U.S. Citizenship and Immigration Services

Non-Precedent Decision of the Administrative Appeals Office

In Re: 19959953

Date: JUL. 20, 2022

Appeal of Texas Service Center Decision

Form I-140, Immigrant Petition for Other Worker

The Petitioner, a describing itself as a video game distribution company, seeks to employ the Beneficiary as a salesperson. It requests classification of the Beneficiary as an unskilled 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 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 denied the petition, indicating the record did not establish that the Petitioner made a *bona fide* job offer to the Beneficiary because of an undisclosed familial relationship between the Beneficiary and one of the Petitioner's owners. In addition, the Director appeared to determine that the Petitioner willfully misrepresented material facts on the labor certification. On appeal, the Petitioner contends, contrary to the Director's determination, that there is no familial relationship between the Beneficiary and its owners. Therefore, the Petitioner asserts that it made a *bona fide* job offer to the Beneficiary and did not willfully misrepresent material facts on the labor certification.

We review the questions in this matter *de novo*. *Matter of Christo's Inc.*, 26 I&N Dec. 537, 537 n.2 (AAO 2015). The Petitioner bears the burden of proof to establish eligibility for the requested benefit by a preponderance of the evidence. Section 291 of the Act, 8 U.S.C. § 1361; *Matter of Chawathe*, 25 I&N Dec. 369, 375 (AAO 2010). Upon *de novo* review, we will remand this case to the Director for further consideration.

I. EMPLOYMENT-BASED IMMIGRATION

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) 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

[1] The priority date of a petition is the date the DOL accepted the labor certification for processing, which in this case is July 5, 2013. *See* 8 C.F.R. § 204.5(d).

that employing a noncitizen in the position will not adversely affect the wages and working conditions of domestic workers similarly employed. *See id.* Second, the employer files an immigrant visa petition with U.S. Citizenship and Immigration Services (USCIS) with the certified labor certification. *See* section 204 of the Act, 8 U.S.C. § 1154. Third, if USCIS approves the petition, the noncitizen 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. ANALYSIS

The Director discussed an undisclosed familial relationship between one of the Petitioner's owners and the Beneficiary and indicated that the record did not establish that the Petitioner made a *bona fide* job offer to the Beneficiary or that the job was clearly open to any U.S. worker. 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, at 7 (BALCA 1991) (en banc);[2] *see* 20 C.F.R. § 656.17(l).[3] 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, at 3 (BALCA 2000); *see Matter of Chamdal Food Mart*, 2000-INA-92 (BALCA 2000).

On appeal, the Petitioner asserts that there was no familial relationship between it and the Beneficiary. Specifically, the Petitioner states that 65% of its shares are owned by [redacted] and the other 35% by [redacted] neither of whom have a familial relationship with the Beneficiary through blood, marriage, or adoption. The Petitioner does acknowledge that the Beneficiary had a child with [redacted] and that they share a residence, but contends that this does not represent

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[2] BALCA stands for the DOL's Board of Alien Labor Certification Appeals.

[3] The regulation at 20 C.F.R. § 656.17(l) states in pertinent part:

> (l) Alien influence and control over job opportunity. If the employer is a closely held corporation or partnership in which the alien has an ownership interest, or if there is a familial relationship between the stockholders, corporate officers, incorporators, or partners, and the alien, or if the alien is one of a small number of employees, the employer in the event of an audit must be able to demonstrate the existence of a bona fide job opportunity, i.e., the job is available to all U.S. workers, and must provide to the Certifying Officer, the following supporting documentation:
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> (1) A copy of the articles of incorporation, partnership agreement, business license or similar documents that establish the business entity;
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> (2) A list of all corporate/company officers and shareholders/partners of the corporation/firm/business, their titles and positions in the business' structure, and a description of the relationships to each other and to the alien beneficiary;
>
> (3) The financial history of the corporation/company/partnership, including the total investment in the business entity and the amount of investment of each officer, incorporator/partner and the alien beneficiary; and
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> (4) The name of the business' official with primary responsibility for interviewing and hiring applicants for positions within the organization and the name(s) of the business' official(s) having control or influence over hiring decisions involving the position for which labor certification is sought.
>
> (5) If the alien is one of 10 or fewer employees, the employer must document any family relationship between the employees and the alien.

a familial relationship as defined by DOL guidance. The Petitioner indicates that it did not check "yes" to the question at Part C.9 of the labor certification because it legitimately believed that the relationship between it and the Beneficiary did not represent a familial relationship required to be disclosed. It therefore asserts that the labor certification should not be called into question on this basis.

The DOL requires the disclosure of any familial relationships between the noncitizen and the owners, stockholders, partners, corporate officers, and incorporators by marking "yes" to question at Part C.9 on the labor certification. DOL guidance states that a familial relationship includes any relationship established by blood, marriage, or adoption, even if distant. For example, the guidance indicates that a familial relationship includes cousins of all degrees, aunts, uncles, grandparents, and grandchildren as well as relationships established through marriage, such as in-laws and stepfamilies. DOL, Office of Foreign Labor Certification, "OFLC Frequently Asked Questions and Answers," at https://www.foreignlaborcert.doleta.gov/faqsanswers.cfm (last visited July 20, 2022).

In addition, a familial relationship is only one factor to be considered among multiple other factors when determining whether the Petitioner made a *bona fide* job offer. These other factors include, but are not limited to, whether a noncitizen: is in a position to control or influence hiring decisions regarding the offered position; incorporated or founded the company; has an ownership interest in the company; is involved in the management of the company; sits on its board of directors; is one of a small group of employees; has qualifications matching specialized or unusual job duties or requirements stated in the labor certification; and is so inseparable from the sponsoring employer because of his or her pervasive presence that the employer would be unlikely to continue in operation without the noncitizen. *Modular Container*, 1991 WL 223955 at 8-10. The DOL adopted the holding in *Modular Container* at 20 C.F.R. § 656.17(1).

A petition may be approved only after an investigation of the facts in each case to ensure that the facts stated in the petition, which necessarily includes the labor certification, are true. Section 204(b) of the Act, 8 U.S.C. § 1154(b). USCIS is responsible for reviewing the Form I-140, and the labor certification is incorporated into the Form I-140 by statute and regulation. *See* section 203(b)(3)(C) of the Act, 8 U.S.C. § 1153(b)(3)(C); 8 C.F.R. § 204.5(a)(2); 8 C.F.R. §103.2(b)(i). USCIS is only required to approve an employment-based immigrant visa petition when it determines that the facts stated in the petition, which incorporates the labor certification, are true, and the foreign worker is eligible for the benefit sought. Section 204(b) of the Act, 8 U.S.C. § 1154(b).

Here, the Director incorrectly concluded that a familial relationship existed between the Petitioner's owners and the Beneficiary. Further, the Director did not consider other factors beyond the claimed familial relationship to determine whether the Petitioner made a *bona fide* job offer. *See Modular Container*, 1991 WL 223955 at 8-10. Therefore, we will withdraw the decision and remand the matter for further consideration of whether a *bona fide* job offer was made by the Petitioner.

In addition, a finding of willful misrepresentation of material fact against a petitioner or beneficiary requires the following elements:

- The petitioner or beneficiary procured, or sought to procure, a benefit under U.S. immigration laws;
- The petitioner or beneficiary made a false representation;
- The false representation was willfully made;
- The false representation was material; and
- The false representation was made to a U.S. government official.

See 8 *USCIS Policy Manual* J.2(B), https://www.uscis.gov/policymanual.

A misrepresentation is willful if it is "deliberately made with knowledge of [its] falsity." *Matter of S- and B-C-*, 9 I&N Dec. 436, 445 (BIA 1960; A.G. 1961); *see also Matter of Kai Hing Hui*, 15 I&N Dec. 288, 289-90 (BIA 1975) (noting that, unlike fraud, a finding of willfulness does not require an "intent to deceive"). 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).

In the section of the decision addressing willful misrepresentation, the Director again pointed to Part C.9 of the labor certification requesting whether there was a familial relationship between the Beneficiary and the Petitioner's owners, stockholders, partners, corporate officers, or incorporators. The Director concluded that since [redacted] checked "no" in answering this question, that she misrepresented herself. However, the Director did not specifically articulate how [redacted] answer to question C.9 represented a willful misrepresentation of a material fact. This is notable, considering the DOL instructions do not clearly indicate that the relationship between the Beneficiary and [redacted], the father of her child, clearly represents a familial relationship. The Director only noted certain discrepancies on the record but did not sufficiently analyze how the Petitioner's or Beneficiary's actions represented willful misrepresentation of a material fact.

Further, the Director did not clearly indicate against whom the finding of willful misrepresentation was made. The Director also did not put the Petitioner on notice of the discrepancies and issues listed in the decision as necessary to give the Petitioner, and Beneficiary, the opportunity to respond.[4] If USCIS bases an adverse decision on derogatory information of which the petitioner is unaware, they must advise the petitioner and provide it with an opportunity to rebut the information. 8 C.F.R. § 103.2(b)(16)(i).

For these reasons, we will withdraw the Director's decision and finding of willful misrepresentation of material fact, and the matter will be remanded for further consideration of the *bona fides* of the job offer. The Director may request any additional evidence considered pertinent and allow the Petitioner

[4] For instance, in the decision, the Director emphasized that the Beneficiary and [redacted] shared the same address and that this suggested that they "maintain[ed] a familial cohabitation relationship." Likewise, the Director noted that the address provided on the labor certification did not appear to be valid address and further pointed to a letter detailing her claimed job experience including misspellings. The Director indicated that this "brings into question the validity of the [Petitioner's] existence and the information provided on the labor certification [and] letter of experience." However, the Director did not detail these, and other, discrepancies in the RFE or in a notice of intent to deny as necessary to provide the Petitioner with a sufficient opportunity to respond to the derogatory information.

reasonable time to respond. Upon receipt of all evidence, the Director will review the entire record and enter a new decision.

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