U.S. Citizenship and Immigration Services

Non-Precedent Decision of the Administrative Appeals Office

In Re: 6522585

Date: DEC. 18, 2019

Appeal of Texas Service Center Decision

Form I-140, Immigrant Petition for Skilled Worker

The Petitioner seeks to employ the Beneficiary as an evening manager. It requests classification of the Beneficiary as a skilled worker 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 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, concluding that the Petitioner did not establish that the Beneficiary possessed the experience required by the labor certification as of the priority date. The Director also entered a finding of willful misrepresentation of a material fact against the Beneficiary.

In these proceedings, it is the Petitioner's burden to establish eligibility for the requested benefit. Section 291 of the Act, 8 U.S.C. § 1361. 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, 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.

[1] The priority date of a petition is the date the DOL accepted the labor certification for processing, which in this case is January 24, 2016. *See* 8 C.F.R. § 204.5(d).

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 24 months of experience in the job offered of evening manager, or in a managerial or related occupation. The labor certification states that the Beneficiary qualifies for the offered position based on experience as a full-time manager (60 hours per week) with [redacted] in India, from January 7, 2010, to March 31, 2014.

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 letter dated April 15, 2014, from [redacted] proprietor of [redacted] in India, stating that the Beneficiary worked as a manager 60 hours per week from January 7, 2010, to March 31, 2014.

In a notice of intent to deny (NOID), the Director indicated that information provided on the Beneficiary's nonimmigrant visa application submitted in August 2013 conflicts with the information provided on the labor certification in this case. The Beneficiary indicated on the nonimmigrant visa application that his occupation was "business" and that he was the proprietor for [redacted] (wholesale and retail of milk merchants, holding stable farm with 140 buffaloes). The Beneficiary also indicated that he had no previous employers.[2] He did not disclose his purported employment with [redacted] on his nonimmigrant visa application. In the NOID, the Director indicated that the Petitioner must provide independent, objective evidence to establish that the Beneficiary meets the experience requirement of the labor certification. *See 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.* The Director indicated that USCIS may deny the petition and enter a finding of willful misrepresentation against the Beneficiary based on the Beneficiary's willful misrepresentation of a material fact.

In response to the NOID, the Petitioner provided affidavits from the Beneficiary; [redacted] proprietor of [redacted] and three former clients of [redacted]. In his affidavit, the Beneficiary stated that since his dairy farm was only 15 minutes away from the [redacted] location and was well established, he did not have to pay much attention to the management part of the dairy business. He stated that his father managed the dairy farm. He stated that he worked for his brother-in-law, [redacted] at [redacted] and spent most of his time "managing the store along with [redacted] and [redacted] brothers)." He stated that he "never had set timings to come to work or paid a salary" and that he sometimes took cash as needed from the register. He stated that he had a "steady income from the dairy farm" so he did not have to take a salary on a regular basis. He also asserted that he didn't

[2] He 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.

consider his time at [redacted] to be "work" but, instead, he considered it to be a "learning period for the future investment."

An affidavit from a client indicates that he met the Beneficiary at a community workshop and that he did business with the Beneficiary at [redacted] "ever since he started managing the location from 2010 until he left in 2014." Another affidavit from a [redacted] customer indicates that the Beneficiary helped him with tires and that he and his family have been vising [redacted] since 2012. Another former [redacted] customer indicated in an affidavit that the Beneficiary helped him service a tire "around 2011."

In response to the NOID, the Petitioner also provided two pictures of [redacted]. The shop appears to be a single small garage with a few dozen tires, a table, and space for one worker. Further, the Petitioner provided business registration certificates for [redacted] The first one is dated in 2010 and shows that [redacted] owned the business and that the business had only one employee.[3] The second one is dated in 2017-2018 and shows that [redacted] owned the business and that it had two employees. The Petitioner also provided pictures and registration certificates for the Beneficiary's dairy farm.

In his denial notice, the Director determined that the Petitioner had not established that the Beneficiary had the required experience as a manager. He stated that the Petitioner did not submit independent, objective evidence of the Beneficiary's purported employment with [redacted] *See Matter of Ho*, 19 I&N Dec. at 591-92. He further determined that the Beneficiary willfully misrepresented his employment with [redacted] on the labor certification and, therefore, he entered a finding of willful misrepresentation of a material fact against the Beneficiary.

On appeal, the Petitioner asserts that the Beneficiary "had a business association and worked at [redacted] from January 2010 to March 2014 as was stated in his labor certification." However, the Beneficiary stated in his affidavit that he "never considered it to be as work but as a learning period for future investment." It is not clear why the Beneficiary considered it to be "work" for purposes of the labor certification in this case but did not consider it to be "work" for purposes of his nonimmigrant visa application.[4] 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. 582, 591-92 (BIA 1988).

On appeal, the Petitioner provides a website printout from www.npr.org entitled "Why Do So Few People Pay Income Tax in India," which states that the agricultural sector and those living on less than $3,700 year are exempt from income tax in India. The Petitioner asserts that the Director's "demands for objective evidence such as paystubs and tax returns from a country and a culture where documents of this nature were historically not maintained is like 'Boiling the Ocean'." However, 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).

[3] The labor certification indicates that the Beneficiary trained new employees at [redacted], and the letter from [redacted] submitted in support of the petition asserts that he trained new employees. However, the shop does not appear to have had any employees for the Beneficiary to train.

[4] We note that he obtained a work verification letter from [redacted], less than one year after submitting his nonimmigrant visa application.

The Petitioner did not provide tax returns or payroll documentation for [redacted] Instead, on appeal, the Petitioner provides the Beneficiary's Indian tax returns for assessment years 2012-13, 2013-14, and 2014-15 (financial years 2011 to 2014). Under the heading "Profit and Gains From Business and Profession," the tax returns indicate that the Beneficiary received his primary income from his dairy farm each year. Under the heading "Income From Other Sources," the returns indicate that he received nominal "pay" from [redacted] Although he received minor amounts from [redacted], the "pay" amounts do not indicate that he managed the tire shop or that he worked 60 hours per week from 2010 to 2014 as listed on the labor certification. With two other managers (the [redacted] brothers) already managing the store, and given the apparent limited physical space in the store, it is not believable that the Beneficiary worked 60 hours per week from January 7, 2010, to March 31, 2014, as a manager at [redacted] If USCIS finds reason to believe that an assertion stated in the petition is not true, USCIS may reject that assertion. *See, e.g.*, Section 204(b) of the Act, 8 U.S.C. § 1154(b); *Anetekhai v. INS*, 876 F.2d 1218, 1220 (5th Cir. 1989); *Lu-Ann Bakery Shop, Inc. v. Nelson*, 705 F. Supp. 7, 10 (D.D.C. 1988); *Systronics Corp. v. INS,* 153 F. Supp. 2d 7, 15 (D.D.C. 2001).

As discussed above, the Petitioner has not demonstrated that the employment history claimed on the labor certification is correct. There are inconsistencies between the Beneficiary's nonimmigrant application and the documentation provided in this case regarding his prior work experience. The Petitioner has not resolved the inconsistencies and ambiguities in the record with independent, objective evidence. *See Matter of Ho*, 19 I&N Dec. at 591-92. 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 experience for the offered job.

III. WILLFUL MISREPRESENTATION OF A MATERIAL FACT

The Director found that the Beneficiary willfully misrepresented his employment with [redacted] on 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.

On appeal, the Petitioner asserts that the Beneficiary's omission of his work experience at [redacted] on a prior nonimmigrant visa application was not a material misrepresentation. However, the issue here is the Beneficiary's material misrepresentation on the labor certification. The Beneficiary indicated on the labor certification that he worked as a full-time manager (60 hours per week) with [redacted] from January 7, 2010, to March 31, 2014. 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 the represented experience as a manager 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 his previous employment with [redacted] The Beneficiary signed the labor certification attesting to the veracity of the claims on the labor certification, including over four years of employment experience working 60 hours per week with [redacted]. In this way, the Beneficiary directly participated in the preparation and submission of documents that convey the false impression that he had the qualifying experience as required on the labor certification. When given the opportunity to address the derogatory information described in the NOID, the Beneficiary reaffirmed his claims regarding his 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 with [redacted] is material to the whether he meets the minimum requirements of the offered position. The labor certification requires 24 months of experience in the job offered of evening manager, or in a managerial or related occupation. The misrepresentation regarding the Beneficiary's experience with [redacted] on the labor certification cut off a potential line of inquiry regarding his claimed experience. *See Matter of Ng*, 17 I&N Dec. at 537.

On appeal, the Petitioner states that even if the Beneficiary had disclosed his experience as a manager at [redacted] on the nonimmigrant visa application, his visa would have been issued because his experience with [redacted] was not a material fact or misleading information in determining eligibility for the visa. 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.

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

IV. ABILITY TO PAY

Although not addressed by the Director, the record does not contain regulatory-required evidence of the Petitioner's ability to pay the proffered wage from the priority date on January 24, 2016, and continuing until the beneficiary obtains lawful permanent residence.[5] The regulation at 8 C.F.R. § 204.5(g)(2) requires that "[e]vidence of this ability shall be either in the form of copies of annual reports, federal tax returns, or audited financial statements."

The Petitioner submitted regulatory-prescribed evidence of its ability to pay the proffered wage in 2015. However, the record does not contain regulatory-prescribed evidence of its ability to pay for 2016 onward. Without this regulatory-required evidence, we cannot affirmatively find that the Petitioner has the continuing ability to pay the proffered wage from the priority date. For this additional reason, the petition cannot be approved.

ORDER: The appeal is dismissed.

[5] The annual proffered wage is $55,500.