U.S. Citizenship and Immigration Services

Non-Precedent Decision of the Administrative Appeals Office

In Re: 5802858

Date: NOV. 27, 2019

Appeal of Texas Service Center Decision

Form I-140, Immigrant Petition for Skilled Worker

The Petitioner seeks to employ the Beneficiary as a retail manager. 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 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 Director of the Texas Service Center denied the petition, concluding that the Petitioner did not properly disclose a familial relationship between it and the Beneficiary. The Director entered a finding of willful misrepresentation of a material fact against the Petitioner, and he 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 withdraw the Director's decision and remand the matter for further proceedings consistent with our opinion and for the entry of a new decision.

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 March 2, 2018. *See* 8 C.F.R. § 204.5(d).

II. WILLFUL MISREPRESENTATION OF A MATERIAL FACT

The Petitioner indicated on the labor certification that the Beneficiary did not have a familial relationship to the Petitioner. Part C.9. of the labor certification asks, "Is the employer a closely held corporation... 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 Petitioner checked 'No' in response to this question, indicating that there is no relationship between the Beneficiary and the owners, stockholders, partners, corporate officers, or incorporators of the Petitioner. However, the record establishes that the Beneficiary is the niece of the Petitioner's President and 50% shareholder [redacted]. The Director determined that the Petitioner willfully made a material misrepresentation on the labor certification, and he invalidated the labor certification. The Director noted DOL's audit of the labor certification and stated that the "audit conducted establishes that there is a *bona fide* job offer;" however, he indicated that the Petitioner did not disclose the relationship to DOL during the audit.[2]

As outlined by the Board of Immigration Appeals (Board), 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). 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.

Here, the Petitioner has established that it disclosed the relevant familial relationship to DOL during an audit of the labor certification.[3] The Petitioner's audit response to DOL included an affidavit from [redacted] stating that the Beneficiary "is related to my wife through marriage to her sister." Thus, although the Petitioner's representation at Part C.9. of the labor certification was false[4] and was

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[2] A labor certification employer must attest that "[t]he job opportunity has been and is clearly open to any U.S. worker." 20 C.F.R. § 656.10(c)(8). This attestation "infuses the recruitment process with the requirement of a *bona fide* job opportunity: not merely a test of the job market." *Matter of Modular Container Sys., Inc.*, 89-INA-228, 1991 WL 223955, *7 (BALCA Jul. 16, 1991) *(en banc)*; *see* 20 C.F.R. § 656.17(l). A relationship between a petitioner and a beneficiary triggering concerns about the *bona fides* of a job opportunity "is not only of the blood; it may also be financial, by marriage, or through friendship." *Matter of Sunmart 374*, 2000-INA-93, 2000 WL 707942, *3 (BALCA May 15, 2000). If a petitioner knowingly misrepresented the *bona fides* of a job opportunity, USCIS may invalidate a labor certification after its issuance. *See* 20 C.F.R. § 656.30(d) (authorizing USCIS invalidation upon a finding of "fraud or willful misrepresentation of a material fact involving the labor certification").

[3] The Petitioner also submitted the audit materials to USCIS in response to the Director's notice of intent to deny.

[4] The Petitioner does not dispute the existence of the familial relationship on appeal. Because the Petitioner's answer at

willfully made,[5] it was not material to the *bona fides* of the job opportunity due to the Petitioner's disclosure of the familial relationship to the DOL during the labor certification audit. The Petitioner did not shut off a line of inquiry which is relevant to the Beneficiary's eligibility for the requested visa classification. *See Matter of Ng*, 17 I&N Dec. at 537. The DOL determined after the audit that, despite the familial relationship between the Petitioner and the Beneficiary, the position of retail manager was a *bona fide* job opportunity open to U.S. workers. Accordingly, the Petitioner has overcome the Director's finding that the Petitioner willfully misrepresented a material fact involving the labor certification process. Therefore, we will withdraw the Director's finding of material misrepresentation against the Petitioner.

However, as further detailed below, the Director's decision did not clarify whether the Beneficiary has the experience required for the offered job or whether the Petitioner has the continuing ability to pay the proffered wage from the priority date. Thus, we will remand the matter to the Director for further consideration.

III. 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.

Based on our withdrawal of the finding of willful misrepresentation of a material fact against the Petitioner involving the labor certification application, we will reinstate the validity of the labor certification.

However, as further detailed below, the Director's decision did not clarify whether the Beneficiary has the experience required for the offered job or whether the Petitioner has the continuing ability to pay the proffered wage from the priority date. Thus, we will remand the matter to the Director for further consideration.

Part C.9. on the ETA Form 9089, Application for Permanent Employment Certification, was not correct, it constitutes a false representation.

[5] The labor certification clearly and specifically asks whether there is a familial relationship between the Petitioner and the Beneficiary. The Petitioner answered "no" on the ETA 9089, and [redacted] signed the labor certification in his capacity as President of the Petitioner certifying that he assented to the answer. Thus, the Petitioner willfully made a misrepresentation in this case.

IV. BENEFICIARY'S QUALIFICATIONS

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).

Section H of the labor certification states that the offered position of retail manager requires a 24 months of experience in the job offered or in management. The labor certification states that the Beneficiary worked as a construction manager with [redacted] Hospital in Pakistan from January 1, 1995, to June 19, 2017. However, the letter submitted relating to the Beneficiary's experience does not confirm the Beneficiary's qualifying two years of experience.[6] Instead, the letter from [redacted] University confirms the Beneficiary's employment from January 1, 1995, to June 19, 2017, and states that "at the time of resignation," the Beneficiary "was holding the position of Manager, Construction." Thus, the letter does not indicate that the Beneficiary served in the managerial role of construction manager for a minimum of 24 months. Further, the employer listed on the letter is [redacted] University, but the Beneficiary indicated on the labor certification that he worked for [redacted] Hospital. Thus, the employers appear to be different. The Petitioner must resolve this inconsistency in the record with independent, objective evidence pointing to where the truth lies. *Matter of Ho*, 19 I&N Dec. 582, 591-92 (BIA 1988).

Thus, based on the deficiencies in the letter described above, we cannot affirmatively find that the Beneficiary possessed the minimum experience required by the labor certification as of the priority date. On remand, the Director should request additional evidence of the Beneficiary's qualifications and allow the Petitioner reasonable time to respond.

V. ABILITY TO PAY

The record does not contain regulatory required evidence of the Petitioner's ability to pay the proffered wage from the priority date on March 2, 2018, and continuing until the beneficiary obtains lawful permanent residence.[7] The regulation at 8 C.F.R. § 204.5(g)(2) requires that "[e]vidence of this ability shall be either in the form of copies of annual reports, federal tax returns, or audited financial statements."

The Petitioner submitted regulatory-prescribed evidence of its ability to pay the proffered wage in 2017. However, the record does not contain regulatory-prescribed evidence of its ability to pay for 2018. Without this regulatory-required evidence, we cannot affirmatively find that the Petitioner has the continuing ability to pay the proffered wage from the priority date. On remand, the Director should request such regulatory-required evidence and allow the Petitioner reasonable time to respond.

[6] 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. 8 C.F.R. § 204.5(l)(3).

[7] The annual proffered wage is $52,478.

VI. CONCLUSION

The Director's decision did not clarify whether the Beneficiary has the experience required for the offered job or whether the Petitioner has the continuing ability to pay the proffered wage from the priority date. Thus, we will remand the matter to the Director for further consideration.

ORDER: The decision of the Director is withdrawn. The matter is remanded for the entry of a new decision consistent with the foregoing analysis.

FURTHER ORDER: The ETA Form 9089, case number [redacted], is reinstated.