U.S. Citizenship and Immigration Services

Non-Precedent Decision of the Administrative Appeals Office

In Re: 9502551

Date: NOV. 23, 2020

Appeal of Texas Service Center Decision

Form I-140, Immigrant Petition for Skilled Worker

The Petitioner, a dry cleaning and alterations business, seeks to employ the Beneficiary as an alterations tailor. 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 Director of the Texas Service Center denied the petition, concluding that the record did not establish that there was a bona fide job opportunity available to U.S. workers. The Director also invalidated the accompanying labor certification based on a finding that the Petitioner willfully misrepresented a material fact.

The Petitioner bears the burden of establishing eligibility for the requested immigration benefit. See section 291 of the Act, 8 U.S.C. § 1361. Upon de novo review, we will withdraw the Director's decision and remand the appeal for the issuance of a new decision.

I. EMPLOYMENT-BASED IMMIGRATION

Immigration as a skilled 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 establish that there are not sufficient U.S. workers who are 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 U.S. Citizenship and Immigration Services (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 classification, and that the employer has the ability to pay the proffered wage. See 8 C.F.R. § 204.5.[1] Finally, if USCIS approves the immigrant visa petition, the foreign worker

[1] 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 (Act. 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. See 8 C.F.R. § 204.5(d). In this case, the priority date is July 30, 2015.

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. BONA FIDE JOB OPPORTUNITY

The Director's decision concludes that there was a pre-existing relationship between the Petitioner and the Beneficiary such that the offered position was not a bona fide job opportunity.[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). Accordingly, a bona fide job opportunity is a position that is clearly open to able, willing, qualified, and available U.S. workers:

> Where the alien for whom labor certification is sought is in a position to control hiring decisions or where the alien has such a dominant role in, or close personal relationship with, the sponsoring employer's business that it would be unlikely that the alien would be replaced by a qualified U.S. applicant, the question arises whether the employer has a bona fide job opportunity.

Matter of Modular Container Sys., Inc., 89-INA-228, 1991 WL 223955, *7 (BALCA July 16, 1991) (en banc). Under Matter of Modular Container, determining whether a job is clearly open to U.S. workers depends on an assessment of the totality of the circumstances. Examples of factors that may be examined include whether the beneficiary of the petition is in the position to control or influence hiring decisions regarding the job for which labor certification is sought; related to the corporate directors, officers, or employees; has an ownership interest in the company; or is involved in the management of the company.

In this case, the Petitioner is an S corporation, incorporated in Florida on July 2, 2004. On the Articles of Incorporation, Mr. [redacted] is listed as the company's incorporator, registered agent, and president. Mr. [redacted] is married to Ms. [redacted] The company does business as [redacted]s Alterations. The Petitioner claims that the company is named after Ms. [redacted] because the business is based on her alteration skills. On the petition, the Petitioner claims to have three employees and gross revenues of approximately $273,000.

The record contains the Petitioner's tax returns from 2014–2018, filed on IRS Form 1120S, U.S. Income Tax Return for an S Corporation. Ms. [redacted] is listed as the president of the Petitioner on the 2014 and 2015 tax returns. The subsequent tax returns in the record do not have a name for the signatory. Schedule K-1 of the Petitioner's tax returns for 2014–2107 state that Ms. [redacted] and Mr. [redacted] each owned 50% of the company. The 2018 tax return states that Ms. [redacted] owned approximately 70% of the company and Mr. [redacted] owned approximately 30%. On July 25, 2018, the Petitioner filed Articles of Amendment listing Ms [redacted] as the company's president and registered agent and changing Mr. [redacted]s title to vice president.[3]

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[2] USCIS may deny a petition accompanied by a labor certification that violates DOL regulations. See Matter of Sunoco Energy Dev. Co., 17 I&N Dec. 283, 284 (Reg'l Comm'r 1979) (affirming a petition's denial under 20 C.F.R. 656.30(c)(2) where the accompanying certification was invalid for the geographic area of intended employment).

[3] The Director's decision questions whether Ms [redacted], the individual who signed the labor certification and immigrant visa petition for the Petitioner, was eligible to do so because she was not listed as an officer in the corporate filings with

The Beneficiary was admitted into the U.S. in E-2 nonimmigrant status as a Treaty Investor. She incorporated [redacted] in 2007.[4] Her daughter, [redacted] was listed on [redacted]'s Articles of Incorporation as the company's vice president. The Petitioner previously filed an immigrant visa petition on behalf of the Beneficiary's daughter, which USCIS denied.

The Director's decision states that the offered position was not a bona fide job opportunity because the Beneficiary and the Petitioner had an undisclosed relationship. It is not clear from the Director's decision what facts support the conclusion that there was a pre-existing relationship between the Petitioner and the Beneficiary such that the offered position was not a bona fide job opportunity. The decision notes that the Petitioner previously filed an immigrant visa petition on behalf of the Beneficiary's daughter but does not explain how this means that the offered position was not clearly open to U.S. workers.

On appeal, the Petitioner claims that neither Ms. [redacted] or Mr. [redacted] have a familial relationship with the Beneficiary or her daughter. In support of this claim, the appeal contains sworn declarations of the Beneficiary and Mr. [redacted] and a translated copy of the Beneficiary's Korean Family Census Register.

Because the Director's decision does not sufficiently articulate the lack of a bona fide job opportunity, we withdraw the Director's finding on this issue.

III. WILLFUL MISREPRESENTATION

The Director's decision also concluded that the Petitioner willfully misrepresented a material fact by not disclosing its relationship with the Beneficiary on the labor certification. Section C.9 of the labor certification application asks: "Is the employer is a closely held corporation, partnership, or sole proprietorship in which the alien has an ownership interest, or is there a familial relationship between the owners, stockholders, partners, corporate officers, or incorporators, and the alien?" The Petitioner responded "No." Section N.8 of the labor certification application also required the Petitioner to certify that the "job opportunity has been and is clearly open to any U.S. worker."

A willful misrepresentation of a material fact must be deliberate and voluntary, made with knowledge of its falsity. Witter v. INS, 113 F.3d 549, 554 (5th Cir. 1997) (citations omitted). A misrepresentation is material if it tends to shut off a line of relevant inquiry that would have predictably disclosed other relevant facts. Matter of D-R-, 27 I&N Dec. 105, 113 (BIA 2017) (citing Kungys v. United States, 485 U.S. 759, 774 (1988)).

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the state of Florida. Individuals may be authorized to sign documents on behalf of a company even if they are not identified as officers in state corporate filings. See USCIS Policy Memorandum PM-602-0134.1, Signatures on Paper Applications, Petitions, Requests, and Other Documents Filed with U.S. Citizenship and Immigration Services 3 (Feb. 15, 2018), http://www.uscis.gov/legal-resources/policy-memoranda. As a co-owner of the Petitioner, we consider Ms. [redacted] to be an eligible signatory for immigration documents filed by the Petitioner with USCIS. Further, on appeal, the Petitioner confirmed that Ms. [redacted] was authorized to sign the labor certification and the petition for the Petitioner.

[4] Section K.a of the labor certification requires the Beneficiary to list her employment experience for the last three years. The labor certification in this case does not mention the Beneficiary's employment at [redacted].

The Director concluded that by answering "No" to section C.9 of the labor certification, the Petitioner engaged in the willful misrepresentation of a material fact. The decision states that the Beneficiary concealed a familial relationship with an owner or officer of the Petitioner but does not explain what the claimed familial relationship is. Citing to Matter of Silver Dragon Chinese Restaurant, 19 I&N Dec. 401, 406 (Comm'r 1986), the Director's decision also states that a "shareholder's concealment, in labor certification proceedings, of his or her interest in the petitioning corporation constitutes willful misrepresentation of a material fact." But the decision does not discuss evidence establishing that the Beneficiary is a shareholder of the Petitioner.

Again, other that noting that the Petitioner previously filed an immigrant visa petition on behalf of the Beneficiary's daughter, the decision does not explain why the Petitioner's "No" response at section C.9 or attestation at section N.8 of the labor certification constitutes the willful misrepresentation of a material fact.

Because the Director's decision does not sufficiently articulate a basis for concluding that the Petitioner engaged in the willful misrepresentation of a material fact, we withdraw the Director's finding of willful misrepresentation in the labor certification proceedings and reinstate the approval of the labor certification.

IV. QUALIFYING EXPERIENCE

The Beneficiary must satisfy the minimum requirements of the offered position set forth on the labor certification by the July 30, 2015 priority date. 8 C.F.R. § 103.2(b)(l), (12). See Matter of Wing's Tea House, 16 I&N Dec. 158, 159 (Act. Reg'l Comm'r 1977); see also Matter of Katigbak, 14 I&N Dec. 45, 49 (Reg'l Comm'r 1971). In this case, the labor certification states that offered position requires two years of experience in the job offered. No other education, training, or skills are required.

Section K of the labor certification is for listing the Beneficiary's work experience. The instructions state that the Beneficiary must list all jobs held in the previous three years as well as any other experience that qualifies the Beneficiary for the job opportunity.

The labor certification states that the Beneficiary was an alterations tailor for [redacted] in [redacted] South Korea from January 1, 2001 until June 30, 2004. There is no other experience listed to account for the time period after June 30, 2004 until the date of filing the labor certification on July 30, 2015. The record contains a translated certificate of employment purportedly from [redacted], dated September 2004. The certificate states that [redacted] employed the Beneficiary as a seamstress/tailor from January 10, 2001 until June 30, 2004. The start dates on the labor certification and on the certificate of employment are not consistent. See Matter of Ho, 19 I&N Dec. 582, 591 (BIA 1988) (requiring petitioners to resolve inconsistencies of record with independent, objective evidence). In addition, the certificate is not sufficient evidence to establish the Beneficiary's employment experience because it does not describe the duties she performed, it does not state whether the position was full-time or part-time, and it does not have the author's contact information. See 8 C.F.R. § 204.5(g)(1).

Therefore, we are remanding the decision to the Director to request additional evidence of the Beneficiary's employment experience, including: an explanation of the discrepancy in the start dates at [redacted]; whether the employment was full-time or part-time; an employment letter that satisfies the requirements of 8 C.F.R. § 204.5(g)(1); and a certificate from an independent source such as the National Tax Service of South Korea and/or the National Pension Service of South Korea as evidence of the claimed employment. The Director should also solicit an explanation from the Petitioner as to why the Beneficiary's employment at [redacted] was not included on the labor certification as required by section K.a.

V. ABILITY TO PAY

Petitioners must demonstrate their ability to pay the proffered wage from the priority date until the beneficiary obtains lawful permanent residence. See 8 C.F.R. § 204.5(g)(2). In order to establish ability to pay, a petitioner must submit its annual reports, federal tax returns, or audited financial statements for each year from the priority date. Id.

The record of proceeding contains copies of the Petitioner's federal income tax returns for 2014–2018 and selected Form 941 quarterly federal tax returns for 2017–2019. On remand, the Director should request the Petitioner's 2019 tax return, or other evidence that satisfies 8 C.F.R. § 204.5(g)(2), as evidence of the Petitioner's continuing ability to pay the proffered wage.

Further, according to USCIS records, the Petitioner has filed petitions on behalf of other beneficiaries. Where a petitioner has filed multiple petitions for multiple beneficiaries which have been pending simultaneously, the petitioner must establish that it has had the ability to pay the proffered wage to the beneficiary of each immigrant visa petition unless that petition has been withdrawn or denied. When calculating ability to pay for multiple immigrant visa petitions, a petition filed on behalf of another beneficiary is considered from the priority date of each petition (but not for any year prior to the priority date of the petition being reviewed on appeal) until the present (or until the other beneficiary obtains lawful permanent residence, if applicable).

According to USCIS records, it appears that the Petitioner has filed five immigrant visa petitions, only one of which meets the requirements stated in the preceding paragraph.[5] That petition, [redacted] filed on behalf of Ms. [redacted] has a priority date of October 26, 2015. Ms. [redacted] was granted lawful permanent residence on November 1, 2017. Therefore, the Petitioner must also demonstrate its ability to pay the proffered wage to the Beneficiary and Ms. [redacted] from October 26, 2015 until November 1, 2017. On remand, the Director should request the following for the petition filed on behalf of Ms. [redacted]

- The proffered wage listed on the labor certification submitted with the petition.
- The salary paid to Ms. [redacted] from the October 26, 2015 priority date until she obtained lawful permanent residence on November 1, 2017.
- The IRS Form W-2, Wage and Tax Statement, issued to Ms. [redacted] from 2015 to the present, if any.

[5] On the petition, the Petitioner claims to have three employees. The Petitioner filed four immigrant visa petitions from 2016 to 2017.

VI. CONCLUSION

We are remanding the appeal. On remand, the Director should allow the Petitioner a reasonable period to provide evidence relating to the Beneficiary's employment history and the Petitioner's ability to pay the proffered wage. Upon receipt of the Petitioner's timely response, the Director should review the entire record and enter a new decision. The Director may also request any evidence relating to the willful misrepresentation of a material fact or other grounds as determined and address all issues in the new decision.

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

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