U.S. Citizenship and Immigration Services

Non-Precedent Decision of the Administrative Appeals Office

In Re: 17572154

Date: JUN. 23, 2021

Appeal of Texas Service Center Decision

Form I-129, Petition for L-1A Manager or Executive

The Petitioner, a manufacturer and distributor of refrigerant products, seeks to temporarily employ the Beneficiary as its president under the L-1A nonimmigrant classification for intracompany transferees. Section 101(a)(15)(L) of the Act, 8 U.S.C. § 1101(a)(15)(L). The L-1A classification allows a corporation or other legal entity (including its affiliate or subsidiary) to transfer a qualifying foreign employee to the United States to work temporarily in a managerial or executive capacity.

The Director of the Texas Service Center initially approved the petition, but later revoked the approval on notice, concluding that the Petitioner did not establish that it is doing business in the United States as defined in the regulations. Specifically, the Director determined that the Petitioner was employing individuals who had entered the United States using B1/B2 visas and was therefore not "conducting business as reported in the Form I-129," despite submitting documents which "indicate the U.S. company conducts business." The Petitioner subsequently filed combined motions to reopen and reconsider. The Director dismissed both motions and affirmed the revocation decision. The matter is now before us on appeal.

The burden of proof to establish eligibility for the benefit sought remains with the petitioner in revocation proceedings. Section 291 of the Act, 8 U.S.C. § 1361; *Matter of Cheung*, 12 I&N Dec. 715 (BIA 1968); and *Matter of Estime*, 19 I&N Dec. 450, 452, n.1 (BIA 1987). Upon *de novo* review, we will withdraw the Director's decision to revoke the approval of the petition and remand the matter for further consideration and action.

I. LEGAL FRAMEWORK

A. The L-1A Classification

To establish eligibility for the L-1A nonimmigrant visa classification, a qualifying organization must have employed the beneficiary "in a capacity that is managerial, executive, or involves specialized knowledge," for one continuous year within three years preceding the beneficiary's application for admission into the United States. Section 101(a)(15)(L) of the Act. In addition, the beneficiary must seek to enter the United States temporarily to continue rendering his or her services to the same employer or a subsidiary or affiliate thereof in a managerial or executive capacity. *Id.* The petitioner

must also establish that the beneficiary's prior education, training, and employment qualify him or her to perform the intended services in the United States. 8 C.F.R. § 214.2(l)(3).

In order to meet the definition of "qualifying organization" there must be a United States employer doing business in the United States and a related parent, branch, affiliate or subsidiary doing business in at least one other country. 8 C.F.R. § 214.2(l)(1)(ii)(G). "Doing business" means the regular, systematic, and continuous provision of goods and/or services by a qualifying organization and does not include the mere presence of an agent or office in the United States and abroad. 8 C.F.R. § 214.2(l)(1)(ii)(H).

B. Revocation Authority

Under U.S. Citizenship and Immigration Services (USCIS) regulations, the approval of an L-1A petition may be revoked on notice under six specific circumstances. 8 C.F.R. § 214.2(l)(9)(iii)(A). To properly revoke the approval of a petition, a director must issue a notice of intent to revoke that contains a detailed statement of the grounds for the revocation and the time period allowed for rebuttal. 8 C.F.R. § 214.2(l)(9)(iii)(B). If the intended revocation is based in whole or in part on derogatory information that is discovered outside the record of proceedings, USCIS is obligated to provide notice of such information, and to make that derogatory information part of the record along with any rebuttal provided by the Petitioner. 8 C.F.R. § 103.2(b)(16)(i).

II. PROCEDURAL HISTORY

The Petitioner filed this petition to classify the Beneficiary as an L-1A executive in December 2018. The record reflects that the Petitioner is a manufacturer of refrigerant products and accessories such as copper tubing and fittings used in the HVAC industry, and the subsidiary of a Chinese company engaged in the same industry. The Petitioner provided evidence that it was established in 2016 and operates from a 100,000 square foot facility in Alabama that includes offices, a warehouse, and a manufacturing plant. The Petitioner stated on the Form I-129, Petition for a Nonimmigrant Worker, that it had over $15 million in gross annual income and 34 employees at the time of filing in December 2018. The Petitioner's stated location, business activities, staffing levels, and financial status were corroborated by supporting evidence submitted with the petition. As noted, the Director initially approved the petition in February 2019.

On September 20, 2019, the Director issued a NOIR in which he informed the Petitioner that "the only issue to be evaluated is whether [the] U.S. organization is doing business in accordance with the regulations" and cited to the definition of "doing business" at 8 C.F.R. § 214.2(l)(1)(ii)(H). The Director acknowledged that "the petitioner provided documents that indicate the U.S. entity is conducting business" but emphasized that "the petitioner appears to have misrepresented the U.S. entity's staffing levels."

The NOIR describes a USCIS site visit that occurred at the Petitioner's facility in June 2019, noting that the visit was prompted by a complaint filed with USCIS. The Director stated that the complaint alleged that the Petitioner "was employing Chinese Nationals that had entered the United States under a B1/B2 visa; and that the Chinese nationals had misrepresented the purpose of their visits with officers at the point of entry." The NOIR advises that Immigration Officers met with the Petitioner's executive

vice president, toured the facility, and had the executive vice president complete a questionnaire and provide additional employment documents regarding current and former staff. The NOIR further states:

> Upon review of the evidence, officers determined that there were nine Chinese nationals that entered the United States using B1/B2 visas in order to work at the U.S. entity. In addition, officers found several homes the Chinese Nationals would stay in when there were in the United States working at the U.S. entity. USCIS has determined the petitioner may have committed fraud by misrepresenting its business demographics, and by not conducting business as reported in the evidence.

The response to the NOIR included a detailed brief in which the Petitioner argued that the Chinese foreign nationals (all employees of the Petitioner's parent company) were engaged in permissible activities, had disclosed the purpose of their travel to consular officials and/or border officials, and received all remuneration, including salaries and temporary housing, from the foreign entity. The Petitioner's brief included a lengthy discussion of the B1 classification, including the applicable regulations, case law and pertinent information from the Foreign Affairs Manual, in support of its assertion that the foreign nationals' activities were compliant with immigration laws. The Petitioner further asserted that even if there was a lack of strict compliance, such actions were not intentional and did not rise to the level of fraud or misrepresentation as suggested by the Director. Finally, the Petitioner argued that the temporary presence of employees from the foreign entity has "no relevance to the determination of whether the U.S. entity was 'doing business' as required by the statute and regulations."

The Petitioner's response included, among other items, additional evidence of the company's business activities, an affidavit from the Beneficiary, and personal statements from the foreign nationals in question, in which they discussed their employment with the foreign entity and the purpose and details of their stays in the United States in B1/B2 status. These personal statements were accompanied by copies of their Forms DS-160, Nonimmigrant Visa Application, their U.S. arrival and departure records, and evidence intended to document their receipt of salary payments from the Petitioner's parent company during the period in question.

The Director revoked the approval of the petition, once again indicating that "the only issue to be evaluated in this case is whether your U.S. organization is doing business in accordance with the regulations." The revocation decision only briefly discussed the Petitioner's response to the NOIR and acknowledges that "[m]any of the documents indicate the U.S. entity conducts business." The Director further stated:

> USCIS informed the petitioner that "USCIS has determined the petitioner may have committed fraud by misrepresenting its business demographics, and by not conducting business as reported in the evidence." The evidence acknowledges that Chinese national[s] entered the U.S. in order to work at the U.S. entity. Even though the petitioner claims the [C]hinese nationals were not paid by the U.S. entity, the petitioner did not provide sufficient corroborating evidence to support the claim. For example, the petitioner provided a spreadsheet that lists the name, date, salary, etc. for the reported Chinese nationals. However, the document is not an official document, such

> as a tax document. You have not established that the foreign entity was conducting busines as reported on the Form I-129; and the statement of facts contained in the petition was not true and correct.

The Director concluded that "it does not appear your U.S. organization is doing business in accordance with the regulations." The Director dismissed the Petitioner's subsequent combined motion to reopen and motion to reconsider determining that it did not meet the regulatory requirements for either type of motion at 8 C.F.R. § 103.5(a)(2) and (3).

III. WITHDRAWAL OF DIRECTOR'S DECISION

The primary issue before us on appeal is whether the Director properly revoked the approval of the petition based on a determination that the Petitioner is not doing business in the United States.

On appeal, the Petitioner maintains that the Director failed to address evidence in the record establishing that it is doing business in accordance with the definition at 8 C.F.R. § 214.2(l)(1)(2)(H). The Petitioner again emphasizes that any concerns the Director may have regarding compliance with immigration laws governing B1 nonimmigrant business visitors "have no relevance to the determination of whether the U.S. entity was 'doing business' as required by the statute and regulations."

We observe that in both the NOIR and the notice of revocation, the Director acknowledged that the record includes documentation "indicating the U.S. entity is conducting business." The Director did not express any doubts that the Petitioner operates the stated type of business at the location identified on the petition or indicate that the site visit revealed that the company was not engaged in the regular, systematic and continuous provision of goods and/or services of the type described in the record. While the Director has expressed concerns with the Petitioner's reported staffing levels, which we will discuss below, his determination that the company's activities do not meet the definition of "doing business" is not supported by the record. Because the Director indicated that the revocation decision was based solely on a determination that the Petitioner's activities do not meet the definition of "doing business," the decision is withdrawn.

IV. BASIS FOR REMAND

Although the Director identified the "doing business" requirement as the "sole issue" to be addressed in this matter, the revocation decision includes determinations that "the statement of facts contained in the petition was not true and correct," that "the petitioner may have committed fraud by misrepresenting its business demographics," and that the Petitioner did not establish that "the foreign entity was conducting business as reported on the Form I-129."

With these statements, the Director raised serious and relevant concerns that require further explanation and further development in the record of proceedings. However, the Director made the statements with little to no discussion of how the record supports these conclusions. We note that an officer must fully explain the reasons for denying a visa petition in order to allow the Petitioner a fair opportunity to contest the decision and to allow us an opportunity for meaningful appellate review. *See* 8 C.F.R. § 103.3(a)(1)(i); see also *Matter of M-P-*, 20 I&N Dec. 786 (BIA 1994) (finding that a

decision must fully explain the reasons for denying a motion to allow the respondent a meaningful opportunity to challenge the determination on appeal).

As we cannot sustain the appeal with these issues unresolved, we will remand the matter to the Director for further consideration, issuance of a new NOIR, and, if warranted, a new revocation decision.

A director's determination that "the statement of facts contained in the petition was not true and correct," may form the basis for revoking an approved L-1 petition on notice. *See* 8 C.F.R. § 214.2(l)(9)(iii)(A)(*4*). Here, however, the Director did not adequately inform the Petitioner what specific facts have been determined to be "not true and correct." It appears that the Director may be referring to the number of employees stated on the Form I-129, as the NOIR states that the Petitioner "appears to have misrepresented the U.S. entity's staffing levels." The Director ultimately determined that there was insufficient evidence to support the Petitioner's claim that its parent company remunerated all Chinese company staff who have come to the United States on a B1/B2 visa.

The Petitioner stated on the Form I-129 that it had 34 employees as of December 2018. Its initial evidence included a copy of its most recent IRS Form 941, Employer's Quarterly Federal Tax Return, showing it reported 31 employees in September 2018. It also provided recent payroll records and an employee list that identified 34 employees by name and job title.

In response to the NOIR, the Petitioner acknowledged that employees from its Chinese parent company have entered on B1/B2 visas to perform activities that the Petitioner believes to be permissible for business visitors. The Petitioner maintained that such foreign employees have always remained on the parent company's payroll. It included the foreign entity's internal payroll records with the NOIR response. In the revocation decision, the Director determined that the Petitioner, in its response to the NOIR, "acknowledges that Chinese national[s] entered the U.S. in order to work at the U.S. entity," but did not address the Petitioner's arguments that the activities of those individuals were permitted under the applicable law. Rather, the Director focused on a lack of "official" documentation demonstrating that the Chinese nationals were paid by the foreign entity rather than the U.S. entity. The Director followed this analysis with a conclusion that "the statement of facts contained in the petition was not true and correct" without further elaborating.

On remand, the Director shall review the record and issue a new NOIR clearly informing the Petitioner which facts contained in the petition have been determined to be "not true and correct," and the reasons such a determination has been made. There are legal arguments and evidentiary exhibits in the record that were not adequately considered in the revocation decision, including much of the brief and evidence submitted in response to the NOIR, and the additional evidence that the Petitioner submitted in support of its motion to reopen. Specifically, the Petitioner's motion included translated Chinese tax documentation intended to demonstrate that its parent company paid all Chinese company employees who spent time in the United States in B1/B2 nonimmigrant status.[1]

[1] The Director declined to consider this evidence and dismissed the motion to reopen based on a finding that such evidence was not "new" since it could have been submitted previously. The regulation governing motions to reopen at 8 C.F.R. § 103.5(a)(2) does not define what constitutes a "new" fact and we do not require the evidence of a "new fact" to have been previously unavailable or undiscoverable. Instead, we interpret "new facts" to mean facts that are relevant to the issue(s) raised on motion and that have not been previously submitted in the proceeding, which includes the original petition.

In addition, we observe that the evidence the Petitioner submitted in response to the NOIR introduced possible inconsistencies into the record regarding its 2018 staffing levels which were not addressed by the Director and which will require further explanation. According to the Petitioner's quarterly federal tax returns, it paid a sum of $772,673 in salaries and wages in 2018. However, the record reflects that the Petitioner reported paying only $323,473 in salaries and wages on its 2018 corporate federal tax return, a difference of nearly $450,000 that has not been explained. In addition, according to the Petitioner's IRS Form 941 for the fourth quarter of 2018, it reported 53 employees as of December 2018, significantly more than the 34 employees reported on the Form I-129 filed during that same month. The Petitioner should be given an opportunity to address these issues on remand.

The Director also expressed concerns about the possibility of both fraud and misrepresentation in the NOIR, noting that "USCIS has determined the petitioner may have committed fraud by misrepresenting its business demographics."[2] The Director repeated this statement in the revocation decision but did not specifically articulate whether it was his intent to enter a formal finding of fraud or willful misrepresentation of a material fact. Further, the revocation decision did not address the Petitioner's argument that the facts presented here, including any potential noncompliance with B1/B2 regulations, did not amount to fraud or misrepresentation. On remand, the Director should fully articulate these issues in a new NOIR and provide the Petitioner an opportunity to respond.

Finally, we observe that the revocation decision includes a statement that the Petitioner did not establish that "the foreign entity was conducting business as reported on the Form I-129." The Director did not further elaborate, nor did he raise the issue of the foreign entity's business activities in the NOIR. We observe that this statement may have been inadvertently made. However, if it was the Director's intention to articulate a determination that the foreign entity is not conducting business, the Director should inform the Petitioner of any deficiencies in the record (and, if applicable, any derogatory information) regarding the foreign entity's activities in a new NOIR.

V. CONCLUSION

For the reasons discussed, the sole stated basis for revocation was not supported by the evidence of record. However, because the revocation decision addressed other issues that must be resolved, we will remand the matter for further consideration, issuance of a new NOIR, and a new decision.

ORDER: The decision of the Director is withdrawn. The matter is remanded for further proceedings consistent with the foregoing opinion and for the entry of a new decision.

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[2] The terms "fraud" and "misrepresentation" are not interchangeable. A finding of fraud requires a determination that a person 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 willful misrepresentation requires that the individual knowingly make a material misstatement to a government official for the purpose of obtaining an immigration benefit to which one is not entitled. *Sergueeva v. Holder*, 324 Fed. Appx. 76 (2nd Cir. 2009) (citing *Matter of Kai Hing Hui*, 15 I&N Dec. 288, 289-90 (B.I.A. 1975). Material misrepresentation requires only a false statement that is material and willfully made. *See* 9 FAM 40.63 N2; *see also Matter of Tijam*, 22 I&N Dec. 408, 424 (BIA 1998) (en banc) (Rosenberg, concurring).