U.S. Citizenship and Immigration Services

Non-Precedent Decision of the Administrative Appeals Office

In Re: 331601

Date: MAY 22, 2020

Appeal of Texas Service Center Decision

Form I-140, Immigrant Petition for Skilled Worker

The Petitioner seeks to employ the Beneficiary as a head cook. It requests classification of the Beneficiary as a skilled worker under the third preference immigrant classification. Immigration and Nationality Act (the Act) section 203(b)(3)(A)(i), 8 U.S.C. § 1153(b)(3)(A)(i). This employment-based immigrant classification allows a U.S. employer to sponsor a foreign national for lawful permanent resident status to work in a position that requires at least two years of training or experience.

The petition was initially approved. Subsequently, the Director of the Texas Service Center revoked the approval of the petition, concluding that the record did not demonstrate that: (1) the Petitioner had the continuing ability to pay the proffered wage from the priority date onward; (2) the Beneficiary met the experience requirements of the labor certification; and (3) the offered position constituted a *bona fide* job offer. In addition, the Director determined that the Petitioner willfully misrepresented the *bona fides* of the job offer and that the Beneficiary willfully misrepresented her experience on the labor certification. The Director also invalidated the labor certification.

In these proceedings, it is the Petitioner's burden to establish eligibility for the requested benefit. Section 291 of the Act, 8 U.S.C. §1361. Upon *de novo* review, we will dismiss the appeal.

I. THE EMPLOYMENT-BASED IMMIGRATION PROCESS

Employment-based immigration generally follows a three-step process. First, an employer obtains an approved labor certification from the U.S. Department of Labor (DOL).[1] *See* section 212(a)(5)(A)(i) of the Act, 8 U.S.C. § 1182(a)(5)(A)(i). 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 applies 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.

[1] The priority date of a petition is the date the DOL accepted the labor certification for processing, which in this case is July 28, 2008. *See* 8 C.F.R. § 204.5(d).

After granting a petition, USCIS may revoke the petition's approval "at any time" for "good and sufficient cause." Section 205 of the Act, 8 U.S.C. § 1155. If supported by the record, a director's realization that a petition was erroneously approved may justify revocation. *Matter of Ho*, 19 I&N Dec. 582, 590 (BIA 1988).

Good and sufficient cause exists to issue a notice of intent to revoke (NOIR) where the record at the time of the notice's issuance, if unexplained or unrebutted, would have warranted the petition's denial. *Matter of Estime*, 19 I&N Dec. 450, 451 (BIA 1987). Similarly, revocation is proper if the record at the time of the decision, including any explanation or rebuttal evidence provided by a petitioner, warranted a petition's denial. *Id.* at 452.

II. ABILITY TO PAY THE PROFFERED WAGE

The Director concluded that the record did not demonstrate the Petitioner's continuing ability to pay the proffered wage from the petition's priority date in 2008 onward.[2] The proffered wage is $19.29 per hour ($40,123.20 per year).

The regulation at 8 C.F.R. § 204.5(g)(2) states in pertinent part:

> *Ability of prospective employer to pay wage.* Any petition filed by or for an employment-based immigrant which requires an offer of employment must be accompanied by evidence that the prospective United States employer has the ability to pay the proffered wage. The petitioner must demonstrate this ability at the time the priority date is established and continuing until the beneficiary obtains lawful permanent residence. Evidence of this ability 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, we first examine whether it paid a beneficiary the full proffered wage each year from a petition's priority date. If a petitioner did not pay a beneficiary the full proffered wage, we next examine whether it had sufficient annual amounts of net income or net current assets to pay the difference between the proffered wage and the wages paid, if any. If a petitioner's net income or net current assets are insufficient, we may also consider other evidence of its ability to pay the proffered wage.[3]

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[2] The regulation at 8 C.F.R. § 205.2 states:

> (a) *General.* Any [USCIS] officer authorized to approve a petition under section 204 of the Act may revoke the approval of that petition upon notice to the petitioner on any ground other than those specified in § 205.1 when the necessity for the revocation comes to the attention of [the USCIS].

[3] Federal courts have upheld our method of determining a petitioner's ability to pay a proffered wage. *See, e.g., River St. Donuts, LLC v. Napolitano*, 558 F.3d 111, 118 (1st Cir. 2009); *Tongatapu Woodcraft Haw., Ltd. v. Feldman*, 736 F.2d 1305, 1309 (9th Cir. 1984); *Estrada-Hernandez v. Holder*, -- F. Supp. 3d --, 2015 WL 3634497, *5 (S.D. Cal. 2015); *Rizvi v. Dep't of Homeland Sec.*, 37 F. Supp. 3d 870, 883-84 (S.D. Tex. 2014), *aff'd*, 627 Fed. App'x 292, 294-295 (5th Cir. 2015).

The record does not demonstrate that the Petitioner has paid the Beneficiary any wages from the priority date onward. The Petitioner's 2008 federal tax return states net income[4] of $50,690. Therefore, for the year 2008, the Petitioner had sufficient net income to pay the proffered wage. However, the record does not contain regulatory-prescribed evidence of the Petitioner's ability to pay the proffered wage from 2009 onward. *See* 8 C.F.R. § 204.5(g)(2). In his NOIR, the Director asked the Petitioner to provide regulatory-prescribed evidence of its ability to pay the proffered wage for 2009 through 2015. The Petitioner has not submitted its annual reports, federal tax returns, or audited financial statements for 2009 onward. Therefore, the Petitioner has not established its continuing ability to pay the proffered wage, and the Director properly revoked the approval of the petition on this basis.

III. BENEFICIARY'S QUALIFICATIONS

The Director also concluded that the record did not demonstrate that the Beneficiary possessed the experience required by the labor certification as of the priority date. A beneficiary must meet all of the requirements of the offered position set forth on the labor certification by the priority date of the petition. 8 C.F.R. § 103.2(b)(1), (12); *Matter of Wing's Tea House*, 16 I&N Dec. 158, 159 (Acting Reg'l Comm'r 1977). In this case, the labor certification requires two years of experience in the job offered of head cook. The labor certification states that the Beneficiary qualifies for the offered position based on experience as a head cook with [redacted] in Bangladesh from February 15, 1997, to January 14, 2000.

Evidence relating to qualifying experience must be in the form of a letter from a current or former employer and must include the name, address, and title of the writer, and a specific description of the duties performed by the beneficiary. *See* 8 C.F.R. § 204.5(l)(3). The record contains an employment certification from [redacted] Owner of [redacted] stating that it employed the Beneficiary as a head cook from February 15, 1997, to January 14, 2000. The description of the job duties on the employment certification matches the description of the job duties on the labor certification exactly. The Director noted in his decision that the building address for [redacted] is not the same on the labor certification and employment certification. The Director also noted that the Beneficiary had indicated on her Form G-325A, Biographic Information form, that she signed in 2013 that she was a housewife from February 1981 to the date she signed the Form G-325A. Her passport also states that she is a housewife. The Petitioner must resolve inconsistencies in the record with independent, objective evidence pointing to where the truth lies. *Matter of Ho*, 19 I&N Dec. at 591-92. Unresolved material inconsistencies may lead us to reevaluate the reliability and sufficiency of other evidence submitted in support of the petition. *Id.* In the NOIR, the Director requested evidence to resolve the inconsistencies in the record regarding the Beneficiary's employment history, including payment records, business registration records, and pay stubs or receipts for wages. The Petitioner failed to provide the requested evidence in its response to the NOIR.

On appeal, the Petitioner submits a revised Form G-325A showing the Beneficiary's employment with [redacted] However, the Petitioner may not make material changes to the Beneficiary's Form G-325A in an effort to conform its petition to USCIS requirements. *See Matter of Izummi*, 22 I&N Dec. 169, 176 (Assoc. Comm'r 1988). The revised Form G-325 is not independent,

[4] Net income is shown on Line 28 of the IRS Form 1120, U.S. Corporation Income Tax Return.

objective evidence resolving the inconsistencies in the Beneficiary's employment history. *See Matter of Ho*, 19 I&N Dec. at 591-92.

On appeal, the Petitioner also submits the Beneficiary's payslips for July 1997, February 1998, May 1998, and April 1999 from [redacted] However, where a petitioner has been put on notice of a deficiency in the evidence and has been given an opportunity to respond to that deficiency, we will not generally accept evidence offered for the first time on appeal. *See Matter of Soriano*, 19 I&N Dec. 764 (BIA 1988); *see also Matter of Obaigbena*, 19 I&N Dec. 533 (BIA 1988). The Petitioner failed to provide the payslips in response to the Director's NOIR and, therefore, we need not consider the sufficiency of the payslips on appeal.[5]

The Petitioner has not resolved the inconsistencies in the record with independent, objective evidence establishing that the Beneficiary possessed the experience required by the labor certification as of the priority date. The Director properly revoked the approval of the petition on this basis.

IV. BONA FIDE JOB OFFER

The Director also concluded that the petition is not supported by a *bona fide* job offer. The Petitioner must establish that its job offer to the Beneficiary is a realistic one. Because the filing of labor certification application establishes a priority date for any immigrant petition later based on the labor certification, the Petitioner must establish that the job offer was realistic as of the priority date and that the offer remained realistic for each year thereafter, until the Beneficiary obtains lawful permanent residence. *See Matter of Great Wall*, 16 I&N Dec. 142 (Acting Reg'l Comm'r 1977).

The petition was initially approved in October 2009. In a letter dated May 31, 2013, submitted to the record in connection with the Beneficiary's adjustment of status application, the Petitioner affirmed its existing offer of employment to the Beneficiary for the position of head cook. However, in response to the NOIR, the Petitioner submitted a letter dated April 2, 2016, which states that it closed its restaurant in late 2009. Thus, when the 2013 letter was written and submitted to USCIS, the job offered by the Petitioner no longer existed. An approved Form I-140 filed by an employer that no longer intends to employ the worker upon approval of the Form I-485, Application to Register Permanent Residence or Adjust Status, does not represent a *bona fide* job offer. Final Rule on Retention of EB-1, EB-2, and EB-3 Immigrant Workers, 81 Fed. Reg. 82398, 82418 (Nov. 18, 2016). Therefore, the petition is not supported by a *bona fide* job offer, and the Director properly revoked the approval of the petition on this basis.

We note that the regulation at 8 C.F.R. § 205.1(a) states that the approval of a petition filed under section 203(b) of the Act shall be automatically revoked as of the date of approval "upon termination of the employer's business in an employment-based preference case under . . . section 203(b)(3) of the Act." The record contains a statement from the Petitioner indicating that it ceased operations in late 2009.[6] We reserve discussion of the applicability of automatic revocation pursuant to 8 C.F.R. §

[5] We note that the payslips do not cover the entire period from February 15, 1997, to January 14, 2000, represented on the labor certification, and therefore, they do not establish the required full-time experience as a head cook.

[6] While this appeal was pending, amended regulations took effect, barring automatic revocation of a petition's approval if termination of a petitioner's business occurred 180 or more days after the petition's approval, or after a filing of an

205.1(a) based on the termination of the Petitioner's business in 2009.[7] In any future proceedings, the Petitioner must address its business termination.

V. WILLFUL MISREPRESENTATION OF A MATERIAL FACT

The Director found that the Petitioner willfully misrepresented the *bona fides* of the job offer and that Beneficiary willfully misrepresented her employment with [redacted] on the labor certification. Any foreign person 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 the Act is inadmissible. *See* section 212(a)(6)(C)(i) of the Act, 8 U.S.C. § 1182(a)(6)(C)(i).

As outlined by the Board of Immigration Appeals, a material misrepresentation requires that the petitioner willfully make a material misstatement to a government official for the purpose of obtaining an immigration benefit to which one is not entitled. *Matter of Kai Hing Hui*, 15 I&N Dec. 288, 289-90 (BIA 1975). A misrepresentation can be made to a government official in an oral interview, on the face of a written application or petition, or by submitting evidence containing false information. INS Genco Op. No. 91-39, 1991 WL 1185150 (April 30, 1991). 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). To be considered material, the misrepresentation must be one which "tends to shut off a line of inquiry which is relevant to the alien's eligibility, and which might well have resulted in a proper determination that he be excluded." *Matter of Ng*, 17 I&N Dec. 536, 537 (BIA 1980).

Accordingly, for an immigration officer to find a willful and material misrepresentation in visa petition proceedings, they must determine: 1) that the petitioner or beneficiary made a false representation to an authorized official of the United States government; 2) that the misrepresentation was willfully made; and, 3) that the fact misrepresented was material. *See Matter of M-*, 6 I&N Dec. 149 (BIA 1954); *Matter of L-L-*, 9 I&N Dec. 324 (BIA 1961); *Matter of Kai Hing Hui*, 15 I&N Dec. at 288.

A. The Petitioner's Willful Misrepresentation of a Material Fact

The Petitioner certified its existing offer of employment to the Beneficiary in its 2013 letter to USCIS even though it closed its business in 2009. Thus, the Petitioner's false attestation that the job offer was *bona fide* constitutes a false representation. Second, the Petitioner prepared and submitted the

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associated adjustment application. Final Rule on Retention of EB-1, EB-2, and EB-3 Immigrant Workers, 81 Fed. Reg. 82398, 82402 (Nov. 18, 2016). In this case, however, the Petitioner's business closed in late 2009, the same timeframe as the petition's approval.

[7] On appeal, the Petitioner submits a letter from another restaurant, dated March 16, 2016, offering the Beneficiary a position as a head cook in its restaurant. The Petitioner requests that we allow for the substitution of this other restaurant as a petitioner for the Beneficiary if it is not possible to sustain the appeal. It appears that the Petitioner is asserting that the Beneficiary may "port" to this other restaurant under the American Competitiveness in the Twenty-First Century Act of 2000 (AC21). Because we find that the Director properly revoked the approval of the petition for the reasons stated herein, we find it unnecessary to reach the issue of whether the Beneficiary may "port" to another employer. *In Herrera v. USCIS*, 571 F.3d 881 (9th Cir. 2009), the Ninth Circuit Court of Appeals determined that the government's authority to revoke a Form I-140, Immigrant Petition for Alien Worker, under section 205 of the Act survives portability under section 204(j) of the Act.

2013 letter to USCIS conveying the false impression that its business was operating and that the job offer was *bona fide*. Thus, we conclude that the Petitioner's misrepresentation was willful. Third, as previously noted, the Petitioner must establish that the *bona fides* of the job offer from the priority date until the Beneficiary obtains lawful permanent residence. The 2013 letter cut off a potential line of inquiry regarding the *bona fides* of the job offer. *See Matter of Ng*, 17 I&N Dec. at 537. Thus, the representation is material. We agree with the Director's determination that the Petitioner made a willful misrepresentation of material fact to USCIS.

B. The Beneficiary's Willful Misrepresentation of a Material Fact

The Beneficiary indicated on the labor certification that she worked as a head cook with [redacted] in Bangladesh from February 15, 1997, to January 14, 2000. In light of the contradictory information presented and lack of independent, objective evidence regarding the Beneficiary's prior work experience as detailed above, the entry at Part K on the ETA Form 9089 was not correct and constitutes a false representation. Because the Beneficiary did not have the represented experience as a head cook, the Beneficiary's false attestation on the labor certification constitutes a false representation on the face of a written petition.

Second, the Beneficiary willfully misrepresented material facts regarding her previous employment with [redacted] The Beneficiary signed the labor certification attesting to the veracity of the claims on the labor certification. In this way, the Beneficiary directly participated in the preparation and submission of documents that convey the false impression that she had the qualifying experience as required on the labor certification. In light of the unresolved contradictory evidence in the record regarding the Beneficiary's experience, we conclude that the Beneficiary's misrepresentations were willful.

Third, the evidence is material to the Beneficiary's eligibility. Here, the Beneficiary's experience with [redacted] is material to the whether she meets the minimum requirements of the offered position. The labor certification requires two years of experience in the job offered. The misrepresentation regarding the Beneficiary's experience on the labor certification cut off a potential line of inquiry regarding her claimed experience. *See id.* We agree with the Director's determination that the Beneficiary made a willful misrepresentation of material fact on the labor certification. This finding of willful material misrepresentation shall be considered in any future proceeding where the Beneficiary's admissibility is an issue.

VI. INVALIDATION OF THE LABOR CERTIFICATION

The regulation at 20 C.F.R. § 656.30(d) provides, in pertinent part:

> (d) Invalidation of labor certifications. After issuance, a labor certification may be revoked by ETA using the procedures described in Sec. 656.32. Additionally, after issuance, a labor certification is subject to invalidation by the DHS or by a Consul of the Department of State upon a determination, made in accordance with those agencies' procedures or by a court, of fraud or willful misrepresentation of a material fact involving the labor certification application.

We agree with the Director's invalidation of the labor certification because the Beneficiary willfully misrepresented her employment with [redacted] on the labor certification.

ORDER: The appeal is dismissed.