U.S. Citizenship and Immigration Services

Non-Precedent Decision of the Administrative Appeals Office

MATTER OF U-M-R-I-N- CORP.

DATE: MAR. 1, 2019

APPEAL OF TEXAS SERVICE CENTER DECISION

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

The Petitioner, a healthcare services business, seeks to employ the Beneficiary as a registered nurse. 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 petition was initially approved. The Director of the Texas Service Center subsequently revoked the approval on multiple grounds and stated that the labor certification was invalidated based on a finding of fraud or willful misrepresentation of a material fact.

On appeal, the Petitioner contests all of the grounds for revocation. Upon *de novo* review, we will withdraw some of the Director's findings. However, we conclude that the Petitioner has not overcome all of the bases for the Director's decision to revoke the petition's approval. Accordingly, we will dismiss the appeal.

I. LAW

This petition is for a Schedule A occupation. A Schedule A occupation is one codified at 20 C.F.R. § 656.5(a) for which the Department of Labor (DOL) has determined that there are not sufficient U.S. workers who are able, willing, qualified and available and that the wages and working conditions of similarly employed U.S. workers will not be adversely affected by the employment of aliens in such occupations. The current list of Schedule A occupations includes professional nurses. *Id.* Petitions for Schedule A occupations do not require the petitioner to test the labor market and obtain a certified ETA Form 9089, Application for Permanent Employment Certification (ETA 9089), from the DOL prior to filing the petition with U.S. Citizenship and Immigration Services (USCIS). Instead, the petition is filed directly with USCIS with an uncertified ETA 9089 in duplicate. *See* 8 C.F.R. §§ 204.5(a)(2) and (k)(4); *see also* 20 C.F.R. § 656.15. 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). 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. *See* 8 C.F.R. § 205.2(b) and (c).

II. ANALYSIS

Because the Form I-140, Immigrant Petition for Alien Worker (I-140 petition), is for a Schedule A occupation, the ETA 9089 that accompanied it did not require certification by the DOL. The I-140 petition, accompanied by the uncertified ETA 9089, in September 2011 and approved in November 2012. Following the issuance of a notice of intent to revoke (NOIR) in March 2018, to which the Petitioner did not respond, the Director issued a decision revoking the approval of the petition in June 2018. The Petitioner's appeal is now before us. For the reasons discussed hereinafter, we will withdraw two of the Director's grounds for revocation, but affirm two others as well as the finding of willful misrepresentation of a material fact.

A. No Labor Certification

As one ground for revoking the approval of the I-140 petition, the Director found that it was not accompanied by a certified ETA 9089 once the "labor certification" was invalidated by USCIS. However, the ETA 9089 did not require and did not receive DOL certification since it accompanied an I-140 petition for a Schedule A occupation. Therefore, the Director could not invalidate the ETA 9089, and the I-140 petition's approval could not be revoked for lack of a labor certification due to invalidation. Accordingly, we will withdraw this ground for revocation.

B. Beneficiary's Identity

In his decision the Director also cited inconsistent information provided on the ETA 9089 as grounds for revocation. Specifically, the information provided in the ETA 9089 that identified the Beneficiary's country of birth and citizenship as the Philippines, contradicts other documentation in the record indicating that the Beneficiary was born in South Africa and had a Canadian passport. While the Director found that the Petitioner did not resolve this conflicting evidence, we find that the record as a whole contains ample documentation showing that the Beneficiary was born in South Africa, as claimed by the Petitioner, and that she has held Canadian citizenship during her multiple entries into the United States. We do not find any evidence in the record that the Petitioner or the Beneficiary deliberately attempted to deceive USCIS as to the Beneficiary's country of birth and citizenship. Based on the entire record we conclude that the inconsistent information in the ETA 9089, which is the only document in the record that identifies the Beneficiary's country of birth and citizenship as the Philippines, was an inadvertent error which does not cast doubt on the

Beneficiary's identity. Accordingly, we will withdraw the Director's finding that the incorrect information in the ETA 9089 is a ground for revocation.

C. Petitioner's Ability to Pay the Proffered Wage

In her decision the Director further found that the record did not demonstrate the Petitioner's ability to pay the proffered wage of $70,000. In this revocation proceeding, the Petitioner must establish its ability to pay the proffered wage from the priority date of the petition,[1] in this case September 8, 2011, to the date of the petition's initial approval on November 23, 2012.[2] Required evidence, as stated in the regulation at 8 C.F.R. § 204.5(g)(2), "shall be either in the form of copies of annual reports, federal tax returns, or audited financial statements."

In determining a petitioner's ability to pay the proffered wage, USCIS first examines whether the beneficiary was employed and paid by the petitioner during the period following the priority date. A petitioner's submission of documentary evidence that it employed the beneficiary at a salary equal to or greater than the proffered wage for the time period in question, when accompanied by a form of evidence required in the regulation at 8 C.F.R. § 204.5(g)(2), may be considered proof of the petitioner's ability to pay the proffered wage. In this case, the Petitioner stated in the ETA 9089 that it began employing the Beneficiary as a professional nurse on November 4, 2010. With its initial evidence the Petitioner submitted a copy of the Form W-2, Wage and Tax Statement, it issued to the Beneficiary for 2010, which recorded "wages, tips, other compensation" totaling $11,100 through the end of that year. The Petitioner also submitted copies of two paychecks it issued to the Beneficiary in April 2011, each in the amount of $2,669.75. There is no further evidence in the record of wages paid to the Beneficiary in the rest of 2011 or any of 2012. Therefore, the Petitioner has not established its continuing ability to pay the Beneficiary's proffered wage of $70,000 per year from the priority date of September 8, 2011, to the initial approval date of November 23, 2012.

If a petitioner does not establish that it has paid the beneficiary an amount equal to or above the proffered wage from the priority date onward, USCIS will examine the net income and net current assets figures recorded on the petitioner's federal income tax return(s), annual report(s), or audited financial statements(s). If either of these figures, net income or net current assets, equals or exceeds the proffered wage or the difference between the proffered wage and the amount paid to the beneficiary in a given year, the petitioner would ordinarily be considered able to pay the proffered wage during that year. On appeal, the Petitioner has submitted copies of its federal income tax returns (Forms 1120) for 2011 and 2012, which recorded net current assets of $313,144 in 2011 and $403,848 in 2012. Thus, the Petitioner's net current assets exceeded the Beneficiary's proffered wage in both 2011 and 2012.

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[1] The "priority date" of a petition is ordinarily the date the underlying labor certification application is filed with the DOL. *See* 8 C.F.R. § 204.5(d). Since this petition is for a Schedule A occupation, the ETA 9089 is not certified by the DOL and the priority date is the date that it along with the uncertified ETA 9089 is filed with USCIS.

[2] As noted in *Matter of Estime*, "with respect to a decision to revoke, we ask whether the evidence of record *at the time the decision was issued*... warranted such a denial." 19 I&N Dec. at 452 (emphasis added).

However, when a petitioner has filed other Form I-140 petitions, it must establish that its job offer is realistic not only for the instant beneficiary, but also for the beneficiaries of its other petitions (I-140 beneficiaries). A petitioner's ability to pay the proffered wage is an essential element in evaluating whether a job offer is realistic. *See Matter of Great Wall*, 16 I&N Dec. 142 (Acting Reg'l Comm'r 1977). Accordingly, the Petitioner must demonstrate its ability to pay the combined proffered wages of the instant Beneficiary and every other I-140 beneficiary from this petition's priority date of September 8, 2011, until its initial approval date of November 23, 2012. *See Patel v. Johnson*, 2 F.Supp. 3d 108, 124 (D.Mass. 2014) (upholding our denial of a petition where a petitioner did not demonstrate its ability to pay multiple beneficiaries).[3]

USCIS records indicate that the Petitioner filed other I-140 petitions before and during the time period in question. In the NOIR, the Director requested documentary evidence showing that the Petitioner had the ability to pay the proffered wages of those I-140 petitions filed from 2011 onward. The Petitioner did not respond to the NOIR. Nor has the Petitioner submitted any evidence on appeal relating to its I-140 beneficiaries to whom it owed wages in the years 2011 and 2012. Therefore, the Petitioner has not established its ability to pay its proffered wage obligations to of all its I-140 beneficiaries from the priority date of the instant petition, September 8, 2011, until its initial approval on November 23, 2012.

D. Intent to Employ the Beneficiary in the Offered Position

The Director also revoked the petition's approval finding that the record did not demonstrate the *bona fide* nature of the job offered. In order to be eligible for the classification sought, the Petitioner must demonstrate that it intends to employ the Beneficiary in the position described on the I-140 petition and on the ETA 9089. *See* section 204(a)(1)(F) of the Act, *see also Matter of Izdebska*, 12 I&N Dec. 54, 55 (Reg'l Comm'r 1966).

In this case, the Director concluded that the duties of the proffered position were inconsistent with the location of the employment, which cast doubt on the Petitioner's intent to make a *bona fide* job offer to the Beneficiary of a registered nurse position. Specifically, the Director found that the worksite location identified on four different documents in the record – the I-140 petition, the ETA 9089, the Form ETA 9141, Application for Prevailing Wage Determination (ETA 9141), and the posting notice for the proffered position – is a private home[4] and, as such, would not ordinarily have the facilities and equipment needed for the Beneficiary to perform the duties of a professional nurse, as described in description of the proffered position. The Director noted that the job duties of the

[3] The Petitioner's ability to pay the proffered wage of one of the other I-140 beneficiaries is not considered:

- After the other beneficiary obtains lawful permanent residence;
- If an I-140 petition filed on behalf of the other beneficiary has been withdrawn, revoked, or denied without a pending appeal or motion; or
- Before the priority date of the I-140 petition filed on behalf of the other beneficiary.

[4] The address – [redacted] – is also the Petitioner's business address.

proffered position included "providing general nursing care to patients in hospitals, nursing homes, infirmaries, or other health care facilities" which clearly could not be performed in a residential setting. Yet the Petitioner did not indicate on any of the four documents above, nor elsewhere in the record, that there would be any other worksite location(s) for the Beneficiary to perform the duties of the proffered position. As such, the Director found that the Petitioner did not establish that it would employ the Beneficiary in the offered position.

On appeal the Petitioner has not provided any further evidence or information to refute the Director's findings on this issue. According to the Petitioner, the information provided in the I-140 petition and associated documents regarding the worksite location of the proffered position was the product of inadequate representation by its previous attorney. But the Petitioner has provided no evidence that it has a worksite that is suitable for the Beneficiary to be able to perform the duties of the offered job. The Petitioner did not indicate on the I-140 petition, or the ETA 9089, or the posting notice that there would be any other work location(s), and on the ETA 9141 specifically indicated that there would *not* be multiple work locations. The Petitioner does not identify any additional worksites on appeal, much less submit any evidence of additional locations. Nor does the Petitioner explain how all the duties of the offered registered nurse position, including those involving general nursing care to patients in hospitals, nursing homes, infirmaries, or other health care facilities, could be performed in a private home. Thus, the Petitioner has not resolved the mismatch between the worksite location and the job duties described in the petition. As job location is incompatible with the duties of the offered position, the Petitioner has not demonstrated its intent to employ the Beneficiary in the job offered.

E. Fraud or Willful Misrepresentation of a Material Fact

The Director also made a finding of fraud or willful misrepresentation against the Petitioner regarding its intent to employ the Beneficiary in the offered job. 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). In addition to the three elements of misrepresentation, a finding of fraud also requires a determination that the alien 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).

In this case, the record supports a finding that the Petitioner willfully misrepresented a material fact. The Petitioner attributes "misstatements as to the location of the offered position" in the I-140 petition and accompanying documents to previous counsel, and acknowledges that they are material

to the Petitioner's eligibility for the requested immigration benefit, but asserts that no willful misrepresentation of the job location was made on its part. However, as the Director pointed out, the Petitioner stated on the I-140 petition that the Beneficiary would perform her nursing duties at [redacted] in [redacted] New York, and does not dispute the fact that this is a residential address. The Petitioner's president and CEO signed the I-140 petition beneath a statement reading "I certify, under penalty of perjury under the laws of the United States of America, that this petition and the evidence submitted with it are all true and correct." The signature on the petition by the Petitioner's president and CEO established a strong presumption that he knew its contents and accepted them. *See Matter of A. J. Valdez*, 27 I&N Dec. 496, 502 (BIA 2018).

For the reasons discussed above, we conclude that the Petitioner made false representations to authorized officials of the U.S. government on the I-140 petition, the posting notice regarding the worksite location and the job duties of the proffered position, that the misrepresentations were willfully made by the Petitioner with its signature on the I-140 petition certifying to the truthfulness and correctness of its contents, and that the fact misrepresented was material to the question of whether the Petitioner intended to employ the Beneficiary in the proffered position in accord with the job duties described in the I-140 petition.

III. CONCLUSION

The revocation of the previously approved petition is affirmed for the above stated reasons, with each considered an independent and alternative basis for the decision. 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). The Petitioner has not met that burden.

ORDER: The appeal is dismissed.

Cite as *Matter of U-M-R-I-N- Corp.*, ID# 2288861 (AAO Mar. 1, 2019)