U.S. Citizenship and Immigration Services

Non-Precedent Decision of the Administrative Appeals Office

In Re: 17833335

DATE: AUGUST 23, 2021

Appeal of Texas Service Center Decision

Form I-140, Immigrant Petition for an Alien Worker

The Petitioner, a martial arts and self-defense school, seeks to employ the Beneficiary as an operations manager. It requests classification for the Beneficiary as an "other worker" under the third preference immigrant category. Immigration and Nationality Act (the Act) section 203(b)(3)(A)(iii), 8 U.S.C. § 1153(b)(3)(A)(iii). This employment-based "EB-3" 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 requires less than two years of training or experience and is not of a temporary or seasonal nature.

The Director of the Texas Service Center denied the petition on the grounds that (1) the record contained inconsistent evidence about the Beneficiary's work history and therefore did not establish that the Beneficiary had the requisite experience to meet the terms of the labor certification that accompanied the petition, and (2) the Beneficiary and/or the Petitioner willfully misrepresented material facts on the labor certification by denying a familial relationship between the Beneficiary and the Petitioner and by submitting fabricated evidence of the Beneficiary's employment history.

On appeal the Petitioner submits a brief and additional documentation. The Petitioner asserts that the evidence of record confirms that the Beneficiary met the experience requirement of the labor certification and that it did not misrepresent any fact on the labor certification concerning the Beneficiary's employment history or a familial relationship between the Petitioner and the Beneficiary. The 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 withdraw the Director's decision. We will remand the case for further consideration and the issuance of a new decision.

I. LAW

Employment-based immigration generally follows a three-step process. First, an employer obtains an approved labor certification (ETA Form 9089) 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 (Form I-140) 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. PROCEDURAL HISTORY AND ANALYSIS

The petition in this case was filed in January 2020, requesting "other worker" classification for the Beneficiary. The accompanying labor certification specified that two months of experience in business management, human resources, or a related field were required to qualify for the proffered position, and asserted that the Beneficiary exceeded that requirement by working for a business called [redacted] in [redacted] Brazil, initially as an HR assistant from January 2011 through December 2012 and then as the human resource manager from January 2003 to August 2015.[1] The initial evidence included an "employment verification" letter dated December 16, 2019, on the letterhead of [redacted] and signed by [redacted] Account Manager, which stated that the Beneficiary was employed on a full-time basis from January 2011 to August 2015, initially as HR assistant before her promotion to human resource manager in January 2013, and described her duties in the latter job.

The Director issued a request for evidence (RFE) which noted that the "employment verification" letter was not acceptable evidence of the Beneficiary's experience because it lacked the employer's address.[2] In addition, the Director cited USCIS records indicating that the Beneficiary had asserted a different employment history during the years 2011-2015 – as a psychology student and psychologist in [redacted] Brazil – in nonimmigrant visa applications she filed in 2011 and 2015. The Director requested that independent, objective evidence be submitted to overcome the discrepancies in the Beneficiary's employment history. In particular, the Director requested the submission of all the Beneficiary's employment agreements with her former employer(s), her earning statements and certified income tax returns for the years 2011-2015, and any other pertinent documentation, including employment verification letter(s) that comport with the regulatory requirements of 8 C.F.R. § 204.5(g)(1).

In response to the RFE the Petitioner submitted additional documentation which covered all of the Director's specific requests except for the Brazilian income tax returns. In addition, the Petitioner submitted a statement from the Beneficiary's father which indicated that he and the Beneficiary co-owned [redacted] each with a 50% interest, and described the business as "doing engineering services associated with the construction and maintenance of small dams and electric grids." The father's statement indicated that the Beneficiary worked for the [redacted] from January 2011

[1] The regulation at 8 C.F.R. § 204.5(l)(ii)(D) provides that "[i]f the petition is for an unskilled (other) worker, it must be accompanied by evidence that the [beneficiary] meets any educational, training and experience, and other requirements of the labor certification."

[2] The regulation at 8 C.F.R. § 204.5(g)(1) states, in pertinent part, that "[e]vidence relating to qualifying experience . . . shall be in the form of letter(s) from current or former employer(s) . . . and shall include the name, address, and title of the writer, and a specific description of the duties performed by the alien . . . "

to August 2015, initially as an HR assistant and later as the HR manager, and described the duties the Beneficiary performed as an HR assistant and as the HR manager. The Petitioner also submitted an affidavit from the Beneficiary which provided the same information as her father about her association with [redacted] and asserted that she worked for the company at the same time she was pursuing her professional career as a psychologist. The Beneficiary claimed that she did not list her work with [redacted] on her nonimmigrant visa applications in 2011 and 2015 because she thought she should only list her professional activities and that she did not list her professional activities on the labor certification application in 2019 because it only called for a listing of jobs in the past three years or other qualifying experience for the job offered, neither of which applied to the Beneficiary's activities in the psychology field.

The Director proceeded to deny the petition. After acknowledging the materials submitted by the Petitioner in response to the RFE, the Director stated that the Petitioner did not indicate on the labor certification that [redacted] was a family-owned business in which the Beneficiary held a 50% interest. The Director also stated that "it appears that the beneficiary's pay stubs were fabricated" based on some apparent miscalculations on some of the forms. Without discussing any other evidence in detail, the Director concluded that the documentation submitted in response to the RFE was not sufficient to establish that the Beneficiary met the experience requirement on the labor certification or to resolve the evidentiary inconsistencies discussed in the RFE. The Director then found that the Petitioner and the Beneficiary willfully misrepresented material facts on the labor certification in two respects: (1) by submitting "fabricated" pay stubs as evidence of the Beneficiary's alleged employment with [redacted] in the years 2011-2015,[3] and (2) by denying any familial relationship between the Petitioner and the Beneficiary in answering "No" to the compound question at section C.9 of the labor certification – Is the employer a closely held corporation, partnership, or sole proprietorship in which the alien has an ownership interest, or is there a familial relationship between the owners, stockholders, partners, corporate officers, or incorporators, and the alien? – since "USCIS research" indicated that the Beneficiary's brother-in-law, [redacted] holds a position of "Chief Master/Executive" with the Petitioner.

On appeal the Petitioner points out that the Director's finding that the Petitioner and the Beneficiary misrepresented a material fact at section C.9 of the labor certification by not disclosing a familial relationship between the Beneficiary and [redacted] violated procedural requirements because the Petitioner was not given notice of this derogatory information in the RFE and afforded the chance to reply before the Director issued a decision. The regulation at 8 C.F.R. § 103.2(b)(16)(i) – *Derogatory information to petitioner or applicant* – provides that:

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[3] 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). Any alien who seeks an immigration benefit by fraud or willfully misrepresenting a material fact is ineligible for a visa or admission to the United States. *See* section 212(a)(6)(C)(i) of the Act.

> If the decision will be adverse to the applicant or petitioner and is based on derogatory information considered by [USCIS] 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, except as provided in [three paragraphs inapplicable to this proceeding]. Any explanation, rebuttal, or information presented by or on behalf of the applicant or petitioner shall be included in the record of proceeding.

The Petitioner denies that its answer of "No" to the labor certification question at C.9 was incorrect, and submits documentary evidence in support of this claim. Since the Director should have given the Petitioner the opportunity to submit these materials prior to the decision, the Director's finding that the Petitioner willfully misrepresented a material fact by denying any familial relationship between itself and the Beneficiary was improper and will be withdrawn.

We also note that the evidence submitted on appeal, including corporate documentation from the Petitioner and an affidavit from [redacted] while confirming that the Beneficiary and [redacted] are brothers-in-law, does not corroborate the "USCIS research" cited by the Director that [redacted] is a "Chief Master/Executive" or has any other official position with the Petitioner. In fact, the corporate documentation submitted on appeal identifies [redacted] as the Petitioner's sole owner, corporate officer, and incorporator. This information appears to confirm that the Petitioner's answer of "No" at section C.9 of the labor certification was correct because there is no evidence that the Beneficiary has an ownership interest in the Petitioner or that there is any familial relationship between the Beneficiary and any owner, officer, or incorporator of the Petitioner.

With regard to the Beneficiary's alleged experience with [redacted] the Petitioner offers some explanations for the apparent pay stub discrepancies discussed in the Director's decision, along with some additional documentation that purports to set the numbers straight. The Petitioner complains that the Director "completely ignored" other employment-related documents it submitted in response to the RFE. Furthermore, the Petitioner asserts that the Director erred in citing, as a ground for denying the petition, the non-disclosure on the labor certification that the Beneficiary's alleged experience was gained in a family business that she co-owned with her father. As the Petitioner correctly points out, neither the law nor the ETA Form 9089 itself requires the disclosure of this specific fact.

III. CONCLUSION

For the reasons discussed above, we determine that the Director's decision is not well grounded. Accordingly, we will remand this case to the Director for further consideration. At his discretion the Director may issue another request for evidence, or a notice of intent to deny. Following the Petitioner's response to such request or notice, or the expiration of the time period to respond, the Director shall issue a new decision.

ORDER: The Director's decision is withdrawn. The matter is remanded for further consideration and the entry of a new decision consistent with the foregoing analysis.