U.S. Citizenship and Immigration Services

Non-Precedent Decision of the Administrative Appeals Office

MATTER OF F-1469, INC.

DATE: APR. 29, 2019

APPEAL OF TEXAS SERVICE CENTER DECISION

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

The Petitioner, a Korean restaurant, seeks to employ the Beneficiary as a cook. It requests classification of the Beneficiary as an unskilled worker under the third preference immigrant classification. *See* 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 a foreign national for lawful permanent resident status to work in a position that requires less than two years of training or experience.

The Director of the Texas Service Center denied the petition, concluding that the Beneficiary misrepresented her qualifying experience on the labor certification. The Director entered a finding of willful misrepresentation of a material fact against the Petitioner and the Beneficiary and invalidated the labor certification.

On appeal, the Petitioner submits additional evidence and asserts that the Beneficiary's omission of her work experience as a cook on a prior nonimmigrant visa application was not a material misrepresentation. It states that the Beneficiary submitted independent, objective evidence of her prior experience as a cook, and that she held two jobs at the same time.

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

I. THE EMPLOYMENT-BASED IMMIGRATION PROCESS

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).[1] *See* section 212(a)(5)(A)(i) of the Act, 8 U.S.C. § 1182(a)(5)(A)(i). 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,

[1] The priority date of a petition is the date the DOL accepted the labor certification for processing, which in this case is August 22, 2016. *See* 8 C.F.R. § 204.5(d).

the foreign national applies 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. THE BENEFICIARY'S EXPERIENCE

The Director denied the petition because the Petitioner did not establish that the Beneficiary possessed the experience required by the labor certification as of the priority date. A beneficiary must meet all of the requirements of the offered position set forth on the labor certification by the priority date of the petition. 8 C.F.R. § 103.2(b)(l), (12); *Matter of Wing's Tea House*, 16 I&N Dec. 158, 159 (Acting Reg'l Comm'r 1977).

In this case, the labor certification requires 12 months of experience in the job offered of cook. The labor certification states that the Beneficiary qualifies for the offered position based on experience as a part-time cook (24 hours per week) with in South Korea, from March 2, 2005, to March 10, 2007. Evidence relating to qualifying experience must be in the form of a letter from a current or former employer and must include the name, address, and title of the writer, and a specific description of the duties performed by the beneficiary. *See* 8 C.F.R. § 204.5(l)(3).

With the petition, the Petitioner submitted a certificate of career issued February 22, 2016, attesting to the Beneficiary's experience as a cook in South Korea, from March 2, 2005, to March 10, 2007. The certificate states that she worked two years as a cook but does not indicate that that employment was part-time. The certificate is written in English by President of '[2] and is not signed. Instead, the certificate has an untranslated stamp with Korean letters next to s name.

In a notice of intent to deny (NOID), the Director indicated that information provided on the Beneficiary's nonimmigrant visa application submitted in August 2008 conflicts with the information provided on the labor certification in this case. The Beneficiary indicated on the nonimmigrant visa application that she worked as a supervisor in finance and administration for in South Korea, from November 1, 1989, to the date the application was signed on August 21, 2008. She also indicated that she had no other previous employers. She signed the application and certified that its contents were correct and that any false or misleading statement may result in the permanent refusal of a visa or denial of entry in the United States. The Director stated that USCIS contacted and was informed that the Beneficiary worked there as a supervisor of finance and administration from April 25, 1989, to September 30, 2008. The Director indicated that USCIS may deny the petition and invalidate the labor certification based on the Beneficiary's willful misrepresentation of a material fact.

In response to the NOID, the Petitioner provided a letter from a law firm in South Korea, explaining the deduction threshold for filing a tax return in South Korea and an excerpt from the Korean income tax act. The letter states that the deduction for daily employed workers is 80,000 won per day and that it is a threshold for determining whether to file a tax return or not. Therefore, the letter states that "if income of a taxpayer is less than the amount of the deduction, the taxpayer has no obligation to file a tax return." It further states that a part-time worker is classified as a daily employed worker. In response to the NOID, the Petitioner also provided an affidavit from the Petitioner's Vice

[2] The company name is spelled on the labor certification.

President stating that he tested the Beneficiary's skills and that her skills "can only come from experience in a commercial kitchen."

In his denial notice, the Director determined that the Petitioner had not established that the Beneficiary had the required one year of experience as a cook. He further determined that the Beneficiary willfully misrepresented her employment with and, therefore, he entered a finding of fraud or willful misrepresentation of a material fact against the Beneficiary. He further stated that the Petitioner "took legal responsibility for the trust and accuracy of any evidence submitted in support of the Form I-140" and appears to have entered a finding of fraud or willful misrepresentation of a material fact against the Petitioner. The Director also the invalidated the labor certification based on fraud or willful misrepresentation of a material fact involving the labor certification.

On appeal, the Petitioner asserts that the Beneficiary's omission of her work experience as a cook on a prior nonimmigrant visa application was not a material misrepresentation. It states that the Beneficiary submitted independent, objective evidence of her prior experience as a cook, and that she held two jobs at the same time. It provides an unsigned verification of work experience dated June 28, 2018, purportedly from President of ' ' Like the prior certificate, it is written in English and stamped in untranslated Korean next to the writer's name. A full English language translation must accompany any document containing foreign language. 8 C.F.R. § 103.2(b)(3). The translator must certify that the translation is complete and accurate, and that the translator is competent to translate from the foreign language into English. *Id.* If the stamp represents the writer's name, it is not clear why the writer wrote the letter in English but stamped his/her name in Korean. Unresolved material inconsistencies may lead us to reevaluate the reliability and sufficiency of other evidence submitted in support of the petition. *Matter of Ho*, 19 I&N Dec. 582, 591-92 (BIA 1988). The verification of work experience states that the Beneficiary worked part-time (Monday through Saturday 7:00 – 11:00pm) as a cook in South Korea, from March 2, 2005, to March 10, 2007. It states that she was paid KRW 7,500/hour in cash.

The Petitioner also provides a South Korean Certificate of Business Registration, together with English translation, stating that began operating as a restaurant in South Korea on 1996. It also provides an affidavit from the Beneficiary stating that she worked the night shift at and earned about KRW 30,000 per day. She asserts that she worked two jobs in 2005, 2006, and 2007. She states that because she earned less than the minimum reporting amount at in 2005, she was not required to file a tax return.[3] However, it appears that she may have been required to file a tax return in 2005, 2006, and 2007 based on her income from and that any income from additional sources should have been reflected on the tax return. Generally, income from all sources would be added together to determine whether a tax payer meets a filing threshold. Here, she claims that she earned income from two separate jobs – - in 2005, 2006, and 2007. However, the Petitioner did not submit evidence of her earnings at

The Beneficiary's husband also earned money in at least two of the three relevant years, and it is not clear whether he filed a separate income tax return from his wife. The financial statements of her husband's business submitted on appeal are not properly translated and, therefore, are not credible evidence of the company's earnings. The financial statements cover the years 2005 through 2008, and

[3] She does not indicate why she could not produce a tax return for 2006 and 2007.

each include a one-page Certificate of Standard Financial Statement; a two-page balance sheet; and a two-page income statement. The certificates are translated from Korean into English, but it is not clear who completed the translations. The balance sheets are written completely in English, except for some untranslated Korean at the bottom of each page. It is not clear why these documents were not completed in Korean, particularly since the certificates confirm that the documents were submitted to the district tax office in Korea. Doubt cast on any aspect of the petitioner's proof may undermine the reliability and sufficiency of the remaining evidence offered in support of the visa petition. *Matter of Ho*, 19 I&N Dec. at 591-92. Similarly, the income statements are written completely in English, except for some untranslated Korean at the bottom of each page. A full English language translation must accompany any document containing foreign language. 8 C.F.R. § 103.2(b)(3). The translator must certify that the translation is complete and accurate, and that the translator is competent to translate from the foreign language into English. *Id.* Because the Petitioner did not submit properly certified English language translations of the documents, we cannot meaningfully determine whether the translated material is accurate and thus supports the Petitioner's claims.

On appeal, the Petitioner submits another letter from a South Korean law firm. It states that in 2008, the Beneficiary "had worked for more than 18 years at [redacted] as the chief of finance and administrative section. It states that the firm determined that the Beneficiary was eligible for an F-1 student visa based on her ties to South Korea. It states that even if the Beneficiary had disclosed her experience as a cook on the nonimmigrant visa application, "her F1 visa would have been issued because her experience as a cook was not a material fact or misleading information in determining eligibility for F1 visa." It further states that because she did not declare her income as a cook with the Korean government, "the difference between no record as a cook on the Certificate of Income, a government-issued document, and her statement about work experience on her DS-158 might have misled adjudication of a consular officer if all work experience had been disclosed."[4] However, the nonimmigrant visa application does not indicate that reporting of prior work experience is optional, and the applicant's work history must be certified as true and correct.

As discussed above, the Petitioner has not demonstrated that the employment history claimed on the labor certification is correct. [redacted] is misspelled, there are inconsistencies between the Beneficiary's nonimmigrant application and the documentation provided in this case regarding her prior work experience, the record paints and incomplete picture of the finances of the Beneficiary and her husband, and the record does not contain proper translations. Thus, we agree with the Director's determination that the evidence submitted to the record regarding the Beneficiary's prior work experience with [redacted] is not credible.[5] The Petitioner has not resolved the inconsistencies and ambiguities in the record with independent, objective evidence, such as paystubs, payroll records, personnel records, and/or tax documents. Thus, the Petitioner has not established that the Beneficiary possessed the experience required by the labor certification as of the priority date. We therefore affirm the Director's determination that the Beneficiary did not have the required two years of experience as a cook.

[4] It is not clear why the Beneficiary would not have been able to assert the income tax reporting exemption that is asserted here. Doubt cast on any aspect of the petitioner's proof may undermine the reliability and sufficiency of the remaining evidence offered in support of the visa petition. *Id.*

[5] The Petitioner must support assertions with relevant, probative, and credible evidence. *See Matter of Chawathe*, 25 I&N Dec. 369, 376 (AAO 2010).

III. FRAUD OR WILLFUL MISREPRESENTATION OF A MATERIAL FACT

The Director found that the Beneficiary fraudulently or willfully misrepresented her employment with [redacted] on the labor certification, and that the Petitioner fraudulently or willfully misrepresented the evidence submitted in support of the Form I-140. He also invalidated the labor certification. Any foreign person 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. *See* section 212(a)(6)(C)(i) of the Act, 8 U.S.C. § 1182(a)(6)(C)(i).

As outlined by the Board of Immigration Appeals, a material misrepresentation requires that one willfully make 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).

Accordingly, for an immigration officer to find a willful and material misrepresentation in visa petition proceedings, he or she must determine that: 1) the petitioner or beneficiary made a false representation to an authorized official of the United States 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 L-L-*, 9 I&N Dec. 324 (BIA 1961); *Matter of Kai Hing Hui*, 15 I&N Dec. at 288.

Here, the Beneficiary indicated on the labor certification that she had two years of part-time experience as a cook with [redacted]. In light of the contradictory information presented and lack of corroborating documentation regarding the Beneficiary's prior work experience, the entry at Part K on the ETA Form 9089 was not correct and constitutes a false representation. A misrepresentation can be made to a government official in an oral interview, on the face of a written application or petition, or by submitting evidence containing false information. INS Genco Op. No. 91-39, 1991 WL 1185150 (April 30, 1991). For the reasons discussed above, because the Beneficiary did not have two years of part-time experience as a cook with [redacted], the Beneficiary's false attestation on the labor certification constitutes a false representation on the face of a written petition.

Second, we find that the Beneficiary willfully misrepresented material facts regarding her previous employment with [redacted]. The Beneficiary signed the labor certification attesting to the veracity of the claims on the labor certification, including two years of part-time employment experience with [redacted]. In this way, the Beneficiary directly participated in the preparation and submission of documents that convey the false impression that she has at least 12 months of qualifying experience as required on the labor certification. When given the opportunity to address the derogatory information described in the NOID, the Beneficiary reaffirmed her claims regarding her foreign employment. In light of the

unresolved contradictory evidence in the record regarding the Beneficiary's experience with [redacted] we conclude that the Beneficiary's misrepresentations were willful.

Third, the evidence is material to the Beneficiary's eligibility. To be considered material, a false statement must be shown to have been predictably capable of affecting the decision of the decision-making body. *Kungys v. U.S.*, 485 U.S. 759 (1988). In the context of a visa petition, a misrepresented fact is material if the misrepresentation cut off a line of inquiry which is relevant to the eligibility criteria and that inquiry might well have resulted in the denial of the visa petition. *See Ng*, 17 I&N Dec. at 537. Here, the Beneficiary's experience is material to the whether she meets the minimum requirements of the offered position. The labor certification requires 12 months of experience in the job offered of cook. The misrepresentation regarding the Beneficiary's experience with [redacted] on the labor certification cut off a potential line of inquiry regarding her claimed experience. *See Matter of Ng*, 17 I&N Dec. at 537.

Accordingly, we agree with the Director's finding that the Beneficiary made willful misrepresentations of material fact. This finding of willful material misrepresentation shall be considered in any future proceeding where the Beneficiary's admissibility is an issue.

However, we do not agree that the Petitioner fraudulently or willfully misrepresented the evidence submitted in support of the Form I-140, as the record does not reflect that the Petitioner knowingly or willfully submitted false documents related to the Beneficiary's prior work experience. We therefore withdraw the Director's finding of fraud or misrepresentation against the Petitioner.

IV. INVALIDATION OF THE LABOR CERTIFICATION

The regulation at 20 C.F.R. § 656.30(d) provides, in pertinent part:

> (d) Invalidation of labor certifications. After issuance, a labor certification may be revoked by ETA using the procedures described in Sec. 656.32. Additionally, after issuance, a labor certification is subject to invalidation by the DHS or by a Consul of the Department of State upon a determination, made in accordance with those agencies' procedures or by a court, of fraud or willful misrepresentation of a material fact involving the labor certification application.

Based on the finding of willful misrepresentation of a material fact against the Beneficiary involving the labor certification application, the Director properly invalidated the labor certification.

V. CONCLUSION

The appeal will be dismissed for the above stated reasons, with each considered an independent and alternative basis for the decision. 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. The Petitioner has not met that burden.

ORDER: The appeal is dismissed.

Cite as *Matter of F-1469, Inc.*, ID# 03841076 (AAO Apr. 29, 2019)