U.S. Citizenship and Immigration Services

Non-Precedent Decision of the Administrative Appeals Office

In Re: 06548639

DATE: JAN. 22, 2020

Appeal of Texas Service Center Decision

Form I-140, Immigrant Petition for a Skilled Worker

The Petitioner, a retail business, seeks to employ the Beneficiary as an accountant. 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 positon that requires at least two years of training or experience.

The Director of the Texas Service Center initially approved the petition, but subsequently revoked the approval. In his revocation decision the Director found that the question at section C.9 of the ETA Form 9089 (labor certification application) was not answered correctly, and as a result the Petitioner did not establish that a *bona fide* job offer existed at the time the petition was filed or at the time of the decision. The Director also found that the Petitioner and the Beneficiary willfully misrepresented a material fact on the ETA Form 9089 in their response to the question at section C.9, and invalidated the labor certification.

On appeal the Petitioner discusses the definition of "relative" and asserts that neither the Petitioner nor the Beneficiary willfully misrepresented a material fact on the ETA Form 9089 with regard to a familial relationship. The Petitioner requests that we reverse the Director's decision.

Upon *de novo* review of the record, including the materials submitted on appeal, we will withdraw the Director's revocation decision, reinstate the validity of the labor certification, and remand the case for further consideration of whether the Beneficiary has the requisite experience to meet the requirements of the labor certification and qualify for classification as a skilled worker.

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)(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 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).

The regulation at 20 C.F.R. § 656.30(d) provides, in pertinent part, that "after issuance, a labor certification is subject to invalidation by the DHS [Department of Homeland Security] . . . . upon a determination, made in accordance with [its] procedures or by a court, of fraud or willful misrepresentation of a material fact involving the labor certification application." A petition that lacks a requisite labor certification is not considered properly filed. *See* 8 C.F.R. § 204.5(a)(2). Thus, a petition whose underlying labor certification has been invalidated is not approvable.

II. ANALYSIS

A. Willful Misrepresentation of a Material Fact and *Bona Fides* of the Job Offer

At issue is whether the Petitioner and the Beneficiary willfully misrepresented a fact on the labor certification in their answer to the question at section C.9, and if so whether the misrepresentation was material to the question of whether the accountant position was a *bona fide* job opportunity open to all qualified applicants at the time it was advertised by the Petitioner and throughout the labor certification process.

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).

Based on the entire record in this matter, we conclude that neither the Petitioner nor the Beneficiary met all three elements of misrepresentation, willfulness, and materiality described above. Accordingly, we will withdraw the Director's finding that they both willfully misrepresented a material fact on the labor certification, as well as the concomitant finding that there was, and is, no *bona fide* job offer. We will also reinstate the validity of the labor certification, which eliminates that ground for revoking the petition's approval.

B. Beneficiary's Experience

Though not addressed by the Director in the revocation proceedings, there is an issue with regard to the Beneficiary's experience which must be addressed. To qualify for classification as a skilled worker a beneficiary must have at least two years of training or experience. 8 C.F.R. § 204.5(l)(3)(ii)(B). A beneficiary must also meet the specific educational, training, experience, or other requirements of the labor certification. *Id.* All requirements must be met by the petition's priority date,[1] which in this case is August 14, 2014. *See Matter of Wing's Tea House*, 16 I&N Dec. 158, 159 (Acting Reg'l Comm'r 1977).

The labor certification in this case states that the minimum experience required for the proffered position of accountant is 36 months in the job offered and that the Beneficiary met this requirement by working as a junior accountant for [redacted] a tax firm in [redacted] India, from June 1, 2005, to June 30, 2008. A letter from the subject tax firm, verifying the Beneficiary's employment, was submitted with the petition. We note, however, that on a Form G-325A, Biographic Information, which accompanied the Beneficiary's application for adjustment of status (Form I-485) in May 2012, the Beneficiary did not list any employment with [redacted] in a section which requested the applicant to list his employment in the last five years. A job in India that ended in June 2008 should have been listed on the Form-G-325A since the five-year period of requested employment information stretched back to May 2007.

It is incumbent upon a petitioner to resolve any inconsistencies in the record by independent objective evidence. Attempts to explain or reconcile such inconsistencies will not suffice without competent evidence pointing to where the truth lies. *See Matter of Ho*, 19 I&N Dec. 582, 591-92 (BIA 1988). Doubt cast on any aspect of the petitioner's evidence also reflects on the reliability of the petitioner's remaining evidence. *See id.*

Therefore, we will remand this case to the Director for further consideration of whether the Beneficiary has the requisite experience to meet the statutory and labor certification requirements for skilled worker classification.

ORDER: The Director's decision to revoke the petition's approval and to invalidate the labor certification is withdrawn.

FURTHER ORDER: The matter is remanded for further consideration of the Beneficiary's experience and whether it meets the requirements of the Act and of the labor certification to qualify the Beneficiary for skilled worker classification.

[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).