U.S. Citizenship and Immigration Services

**Non-Precedent Decision of the Administrative Appeals Office**

In Re: 1579811

Date: FEB. 20, 2020

Appeal of Texas Service Center Decision

Form I-140, Immigrant Petition for Skilled Worker

The Petitioner seeks to employ the Beneficiary as a chef specializing in Korean cuisine. It requests her classification under the third-preference immigrant category as a skilled worker. *See* Immigration and Nationality Act (the Act) section 203(b)(3)(A)(i), 8 U.S.C. § 1153(b)(3)(A)(i).

After initially granting the filing, the Director of the Texas Service Center revoked the petition's approval. The Director concluded that the Petitioner did not establish the Beneficiary's qualifications for the offered position or the requested classification. Also, finding that the Beneficiary willfully misrepresented her employment experience, the Director invalidated the accompanying certification from the U.S. Department of Labor (DOL).

On appeal, we will withdraw the Director's decision and remand the matter for entry of a new decision consistent with the following analysis.

## I. EMPLOYMENT-BASED IMMIGRATION

Immigration as a skilled worker generally follows a three-step process. To permanently fill a position in the United States with a foreign worker, an employer must first obtain DOL 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 a position. *Id.* Labor certification also indicates that employment of a foreign national would not harm wages and working conditions of U.S. workers with similar jobs. *Id.*

If the DOL approves a position, a prospective 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 considers whether a beneficiary meets the requirements of a certified position and a requested visa classification. If USCIS approves 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.

"[A]t any time" before a beneficiary obtains lawful permanent residence, however, USCIS may revoke a petition's approval for "good and sufficient cause." Section 205 of the Act, 8 U.S.C.

§ 1155. If supported by the record, the erroneous nature of a petition's approval justifies its revocation. *Matter of Ho*, 19 I&N Dec. 582, 590 (BIA 1988).

USCIS may issue a notice of intent to revoke (NOIR) if the unexplained and unrebutted record would have warranted the petition's denial. *Matter of Estime*, 19 I&N Dec. 450, 451 (BIA 1987). USCIS properly revokes a petition's approval if a petitioner's NOIR response does not rebut or resolve the grounds alleged. *Id.* at 451-52.

## II. INVALIDATION OF THE LABOR CERTIFICATION

Unless accompanied by an application for Schedule A designation or documentation of a beneficiary's qualifications for a shortage occupation, a petition for a skilled worker 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).

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.*

Here, the labor certification states that the offered position of Korean chef requires a U.S. high-school diploma, or a foreign educational equivalent, and at least two years of experience "in the job offered." On a labor certification, 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). The Beneficiary's educational qualifications are not at issue.

On the labor certification, the Beneficiary attested that she gained about four years of full-time, qualifying experience. She stated that she worked as a "head cook" at a restaurant in South Korea from March 1995 to March 1999.

The Director's NOIR informed the Petitioner that, after the petition's approval, USCIS officers in South Korea could not verify the Beneficiary's claimed experience. Using a cell-phone number listed on the labor certification and a 2008 letter from the Beneficiary's former employer, an officer tried to call the restaurant's owner. The person who answered, however, told the officer that the number was not the owner's. Officers also called two other restaurants operating in the same area with the name of the Beneficiary's former employer. These restaurant owners stated that they did not recall her as a former employee.

However, in this case, based on the facts above, USCIS' inability to verify the Beneficiary's qualifying experience would not have warranted the petition's denial. First, the record contained independent, objective evidence that the letter's signatory operated the Beneficiary's claimed former employer. The restaurant's address, name, and owner's name on a copy of a 2001 certificate from a South Korean tax office match those stated on the business's letter and the labor certification. The

certificate and the letter also list the same government-issued identification number for the restaurant.

In addition, USCIS' attempts to confirm the Beneficiary's experience occurred between November 2015 and January 2016, about seven years after the restaurant's issuance of its letter. During that lengthy period, the Beneficiary's former employer may have closed or moved, or its owner may have changed her phone number. In light of the passage of significant time and the existence of independent, objective evidence supporting the Beneficiary's claimed experience, USCIS' inability to verify her employment did not warrant a finding that she willfully misrepresented her qualifications on the labor certification. Even if the record supported the NOIR's allegation, the Petitioner's response included a copy of another South Korean tax document indicating the restaurant's closure in December 2006. This document therefore explains USCIS' inability to phone the restaurant's owner in 2015 and 2016.

Thus, as of the NOIR's issuance, the record did not support the Beneficiary's willful misrepresentation of her qualifying experience on the labor certification. We will therefore withdraw the Director's contrary finding and reinstate the labor certification.

New derogatory information, however, again casts doubt on the Beneficiary's labor certification attestations. Using information the Petitioner submitted on appeal, USCIS officers in South Korea last year contacted the restaurant's owner and two former coworkers of the Beneficiary. The owner and coworkers generally confirmed the restaurant's employment of the Beneficiary. But the owner indicated that she, the owner, served as the restaurant's chef, while the Beneficiary merely assisted her in the kitchen. The employer's statement suggests the Beneficiary's willful misrepresentation of the nature of her employment on the labor certification and potential elevation of her duties to show requisite experience "in the job offered."

USCIS must notify a petitioner of material derogatory information of which the business is unaware and afford it a reasonable opportunity to respond. 8 C.F.R. § 103.2(b)(16)(i). We will therefore remand this matter. On remand, the Director should issue a new NOIR detailing the new derogatory information contained in the most recent USCIS report from South Korea. The NOIR should also explain how the information suggests the Beneficiary's willful misrepresentation of a material fact on the labor certification. Following issuance of the NOIR, and review of the response, the Director should determine if any misrepresentation occurred and if such misrepresentation would warrant the invalidation of the labor certification.

## III. THE REQUIRED EXPERIENCE

The Director also determined that the Petitioner did not establish the Beneficiary's qualifying experience for the offered position and the requested visa classification. A skilled worker must have at least two years of training or experience. Section 203(b)(3)(A)(i) of the Act. A petitioner must also demonstrate a beneficiary's possession of all DOL-certified job requirements by a petition's priority date.[1] *Matter of Wing's Tea House*, 16 I&N Dec. 158, 160 (Acting Reg'l Comm'r 1977).

[1] This petition's priority date is March 24, 2009, the date the 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).

As previously discussed, the labor certification states that the offered position of Korean chef requires a U.S. high-school diploma, or a foreign educational equivalent, and at least two years of experience in the job offered. On the labor certification, the Beneficiary attested that she worked as a "Korean-style Food Head Cook" at the South Korean restaurant from March 1995 to March 1999. She partially described her job duties as, "headed direction of and preparation of and cooked Korean traditional food." She stated that she also, "selected and prepared menu and dessert," and that she "forecasted the food expenditure and ordered the required quantity."

Consistent with 8 C.F.R. § 204.5(l)(3)(ii)(A), the Petitioner submitted the letter from the Beneficiary's former employer, confirming the Beneficiary's employment and describing her experience. The Petitioner also submitted the South Korean tax document, identifying the restaurant's owner as the letter's signatory and confirming the business's address and identification number.

The Director found that the Petitioner did not establish the Beneficiary's qualifying experience, citing the inability of USCIS officers in South Korea in 2015 and 2016 to verify her former employment. As previously discussed, that inability would not have warranted the petition's denial. But the restaurant owner's 2019 statement indicating the Beneficiary's lack of experience "in the job offered" would have justified the petition's denial. However, unlike USCIS' prior inability to verify the Beneficiary's employment, the new derogatory information from the additional verification seems to show that the restaurant owner appears to *deny* the Beneficiary's claimed employment in the position of a chef. Rather, it appears that the beneficiary was more of a kitchen assistant, or maybe a cook. Also, independent, objective evidence does not support the Beneficiary's claimed qualifying experience "in the job offered."

Thus, on remand, the Director's new NOIR should notify the Petitioner of its need to demonstrate the Beneficiary's qualifying experience for the offered position. The new NOIR should detail the derogatory information contained in USCIS' most recent report and explain how the information casts doubt on the Beneficiary's claimed qualifying experience.

The Director should afford the Petitioner a reasonable opportunity to respond to the new NOIR. Upon receipt of a timely response, the Director should review the entire record – including evidence the Petitioner submits on appeal – and issue a new decision.

## IV. CONCLUSION

The record did not support the NOIR's allegations that the Beneficiary's willfully misrepresented her qualifications on the labor certification or that the Petitioner did not establish the Beneficiary's possession of the experience required for the offered position. New derogatory information, however, would have warranted the petition's denial on both grounds.

**ORDER:** The decision of the Director is withdrawn. The matter is remanded for entry of a new decision consistent with the foregoing analysis.

**FURTHER ORDER:** The ETA Form 9089, case number A-09083-35575, is reinstated.