U.S. Citizenship and Immigration Services

Non-Precedent Decision of the Administrative Appeals Office

MATTER OF U-C-, INC.

DATE: JAN. 10, 2020

APPEAL OF NEBRASKA SERVICE CENTER DECISION

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

The Petitioner, a restaurant, seeks to employ the Beneficiary as a specialty chef, South Indian cuisine. It requests classification of the Beneficiary as a skilled worker under the third preference immigrant category. 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" immigrant classification allows a U.S. employer to sponsor a foreign national for lawful permanent resident status to work in a position that requires at least two years of training or experience.

The petition was initially approved. The Director of the Nebraska Service Center subsequently revoked the approval on the ground that the Petitioner did not reveal the existence of a familial relationship on the labor certification and therefore the proffered position, more likely than not, was not a *bona fide* job opportunity open to U.S. workers. On appeal the Petitioner acknowledges the familial relationship but asserts that the error on the labor certification was neither willful nor material because no U.S. workers responded to its advertisements for the specialty chef position.

Upon *de novo* review, we will withdraw the Director's decision and 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 from the U.S. Department of Labor (DOL). *See* section 212(a)(5)(A)(i) of the Act, 8 U.S.C. § 1182(a)(5)(A)(i). 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)(i)(I)-(II) 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 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 the Department of Homeland Secuity] may, at any time, for what he deems to be good and sufficient cause, revoke the

approval of any petition approved by him under section 204 [Procedure for Granting Immigrant Status]." A director's realization that a petition was erroneously approved may constitute good and sufficient cause for revocation if supported by the record. *Matter of Ho*, 19 I&N Dec. 582, 590 (BIA 1988).

The regulation at 8 C.F.R. § 205.2(a) provides that "[any USCIS] officer authorized to approve a petition under section 204 of the Act may revoke the approval of that petition upon notice to the petitioner ... when the necessity for the revocation comes to the attention of [USCIS]." Revocation of the approval of a petition under 8 C.F.R. § 205.2(a) may only be made with notice of intent to revoke the approval (NOIR) to the petitioner and the petitioner must be given the opportunity to respond and offer rebuttal evidence. 8 C.F.R. § 205.2(b).

II. ANALYSIS

The instant petition was filed and initially approved in 2006. In March 2019, however, the Director issued a notice of intent to revoke (NOIR), stating that it had come to the attention of USCIS that there was a familial relationship (brothers-in-law) between the Beneficiary and the Petitioner's owner which was not revealed on the labor certification that accompanied the petition. The Director pointed out that the Petitioner incorrectly answered "No" to the question at section C.9 on the labor certification which asked whether the employer is a closely held corporation, partnership, or sole proprietorship in which the Beneficiary has an ownership interest, or whether there is a familial relationship between the owners, stockholders, partners, corporate officers, incorporators, and the Beneficiary. The Director requested the Petitioner to submit a statement explaining the discrepancy. The Director also requested that documentary evidence be submitted, including the Petitioner's recruitment-related materials, to establish that the specialty chef position was and is a *bona fide* job opportunity open to all U.S. workers.

The Petitioner responded to the NOIR with an affidavit from its owner stating that he answered "No" to the question at C.9 of the labor certification "without carefully reading and understanding" it, acknowledging that he and the Beneficiary are brothers-in-law, but maintaining that the specialty chef position "continues to be a *bona fide* job opportunity" for which the Beneficiary's services are needed. The Petitioner also submitted documentation of its recruitment efforts for the specialty chef position in August and September 2005. According to the Petitioner, there were no applicants for the job.

After receiving the Petitioner's response to the NOIR the Director revoked the previous approval of the petition. The Director noted the Petitioner's acknowledgement that the question at C.9 on the labor certification was answered incorrectly because there was a brother-in-law relationship between the Petitioner's owner and the Beneficiary. The Director then discussed the decision in *Matter of Silver Dragon Chinese Restaurant,* 19 I&N Dec. 401 (Comm'r 1986), in which the legacy Immigration and Naturalization Service indicated that while it was not automatically disqualifying for a beneficiary to have an interest in a petitioning business, if that relationship was not revealed in the labor certification proceedings the certifying officer might fail to adequately examine whether

the job at issue was clearly open to qualified U.S. workers and whether rejections were based on lawful job-related grounds. The Director cited the regulation at 20 C.F.R. § 656.30(d) which provides that USCIS, the Department of State, or a court may invalidate a labor certification upon a determination of fraud, or willful misrepresentation of a material fact involving the application for labor certification. However, the Director did not make a determination that the Petitioner in this case committed fraud or willfully misrepresented a material fact in its labor certification application, and did not invalidate the labor certification. Instead, the Director determined that due to the familial relationship "it is more likely than not that the [specialty chef] position was not open to any U.S. worker and . . . was not a bona fide job opportunity." Citing section 205 of the Act and *Matter of Ho*, the Director concluded that there was "good and sufficient cause" in the record to revoke the petition's approval.

On appeal the Petitioner asserts that the Director misapplied *Matter of Silver Dragon* because that case involved a petitioner that willfully misrepresented an existing business relationship with the beneficiary which was material to the issue of whether there was a *bona fide* job opportunity for U.S. workers, whereas in this case the Petitioner claims that its erroneous answer to question C.9 on the labor certification was inadvertent and immaterial since its online and newspaper advertisements for the specialty chef position did not produce any U.S. applicants. The Petitioner resubmits copies of the recruitment materials initially submitted in response to the NOIR, as well as a copy of the job advertisement it posted in the restaurant itself during August and September 2005.

We will remand so that the Director can address the following points. The revocation decision does not discuss most of the evidence submitted by the Petitioner in response to the NOIR, in particular the recruitment materials that were specifically requested. These materials are relevant to the question of whether there was a *bona fide* job opportunity open to U.S. workers. As a result of this oversight the revocation decision does not adequately explain how the record supports a determination that the specialty chef position was more than likely not a *bona fide* job opportunity open to U.S. workers.[1] Furthermore, the decision makes no finding as to whether fraud or willful misrepresentation of a material fact was committed by the Petitioner in its labor certification application, specifically with respect to the question at C.9 and the non-disclosure of a familial

[1] The petitioner has the burden of establishing that a *bona fide* job opportunity exists when it is asked to show that the job is clearly open to U.S. workers. *See Matter of Amger Corp.*, 87-INA-545 (BALCA 1987); *see also* 8 U.S.C. § 1361; 20 C.F.R. § 656.17(l). The factors to be examined in determining whether a *bona fide* job offer exists are set forth in a decision by the Board of Alien Labor Certification Appeals in *Matter of Modular Container Systems, Inc.* 89-INA-288 (BALCA 1991). Those factors include such items as whether the beneficiary (a) is in the position to control or influence hiring decisions regarding the job for which labor certification is sought; (b) is related to the corporate directors, officers, or employees; (c) was an incorporator or founder of the company; (d) has an ownership interest in the company; (e) is involved in the management of the company; (f) is on the board of directors; (g) is one of a small number of employees; (h) has qualifications for the job that are identical to specialized or unusual job duties and requirements stated in the application; and (i) is so inseparable from the sponsoring employer because of his or her persuasive presence and personal attributes that the employer would be unlikely to continue in operation without the beneficiary.

relationship between the Petitioner and the Beneficiary.[2] A finding of fraud or willful misrepresentation of a material fact would be a ground for invalidating the labor certification under 20 C.F.R. § 656.30(d). In sum, the Director has not adequately explained how the evidence in the record, or the lack thereof, supports his finding of "good and sufficient cause" to revoke the petition's approval.

For the reasons discussed above, we will remand this case to the Director for further consideration and the issuance of 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.

Cite as *Matter of U-C- Inc.,* ID# 6821061 (AAO Jan. 10, 2020)

[2] A finding of fraud requires a determination that the alien or the 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). 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).