U.S. Citizenship and Immigration Services

Non-Precedent Decision of the Administrative Appeals Office

In Re: 27035915

Date: JUN. 08, 2023

Appeal of Texas Service Center Decision

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

The Petitioner, a manufacturer of frozen waffles and pancakes, seeks to employ the Beneficiary as a production helper. It requests classification of the Beneficiary as an unskilled worker under the third preference immigrant classification. *See* Immigration and Nationality Act (the Act) section 203(b)(3)(A)(iii), 8 U.S.C. § 1153(b)(3)(A)(iii). This employment-based immigrant classification allows a U.S. employer to sponsor a noncitizen for lawful permanent resident status to work in a position that requires less than two years of training or experience.

The Director of the Texas Service Center revoked the approval of the petition, concluding that the Petitioner had willfully misrepresented a material fact concerning the Beneficiary's payment of costs related to the labor certification filed on her behalf. In addition, the Director concluded that the Petitioner misrepresented its relationship with the Beneficiary. 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 withdraw the Director's decision and remand the matter for entry of a new decision consistent with the following analysis.

I. LAW

The Secretary of Homeland Security "may, at any time, for what he deems to be good and sufficient cause, revoke the approval of any petition .... " Section 205 of the Act, 8 U.S.C. § 1155. By regulation this revocation authority is delegated to any U.S. Citizenship and Immigration Services (USCIS) officer who is authorized to approve an immigrant visa petition. 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 (NOR). See 8 C.F.R. § 205.2(b) and (c). The Board of Immigration Appeals (the Board) has discussed revocations on notice as follows:

> [A] notice of intention to revoke a visa petition is properly issued for "good and sufficient cause" where the evidence of record at the time the notice is issued, if unexplained and unrebutted, would warrant a denial of the visa petition based upon the petitioner's failure to meet his burden of proof. The decision to revoke will be sustained where the evidence of record at the time the decision is rendered, including any evidence or explanation submitted by the petitioner in rebuttal to the notice of intention to revoke, would warrant such denial.[1]

Immigration as an unskilled worker usually follows a three-step process. First, the prospective employer must obtain a labor certification approval from the U.S. Department of Labor (DOL) to demonstrate that there are not sufficient U.S. workers who are able, willing, qualified, and available for the offered position. Section 212(a)(5) of the Act, 8 U.S.C. § 1182(a)(5).

Second, the employer must submit the approved labor certification with an immigrant visa petition to USCIS. Section 204 of the Act, 8 U.S.C. § 1154. The immigrant visa petition must establish that the foreign worker qualifies for the offered position, that the foreign worker and the offered position are eligible for the requested immigrant visa category, and that the employer has the ability to pay the proffered wage. *See* 8 C.F.R. § 204.5. These requirements must be satisfied by the priority date of the immigrant visa petition. *See* 8 C.F.R. § 204.5(g)(2); *Matter of Wing's Tea House*, 16 I&N Dec. 158, 159 (Acting Reg'l Comm'r 1977). For petitions that require a labor certification, the priority date is the date on which the DOL accepted the labor certification application for processing. 8 C.F.R. § 204.5(d). In this matter, the priority date is June 14, 2017.

Finally, if USCIS approves the immigrant visa petition, the foreign worker may apply for an immigrant visa abroad or, if eligible, for adjustment of status in the United States. Section 245 of the Act, 8 U.S.C. § 1255.

II. ANALYSIS

At issue in this case is whether the Director properly revoked the approval of the petition. For the reasons discussed below, we will withdraw the Director's decision and remand the matter for further consideration and the entry of a new decision.

A. Willful Misrepresentation of a Material Fact

USCIS will deny a visa petition if the petitioner submits evidence which contains false information. *See* section 204(b) of the Act. A petition includes its supporting evidence - including a labor certification. 8 C.F.R. § 103.2(b)(1). Further, misrepresentation of a material fact may lead to multiple consequences in immigration proceedings. Any noncitizen 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 this Act is inadmissible. Section 212(a)(6)(C)(i) of the Act, 8 U.S.C. § 1182(a)(6)(C)(i).

[1] *Matter of Ho*, 19 I&N Dec. 582, 590 (BIA 1988) (*citing Matter of Estime*, 19 I&N Dec. 450 (BIA 1987)). Upon the proper issuance of a notice of intent to revoke (NOIR) for good and sufficient cause, the petitioner bears the burden of proving eligibility the requested immigration benefit. *Id.* at 589. However, an NOR is not valid unless it is based on evidence contained in the record of proceedings. *Matter of Estime*, 19 I&N Dec. at 451-52.

A finding of material misrepresentation requires the following elements: the petitioner procured or sought to procure a benefit under U.S. immigration laws; they made a false representation; and the false representation was willfully made, material to the benefit sought, and made to a U.S. government official. *Id.*; *see generally* 8 *USCIS Policy Manual* J.2(B), https://www.uscis.gov/policymanual. Under Board precedent, a material misrepresentation is one which "tends to shut off a line of inquiry which is relevant to the [noncitizen's] eligibility and which might well have resulted in a proper determination that he be excluded."[2] A willful misrepresentation requires that the individual knowingly make a material misstatement to a government official for the purpose of obtaining an immigration benefit to which one is not entitled.[3] Material misrepresentation requires only a false statement that is material and willfully made. The term "willfully" means knowing and intentionally, as distinguished from accidentally, inadvertently, or in an honest belief that the facts are otherwise.[4]

In his NOIR, the Director noted that according to information from the United States Consulate in Ho Chi Minh City, Vietnam, during her immigrant visa interview subsequent to the approval of the petition, the Beneficiary stated that she had made payments to an intermediary company which then paid her representative in this case. The Director stated that the Petitioner had thus willfully misrepresented a material fact when it responded "no" to question 23 in Part I of the ETA Form 9089, Application for Permanent Employment Certification, which asks whether the employer had received payment of any kind for submission of the application.

As indicated by the Director, the regulation at 20 C.F.R. § 656.12(b) states in pertinent part:

> An employer must not seek or receive payment of any kind for any activity related to obtaining permanent labor certification, including payment of the employer's attorneys' fees, whether as an incentive or inducement to filing, or as a reimbursement for costs incurred in preparing or filing a permanent labor certification application… An alien may pay his or her own costs in connection with a labor certification, including attorneys' fees for representation of the alien, except that where the same attorney represents both the alien and the employer, such costs shall be borne by the employer.

The Director stated in the NOIR that under 20 C.F.R. § 656.12(b), the Petitioner's response on the labor certification misrepresents its receipt of payment in exchange for the application's submission. He further noted that the Petitioner's signatory, in signing the Form I-140, certified to the truth and accuracy of all of the evidence submitted in support of the petition. However, after providing the information from the consulate and the grounds for possible revocation, the Director's NOIR improperly requested the submission of evidence pertaining to the Beneficiary's employment experience, not to any prohibited payments relating to obtaining the permanent labor certification.[5] As such it was not properly issued in accordance with 8 C.F.R. § 205.2(b), which requires that a

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[2] *Matter of S- and B-C-*, 9 I&N Dec. 436, 447 (BIA 1961).

[3] *Sergueeva v. Holder*, 324 Fed. Appx. 76 (2d Cir. 2009) (citing *Matter of Kai Hing Hui*, 15 I&N Dec. 288, 289-90 (BIA 1975).

[4] *See Matter of Healy and Goodchild*, 17 I&N Dec. 22, 28 (BIA 1979).

[5] We note that the minimum requirements for the offered position do not include work experience requirements, nor is such evidence relevant to the Beneficiary's eligibility for the requested classification.

petitioner be given an opportunity to offer evidence in support of the petition and in opposition to the grounds alleged for revocation.

In addition, the Director's NOR does not include consideration of the Petitioner's NOIR response, and it includes a ground of revocation of which the Petitioner was not notified in the NOIR. Specifically, in the NOR, the Director noted that the Petitioner checked "no" in response to question 9 of Part C on the ETA 9089, which asks whether there is a business or familial relationship between the Petitioner and the Beneficiary, and that this response also constituted willful misrepresentation of a material fact. Although the Director concluded that a familial relationship exists between the Petitioner and the Beneficiary, he did not refer to evidence in the record to support this assertion, and our review of the record does not find any such evidence. In addition, because the issue was not raised in the NOIR, it cannot form the basis of the revocation. *See* 8 C.F.R. § 205.2(b); *Matter of Estime*, 19 I&N Dec. at 451.

For the reasons stated above, we will withdraw the Director's decision and remand this matter to the Director to review the entirety of the record and to issue a new NOIR concerning the Petitioner's and the Beneficiary's eligibility for the requested benefit, and whether the Petitioner willfully misrepresented material facts. When considering this evidence, the Director should note that the regulation at 20 C.F.R. § 656.12(b) does not prohibit the beneficiary of a petition from paying costs associated with the preparation and filing of a Form I-140 petition, whether or not they and the petitioner are represented by the same attorney. Upon receipt of a timely response to the new NOIR, or the expiration of the time period to respond, the Director should review the entire record, including the materials submitted on appeal, and enter a new decision.

B. Ability to Pay the Proffered Wage

Although not addressed by the Director in the NOIR or NOR, the record does not establish that the Petitioner has the continuing ability to pay the wage proffered to the Beneficiary from the priority date. This issue should therefore also be addressed by the Director on remand.

A petitioner must establish its continuing ability to pay the proffered wage from the priority date of the petition. 8 C.F.R. § 204.5(g)(2). Evidence of ability to pay must generally include annual reports, federal tax returns, or audited financial statements. *Id.* If a petitioner employs 100 or more workers, USCIS may accept a statement from a financial officer attesting to the petitioner's ability to pay the proffered wage. *Id.* In appropriate cases, additional evidence, such as profit/loss statements, bank account records, or personnel records, may be submitted by the petitioner or requested by USCIS. *Id.*

In determining ability to pay in revocations, USCIS first determines whether the petitioner paid the beneficiary the full proffered wage each year from the priority date to the date of the petition's approval. If the petitioner did not pay the proffered wage in any given year, USCIS next determines whether the petitioner had sufficient net income or net current assets to pay the proffered wage (reduced by any wages paid to the beneficiary) during that same timeframe.

If net income and net current assets are insufficient, USCIS may consider other relevant factors, such as the number of years the petitioner has been in business, the size of its operations, the growth of its business over time, its number of employees, the occurrence of any uncharacteristic business

expenditures or losses, its reputation within its industry, or whether a beneficiary will replace a current employee or outsourced service. *See Matter of Sonegawa*, 12 I&N Dec. 612, 614-15 (Reg'l Comm'r 1967).

Here, Section G of the labor certification indicates that the proffered wage is $8.28 per hour, or $17,222 on an annual basis. As previously indicated, the priority date in this matter is June 14, 2017; the petition was approved on September 8, 2018.

The Form I-140 indicates that the Beneficiary resides in Vietnam, and the Petitioner does not claim to have previously employed her. It cannot therefore establish its ability to pay the offered wage based upon previous payments to the Beneficiary.

The record does not include copies of the Petitioner's annual reports, federal tax returns, or audited financial statements, but it did submit a letter from its Chief Financial Officer (CFO) stating that it employed "roughly 220" full-time employees "at any given time throughout the year" and is able to pay all of the foreign workers it seeks to employ. However, while the labor certification states that it employs 220 workers, the record does not include supporting documentation which verifies the number of workers employed by the Petitioner. Also, the CFO's letter does not provide any financial information supporting the Petitioner's ability to pay the proffered wage.

In addition, USCIS records indicate that the Petitioner has filed dozens of Form I-140 petitions for other beneficiaries. A petitioner must demonstrate its ability to pay the proffered wage of each petition it files until a beneficiary obtains lawful permanent residence. 8 C.F.R. § 204.5(g)(2). The Petitioner must therefore demonstrate its ability to pay the combined proffered wages of this Form I-140 petition and any others it filed that were approved or pending as of this petition's priority date of June 14, 2017, or filed thereafter. *See Patel v. Johnson*, 2 F.Supp.3d 108, 124 (D. Mass. 2014) (affirming our revocation of a petition's approval where, as of the filing's grant, the petitioner did not demonstrate its ability to pay the combined proffered wages of multiple petitions). While USCIS may accept a statement from a financial officer regarding ability to pay, we are not required to do so. Here, the Petitioner's obligation to demonstrate its ability to pay the combined proffered wages of multiple Form I-140 petitions merits additional scrutiny. Therefore, if the Director finds the CFO's statement insufficient to demonstrate the Petitioner's ability to pay, in addition to the required evidence per 8 C.F.R. § 204.5(g)(2), he should request the Petitioner to submit in response to the new NOIR a list of all Form I-140 petitions that were pending or approved as of, or filed after, the priority date of the current petition.[6]. The Petitioner should document the receipt numbers, names of beneficiaries, priority dates, and proffered wages of these other petitions, and indicate the status of each petition and the date of any status change (i.e., pending, approved, withdrawn, revoked, denied, on appeal or motion, beneficiary obtained lawful permanent residence). The Petitioner may also submit additional evidence of its ability to pay the combined proffered wages, including proof of any wages it paid applicable

[6] 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.

beneficiaries in relevant years or materials supporting the factors stated in *Sonegawa. See Sonegawa,* 12 I&N Dec. at 614-15.

III. CONCLUSION

For the reasons discussed above, we will remand this matter to the Director to review the entirety of the record and to issue a new NOIR concerning the Petitioner's and the Beneficiary's eligibility for the requested benefit, and whether the Petitioner willfully misrepresented material facts. Upon receipt of a timely response, or the expiration of the time period to respond, the Director should review the entire record, including the materials submitted on appeal, and enter a new decision.

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