U.S. Citizenship and Immigration Services

Non-Precedent Decision of the Administrative Appeals Office

MATTER OF A-S-O-A-, INC.

DATE: JULY 9, 2018

MOTION ON ADMINISTRATIVE APPEALS OFFICE DECISION

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

The Petitioner, a provider of adoption services, sought to employ the Beneficiary as a business development specialist. It requested 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 with at least two years of training or experience for lawful permanent resident status.

After first granting the filing, the Director of the Texas Service Center revoked the petition's approval. Finding that the Petitioner willfully concealed the Beneficiary's ownership interest in it, the Director invalidated the accompanying certification from the U.S. Department of Labor (DOL). The Director also concluded that, as of the petition's approval, the Petitioner did not establish: its required ability to pay the proffered wage; the Beneficiary's possession of the minimum experience required for the offered position; or the *bona fides* of the job offer. On appeal, we affirmed the Director's revocation of the petition's approval and invalidation of the labor certification. *See Matter of A-S-O-A-, Inc.*, ID #266990 (AAO Oct. 27, 2017).

The matter is now before us on the Petitioner's motion to reconsider. Contrary to our appellate finding, the Petitioner asserts that its labor certification did not contain a misrepresentation. It also renews its arguments against the other revocation grounds.

Upon review, we will deny the motion to reconsider.

I. MOTION TO RECONSIDER

A motion to reconsider must establish that, based on the record at that time, our prior decision incorrectly applied law or policy. 8 C.F.R. § 103.5(a)(3). A motion to reconsider must be supported by a pertinent precedent or adopted decision, statutory or regulatory provision, or statement of U.S. Citizenship and Immigration Services (USCIS) or Department of Homeland Security policy. We may grant a motion that satisfies these requirements and demonstrates eligibility for the requested immigration benefit.

II. INVALIDATION OF THE LABOR CERTIFICATION

The Petitioner asserts that, contrary to our appellate finding, the accompanying labor certification lacked a misrepresentation. *See* 20 C.F.R. § 656.30(d) (authorizing USCIS to invalidate a certification after its issuance upon a finding of "fraud or willful misrepresentation of a material fact involving the labor certification application"). The Director grounded invalidation on the Petitioner's alleged concealment of the Beneficiary's ownership interest in it. The Petitioner notes that, unlike the DOL's current certification application form, the form the Petitioner filed in 2003 did not inquire about the Beneficiary's relationship to the company. The Petitioner therefore argues that its application did not misrepresent the Beneficiary's ownership interest in it.

Contrary to the Petitioner's argument, however, our appellate decision affirmed invalidation of the labor certification on a different basis than the Director. We agreed that the Petitioner did not misrepresent the Beneficiary's relationship to it. Rather, we found that the Petitioner falsely represented the availability of the offered position to U.S. workers.

By signing the certification application, the Petitioner attested that "[t]he job opportunity has been and is clearly open to any qualified U.S. worker." Part 22(h) of Form ETA 750, Part A; *see also* 20 C.F.R. § 656.20(c)(8) (2004) (requiring employers to so certify).[1] We found several factors indicating that the position was not clearly available to U.S. workers, including: the Beneficiary's ownership interest in the Petitioner; his status as an officer and a director of the corporation; his imputed involvement in its management; and his membership in a small group of employees. *See Matter Modular Container Sys., Inc.*, 89-INA-228, 1991 WL 223955, *8 (BALCA July 16, 1991) (*en banc*) (listing factors that adjudicators must consider in determining the *bona fides* of a job opportunity). The record therefore supports our finding that the Petitioner willfully mispresented the availability of the offered position to U.S. workers.

The Petitioner further contends that USCIS lacks authority to invalidate a labor certification based on the *bona fides* of the job opportunity. The Petitioner argues that USCIS' invalidation authority is limited to circumstances of fraud or willful misrepresentation. The Petitioner states:

> The issue of whether the employer made a good faith effort to test the labor market is a determination that falls within the jurisdiction of the DOL, not the Director. Absent any subsequent action by the DOL, an approved labor certification is dispositive of whether the petitioning employer adequately tested the labor market for qualified and willing U.S. workers.

[1] Because the Petitioner filed its labor certification application before March 28, 2005, prior DOL regulations govern the certification. *See* Final Labor Certification Rule for the Permanent Employment of Foreign Nationals in the United States, 69 Fed. Reg. 77326, 77326 (Dec. 27, 2004) (stating that current regulations apply to applications filed on or after March 28, 2005). We therefore cite to DOL regulations as of 2004.

Pet's App. Brf. (citing *USCIS Adjudicator's Field Manual*, Ch. 22.2(b)(3)(E), https://www.uscis.gov/sites/default/ files/ocomm/ilink/0-0-0-6423.html (stating that "[a]n approved labor certification means that the petitioning employer made a good faith effort to test the labor market and demonstrated to DOL that there were no qualified, able, and available U.S. workers for the position")).

We agree that invalidation of a labor certification requires a finding of fraud or willful misrepresentation. But the DOL's delegation of invalidation powers to USCIS does not include further limitations. Rather, the DOL regulation broadly authorizes USCIS to invalidate a certification after finding fraud or willful misrepresentation "involving the labor certification application." 20 C.F.R. § 656.30(d); *see also Castaneda-Gonzalez v. INS*, 564 F.2d 417, 430 (D.C. Cir. 1977) (finding that the regulation "unambiguously delegate[s] the power to invalidate a labor certificate to the Service but limit[s] that power to cases of fraud or willful misrepresentation of a material fact"). We therefore find that USCIS had authority to invalidate the certification based on a fraudulent or willful misrepresentation involving availability of the position to U.S. workers.

We also acknowledge that the *Adjudicator's Field Manual* describes a labor certification as reflecting an employer's good-faith effort to test the labor market. The manual, however, does not bar USCIS from invalidating a certification upon finding that an employer fraudulently or willfully misrepresented the availability of a position to U.S. workers. *See USCIS Adjudicator's Field Manual*, Ch. 22.2(b)(11)(A), https://www.uscis.gov/ sites/default/files/ocomm/ilink/0-0-0-6423.html (stating that USCIS "may invalidate a labor certification if fraud or willful misrepresentation is discovered"). Our finding therefore is consistent with the manual.

The Petitioner attempts to distinguish the facts in its case from those in *Matter of Silver Dragon Chinese Restaurant*, 19 I&N Dec. 401 (Comm'r 1986), which affirmed invalidation of a labor certification. The Petitioner notes that, in *Silver Dragon*, the employer's certification falsely represented its president as the foreign national's supervisor in the offered position when, in fact, the foreign national was the company's president. *Matter of Silver Dragon*, 19 I&N Dec. at 404. Here, the Petitioner asserts that it "made no such misrepresentation." The Petitioner also notes that it provided the DOL with a copy of its articles of incorporation, which identified the Beneficiary as its sole corporate director.

Unlike the employer in *Silver Dragon*, the Petitioner did not knowingly misrepresent the Beneficiary's company role on the labor certification.[2] As previously discussed, however, the record indicates the Petitioner's knowing misrepresentation of the *bona fides* of the job opportunity on the certification. In both cases, the labor certifications contained willful misrepresentations of material facts. Further factual differences are immaterial.

[2] On the labor certification, the Petitioner stated that its "director" would supervise the Beneficiary in the offered position. Although the Beneficiary was a corporate director of the company, the Petitioner established that the supervisor on the labor certification referred to its operational director.

As discussed in our appellate decision, the Petitioner submitted a copy of its articles of incorporation to the DOL during the labor certification proceedings as proof of the company's existence. Referring to the Beneficiary by a nickname, one of the articles' pages identifies him as the corporation's sole director. The articles, however, do not identify the Beneficiary as an owner of the company. Also, in its cover letter to the DOL, the Petitioner did not state the Beneficiary's connections to the company or otherwise highlight his name in the articles. The record therefore does not establish the Petitioner's attempt to notify the DOL of the Beneficiary's relationship to the company or the agency's awareness of the relationship. We therefore find that the Petitioner's submission of the articles of incorporation to the DOL does not cure its willful misrepresentation on the labor certification.

For the foregoing reasons, the Petitioner has not established that USCIS erroneously invalidated the labor certification. We will therefore reaffirm the revocation of the petition's approval based on the labor certification's invalidation.

III. THE MINIMUM EXPERIENCE FOR THE OFFERED POSITION

The Petitioner also asserts that we disregarded evidence of the Beneficiary's requisite two years of experience in the job offered. *See Matter of Wing's Tea House*, 16 I&N Dec. 158, 160 (Acting Reg'l Comm'r 1977) (holding that a petitioner must establish a beneficiary's possession, by a petition's priority date, of all DOL-certified job requirements).

The Petitioner acknowledges discrepancies in the Beneficiary's claimed, qualifying experience. On the labor certification, for example, the Beneficiary attested that he started working full-time for a U.S. company that he owned in August 2000, while a company letter indicates that he began in October 1999. The Petitioner notes, however, that USCIS' own investigation indicated that the company formed in October 1999, suggesting that the Beneficiary started in that month. The Petitioner also notes that it submitted another letter from a former company official detailing the Beneficiary's duties and copies of his income tax returns from 1999 to 2003, indicating his employment by the company.

The record, however, lacks reliable evidence that the signatory of the other letter worked for the company. The Petitioner provided a copy of a purported photograph of her at work. But, without authentication of the date, place, and subject of the photo, the record does not reliably establish the company's employment of the signatory during the required period. Also, most of the copies of the Beneficiary's tax returns indicate that the company employed him.[3] But the returns list the Beneficiary's occupation as "investor," suggesting that he did not work in the offered position full-time from 1999 to 2003. *See Matter of Ho*, 19 I&N Dec. 582, 591 (BIA 1988) (requiring a petitioner to resolve inconsistencies of record by independent, objective evidence pointing to where the truth lies).

[3] The Beneficiary's tax returns for 2002 and 2003 do not indicate who paid his wages.

For the foregoing reasons, the record as of approval did not establish the Beneficiary's possession, by the petition's priority date, of at least two years of full-time experience in the job offered. We will therefore reaffirm the revocation of the petition's approval on this ground.

IV. ABILITY TO PAY THE PROFFERED WAGE

The Petitioner further asserts that we disregarded evidence of its ability to pay the proffered wage. *See* 8 C.F.R. § 204.5(g)(2) (requiring a petitioner to demonstrate its continuing ability to pay a proffered wage from a petition's priority date until a beneficiary obtains lawful permanent residence). The Petitioner notes that it provided copies of its federal income tax returns for 2003 and 2004, which it asserts demonstrate its ability to pay in those years.

In these petition revocation proceedings, however, the Petitioner must demonstrate its ability to pay from the petition's priority date of March 1, 2003, until its approval on February 2, 2007. *See Matter of Estime*, 19 I&N Dec. 450, 451 (BIA 1987) (stating that revocation of a petition's approval is proper if the record "would have warranted a denial"). Although the Petitioner submitted copies of its tax returns for 2003 and 2004, it did not submit required evidence of its ability to pay in 2005 and 2006. *See* 8 C.F.R. § 204.5(g)(2) (stating that evidence of ability to pay "shall be either in the form of copies of annual reports, federal tax returns, or audited financial statements"). The record therefore does not establish the Petitioner's continuing ability to pay during the required period.

Also, the Petitioner's tax returns are unreliable. Line 27 of its IRS Form 1120, U.S. Corporation Income Tax Return, for 2004 states total deductions of $137,977. The individual deductions on lines 13 through 26, however, total $272,618. Because the amount of total deductions is incorrect, the amount of net income on line 28 may also be incorrect. The record does not explain whether the Petitioner miscalculated its total deductions or omitted some of them from the form. *See Matter of Ho*, I&N Dec. 591 (requiring a petitioner to resolve inconsistencies of record).

In addition, the Petitioner signed its 2003 and 2004 tax returns in November 2005. A corporation's tax returns are generally due on April 15 of the following year, or, upon request for an automatic six-month extension of time, on October 15 of the following year. *See* Internal Revenue Serv., Instructions to Form 1120, https://www.irs.gov/pub/irs-pdf/i1120.pdf; Instructions to Form 7004, https://www.irs.gov/pub/irs-pdf/i7004.pdf. Contrary to the Director's request in the notice of intent to revoke, the Petitioner did not explain the untimely filings of its tax returns. The unexplained dates cast doubt on the returns' authenticity and accuracy. *See Matter of Ho*, 19 I&N Dec. at 591 (stating that doubt cast on any portion of a petitioner's proof may lead to a reevaluation of the sufficiency and reliability of the remaining evidence of record).

For the foregoing reasons, the record as of the petition's approval did not establish the Petitioner's continuing ability to pay the proffered wage from the petition's priority date. We will therefore reaffirm the revocation of the petition's approval on this ground.

V. CONCLUSION

The Petitioner's motion does not establish our incorrect application of law or policy in affirming the revocation of the approval and invalidation of the labor certification. As such, the Petitioner has not shown proper cause to reconsider our prior decision.[4]

ORDER: The motion to reconsider is denied.

Cite as *Matter of A-S-O-A-, Inc.*, ID# 1183253 (AAO July 9, 2018)

[4] On motion, the Petitioner also challenges a previous finding that the Petitioner did not intend to employ the Beneficiary in the offered position. Because the other grounds of eligibility discussed are dispositive in this case, we need not enter a finding on this issue.