U.S. Citizenship and Immigration Services

Non-Precedent Decision of the Administrative Appeals Office

In Re: 33410379

Date: SEP. 16, 2024

Appeal of California Service Center Decision

Form I-129, Petition for a Nonimmigrant Worker (H-1B)

The Petitioner seeks to temporarily employ the Beneficiary under the H-1B nonimmigrant classification for specialty occupations. *See* Immigration and Nationality Act (the Act) section 101(a)(15)(H)(i)(B), 8 U.S.C. § 1101(a)(15)(H)(i)(b). The H-1B program allows a U.S. employer to temporarily employ a qualified foreign worker in a position that requires both (a) the theoretical and practical application of a body of highly specialized knowledge and (b) the attainment of a bachelor's or higher degree in the specific specialty (or its equivalent) as a minimum prerequisite for entry into the position.

The Director of the California Service Center revoked the approval of the petition pursuant to 8 C.F.R. § 214.2(h)(iii)(A)(*1*), (A)(*2*), and (A)(*3*) because the Beneficiary is no longer employed by the Petitioner in the capacity specified in the petition; the statement of facts contained in the petition was not true and correct, inaccurate, fraudulent, or misrepresented a material fact; and the Petitioner violated the terms and conditions of the approved petition. The matter is now before us on appeal pursuant to 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

U.S. Citizenship and Immigration Services (USCIS) may revoke the approval of an H-1B petition pursuant to 8 C.F.R. § 214.2(h)(11)(iii), which states the following:

> (A) *Grounds for revocation*. The director shall send to the petitioner a notice of intent to revoke the petition in relevant part if he or she finds that:
>
> (1) The beneficiary is no longer employed by the petitioner in the capacity specified in the petition . . .; or

(2) The statement of facts contained in the petition or the application for a temporary labor certification was not true and correct, inaccurate, fraudulent, or misrepresented a material fact; or

(3) The petitioner violated terms and conditions of the approved petition; or

(4) The petitioner violated requirements of section 101(a)(15)(H) of the Act or paragraph (h) of this section; or

(5) The approval of the petition violated paragraph (h) of this section or involved gross error.

The regulations require that USCIS provide notice consisting of a detailed statement of the grounds for revocation of petition approval and provide an opportunity for the petitioner to respond to the notice of intent to revoke. 8 C.F.R. § 214.2(h)(11)(iii)(B).

II. ANALYSIS

The Petitioner states that it is a full-service restaurant employing 18 people. The Petitioner filed the underlying petition on behalf of the Beneficiary seeking new employment and change of status. After initially approving the petition, the Director notified the Petitioner of USCIS' intent to revoke the approval of the petition with a notice of intent to revoke (NOIR). The Petitioner's response to the NOIR did not sufficiently rebut the derogatory information. Accordingly, the Director revoked the petition's approval.

Upon de novo review, we agree with the Director's decision to revoke the petition's approval under 8 C.F.R. § 214.2(h)(11)(iii)(A)(*1*), (A)(*2*), and (A)(*3*). The Petitioner has not rebutted the derogatory information which shows that the Beneficiary is not employed by the Petitioner in the capacity specified in the petition; the statement of facts in the petition was not true and correct; and the Petitioner violated the terms and conditions of the approved petition. Specifically, the information shows that the Beneficiary has been working from a work location other than that specified in the petition and has not been performing the duties of the specialty occupation.

However, for the reasons discussed below, we also conclude that the Director did not sufficiently articulate the grounds to revoke the petition based upon the Petitioner's potential collusion with other entities to unfairly increase the chances of the Beneficiary's selection in the H-1B registration process or the related finding of fraud. For that reason, we will withdraw that finding as a ground for the petition's revocation and the Director's finding of fraud.

A. The Petitioner Has Not Overcome the Revocation Grounds at 8 C.F.R. § 214.2(h)(11)(iii)(A)(*1*) through (A)(*3*).

The Petitioner stated in its H-1B petition that the Beneficiary would be working as a management analyst from the Petitioner's business location in Utah. The Director notified the Petitioner in its NOIR that USCIS received information that the Beneficiary was not working exclusively at the Petitioner's location in Utah, but instead was working remotely from Arkansas, and was not

performing the duties of the management analyst position as articulated in the petition. This information was primarily obtained from an admission interview with the Beneficiary after returning from international travel, in which the Beneficiary stated in part that he was working remotely "when they need me" and was "managing finances" for the Petitioner. Based upon this information, the Director also concluded that the information shows that the Petitioner has not established that there is a bona fide job offer for the Beneficiary. The Director therefore advised the Petitioner of the intent to revoke the petition because the information reflected that the Beneficiary is no longer employed by the Petitioner in the capacity specified in the petition; the statement of facts contained in the petition was not true and correct, inaccurate, fraudulent, or misrepresented a material fact; and the Petitioner violated terms and conditions of the approved petition.

In response to the Director's NOIR, and on appeal, the Petitioner does not deny that the Beneficiary worked remotely for the Petitioner from the Beneficiary's home in Arkansas, rather than working exclusively at the Petitioner's location in Utah. Instead, the Petitioner asserts that the Beneficiary had difficulties in locating housing in Utah and in leaving his housing in Arkansas. The Petitioner insists that these are extraordinary circumstances and therefore the statements of fact contained in the H-1B petition were true and correct and the Petitioner did not violate the terms and conditions of the approved petition.

The Petitioner's claims are not persuasive. A petitioner must immediately notify USCIS of any changes in the terms and conditions of employment of a beneficiary which may affect eligibility for H-1B status and, if they will continue to employ the beneficiary, file an amended petition. 8 C.F.R. § 214.2(h)(11)(i)(A). A change in a beneficiary's authorized place of employment to geographical areas not covered by a certified ETA 9035E, Labor Condition Application for Nonimmigrant Workers (LCA), is a material change and requires that a petitioner immediately notify USCIS and file an amended or new H-1B petition along with a corresponding LCA certified by U.S. Department of Labor (DOL). *See Matter of Simeio Solutions, LLC*, 26 I&N Dec. 542, 549 (AAO 2015). While we are sympathetic to the difficulties that may arise in a relocation, the Petitioner was responsible for, and in control of, selecting the requested start date for the Beneficiary's employment, the work location for Beneficiary to perform services, and the other circumstances of the Beneficiary's H-1B employment. The Petitioner remains bound by the governing statute and regulations, and the Petitioner has not provided any basis in law that permits the Petitioner to ignore the relevant statutory and regulatory requirements based on these circumstances.

Additionally, the Petitioner does not address on appeal the Director's conclusion that the Beneficiary is not performing the duties of a management analyst. In the NOIR, the Petitioner asserted that the Beneficiary is performing the job duties stated in the petition and claimed that the Beneficiary was experiencing "stress and fatigue" when he was interviewed. The Director found these statements insufficient to overcome the derogatory information. We do as well. The Petitioner did not provide in its NOIR response any details about the Beneficiary's work product, specific work assignments, or duties with the company other than the conclusory statement that the Beneficiary was performing the duties stated in the petition. In addition to being substantively insufficient, the statements provided in the NOIR response are also unsigned and undated by either the Petitioner or the Beneficiary, and for this reason carry even less persuasive weight. Finally, as noted, the Petitioner does not address the issue of the Beneficiary's duties on appeal, and we consider an issue not raised on appeal to be waived.

See, e.g., Matter of O-R-E, 28 I&N Dec. 330, 336 n.5 (BIA 2021) (citing *Matter of R-A-M-*, 25 I&N Dec. 657, 658 n.2 (BIA 2012)).

The Director's statements in the NOIR regarding the Beneficiary's work location and duties were adequate to notify the Petitioner of the intent to revoke the approval of the petition in accordance with the provisions at 8 C.F.R. § 214.2(h)(11)(iii)(A)(*1*), (A)(*2*), and (A)(*3*). As stated in the NOIR, the Beneficiary has been placed at a work location other than that disclosed on the H-1B petition, the Beneficiary has not been performing services in the specialty occupation, and the Petitioner therefore has not established that there is a bona fide job offer for the Beneficiary. These unrebutted facts disclosed in the NOIR demonstrate that the Beneficiary is not employed by the Petitioner in the capacity specified in the petition; that the statements of fact contained in the petition were not true and correct; and that the petition's terms and conditions were violated. This necessitates the revocation of the petition's approval.

B. The Revocation Ground Related to the H-1B Registration and Fraud Will Be Withdrawn.

The Director also notified the Petitioner in the NOIR that it appeared that the Petitioner worked with another entity or entities to submit multiple H-1B registrations to unfairly increase the chances of selection for the Beneficiary. Specifically, the Director notified the Petitioner of what appear to be connections between the Petitioner and other entities that also submitted registrations on behalf of the Beneficiary and other individuals. This includes the fact that the suspect registrations were submitted from the same IP address in Arkansas within a few minutes of each other, despite the business locations of Petitioner and the other entities not being located near the Arkansas IP address. The Director reminded the Petitioner of the attestation that it made in submitting the H-1B registration for the Beneficiary: that the registration reflects a legitimate job offer and that it had not worked with or agreed to work with any other entities or individuals to submit a registration to unfairly increase the chances of selection for the Beneficiary. The Director concluded that this attestation was not true and correct, and because the H-1B registration instructions advise registrants that USCIS may consider a registration invalid if this attestation is not true and correct, and may revoke any related petition, the Director advised the Petitioner of the intent to revoke the petition with a finding of fraud.

In response to the NOID, the Petitioner stated that the law firm it hired to complete the registration for the Beneficiary "did not meet the standards of legitimacy" that it expected related to the electronic signatures. The Petitioner generally denied knowledge of the other entities and their H-1B registrations, but also submitted a statement from the Beneficiary and a statement from the other entities about the Beneficiary's prior employment and association with these entities, and alleged job offer letters from these entities.

The Director concluded that the NOIR response was insufficient to overcome the derogatory information. The Director noted that the registration was filed without an attorney of record and the Petitioner provided no evidence of retaining or receiving counsel from an attorney in this matter. The Director also found that the job offer letters were not sufficiently credible and that the statements from the Beneficiary and the other entities provide conflicting information. Therefore, rather than overcoming the concerns regarding the relationship between the Petitioner, Beneficiary, and the other entities, the response instead raised further doubts about the reliability of the evidence in the record. The Director concluded that Petitioner's NOIR response did not sufficiently address the issues raised

in the NOIR and in fact added additional inconsistencies to the record that cast further doubt on the credibility of the evidence submitted.

The Petitioner repeats on appeal the assertions that its job offer was legitimate, that it is unconnected to the other entities that submitted registrations for the Beneficiary, that it did not work with those entities, and that it understands that the Beneficiary's job offers from those entities were also legitimate. The Petitioner also provides on appeal an alleged contract for legal services related to the filing of the H-1B registration for the Beneficiary and documents related to the ownership of the other entities to document that it does not have shared ownership or other connections to them.

We agree with the Director's concerns regarding the submission of these H-1B registrations, and we agree that the Petitioner's response does not sufficiently address these concerns. For example, the Petitioner has not sufficiently explained why its H-1B registration for the Beneficiary was submitted with e-signature by an individual purporting to be an authorized representative of the Petitioner from the same IP address in Arkansas, at nearly the same date and time, as two other organizations that also submitted registrations on behalf of the Beneficiary. Despite the Petitioner's claims that it relied on counsel in this matter, as noted by the Director, the registration was not submitted by an attorney. Additionally, we note again that the Petitioner's and Beneficiary's statements submitted with the NOIR are unsigned and undated, and we agree with the Director that the job offer letters are not sufficiently credible and that the Beneficiary's statement and the statement of the other organizations provide conflicting information.

However, despite these valid concerns related to the underlying H-1B registration, the Director did not provide sufficient notice of the specific grounds for revocation based upon this derogatory information. Instead, the Director reminded the Petitioner of the website instructions for the H-1B registration process, which advise petitioners of the attestation that the registrant certifies, under penalty of perjury, that the registration reflects a legitimate job offer and that the registrant has not worked with other entities or individuals to unfairly increase the chances of selection for the beneficiary of the submission. Additionally, the instructions state that:

> If USCIS finds that this attestation was not true and correct (for example, that a company worked with another entity to submit multiple registrations for the same beneficiary to unfairly increase chances of selection for that beneficiary), USCIS will find that registration to not be properly submitted. Since the registration was not properly submitted, the prospective petitioner would not be eligible to file a petition based on that registration in accordance with the regulatory language at 8 CFR § 214.2(h)(8)(iii)(A)(*1*). USCIS may deny or revoke a petition based on a registration that contained a false attestation and was therefore not properly submitted.

The Director also advised the Petitioner that 8 C.F.R. § 103.2(a)(1) requires that every benefit request be submitted in accordance with the form instructions, and further that the website instructions here function as form instructions within the meaning of 8 C.F.R. § 1.2.

We agree with the Director that the Petitioner has not sufficiently addressed and overcome the derogatory information that its attestation was not true and correct. Moreover, we conclude that this would be a sufficient evidentiary deficiency to preclude the Petitioner from demonstrating that it has

a properly submitted H-1B registration for the Beneficiary as required by 8 C.F.R. § 214.2(h)(8)(iii)(A)(*1*).

However, the revocation regulations require that the Director provide a petitioner a detailed statement of the specific grounds for revocation. 8 C.F.R. § 214.2(h)(11)(iii)(A), (iii)(B). Based upon the deficiencies in the record, the Director could have notified the Petitioner that the lack of a bona fide job offer, the indications that the Petitioner worked with other entities to unfairly increase the chances of selection for the Beneficiary, and the concomitant lack of a properly submitted H-1B registration for the Beneficiary demonstrate that the Petitioner violated the requirements of paragraph (h) of 8 C.F.R. § 214.2, that the approval of the petition violated paragraph (h) of 8 C.F.R. § 214.2 and involved gross error, and that the petition's revocation is therefore required under 8 C.F.R. § 214.2(h)(11)(iii)(A)(*4*) and (A)(*5*). But the Director did not do so, and based upon this deficiency in the notice to the Petitioner we must withdraw this revocation ground.

Separately, we also conclude that the Director did not sufficiently articulate a basis to support the finding of fraud. As outlined by the Board of Immigration Appeals (BIA), a material misrepresentation requires that an individual 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 Tijam*, 22 I&N Dec. 408, 425 (BIA 1998); *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 foreign national'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, he or she 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 289-90.

Additionally, the USCIS Policy Manual provides the framework for fraud determinations including the specific elements which must be established to sustain a finding of fraud. *See generally* 8 *USCIS Policy Manual* J.2(C), https://www.uscis.gov/policy-manual. This includes the immigration officer making a determination that the individual or petitioner, when making the false representation, had the intent to deceive a U.S. government official authorized to act upon the request and that the U.S. government official believed and acted upon the false representation.

In the instant matter, despite the valid concerns relating to the legitimacy of the H-1B registration, the Director did not provide an adequate analysis of these factors to support the finding of fraud. The Director did not discuss the specific framework for making a fraud determination as provided by administrative case law and USCIS policy guidance and did not apply the facts of the instant matter to each of the required elements in the framework. Therefore, we will withdraw the Director's finding of fraud.

III. CONCLUSION

The Director's revocation of the previously approved petition based upon the finding that the Petitioner worked with another entity or entities to submit multiple H-1B registrations to unfairly increase the chances of selection for the Beneficiary is withdrawn, as the finding of fraud based upon this ground. However, the revocation of the previously approved petition under 8 C.F.R. § 214.2(h)(11)(iii)(A)(*1*), (A)(*2*), and (A)(*3*) is affirmed because the Beneficiary is no longer employed by the Petitioner in the capacity specified in the petition; the statement of facts in the petition was not true and correct; and the Petitioner violated the terms and conditions of the approved petition. The burden of proof to establish eligibility for the benefit sought remains with the petitioner in revocation proceedings. Section 291 of the Act, 8 U.S.C. § 1361; *Matter of Cheung*, 12 I&N Dec. 715 (BIA 1968); and *Matter of Estime*, 19 I&N Dec. 450, 452, n.1 (BIA 1987). The Petitioner has not met that burden. The appeal will be dismissed with the finding of fraud withdrawn. The petition will remain revoked.

ORDER: The appeal is dismissed.