U.S. Citizenship and Immigration Services

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

In Re: 16132492

DATE: JUNE 11, 2021

Appeal of Texas Service Center Decision

Form I-140, Immigrant Petition for a Skilled Worker

The Petitioner, a freight trucking business, seeks to employ the Beneficiary as a maintenance mechanic. It requests skilled worker classification for the Beneficiary 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 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 on multiple grounds. The Director first determined that the Petitioner did not establish that it made a *bona fide* job offer to the Beneficiary for the proffered position identified in the labor certification. Secondly, the Director determined that the Petitioner did not establish its ability to pay the proffered wage. Thirdly, the Director determined that both the Petitioner and the Beneficiary willfully misrepresented material facts on the labor certification and other documentation regarding the Beneficiary's employment history, and invalidated the labor certification on that basis.

On appeal, the Petitioner contests all of the Director's grounds for the denial and asserts that the evidence of record establishes its eligibility for the immigration benefit sought in this proceeding.

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 based on the first and third grounds of the Director's decision. Since our decision on these two issues is dispositive of the appeal, we will reserve the remaining issue of the Petitioner's ability to pay the proffered wage.[1]

## I. LAW

Employment-based immigration generally follows a three-step process. First, an employer obtains an approved labor certification (ETA Form 9089) from the U.S. Department of Labor (DOL). *See* section

[1] *See INS v. Bagamashad*, 429 U.S. 24, 25 (1976) ("courts and agencies are not required to make findings on issues the decision of which is unnecessary to the results they reach"); *see also Matter of L-A-C-*, 26 I&N Dec. 516, 526 n. 7 (BIA 2015) (declining to reach alternative issues on appeal where an applicant is otherwise ineligible).

212(a)(5) of the Act, 8 U.S.C. § 1182(a)(5). 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 (Form I-140) 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. *Bona Fides* of the Job Offer

A petitioner must establish its intent to employ the beneficiary in accordance with the terms and conditions of the labor certification. *See Matter of Izdebska*, 12 I&N Dec. 54 (Reg. Comm'r 1966) (upholding the denial of an employment-based immigrant visa where the evidence did not establish that the petitioner actually desired and intended to employ the beneficiary pursuant to the terms of the labor certification). A labor certification is valid only for the particular job opportunity, beneficiary, and area of intended employment identified in the labor certification. *See Matter of Sunoco Energy Development Co.*, 17 I&N Dec. 283 (Reg'l Comm'r 1979) and 20 C.F.R. § 656.30(c)(1).

In this case the labor certification identified the job opportunity (in section H.3) as a maintenance mechanic and the area of intended employment (in sections H.1 and H.2) as the Petitioner's home address in [redacted] Florida. In section H.11 of the labor certification the duties of the proffered position were described as follows:

> Repair machines and equipment such as electric and mechanical motors, parts and systems using equipment like the precision measuring instruments or electrical or electronic testing devices and tools such as hammers, hoists, saws, drills, and or wrenches. Perform routine maintenance, such as inspecting drivers, motor, or belts, checking fluid levels, replacing filters, or doing other preventive maintenance actions. Inspect, operate, or test machinery or equipment to diagnose machine malfunctions.

In denying the petition the Director reviewed the evidence showing that the Petitioner had just one employee and otherwise utilized independent contract labor to conduct its business. In the Director's view this situation cast doubt on whether the Petitioner intended to hire the Beneficiary as a full-time employee. The Director alluded to a statement from the Petitioner's president [redacted], asserting that a maintenance mechanic was necessary to maintain its fleet of trucks, but pointed to other documentation indicating that the Petitioner does not actually own any trucks, acting instead as a middleman, or dispatcher, securing trucks from other companies for its clients. Considering this business model the Director questioned why the Petitioner had any need for a maintenance mechanic. The Director further noted that the Petitioner's home address, identified on the labor certification as the primary worksite, was office space and thus not a location where the duties of a maintenance mechanic could be performed. For all of these reasons the Director concluded that the Petitioner failed

to establish that it made a *bona fide* job offer to the Beneficiary for employment in the proffered position of a maintenance mechanic.

On appeal the Petitioner contends that it satisfied all requirements to recruit for a maintenance mechanic, and the fact that its business model up to now has been outsourcing services and tasks does not mean that it will continue to operate this way in the future. The Petitioner contends that its search for a maintenance mechanic is part of an "operations redesign program" and thus a *bona fide* job offer. The Petitioner acknowledges that its headquarters offices are not where the maintenance mechanic will work (notwithstanding the labor certification which states otherwise), and asserts that it intends to rent suitable premises when the maintenance mechanic is hired.

The Petitioner's claims are not persuasive. While it is true that the Petitioner has no obligation to hire a maintenance mechanic before the instant petition is approved, the Petitioner's existing business model does not indicate that it needs any maintenance mechanic since it apparently does not own any trucks that require maintenance. Though the Petitioner suggests that its business model will change as part of an "operations redesign program," it provides no specifics or supporting documentation thereof. In particular, the Petitioner provides no evidence of any concrete plan and financial outlay to buy trucks that would require the services of a maintenance mechanic. Likewise, the Petitioner offers no evidence of any concrete plan to purchase or lease a facility where truck maintenance could be performed. Due to these evidentiary deficiencies we conclude that the Petitioner has not established that it intends to employ the Beneficiary as a full-time maintenance mechanic, in accord with the terms of the labor certification. Thus, the Petitioner has not established the *bona fides* of the job offer. On this ground alone the petition cannot be approved. *See Matter of Izdebska, id.*

B. Willful Misrepresentation of a Material Fact

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).

The labor certification in this case stated that the minimum requirements for the position of maintenance mechanic were a high school level education and two years of experience in the job offered. According to the labor certification the Beneficiary met the experience requirement by virtue of his employment as a maintenance mechanic by [redacted] a "mechanic shop" in [redacted] Venezuela, from June 2008 to February 2018. This job was the only experience listed for the Beneficiary on the labor certification.

As evidence of the Beneficiary's alleged experience the Petitioner submitted a Spanish language letter with an English translation, ostensibly from the operations manager of the Venezuelan business, [redacted] stating that the Beneficiary was employed as chief maintenance mechanic in its diesel workshop from June 2, 2008, to February 23, 2018. Also submitted in support of the petition was the Beneficiary's resume in which the position as a maintenance mechanic with [redacted] was the only job listed under the heading of Experience.

In a notice of intent to deny the petition (NOID) the Director advised the Petitioner of an earlier nonimmigrant visa (NIV) application filed by the Beneficiary in March 2015 which did not mention his alleged experience with [redacted] (we will refer to this company hereinafter as [redacted]). Instead, the Beneficiary indicated on the 2015 NIV application that his current employment was in the engineering field with [redacted]), a company in which he held a partnership interest and whose business was buying and selling tires. The NIV application also indicated, as the Director pointed out, that the Beneficiary had no prior employment. Based on the inconsistent employment histories stated on the NIV application in 2015 and the labor certification underlying the instant immigrant visa petition, the Director stated that it appeared the Petitioner and the Beneficiary had misrepresented the Beneficiary's work experience.

In the denial decision the Director discussed the Petitioner's response to the NOID, including the Petitioner's assertion that the Beneficiary had two jobs at the time of the 2015 NIV application – working as the director and co-owner of [redacted] and as chief maintenance mechanic at [redacted] According to the Petitioner, since the two jobs were simultaneous, the Beneficiary chose to list the work with his own company on the NIV application and correctly indicated that he had no prior experience. As pointed out by the Director, however, the Beneficiary claimed that the work with [redacted] began in 2012, four years after the beginning of his employment with [redacted] in 2008. Therefore, the Beneficiary would have had four years of employment at [redacted] prior to the job listed on the NIV application, making his denial on that form of any prior employment incorrect. The Director also noted that the NIV application allowed the listing of additional employment, so the Beneficiary could have listed his alleged employment with [redacted] Adding to the Beneficiary's alleged employment history, the Petitioner submitted with its NOID response a photocopied letter ostensibly from [redacted] in [redacted] stating that the Beneficiary was employed from December 1997 to May 2008, when the company was known as [redacted]), as "leader of the heavy repair workshop." Since this job was not listed on the labor certification or in the Beneficiary's resume submitted with the petition, the Director deemed the purported employment verification letter not credible.

The Director concluded that the Petitioner and the Beneficiary misrepresented the Beneficiary's work history on the NIV application (the Beneficiary alone) and on the labor certification underlying the immigrant visa petition (both the Petitioner and the Beneficiary), that the misrepresentations were willfully made because the Petitioner and the Beneficiary attested to the truth and accuracy of the information on the forms, and that the misrepresentations were material because they related to whether the Beneficiary had two years of experience as a maintenance mechanic, as required to qualify for the immigration benefit of skilled worker classification sought by the Petitioner. The Director then invalidated the labor certification under 20 C.F.R. § 656.30(d), which provides, in pertinent part, that "after issuance, a labor certification is subject to invalidation by the DHS [Department of Homeland

Security] . . . upon a determination, made in accordance with [its] procedures or by a court, of fraud or willful misrepresentation of a material fact involving the labor certification application." Though not expressly stated by the Director, since the petition was not accompanied by a valid labor certification it could not be approved. *See* 8 C.F.R. § 204.5(a)(2).

On appeal the Petitioner reiterates its contention that the Beneficiary worked simultaneously in Venezuela as the chief maintenance mechanic in the diesel retail shop of [redacted] and as the 50% co-owner of [redacted] The Petitioner claims that the Beneficiary's alleged employment with [redacted] in the years 1997-2008 was not listed on the labor certification because the Beneficiary exceeded the two-year requirement for qualifying experience with his employment at [redacted] making the earlier experience at [redacted] irrelevant. As for the experience claimed on the Beneficiary's NIV application, the Petitioner reiterates the Beneficiary's claim that he chose to list his work with [redacted] the company he co-owned, since it was more lucrative and he thought it would facilitate the application's approval. Echoing another claim by the Beneficiary, the Petitioner asserts that the experience with [redacted] was not listed on the NIV application because the form asked about previous work, not a simultaneous job.

The Petitioner's explanations are not persuasive. Section K of the labor certification (Alien Work Experience) has the following instructions:

> List all jobs the alien has held during the past 3 years. Also list any other experience that qualifies the alien for the job opportunity for which the employer is seeking certification.

Only one job was listed for the Beneficiary on the labor certification – the position of maintenance mechanic with [redacted] from June 2008 to February 2018. However, at the time the labor certification was filed with the DOL in August 2018 the Beneficiary asserts that he was working for [redacted] as well. Therefore, that experience should have been listed on the labor certification, whether or not it was qualifying experience, because it was a job the Beneficiary held "during the past 3 years." In addition, if the Beneficiary's alleged position with [redacted] from 1997 to 2008 was qualifying experience, as the Petitioner claims, it should also have been listed on the labor certification as "other experience that qualifies the alien for the job opportunity." The fact that the [redacted] and [redacted] positions were not listed on the labor certification lessens the credibility of that alleged experience. *See Matter of Leung*, 16 I&N Dec. 2530 (BIA 1976). Moreover, neither of those jobs was listed in the Beneficiary's resume submitted with the instant petition. Furthermore, the Beneficiary has provided no convincing explanation for omitting his alleged experience with [redacted] and [redacted] from his NIV application since that form requested information about previous employment – which the [redacted] job would have been in full because it preceded the [redacted] business, and the [redacted] job would have been in part because it started four years before [redacted] began.

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). Neither the Petitioner nor the Beneficiary in this case has resolved the myriad inconsistencies

discussed above regarding the Beneficiary's employment history, which casts doubt on the veracity of all the employment claims.

Accordingly, we will not disturb the Director's determination that the Petitioner and the Beneficiary willfully misrepresented material facts about the Beneficiary's employment history on the labor certification[2] and other documentation, nor the Director's invalidation of the labor certification under 20 C.F.R. § 656.30(d). The regulation at 8 C.F.R. § 204.5(a)(2) provides that a Form I-140 petition must be accompanied by any required labor certification to be considered properly filed. Since the instant petition is not accompanied by a valid labor certification, it is not properly filed and cannot be approved.

C. Petitioner's Ability to Pay the Proffered Wage

As previously discussed, we reserve the issue of the Petitioner's ability to pay the proffered wage.

## III. CONCLUSION

The Petitioner has not established its intent to employ the Beneficiary as a maintenance mechanic. Accordingly, it has not established that the proffered position in the labor certification is a *bona fide* offer of employment. In addition, we agree with the Director's determination that the Petitioner and the Beneficiary willfully misrepresented material facts concerning the Beneficiary's employment history on the labor certification and other documentation. Accordingly, the labor certification was properly invalidated. Without a valid labor certification, the instant petition cannot be approved. For the above stated reasons we will dismiss the appeal.

**ORDER:** The appeal is dismissed.

[2] In the NOID and the denial decision the Director suggested that the Petitioner may have misrepresented its relationship to the Beneficiary by answering "No" to the compound question at section C.9 of the labor certification which asks: (1) Is the employer a closely held corporation, partnership, or sole proprietorship in which the alien has an ownership interest? and (2) is there a familial relationship between the owners, stockholders, partners, corporate officers, or incorporators, and the alien? The answer to part (1) is "No" since the Beneficiary has no ownership interest in the petitioning company, which is wholly owned by its president, Felix Alvarado. The answer to part (2) is also "No" because the record indicates there is no family relationship between the Beneficiary and the petitioning company's owner/president or anyone else associated with the company. Therefore, the Petitioner's answer to the question at section C.9 of the labor certification was correct.