U.S. Citizenship and Immigration Services

Non-Precedent Decision of the Administrative Appeals Office

MATTER OF O-D-C-, INC.

DATE: AUG. 30, 2017

APPEAL OF TEXAS SERVICE CENTER DECISION

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

The Petitioner, a dry cleaner and tailoring company, seeks to employ the Beneficiary as an alterations tailor. 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 record did not establish, as required, that the Beneficiary was qualified for the offered position. The Director also entered a finding of fraud or willful misrepresentation against the Beneficiary, and invalidated the labor certification.[1]

On appeal, the Petitioner submits a brief from counsel and asserts that the inconsistencies in the record regarding the Beneficiary's experience were addressed with reasonable explanations, that there was no fraud or willful misrepresentation by the Beneficiary, that the labor certification should not have been invalidated, and that the record establishes the Beneficiary's qualifications for the offered position.

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

I. LAW AND ANALYSIS

A. Employment-Based Immigration

Employment-based immigration generally follows a three-step process. First, an employer obtains an approved ETA Form 9089, Application for Permanent Employment Certification (labor certification), from the U.S. Department of Labor (DOL).[2] *See* section 212(a)(5)(A)(i) of the Act,

[1] The regulation at 20 C.F.R. § 656.30(d) provides that a labor certification is subject to invalidation upon a determination of fraud or willful misrepresentation of a material fact involving the labor certification application. A material issue in this case is whether the Beneficiary is qualified to perform the duties of the offered position.

[2] The date the labor certification is filed, in cases such as this one, is called the "priority date." *See* 8 C.F.R. § 204.5(d).

8 U.S.C. § 1182(a)(5)(A)(i). By approving the labor certification, 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. 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.

B. Beneficiary Qualifications

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. In this case, the labor certification states that the offered position requires six months of experience in the offered job or in alterations and/or tailoring. On the labor certification, the Beneficiary represented that she had worked full-time (40 hours per week) for [redacted] in South Korea as an Assistant Manager, Production, from February 10, 2003, to July 8, 2011.[3]

The regulation at 8 C.F.R. § 204.5(l)(3) provides, in part:

> (ii) *Other documentation—*
>
> > (A) *General.* Any requirements of training or experience for skilled workers, professionals, or other workers must be supported by letters from trainers or employers giving the name, address, and title of the trainer or employer, and a description of the training received or the experience of the alien.

With the petition, the Petitioner submitted a "Certificate of Career" from [redacted] owner of [redacted] dated October 30, 2013. It stated that the Beneficiary was employed as an assistant manager in production from February 10, 2003, through July 8, 2011, where she performed clothes tailoring, alteration, and inspection. The certificate was not signed.

In a notice of intent to deny (NOID), the Director noted several discrepancies in the record, including:

- The Beneficiary indicated on a visa application that she owned a restaurant in South Korea, but this employment was not listed on the Form G-325, Biographic Information, and it was not listed on the labor certification.

In this case, the priority date is October 29, 2014. Therefore, the Petitioner must establish that all eligibility requirements for the petition have been satisfied from October 29, 2014.

[3] The labor certification was signed by both the Petitioner and the Beneficiary under penalty of perjury.

- In correspondence submitted with the Beneficiary's Form I-539, Application to Extend/Change Nonimmigrant Status, she indicated that she had been employed by a bank for 13 years. She did not indicate that she had been employed as an alterations tailor or that she owned a restaurant on the Form I-539.
- The U.S. Department of State in South Korea, contacted owner of He stated that he did not remember the Beneficiary as an employee, that he did not write the "Certificate of Career" for the Beneficiary, and that he could not vouch for the Beneficiary's employment. Another employee who worked at during the Beneficiary's purported employment did not know the Beneficiary either.

In response to the NOID, the Petitioner submitted the following:

- Statement from the Beneficiary dated June 23, 2016. The Beneficiary indicated that the start date of her employment with was mistakenly entered on the labor certification and Form G-325; she confirmed her ownership of a restaurant from November 1, 2011, to April 30, 2012, and stated that she didn't list the experience on the Form G-325 because it was a short period time and she didn't consider it as "employment by somebody else;" she confirmed her employment by a bank from July 9, 1988, to April 2, 2002, and that she didn't think it was relevant to list that employment on her Form I-539; and that she was employed with in South Korea from December 1, 1995, to September 12, 1996, performing alterations and tailoring;
- Statement from owner of dated June 20, 2016. stated that the October 30, 2013, Certificate of Career submitted with the petition was prepared by his assistant, and that the certificate contains a mistake in the Beneficiary's employment start date. He stated that while he didn't remember the Beneficiary in his conversation with the State Department, "that does not mean she was not employed by our company." He stated that the Beneficiary was employed part-time as an assistant manager, production, with his company from February 10, 2008, to July 8, 2011;
- Certificate of Work Experience dated June 15, 2016, stating that the Beneficiary was employed with as a supervisor in production from February 10, 2008, through July 8, 2011, where she performed clothes tailoring, alteration, and general supervision for various products. The certificate is signed by
- Statement of Monthly Working Days dated June 15, 2016, listing the Beneficiary's purported part-time working hours with from February 2008 through July 2011;
- Cash Payment Statement dated June 15, 2016, listing the Beneficiary's purported payments for part-time work with from February 2008 through July 2011;
- Certificate of Business Cessation for the Beneficiary's restaurant in South Korea, stating that it commenced business on November 1, 2011, and suspended business on April 30, 2012;
- Career Certificate and Certificate of Work Experience stating that the Beneficiary was employed by in South Korea, from July 9, 1988, to April 2, 2002; and

- Certificate of Work Experience dated June 13, 2016, stating that the Beneficiary was employed by [redacted] in South Korea from December 1, 1995, to September 12, 1996, where she performed clothes tailoring and alteration.[4]

In his decision, the Director stated that the statements of the Petitioner, the Beneficiary, and counsel were not independent, objective evidence sufficient to overcome the inconstancies in the record.[5] Further, the Director noted that the new Certificate of Work Experience from [redacted] the Statement of Monthly Working Days, and the Cash Payment Statement were created after he issued the NOID. Evidence that a petitioner creates after USCIS points out the inconsistencies in a petition is generally not considered as independent and objective evidence. Without independent, objective evidence of the Beneficiary's employment, the Director determined that the Petitioner had not established that the Beneficiary had the required six months of experience. The Director also determined that the Beneficiary submitted a false work certificate to validate her prior training with [redacted] The Director therefore issued a finding of fraud or willful misrepresentation against the Beneficiary and invalidated the labor certification.[6]

On appeal, the Petitioner submits a statement from counsel. However, 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 statements must be substantiated in the record with independent evidence. The Petitioner did not submit independent, objective evidence on appeal to overcome the inconsistencies in the record regarding the Beneficiary's experience. See *Matter of Ho*, 19 I&N Dec. at 591-92.

In sum, the Beneficiary listed false work experience on the labor certification. She was not employed full-time (40 hours per week) for [redacted] in South Korea as an assistant manager in production from February 10, 2003, to July 8, 2011, as indicated on the labor certification. Further, with the petition, the Beneficiary submitted a certificate listing false work experience. She was not employed as an assistant manager in production with [redacted] from February 10, 2003, through July 8, 2011, as detailed in the certificate. In a telephone call with the Beneficiary's purported former employer, the State Department confirmed that the information contained on the labor certification and in the experience certificate was false. Additionally, there are numerous inconsistencies regarding the work experience listed by the Beneficiary in various immigration filings. The Petitioner has not overcome these discrepancies with independent, objective evidence. Therefore, the appeal will be dismissed.

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[4] A beneficiary's experience, without such fact certified by the DOL on the labor certification, lessens the credibility of the evidence and facts asserted. *See Matter of Leung*, 16 I&N Dec. 2530 (BIA 1976). The Petitioner states on appeal that the certificate was not submitted to prove that the Beneficiary possessed the required experience for the offered job.

[5] The Petitioner must resolve 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.*

[6] Section 212(a)(6)(C) of the Act, 8 U.S.C. § 1182(a)(6)(C)(i), states that "[a]ny alien, who by fraud or willfully misrepresenting a material fact, seeks (or has sought to procure, or who has procured) a visa, other documentation, or admission to the United States or other benefit provided under the Act is inadmissible."

II. CONCLUSION

The Petitioner has not established that the Beneficiary is qualified for the offered position. The Beneficiary listed false experience on the labor certification and submitted a false work experience certificate with the petition. Therefore, we affirm the Director's finding of fraud or willful misrepresentation of a material fact against the Beneficiary, and we affirm his invalidation of the labor certification.

ORDER: The appeal is dismissed.

Cite as *Matter of O-D-C-, Inc.*, ID# 468134 (AAO Aug. 30, 2017)