U.S. Citizenship and Immigration Services

Non-Precedent Decision of the Administrative Appeals Office

MATTER OF T-F-S- INC.

DATE: FEB. 23, 2017

APPEAL OF TEXAS SERVICE CENTER DECISION

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

The Petitioner, a retail flooring supplier, seeks to permanently employ the Beneficiary in the United States as a product line manager. It requests classification of the Beneficiary as a skilled worker under the third preference immigrant category. *See* Immigration and Nationality Act (the Act) section 203(b)(3)(A)(i), 8 U.S.C. § 1153(b)(3)(A)(i). This classification allows a U.S. employer to sponsor a foreign national with at least 2 years of training or experience for lawful permanent resident status.

The Director, Texas Service Center, denied the petition, concluding that the record did not establish that the Beneficiary possessed the education, experience, and training required on the submitted ETA Form 9089, Application for Permanent Employment Certification (labor certification), and that the Petitioner did not establish that a *bona fide* job offer exists for the Beneficiary. The Director further invalidated the underlying labor certification, entering a finding of fraud or willful material misrepresentation, based on misrepresentations made regarding the Beneficiary's experience.

The Petitioner filed a motion to reopen and motion to reconsider with the Director, asserting that that Director erred in his findings. The Director dismissed the motion to reopen and motion to reconsider, finding that the motion did not meet regulatory requirements.

The matter is now before us on appeal. We agree with the Director's decision to dismiss the motion to reopen and reconsider. The Petitioner did not provide new evidence that would change the outcome of the case, nor did the Petitioner cite to pertinent case law to show that the original decision was incorrect.

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

I. LAW

Section 203(b)(3)(A)(i), 8 U.S.C. § 1153(b)(3)(A)(i), provides immigrant classification to skilled workers. *See also* 8 C.F.R. § 204.5(l)(2). A petition for skilled worker must be accompanied by a valid, individual labor certification, an application for Schedule A designation, or documentation of a beneficiary's qualifications for a shortage occupation. 8 C.F.R. § 204.5(l)(3)(i).

The determination of whether a petition may be approved for a skilled worker is based on the requirements of the job offered as set forth on the labor certification. *See* 8 C.F.R. § 204.5(l)(4). The labor certification must require at least 2 years of training and/or experience. Relevant post-secondary education may be considered as training. *See* 8 C.F.R. § 204.5(l)(2).

In addition, the beneficiary must possess 2 years of training and/or experience, *see* 8 C.F.R. § (l)(3)(ii)(B), and otherwise 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). *See Matter of Wing's Tea House*, 16 I&N Dec. 158, 159 (Acting Reg'l Comm'r 1977); *see also Matter of Katigbak*, 14 I&N Dec. 45, 49 (Reg'l Comm'r 1971).

Accordingly, a petition for a skilled worker must establish that the job offer portion of the labor certification requires at least 2 years of training and/or experience, that the beneficiary has at least 2 years of training and/or experience, and that the beneficiary otherwise meets all of the requirements of the offered position set forth on the labor certification. The Petitioner must also establish that it has the ability to pay the proffered wage from the priority date onward.

II. ANALYSIS

A. The Record Does Establish that a *Bona Fide* Job Offer Exists

The Director found that the record did not establish that a *bona fide* job offer as a product manager existed at the time of filing of the labor certification in October 2012 or continues to exist. After a review of the record, including evidence submitted on appeal, we find that the Petitioner has established by a preponderance of the evidence that a *bona fide* job offer existed at the time of filing of the labor certification and continues to exist.

In the denial, the Director cited concerns about the Beneficiary's ownership of a tile business, the Beneficiary's participation in industry events with two other companies during the time he claimed to be working for the Petitioner, and evidence from the Internet that a company in New York may also be related to or owned by the Beneficiary. On appeal, the Petitioner satisfactorily addresses each of the Director's concerns and emphasizes that the Beneficiary has been employed by the Petitioner since before 2012, when the labor certification was filed, and continues to be employed by the Petitioner to date in H-1B status. Evidence submitted supports the Petitioner's assertions. The Beneficiary's continued employment is evidence of a *bona fide* job offer. Given the evidence in the record, we find that the Petitioner has established that it is more likely than not that a *bona fide* job opportunity existed at the time of filing of the labor certification and continues to exist. We therefore withdraw the Director's finding to the contrary.

B. The Record Does Not Establish the Beneficiary's Qualifying Experience for the Offered Position

The Director further found that the record did not establish the Beneficiary's qualifying experience for the position. 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). *See Wing's Tea House*, 16 I&N Dec. at 159; *see also Katigbak*, 14 I&N Dec. at 49. The priority date of the petition is October 18, 2012.[1] The required education, training, experience, and skills for the proffered position of product line manager are set forth at Part H of the labor certification. The labor certification states that the position has the following minimum requirements:

H.4.	Education: minimum level required: None.
. . .	
H.6.	Is experience in the job offered required for the job? Yes.
H.6-A.	If Yes, number of months experience required: 48.
. . .	
H.8.	Is there an alternate combination of education and experience that is acceptable? No.
. . .	
H.14.	Specific skills or other requirements: Knowledge with floor supplies industry.

As noted above, a petition for a skilled worker must establish that, among other things, the Beneficiary possesses the required training and/or experience as of the priority date. A petitioner must support a beneficiary's claimed qualifying experience with letters from employers. 8 C.F.R. § 204.5(g)(1). The letters must include the employers' names, addresses, and titles, and descriptions of a beneficiary's experience. *Id.*

Here, the proffered position requires 4 years of experience as a product line manager. Part K of the labor certification states that the Beneficiary qualifies for the offered position based on experience as a product line manager with [redacted] from February 15, 1999, to June 18, 2004.

The record contains a January 13, 2014, letter from [redacted] General Manager, [redacted] stating that the Beneficiary was employed as a product line manager from July 26, 2001, to June 15, 2006.

The letter and labor certification are inconsistent regarding the Beneficiary's dates of employment. The Director noted this inconsistency in the notice of intent to deny and provided the Petitioner with notice of other derogatory information that contradicted the Petitioner's claims regarding the Beneficiary's prior employment. Specifically, the Director pointed out that according to publically available information, [redacted] was not incorporated until June 26, 2001; that the

[1] The priority date is the date the DOL accepted the labor certification for processing. *See* 8 C.F.R. § 204.5(d).

Beneficiary had stated on a February 18, 2004, visa application that he was employed as "Secretary" of at that time; and that the Beneficiary stated on a September 28, 2007, visa application that he was presently employed as the managing director of and that he did not have any other previous employers. The Director stated that this information contradicted the Beneficiary's claimed employment with and instructed the Petitioner to respond with independent objective evidence to overcome the inconsistencies presented.

In response, the Petitioner stated that the start date of employment used in the employment letter reflected incorporation in 2001, and that the end date used was the date when the Beneficiary also began spending more time on his own business. The Petitioner stated that the Beneficiary's true dates of employment with were a hybrid of the dates reported in the labor certification and letter, and were February 15, 1999, to June 15, 2006. The Petitioner did not address the absence of the Beneficiary's employment with on the previously submitted visa application.

The Petitioner also submitted the following letters attesting to the Beneficiary's employment:

- A letter dated March 11, 2015, from stating that he has known the Beneficiary "both personally and in the business of for many years."
- A letter dated March 11, 2015 from who states that the Beneficiary and "I have worked together at for several years."
- A letter dated March 11, 2015, from stating that the Beneficiary "has been the go to guy over the past 12 years."
- A letter dated November 2, 2015, from Supervisor, stating that the beneficiary "has been working at for a period of time."
- A letter dated November 2, 2015, from the Beneficiary's spouse, stating that the Beneficiary was employed by from February 1999 to June 2006.

The evidence submitted does not overcome the inconsistencies presented. First, the Petitioner's reliance on the above letters is misplaced. None of the letters in question confirm the dates of employment cited in either the original employment letter or the labor certification. In fact, the first four letters refer to the Beneficiary's employment in the present tense, indicating that as of the date the letter was written in 2015, the Beneficiary was still employed by contrary to the evidence in the record. Importantly, the letters do not represent contemporaneous objective documentary evidence of the Beneficiary's employment at during the claimed time period, but were rather produced only after the Director questioned the Beneficiary's employment history. The Petitioner must resolve inconsistencies in the record with independent objective evidence, and attempts to explain or reconcile such inconsistencies, absent competent objective evidence pointing to where the truth, in fact, lies, will not suffice. *See Matter of Ho*, 19 I&N Dec. 582, 591-592 (BIA 1988).

The Petitioner's claim that the Beneficiary was employed prior to the actual incorporation of the business is likewise not supported by documentary evidence such as employment records, pay stubs, or any other evidence from the time period the Beneficiary claims to have been employed. Going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. *Matter of Soffici*, 22 I&N Dec. 158, 165 (Comm'r 1998) (citing *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg'l Comm'r 1972)). Further, the Beneficiary's statement that he continued to work with after June 2004, while also devoting more time to his own tile business, is not sufficient to explain the discrepancies presented. The Petitioner has not provided evidence that the Beneficiary was employed by both businesses during the same period of time or explained how the Beneficiary split his between the two entities, such that we could evaluate his position or calculate the true time of employment with As noted, going on record without supporting documentary evidence is not sufficient to establish the Beneficiary's eligibility. *See Id.*

Moreover, the Petitioner has not responded to or explained why the Beneficiary's employment with was not included on his prior visa applications. The absence of this employment on the applications raises doubt as the veracity of the claims made. Doubt cast on any aspect of the petitioner's proof may, of course, lead to a reevaluation of the reliability and sufficiency of the remaining evidence offered in support of the visa petition. *Id.* In sum, the Petitioner has not established that the Beneficiary was employed as a product line specialist with for the claimed time period.

The Petitioner also asserted that, in the alternative, U.S. Citizenship and Immigration Services (USCIS) should consider the Beneficiary's employment with when evaluating his prior experience. In support of this contention, the Petitioner submitted a letter from Partner, of stated that his company has acted as the accountants for since its incorporation in 2001 and that he can confirm the Beneficiary has acted as the managing director of the business. As noted above, the Petitioner did not include the Beneficiary's experience with on the labor certification. In *Matter of Leung*, 16 I&N Dec. 2530 (BIA 1976), the Board's dicta notes that the beneficiary's experience, without such fact certified by DOL on the beneficiary's labor certification, lessens the credibility of the evidence and facts asserted. Here, the record does not contain any evidence that the Beneficiary was employed with as a product line manager for any period of time. The letter from attests to the Beneficiary's ownership and role as managing director, but it not sufficient to establish that the Beneficiary was employed or has any experience as a product line manager.

On motion to the Diretor, the Petitioner submitted results from a lie detection test conducted by The Petitioner claims that the responses in this lie detection test corroborate the Beneficiary's claimed experience. However, the question that the Petitioner highlights do not actually relate to the experience in question. Specifically, the Beneficiary was asked "[d]o you have more than (5) years experience in Business Management?" This question does not concern the Beneficiary's experience as a product line manager in general or his claimed

experience with the [redacted] or [redacted] Therefore, contrary to the Petitioner's claims, the results of the lie detection examination do not corroborate the Petitioner's claims regarding the Beneficiary's experience.

The Petitioner must provide independent objective evidence of the Beneficiary's employment in order to overcome the noted discrepancies in the record. Here, the Petitioner has not done so and as such, the Petitioner has not established that the Beneficiary has the claimed experience with [redacted] or any other qualifying experience. For the foregoing reasons, we find that the Petitioner has not established that the Beneficiary possessed the experience required by the terms of the labor certification.

C. Invalidation of the Labor Certification

The Director further found that the Petitioner or Beneficiary had committed fraud or willful misrepresentation in filing this petition, and that as such, invalidated the labor certification. The regulation at 20 C.F.R. § 656.30(d) provides:

> (d) Invalidation of labor certifications. After issuance, a labor certification may be revoked by ETA using the procedures described in Sec. 656.32. Additionally, after issuance, a labor certification is subject to invalidation by the DHS or by a Consul of the Department of State upon a determination, made in accordance with those agencies' procedures or by a court, of fraud or willful misrepresentation of a material fact involving the labor certification application. If evidence of such fraud or willful misrepresentation becomes known to the CO or to the Chief, Division of Foreign Labor Certification, the CO, or the Chief of the Division of Foreign Labor Certification, as appropriate, shall notify in writing the DHS or Department of State, as appropriate. A copy of the notification must be sent to the regional or national office, as appropriate, of the Department of Labor's Office of Inspector General.

Upon review of the record, we find that the Petitioner and Beneficiary willfully misrepresented material facts in this case and will therefore affirm the invalidation of the labor certification. Specifically, the discrepancies described above regarding the Beneficiary's employment history lead us to conclude that the documents submitted to show that the Beneficiary was employed by [redacted] are neither true nor credible.

Section 212(a)(6)(C) of the Act provides:

> Misrepresentation. – (i) In general. – Any alien 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 this Act is inadmissible.

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, the officer must determine: 1) that the petitioner or beneficiary made a false representation to an authorized official of the United States government; 2) that the misrepresentation was willfully made; and 3) that 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.

We will first address our finding of willful misrepresentation of material fact against the Petitioner. First, the Petitioner provided USCIS with false documents intended to establish that the Beneficiary worked abroad for [redacted] as a product line manager for 4 years. 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). Here, the submission of false experience letters in support of the petition constitutes a false representation to a government official. We also find that the Petitioner willfully made the misrepresentation. The Petitioner submitted a copy of the false experience letter with the original petition and continues to intentionally submit the same letter despite notification of the existence of contradictory facts in the record. Further, 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. The misrepresentations cut off a potential line of inquiry regarding the Beneficiary's employment history, which is directly material to the Beneficiary's eligibility. *See* 8 C.F.R. § 204.5(l)(3)(ii)(B).

We next address the Beneficiary's willful misrepresentation of material fact. The Beneficiary attested to his prior experience in part K of the labor certification, affirming that the experience reported was true and correct. However, as was discussed above, we do not find the claims credible. Moreover, we find the representation made on the labor certification to constitute a false representation to a government official. We also find that this misrepresentation was willful. As noted, the Beneficiary's claims on the labor certification directly contradict his prior claims of experience reported in a visa application. Finally, the Beneficiary's misrepresentation was material to the Beneficiary's eligibility. The misrepresentations cut off a potential line of inquiry regarding

the Beneficiary's employment history, which is directly material to the Beneficiary's eligibility. *See* 8 C.F.R. § 204.5(l)(3)(ii)(B).

In light of the contradictory evidence and information we described above, we find that the Petitioner and Beneficiary knowingly submitted documents containing false statements in an effort to mislead USCIS on an element that is material to the Beneficiary's eligibility for a benefit sought under the immigration laws of the United States. *See* 18 U.S.C. §§ 1001, 1546. Therefore, we hereby affirm the finding of willful misrepresentation of a material fact against the Petitioner and Beneficiary and affirm the invalidation of the underlying labor certification. This finding of willful material misrepresentation shall be considered in any future proceeding where admissibility is an issue.

III. CONCLUSION

In visa petition proceedings, it is the petitioner's burden to establish eligibility for the immigration benefit sought. Section 291 of the Act, 8 U.S.C. § 1361. The Petitioner has not met that burden.

ORDER: The appeal is dismissed.

Cite as *Matter of T-F-S- Inc.*, ID# 76760 (AAO Feb. 23, 2017)