U.S. Citizenship and Immigration Services

Non-Precedent Decision of the Administrative Appeals Office

In Re: 06409520

DATE: JAN. 16, 2020

Appeal of Texas Service Center Decision

Form I-140, Immigrant Petition for a Skilled Worker

The Petitioner, a convenience store with a gas station, seeks to employ the Beneficiary as a night shift manager. It requests skilled worker classification for the Beneficiary 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 "EB-3" 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. The Director found that the Petitioner did not establish that the Beneficiary had the requisite experience to meet the terms of the labor certification and to qualify for skilled worker classification. The Director also found that the Beneficiary willfully misrepresented her work experience on the labor certification, which was material to her eligibility for the immigration benefit sought in this proceeding.

On appeal the Petitioner asserts that previously submitted documentation establishes that the Beneficiary had the requisite experience for the job offered and the requested visa classification, and that the Beneficiary did not misrepresent any material fact regarding her prior employment on the labor certification.

In visa petition proceedings it is the Petitioner's burden to establish eligibility for the requested benefit. *See* section 291 of the Act, 8 U.S.C. § 1361. Upon *de novo* review, we will dismiss the appeal.

I. LAW

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). *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 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.

II. ANALYSIS

A. Beneficiary's Experience

To qualify for classification as a skilled worker a beneficiary must have at least two years of training or experience. 8 C.F.R. § 204.5(l)(3)(ii)(B). A beneficiary must also meet the specific educational, training, experience, or other requirements of the labor certification. *Id.* All requirements must be met by the petition's priority date,[1] which in this case is April 14, 2016. *See Matter of Wing's Tea House*, 16 I&N Dec. 158, 159 (Acting Reg'l Comm'r 1977). The first issue on appeal is whether the Beneficiary has two years of qualifying experience to meet the requirements of the labor certification and to qualify for skilled worker classification.

The labor certification that accompanied the Petitioner's Form I-140, Immigrant Petition for Alien Worker (I-140 petition), filed in December 2016, states that the minimum experience required for the proffered position of night shift manager is 24 months in the job offered or in a related position such as store supervisor or store manager. According to the labor certification the Beneficiary met this requirement by working 50 hours a week as a store supervisor/store manager at [redacted] a retail store in [redacted] India, from June 1, 2011, to June 30, 2014. The job with [redacted] is the only employment experience listed for the Beneficiary on the labor certification. As evidence of this job the Petitioner submitted with the I-140 petition a letter dated July 21, 2015, from [redacted] who identified himself as the manager of [redacted] stated that the Beneficiary had been employed as the store supervisor from June 2011 to June 2013 and as the store manager from July 2013 to June 2014.

The Director issued a notice of intent to deny (NOID) in March 2019, citing a prior visa application filed by the Beneficiary on August 1, 2014, on which she stated that she was not previously employed and that she was a university student enrolled in a master of commerce program from July 2012 until February 2014, which she did not complete. The Director pointed out that the information on this visa application conflicted with the employment information on the labor certification underlying the instant petition, and appeared to indicate that the Beneficiary misrepresented her employment experience on the labor certification. The Petitioner was advised to submit documentary evidence to resolve these conflicts and establish the Beneficiary's eligibility for skilled worker classification.

In response to the NOID the Petitioner submitted an affidavit from the Beneficiary who stated that she filed her application for a student (F-1) visa with the Department of State (Form DS-160) through a consultant who only requested information about her schooling and not about her experience in completing the application form. The Beneficiary conceded that she did not mention her work experience at [redacted] to the consultant, or in her consular interview, ostensibly because she did not consider it relevant in her student visa application. The Beneficiary indicated that she also did not mention some additional experience she had at [redacted] a children's clothing store, over three time periods totaling seven months of work from April 2009 to May 2011.[2] The Beneficiary claims that

[1] The priority date of a petition is the date the underlying labor certification is filed with the DOL. *See* 8 C.F.R. § 204.5(d).
[2] The Beneficiary's alleged experience at [redacted] was not listed on the labor certification. The failure to list work

she was able to work at [redacted] while going to school because her schedule was flexible and her master's degree studies were an online distance learning program. While acknowledging that the Beneficiary's failure to mention her work experience on the student visa application was a misrepresentation, the Petitioner contends that it was not material to the immigration benefit sought in that application and should not be used to draw negative conclusions about the Beneficiary's work experience in the instant petition.

In denying the petition the Director found that the Petitioner's response to the NOID did not resolve the discrepancy between the labor certification in the instant proceeding and the previously filed student visa application with regard to the Beneficiary's employment history. The Director noted that the Beneficiary signed and submitted her student visa application in August 2014 with a specific denial of any prior employment experience, which directly contradicted her claim on the subsequent labor certification that she worked for [redacted] from 2011 to 2014. The Director concluded that the Petitioner failed to establish that the Beneficiary met the experience requirements of the labor certification, and that the Beneficiary willfully misrepresented a fact that was material to the skilled worker classification she seeks in the instant proceeding by asserting on her labor certification to have work experience at [redacted]

On appeal the Petitioner refers to the previously submitted employment verification letter from [redacted] and asserts that it is good evidence of the Beneficiary's job experience at [redacted] because it complies with the regulation at 8 C.F.R. § 204.5(g)(1), which provides that "[e]vidence relating to qualifying experience . . . shall be in the form of letter(s) from current or former employer(s) . . . and shall include the name, address, and title of the writer, and a specific description of the duties performed by the alien . . ." We do not agree with the Petitioner's claim that [redacted]'s letter meets the substantive requirements of 8 C.F.R. § 204.5(g)(1). The letter provides few details about the Beneficiary's alleged employment at [redacted] stating simply that as the store supervisor and later store manager she "follow[ed] up the Accounting and Human Resource departments working under her." [redacted]s letter does not provide "a specific description of the duties performed" by the Beneficiary, as the regulation requires, and does not indicate how many hours per week the Beneficiary worked for our purpose of determining length of employment. Moreover, the vague job duties described by [redacted] do not appear to match up with the more detailed description of the Beneficiary's alleged job duties in section K of the labor certification. [redacted] is described as a "retail store" and [redacted] asserts that it has accounting and human resource departments. But he offers no information about the size and scale of the store as a whole, those departments in particular, or the specific duties related to accounting and human resources that were assertedly performed by the Beneficiary. For all of the reasons discussed above the letter from [redacted] does not have sufficient evidentiary weight to establish that the Beneficiary acquired any qualifying experience at [redacted]

Furthermore, the Beneficiary has still not furnished a persuasive rationale for the conflicting information about her employment history on her application for a student visa in 2014 and the labor certification supporting the instant petition in 2016. On the Form DS 160 in 2014 the Beneficiary entered "Not employed" in the box asking for her "Primary Occupation" and answered "No" to the

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experience on a labor certification lessens the credibility of the claimed experience and supporting evidence. *See Matter of Leung*, 16 I&N Dec. 2530 (BIA 1976).

question "Were you previously employed?" Furthermore, while asserting that she applied for her student visa through a consultant who never asked for information about her work experience, the Beneficiary specifically answered "No" to the question "Did anyone assist you in filling out this application?" The Beneficiary's assertion that she did not think work experience at [redacted] was relevant in her student visa application does not explain her answers to specific questions on the application form in which she clearly stated she had no work experience. The statements on the Beneficiary's student visa application totally contradict the information provided on the labor certification in 2016, claiming that she had three years of employment with [redacted]

It is incumbent upon a petitioner to resolve any inconsistencies in the record by independent objective evidence. Attempts to explain or reconcile such inconsistencies will not suffice without competent evidence pointing to where the truth lies. *See Matter of Ho*, 19 I&N Dec. 582, 591-92 (BIA 1988). Doubt cast on any aspect of the petitioner's evidence also reflects on the reliability of the petitioner's remaining evidence. *See id.* Neither the Petitioner nor the Beneficiary has provided independent objective evidence to resolve the inconsistencies in the record involving the Beneficiary's alleged employment by [redacted] The affidavits of interested parties, like those submitted by the Beneficiary and her father in response to the NOID, do not constitute independent objective evidence. Nor have any official employment records, pay statements verifiably issued to the Beneficiary, or other contemporary documentation of the Beneficiary's alleged employment been submitted.

We conclude, therefore, that the evidence of record does not establish that the Beneficiary gained any qualifying experience with [redacted] in the years 2011-2014, as alleged on the labor certification. Thus, the Petitioner has not established that the Beneficiary has the requisite two years of experience to meet the labor certification requirements and to qualify for skilled worker classification. Accordingly, we will dismiss the appeal.

B. Willful Misrepresentation of a Material Fact

The second issue on appeal is whether the Beneficiary willfully misrepresented a material fact on the labor certification by asserting that she had qualifying work experience as a store supervisor and store manager at [redacted] A misrepresentation is an assertion or manifestation that is not in accord with the true facts. For an immigration officer to find a willful and material misrepresentation of fact, he or she must determine that (1) the petitioner or beneficiary made a false representation to an authorized official of the U.S. 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 Kai Hing Hui,* 15 I&N Dec. 288, 289 (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 Healy and Goodchild*, 17 I&N Dec. 22, 28 (BIA (1979). A "material" misrepresentation is one that "tends to shut off a line of inquiry relevant to the alien's eligibility." *Matter of Ng,* 17 I&N Dec. 536, 537 (BIA 1980).

In his decision the Director recounted the facts that the Beneficiary specifically stated on her student visa application in 2014 that she had no previous employment, that she contradicted this statement on the labor certification in 2016 by claiming that she was employed at [redacted] from 2011 to 2014, and

found that this employment claim on the labor certification constituted a willful misrepresentation of a material fact for the purpose of obtaining an immigration benefit.

On appeal the Petitioner asserts that this finding is refuted by the evidence in the record – specifically, the letter from the manager of [redacted] and the affidavits from the Beneficiary and his father attesting to the Beneficiary's employment at [redacted] from 2011 to 2014. According to the Petitioner, these materials establish that the Beneficiary did work for [redacted] We do not agree. As previously discussed, the letter from [redacted]'s manager is substantively deficient in that it does not provide "a specific description of the duties performed" by the Beneficiary, as required by the regulation at 8 .C.F.R. § 204.5(g)(1), and the vague duties it does describe do not line up with the job duties described in the labor certification. This lack of specificity in the [redacted] letter and its inconsistency with the labor certification tends to lessen the reliability of the asserted employment. Nor do the affidavits from the Beneficiary and her father have much evidentiary weight since they are not supported by any independent objective evidence of the Beneficiary's employment. Moreover, the Beneficiary has not adequately explained why she answered "No" on her student visa application to the question of whether she had been previously employed if, as she claims in the current I-140 proceeding, she was actually employed by [redacted] for three years prior to the filing of the student visa application. The Beneficiary's claim that the student visa application was handled by a consultant who did not ask for any information about her employment experience is contradicted by her answer of "No" on that very application to the question of whether anyone had assisted her in filling out.

Based on the documentation of record and the conflicting evidence discussed above, we agree with the Director that the Beneficiary made a false representation to the DOL when she claimed on the labor certification to have been employed by [redacted] as a store supervisor and store manager from 2011 to 2014, that this misrepresentation was willfully made since she specifically declared under penalty of perjury in section L of the labor certification that the information about her employment history was true and correct, and that this misrepresentation was material to the Beneficiary's ability to meet the terms of the labor certification and her eligibility for the skilled worker classification which requires two years of qualifying experience. Accordingly, we will not disturb the Director's finding that the Beneficiary willfully misrepresented a material fact about her employment history on the labor certification for the purpose of obtaining the immigration benefit sought in this I-140 proceeding.

III. CONCLUSION

The Petitioner has not established that the Beneficiary had at least two years of qualifying experience by the priority date of April 14, 2016. Therefore, the Beneficiary does not meet the requirements of the labor certification and does not qualify for classification as a skilled worker. The record also indicates that the Beneficiary willfully misrepresented a material fact about her employment history on the labor certification. The appeal will be dismissed for the above stated reasons, with each considered an independent and alternative basis for the decision.

ORDER: The appeal is dismissed.