U.S. Citizenship and Immigration Services

Non-Precedent Decision of the Administrative Appeals Office

In Re: 11198725

Date: MAR. 12, 2021

Appeal of Texas Service Center Decision

Form I-140, Immigrant Petition for Other Worker

The Petitioner, a Chinese restaurant, seeks to employ the Beneficiary as a cook. It requests classification of the Beneficiary as an unskilled worker under the third preference employment-based immigrant visa category. Immigration and Nationality Act (the Act) section 203(b)(3)(A)(iii), 8 U.S.C. § 1153(b)(3)(A)(iii). This immigrant visa category allows a U.S. employer to sponsor a foreign national for lawful permanent resident status to work in a position that requires less than two years of education, training, or experience.

The Director of the Texas Service Center denied the petition because: (a) the Petitioner did not disclose a familial relationship with the Beneficiary; and (b) the Beneficiary did not possess the required experience for the offered position. The Director also found that the Petitioner made a willful misrepresentation of a material fact by not disclosing the familial relationship on the labor certification; and that the Beneficiary willfully misrepresented his employment experience. The Director dismissed the Petitioner's subsequent combined motion to reopen and motion to reconsider. The matter is now before us on appeal.

The Petitioner bears the burden of establishing eligibility for the requested immigration benefit. *See* section 291 of the Act, 8 U.S.C. § 1361. Upon *de novo* review, we will dismiss the appeal.

I. EMPLOYMENT-BASED IMMIGRATION

Immigration as an unskilled worker usually follows a three-step process. First, the prospective employer must obtain a labor certification approval from the U.S. Department of Labor (DOL) to demonstrate that there are not sufficient U.S. workers who are able, willing, qualified, and available for the offered position. Section 212(a)(5) of the Act, 8 U.S.C. § 1182(a)(5).

Second, the employer must submit the approved labor certification with an immigrant visa petition to U.S. Citizenship and Immigration Services (USCIS). Section 204 of the Act, 8 U.S.C. § 1154. The immigrant visa petition must establish that the foreign worker qualifies for the offered position, that the foreign worker and the offered position are eligible for the requested immigrant visa category, and that the employer has the ability to pay the proffered wage. *See* 8 C.F.R. § 204.5. These requirements must be satisfied by the priority date of the immigrant visa petition. *See* 8 C.F.R. § 204.5(g)(2); *Matter*

of Wing's Tea House, 16 I&N Dec. 158, 159 (Act. Reg'l Comm'r 1977). In this case, the priority date is November 28, 2017.[1]

Finally, if USCIS approves the immigrant visa petition, the foreign worker may apply for an immigrant visa abroad or, if eligible, for adjustment of status in the United States. Section 245 of the Act, 8 U.S.C. § 1255.

II. COMBINED MOTION TO REOPEN AND RECONSIDER

This case is an appeal of the Director's dismissal of a combined motion to reopen and motion to reconsider. Motions request a review by the same authority that issued the latest decision in the proceeding. 8 C.F.R. § 103.5(a)(1)(ii). If the Director denies a petition, a petitioner may file a motion to reopen the proceeding, a motion to reconsider the decision, or both. A motion that does not meet the applicable requirements shall be dismissed. 8 C.F.R. § 103.5(a)(4).

A motion to reopen must state new facts and be supported by relevant documentary evidence. 8 C.F.R. § 103.5(a)(2). Resubmitting previously provided evidence or reasserting previously stated facts do not meet the requirements of a motion to reopen.

A motion to reconsider must establish that USCIS based its decision on an incorrect application of law or policy, and that the decision was incorrect based on the evidence in the record of proceeding at the time of the decision. 8 C.F.R. § 103.5(a)(3). USCIS will not consider new facts or evidence in a motion to reconsider.

For a combined motion to reopen and reconsider, USCIS will consider each motion independently. USCIS may grant both motions, grant one motion but dismiss the other, or dismiss both motions.

In this case, the Director's decision denying the petition was based on two grounds: the Beneficiary's familial relationship to an individual acting on behalf of the Petitioner; and the Beneficiary's claimed employment experience. The Petitioner's brief in support of its combined motion did not state new facts that were supported by documentary evidence. Therefore, the Director correctly dismissed the motion to reopen for failing to meet the requirements of 8 C.F.R. § 103.5(a)(2).

Further, the Petitioner's brief in support of its combined motion to reopen and reconsider did not address the Director's conclusions that the Beneficiary willfully misrepresented his employment experience. Therefore, these grounds of the Director's decision remain undisturbed.

However, the Director's finding that the Petitioner willfully misrepresented a material fact by not disclosing a familial relationship with the Beneficiary on the labor certification will be withdrawn for the reasons set forth below.[2]

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[1] For petitions that require a labor certification, the priority date is the date on which the DOL accepted the labor certification application for processing. *See* 8 C.F.R. § 204.5(d).

[2] Since the identified reasons for dismissal are dispositive of this appeal, we reserve the issue of whether or not there was a *bona fide* job opportunity available to U.S. workers because the Beneficiary's relative was involved in the labor certification process under *Matter of Modular Container Sys., Inc.*, 89-INA-228, 1991 WL 223955, *7 (BALCA July 16,

III. WILLFUL MISREPRESENTATION

The Director's decision concluded that the Petitioner willfully misrepresented a material fact by not disclosing a familial relationship on the labor certification. Section C.9 of the labor certification asks: "Is the employer a closely held corporation, partnership, or sole proprietorship in which the alien has an ownership interest, or is there a familial relationship between the owners, stockholders, corporate officers, incorporators, or partners, and the alien?" The Petitioner responded "no." The Director concluded that this answer constituted the willful misrepresentation of a material fact.

Turning to the facts of this case, the Beneficiary's sister-in-law, [redacted] is listed as the Petitioner's contact at section D of the labor certification. [redacted] is also listed as the interpreter on the petition.[3] The Director's decision notes that the Beneficiary's prior visa application listed [redacted] as his contact person in the United States.

The Petitioner is owned by [redacted] and his wife. It has been in business since 1987. According to [redacted], [redacted] is the daughter of his friend (and the Beneficiary's mother-in-law), [redacted] attests that it was through his friendship with [redacted] that he first met the Beneficiary.

The record contains an affidavit from [redacted] stating that she has never been an owner, officer, or employee of the Petitioner, but she assisted [redacted] and the Beneficiary with translating and communications during the labor certification and petition process. [redacted] attests that she did not receive any compensation for her assistance. The record also contains an affidavit of [redacted] attesting that [redacted] speaks English, Spanish, and Cantonese and was therefore able to help both him and the Beneficiary with translating documents from English into their respective first languages.

The Petitioner is located in Florida. [redacted] lives in Texas. The record contains [redacted]'s 2017 Form W-2, Wage and Tax Statement, and driver's license which establish that she lives in [redacted] Texas and works for a dental office. Her email address on the labor certification is a personal yahoo.com email, and her phone number on the labor certification has an area code for [redacted] Texas. Corporate records for the Petitioner show that [redacted] is not a founder, owner, or registered agent of the Petitioner.

Although [redacted] is the Beneficiary's sister-in-law, the evidence in the record does not establish that [redacted] is an owner, stockholder, corporate officer, incorporator, or partner of the Petitioner. Therefore, the evidence in the record is not sufficient to conclude that the Petitioner willfully misrepresented a material fact by answering "no" to section C.9 of the labor certification or otherwise failing to disclose the relationship between the Beneficiary and [redacted] The Director's finding on this issue is therefore withdrawn.

1991) (*en banc*). *See INS v. Bagamasbad*, 429 U.S. 24, 25 (1976) (courts and agencies are not required to make findings on issues that are 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).

[3] On the labor certification, Petitioner's counsel is listed as the preparer, and [redacted] signed for the Petitioner. The advertisements for the position placed during the labor certification instructed applicants to submit their resumes to [redacted]

IV. CONCLUSION

We withdraw the Director's finding that the Petitioner misrepresented a material fact by not disclosing a familial relationship on the labor certification. We reserve the issue of whether or not there existed a *bona fide* job opportunity that was open to U.S. workers. The Petitioner's combined motion to reopen and reconsider did not address the Director's conclusions relating to the Beneficiary's claimed employment experience. This ground of the Director's decision remains undisturbed. Accordingly, the Director correctly dismissed the combined motion to reopen and reconsider. The petition will remain denied.

ORDER: The appeal is dismissed.