U.S. Citizenship and Immigration Services

Non-Precedent Decision of the Administrative Appeals Office

In Re: 01281752

DATE: MAY 10, 2021

Appeal of Texas Service Center Decision

Form I-140, Immigrant Petition for an Alien Worker

The Petitioner, a private individual, seeks to employ the Beneficiary as a household cook. She requests classification of the Beneficiary as an "other worker" under the third preference immigrant category. Immigration and Nationality Act (the Act) section 203(b)(3)(A)(iii), 8 U.S.C. § 1153(B)(3)(A)(iii). This employment-based "EB-3" immigrant classification allows a U.S. employer to sponsor for permanent resident status a foreign national who is capable of performing unskilled labor that is not temporary or seasonal in nature and requires less than two years of training or experience.

The petition was initially approved. However, the Director of the Texas Service Center subsequently revoked the approval based on findings that the Petitioner submitted an invalid labor certification, that the Beneficiary did not meet the experience requirement of the labor certification, that evidentiary discrepancies regarding the Beneficiary's name and identity were not resolved, and that the Petitioner did not disclose a relationship to the Beneficiary which called into question whether the proffered position was a *bona fide* job opportunity open to U.S. workers. In connection with these determinations the Director also found fraud or willful misrepresentations of material facts by the Petitioner in the labor certification with regard to the Beneficiary's alleged work experience and an undisclosed relationship between the Petitioner and the Beneficiary that called into question whether the proffered position was a *bona fide* job offer open to all qualified applicants.

The Petitioner filed a combined motion to reopen and reconsider, which the Director dismissed. On appeal the Petitioner does not contest the revocation of the petition's approval or the invalidation of the labor certification, but asserts that she did not commit fraud or willfully misrepresent any material facts in the labor certification. Accordingly, the Petitioner requests that the Director's findings of fraud or willful misrepresentation of material facts be withdrawn.

Upon *de novo* review, we will remand this case to the Director for further consideration of whether the Petitioner committed fraud or willfully misrepresented any material facts in the labor certification. Though the appeal is restricted to this single issue, we will also address the other issues discussed by the Director in the revocation decision because they form the basis of the Director's fraud/misrepresentation finding against the Petitioner and must be considered anew on remand to determine whether any such finding is warranted by the evidence.

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) of the Act, 8 U.S.C. § 1182(a)(5). 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 (DHS) 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 . . . 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. PROCEDURAL HISTORY AND ANALYSIS

The record shows that the instant petition was filed in March 2007, accompanied by a labor certification that was filed with and certified by the DOL in February 2007. The petition was approved in November 2007.

In April 2017, nearly ten years after approving the petition, the Director issued a notice of intent to revoke (NOIR) the approval. Following receipt of the Petitioner's response to the NOIR, the Director revoked the petition's approval in June 2017[1] on four grounds: (1) the Petitioner submitted an invalid

[1] In the revocation decision the Director incorrectly stated that the Petitioner's response to the NOIR was not filed by the due date of May 21, 2017. The NOIR was issued on April 18, 2017, and advised the Petitioner that a response was due in 33 days. Since the 33rd day fell on Sunday, May 21st, however, the next business day, Monday, May 22, 2017, was the actual due date. *See* 8 C.F.R. § 1.2. The record includes documentary evidence in the form of a Federal Express tracking label and a confirmation letter from FedEx that the Petitioner's response to the NOIR was received by USCIS on May 22, 2017. Therefore, it was timely filed.
At the outset of the NOIR response the Petitioner requested that she be allowed to withdraw her petition. In the revocation decision the Director indicated that the withdrawal request would not granted because it was received more than 180 days after the approval of the Form I-140 petition, citing 8 C.F.R. § 205.1(a)(3)(C), which states, in pertinent part, that: "A petition that is withdrawn 180 days or more after its approval, or 180 days or more after the associated adjustment of status application has been filed, remains approved unless its approval is revoked on other grounds." The Petitioner did not renew a request for withdrawal in the subsequent motions to reopen and reconsider or on appeal.

labor certification; (2) the Beneficiary did not meet the labor certification's experience requirement; (3) the Petitioner did not submit sufficient evidence to resolve inconsistencies regarding the Beneficiary's name and identity; and (4) the Petitioner did not establish that the proffered position was a *bona fide* job opportunity open to all qualified applicants. The Director also found that the Petitioner committed fraud or willfully misrepresented material facts in connection with the labor certification, but did not distinguish between the two or specify which -- either fraud or willful misrepresentation of material facts – applied in this case.

On appeal, following the Director's dismissal of the Petitioner's combined motions to reopen and reconsider in October 2017, the Petitioner asserts that the Director's revocation decision contains factual inaccuracies and that his findings of fraud or willful misrepresentation of material facts against the Petitioner are ill-founded. The Petitioner claims that any and all inaccuracies in the petition and the labor certification were due to the malpractice of the attorney, [redacted] with whom she allegedly never had an attorney-client relationship[2] and who has since been convicted of immigration fraud,[3] and possible misrepresentations by the Beneficiary of her employment history of which the Petitioner had no prior knowledge. While the Petitioner does not contest the Director's revocation of the petition's approval and the invalidation of the labor certification, we will nonetheless discuss the Director's grounds for these determinations because each must be reviewed on remand to determine whether a finding of fraud or willful misrepresentation of material facts by the Petitioner is warranted by the evidence of record.

A. Grounds for Revocation in Director's Decision

1. Finding that Petitioner Submitted an Invalid Labor Certification

When the Petitioner filed the instant petition in March 2007 it was accompanied by a labor certification that was prepared by the attorney [redacted] filed with the DOL on February 11, 2007 (ETA Case Number [redacted]), certified by the DOL on February 22, 2007, and signed by the Petitioner and the Beneficiary on March 12, 2007. The Petitioner also submitted a letter from the DOL certifying officer to the Petitioner, c/o [redacted] advising of his positive determination on the labor certification application for the Beneficiary's employment as a household cook.

The record indicates that in connection with the Beneficiary's application to adjust status, Form I-485, also prepared by [redacted] and filed in October 2007, another labor certification approval letter from the DOL was submitted to USCIS. That letter was addressed to [redacted], c/o [redacted] and referenced ETA Case Number [redacted] which was purportedly filed on behalf of

[2] Contrary to the Petitioner's contention, the record shows that she did have an attorney-client relationship with [redacted] since the Form I-140 petition she filed in March 2007 was accompanied by a Form G-28, Notice of Entry of Appearance as Attorney or Representative, identifying [redacted] as the attorney for both the Beneficiary and the Petitioner. The Form G-28 was co-signed by [redacted] and the Petitioner, who also wrote the date March 12, 2007. The Form I-140 petition was also co-signed by the Petitioner and [redacted] as "Attorney or Representative."

[3] In [redacted] 2015 [redacted] pleaded guilty in federal district court to conspiring with others to provide fraudulent documentation in support of employment-based immigration petitions. He was sentenced to 27 months in prison, among other penalties. *See* https://www.justice.gov [redacted] (last visited Jan. 26, 2021).

the Beneficiary for the occupation of cake decorator in January 2001 and approved by the DOL in July 2006.

In the revocation decision of June 2017 the Director referenced both of these labor certifications and stated that the DOL had no record of the earlier dated labor certification, ETA Case Number [redacted] The Director concluded that the Petitioner had not established the validity of the labor certification submitted in support of her Form I-140 petition, and that the petition was therefore unreviewable because it did not meet threshold filing requirements which mandate that a petition be accompanied by a valid labor certification, citing 8 C.F.R. § 103.2(b). As previously discussed, however, the record clearly shows that the labor certification submitted in support of the instant petition was ETA Case Number [redacted] While that document was not signed by the preparer, [redacted] it does bear the requisite signatures of the Petitioner and the Beneficiary.

2. Finding that Beneficiary did not Meet Experience Requirement of the Labor Certification

A beneficiary must meet all of the education, training, experience, and other requirements of the labor certification as of the petition's priority date,[4] which in this case was February 11, 2007. The labor certification filed with the instant petition requires two years of experience as a household cook, and asserts that the Beneficiary acquired this experience working for a household in [redacted] Czech Republic, from February 1997 to July 1999. As evidence of this experience the Petitioner submitted a letter from a member of the household, [redacted]

In the revocation decision, however, the Director stated that according to USCIS records the Beneficiary did not mention any employment in the Czech Republic in her application for a B-2 visa to the United States, which was approved and issued in [redacted] in March 1999. Since no evidence was submitted in the current proceeding to resolve this discrepancy between the work history indicated in the labor certification and the lack thereof in the visa application, the Director found that the record did not demonstrate that the Beneficiary had the requisite work experience to qualify for the job offered.

On appeal the Petitioner contends that she is not responsible for any false employment history [redacted] may have claimed for the Beneficiary in the labor certification because she had no reason to doubt the information provided by [redacted] in that document at the time it was submitted to the DOL and USCIS in 2007, nor any reason to doubt the information provided in the employment verification letter received from [redacted] at that time. In addition, the Petitioner states that she was not privy to any conflicting information the Beneficiary may have provided in 1999 on her visa application in [redacted] The Petitioner has submitted two personal affidavits in support of these claims.

3. Finding that Petitioner did not Resolve Discrepancies regarding Beneficiary's Name and Identity

In the revocation decision the Director noted that there were differences in the Beneficiary's name in the various documents of record, and found that these inconsistencies raised questions as to whether

[4] The priority date of an employment-based immigrant petition is the date the underlying labor certification was filed with the DOL. *See* 8 C.F.R. § 204.5(d).

all of the documents referred to the same individual. Most of these discrepancies are explained by marriage documents showing that the Beneficiary has added her husband's family name to her maiden name. The other apparent discrepancy is on an I-94 arrival and departure form filled in by hand, which includes one letter in the Beneficiary's maiden name which the Director read as an "H" rather than an "M" and resulted, according to the Director, in a spelling of [redacted] rather than [redacted]. In our view the subject letter, as written, is not clearly an "H" and could be seen as an "M" consistent with the Beneficiary's maiden name. In sum, we do not share the Director's view that the purported discrepancies raise any serious doubt about the Beneficiary's name and identity.

4. Finding that Proffered Position was not a *Bona Fide* Job Opportunity Open to U.S. Workers

In the revocation decision the Director found that the labor certification was filed for a family member, that there was no evidence the Beneficiary's relationship to the Petitioner was disclosed to the DOL during the labor certification process, that this failure to disclose raised questions about the availability of the job opportunity to U.S. workers, and that the labor certification application would not have been approved if all the facts had been presented to the DOL. The Director stated that these findings warranted the invalidation of the labor certification.

There is no basis in the record for these findings regarding an undisclosed relationship between the Petitioner and the Beneficiary. In Part C, item 9, of the labor certification, the Petitioner answered "No" in response to the following compound 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?" The Director does not identify any business or familial relationship between the Petitioner and the Beneficiary at the time the labor certification was processed in 2007, none was acknowledged by those two individuals, and there is no evidence in the record of any business or familial relationship between the Petitioner and the Beneficiary at that time.

B. Finding of Fraud or Willful Misrepresentation of Material Facts by the Petitioner

As previously indicated, the only issue the Petitioner contests on appeal is the Director's finding that she committed fraud or willfully misrepresented material facts in the labor certification – specifically, with respect to the Beneficiary's work experience and whether the proffered position is, or was, a *bona fide* job opportunity open to U.S. workers.

A finding of fraud 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). 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 the revocation decision the Director did not specify whether he found that the Petitioner committed fraud in the labor certification, or whether the Petitioner willfully misrepresented material facts in the labor certification. The Director did not apply either the fraud elements outlined in *Matter of G-G-* or the willful misrepresentation of a material fact elements outlined in *Matter of M-* and *Matter of Kai Hing* in analyzing the Petitioner's assertions in the labor certification regarding (1) the Beneficiary's qualifying experience and (2) the lack of any business or familial relationship between the Petitioner and the Beneficiary that would undercut the *bona fides* of the proffered position as a job opportunity open to U.S. workers. Thus, the Director's finding(s) of fraud or willful misrepresentation of material facts against the Petitioner are neither specific nor well grounded.

IV. CONCLUSION

In accord with the foregoing analysis, we will withdraw the Director's finding(s) of fraud or willful misrepresentation of material facts by the Petitioner in the labor certification. We will remand this matter to the Director for further consideration and a proper analysis of this issue.

The Director's revocation of the petition's approval and the invalidation of the labor certification, uncontested in the Petitioner's appeal, remain undisturbed.

ORDER: The matter is remanded for further proceedings consistent with the foregoing decision and the entry of a new decision on the issue of whether the evidence of record warrants a finding of fraud or willful misrepresentation of a material fact against the Petitioner in the labor certification.