U.S. Citizenship and Immigration Services

Non-Precedent Decision of the Administrative Appeals Office

In Re: 10572221

Date: FEB. 16, 2021

Appeal of Nebraska Service Center Decision

Form I-140, Immigrant Petition for Skilled Worker

The Petitioner, an importer of wholesale costume jewelry, seeks to employ the Beneficiary as a marketing specialist. It requests his classification under the third-preference, immigrant category as a skilled worker. Immigration and Nationality Act (the Act) section 203(b)(3)(A)(i), 8 U.S.C. § 1153(b)(3)(A)(i). This employment-based, "EB-3" category allows a U.S. business to sponsor a foreign national for lawful permanent resident status based on a job offer requiring at least two years of training or experience.

After the filing's initial grant, the Director of the Nebraska Service Center revoked the petition's approval. The Director concluded that the Petitioner did not properly disclose a familial relationship between it and the Beneficiary. The Director entered a finding of willful misrepresentation of a material fact against the Petitioner.

In these proceedings, it is the Petitioner's burden to establish eligibility for the requested benefit by a preponderance of the evidence. Section 291 of the Act, 8 U.S.C. § 1361; *Matter of Chawathe*, 25 I&N Dec. 369, 375 (AAO 2010). The Administrative Appeals Office (AAO) reviews the questions in this matter *de novo*. *See Matter of Christo's Inc.*, 26 I&N Dec. 537, 537 n.2 (AAO 2015). Upon *de novo* review, we will withdraw the decision of the Director. The matter is remanded for the entry of a new decision consistent with the analysis below.

I. EMPLOYMENT-BASED IMMIGRATION

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). *See* section 212(a)(5)(A) 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 working conditions of domestic workers similarly employed. *See* section 212(a)(5)(A) 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.

At any time before a beneficiary obtains lawful permanent residence, however, USCIS may revoke a petition's approval for "good and sufficient cause." Section 205 of the Act, 8 U.S.C. § 1155. If supported by the record, a petition's erroneous approval may justify its revocation. *Matter of Ho*, 19 I&N Dec. 582, 590 (BIA 1988). 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. WILLFUL MISREPRESENTATION OF A MATERIAL FACT

The Petitioner in this matter is a jewelry import business, established in 2015 and employing two individuals. The accompanying labor certification was filed on March 24, 2016.[1] The immigrant visa petition was initially approved on December 2, 2016.

The Director issued a NOIR on October 10, 2019, informing the Petitioner that USCIS was in possession of adverse information. Specifically, the Director noted that the Petitioner checked "no" to question C.9 on the labor certification, "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, corporate officers, incorporators, or partners, and the alien?" However, the Director found that information in the record demonstrated that the Beneficiary's sister "is either an owner, stockholder, partner, corporate officer, or an incorporator." The Director further noted that the Petitioner may have willfully misrepresented its association with the Beneficiary in failing to disclose the familial relationship on the labor certification.

In its response to the Director's NOIR, the Petitioner asserted that it correctly answered "No" to question C.9 on the labor certification because the Beneficiary's sister was no longer associated with the Petitioner at the time the labor certification was filed, and there was no familial relationship between the Beneficiary and any of the Petitioner's owners, stockholders, partners, corporate officers, or incorporators. The Petitioner provided the following evidence in support of this assertion:

- An undated statement from the Beneficiary's sister asserting that she resigned from the Petitioner on November 1, 2015, which permanently terminated her relationship with the company.

[1] The "priority date" of a petition is the date the underlying labor certification is filed with the DOL. *See* 8 C.F.R. § 204.5(d). The Petitioner must establish that all eligibility requirements for the petition have been satisfied as of the priority date.

- A statement from the Petitioner's accountant stating that the single and sole owner of the Petitioner "from the beginning of the business" was [redacted]
- A shareholder certificate dated October 28, 2015 listing [redacted] as the holder of 200 shares.
- A sworn statement from [redacted] attesting that he is the sole owner of the Petitioner, that the Beneficiary's sister "was added as one of the company's directors as an administrative procedure" at the time of incorporation, and that the Beneficiary's sister "left the company immediately after the company was formed."

The Director concluded that the evidence that the Petitioner submitted "confirms that [the Beneficiary's sister] was an incorporator of the company." The Director found that the Petitioner willfully misrepresented a material fact by failing to disclose the existence of a familial relationship between the Petitioner and the Beneficiary on the labor certification, and revoked the approval of the petition.

On appeal the Petitioner submits page one of a two-page document titled "Certificate of Inc. (Profit)," issued by the [redacted] Department of the Treasury, Division of Revenue and Enterprise Services.[2] The Petitioner asserts that the Beneficiary's sister is not listed as a registered agent, on the board of directors, nor an incorporator of the Petitioner on its official incorporation document.

As outlined by the Board of Immigration Appeals (Board), 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, in advertently, 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.

Despite the Director's conclusion, the record here does not demonstrate that the Beneficiary's sister was an "incorporator" of the Petitioner. Rather, the statement from the Petitioner's owner demonstrates that the Beneficiary's sister was a "director" of the Petitioner at the time of incorporation in October 2015, and the statement from the Beneficiary's sister demonstrates that she resigned before the filing of the labor certification. Misrepresentations are willful if they are "deliberately made with knowledge of their falsity." *Matters of Valdez*, 27 I&N Dec. 496, 298 (BIA 2018) (citations omitted).

[2] Page 1 of the certificate shows an effective date of October 27, 2015, and lists the Petitioner's registered agent, first board of directors, and incorporators. None of these individuals is the Beneficiary's sister.

A misrepresentation is material when it has a "natural tendency to influence, or [be] capable of influencing, the decision of the decision-making body to which it was addressed." *Id.*

Because the Beneficiary's sister asserts that her role as a director terminated before the labor certification was filed, we cannot conclude that the representation on the labor certification that no familial relationship existed was deliberately false. Therefore, we will withdraw the Director's finding of willful misrepresentation. However, based on inconsistencies in the record, we cannot affirmatively say that the Beneficiary did not, in fact, have a familial relationship between any of the Petitioner's owners, stockholders, corporate officers, incorporators, or partners at the time of filing the labor certification, or that the Beneficiary was eligible for the requested benefit in all other respects. The Petitioner must resolve this inconsistency in the record with independent, objective evidence pointing to where the truth lies. *Matter of Ho*, 19 I&N Dec. 582, 591-92 (BIA 1988). Therefore, we will remand the matter to the Director for further consideration based on the foregoing analysis.

The Petitioner here provides only unsupported testimonial evidence to establish that the Beneficiary's sister was not a director or corporate officer at the time the labor certification was filed. A petitioner may submit a letter or affidavit that contains hearsay or biased information, but such factors will affect the weight to be accorded the evidence in an administrative proceeding. *See Matter of D-R-*, 25 I&N Dec. 445, 461 (BIA 2011) (citations omitted). Probative evidence beyond a letter or affidavit may be considered when submitted to resolve inconsistencies or discrepancies in the record. *See Matter of Ho*, 19 I&N Dec. at 591-92. Ultimately, to determine whether a petitioner has established eligibility for a requested benefit by a preponderance of the evidence, USCIS must examine each piece of evidence - both individually and within the context of the entire record - for relevance, probative value, and credibility. *Matter of Chawathe*, 25 I&N Dec. 369, 376 (AAO 2010).

As noted above, the Petitioner submitted the first page of a Certificate of Incorporation issued by the state of [redacted] The Certificate of Incorporation does not include a list of corporate officers or directors, and the second page is not provided. Although the record includes the Petitioner's 2015 Form 1120, U.S. Corporation Income Tax Return, the Form 1125E listing compensation of officers is not included.

The undated statement from the Beneficiary's sister asserts that she resigned from the Petitioner on November 1, 2015, resulting in permanent termination of her relationship with the Petitioner on that effective date. However, the record includes the Petitioner's 2017 Quarterly Wage Reports listing the Beneficiary's sister as one of three employees in each quarter, two years after she claims to have resigned and terminated her relationship with the Petitioner. Unresolved material inconsistencies may lead us to reevaluate the reliability and sufficiency of other evidence submitted in support of the requested immigration benefit. *Matter of Ho*, 19 I&N Dec. at 591-92.

Because these inconsistencies are unresolved, we will remand the matter to the Director. On remand, the Director may wish to issue a new NOIR outlining the deficiencies above, requesting additional independent objective evidence in support, and allowing the Petitioner an opportunity to respond.

III. THE BENEFICIARY'S QUALIFICATIONS

The accompanying labor certification in this case states that the offered position of marketing specialist requires a bachelor's degree, or foreign educational equivalent, in marketing and 24 months of experience in the job offered. In the alternative, the Petitioner will accept 48 months of experience in consumer marketing and sales in the fashion jewelry industry, with no education required. On the labor certification the Beneficiary claimed to have no education and experience with two companies as president: 1) [redacted] from May 1, 2005 to May 30, 2013; and 2) [redacted] from June 10, 2013 to June 30, 2015.

The initial evidence submitted with the petition included a letter from the general manager of [redacted] stating that the Beneficiary worked as president from May 1, 2005 to May 30, 2013. However, this information is inconsistent with a nonimmigrant visa application that the Beneficiary submitted in 2013. In his prior nonimmigrant visa application, the Beneficiary listed his current employer in May 2013 as [redacted] The Beneficiary also listed his two previous employers as [redacted] from May 1, 2009 to February 28, 2013; and [redacted] from October 1, 2005 to March 30, 2009. The inconsistencies in the Beneficiary's employment history cast doubt as to his possession of the required 48 months of experience for the offered position. The Petitioner must resolve this inconsistency in the record with independent, objective evidence pointing to where the truth lies. *Id.*

Because we cannot affirmatively find that the Beneficiary possesses the experience required for the offered position, we will remand the matter to the Director for further consideration. On remand, the Director may wish to issue a new NOIR outlining the deficiencies above, requesting additional independent objective evidence in support, and allowing the Petitioner an opportunity to respond.

IV. ABILITY TO PAY THE PROFFERED WAGE

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-required evidence of the Petitioner's ability to pay the proffered wage of $61,589 per year, from the priority date on March 24, 2016, and continuing until the beneficiary obtains lawful permanent residence.

Specifically, the record does not contain regulatory-prescribed evidence of the Petitioner's ability to pay for 2016, the year of the priority date. Without this regulatory-required evidence, we cannot affirmatively find that the Petitioner has the continuing ability to pay the proffered wage from the priority date.

Therefore, we will remand the matter to the Director to request additional evidence, if deemed appropriate, and analyze the record and determine whether the Petitioner has established its continuing ability to pay the proffered wage to the Beneficiary. On remand, the Director should request such regulatory-required evidence and allow the Petitioner reasonable time to respond.

V. CONCLUSION

Considering the above discussed deficiencies, we are withdrawing the Director's decision finding of a willful misrepresentation of a material fact. However, the record does not demonstrate affirmatively that the Petitioner is eligible for the benefit sought, including whether the Petitioner has the ability to pay the proffered wage to the Beneficiary as required by 8 C.F.R. § 204.5(g)(2), and whether the Beneficiary meets the experience requirement as stated on the labor certification. Therefore, we will remand this case to the Director for further consideration of the Petitioner's eligibility for the requested benefit.

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