be accompanied by evidence that the alien meets any educational, training and experience, and other requirements of the labor certification.

All requirements must be met by the petition's priority date,[2] which in this case is September 21, 2015. See Matter of Wing's Tea House, 16 I&N Dec. 158, 159 (Acting Reg'l Comm'r 1977).

In this case section H of the labor certification (Job Opportunity Information) specifies the following with respect to the requirements for the job of jewelry setter:

4.	Education: Minimum level required:	None
5.	Is training required for the job?	No
6.	Is experience in the job offered required?	Yes
6-A.	How long?	12 months
8.	Is an alternate combination of education and experience acceptable?	No
10.	Is experience in an alternate occupation acceptable?	No
14.	Specific skills or other requirements:	None

[2] The priority date of an employment-based immigrant petition is the date the underlying labor certification is filed with the DOL. See 8 C.F.R. § 204.5(d).

Thus, the labor certification requires that the Beneficiary have at least 12 months of experience as a jewelry setter by the priority date of September 21, 2015. In sections J and K of the labor certification the Beneficiary claims that she met this requirement by virtue of her employment as a jewelry setter by [redacted] in [redacted] Ukraine, in four different stints between March 2010 and August 2013. The I-140 petition was filed in November 2016, accompanied by initial evidence that included a letter bearing the co-signatures of [redacted] and [redacted] on the letterhead of [redacted] and dated August 10, 2015, stating that the Beneficiary was employed 30 hours a week as a jewelry setter in four separate time segments – from March 9, 2010, to June 5, 2010; from September 29, 2010, to May 14, 2011; from September 25, 2011, to April 29, 2012; and from October 13, 2012, to August 30, 2013 – which totaled approximately 28 months. The I-140 petition was approved on November 18, 2016.

In April 2019, however, the Director sent the Petitioner a NOIR which requested that the Petitioner "submit additional evidence to support the [B]eneficiary's experience requirements as mandated by the ETA-9089" labor certification application. The Director advised that the Petitioner submit "the foreign equivalent to paycheck stubs, Forms W-2 for 2010-2013, performance evaluations or other corroborating evidence in support of the claimed work experience." The Director indicated that the current record did not establish that the Beneficiary met the minimum experience requirement of the labor certification.

In response to the NOIR the Petitioner submitted a statement from the bookkeeper of the [redacted] jewelry shop in [redacted] Ukraine, dated May 6, 2019, stating that the Beneficiary worked there part-time during her university studies and that she was paid in cash. The Petitioner also submitted copies of monthly "statements of cash payment" from the jewelry shop to the Beneficiary.

On March 20, 2020, The Director revoked the petition's approval. In his decision the Director acknowledged the materials submitted in response to the NOIR, but indicated that they did not conform with the types of documentation requested in the NOIR and determined that the record still "lacked verifiable documentation" to demonstrate that the Beneficiary worked as a jewelry setter for the [redacted] jewelry shop in [redacted] The Director concluded that the evidence did not establish that the Beneficiary met the minimum experience requirement of the labor certification to qualify for the proffered position. The Director also stated that "[s]ince fraud or willful misrepresentation of material fact has been found in the application for this labor certification, the submitted labor certification is hereby invalidated."

On appeal the Petitioner asserts that the evidence it has submitted relating to the Beneficiary's alleged employment with the [redacted] jewelry shop in [redacted] already exceeds the regulatory requirement of 8 C.F.R. § 204.5(g)(1), which states, in pertinent part, that "[e]vidence relating to qualifying experience . . . shall be in the form of letter(s) from current or former employer(s) . . . and shall include the name, address, and title of the writer, and a specific description of the duties performed by the alien . . . " and of 8 C.F.R. § 204.5(l)(3)(ii)(A), which states the same substantive requirements for specific visa categories including "other workers." The Petitioner recounts that it furnished a letter which assertedly meets the above requirements with its initial evidence, and additional documentation with its response to the NOIR. The Director indicated that the Petitioner's additional evidence – including the bookkeeper's letter and the "statements of cash payment" – did not fit into one of the specific evidentiary categories identified in the NOIR. The Director called the

evidence "not verifiable documentation," which may be true, but did not explain why additional verifiable documentation was necessary considering the Petitioner had already submitted with its initial evidence a letter from the alleged employer in [redacted] that appeared to meet all the substantive requirements of 8 C.F.R. § 204.5(g)(1) and 8 C.F.R. § 204.5(l)(3)(ii)(A).

In short, the Director did not explain in the revocation decision, nor in the NOIR that preceded it, why the Petitioner's initial evidence was no longer sufficient to justify the approval of the petition, and warranted revocation. The Director did not identify any "good and sufficient cause" in the NOIR to revoke the petition's approval, did not provide the facts underlying the proposed revocation, and did not specify any supporting evidence for the revocation. Lacking all of these substantive elements, the NOIR did meet the standards set in Matter of Estime. Accordingly, we will withdraw the revocation decision and remand this case to the Director for the purpose of reissuing a NOIR which sets forth a "good and sufficient cause" for revocation, "the facts underlying the proposed action," and "the supporting evidence," in accord with Matter of Estime.

We will also withdraw the Director's finding of fraud or willful misrepresentation of a material fact in the labor certification application, along with the Director's invalidation of the labor certification. 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. The false representation must also have been believed and acted upon by the officer. See Matter of G-G-, 7 I&N Dec. 161 (BIA 1956). A misrepresentation is an assertion or manifestation that is not in accord with the true facts. For an immigration officer to find a willful and material misrepresentation of fact, he or she must determine that (1) the petitioner or beneficiary made a false representation to an authorized official of the U.S. government, (2) the misrepresentation was willfully made, and (3) the fact misrepresented was material. See Matter of M-, 6 I&N Dec. 149 (BIA 1954); Matter of Kai Hing Hui, 15 I&N Dec. 288, 289 (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). A "material" misrepresentation is one that "tends to shut off a line of inquiry relevant to the alien's eligibility." Matter of Ng, 17 I&N Dec. 536, 537 (BIA 1980).

The Director's NOIR did not even mention the subject of fraud or willful misrepresentation. In the revocation decision the Director found fraud or willful representation of a material fact in the labor certification application without specifying which and without analyzing either in accordance with the factors discussed in the above case law.

If the Director wishes to pursue this matter on remand, he shall provide notice of the basis for any alleged fraud or misrepresentation in the reissued NOIR, afford the Petitioner the opportunity to refute any derogatory information with supporting evidence, and employ the factors discussed in the above case law in determining whether a finding of fraud or willful misrepresentation of a material fact is warranted. Additionally, following any reissued NOIR, the Director should consider the Petitioner's response and evaluate the quality and sufficiency of any submitted evidence to determine whether the experience requirement has been established.

III. CONCLUSION

For the reasons discussed above, we will remand this case to the Director for further consideration. The content of any new NOIR and the consideration of any evidence submitted by the Petitioner should comply with the requirements of 8 C.F.R. § 205.2(b) and (c) and Matter of Estime. The Director shall then issue a new decision.

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