U.S. Citizenship and Immigration Services

Non-Precedent Decision of the Administrative Appeals Office

In Re: 12967937

DATE: APR. 15, 2021

Appeal of Texas Service Center Decision

Form I-140, Immigrant Petition for a Skilled Worker

The Petitioner, a not for profit religious organization, seeks to employ the Beneficiary as a pastoral assistant. It requests skilled worker classification for the Beneficiary under the third preference immigrant category. Immigration and Nationality Act (the Act) section 203(b)(3)(A)(i), 8 U.S.C. § 1153(b)(3)(A)(i). This employment-based "EB-3" 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 on four grounds, determining that: (1) the evidence did not show that the Beneficiary met the minimum experience requirement of the labor certification by the petition's priority date; (2) the Petitioner did not establish that it had the ability to pay the proffered wage from the priority date onward; (3) the record did not show that a *bona fide* job offer existed for U.S. workers at the time of filing; and (4) the Petitioner and the Beneficiary committed fraud or willful misrepresentation of a material fact involving the labor certification, which warranted its invalidation. The Petitioner filed a motion to reopen and reconsider, which the Director dismissed. The matter is now before us on appeal.

In visa petition proceedings it is the petitioner's burden to establish eligibility for the immigration benefit sought. Section 291 of the Act, 8 U.S.C. § 1361. Upon *de novo* review, we will dismiss the appeal on two grounds. We determine that (1) the Petitioner has not established that the Beneficiary had two years of qualifying experience by the priority date, as required to meet the terms of the labor certification and to qualify for skilled worker classification, and (2) the Petitioner and the Beneficiary willfully misrepresented a material fact in the labor certification application, which warrants its invalidation. We will reserve the remaining two issues of whether the Petitioner has established its continuing ability to pay the proffered wage from the priority date onward, and whether the proffered position is, or was, a *bona fide* job opportunity open to U.S. workers.

I. LAW

Employment-based immigration generally follows a three-step process. First, an employer obtains an approved labor certification from the U.S. Department of Labor (DOL). *See* section 212(a)(5) of the Act, 8 U.S.C. § 1182(a)(5). By approving the labor certification, the DOL certifies that there are

insufficient U.S. workers who are able, willing, qualified, and available for the offered position and that employing a foreign national in the position will not adversely affect the wages and working conditions of domestic workers similarly employed. *See* section 212(a)(5)(A)(i)(I)-(II) of the Act. Second, the employer files an immigrant visa petition with U.S. Citizenship and Immigration Services (USCIS). *See* section 204 of the Act, 8 U.S.C. § 1154. Third, if USCIS approves the petition, the foreign national may apply for an immigrant visa abroad or, if eligible, adjustment of status in the United States. *See* section 245 of the Act, 8 U.S.C. § 1255.

II. ANALYSIS

The instant petition was filed with USCIS on March 11, 2015, accompanied by a labor certification that was filed with the DOL on June 3, 2013, and certified on January 26, 2015.

A. Labor Certification Requirements and the Beneficiary's Experience

A beneficiary must meet the specific educational, training, experience, and other requirements of the labor certification, regardless of the classification requested. *See* 8 C.F.R. § 204.5(l)(3)(i). To be eligible for classification as a skilled worker, a beneficiary must have at minimum two years of training or experience. *See* 8 C.F.R. § 204.5(l)(3)(ii)(B). All requirements must be met by the petition's priority date,[1] which in this case is June 3, 2013. *See Matter of Wing's Tea House*, 16 I&N Dec. 158, 159 (Acting Reg'l Comm'r 1977).

The requirements for the proffered position of pastoral assistant are indicated in section H of the labor certification (Job Opportunity Information), which specifies that two years of experience in the job offered are required. The job duties are described as: "Assist clergy in conducting worship services. Plan, arrange educational activities for congregation." According to sections J and K of the labor certification (Alien Information and Work Experience) the Beneficiary met the experience requirement of section H by virtue of a job as pastoral assistant with The Government of Egypt, The Ministry of [redacted] Section, in [redacted] Egypt, from June 28, 2004, to September 30, 2010. The labor certification also lists a job with the Petitioner as a pastoral assistant from October 1, 2010, to May 28, 2013, but this job does not constitute qualifying experience because the labor certification indicates at section J.21 that the Beneficiary did not gain any qualifying experience with the employer in a position substantially comparable to the job opportunity in this proceeding. Thus, the only job listed in the labor certification which could be qualifying experience in this petition is the alleged job with The Government of Egypt from 2004 to 2010.

As its initial evidence of the Beneficiary's work experience the Petitioner submitted copies of an Arabic language document with an English translation entitled "Employee-status Report," purportedly from the "[redacted] Department Human Resources" in [redacted] Egypt, and dated February 11, 2015, stating that the Beneficiary was hired on June 28, 2004, for a job described as follows:

> Mokeem shaer (his duties included assisting the clergy in conducting Muslim prayer and worship services). This also included planning and arranging educational, social,

[1] The priority date of an employment-based immigrant petition is the date the underlying labor certification is filed with the DOL. *See* 8 C.F.R. § 204.5(d).

and recreational activities for congregation. He also assisted in the planning and arrangement [of] various retreats, social events, funerals, weddings, etc.

The English translation stated that the Beneficiary "is on vacation since the beginning of year 2011."

The Director issued a notice of intent to deny (NOID) in May 2017. After noting that the English language version of the "Employee-status Report" lacked the translator's certification required by the regulation at 8 C.F.R. § 103.2(b)(3), the Director discussed various USCIS records which appeared to conflict with the experience information provided in the labor certification. With respect to the Beneficiary's alleged employment with the Government of Egypt from 2004 to 2010, the Director pointed out that no such employment experience was claimed by the Beneficiary on three different nonimmigrant visa (NIV) applications he filed in 2006, 2009, and 2014. In his first NIV application, dated September 6, 2006, the Beneficiary stated that his current occupation was "celcbrant",[2] but did not identify his current employer and in the spaces calling for the employer's name and address inserted "celcbrant" in [redacted] Egypt. In his second NIV application, dated June 21, 2009, the Beneficiary identified his current employer or school as [redacted] School in [redacted], New Jersey, and his current occupation as "celcbrant." In his third NIV application, from early 2014, the Beneficiary answered "No" to the question "Were You Previously Employed?" Furthermore, USCIS records indicated that the Beneficiary spent most of the time between September 2006 and September 2008 in the United States with tourist or temporary religious worker visas, which appeared to conflict with the claim that the Beneficiary worked for the Egyptian Government during that time.

In response to the NOID the Petitioner asserted that the Beneficiary obtained the first of several temporary religious worker (R-1) visas in December 2006 to work at the [redacted] School in New Jersey, that he was granted a "vacation from [his] official work in Egypt" and spent most of the next two years in the United States, that he returned to Egypt in September 2008 and resumed his work with the "Ministry of Endowment, branch of [redacted]' until he was granted a new "vacation" in August 2010 for the purpose of working in the United States, and that he re-entered the United States with a new R-1 visa in October 2010 to work for the Petitioner. As evidence thereof the Petitioner submitted copies of Arabic-language letters with certified English translations, all purportedly stamped and signed by officials of the [redacted] Directorate, Personnel Affairs." The first letter, dated May 12, 2009, stated that the Beneficiary was hired on June 28, 2014, to work as "rituals performer (he is the Imam of people in prayers)." The second and third letters, virtually identical, are dated June 13, 2017, and state that the Beneficiary was hired by the [redacted] Directorate on June 28, 2004, to work as "Ritual Performer and Imam Assistant" (or "prayer lead and assistant imam"), was granted a three-year leave in November 2006 to work in the United States, returned to his job at [redacted] Administration" (or [redacted] Directorate") in October 2008, was granted another three-year leave to travel or work abroad in August or September 2010, and returned to work in Egypt in September 2013 before taking another leave in June 2014 that was ongoing in June 2017.

In denying the petition the Director determined that the Petitioner had not resolved the inconsistencies in the record, as discussed in the NOID, regarding the Beneficiary's employment history. The Director indicated that the Petitioner had not submitted independent objective evidence of the

[2] The Beneficiary may have meant "celebrant" but neither he nor the Petitioner ever clarifies this matter.

Beneficiary's claimed employment, such as the Beneficiary's wage and tax records for the asserted period(s) of employment, and concluded that the record did not establish that the Beneficiary had at least two years of qualifying experience.

On appeal the Petitioner asserts that "[t]here are no income taxes" or "wage statements" documenting the Beneficiary's alleged employment with the Egyptian government. The Petitioner submits another Arabic language letter with a certified English translation from the "Ministry of [redacted] Endowments Directorate, [redacted] Endowment Management," dated March 25, 2019, which reiterates the employment and leave history from 2004 up to the present as alleged in the agency's previous letters from 2017. According to the Petitioner the record as a whole establishes that the Beneficiary has more than two years of qualifying experience.

We do not agree. The Petitioner has not addressed the fundamental inconsistencies discussed in the NOID concerning to the Beneficiary's alleged employment with the Egyptian Government from 2004 to 2010, which is the only employment listed in the labor certification which could possibly be qualifying experience. The Director pointed out that the Beneficiary did not claim any employment with the Egyptian government on any of the three NIV applications he filed between 2006 and 2014. Moreover, the second NIV application in June 2019 identified the Beneficiary's current employer as the [redacted] School in [redacted], New Jersey, and the third NIV application in 2014 denied any prior employment (with the Egyptian Government or any other entity). Neither the Petitioner nor the Beneficiary has explained the absence of any reference to employment by the Egyptian government in the three NIV applications. Furthermore, USCIS records show, and the Petitioner concurs, that the Beneficiary was in the United States for approximately two years (2006-2008) during the six-year period from 2004 to 2010 in which the labor certification alleged that the Beneficiary was working exclusively for the Egyptian Government. The Petitioner's claim that the Beneficiary was granted "leave" (or "vacation") from the Egyptian Government during his extended absences from Egypt does not square with the information provided in the labor certification, which presented the Beneficiary's employment by the Egyptian Government as uninterrupted.

It is incumbent upon a petitioner to resolve any inconsistencies in the record by independent objective evidence. Attempts to explain or reconcile such inconsistencies will not suffice without competent evidence pointing to where the truth lies. *See Matter of Ho*, 19 I&N Dec. 582, 591-92 (BIA 1988). Doubt cast on any aspect of the petitioner's evidence also reflects on the reliability of the petitioner's remaining evidence. *See id.*

The Petitioner has not resolved the inconsistencies in this case. In the denial decision the Director pointed out that the Petitioner had not submitted tax records, pay statements, or any other independent objective evidence that the Beneficiary was employed by the Egyptian Government during the years 2004-2010. On appeal the Petitioner asserts that no income tax records or pay statements are available, but has not explained why or documented any efforts to obtain specific evidence such as pay statements to the Beneficiary from the Egyptian Government, income tax returns filed by the Beneficiary in Egypt, or other official documentation of the Beneficiary's alleged employment in Egypt. Based on the evidence of record, therefore, we determine that the Petitioner has not established that the Beneficiary worked for or gained any qualifying experience with the Egyptian Government during the years 2004-2010. Accordingly, the Petitioner has not established that the Beneficiary has

the requisite two years of experience to meet the terms of the labor certification and qualify for skilled worker classification. The appeal will be dismissed on these grounds.

B. Willful Misrepresentation of a Material Fact

A misrepresentation is an assertion or manifestation that is not in accord with the true facts. For an immigration officer to find a willful and material misrepresentation of fact, he or she must determine that (1) the petitioner or beneficiary made a false representation to an authorized official of the U.S. government, (2) the misrepresentation was willfully made, and (3) the fact misrepresented was material. *See Matter of M-,* 6 I&N Dec. 149 (BIA 1954); *Matter of Kai Hing Hui,* 15 I&N Dec. 288, 289 (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 Healy and Goodchild*, 17 I&N Dec. 22, 28 (BIA 1979). A "material" misrepresentation is one that "tends to shut off a line of inquiry relevant to the alien's eligibility." *Matter of Ng,* 17 I&N Dec. 536, 537 (BIA 1980).

In the NOID the Director pointed out that the evidence showed the Beneficiary was in the United States during a substantial time period when the labor certification claimed he was employed in Egypt, and cited this conflict as a misrepresentation of information that was material to the Beneficiary's eligibility for the classification sought in this proceeding. The Director cited the regulation at 8 C.F.R. § 656.30(d) which provides, in pertinent part, that "after issuance, a labor certification is subject to invalidation by the DHS [Department of Homeland Security] . . . upon a determination, made in accordance with [its] procedures or by a court, of fraud or willful misrepresentation of a material fact involving the labor certification application."

In its response to the NOID the Petitioner did not address the issue of why the labor certification claimed that the Beneficiary was employed uninterruptedly in Egypt during the years 2004-2010 when the record clearly showed that he was in the United States for a considerable amount of that time. Nor was any explanation provided for the Beneficiary's omission of any claim that he was employed by the Egyptian Government in three different NIV applications filed between 2006 and 2014.

In the denial decision, therefore, the Director determined that the Petitioner and the Beneficiary misrepresented the Beneficiary's employment experience in the labor certification, and invalidated the labor certification.

On appeal the Petitioner reiterates its contention that the Egyptian government considered the Beneficiary, even during his extended periods of "leave" from work, to still be in its employ. According to the Petitioner, therefore, no fact was misrepresented in the labor certification which claims that the Beneficiary was employed uninterruptedly by the Egyptian government from June 2004 to September 2010. As previously discussed, however, the Petitioner has not submitted sufficiently independent and objective evidence to demonstrate that the Beneficiary was employed at any time by the Egyptian government during the years 2004-2010. Moreover, the Petitioner once again offers no explanation as to why the Beneficiary provided no information about his alleged employment with the Egyptian Government in any of the three NIV applications he filed in the years 2006, 2009, and 2014.

Based on the foregoing analysis, we will not disturb the Director's determination that the Petitioner and the Beneficiary willfully misrepresented a material fact in the labor certification. In accord with the three conditions discussed in *Matter of M-* and *Matter of Kai Hing Hui*, we determine that the Petitioner and the Beneficiary misrepresented a fact concerning the Beneficiary's employment history in the labor certification by claiming that he was employed uninterruptedly by the Egyptian Government from 2004 to 2010, that this misrepresentation was willfully made by the Petitioner and the Beneficiary since they each signed a declaration on the labor certification that the information provided therein was true and correct, and that the misrepresentation was material to the Beneficiary's ability to meet the experience requirement of the labor certification and skilled worker classification. Given this determination that the Petitioner and the Beneficiary willfully misrepresented a material fact involving the labor certification application, we concur with the Director's invalidation of the labor certification in accordance with 8 C.F.R. § 656.30(d).

The regulation at 8 C.F.R. § 204.5(a)(2) provides that a Form I-140 petition must be accompanied by any required labor certification to be considered properly filed. Since the labor certification accompanying the instant petition is invalidated, the petition is not considered properly filed and cannot be approved. On this ground as well the appeal we be dismissed.

C. Reserved Issues

As previously discussed, we will reserve the issues of whether the Petitioner has established its continuing ability to pay the proffered wage from the priority date onward, and whether the proffered position is, or was, a *bona fide* job opportunity open to U.S. workers.

III. CONCLUSION

The Petitioner has not established that the Beneficiary had at least two years of qualifying experience as of the petition's priority date. Therefore, the Beneficiary does not meet the labor certification's minimum experience requirement and does not qualify for skilled worker classification. The evidence of record also establishes that the Petitioner and the Beneficiary willfully misrepresented a material fact regarding the Beneficiary's employment history in the labor certification accompanying the petition, and that the labor certification must be invalidated on that basis. Thus, the petition is not accompanied by the requisite labor certification. We will dismiss the appeal for the above stated reasons.

ORDER: The appeal is dismissed.