U.S. Citizenship and Immigration Services

Non-Precedent Decision of the Administrative Appeals Office

MATTER OF N-M- LLC

DATE: JULY 30, 2019

APPEAL OF TEXAS SERVICE CENTER DECISION

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

The Petitioner, a restaurant management company, seeks to employ the Beneficiary as an inventory specialist. 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). This employment-based, "EB-3" category allows a U.S. business to sponsor a foreign national for lawful permanent resident status to work in a job requiring at least two years of training or experience.

The Director of the Texas Service Center denied the petition. The Director concluded that the Petitioner did not establish the Beneficiary's possession of the minimum experience required for the offered position.

On appeal, the Petitioner asserts that it resolved inconsistencies in the Beneficiary's employment history, including a discrepancy it blames on prior counsel.

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

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, a prospective employer must first obtain 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). DOL certification signifies that insufficient U.S. workers are able, willing, qualified, and available for an offered position, and that employment of a foreign national will not harm wages and working conditions of U.S. workers with similar jobs. *Id.*

If DOL approves a position, an employer must next submit the labor certification 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 the requested 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 EXPERIENCE

A petitioner must 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).[1] 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 labor certification states the minimum requirements of the offered position of inventory specialist as two years of experience in the job offered. The labor certification states that the position does not require training or education, and that the Petitioner will not accept experience in a related occupation.

On the labor certification, the Beneficiary attested that, by the petition's priority date, she gained about four years of full-time, qualifying experience. She stated that she worked as an inventory specialist at a restaurant in Mexico from December 2012 to December 2016.

Pursuant to 8 C.F.R. § 204.5(l)(3)(ii)(A), the Petitioner submitted a letter from the Beneficiary's claimed former employer in support of the Beneficiary's qualifying experience. The letter states that the restaurant employed her during the period indicated on the labor certification and describes her duties.

In a written request for additional evidence (RFE), however, the Director noted that the descriptions of the Beneficiary's experience in the restaurant's letter and on the labor certification conflict with information she listed on an application for a U.S. visitor's visa. On the visa application, which was filed and approved in July 2016, the Beneficiary listed her primary occupation as a "Homemaker." She also stated that, from March 2010 to March 2014, a firm employed her in Mexico as a sales executive, selling products to construction companies. She did not list any other prior employment on the visa application. The Director found that the Beneficiary's listing of a different occupation and former employer on the visa application cast doubt on her claimed, qualifying experience at the restaurant. *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 RFE asked the Petitioner to submit evidence explaining the inconsistencies in the Beneficiary's employment history. But the Petitioner's response included an affidavit from the Beneficiary and another letter from the restaurant that revealed another discrepancy. Contrary to the information on the labor certification, the Beneficiary and her former employer stated that the restaurant initially employed her for more than a year on a part-time basis. They stated that she did not begin working full-time for the restaurant until March 2014.

[1] This petition's priority date is August 25, 2017, the date DOL accepted the Petitioner's labor certification application for processing. *See* 8 C.F.R. § 204.5(d) (explaining how to determine a petition's priority date).

Based on the discrepancies in the Beneficiary's employment history, the Director found that the Beneficiary willfully misrepresented her qualifying experience for the offered position. The Director noted that a misrepresentation finding could render the Beneficiary inadmissible to the United States. *See* section 212(a)(6)(C)(i) of the Act (excluding foreign nationals from admission to the United States if they, by fraud or willful misrepresentations of material facts, sought to procure benefits under the Act). The Petitioner also devoted much of its written, appellate brief to challenging the inadmissibility finding. The Beneficiary's admissibility, however, is not at issue in these proceedings. *See Matter of O-*, 8 I&N Dec. 295, 297 (BIA 1959) (holding that immigrant petition proceedings do not address substantive questions of admissibility). We will therefore express no opinion on the Beneficiary's admissibility. Later in this decision, we will review the Director's misrepresentation finding, as it may warrant invalidation of the accompanying labor certification. *See* 20 C.F.R. § 656.30(d) (authorizing USCIS to invalidate a labor certification after its issuance upon a finding of "fraud or willful misrepresentation of a material fact involving the labor certification application"). Here, however, we will focus on whether the record establishes the Beneficiary's possession of the experience required for the offered position.

In her affidavit, the Beneficiary stated that she "was not fully aware of the fact that I had to display my work history" on the visa application form. She also said she "became very anxious and frustrated" because the online application "kept timing me off every couple of minutes, and I ended up moving on" to complete the form.

The Beneficiary's claimed problems with the application form, however, do not resolve the discrepancies in her employment history. The Beneficiary claims that, as of the visa application's filing in July 2016, she worked full-time at the restaurant as an inventory specialist. Yet, when the application asked for her "Primary Occupation," she stated "Homemaker." Thus, the Beneficiary did not merely neglect to list the restaurant on the visa application as an employer. Rather, she affirmatively stated a different primary occupation on the application. The record does not sufficiently explain how problems with the online application caused the Beneficiary to misstate her then-current, full-time occupation.

Also, evidence indicates that, from December 2012 to December 2016, the Beneficiary spent significant time in the United States. USCIS records indicate that, over that period, she entered the country at least 17 times. Also, the petition and the Beneficiary's application for adjustment of status state that her two children were born in the United States: one in May 2014; and the other in November 2015. The record does not explain how the Beneficiary maintained full-time employment in Mexico - plus a part-time job there from December 2012 to March 2014 - while spending so much time in the United States.

The Petitioner's RFE response also included copies of the Beneficiary's purported payroll records with the restaurant from December 2012 to December 2016. The records are in the name of another company. But the Petitioner submitted copies of a contract and a letter from the restaurant indicating that it hired the other company to administer its payroll. The Petitioner therefore states that the payroll records of the restaurant's employees bear the name of the administrator.

The payroll administrator, however, appears to be a company related to the Petitioner. A website identifies one of the administrator's "brands" as a Florida restaurant whose corporate entity is managed by the Petitioner's sole manager. *See* Fla. Dep't of State, Div. of Corps., https://dos.myflorida.com/sunbiz/search/ (last visited June 10, 2019). Thus, the payroll

documentation is unreliable because the administrator appears biased in favor of the Petitioner. The documentation is therefore not independent, objective evidence. Also, as previously discussed, the Petitioner has not sufficiently explained why the Beneficiary listed a different occupation on the visa application, or how she maintained full-time employment in Mexico while spending significant time in the United States. These unresolved inconsistencies cast additional doubt on the authenticity of the payroll records. *See Matter of Ho*, 19 I&N Dec. at 591 (stating that doubt cast on any aspect of a petitioner's proof may lead to a reevaluation of the sufficiency and reliability of remaining evidence). The payroll records therefore do not establish the Beneficiary's claimed, qualifying experience.

On appeal, counsel asserts that, although the Beneficiary worked as a sales representative for the other firm from March 2010 to March 2014, "her employment was actually based with [the restaurant], the company providing the sales service to [the other firm]." The assertions of counsel, however, do not constitute evidence. *Matter of Obaigbena*, 19 I&N Dec. 533, 534 n.2 (BIA 1988) (citing *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980)). The Petitioner must substantiate counsel's statements with independent evidence, which may include affidavits and declarations. Also, counsel's claim that the restaurant employed the Beneficiary since March 2010 would conflict with her December 2012 start date listed on the labor certification and in the restaurant's letters. In addition, if the Beneficiary served as a sales representative through the restaurant, the record does not explain why the restaurant's letters describe her position as an inventory specialist, or why the restaurant would provide sales services to construction companies. *See Matter of Ho*, 19 I&N Dec. at 591 (requiring a petitioner to resolve inconsistencies of record).

The Petitioner also asserts that prior counsel "inadvertently miscategorized" all of the Beneficiary's qualifying experience on the labor certification as full-time in nature. In as much as the Petitioner may be making a claim of ineffective assistance of counsel, the Petitioner has not met any of the documentary requirements of that claim.[2] Moreover, as noted above, the full-time nature of the employment is only one of the numerous inconsistencies in the record regarding the Beneficiary's employment experience. Resolving that question alone, would not overcome our other findings.

For the foregoing reasons, the record does not establish the Beneficiary's possession of the minimum experience required for the offered position. We will therefore affirm the Director's decision.

III. WILLFUL MISREPRESENTATION OF A MATERIAL FACT

As noted above, the Director also found that the Beneficiary misrepresented her experience on the labor certification. A willful misrepresentation of a material fact involves: 1) a false representation to an authorized U.S. government official, *Matter of Y-G-*, 20 I&N Dec. 794, 796 (BIA 1994); 2) that was "deliberately made with knowledge of [its] falsity," *Matters of Valdez*, 27 I&N Dec. 496,

[2] A claim of ineffective assistance must include: 1) a written affidavit from a petitioner detailing its agreement with former counsel and counsel's actions and representations; 2) evidence that it informed former counsel of the allegations and provided him or her with an opportunity to respond; and 3) evidence that it filed a complaint against former counsel with appropriate attorney discipline authorities or an explanation of why not. *Matter of Lozada*, 19 I&N Dec. 637, 639 (BIA 1988), *aff'd*, 857 F.2d 10 (1st Cir. 1988). Here, the Petitioner did not meet any of the *Lozada* requirements.

498 (BIA 2018); and 3) has a "natural tendency to influence, or [be] capable of influencing, the decision of the decision-making body." *Id.* (citations omitted).

A. Misrepresentation

Here, the record supports the Beneficiary's misrepresentation of her qualifying experience on the labor certification. As previously indicated, she attested that she worked full-time in the offered position of inventory specialist at a restaurant in Mexico from December 2012 to December 2016. A letter from the restaurant supported the attestation, but her prior application for a U.S. visitor's visa in July 2016 undermines her claim. On the visa application, the Beneficiary listed her primary occupation as a "homemaker" and stated that, from March 2010 to March 2014, a firm employed her in Mexico as a sales executive selling products to construction companies. Also, contrary to the information on the labor certification, the Beneficiary and the restaurant stated that it initially employed her for more than a year on a part-time basis. These discrepancies cast significant doubt on the Beneficiary's claimed, qualifying experience. *See Matter of Ho*, 19 I&N Dec. at 591.

Also, the explanations of the inconsistencies by the Beneficiary and the Petitioner are unconvincing. The Beneficiary attributed the discrepancies on the visa application to her misunderstanding of the application form and technical difficulties in completing the online submission. But she did not merely omit the restaurant as her employer on the application; she affirmatively misstated her then-current, full-time occupation. The Petitioner submitted copies of the Beneficiary's purported payroll records with the restaurant. But Internet information indicates that the payroll records are in the name of a payroll administration company related to the Petitioner, rendering the records biased and unreliable. Counsel asserted that the Beneficiary's employment as a sales representative from March 2010 to March 2014 "was actually based with [the restaurant]." But counsel's assertion does not constitute evidence. Also, the Beneficiary's start date would conflict with the information on the labor certification and the restaurant's letters, and would not explain why the restaurant described her position as an inventory specialist or why it would provide sales services to construction companies. In addition, the record does not explain how the Beneficiary maintained full-time employment in Mexico from December 2012 to December 2016 - plus a part-time job there for part of that time - while spending so much time in the United States during the period. For the foregoing reasons, the record establishes that the Beneficiary misrepresented her qualifying experience on the labor certification.

B. Willfulness

The record also indicates that the Beneficiary deliberately misrepresented her employment on the labor certification as an inventory specialist from December 2012 to December 2016. When the Beneficiary applied for a U.S. visitor's visa in July 2016, she stated her occupation as "homemaker" and indicated that another firm in Mexico employed her as a sales representative from March 2010 to March 2014. Yet, the Beneficiary signed the labor certification, certifying under penalty of perjury that she worked full-time in Mexico as an inventory specialist during the period. A foreign national's signature on an immigration-related form establishes a "strong presumption" that the signatory knew the form's contents and assented to them. *See Matters of Valdez*, 27 I&N Dec. at 499. Neither the Petitioner nor the Beneficiary has rebutted that presumption. Thus, the record indicates that the Beneficiary deliberately and affirmatively misrepresented her employment history on the labor certification.

C. Materiality

Finally, the record supports the materiality of the misrepresentation. The offered position requires two years of full-time experience in the offered position of inventory specialist. The Beneficiary listed her only qualifying experience with the restaurant in Mexico from December 2012 to December 2016.

On appeal, the Petitioner argues that the misrepresentation of the Beneficiary's employment history was immaterial because she worked full-time for the restaurant in the offered position for more than the requisite two-year period, from March 2014 to December 2016. As previously discussed, however, the record lacks independent, objective evidence of the Beneficiary's purported qualifying experience from 2014 to 2016. Because the payroll administrator appears to be affiliated with the Petitioner, the copies of the Beneficiary's payroll records are unreliable. Also, if the Beneficiary worked full-time as an inventory analyst for the restaurant from March 2014 to December 2016, the record does not sufficiently explain why she stated her primary occupation as "Homemaker" on the July 2016 visa application. The Beneficiary's employment experience is required to show her qualifications for the offered position; the misrepresentation of that experience therefore has a natural tendency to influence any eligibility determination. As such, it is material.

For the foregoing reasons, we affirm the Director's finding that the Beneficiary willfully misrepresented a material fact on the labor certification.

IV. INVALIDATION OF THE LABOR CERTIFICATION

Although unaddressed by the Director, the record also supports invalidation of the accompanying 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). As previously indicated, USCIS may invalidate a labor certification after its issuance upon a finding of fraud or willful misrepresentation of a material fact involving the certification application. 20 C.F.R. § 656.30(d). As the Director found, and we affirm, that the Beneficiary willful misrepresented a material fact on the labor certification. We will therefore invalidate the labor certification.

V. CONCLUSION

The Petitioner did not demonstrate the Beneficiary's possession of the minimum experience required for the offered position by the petition's priority date. The record also establishes that the Beneficiary willfully misrepresented her qualifying experience on the accompanying labor certification. As such, the labor certification has been invalidated and the petition is left unsupported by a valid labor certification. We will affirm the petition's denial for the foregoing reasons, with each considered an independent and alternate ground of denial. A petitioner bears the burden of establishing eligibility for the requested benefit. Section 291 of the Act; 8 U.S.C. § 1361. Here, the Petitioner did not meet that burden.

ORDER: The appeal is dismissed.

FURTHER ORDER: The ETA Form 9089, case number A-17235-79035, is invalidated under 20 C.F.R. § 656.30(d), based on the Beneficiary's willful misrepresentation of a material fact.

Cite as *Matter of N-M- LLC*, ID# 4637519 (AAO July 30, 2019)