U.S. Citizenship and Immigration Services

Non-Precedent Decision of the Administrative Appeals Office

MATTER OF S-S-G-S-CORP.

DATE: MAR. 26, 2018

APPEAL OF NEBRASKA SERVICE CENTER DECISION

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

The Petitioner, a Japanese and Korean restaurant, seeks to employ the Beneficiary as a Japanese chef. 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 employment-based 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 petition was initially approved. The Director of the Nebraska Service Center subsequently revoked the approval, finding that the Petitioner and the Beneficiary did not adequately explain evidentiary inconsistencies concerning the Beneficiary's past employment and had willfully misrepresented the Beneficiary's work history. The Director concluded that the evidence of record did not establish that the Beneficiary had two years of experience as a Japanese chef, as required by the underlying labor certification to qualify for the proffered position.

On appeal the Petitioner submits additional evidence, asserts that the evidentiary issues cited by the Director have been resolved and claims that the evidence establishes the Beneficiary's qualifying experience for the proffered position.

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.

Section 205 of the Act. 8 U.S.C. § 1155, provides that the Secretary of Homeland Security may "for good and sufficient cause, revoke the approval of any petition." By regulation this revocation authority is delegated to any USCIS officer who is authorized to approve an immigrant visa petition "when the necessity for the revocation comes to the attention of [USCIS]." 8 C.F.R. § 205.2(a). USCIS must give the petitioner notice of its intent to revoke the prior approval of the petition and the opportunity to submit evidence in opposition thereto before proceeding with written notice of revocation. *See* 8 C.F.R. § 205.2(b) and (c).

II. ANALYSIS

A. Required Experience

A beneficiary must meet all of the education, training, experience, and other requirements of the labor certification as of the petition's priority date.[1] *See Matter of Wing's Tea House*, 16 I&N Dec. 158, 159 (Acting Reg'l Comm'r 1977). The labor certification in this case states that the minimum requirement for the job of Japanese chef is 24 months of experience in the job offered. The labor certification states that the Beneficiary met this requirement by virtue of his employment as a Japanese chef by a restaurant in South Korea, from September 1, 2001, to December 31, 2003. As evidence of the Beneficiary's employment at the Petitioner submitted a letter from the restaurant's owner, dated March 23, 2010.

The petition was initially approved, but the Director issued a notice of intent to revoke (NOIR) the approval in March 2017. The Director indicated that the labor certification's claim that the Beneficiary was employed by as a Japanese chef from September 2001 to December 2003 conflicted with information recently obtained by USCIS officials from which confirmed that the Beneficiary was a prior employee, but only for the nine-month period of May 1, 2002, to February 9, 2003. The Director stated that it appeared the previous approval of the petition should be revoked because the Beneficiary did not meet the minimum experience requirement of the labor certification.

In response to the NOIR the Petitioner submitted a letter from the Beneficiary reiterating his claim to have worked for as a Japanese chef from September 2001 to December 2003, as well as a "certificate of work experience" from in South Korea, stating that the Beneficiary was employed there as a sushi chef from January 2000 to July 2001.

After receiving the Petitioner's response to the NOIR, the Director issued a decision revoking the approval of the petition. The Director stated that officers of the USCIS field office in had contacted in January 2016 and obtained information from its human resource office that the restaurant had employed the Beneficiary during a nine-month period from May 2002 to February

[1] The "priority date" of a Form I-140 petition is the date the underlying labor certification was filed with the DOL. *See* 8 C.F.R. § 204.5(d). In this case the priority date is April 8, 2013.

2003, not the far longer period of September 2001 to December 2003, as asserted in the labor certification and in the Beneficiary's letter responding to the NOIR. The Director also found that the certificate from [redacted] lacked credibility because the experience alleged therein was not listed by the Beneficiary in the labor certification. The Director noted that no objective documentary evidence had been submitted to demonstrate the Beneficiary's qualifying experience with either [redacted] or [redacted], such as certificates of income from the National Tax Service of Korea (NTSK), the government agency to which all employment in South Korea is required to be reported, or statements of national pension coverage from the National Pension Service (NPS). The Director concluded that the Petitioner had not resolved the inconsistencies in the record concerning the Beneficiary's employment history, and had not established that the Beneficiary met the minimum experience requirement of the labor certification. The Director also found that the Petitioner and the Beneficiary had willfully misrepresented a material fact concerning the Beneficiary's employment history.

On appeal the Petitioner submits an affidavit from [redacted] who states that he was employed by a subsidiary of [redacted] as team manager from 1999 to 2009 and that during this time the Beneficiary was employed as the Japanese food chef on a part-time basis (40+ hours per week) from September 1, 2001, to April 30, 2002, on a full-time basis (50+ hours per week) from May 1, 2002, to February 9, 2003, and on a part-time basis again (40 hours per week) from February 10, 2003, to December 31, 2003. [redacted] asserts that no records were kept of part-time employees, implicitly explaining why USCIS officials were only able to obtain confirmation from [redacted] of the Beneficiary's full-time employment from May 2002 to February 2003, even though his part-time employment before and after that time period consisted of 40 or more hours per week. The Petitioner also submits certificates of employment and income from the NTSK for [redacted] confirming his dates of employment by [redacted] and his income in the years 2001-2004, which the Petitioner touts as qualifying [redacted] to confirm the duration and nature of the Beneficiary's employment by [redacted] from September 2001 to December 2003.

The documentation pertaining to [redacted] however, is not supplemented by any documentary records of the Beneficiary's own employment with [redacted] No certificates of income from the NTSK or pension statements from the NPS have been submitted to confirm the Beneficiary's employment and dates of service with [redacted] Nor have any earnings statements from the Beneficiary, or payroll records from [redacted] or tax records from [redacted] or the Beneficiary been submitted to document the Beneficiary's dates of employment with [redacted] The Petitioner asserts that NPS requirements were not mandatory for a small employer like [redacted] until July 1, 2003. Assuming that was the case, however, the Petitioner has not explained why no NPS pension statement at all has been submitted for the Beneficiary's employment with [redacted] since he claims to have worked there during second half of 2003. For the reasons discussed above, we conclude that the Petitioner has not resolved the evidentiary discrepancy regarding the duration of the

[2] The Petitioner submits the types of documentation requested by the Director, not for the Beneficiary, but for [redacted] If the Beneficiary did indeed work for [redacted] during the time period claimed, it is unclear why these same documents are not available for the Beneficiary.

Beneficiary's employment with [redacted] and has not established that the Beneficiary gained at least two years of qualifying experience 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.* Here the Petitioner has not overcome the inconsistencies present in the record.

On appeal, the Petitioner also submits a statement from the owner of [redacted] supplementing the previously submitted work experience certificate, asserting that the Beneficiary was employed as a Japanese food chef from January 2000 to July 2001. This job was not listed on the labor certification, however, despite the instruction in section K of the ETA Form 9089 to list not only jobs of the past three years, but also "any other experience that qualifies the [beneficiary] for the job opportunity." The fact that no experience with [redacted] was certified by DOL on the labor certification lessens the credibility of the Beneficiary's claim to have gained such experience. *See Matter of Leung*, 16 I&N Dec. 2530 (BIA 1976). The statement from [redacted] owner, like the work experience certificate submitted in response to the NOIR, was prepared in 2017 and is not supported by any corroborating documentation dating from the time of the Beneficiary's alleged employment, such as the Beneficiary's earnings statements, or payroll records from [redacted] or tax records from [redacted] or the Beneficiary. Nor have any certificates of income from the NTSK or pension statements from the NPS been submitted to document the Beneficiary's employment with [redacted] in 2000 and 2001. For the reasons discussed above, we conclude that the Petitioner has not established that the Beneficiary gained any qualifying experience with [redacted]

Based on the foregoing analysis, we conclude that the record does not establish that the Beneficiary gained at least two years of qualifying experience with [redacted] and [redacted] Accordingly, the Beneficiary does not meet the minimum experience requirement of the labor certification.

B. Eligibility for Classification as a Skilled Worker

Although not specifically mentioned by the Director, the record also does not establish the Beneficiary's eligibility for classification as a skilled worker. A petition requesting skilled worker classification "must be accompanied by evidence that the [beneficiary] meets the . . . requirements of the labor certification. . . . The minimum requirements for this classification are at least two years of training or experience." 8 C.F.R. § 204.5(l)(3)(ii)(B). As discussed above, the evidence of record does not establish that the Beneficiary has two years of experience or training. Therefore, the

[3] On appeal the Petitioner also submits letters from its owner president and from a clergyman who attest to the Beneficiary's professional competence and good character. Neither of these letters, however, sheds any light on the evidentiary discrepancies regarding the Beneficiary's qualifying work experience.

Beneficiary does not meet the minimum experience requirement to be eligible for classification as a skilled worker.

C. Willful Misrepresentation of a Material Fact

Although the record does not demonstrate the Beneficiary's eligibility for the benefit sought, we do not find that the evidence in the record supports the Director's finding that the Petitioner and the Beneficiary willfully misrepresented a material fact pertinent to the Form I-140 petition. 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 revocation decision, the Director found that the Petitioner and the Beneficiary willfully misrepresented a material fact by alleging an employment history in the labor certification which is inconsistent with the information gleaned by the USCIS field office in Seoul. After reviewing and discussing all pertinent evidence, including the new documentation submitted on appeal, we find that the record does not support a finding that the Petitioner or the Beneficiary willfully misrepresented a material fact in this petition. Accordingly, we will withdraw the Director's finding.

III. CONCLUSION

The Petitioner has not established that the Beneficiary has at least two years of qualifying experience as a Japanese chef. Accordingly, the Beneficiary does not meet the minimum experience requirement of the labor certification, and does not qualify for classification as a skilled worker. However, we withdraw the Director's finding that the Petitioner and Beneficiary willfully misrepresented a material fact.

ORDER: The appeal is dismissed.

Cite as *Matter of S-S-G-S-Corp.*, ID# 996864 (AAO Mar. 26, 2018)