U.S. Citizenship and Immigration Services

Non-Precedent Decision of the Administrative Appeals Office

MATTER OF O-D-C-, INC.

DATE: APR. 5, 2018

MOTION ON ADMINISTRATIVE APPEALS OFFICE DECISION

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

The Petitioner, a dry cleaning and tailoring business, seeks to employ the Beneficiary as an alterations tailor. It requests classification of the Beneficiary as an "other worker" under the third preference immigrant classification. 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 for lawful permanent resident status a foreign national who is capable of performing unskilled labor that is not temporary or seasonal in nature and requires less than two years of training or experience.

The Director of the Texas Service Center denied the petition, finding that the Petitioner had not adequately explained evidentiary inconsistencies concerning the Beneficiary's employment history and had not established that the Beneficiary met the minimum experience requirement of the labor certification. The Director also found that the Petitioner and the Beneficiary willfully misrepresented material facts, and invalidated the labor certification.

The Petitioner filed an appeal, which we dismissed. We found that the Beneficiary made a false claim on the labor certification about her experience and submitted false evidence thereof with the petition, and that the Petitioner had not resolved the evidentiary discrepancies in the record. We affirmed the Director's finding that the Petitioner did not establish the Beneficiary's qualification for the offered position as well as the Director's invalidation of the labor certification based on a finding of fraud or willful misrepresentation of a material fact against the Beneficiary.

The matter is now before us on a motion to reconsider. Upon review, we will deny the motion.

I. LAW

A motion to reconsider must establish that our decision was based on an incorrect application of law or policy and that the decision was incorrect based on the evidence in the record of proceedings at the time of the decision. 8 C.F.R. § 103.5(a)(3). A motion to reconsider must be supported by a pertinent precedent or adopted decision, statutory or regulatory provision, or statement of U.S. Citizenship and Immigration Services (USCIS) or Department of Homeland Security (DHS) policy. *Id.* We may grant a motion that satisfies these requirements and demonstrates eligibility for the requested immigration benefit.

II. ANALYSIS

On motion, the Petitioner asserts that the evidence of record establishes that the Beneficiary has the requisite experience to meet the terms of the labor certification[1] and contends that we erred in affirming the finding of willful material misrepresentation and invalidation of the labor certification.[2] However, as discussed below, the Petitioner's motion does not establish that our appellate decision was based on an incorrect application of law or policy and that the decision was incorrect based on the evidence in the record of proceedings at the time of the decision.

In this case, the labor certification states that the minimum experience required for the proffered position of alterations tailor is six months in the job offered or in tailoring generally. The labor certification states that the Beneficiary met this requirement by virtue of her employment as "assistant manager, production" by a tailoring company in South Korea, from February 10, 2003, to July 8, 2011. This job is the only experience listed on the labor certification.

In our decision on appeal we noted that the Petitioner had submitted conflicting evidence regarding the dates of the Beneficiary's employment at and whether it was full- or part-time employment. Moreover, when the company's owner, , was contacted by a U.S. State Department official in South Korea he stated that he did not recall employing the Beneficiary and did not write the initial certificate of employment that was submitted with the petition. subsequently changed his story, asserted that the Beneficiary had been employed by and produced a new certificate stating that this employment actually began on February 10, 2008, five years later than originally asserted. We also noted that in other immigration filings the Beneficiary made no mention of any employment as a tailor with and identified other work she had performed in South Korea as a restaurant owner and at a bank. In view of these multiple unresolved discrepancies, and the admission that the dates and nature of the employment originally claimed of the labor certification were not true, we concluded that false evidence of

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[1] A beneficiary must meet all of the education, training, experience, and other requirements of the labor certification as of the petition's priority date.[1] *See Matter of Wing's Tea House*, 16 I&N Dec. 158, 159 (Acting Reg'l Comm'r 1977). The "priority date" of a Form I-140 petition is the date the underlying labor certification was filed with the DOL. *See* 8 C.F.R. § 204.5(d). The priority date in this case is October 29, 2014.

[2] As outlined by the Board of Immigration Appeals, a material misrepresentation requires that one willfully makes 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 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). A labor certification is subject to invalidation by DHS upon a finding of fraud or willful misrepresentation of a material fact involving the labor certification application. 20 C.F.R. § 656.30(d)

employment had been submitted and dismissed the appeal, affirming the Director's finding that the Beneficiary willfully misrepresented the Beneficiary's experience on the labor certification.

On motion the Petitioner asserts that the Director erred in his findings that there were numerous evidentiary inconsistencies concerning the Beneficiary's work experience and that fraud was committed. The Petitioner contends that the only inconsistencies in the record are the Beneficiary's starting date of employment with , now conceded to be February 10, 2008, rather than February 10, 2003, and the nature of her employment, now conceded to be part-time rather than full-time but, according to the Petitioner, still amounting to more than six months of qualifying employment. The Petitioner claims that these inconsistencies were resolved by the documentation it submitted in response to the Director's notice of intent to deny (NOID) that preceded the denial decision. We do not agree.

The documentation submitted in response to the NOID included a new certificate from stating that employed the Beneficiary from February 10, 2008, to July 8, 2011; a statement of monthly working days from listing the Beneficiary's alleged monthly working day totals from February 2008 to July 2011; and a cash payment statement from listing the Beneficiary's alleged monthly pay from February 2008, to July 2011. All three of these documents were prepared by and dated June 15, 2016, long after the Beneficiary's purported employment by They were not corroborated by any contemporaneous documentation such as pay statements from to the Beneficiary, personnel or tax records of from the years 2008-2011, or any other employment-related materials from dating from 2008 to 2011. Nor did the Petitioner submit any certificates of income for the years 2008-2011 from the , the government agency to which all employment in South Korea is required to be reported. Thus, the Petitioner did not submit any objective, independent evidence of the Beneficiary's employment by as required to resolve evidentiary inconsistencies in the record. *See Matter of Ho*, 19 I&N Dec. 582, 591-92 (BIA 1988). This evidentiary deficiency was not remedied on appeal or on motion.

The Petitioner also asserts that the restaurant and bank experience mentioned in connection with other immigration filings was either immaterial in the current proceedings (in the case of the restaurant) or sufficiently documented (in the case of the bank).[1] With regard to the restaurant, the record includes evidence of the Beneficiary's ownership of a Chinese restaurant in South Korea from November 1, 2011, to April 30, 2012. The Petitioner asserts that the Beneficiary did not list this experience in her employment history on the Form G-325A she submitted with an application for change of status (Form I-485) filed in 2015 because "ownership" is not the same as "employment." Restaurant ownership is a type of self-employment, however, and the Form G-325A requested a listing of the applicant's employment for the last five years, which included 2011 and 2012. Not listing the restaurant operation on the Form G-325A, while perhaps technically defensible, did not help to reconcile the conflicting evidence regarding the Beneficiary's work experience. The Beneficiary's past work, including ownership of a restaurant, is material because the Beneficiary's inconsistent characterization of her employment history raises concerns about the credibility of the statements being made. As for the bank employment, the record includes a certificate of work

experience from [redacted] in [redacted] South Korea, stating that the Beneficiary was employed from July 9, 1988, to April 2, 2002, with four leaves of absence for maternity leave. We note, however, that one of the periods identified by [redacted] as maternity leave – October 14, 1995, to September 12, 1996 – closely overlaps the time period – December 1, 1995, to September 12, 1996 – in which the Beneficiary claims to have worked for a South Korean tailoring business, [redacted] A certificate of employment from [redacted] has been submitted as evidence of this alleged employment, but the Beneficiary has not explained the apparent conflict between her claims of simultaneously working for a tailor and being on maternity leave. Here again, the Petitioner has not provided objective, independent evidence of the Beneficiary's claimed employment. *Matter of Ho*, 19 I&N Dec. 591-92.

For the reasons discussed above – in particular the lack of primary contemporaneous evidence that the Beneficiary was employed by [redacted] from 2008 to 2011, which could reduce the materiality of the evidentiary discrepancies regarding the Beneficiary's overall employment history – the Petitioner has not shown that our decision to dismiss the appeal was based on an incorrect application of law or of USCIS or DHS policy.

III. CONCLUSION

The Petitioner has not met the requirements for a motion to reconsider. Accordingly, we will not disturb our previous decision in which we upheld the Director's findings that the Petitioner did not establish the Beneficiary's qualification for the offered position under the terms of the labor certification and affirmed the invalidation of the labor certification based on a finding of fraud or willful misrepresentation of a material fact by the Beneficiary.

ORDER: The motion to reconsider is denied.

Cite as *Matter of O-D-C, Inc.*, ID# 985830 (AAO Apr. 5, 2018)