U.S. Citizenship and Immigration Services

Non-Precedent Decision of the Administrative Appeals Office

MATTER OF D-S-, LLC

DATE: JAN. 26, 2017

APPEAL OF TEXAS SERVICE CENTER DECISION

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

The Petitioner, an operator of a nail salon and spa, seeks to employ the Beneficiary as a nail technician. 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 category 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 the Beneficiary's possession of the experience required for the offered position. The Director also invalidated the accompanying ETA Form 9089, Application for Permanent Employment Certification (labor certification), finding that the Beneficiary fraudulently or willfully misrepresented her qualifying experience on the document.

The matter is now before us on appeal. The Petitioner asserts that the Director requested evidence of the Beneficiary's qualifying experience beyond that required by regulation and that the record does not support the finding of a willful misrepresentation by the Beneficiary.

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

I. LAW

Employment-based immigration is generally a three-step process. First, a U.S. employer must obtain 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). Next, the employer must file a Form I-140, Immigrant Petition for Alien Worker, with U.S. Immigration and Citizenship Services (USCIS). *See* section 204 of the Act. Finally, if USCIS approves the petition, a 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.

By approving the labor certification in this case, the DOL certified that there are insufficient U.S. workers who are able, willing, qualified, and available for the offered position of nail technician. *See* section 212(a)(5)(A)(i)(I) of the Act. The DOL also certified that the employment of 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)(II).

USCIS must determine whether the Beneficiary meets the requirements of the offered position certified by the DOL and whether the Petitioner and the Beneficiary otherwise qualify for the requested benefit. *See, e.g., Tongatapu Woodcraft Haw., Ltd. v Feldman*, 736 F.2d 1305, 1309 (9th Cir. 1984) (holding that the immigration service "makes its own determination of the alien's entitlement to [the requested] preference status").

II. ANALYSIS

A. The Beneficiary's Possession of the Required Experience

A petitioner must establish a beneficiary's possession of all the education, training, and experience specified on a labor certification by a petition's priority date. 8 C.F.R. §§ 103.2(b)(l), (12); *see also Matter of Wing's Tea House,* 16 I&N Dec. 158, 159 (Acting Reg'l Comm'r 1977); *Matter of Katigbak,* 14 I&N Dec. 45, 49 (Reg'l Comm'r 1971). The priority date is the date the DOL accepted the labor certification application for processing. *See* 8 C.F.R. § 204.5(d).

In this case, the petition's priority date is April 13, 2015. The labor certification states the minimum requirements of the offered position of nail technician as a U.S. high school diploma or an equivalent foreign credential, and 24 months of experience in the job offered.

In evaluating a beneficiary's qualifications, we must examine the job offer portion of an accompanying labor certification to determine the minimum requirements of an offered position. We may neither ignore a term of the labor certification, nor impose additional requirements. *See K.R.K. Irvine, Inc.* v. *Landon,* 699 F.2d 1006, 1009 (9th Cir. 1983); *Madany* v. *Smith,* 696 F.2d 1008, 1012-13 (D.C. Cir. 1983); *Stewart Infra-Red Commissary of Mass., Inc.* v. *Coomey,* 661 F.2d 1, 3 (1st Cir. 1981).

The Petitioner submitted a copy of a graduation certificate, indicating the Beneficiary's possession of the foreign equivalent of a U.S. high school diploma. This evidence is sufficient to establish that the Beneficiary has the education required by the labor certification. At issue is whether the Beneficiary has the experience required in order to qualify for the offered position

The Beneficiary attested on the labor certification to her possession of about 28 months of full-time experience as a nail technician with [redacted] in South Korea from April 1, 2010, to July 30, 2012. In response to the Director's request for evidence (RFE) concerning the Beneficiary's claimed experience, the Petitioner submitted a "verification of employment" certificate signed by the president of [redacted] Consistent with the labor certification, the certificate states the

Beneficiary's employment by [redacted] as a nail technician from April 1, 2010, to July 30, 2012, and describes her job duties.

A petitioner must support a beneficiary's claimed qualifying experience with a letter from an employer. 8 C.F.R. § 204.5(l)(3)(ii)(A). A letter must provide the name, title, and address of the employer and describe a beneficiary's experience. *Id.* The Director found the submitted certificate insufficient to establish the Beneficiary's claimed qualifying experience, noting that the certificate is not printed on [redacted] stationery and does not otherwise indicate the signatory's affiliation with the business. But a "certificate of business registration" submitted by the Petitioner identifies the signatory as a representative of [redacted] Thus, together, the certificates link the signatory to [redacted] and appear to comply with 8 C.F.R. § 204.5(l)(3)(ii)(A).

Nevertheless, the record contains inconsistencies casting doubt on the Beneficiary's claimed qualifying experience. USCIS records indicate the Beneficiary's omission of her purported employment by [redacted] when she applied for a student visa in South Korea on July 2, 2012. On the labor certification, the Beneficiary claims that she worked full-time at [redacted] from April 1, 2010, to July 30, 2012. But the visa application filed in July 2012 stated her current employer as [redacted] and her prior employer as [redacted].[1] The Director identified this discrepancy in the Beneficiary's employment history in the denial, indicating that it cast doubt on whether the Beneficiary had the claimed qualifying experience.

In an affidavit submitted on appeal, the Beneficiary states that, before working at [redacted], she worked as a chief flight attendant at [redacted] from February 1989 to August 2009. She states that she had to quit that job for medical reasons. The Petitioner submitted medical documentation indicating that the Beneficiary underwent surgery in September 2009. From October 2009 to February 2010, the Beneficiary states she worked part-time as a flight attendant instructor for [redacted]. She states that she decided to become a nail technician because the position required little physical labor.

The Beneficiary claims that she began working again for [redacted] in June 2012 on a part-time basis and was selected to study in the United States in conjunction with her employment with [redacted]. Although still working for [redacted], the Beneficiary stated that she listed [redacted] as her current employer on the student visa application because the company sponsored her for the U.S. studies. The Beneficiary states that she did not list [redacted] as her prior employer on

[1] The Director did not inform the Petitioner of the Beneficiary's omission of her purported qualifying experience from the visa application until issuing his decision. The Petitioner therefore did not receive an opportunity to respond to the information before the decision. *See* 8 C.F.R. § 103.2(b)(16)(i) (requiring USCIS, before issuing an adverse decision, to advise a petitioner of derogatory information of which the petitioner is unaware and to afford it an opportunity to respond). The Petitioner, however, responded to the information on appeal. *See* USCIS, Instructions to Form I-290B, Notice of Appeal or Motion, 2, at https://www.uscis.gov/sites/default/files/files/form/i-290binstr.pdf (accessed Jan. 26, 2017) (providing that a petitioner may submit additional evidence on appeal); *see also* 8 C.F.R. § 103.2(a)(1) (incorporating form instructions into the regulations). Pursuant to regulations, the Petitioner therefore received notice of the derogatory information and an opportunity to respond before the issuance of this decision.

the application because she considered the position to be an "unofficial job," as the business did not report her employment to government authorities. The Beneficiary states:

> The reason I forgot to mention [redacted] was because I was paid in cash and the employer did not report my employee status and my employee payment tax and employee benefits like employment insurance and health insurance to the Korean government.

A petitioner may rely on unauthorized employment by a beneficiary to establish qualifying experience. But unauthorized employment may be more difficult to document than authorized employment. *See Matter of B&B Residential Facility*, 2001-INA-00146, 2002 WL 1586297, *3 (BALCA July 16, 2002) (stating that, to establish "under the table" employment as qualifying experience, a labor certification employer "will undoubtedly need to present credible supporting documentation of the work and/or corroborating affidavits or declarations of witnesses with personal knowledge").

Certificates from a certified tax accountant and the president of [redacted] state that the amount of the Beneficiary's monthly wages did not require the business to withhold taxes from her pay. The Petitioner also submitted copies of news articles indicating that many small businesses in South Korea - including beauty salons - pay their employees less than legal minimum wages and rarely receive punishment for the infractions.

But other evidence of record conflicts with the Beneficiary's statements. The labor certification and the certificate from the president of [redacted] state the Beneficiary's continuous employment by the business for 28 months performing the job duties of the offered position of nail technician, including manicuring customers' nails. However, in an affidavit submitted on appeal, the Beneficiary stated that she began work for [redacted] as a trainee, a position in which she cleaned customers' nails and merely observed other employees performing manicures on customers. The Beneficiary's work in a non-manicuring position at [redacted] casts doubt on the Beneficiary's possession of the required 24 months of full-time experience in the offered position.

Also, the Beneficiary stated that she earned 500,000 South Korean won (about $450) per month when she started work at [redacted] and eventually received 700,000 won (about $630) per month. The certified tax accountant stated that South Korean employees who earn less than 700,000 won per month are exempt from earned income taxes. If the Beneficiary eventually earned 700,000 won per month, however, the record does not explain why the president of [redacted] and the tax accountant stated that the business was not required to withhold taxes from the Beneficiary's pay.

A petitioner bears the burden of establishing eligibility for a requested benefit. Section 291 of the Act, 8 U.S.C. § 1361. The Petitioner must therefore explain the discrepancies of record regarding the Beneficiary's claimed qualifying experience. *See Matter of Ho*, 19 I&N Dec. 482, 591 (BIA 1988) (requiring a petitioner to resolve inconsistencies of record by independent, objective evidence pointing to where the truth lies).

On appeal, the Petitioner asserts that the certificates of record establish the Beneficiary's qualifying experience. Pursuant to 8 C.F.R. § 204.5(l)(3)(ii)(A), the Petitioner suggests that USCIS abuses its authority by requiring South Korean tax or pension documentation to further confirm the claimed employment.

As previously indicated, the certificates of record appear to meet the regulatory requirements. But the Beneficiary's omission of her claimed qualifying experience on the 2012 visa application and the other inconsistencies of record previously discussed cast doubt on the reliability of the certificates. *See Ho*, 19 I&N Dec. at 591 (requiring a petitioner to resolve inconsistencies of record by independent, objective evidence pointing to where the truth lies). Where the reliability of required evidence is in question, USCIS does not err in requesting additional, objective documentation.

The Petitioner also asserts that USCIS disregarded evidence of record indicating that many South Korean small businesses do not report their employees to government authorities to avoid insurance and pension obligations. However, as previously indicated, we have considered the news articles submitted by the Petitioner. But these articles focus on minimum wage obligations in South Korea. Contrary to the Petitioner's assertion, the articles do not specifically address avoidance of insurance and pension obligations by South Korean businesses. Counsel asserts the evasion of insurance and pension obligations by South Korean small businesses. But counsel's assertions do not constitute evidence. See *INS v. Phinpathya*, 464 U.S. 183, 188 n.6 (1984) (noting that counsel's unsupported assertions do not establish facts of record). A petitioner bears the burden of establishing eligibility for a requested benefit. Section 291 of the Act, 8 U.S.C. § 1361.

Moreover, the president of [redacted] and the certified tax accountant stated that the business did not report the Beneficiary's employment to Korean authorities because the Beneficiary earned less than the minimum taxable wage. Contrary to the Petitioner's assertion, they did not state that the business sought to avoid insurance and pension obligations to the Beneficiary.

For the foregoing reasons, the record does not establish the Beneficiary's possession of the required experience for the offered position as specified on the labor certification by the petition's priority date. We will therefore affirm the Director's decision and dismiss the appeal.

B. The Invalidation of the Labor Certification

A petition for a 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). 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." 20 C.F.R. § 656.30(d).

Willful misrepresentation of a material fact requires a deliberate and voluntary misrepresentation made with knowledge of its falsity. *Xing Yang Yang v. Holder*, 770 F.3d 294, 303 (4th Cir. 2014). Fraud requires an intention to deceive. *Id.*

In this case, the Director found that the Petitioner fraudulently or willfully misrepresented the Beneficiary's qualifying experience on the labor certification. As previously indicated, certificates from the president of the Beneficiary's purported former employer support the Beneficiary's claimed prior employment, but the Beneficiary's statements on appeal raise doubt as to the nature of the duties performed. In light of inconsistencies of record, the submitted evidence does not establish the Beneficiary's possession of the claimed experience. However, we do not find that the inconsistencies present are sufficient to warrant a finding that the Petitioner fraudulently or willfully misrepresented material facts on the labor certification, meriting its invalidation.

As such, we will withdraw the Director's finding of fraud or willful misrepresentation of a material fact as it relates to the Form I-140 petition and reinstate the validity of the labor certification.

On appeal, the Petitioner also challenges the Director's determination that the Beneficiary fraudulently or willfully omitted material facts on her visa application, rendering her inadmissible. *See* section 212(a)(6)(C)(i) of the Act, 8 U.S.C. § 1182(a)(6)(C)(i). That determination, however, was not grounds for the petition's denial or the invalidation of the labor certification. *See Matter of O-*, 8 I&N Dec. 295, 296-97 (BIA 1959) (holding that visa petition proceedings do not concern substantive questions of inadmissibility). We will therefore not review that finding or express an opinion on its validity.[2]

III. CONCLUSION

The record lacks evidence of fraud or willful misrepresentation of the Beneficiary's qualifying experience on the labor certification. We therefore withdraw the Director's finding of fraud or willful misrepresentation of a material fact as it relates to the underlying petition and reinstate the validity of the labor certification. But the record does not establish the Beneficiary's possession of the required experience for the offered position as specified on the labor certification by the petition's priority date. For this reason, the petition must remain denied.

[2] The Petitioner also asserts that a USCIS officer engaged in improper conduct while investigating the Beneficiary's claimed qualifying experience. The Petitioner submits a copy of a letter from the chief executive officer (CEO) of describing an officer's questions and manner of questioning as "inappropriate." Neither the Petitioner nor the CEO of however, asserts that the officer's purported misconduct materially affected the petition's adjudication. We otherwise lack authority to investigate the complaint.

In visa petition proceedings, a petitioner bears the burden of establishing eligibility for a requested benefit. Section 291 of the Act; *Matter of Otiende*, 26 I&N Dec. 127, 128 (BIA 2013). Here, the Petitioner did not meet that burden.

ORDER: The appeal is dismissed.

FURTHER ORDER: The approval of the ETA Form 9089, ETA Case number A-15103-66174, is reinstated.

Cite as *Matter of D-S-, LLC*, ID# 94037 (AAO Jan. 26, 2017)