U.S. Citizenship and Immigration Services

Non-Precedent Decision of the Administrative Appeals Office

In Re: 15920504

Date: APR. 28, 2021

Appeal of Texas Service Center Decision

Form I-140, Immigrant Petition for Skilled Worker

The Petitioner, a gas station grocery store, seeks to employ the Beneficiary as a manager. It requests classification of the Beneficiary under the third-preference, immigrant category as a skilled worker. 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" category allows a U.S. business to sponsor a foreign national for lawful permanent resident status based on a job offer requiring at least two years of training or experience.

After the filing's initial grant, the Director of the Texas Service Center revoked the petition's approval. The Director concluded that the Petitioner did not provide sufficient evidence of the Beneficiary's qualifying experience for the offered position or that a *bona fide* job offer existed. The Director also found that the Petitioner and the Beneficiary willfully misrepresented a material fact with respect to the Beneficiary's employment history.

In these proceedings, it is the Petitioner's burden to establish eligibility for the requested benefit by a preponderance of the evidence. Section 291 of the Act, 8 U.S.C. § 1361; *Matter of Chawathe*, 25 I&N Dec. 369, 375 (AAO 2010). The Administrative Appeals Office (AAO) reviews the questions in this matter *de novo*. *See 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. EMPLOYMENT-BASED IMMIGRATION

Employment-based immigration generally follows a three-step process. To permanently fill a position in the United States with a foreign worker, a prospective employer must first obtain certification from the U.S. Department of Labor (DOL). *See* section 212(a)(5) of the Act, 8 U.S.C. § 1182(a)(5). DOL approval signifies that insufficient U.S. workers are able, willing, qualified, and available for a position. *Id.* Labor certification also indicates that the employment of a foreign national will not harm wages and working conditions of U.S. workers with similar jobs. *Id.*

If DOL approves a position, an employer must next submit the certified labor application with an immigrant visa petition to U.S. Citizenship and Immigration Services (USCIS). *See* section 204 of the Act, 8 U.S.C. § 1154. Among other things, USCIS considers whether a beneficiary meets the requirements of a certified position and a requested immigrant visa classification. If USCIS approves

the petition, a foreign national may finally 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.

At any time before a beneficiary obtains lawful permanent residence, however, USCIS may revoke a petition's approval for "good and sufficient cause." Section 205 of the Act, 8 U.S.C. § 1155. If supported by the record, a petition's erroneous approval may justify its revocation. *Matter of Ho*, 19 I&N Dec. 582, 590 (BIA 1988). By regulation this revocation authority is delegated to any USCIS officer who is authorized to approve an immigrant visa petition "when the necessity for the revocation comes to the attention of [USCIS]." 8 C.F.R. § 205.2(a). USCIS must give the petitioner notice of its intent to revoke the prior approval of the petition and the opportunity to submit evidence in opposition thereto, before proceeding with written notice of revocation. *See* 8 C.F.R. § 205.2(b) and (c). A notice of intent to revoke (NOIR) "is not properly issued unless there is 'good and sufficient cause' and the notice includes a specific statement not only of the facts underlying the proposed action, but also of the supporting evidence." *Matter of Estime*, 19 I&N Dec. 450, 451 (BIA 1987). Per *Matter of Estime*, "[i]n determining what is 'good and sufficient cause' for the issuance of a notice of intention to revoke, we ask whether the evidence of record at the time the notice was issued, if unexplained and unrebutted, would have warranted a denial based on the petitioner's failure to meet his or her burden of proof." *Id.*

II. THE BENEFICIARY'S EXPERIENCE

The Petitioner here is a gas station grocery store that was established in 1995 and has approximately four employees. The underlying labor certification was filed with DOL on February 18, 2004.[1] The labor certification states that the offered position requires no training or education and 24 months of experience in the offered job of manager. Experience in an alternate occupation is not accepted.

On the labor certification, the Petitioner asserts that the Beneficiary gained the following experience as a manager:

- With [redacted] in Texas, from September 2000 to February 10, 2004 (the date the labor certification was signed); and
- With [redacted] in India, from May 1997 to August 2000.

The initial evidence submitted with the petition included a letter from the president of [redacted] dated June 8, 2004. The letter states that the Beneficiary was employed as a store manager from November 2000 to May 2004. The initial filing did not include evidence supporting the Beneficiary's claimed employment with [redacted] in India.

Following the approval of the petition, the Director identified inconsistencies in the Beneficiary's claimed employment history. Specifically, the Director found that a search of registered businesses in Texas revealed that [redacted] was first incorporated in May 2001, several months after the Beneficiary claims to have begun employment in 2000, and that the business did not begin operating until 2004. Further, the Director identified the author of the letter and president of [redacted] as the Beneficiary's paternal uncle. This information cast doubt as to the Beneficiary's claimed qualifying experience for the offered position.

[1] The priority date of a petition is the date the DOL accepted the labor certification for processing. *See* 8 C.F.R. § 204.5(d).

The Director sent the Petitioner a NOIR providing the details of the derogatory information regarding the incorporation and business operations of [redacted] The Director also questioned the existence of [redacted] in India, as the record did not include evidence to support this claimed employment. The Director gave the Petitioner an opportunity to respond and establish that the Beneficiary met the requirement of 24 months of experience as a manager as of the priority date, and that the Petitioner and the Beneficiary did not willfully misrepresent the Beneficiary's experience on the labor certification. He specifically requested the following evidence:

- Independent objective evidence of the Beneficiary's previous employment, to include his wage and tax statements for all periods of employment for the years 2000 to 2019; and
- Copies of the Beneficiary's income tax returns for the years 2000 to 2019.

The Director issued the NOIR for good and sufficient cause. The dates of employment that the Beneficiary provided on the labor certification contradict the dates in the letter and the business registration information for his claimed employer. The Petitioner must resolve inconsistencies with independent, objective evidence pointing to where the truth lies. *Matter of Ho*, 19 I&N Dec. 582, 591-92 (BIA 1988). Thus, the record lacked sufficient reliable evidence of the Beneficiary's qualifying experience for the offered position or the requested visa classification.

In response to the NOIR, the Petitioner submitted photographs of a business license and the interior and exterior of what it asserts is [redacted] in India. The Petitioner did not submit all of the requested evidence, including any of the Beneficiary's income tax returns or wage and tax statements, or address the inconsistent information in the business registration dates of [redacted][2]

The Director concluded that the Petitioner did not submit independent objective evidence to resolve the inconsistencies and verify the Beneficiary's qualifying employment and revoked the petition's approval. The Director noted that, although the business address matches the address of [redacted] listed on the labor certification, the business license in the photograph was issued in February 2016 to [redacted] identifying the business as a hotel. He further noted that the photographs of the store show the operation of a business, but do not demonstrate that the Beneficiary was employed there as a manager from May 1997 to September 2000.

On appeal, the Petitioner asserts that, although the dates were not listed correctly on the labor certification, the Beneficiary gained the minimum required 24 months of experience with [redacted] as reflected on the labor certification and in the employment letter. The Petitioner submits the articles of incorporation and federal tax returns for [redacted] for 2002 to 2004, and 2019.

Although the Petitioner submits new evidence to demonstrate that [redacted] was an operating business from 2002, the Petitioner does not explain why this evidence was not submitted in response to the Director's NOIR. Nor does the Petitioner assert that this information was unavailable at any

[2] The regulation at 8 C.F.R. § 103.2(b)(14) states that the failure to submit requested evidence that precludes a material line of inquiry shall be grounds for denying the petition.

time. Therefore, we need not consider this evidence for the first time on appeal. *See, e.g., Matter of Soriano*, 19 I&N Dec. 764, 766 (BIA 1988) (citation omitted). Further, the articles of incorporation and tax returns for [redacted] do not represent independent objective evidence of the Beneficiary's qualifying experience as a manager. The Petitioner did not submit the Beneficiary's tax or pay records to support his claimed employment, as specifically requested by the Director.

The Petitioner asserts, through counsel, that the dates of employment were incorrectly listed on the labor certification. However, the Petitioner does not explain how this error occurred or even state the actual dates of the Beneficiary's employment with [redacted] Assertions made without supporting documentation are of limited probative value and do not carry the weight to satisfy the Petitioner's burden of proof. *See Matter of Soffici*, 22 I&N Dec. 158, 165 (Comm'r 1998). The labor certification states that the Beneficiary began employment with [redacted] in September 2000. However, the employment letter and a Form G-325-A, Biographic Information, signed by the Beneficiary in 2009, both state that he began employment in November 2000. The tax returns state that the business was not incorporated until 2001. Doubt cast on any aspect of the petitioner's evidence also reflects on the reliability of the petitioner's remaining evidence. *See Matter of Ho*, 19 I&N Dec. 582, 591-92 (BIA 1988). Additionally, the employment letter from [redacted] is signed by the Beneficiary's uncle. Where the author is identified as a relative, USCIS, in its discretion, may assess the credibility and afford less weight to such evidence.[3] Therefore, the Petitioner has not established by a preponderance of the evidence that the Beneficiary gained 24 months of qualifying employment with [redacted]

On appeal the Petitioner asserts that the Beneficiary also gained qualifying employment with [redacted] as listed on the labor certification. It submits an employment letter dated September 22, 2020 from the owner of [redacted] (formerly [redacted]). The letter states that the Beneficiary was employed as a full-time manager from May 1997 to August 2000. The Petitioner also submits affidavits dated September 2020 from four individuals claiming to have been former coworkers of the Beneficiary while he was a manager at [redacted] from May 1997 to August 2000. The Petitioner does not indicate that this evidence was previously unavailable, despite the Director's specific request in the NOIR for evidence regarding the Beneficiary's prior employment including specific job titles, dates of employment and descriptions of his job duties. Therefore, we need not consider this evidence for the first time on appeal. *See, e.g., Matter of Soriano*, 19 I&N Dec. 764, at 766.[4]

Here, the Petitioner relies only on testimonial evidence from the Beneficiary's former employers and coworkers to establish his claimed employment experience, without providing independent, objective evidence in support of this testimony. Based on unresolved inconsistencies in the record, further independent evidence is required. The record does not include evidence contemporaneous with the Beneficiary's employment, such as income tax or payroll records, to corroborate his claimed

[3] Probative evidence beyond a letter or affidavit may be considered when submitted to resolve inconsistencies or discrepancies in the record. *See Matter of Ho*, 19 I&N Dec. 582, 591-92 (BIA 1988). Ultimately, to determine whether a petitioner has established eligibility for a requested benefit by a preponderance of the evidence, USCIS must examine each piece of evidence - both individually and within the context of the entire record - for relevance, probative value, and credibility. *Matter of Chawathe*, 25 I&N Dec. 369, 376 (AAO 2010).

[4] Even if we considered this evidence in support of the Beneficiary's claimed experience, neither the letter from the owner, nor the statements from the Beneficiary's former co-workers include a description of the Beneficiary's job duties.

employment with either employer. It is the Petitioner's burden to establish eligibility for the immigration benefit sought. Section 291 of the Act, 8 U.S.C. § 1361; *Matter of Skirball Cultural Ctr.*, 25 I&N Dec. 799, 806 (AAO 2012).

As the inconsistencies in the record have not been resolved, the Petitioner has not established with independent, objective evidence that the Beneficiary possesses the required 24 months of experience in the offered position, as required by the labor certification. We affirm the Director's revocation of the approved petition on this basis.

III. *BONA FIDE* JOB OFFER

The petitioner has the burden of establishing that a *bona fide* job opportunity exists when it is asked to show that the job is clearly open to U.S. workers. *See Matter of Amger Corp.*, 87-INA-545 (BALCA 1987); *see also* 8 U.S.C. § 1361; 20 C.F.R. § 656.17(l).

In the NOIR, the Director also noted that a familial relationship exists between the Beneficiary and several of the Petitioner's officers. He found that these relationships cast doubt on whether a *bona fide* job offer existed, whether the Beneficiary intended to work for the Petitioner, and whether the Petitioner intended to hire the Beneficiary in the offered position. The Director requested evidence of the recruitment conducted for the offered position before the labor certification filing. Additionally, he specifically requested that the Petitioner submit a statement to show that a *bona fide* job offer exists, issued by an authorized official, on official letterhead, listing the Petitioner's name and address, the date and the signer's name and title.

The Petitioner responded to the NOIR providing copies of its recruitment efforts, its articles of incorporation and business registration documents, its 2004 income statement and unaudited balance sheet, and its quarterly federal tax returns for some quarters in 2006, 2017 and 2018. The Petitioner also asserted that it currently employs the Beneficiary in the offered position and provided copies of six checks it made payable to the Beneficiary. The Petitioner's counsel identified the checks as the Beneficiary's pay stubs.[5]

In revoking the petition's approval, the Director noted the Board of Alien Labor Certification Appeals decision in *Matter of Modular Container Systems, Inc.* 89-INA-288 (BALCA 1991), which sets forth the factors to be examined in determining whether a *bona fide* job offer exists.[6] He states that his

[5] We note that the checks do not appear to have been issued on a regular schedule, as the day of the month varies, with checks dated July 31 and August 25, 2018 and others dated December 4, 2019, January 4, 2020, February 20, 2020 and March 12, 2020. Additionally, the copies include only the front of the handwritten checks and do not show evidence that any of the checks were cashed or deposited. The varying pay schedule without evidence of actual payment of wages, including an Internal Revenue Service Form W-2, Wage and Tax Statement, casts doubt on the Petitioner's claim to have employed the Beneficiary.

[6] Those factors include such items as whether the beneficiary (a) is in the position to control or influence hiring decisions regarding the job for which labor certification is sought; (b) is related to the corporate directors, officers, or employees; (c) was an incorporator or founder of the company; (d) has an ownership interest in the company; (e) is involved in the management of the company; (f) is on the board of directors; (g) is one of a small number of employees; (h) has qualifications for the job that are identical to specialized or unusual job duties and requirements stated in the application; and (i) is so inseparable from the sponsoring employer because of his or her persuasive presence and personal attributes that the employer would be unlikely to continue in operation without the beneficiary.

decision is "not based on the familial relationship alone," but that the Petitioner's evidence did not establish that "the recruitment for the offered position in this matter was not influenced by the Beneficiary …" Thus, he concluded that it appeared that a *bona fide* job offer never existed.

On appeal, the Petitioner's counsel states that the Director did not review the documented recruitment efforts. However, the Petitioner does not address or provide additional evidence to establish the level of control or influence of the Beneficiary in hiring decisions, or other factors set forth in *Matter of Modular Container Systems, Inc.* Also absent from the record is a statement from the Petitioner confirming the *bona fide* job offer. Although the Director, in his decision, identifies the cover letter from the Petitioner's counsel as the "Petitioner's statement," the assertions of counsel do not constitute evidence. *Matter of Obaigbena*, 19 I&N Dec. 533, 534 n.2 (BIA 1988) (citing *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980)). Counsel's letter cannot be substituted for an actual statement from the Petitioner itself confirming the *bona fide* nature of the job offer to the Beneficiary.

The record at the time of the NOIR's issuance did not demonstrate the existence of a *bona fide* job offer. Thus, on this ground, USCIS properly issued the NOIR. Because the Petitioner did not submit all requested evidence in response to the NOIR, and because the record on appeal does not demonstrate the *bona fide* job offer by a preponderance of the evidence, we affirm the Director's decision to revoke the petition's approval on this basis.

IV. WILFULL MISREPRESENTATION OF A MATERIAL FACT

To find a willful and material misrepresentation of fact an immigration officer 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).

Accordingly, for an immigration officer to find a willful and material misrepresentation in visa petition proceedings, they 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.

Here, the Director found that the Petitioner and the Beneficiary willfully misrepresented the Beneficiary's qualifying employment on the labor certification. He also found that the Petitioner willfully misrepresented the availability of the job opportunity to U.S. workers on the labor certification.

On the labor certification the Petitioner and the Beneficiary claimed qualifying experience with [redacted] beginning in 2000. However, the record establishes, and the Petitioner does not dispute, that this business did not exist until 2001. The Petitioner's counsel states that "evidence is clear that the

minimum experience required under this petition is satisfied." However, as discussed above, the Petitioner has not submitted sufficient evidence of the Beneficiary's actual dates of employment with [redacted] or his job duties. Nor does the record include sufficient independent objective evidence of the Beneficiary's experience with [redacted]

The Petitioner's counsel states in the NOIR response that the Beneficiary's employment history with [redacted] "is not being used for the purpose of demonstrating that the Beneficiary meets the minimum work experience requirements under the labor certification. Therefore, this information is not material to the petition." However, the only evidence of qualifying experience submitted with the petition was the letter from the owner of [redacted] If the Petitioner were relying on other qualifying experience, it could have provided evidence of this with the petition, but it did not. Thus, it appears that, until the Petitioner was notified of the derogatory information regarding the discrepant dates of employment, it was relying on the Beneficiary's qualifying employment with [redacted] and this information was material to the requested benefit.

The Petitioner has not resolved the inconsistencies in the claimed experience, and it has not provided evidence to support counsel's claim that the inconsistency was the result of an inadvertent error. As such, substantial evidence supports the Petitioner's and the Beneficiary's willful misrepresentation of his experience on the labor certification. Further, the Petitioner has not established that the job offer to the Beneficiary was *bona fide*. Therefore, we affirm the Director's finding of willful misrepresentation of a material fact against the Petitioner and the Beneficiary.

V. CONCLUSION

The Petitioner has not established that the Beneficiary meets the minimum experience requirement as set forth on the accompanying labor certification. The record includes unresolved inconsistencies with respect to the Beneficiary's claimed employment history and supports the Director's finding that the Petitioner and the Beneficiary willfully misrepresented this information on the labor certification. The record also does not demonstrate the *bona fides* of the job offer.

ORDER: The appeal is dismissed.