U.S. Citizenship and Immigration Services

Non-Precedent Decision of the Administrative Appeals Office

In Re: 27405778

Date: JAN. 24, 2024

Appeal of Texas Service Center Decision

Form I-140, Immigrant Petition for Alien Workers (Advanced Degree)

The Petitioner, a restaurant, seeks to employ the Beneficiary as an accountant. It requests classification of the Beneficiary as a member of the professions holding an advanced degree under the second preference immigrant classification. See Immigration and Nationality Act (the Act) section 203(b)(2), 8 U.S.C. § 1153(b)(2). This employment-based immigrant classification allows a U.S. employer to sponsor a professional with an advanced degree for lawful permanent resident status.

The Director of the Texas Service Center revoked the approval of the petition, concluding that the Petitioner had willfully misrepresented a material fact. The matter is now before us on appeal. 8 C.F.R. § 103.3.

The Petitioner bears the burden of proof to demonstrate eligibility by a preponderance of the evidence. *Matter of Chawathe*, 25 I&N Dec. 369, 375-76 (AAO 2010). We review the questions in this matter de novo. *Matter of Christo's, Inc.*, 26 I&N Dec. 537, 537 n.2 (AAO 2015). Upon de novo review, we will withdraw the Director's decision and remand the matter for entry of a new decision consistent with the following analysis.

I. LAW

Immigration as an advanced degree professional usually follows a three-step process. First, the prospective employer must obtain a labor certification approval from the U.S. Department of Labor (DOL) to demonstrate that there are not sufficient U.S. workers who are able, willing, qualified, and available for the offered position. Section 212(a)(5) of the Act, 8 U.S.C. § 1182(a)(5).

Second, the employer must submit the approved labor certification with an immigrant visa petition to U.S. Citizenship and Immigration Services (USCIS). Section 204 of the Act, 8 U.S.C. § 1154. The immigrant visa petition must establish that the foreign worker qualifies for the offered position, that the foreign worker and the offered position are eligible for the requested immigrant visa category, and that the employer has the ability to pay the proffered wage. *See* 8 C.F.R. § 204.5. These requirements must be satisfied by the priority date of the immigrant visa petition. *See* 8 C.F.R. § 204.5(g)(2); *Matter of Wing's Tea House*, 16 I&N Dec. 158, 159 (Act. Reg'l Comm'r 1977). For petitions that require a

labor certification, the priority date is the date on which the DOL accepted the labor certification application for processing. 8 C.F.R. § 204.5(d).

Finally, if USCIS approves the immigrant visa petition, the foreign worker may apply for an immigrant visa abroad or, if eligible, for adjustment of status in the United States. Section 245 of the Act, 8 U.S.C. § 1255.

The Secretary of Homeland Security "may, at any time, for what he deems to be good and sufficient cause, revoke the approval of any petition .... " Section 205 of the Act, 8 U.S.C. § 1155. By regulation this revocation authority is delegated to any U.S. Citizenship and Immigration Services (USCIS) officer who is authorized to approve an immigrant visa petition. 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 (NOR). See 8 C.F.R. § 205.2(b) and (c). The Board of Immigration Appeals (the Board) has discussed revocations on notice as follows:

> [A] notice of intention to revoke a visa petition is properly issued for "good and sufficient cause" where the evidence of record at the time the notice is issued, if unexplained and unrebutted, would warrant a denial of the visa petition based upon the petitioner's failure to meet his burden of proof. The decision to revoke will be sustained where the evidence of record at the time the decision is rendered, including any evidence or explanation submitted by the petitioner in rebuttal to the notice of intention to revoke, would warrant such denial.[1]

USCIS will deny a visa petition if the petitioner submits evidence which contains false information. *See* section 204(b) of the Act. A petition includes its supporting evidence - including a labor certification. 8 C.F.R. § 103.2(b)(1). Further, misrepresentation of a material fact may lead to multiple consequences in immigration proceedings. Any noncitizen who, by fraud or willfully misrepresenting a material fact, seeks to procure (or has sought to procure or has procured) a visa, other documentation, or admission into the United States or other benefit provided under this Act is inadmissible. Section 212(a)(6)(C)(i) of the Act, 8 U.S.C. § 1182(a)(6)(C)(i).

A finding of material misrepresentation requires the following elements: the petitioner procured or sought to procure a benefit under U.S. immigration laws; they made a false representation; and the false representation was willfully made, material to the benefit sought, and made to a U.S. government official. *Id.*; *see generally* 8 *USCIS Policy Manual* J.2(B), https://www.uscis.gov/policymanual. Under Board precedent, a material misrepresentation is one which "tends to shut off a line of inquiry which is relevant to the [noncitizen's] eligibility and which might well have resulted in a proper determination that he be excluded."[2] A willful misrepresentation requires that the individual knowingly make a material misstatement to a government official for the purpose of obtaining an

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[1] *Matter of Ho*, 19 I&N Dec. 582, 590 (BIA 1988) (*citing Matter of Estime*, 19 I&N Dec. 450 (BIA 1987)). Upon the proper issuance of a NOIR for good and sufficient cause, the petitioner bears the burden of proving eligibility for the requested immigration benefit. *Id.* at 589. However, a notice of revocation NOR is not valid unless it is based on evidence contained in the record of proceedings. *Matter of Estime*, 19 I&N Dec. at 451-52.

[2] *Matter of S- and B-C-*, 9 I&N Dec. 436, 447 (BIA 1961).

immigration benefit to which one is not entitled.[3] Material misrepresentation requires only a false statement that is material and willfully made. The term "willfully" means knowing and intentionally, as distinguished from accidentally, inadvertently, or in an honest belief that the facts are otherwise.[4]

II. ANALYSIS

The Director initially approved the petition on August 22, 2012, and the Beneficiary subsequently adjusted his status to a lawful permanent resident. On April 3, 2020, the Director issued a notice of intent to revoke the approval of the petition (NOIR), noting that during the course of the adjudication of the Beneficiary's application for citizenship, United States Citizenship and Immigration Services (USCIS) had received documentation suggesting that "the petitioning company is owned by a family member." The Director stated that this information is material because in Part C.9 of the labor certification associated with the petition, the Petitioner had answered "no" to the following question:

> 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, partners, corporate officers, incorporators, and the alien?

However, we note that the Director did not specify the nature of the familial relationship indicated by the information in the record. After receipt of the Petitioner's response to the NOIR, the Director concluded that the Petitioner had willfully misrepresented a material fact by not disclosing a familial relationship when asked, and accordingly revoked the approval of the petition.

On appeal, the Petitioner contends that it did not willfully misrepresent a material fact by answering "no" to the question in Part C.9 of the labor certification because the relationship between the Petitioner's principal and signatory and the Beneficiary is not included in the scope of the question. It asserts that the Beneficiary's sister is married to the brother of the Petitioner's principal, making him an in-law of the principal's brother. The Petitioner then refers to the United States Department of Labor's (DOL's) frequently asked questions (FAQ), which states the following:

> A familial relationship includes any relationship established by blood, marriage, or adoption, even if distant. For example, cousins of all degrees, aunts, uncles, grandparents and grandchildren are included. It also includes relationships established through marriage, such as in-laws and step-families. The term "marriage" will be interpreted to include same-sex marriages that are valid in the jurisdiction where the marriage was celebrated.

Here, the Director did not show "good and sufficient cause" for revocation of the petition's approval in the NOIR or in the revocation notice. Although DOL uses a broad definition for the term "familial relationship," the Director's statement that the Petitioner is owned by a family member of the Beneficiary is too vague to show that the Petitioner misrepresented a material fact when answering "no" to the question in Part C.9 of the labor certification. While the Petitioner did not submit evidence

[3] *Sergueeva v. Holder*, 324 Fed. Appx. 76 (2d Cir. 2009) (citing *Matter of Kai Hing Hui*, 15 I&N Dec. 288, 289-90 (BIA 1975).
[4] *See Matter of Healy and Goodchild*, 17 I&N Dec. 22, 28 (BIA 1979).

in support of its assertion on appeal regarding the actual familial relationship in this case, and has therefore not resolved this issue, the Director's NOIR was not issued for good and sufficient cause. Accordingly, we will withdraw the Director's decision and remand this matter for the Director to consider the issuance of a new NOIR which sufficiently describes the grounds for revocation.

We note that the Director's revocation also appears to rely in part on whether the familial relationship led to the Beneficiary's undue influence and control over the hiring process, thus invalidating the determination of a bona fide job offer. USCIS, however, lacks authority to determine the bona fides of a job opportunity. Congress authorized DOL - not USCIS - to determine the availability of an offered position to U.S. workers. *See* section 212(a)(5)(A)(i)(I) of the Act. "[D]eterminations vested by statute with one agency are not normally subject to horizontal review by a sister entity, absent congressional authorization to that effect." *Madany v. Smith*, 696 F.2d 1008, 1012 (D.C. Cir. 1983). Thus, DOL - not USCIS - must determine the bona fides of the Petitioner's job opportunity. The Director's findings regarding the bona fides of the job opportunity exceed the scope of these proceedings. If the Petitioner seeks a determination of the offered position's availability to U.S. workers on the true facts, the company must contact DOL. *See Matter of Gen. Elec. Co.*, 2011-PER-01818, *3 (BALCA Apr. 15, 2014) (stating that DOL has discretion to retroactively amend the contents of an approved labor certification application to allow an error's correction) (citation omitted). On remand, the Director should focus on whether the Petitioner willfully misrepresented a material fact, thereby shutting off DOL's line of inquiry into the bona fide nature of the job offer. *See Matter of S-and B-C-,* 9 I&N Dec. 436, 447 (BIA 1961).

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