U.S. Citizenship and Immigration Services

Non-Precedent Decision of the Administrative Appeals Office

In Re: 28184207

Date: AUG. 30, 2023

Appeal of Texas Service Center Decision

Form I-140, Immigrant Petition for Alien Workers (Skilled Worker)

The Petitioner, a retail and wholesale distribution business, seeks to permanently employ the Beneficiary as a financial analyst. It requests his classification as a skilled worker under the third preference immigrant classification. *See* Immigration and Nationality Act (the Act) section 203(b)(3)(A)(i), 8 U.S.C. § 1153(b)(3)(A)(i). This category allows prospective U.S. employers to sponsor noncitizens for lawful permanent residence to work in positions requiring at two years of training or experience. *Id*.

The Director of the Texas Service Center denied the petition. The Director concluded that the Petitioner concealed the spousal relationship between its minority owner and the Beneficiary on the accompanying labor certification from the U.S. Department of Labor (DOL) and noted that non-disclosure of this familial relationship calls into question the bona fide nature of the job offer. The Director also made a separate determination that the Petitioner had willfully misrepresented material facts based on this non-disclosure. The matter is now before us on appeal. 8 C.F.R. § 103.3.

The Petitioner bears the burden of proof to demonstrate eligibility by a preponderance of the evidence. *Matter of Chawathe*, 25 I&N Dec. 369, 375-76 (AAO 2010). We review the questions in this matter de novo. *Matter of Christo's, Inc.*, 26 I&N Dec. 537, 537 n.2 (AAO 2015). Upon de novo review, we will dismiss the appeal.

I. LAW

Immigration as a skilled worker generally follows a three-step process. First, a prospective employer must obtain DOL certification that: (1) there are insufficient U.S. workers able, willing, qualified, and available for an offered position; and (2) permanent employment of a noncitizen in the position would not harm wages and working conditions of U.S. workers with similar jobs. Section 212(a)(5)(A)(i) of the Act, 8 U.S.C. § 1182(a)(5)(A)(i).

Second, an employer must submit an approved labor certification with an immigrant visa petition to USCIS. Section 204(a)(1)(F) of the Act, 8 U.S.C. § 1154(a)(1)(F). Among other things, USCIS determines whether a noncitizen beneficiary meets the requirements of a DOL-certified position and a requested immigrant visa category. 8 C.F.R. § 204.5(l)(3)(ii)(D)(4). Finally, if USCIS approves a

petition, a beneficiary 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.

II. NON-DISCLOSURE OF A FAMILIAL RELATIONSHP

The first issue before us is whether the Director properly denied the petition based on the Petitioner's non-disclosure of a familial relationship between the Beneficiary and the company's minority owner.

USCIS approves a petition if "the facts stated in [it] are true" and the beneficiary qualifies for the requested immigrant visa category. Section 204(b) of the Act. A petition includes its supporting evidence – including a labor certification. 8 C.F.R. § 103.2(b)(1). Thus, USCIS cannot approve a petition if the facts stated on an accompanying labor certification are untrue.

Part C.9 of the accompanying labor certification asked the Petitioner: "[I]s there a familial relationship between the owners, stockholders, partners, corporate officers, or incorporators, and the alien?" The attorney who prepared the labor certification checked the box marked "No." By signing the employer declaration at Part N, the company's authorized signatory took full responsibility for the accuracy of any representations made by the attorney. He also declared under penalty of perjury that he reviewed the application and the information contained therein was true and accurate to the best of his knowledge.

The initial evidence provided with this petition included a copy of the petitioning liability company's federal tax return for 2020. The Schedule K-1 accompanying the IRS Form 1065, U.S. Return of Partnership Income, identifies the Beneficiary's spouse as a general partner or LLC member-manager holding a 49 percent ownership interest in the company.[1]

In response to the Director's NOID, the Petitioner conceded the relationship's existence and provided a letter from its operations manager, who signed the labor certification and petition. He asserted that the attorney who prepared the labor certification "was fully aware" of the spousal relationship between the Beneficiary and the company's minority shareholder, noting that the attorney had assisted with other immigration matters and possessed copies of the company tax returns and operating agreements dating back to 2016. The operations manager stated that the attorney's office made a mistake by checking "No" to question C.9 on the labor certification and "it was an oversight" by the Petitioner to not notice the error. He maintained that "[t]here was no intention to hide the relationship."

The Director correctly determined that the labor certification misrepresents the family relationship between the Petitioner's owner and the Beneficiary. Thus, the facts stated on the petition are untrue. *See* section 204(b) of the Act. As indicated above, DOL must certify that "there are no sufficient workers who are able, willing, qualified . . . and available" for an offered position. Section 212(a)(5)(A)(i)(I) of the Act. A family relationship between an employer's owner and a sponsored noncitizen creates a presumption that that an offered position is not clearly available to U.S. workers.

[1] The name of this shareholder matches the information the Petitioner provided at Part 7 of the Form I-140, Immigrant Petition for Alien Worker, which requests information about the Beneficiary's spouse and children, while the shareholder's address on Schedule K-1 matches the U.S. mailing address provided for the Beneficiary at Part 1 of the Form I-140. The Director noted the information derived from the Petitioner's tax return in the notice of intent to deny (NOID) and further advised that the spousal relationship had been discovered through a separate "investigation made by a supporting agency."

See 20 C.F.R. § 656.17(1) (requiring a labor certification employer to demonstrate the bona fides of a job opportunity if a family relationship exists between an employer's principal and the noncitizen). Therefore, under section 204(b) of the Act, the Director properly denied the petition based on the misrepresentation at part C.9 of the labor certification.

The Director further determined that, because of the initially undisclosed family relationship, the Petitioner did not demonstrate the offered position's availability to U.S. workers. On appeal, the company contends that, despite the non-disclosure of the familial relationship, the job opportunity was bona fide. It maintains that its recruitment documentation, which it submitted in response to the NOID, satisfies the law's requirements and that "in the absence of any qualifying workers having applied for the job, there was no opportunity for any influence to have been exercised over the consideration of an applicant."

USCIS, however, lacks authority to determine the bona fides of a job opportunity. Congress authorized DOL - not USCIS - to determine the availability of an offered position to U.S. workers. *See* section 212(a)(5)(A)(i)(I) of the Act. "[D]eterminations vested by statute with one agency are not normally subject to horizontal review by a sister entity, absent congressional authorization to that effect." *Madany v. Smith*, 696 F.2d 1008, 1012 (D.C. Cir. 1983). Thus, DOL - not USCIS - must determine the bona fides of the Petitioner's job opportunity. The Director's conclusions and the Petitioner's arguments regarding the bona fides of the job opportunity exceed the scope of these proceedings. If the Petitioner seeks a determination of the offered position's availability to U.S. workers on the true facts, the company must contact DOL. *See Matter of Gen. Elec. Co.*, 2011-PER-01818, *3 (BALCA Apr. 15, 2014) (stating that DOL has discretion to retroactively amend the contents of an approved labor certification application to allow an error's correction) (citation omitted).

Because the petition misstates a fact bearing on a statutory labor certification requirement, it was properly denied. Accordingly, we will dismiss the appeal.

III. WILLFUL MISREPRESENTATION OF A MATERIAL FACT

The remaining issue is whether the Director properly determined that the Petitioner willfully misrepresented a material fact by concealing the familial relationship between the Beneficiary and the company's owner. On appeal, the Petitioner maintains that the false "No" response at section C.9 of the labor certification was neither material nor willfully made.

For an immigration officer to find a willful and material misrepresentation of fact, they must determine that (1) the petitioner or beneficiary made a false representation to an authorized official of the U.S. government in procuring or seeking to procure a benefit under U.S. immigration laws, (2) the false representation 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). Misrepresentations are willful if they are "deliberately made with knowledge of their falsity." *Matter of Valdez*, 27 I&N Dec. 596,598 (BIA 2018) (citations omitted). A misrepresentation is material if it has a "natural tendency to influence, or [be] capable of influencing, the decision of the decision-making body to which it was addressed." *Id.*

On appeal, the Petitioner maintains that section C.9 was mistakenly marked "no" by the attorney who prepared the labor certification, that its failure to notice the mistake was an "oversight," and that it had no intent to conceal the relationship. The record does not include a statement from the attorney corroborating the Petitioner's assertion that the "No" response was an unintentional error. Regardless, as noted, the Petitioner's authorized representative, by signing the employer declaration at section N of the labor certification, took full responsibility for the accuracy of any representations made by the attorney, and declared under penalty of perjury that he read and reviewed the application and that, to the best of his knowledge, the information contained therein was true and accurate. The Petitioner's signature "establishes a strong presumption" they knew and assented to the contents. *See Valdez*, 27 I&N Dec. at 499.

The Petitioner also signed the Form I-140, certifying under penalty of perjury that the petition and the evidence submitted with it was true and correct. *See* section 287(b) of the Act, 8 U.S.C. § 1357(b); *see also* 8 C.F.R. § 103.2(a)(2). The Petitioner took legal responsibility for the truth and accuracy of any evidence submitted in support of the petition. Based on the Petitioner's declarations on the labor certification and Form I-140, we agree with the Director's determination that the misrepresentation was willfully made.

The Petitioner further maintains that the misrepresentation was not material, explaining that "[t]he disclosure of the familial relationship would not have changed the result" as there were no applicants for the job during the recruitment process. The Petitioner argues that the Director incorrectly presumed that its failure to disclose the familial relationship "negatively impacted the recruitment" and argues that "there is no factual or legal basis for that allegation." Specifically, it asserts that, based on the lack of response to its recruitment efforts, DOL would have certified its application based on the true facts.

However, a material misrepresentation is also one which "tends to shut off a line of inquiry which is relevant to the alien's eligibility." *Matter of S- and B-C-*, 9 I&N Dec. 436, 447 (BIA 1961). Disclosure of the familial relationship in this case would have required DOL to examine the bona fide nature of the job offer under 20 C.F.R. § 656.17(1), an inquiry that goes beyond reviewing the results of a petitioning employer's recruitment efforts alone.

Here, the DOL did not have an opportunity to determine the position's availability to U.S. workers under the true, relevant facts. The record indicates that DOL did not know of 20 C.F.R. § 656.17(l)'s applicability to the Petitioner's filing and the potential effect of the concealed family relationship on the bona fides of the job opportunity. The Petitioner has not substantiated its claim that DOL's approval of its labor certification application was the only possible result and that its misrepresentation at section C.9 of the application was therefore immaterial. The Petitioner's misrepresentation effectively shut off DOL's inquiry into the bona fide nature of the job offer.

The Petitioner's claims on appeal do not overcome the Director's conclusion that it willfully misrepresented material facts related to the familial relationship between the Beneficiary and the company's owner.

IV. CONCLUSION

For the reasons discussed, we affirm the Director's decision to deny the petition. The appeal will be dismissed for the above stated reasons, with each considered as an independent and alternate basis for the decision.

ORDER: The appeal is dismissed.