U.S. Citizenship and Immigration Services

Non-Precedent Decision of the Administrative Appeals Office

In Re: 30400107

Date: APR. 08, 2024

Motion on Administrative Appeals Office Decision

Form I-140, Immigrant Petition for Alien Workers (Skilled Worker)

The Petitioner, a liquor store, seeks to permanently employ the Beneficiary as a bookkeeper. It requests classification of the Beneficiary as a skilled worker under the third preference immigrant classification. See 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 noncitizen 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 initially approved the petition in 2004. But they subsequently revoked the approval of the petition, concluding that the Petitioner did not establish that the Beneficiary possessed the qualifying employment experience for the offered position and the requested immigrant visa category, and the bona fides of the job offer. The Director also concluded that the Beneficiary willfully misrepresented his employment experience on the accompanying labor certification from the U.S. Department of Labor (DOL). On appeal, we withdrew the Director's decision and remanded the matter for consideration of additional evidence.

After issuing a notice of intent to revoke (NOIR) and considering the Petitioner's response, the Director again concluded that the Petitioner did not demonstrate that the Beneficiary possessed the requisite qualifying experience at the time the petition was filed, and that the Beneficiary willfully misrepresented his employment experience. The Petitioner filed another appeal, and we withdrew the Director's finding of willful misrepresentation of a material fact. But we agreed that the Beneficiary did not have the qualifying experience required for the position and the requested classification. In addition, we noted that, while not addressed in the Director's decision, the record does not demonstrate the Petitioner's continuing intent to employ the Beneficiary in the offered position. The matter is now before us on combined motions to reopen and reconsider.

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). Upon review, we will dismiss both motions.

I. ANALYSIS

As detailed in our most recent decision, on appeal, the Petitioner indicated on the labor certification filed on the Beneficiary's behalf that the position of bookkeeper requires two years of experience in the job offered, with no alternate experience acceptable and no training or education required. The offered position therefore comports with the requirements of the requested classification noted above. So, in order for the Beneficiary to meet the requirements of both the offered position and the requested classification, the Petitioner must establish that he possessed at least two of experience in the job offered prior to August 20, 2001, the priority date for this petition.

The Beneficiary attested on the labor certification that he gained the required experience while employed as a bookkeeper with a metals company in India from June 1994 to August 1997, and did not list any other potentially qualifying work experience. As evidence of this experience, the Petitioner submitted a letter from this company, signed by the proprietor but not including a printed, legible name, which states that the Beneficiary was employed as a bookkeeper from June 6, 1994 to August 25, 1997. While the duties include those listed by the Petitioner for the offered position, the letter does not state whether the Beneficiary was employed on a full- or part-time basis, as required for such letters per 8 C.F.R. § 204.5(g)(1).

In addition, as stated in the Director's NOIR and notice of revocation (NOR), as well as our most recent decision on appeal, there are multiple inconsistencies in the record relating to the Beneficiary's identity and date of entry into the United States, as well as to the credibility of the proprietor of the Beneficiary's previous employer (whom U.S. government records identify as the Beneficiary's brother). It is the Petitioner's burden to resolve these inconsistencies in the record with independent, objective evidence pointing to where the truth lies. *Matter of Ho*, 19 I&N Dec. 582, 591-92 (BIA 1988). Unresolved material inconsistencies may lead us to reevaluate the reliability and sufficiency of other evidence submitted in support of the requested immigration benefit. *Id.; see also Matter of O-M-O-*, 28 I&N Dec. 191, 197 (BIA 2021) ("by submitting fabricated evidence, the appellant compromised the integrity of his entire claim") (cleaned up). Due to the missing information on the employment experience letter, as well as these unresolved inconsistencies and credibility issues, we determined that the record did not establish that the Beneficiary possessed the qualifying experience for the offered position and the requested classification before the priority date and affirmed the Director's revocation of the petition's approval.

A. Motion to Reopen

A motion to reopen must state new facts and be supported by documentary evidence. 8 C.F.R. § 103.5(a)(2). Our review on motion is limited to reviewing our latest decision. 8 C.F.R. § 103.5(a)(1)(ii). We may grant motions that satisfy these requirements and demonstrate eligibility for the requested benefit. *See Matter of Coelho*, 20 I&N Dec. 464, 473 (BIA 1992) (requiring that new evidence have the potential to change the outcome).

On motion, the Petitioner submits a brief and three signed letters dated after our most recent decision from the owners of metal businesses from the same city in India as the Beneficiary's claimed previous employment. All of them state that they met the Beneficiary personally in the course of conducting

business with his claimed previous employer (owned by the Beneficiary's brother) in India, and that he was employed as a bookkeeper by that employer between 1994 and 1997.

Evidence of qualifying work experience must be in the form of letters from former employers which include a specific description of the duties performed by an individual, and must include the name, address, and title of the writer. If such evidence is not available, other documentation relating to the individual's experience will be considered. 8 C.F.R. § 204.5(g)(1).

Here, the letter from the Beneficiary's former employer sufficiently described his duties, but did not include information as to whether he worked full- or part-time. In addition, as detailed in our prior decision, a number of factors contributed to diminishing the credibility of the Beneficiary, his brother, and this evidence, including:

- The discrepancy between the Beneficiary's claimed dates of entry into the United States (July 1997) and the end date of his claimed employment with the metal company in India (August 25, 1997),
- The familial relationship between the proprietor of the Beneficiary's claimed former employer and the Beneficiary,
- The attestations from the Beneficiary's son in May 2011 that the proprietor of the Beneficiary's former employer, the Beneficiary's brother and his son's uncle, had provided him with false documents with which to apply for U.S. visitor visas,
- The Beneficiary's entry into the United States using a passport, visa and I-94 issued with a different name (M.K.) and birthdate,
- The discrepancy between the issuing post listed on the visa in the name of M.K. and U.S. government records,
- An unexplained admission stamp dated April 3, 1998, in the passport issued in the Beneficiary's true name and birthdate; and,
- The attempt in 1996 by the Beneficiary and his immediate family to enter the United States with false documents obtained from another brother.

The additional evidence submitted with the Petitioner's motion does not serve to rehabilitate the credibility of the work experience letter from the Beneficiary's claimed former employer. We initially note that these letters were created nearly 30 years after the beginning of the Beneficiary's claimed employment, and after the Petitioner was given notice of the deficiencies with the evidence of his work experience and provided an opportunity to respond. Fundamentally, independent and objective evidence would be material that is contemporaneous with the event to be proven and existent at the time of the Director's notice, rather than after learning of a deficiency in the filing. *See Matter of O-M-O-*, 28 I&N Dec. 191, 197 n.5 (BIA 2021) (quoting *Matter of Pineda*, 20 I&N Dec. 70, 73 (BIA 1989) for the prospect that the most persuasive evidence presented was "documentary evidence which was contemporaneous with the events in question").

In addition to the timing of these letters in relation to the events they purport to verify, we note that the letters were not written by individuals who claimed to have access to payroll and other administrative records which might verify the Beneficiary's employment with his brother's company. They also do not provide a sufficient level of specificity regarding the dates of the Beneficiary's purported employment or his job duties to serve to support the experience letter from the employer.

For all of these reasons, the new evidence submitted on motion does not establish the Beneficiary's qualification for the offered position or for the underlying classification, and the motion to reopen is dismissed.

B. Motion to Reconsider

A motion to reconsider must establish that our prior 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). Our review on motion is limited to reviewing our latest decision. 8 C.F.R. § 103.5(a)(1)(ii). We may grant motions that satisfy these requirements and demonstrate eligibility for the requested benefit.

The Petitioner first asserts that it has met the preponderance of the evidence standard and shown that it is more likely than not that the Beneficiary meets the requirements for the requested classification and the offered position. It argues that U.S. Citizenship and Immigration Services (USCIS) has requested specific evidence which is not required. We note that the Petitioner does not name specific evidence that has been requested by USCIS that it feels went beyond the requirements of the pertinent statue and regulations. But regarding the Beneficiary's work experience, we explained in great detail in our most recent decision why the evidence submitted was insufficient.

Next, the Petitioner challenges whether we conducted a diligent search of government records regarding a visa apparently used by the Beneficiary to enter the United States as M.K., his claimed alias, which government records show as being issued in Rio de Janeiro, Brazil and not Bombay (Mumbai), India as the copy of the visa indicates. The Petitioner acknowledges that, as we noted in our appeal decision, government records are presumed to be reliable, but asserts that this presumption is insufficient to imply any wrongdoing by the Beneficiary with regard to this visa. However, as previously noted, it is the Petitioner's burden to resolve discrepancies in the record with independent, objective evidence pointing to where the truth lies. *Matter of Ho*, 19 I&N Dec. at 591-92 (BIA 1988). Here, while it is possible that a data entry error occurred, the other unresolved discrepancies regarding the passport in which the visa appears, including the Beneficiary's name and date of birth and an unexplained entry stamp, tend to support the additional discrepancy regarding the issuing post rather than undermine the presumption concerning government records.

More importantly, despite the Petitioner's characterization of the identification of the visa issuing post being "a major reason" for our conclusion about the insufficiency of the evidence of the Beneficiary's qualifying work experience, we named several factors that led to that conclusion, which we have listed above. Even if the Petitioner had submitted evidence to undermine the presumption of government reliability, which it has not, the remaining factors and discrepancies would remain unresolved.

The Petitioner also challenges USCIS's reliance upon actions and statements by the Beneficiary's brother and son in submitting false documents with which to apply for U.S. visitor visas, stating that it has not been provided with any evidence of these allegations. The regulation at 8 C.F.R. § 130.2(6)(16) states that a petitioner "shall be permitted to inspect the record of proceeding which constitutes the basis for the decision," but provides for exceptions including the following:

> If the decision will be adverse to the applicant or petitioner and is based on derogatory information considered by the Service and of which the applicant or petitioner is unaware, he/she shall be advised of this fact and offered an opportunity to rebut the information and present information in his/her own behalf before the decision is rendered.

8 C.F.R. § 103.2(b)(16)(i). Thus, USCIS need not allow a petitioner to inspect derogatory information if - before a decision's issuance - the Agency advises a petitioner of the information and provides the business a chance to respond. Here, the Director advised the Petitioner of the derogatory evidence relating to the Beneficiary and provided details about this information, and the Petitioner has had multiple opportunities to respond.

The Petitioner next asserts that the discrepancies concerning the Beneficiary's date of entry into the United States are immaterial, as regardless of whether he entered in July 1997, September 1997, or April 1998, he would have been able to accrue the requisite two years of experience with his brother's company before leaving India. But as noted above, the multiple discrepancies in the record, including those concerning the date of his entry into the United States, justify a reevaluation of the reliability and sufficiency of other evidence in the record, including the work experience letter which indicates that he continued to work for his brother's company in India until August 25, 1997. So, the inconsistency in the petition regarding the Beneficiary's claimed entry in July 1997 and the letter's statement that he was working for his brother's company in India for at least an additional month adds to the list of discrepancies in the record which serve to undermine the credibility of the evidence. Further, while the Petitioner asserts on motion that the Beneficiary "was clearly still on [his employer's] books as an employee" after entering the United States, it has offered no evidence to support this assertion.

Finally, the Petitioner asserts on motion that our decision to withdraw the Director's conclusion that the Beneficiary willfully misrepresented material facts regarding his previous employment is at odds with our conclusion that the evidence is insufficient to establish that he is eligible for the classification requested or meets the requirements of the offered position. However, as explained in our decision on appeal, these are two different issues with different standards. A finding of material misrepresentation requires the following elements: the petitioner procured or sought to procure a benefit under U.S. immigration laws; they made a false representation; and the false representation was willfully made, material to the benefit sought, and made to a U.S. government official. *Id.*; *see generally* 8 *USCIS Policy Manual* J.2(B), https://www.uscis.gov/policymanual. Under Board precedent, a material misrepresentation is one which "tends to shut off a line of inquiry which is relevant to the [noncitizen's] eligibility and which might well have resulted in a proper determination that he be excluded."[1] A willful misrepresentation requires that the individual knowingly make a material misstatement to a government official for the purpose of obtaining an immigration benefit to which one is not entitled.[2] Material misrepresentation requires only a false statement that is material and willfully made. The term "willfully" means knowing and intentionally, as distinguished from accidentally, inadvertently, or in an honest belief that the facts are otherwise.[3]

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[1] *Matter of S- and B-C-*, 9 I&N Dec. 436, 447 (BIA 1961).

[2] *Sergueeva v. Holder*, 324 Fed. Appx. 76 (2d Cir. 2009) (citing *Matter of Kai Hing Hui*, 15 I&N Dec. 288, 289-90 (BIA 1975).

[3] *See Matter of Healy and Goodchild*, 17 I&N Dec. 22, 28 (BIA 1979).

Here, we determined that the inconsistencies noted did not rise to the level of willful misrepresentation of material facts, as we were able to corroborate some of the facts involved. But they were sufficient, when considered with the additional derogatory evidence concerning the actions of the Beneficiary and his brother, to undermine the credibility of the evidence such that it was insufficient to show, by a preponderance of the evidence, that the Beneficiary is qualified for the offered position and requested classification.

Although the Petitioner has submitted additional evidence in support of the motion to reopen, the Petitioner has not established eligibility. On motion to reconsider, the Petitioner has not established that our previous decision was based on an incorrect application of law or policy at the time we issued our decision. Therefore, the motion will be dismissed. 8 C.F.R. § 103.5(a)(4).

ORDER: The motion to reopen is dismissed.

FURTHER ORDER: The motion to reconsider is dismissed.