U.S. Citizenship and Immigration Services

Non-Precedent Decision of the Administrative Appeals Office

In Re: 6059157

Date: FEB. 19, 2020

Appeal of Texas Service Center Decision

Form I-140, Immigrant Petition for Professional

The Petitioner seeks to employ the Beneficiary as a corporate trainer under the third-preference, immigrant classification as a member of the professions. *See* Immigration and Nationality Act (the Act) section 203(b)(3)(A)(ii), 8 U.S.C. § 1153(b)(3)(A)(ii).[1]

The Director of the Texas Service Center denied the petition. The Director concluded that the Petitioner did not demonstrate the Beneficiary's possession of the minimum qualifications required for the offered position or the requested visa classification. The Director also found that, on the accompanying certification from the U.S. Department of Labor (DOL), the Petitioner and the Beneficiary willfully misrepresented the Beneficiary's qualifications.

The Petitioner bears the burden of establishing eligibility for the requested benefit. *See* section 291 of the Act, 8 U.S.C. § 1361. Supplemental argument would not benefit us in this matter. Under 8 C.F.R. § 103.3(b), we therefore deny the Petitioner's request for oral argument. Upon *de novo* review, we will dismiss the appeal.

I. EMPLOYMENT-BASED IMMIGRATION

Immigration as a professional 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 DOL

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[1] In a letter accompanying the petition, the Petitioner's partner/sole shareholder requested the Beneficiary's classification as a skilled worker. *See* section 203(b)(3)(A)(i) of the Act. The Petitioner, however, marked the box in Part 2 of the Form I-140, Immigrant Petition for Alien Worker, identifying the requested classification as professional. The letter does not assert that the Petitioner seeks a classification change to correct a clerical error. *See* USCIS, "Petition Filing and Processing Procedures for Form I-140, Immigrant Petition for Alien Worker," https://www.uscis.gov/forms/petition-filing-and-processing-procedures-form-i-140-immigrant-petition-alien-worker (last visited Jan. 29, 2020) (describing how to correct the visa classification of a Form I-140 petition). The filing procedures also note that, "Although you may request that we change the visa classification to correct a clerical error in Part 2 of the form, we will make the final determination about whether to change the visa classification based on everything in your case." Additionally, the procedures state that, "We cannot change the visa category if we have already made a decision on your Form I-140." We will therefore treat the petition as a request for professional classification as indicated on the Form I-140.

certification. *See* section 212(a)(5)(A)(i) of the Act, 8 U.S.C. § 1182(a)(5)(A)(i). DOL approval signifies that insufficient U.S. workers are able, willing, qualified, and available for an offered position. *Id.* Labor certification also includes DOL's finding that employment of a foreign national will not harm wages and working conditions of U.S. workers with similar jobs. *Id.*

If DOL approves an offered 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 determines whether a beneficiary meets the requirements of a DOL-certified position and a requested visa classification. If USCIS grants a 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.

II. THE REQUIRED QUALIFICATIONS

To obtain classification as a professional, a foreign national must hold at least a U.S. bachelor's degree or a foreign equivalent degree. 8 C.F.R. § 204.5(l)(2) (defining the term "professional"). A petitioner must also establish a beneficiary's possession of all DOL-certified job requirements of an offered position by a petition's priority date. *Matter of Wing's Tea House*, 16 I&N Dec. 158, 160 (Acting Reg'l Comm'r 1977).[2] In evaluating a beneficiary's qualifications, USCIS must examine the job-offer portion of an accompanying labor certification to determine a position's minimum requirements. USCIS may neither ignore a certification term, nor impose additional requirements. *See, e.g., Madany v. Smith*, 696 F.2d 1008, 1015 (D.C. Cir. 1983) (holding that "DOL bears the authority for setting the *content* of the labor certification") (emphasis in original).

Here, the accompanying labor certification states the minimum requirements of the offered position of corporate trainer as a U.S. bachelor's degree in English, or a foreign equivalent degree, and two years of experience in the job offered. Experience "in the job offered" means "experience performing the key duties of the job opportunity." *Matter of Symbioun Techs., Inc.*, 2010-PER-01422 slip op. at *4 (BALCA Oct. 24, 2011) (citations omitted).[3]

Contrary to the information on the labor certification, the letter from the Petitioner's partner/sole shareholder states the offered position's requirements as "3 years of similar experience as a corporate trainer plus [a] degree." As previously discussed, however, the job requirements listed on the labor certification control. Thus, despite the requirements stated by the Petitioner's partner/sole shareholder, the company must demonstrate the Beneficiary's possession of at least a bachelor's degree in English and two years of experience in the job offered.

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[2] This petition's priority date is August 27, 2018, the date DOL accepted the accompanying labor certification application for processing. *See* 8 C.F.R. § 204.5(d) (explaining how to determine a petition's priority date).

[3] Decisions of the Board of Alien Labor Certification Appeals (BALCA) do not bind USCIS. *See* 8 C.F.R. § 103.9(b) (stating that, in Department of Homeland Security (DHS) proceedings involving the same issues, precedent decisions of the Attorney General and the Board of Immigration Appeals bind DHS officers). But USCIS defers to DOL's reasonable interpretations of its labor certification regulations. *See Martin v. Occupational Safety & Health Review Comm'n*, 499 U.S. 144, 152 (1991) (requiring one administrative agency to defer to another's reasonable interpretation of regulations that Congress authorized it to promulgate and enforce).

On the labor certification application, the Beneficiary attested that, by the petition's priority date, a Turkish university awarded her a bachelor's degree in English. A petition for a professional must include evidence of a beneficiary's possession of a bachelor's degree "in the form of an official college or university record showing the date the baccalaureate degree was awarded and the area of concentration of study." 8 C.F.R. § 204.5(l)(3)(ii)(C). The Petitioner submitted copies of a diploma and transcript from the Turkish university. The documents indicate that, after the Beneficiary's completion of four years of study in November 1999, the university awarded her a *lisans diplomasi* in English language and literature.[4] The Petitioner also submitted an independent, professional evaluation of the foreign credential, concluding that it equates to a U.S. bachelor's degree in English.

In a written notice of intent to deny (NOID) the petition, the Director questioned the Beneficiary's educational qualifications. The NOID notes that the Beneficiary did not indicate her receipt of university-level education on a November 2013 application for a U.S. nonimmigrant visa. The NOID thus alleges a discrepancy in the Beneficiary's educational history between the visa and labor certification applications. *See Matter of Ho*, 19 I&N Dec. 582, 591 (BIA 1988) (requiring a petitioner to resolve inconsistencies of record with independent, objective evidence pointing to where the truth lies). The Petitioner's NOID response included a letter from the Beneficiary stating that she does not recall whether the visa application form asked her about education. She said that, if the form indicates that she received no university education, then she must have misunderstood the question. The Beneficiary also stated that she had difficulty completing the application because she then suffered from postpartum depression and her spouse could not help her because he was temporarily away from home. In addition, she stated that "I would never intentionally say that I have less education than I actually do - that wouldn't help my application after all."

The Director found the Petitioner's evidence insufficient to demonstrate the Beneficiary's possession of a bachelor's degree in English. A review of her nonimmigrant visa application, however, indicates that her visa application did not ask her about post-secondary education. The record therefore does not support a discrepancy finding between the visa and labor certification applications regarding the Beneficiary's university education. Also, under *Ho*, the copies of the Beneficiary's diploma and transcript would constitute independent, objective evidence of her university degree. Thus, although the visa application does not mention the Beneficiary's post-secondary studies, the Petitioner has demonstrated her possession of the minimum education required for the offered position and the requested visa classification. We will therefore withdraw the Director's contrary finding.

The Beneficiary also attested on the labor application that, by the petition's priority date, she gained more than the requisite two years of experience in the job offered. She stated that a healthcare firm employed her full-time in Turkey as a corporate trainer for about 26 months, from November 2010 to January 2013. She also stated that she worked at a Turkish cosmetics company as a full-time corporate trainer for about 28 months, from February 2008 to May 2010.

[4] The diploma and transcript identify the Beneficiary by a different name than listed on the Form I-140 and labor certification. The Petitioner, however, provided a copy of the Beneficiary's marriage certificate, indicating the degree's issuance in her maiden name.

As proof of a beneficiary's qualifying experience, a petitioner must provide letters from the beneficiary's employers. 8 C.F.R. § 204.5(l)(3)(ii)(A). The letters must include the names, titles, and addresses of the employers, and describe a beneficiary's experience. *Id.* The Petitioner did not submit a letter from the cosmetics company, but provided one from the healthcare firm. Consistent with the information on the labor certification, the firm's letter states its employment of the Beneficiary from November 2010 to January 2013.

The NOID, however, notes that the Beneficiary's November 2013 visa application indicates her employment by a third Turkish company for part of her claimed tenure at the healthcare firm. The application states that she worked as a project coordinator for the third company from February 2012 to July 2013. The Director therefore questioned the Beneficiary's claim of more than two years of experience with the healthcare firm. *See Matter of Ho*, 19 I&N Dec. at 751 (requiring a petitioner to resolve inconsistencies of record with independent, objective evidence).

In her letter responding to the NOID, the Beneficiary stated that, on the visa application, she inadvertently listed an incorrect start date of employment with the third company. She said that, contrary to the information on the application, she began working for the third company in February *2013*, not February 2012. The Petitioner submitted copies of payroll records from both the healthcare firm and the third company, as well as documentation from the Turkish social security administration. The social security records show the Beneficiary's employment from November 2010 to January 2013 by one company, and her employment from February 2013 to July 2013 by another. The social security records identify the employers by numbers. The number of the Beneficiary's employer from November 2010 to January 2013 corresponds to the employer identification number on the payroll records of the healthcare firm. Similarly, the number of the Beneficiary's employer from February 2013 to July 2013 corresponds to the employer identification number of the third company listed on the Beneficiary's visa application.

The Director found the Petitioner's evidence insufficient to demonstrate the Beneficiary's possession of at least two years of experience at the medical firm. But, just as the university documents would constitute independent, objective evidence of the Beneficiary's qualifying education, the Turkish social security records constitute independent, objective evidence of her employment at the healthcare firm. *See Matter of Ho*, 19 I&N Dec. at 591 (requiring "independent object evidence" to resolve inconsistencies of record). The Beneficiary credibly explained that she inadvertently listed an incorrect start date of employment on the visa application. The social security and payroll records show that she worked for the healthcare firm for the period stated on the labor certification. The Petitioner also submitted an updated letter from the firm confirming the Beneficiary's claimed experience. Thus, a preponderance of evidence establishes that the healthcare firm employed the Beneficiary for at least two years.

Although the record establishes the Beneficiary's employment by the healthcare firm for 26 months, the Petitioner has not demonstrated that her tenure with the firm included the requisite two years of experience in the job offered. The Beneficiary attested on the labor certification that she worked the entire 26-month period with the firm as a "corporate trainer." The firm's initial letter, however, states that it employed her during that period "as a corporate trainer *and project coordinator*."

(emphasis added).[5] Thus, the initial letter suggests that she had two positions with the healthcare firm - "corporate trainer" and "project coordinator." The letter describes her experience "[a]s the corporate trainer," establishing that experience was in the job offered. The letter does not describe her job duties as a "project coordinator." A copy of the Beneficiary's employment agreement with the firm also suggests that, during her tenure with the firm, she worked in two positions. The agreement states her hiring "as PROJECT MANAGER and CORPORATE TRAINER" (emphasis in original). Thus, substantial evidence indicates that the Beneficiary's 26-month tenure at the healthcare firm included experience outside the job offered. The record therefore does not establish the Beneficiary's possession of the requisite two years of qualifying experience in the job offered.

The record on appeal does not establish the Beneficiary's possession of the minimum employment experience required for the offered position. We will therefore affirm the petition's denial.

III. MISREPRESENTATION

Unless accompanied by an application for Schedule A designation or documentation of a beneficiary's qualifications for a shortage occupation, a petition for a professional must include a valid, individual labor certification. 8 C.F.R. § 204.5(l)(3)(i). USCIS may invalidate a labor certification after its issuance upon a finding of "fraud or willful misrepresentation of a material fact involving the labor certification application." 20 C.F.R. § 656.30(d).

An intentional omission of information requested on an immigration application constitutes a misrepresentation. *Matter of D-R-*, 27 I&N Dec. 105, 114-15 (BIA 2017) (holding that a refugee applicant misrepresented his background by willfully concealing his service as a special police officer and platoon commander during the Bosnian War). Misrepresentations are willful if they are "deliberately made with knowledge of their falsity." *Matters of Valdez*, 27 I&N Dec. 496, 498 (BIA 2018) (citations omitted). A misrepresentation is material when it has a "natural tendency to influence, or [be] capable of influencing, the decision of the decision-making body to which it was addressed." *Id.* (citation omitted).

Here, the Director found that the Petitioner and Beneficiary willfully misrepresented the Beneficiary's education and experience on the accompanying labor certification application. The decision states that "USCIS intends to invalidate the labor certification."

Although USCIS did not actually invalidate the labor certification, the record does not support the misrepresentation findings. As previously discussed, there is insufficient evidence that the certification application falsely states the Beneficiary's educational qualifications. The record does not indicate that the 2013 visa application asked the Beneficiary about her university education. Moreover, consistent with the information on the labor certification, the Petitioner submitted independent, objective evidence establishing the Beneficiary's possession of a requisite bachelor's degree in English. *See Matter of Ho*, 19 I&N Dec. at 591 (requiring a petitioner to resolve inconsistencies with independent, objective evidence).

[5] The healthcare firm's later letter identifies the Beneficiary's former position as only "corporate trainer."

We found that the Petitioner did not establish the Beneficiary's possession of the requisite two years of experience in the job offered because evidence indicates that her 26-month tenure with the Turkish healthcare firm may include experience outside the job offered. But, consistent with the Beneficiary's attestation on the certification, the Petitioner demonstrated that at least part of her employment by the healthcare firm included qualifying experience. The record therefore does not establish that the certification contains a willful misrepresentation of a material fact regarding the Beneficiary's qualifying experience.[6] In future filings, the Petitioner must establish through independent objective evidence that her entire tenure with the firm constituted qualifying experience, or that she gained the requisite experience with her other former employer listed on the certification.

The record on appeal does not support the Director's finding that the Petitioner and Beneficiary willfully misrepresented the Beneficiary's qualifications on the labor certification. We will therefore withdraw that portion of the decision.

IV. ABILITY TO PAY THE PROFFERED WAGE

Although unaddressed by the Director, the record also does not establish the Petitioner's ability to pay the proffered wage of the offered position. A petitioner must demonstrate its continuing ability to pay a proffered wage, from a petition's priority date until a beneficiary obtains lawful permanent residence. 8 C.F.R. § 204.5(g)(2). For petitioners with less than 100 employees, as in this case, evidence of ability to pay must include copies of annual reports, federal tax returns, or audited financial statements. *Id.*

Here, the labor certification states the proffered wage of the offered position of corporate trainer as $44,013 a year. As previously noted, the petition's priority date is August 27, 2018.

As proof of its ability to pay, the Petitioner submitted copies of its federal income tax returns for 2016 and 2017. Contrary to 8 C.F.R. § 204.5(g)(2), however, the record lacks required evidence of the Petitioner's ability to pay in 2018, the year of the petition's priority date. The record therefore does not establish the Petitioner's ability to pay the proffered wage from the petition's priority date onward.

Also, USCIS records indicate the Petitioner's filing of Form I-140 petitions for two other beneficiaries.[7] A petitioner must demonstrate its ability to pay the proffered wage of each petition it files until a beneficiary obtains lawful permanent residence. 8 C.F.R. § 204.5(g)(2). The Petitioner here must therefore demonstrate its ability to pay the combined proffered wages of this and any other

[6] The record indicates that the information on the labor certification misrepresents a different fact. The Beneficiary indicated that, during the three years preceding the filing of the certification application, she was unemployed. *See* part K of the certification application (requiring a list of "all jobs the alien has held during the past 3 years"). Information provided to the Texas Workforce Commission, however, does not support the Beneficiary's claimed unemployment during that entire period. Even if the Beneficiary willfully concealed employment from the certification application, however, the record would not establish the misrepresentation's materiality. We note, however, that this adds to the collective inconsistencies throughout the record to include inconsistent dates and inconsistent titles as noted above.

[7] USCIS records identify the two other petitions by the following receipt numbers: [redacted] and [redacted]

Form I-140 petitions that were pending or approved as of this petition's priority date of August 27, 2018, or filed thereafter. *See Patel v. Johnson*, 2 F.Supp.3d 108, 124 (D. Mass. 2014) (affirming our revocation of a petition's approval where, as of the filing's grant, the petitioner did not demonstrate its ability to pay the combined proffered wages of multiple petitions).[8]

The record lacks the proffered wages and priority dates of the Petitioner's two other Form I-140 petitions. We are therefore unable to determine the total amount of combined proffered wages the Petitioner must demonstrate its ability to pay. For this additional reason, the record does not establish the Petitioner's ability to pay the proffered wage.

In any future filings in this matter, the Petitioner must submit copies of annual reports, federal tax returns, or audited financial statements for 2018 and, if available, 2019. The Petitioner must also provide the proffered wages and priority dates of its other two Form I-140 petitions. The company may also submit additional evidence of its ability to pay the combined proffered wages, including proof of wages paid to beneficiaries in relevant years and materials supporting the factors stated in *Matter of Sonegawa*, 12 I&N Dec. 612, 614-15 (Reg'l Comm'r 1967).

V. CONCLUSION

The record on appeal does not support the Director's finding that the Petitioner and Beneficiary willfully misrepresented the Beneficiary's qualifications on the accompanying labor certification. But the Petitioner has not demonstrated the Beneficiary's possession of the minimum experience required for the offered position. We will therefore affirm the petition's denial.

ORDER: The appeal is dismissed.

[8] The Petitioner need not demonstrate its ability to pay proffered wages of petitions that it withdrew or that USCIS rejected, denied, or revoked. The Petitioner also need not demonstrate its ability to pay proffered wages before the priority dates of their corresponding petitions, or after the dates their corresponding beneficiaries obtained lawful permanent residence.