U.S. Citizenship and Immigration Services

Non-Precedent Decision of the Administrative Appeals Office

MATTER OF A-A-S-

DATE: JUNE 22, 2017

APPEAL OF TEXAS SERVICE CENTER DECISION

PETITION: FORM I-140, IMMIGRANT PETITION FOR ALIEN WORKER

The Petitioner, a physician, seeks an immigrant visa petition as a member of the professions holding an advanced degree as set forth in section 203(b)(2) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(2). In addition, the Petitioner seeks a "national interest" waiver from the requirement of a job offer by a U.S. employer. Section 203(b)(2)(B)(ii) of the Act provides that such a waiver shall be afforded to a physician who meets several conditions, including that the individual will work in an area with a shortage of health care professionals.

The California Service Center approved the Form I-140, Immigrant Petition for Alien Worker. However, the Director of the Texas Service Center subsequently revoked the approval of the immigrant petition, finding that the Petitioner did not establish that he had an employer-employee relationship with as he attested at the time of filing. The Director further indicated that the Petitioner "willfully misrepresented his intention of seeking employment with when he submitted an employment contract with signed by an unauthorized signatory."

On appeal, the Petitioner states that the question of whether he was an employee of is immaterial, he has established his eligibility under the "spirit" of the regulations, and he denies willfully misrepresenting material facts.

Upon *de novo* review, we will dismiss the appeal.

I. LAW

Section 203(b) of the Act sets out this sequential framework:

> (2) Aliens who are members of the professions holding advanced degrees or aliens of exceptional ability. –
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> > (A) In general. – Visas shall be made available . . . to qualified immigrants who are members of the professions holding advanced degrees or their equivalent or who because of their exceptional ability in the sciences, arts, or business, will substantially benefit prospectively the national economy, cultural or educational

> interests, or welfare of the United States; and whose services in the sciences, arts, professions, or business are sought by an employer in the United States.
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> (B) Waiver of job offer –
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> (i) National interest waiver. Subject to clause (ii), the Attorney General[1] may, when the Attorney General deems it to be in the national interest, waive the requirements of subparagraph (A) that an alien's services in the sciences, arts, professions, or business be sought by an employer in the United States.
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> (ii) Physicians working in shortage areas or veteran facilities.
>
> (I) In general. The Attorney General shall grant a national interest waiver pursuant to clause (i) on behalf of any alien physician with respect to whom a petition for preference classification has been filed under subparagraph (A) if –
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> (aa) the alien physician agrees to work full time as a physician in an area or areas designated by the Secretary of Health and Human Services as having a shortage of health care professionals or at a health care facility under the jurisdiction of the Secretary of Veterans Affairs; and
>
> (bb) a Federal agency or a department of public health in any State has previously determined that the alien physician's work in such an area or at such facility was in the public interest.

The implementing regulations at 8 C.F.R. § 204.12 specify that a physician must agree to work full time for an aggregate of five years, and set forth the evidentiary requirements to establish eligibility for the national interest waiver. Specifically, as relevant here, the provisions at 8 C.F.R. § 204.12(c)(1) provide that a petitioner must submit evidence with the petition relating to his intended employment arrangement, either as "an employee" or through his "own practice." If the physician will be an employee, he is required to submit a full-time employment contract covering the required five year period of clinical medical practice, or an employment commitment letter from a veterans' facility. The contract or letter must have been issued and dated within six months prior to the date the petition is filed. 8 C.F.R. § 204.1(c)(1)(i). Alternatively, if the physician will establish his own practice, he must provide a sworn statement committing to the full-time practice of clinical

[1] Pursuant to section 1517 of the Homeland Security Act of 2002 ("HSA"), Pub. L. No. 107-296, 116 Stat. 2135, 2311 (codified at 6 U.S.C. § 557 (2012)), any reference to the Attorney General in a provision of the Act describing functions that were transferred from the Attorney General or other Department of Justice official to the Department of Homeland Security by the HSA "shall be deemed to refer to the Secretary" of Homeland Security. *See also* 6 U.S.C. § 542 note (2012); 8 U.S.C. § 1551 note (2012).

medicine for the required period, and describing the steps he has taken or intends to actually take to establish the practice. 8 C.F.R. § 204.1(c)(1)(ii).

II. ANALYSIS

A. Procedural Background

In September 2007, the Petitioner filed the Form I-140 petition stating that he intended to work full-time in a clinical medical practice for an aggregate of five years as an employee of [redacted] He provided a copy of a full-time employment contract, dated November 14, 2006, signed by his brother, [redacted] on behalf of [redacted] In November 2009, the Director approved the petition.

The Petitioner held H-1B status authorizing his employment with [redacted] when he filed the instant petition.[2] In October 2013, U.S. Citizenship and Immigration Services (USCIS) revoked the H-1B petition finding that the Petitioner was the sole owner and member of [redacted] and therefore, the company did not establish that it was a U.S. employer having an employer-employee relationship with the Petitioner as is required by H-1B regulations and labor condition application attestations.

Upon revocation of the H-1B petition, the Director sent a Notice of Intent to Revoke (NOIR) the instant petition, stating that USCIS had determined that the Petitioner did not have an employer-employee relationship with [redacted] as he had indicated. The Director explained that the Petitioner stated he would be an employee of [redacted] in accordance with 8 C.F.R. § 204.12(c)(1)(i), and that since USCIS had determined that no such employment relationship exists, the Form I-140 petition would be revoked. The Director also found that the Petitioner willfully misrepresented his intention of seeking employment with [redacted] as its employee when he provided an employment contract signed by an unauthorized signatory.

The Petitioner responded to the NOIR, stating that "whether [the Petitioner] is an employee is not material to the Form I-140 in this case," and that "the national waiver law does not require that the alien be an employee." The Director revoked the approval of the Form I-140 and the Petitioner subsequently filed an appeal. The Director's decision will be upheld and the appeal dismissed.

B. Proper Issuance of the NOIR

The first issue we must address is whether the Director adequately advised the Petitioner of the basis for revocation of approval of the petition. Section 205 of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1155, provides that "[t]he Attorney General [now Secretary, Department of Homeland Security] may, at any time, for what he deems to be good and sufficient cause, revoke the approval of any petition approved by him under section 204." This means that notice must be

[2] The Petitioner was the Beneficiary of a Form I-129 Petitioner for Nonimmigrant Worker, Notice of Approval [redacted] filed by [redacted]

provided to the petitioner before a previously approved petition can be revoked. *See* 8 C.F.R. § 205.2.

Further, the regulation at 8 C.F.R. § 103.2(b)(16) requires USCIS to disclose derogatory information of which the petitioner is unaware, to afford the petitioner an opportunity to rebut the information before the decision is rendered. A notice of intention to revoke the approval of a visa petition is properly issued for "good and sufficient cause" when the evidence of record at the time of issuance, if unexplained and unrebutted, would warrant a denial of the visa petition based upon the Petitioner's failure to meet his burden of proof. *Matter of Arias*, 19 I&N Dec. 568 (BIA 1988); *Matter of Estime*, 19 I&N Dec. 450 (BIA 1987).

In the NOIR, the Director advised the Petitioner that because he had not established that he was an employee of [redacted] as described in his initial filing, he "may not submit a full-time contract in accordance with 8 C.F.R. § 204.12(c)(1)(i), but is obligated to submit the requisite evidence for physicians establishing their own practice." The Director also advised the petitioner that the Form I-140 may be revoked due his willfully misrepresentation of material facts. The Director stated that the Petitioner "submitted an employment contract with [redacted] signed by an unauthorized signatory in order to receive the benefit of his approved Form I-140."

While the Petitioner asserts on appeal that the Director did not have "good cause - in the form of a legal or factual basis - upon which to revoke the petition," we find that the Director appropriately reopened the approval of the petition by issuing the NOIR by questioning the Petitioner's employment relationship with [redacted] and apprising him of possible willful misrepresentation of material fact, thereby giving him notice of the derogatory information specific to the current proceeding. As such, we find that the Petitioner was afforded a meaningful opportunity to rebut or respond to the evidence described in the NOIR. *See Ghaly v. INS*, 48 F.3d 1426, 1431 (7th Cir. 1995).

C. Eligibility for the Requested Benefit

As stated above, the regulations require physicians seeking a national interest waiver to choose between two intended employment arrangements with different evidentiary requirements. *See* 8 C.F.R. § 204.12(c)(1)(i), (ii). These requirements are meant to ensure that petitioners verify their commitment to practice medicine full time in an underserved area and document how they will accomplish this requirement.

The Petitioner explained in his initial filing that he "will be working for [redacted]' as an internal medicine physician contracting with three hospital facilities in underserved areas. He offered a Form G-325A, Biographic Information; statement of qualifications of alien, in which he listed [redacted] as his employer; and a physician employment agreement. The employment agreement, executed on November 14, 2006, dictates that "the term of the employment under this agreement shall be for five year beginning on December 15, 2006."

For the reasons discussed below, we find that the Petitioner has not proven his eligibility as an employee under 8 C.F.R. § 204.12(c)(1)(i). Specifically, he did not provide an employment contract that was dated and issued within six months prior to filing the petition and valid for the required five year period, or establish that he was an "employee" of [redacted] at the time of filing. 8 C.F.R. § 204.1(c)(1)(i).

Regarding the contract evidencing the Petitioner's employment status, although not addressed by the Director, we note that the employment agreement between the Petitioner and [redacted] was signed on November 14, 2006, and became effective on December 15, 2006. This is more than six months prior to the date the immigrant petition was filed on September 26, 2007. Furthermore, the contract states that it is valid for five years after its effective date, or until December 15, 2011. The petition was filed on July 27, 2007, and therein the Petitioner attested that he would be practicing in a medically underserved area for five years, or until July 27, 2012. Given the contract's deficiencies, we find that the Petitioner has not provided the evidence required under 8 C.F.R. § 204.12(c)(1)(i) for employees.

Furthermore, as noted by the Director, the Petitioner has not otherwise demonstrated that he had an employer-employee relationship with [redacted] at the time of filing because he did not established that the company would exercise control over his work. While the nonimmigrant visa regulations define the term "employer,"[3] the regulations do not define the term "employed" or "employee" for purposes of the either the nonimmigrant visa or the national interest waiver visa classifications. The Supreme Court has determined that where the applicable federal law does not define "employee," the term should be construed as "intend[ing] to describe the conventional master-servant relationship as understood by common-law agency doctrine." *Nationwide Mut. Ins. Co. v. Darden*, 503 U.S. 318, 322-323 (1992) ("*Darden*") (quoting *Comty. for Creative Non-Violence v. Reid*, 490 U.S. 730, 739-40 (1989) ("*C.C.N.V.*")). The Court stated that, in determining whether a hired party is an employee under the general common law of agency, it considers the hiring party's "right to control the manner and means by which the product is accomplished." *Darden*, 503 U.S. at 323-324 (quoting *C.C.N.V.*, 490 U.S. at 751-752); *see also Clackamas Gastroenterology Assocs. P.C. v. Wells*, 538 U.S. 440, 445, 447 & n.5 (2003).

Therefore, in considering whether or not one was an "employee" for purposes of either nonimmigrant or immigrant petitions, USCIS must focus on the common-law touchstone of "control." *Clackamas*, 538 U.S. at 450. The factors indicating that a worker is or will be an "employee" of an "employer" are clearly delineated in both the *Darden* and *Clackamas* decisions. *Darden*, 503 U.S. at 323-24; *Clackamas*, 538 U.S. at 445; *see also Restatement (Second) of Agency* § 220(2) (1958). Such indicia of control include when, where, and how a worker performs the job; the continuity of the worker's relationship with the employer; the tax treatment of the worker; the provision of employee benefits; and whether the work performed by the worker is part of the employer's regular business. *See Clackamas*, 538 U.S. at 445; *see also* EEOC Compl. Man. at § 2-III(A)(1) (adopting a materially identical test and indicating that said test was based on the *Darden* decision).

[3] 8 C.F.R. § 214.2(h)(4)(ii)

Lastly, the "mere existence of a document styled 'employment agreement'" shall not lead inexorably to the conclusion that the worker is an employee. *Clackamas*, 538 U.S. at 450. "Rather, . . . the answer to whether [an individual] is an employee depends on 'all of the incidents of the relationship . . . with no one factor being decisive." *Id.* at 451 (quoting *Darden*, 503 U.S. at 324).

Applying the *Darden* and *Clackamus* tests to this matter, the Petitioner has not established that he had an employer-employee relationship at the time the petition was filed and during the validity period of the petition because he has not documented the manner in which [redacted] had control over his work. The record indicates that [redacted] is a limited liability company that is owned, controlled, and operated by the Petitioner. The Petitioner owns 100 percent member interest and he is solely in control of the company. Thus, [redacted] does not exercise control over the petitioner, rather, the Petitioner exercises control over the company. Additionally, the employment agreement carries little weight for purposes of demonstrating an employer-employee relationship because in the instant case, the employer and employee are one in the same. Accordingly, the Petitioner has not established that he was an "employee" of [redacted] as he stated in his initial filing.[4]

On appeal, the Petitioner asserts that whether he had an employer-employee relationship with [redacted] is "immaterial." He argues that he "could have just as easily presented his own sworn statement confirming self-employment, and that the regulation "provides alternative avenues by which [the Petitioner] is able to comply, including the option of providing the services at issue in the context of self-employment." While the Petitioner is correct that the regulations allow filing as a self-employed physician, the regulation at 8 C.F.R. § 204.12(c)(1)(ii) requires self-employed physicians to provide a sworn statement committing to the full-time practice of clinical medicine for the required period, and describe the steps he has taken or intends to actually take to establish the practice. As the Petitioner has not submitted this required evidence, the record does not support his contention that he established eligibility as a self-employed physician.

The Petitioner must establish that all eligibility requirements for the immigration benefit have been satisfied from the time of the filing and continuing through adjudication. 8 C.F.R. § 103.2(b)(1). Here, the Petitioner has not established that he met the initial filing requirements for the immigration benefit, either as an employee or as a self-employed worker. As such, the Director's revocation will be affirmed on this ground.[5]

D. Willful Misrepresentation of Material Fact

We will next address the Director's finding that the Petitioner engaged in willful misrepresentation of a material fact. The Act states that any foreign national who, by fraud or willfully misrepresenting a

[4] We acknowledge that there may be some scenarios in which a solely owned limited liability company may establish an employer-employee relationship. However, the Petitioner has not provided such evidence in this proceeding.

[5] The Petitioner also claims on appeal that the Director's revocation was prejudicial and unfair, violating his due process rights. However, as discussed above, we find that the Petitioner was properly notified of the basis of the revocation, and that the decision to revoke approval of the petition was proper.

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 the Act, is inadmissible. Section 212(a)(6)(C)(i) of the Act, 8 U.S.C. § 1182(a)(6)(C)(i). The Petitioner bears the burden of proving he did not willfully mispresent the material facts in revocation proceedings. *Matter of Cheung*, 12 I&N Dec. 715 (BIA 1968).

As outlined by the Board of Immigration Appeals (BIA), a material misrepresentation requires that the individual willfully make a material misstatement to a government official for the purpose of obtaining an immigration benefit to which one is not entitled. *Kai Hing Hui*, 15 I&N Dec. at 289-90. 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 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).

Thus, 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 288.

In the revocation, the Director found that the Petitioner willfully misrepresented his intention of seeking employment with as its employee by providing an employment contract that was signed by an unauthorized signatory. The Director noted that the company's articles of organization, filed with the Secretary of State of Indiana, provide that the company will be managed by its sole member, the Petitioner and no amendments to the company's articles have been filed. The Director concluded that was not authorized to sign the employment agreement in November 2006 acting as the representing agent of because he is not designated as a managing member of the company.

On appeal, the Petitioner maintains that was designated as an authorized signatory despite the fact that his name does not appear on the company's articles of organization. He also asserts that "there exists no law – and the present Notice of Revocation provides no supporting citation – requiring to have its articles or organization to be amended so as to allow Mr. to be an authorized signor on behalf of the company." He does not, however, provide documentation of Mr. designation by or evidence to demonstrate the legal validity of such designation.

The burden of proof remains with the Petitioner to show, by a preponderance of the evidence, that the Director's finding is not appropriate and that a material misrepresentation was not committed. *See Matter of Ho*, 19 I&N Dec. 582, 591 (BIA 1988); *Matter of Cheung*, 12 I&N Dec. 715 (BIA 1968). Here, the Petitioner knowingly presented an employment contract as evidence that he would

be "an employee" of [redacted]. This is material to the Petitioner's eligibility because it directly relates to the requirements of the regulatory provision under which he sought eligibility, 8 C.F.R. § 204.12(c)(1)(i).

While the Petitioner maintains that he authorized Mr. [redacted] to sign on behalf of the company, he has not provided sufficient documentation to support this claim. Mr. [redacted] is listed as a "Director" on an undated addendum to [redacted] articles of incorporation; however, this alone does not establish that he was an authorized signatory because the articles of incorporation specifically state that "any *member* may bind the company in all matters in the ordinary course of business" (emphasis added). They do not speak to whether a "director" may similarly bind the company. Furthermore, while the Petitioner's assertion that an authorized signatory does not necessarily have to be listed on the company's articles of organization is valid, it does not establish that, in this case, Mr. [redacted] was, in fact, authorized to sign on behalf of the company, and he has not offered any other evidence to support this contention. Accordingly, the Petitioner has not met his evidentiary burden of proving that he did not willfully misrepresent material facts and the Director's decision will be affirmed.[6]

III. CONCLUSION

For the reasons discussed above, we find the Petitioner has not established eligibility for a national interest waiver.

ORDER: The appeal is dismissed.

Cite as *Matter of A-A-S-*, ID# 462626 (AAO June 22, 2017)

[6] Willful misrepresentation of a material fact in these proceedings may render a beneficiary inadmissible to the United States. "Any [foreign national] 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 [the Act] is inadmissible." Section 212(a)(6)(C) of the Act. In the context of this visa petition, our determination is a "finding of fact" and not an admissibility determination. The immigrant visa petition is not the appropriate forum for finding a foreign national inadmissible. *See Matter of O*, 8 I&N Dec. 295 (BIA 1959). However, we will generally enter a written decision with a statement of findings and conclusions on all material issues of law or fact, including findings of material misrepresentation. *See* 8 C.F.R. § 103.3(a)(2)(x). After we enter the finding of fact in this decision, the foreign national may be found inadmissible at a later date in separate proceedings.