U.S. Citizenship and Immigration Services

Non-Precedent Decision of the Administrative Appeals Office

MATTER OF C-C- LLC

DATE: MAR. 29, 2017

APPEAL OF TEXAS SERVICE CENTER DECISION

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

The Petitioner, a Brazilian steakhouse, seeks to employ the Beneficiary as a business development and marketing director. It requests classification of the Beneficiary as a member of the professions holding an advanced degree under the second preference immigrant classification. *See* Immigration and Nationality Act section 203(b)(2), 8 U.S.C. § 1153(b)(2). This employment-based immigrant classification allows a U.S. employer to sponsor a professional with an advanced degree for lawful permanent resident status.

The Director of the Texas Service Center denied the petition with a finding of fraud or willful misrepresentation of a material fact, and also invalidated the underlying labor certification. The Director found that the evidence of record did not establish that the Beneficiary had 24 months of qualifying experience for the job offered, as required by the labor certification, and that the Petitioner and the Beneficiary willfully misrepresented the Beneficiary's prior employment experience.

The Petitioner filed an appeal, which we initially dismissed. We subsequently reopened this proceeding on service motion.[1] Upon review, we will withdraw the finding of fraud or willful misrepresentation of a material fact against the Petitioner and the Beneficiary, and rescind the invalidation of the labor certification. However, we will affirm the finding that the Petitioner has not established the Beneficiary's qualifying experience for the job offered, and as such, the appeal will be dismissed.

I. LAW AND ANALYSIS

Upon review of the entire record, including the relevant employment-related documentation and the Petitioner's briefs in response to the Director's notice of intent to deny and in support of the appeal, we find that the Petitioner and the Beneficiary did not willfully misrepresent a material fact with respect to the Beneficiary's prior employment history. Accordingly, we will withdraw the finding of

[1] We issued a notice of reopening on service motion, in accordance with our authority under 8 C.F.R. § 103.5(a)(5)(ii). We advised the Petitioner that an additional brief could be submitted within 33 days, after which a new decision would be issued based on the evidence of record. Within this timeframe, we received a letter from a managing member of [redacted] in [redacted] Florida, stating that the Petitioner disagreed with the finding of fraud or willful misrepresentation of a material fact, but that no further action would be taken.

fraud or willful misrepresentation originally made by the Director and affirmed by our office, and rescind the invalidation of the labor certification.

However, we will not withdraw the Director's finding, affirmed by our office, that the Petitioner has not established that the Beneficiary has 24 months of qualifying experience, as required by the labor certification to qualify for the job offered.

A petitioner must establish that the beneficiary possessed all the education, training, and experience specified on the labor certification as of the priority date of the petition. *See 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 of the petition is the date the underlying labor certification application was received for processing by the DOL, in this case August 29, 2013. *See* 8 C.F.R. § 204.5(d). The labor certification in this case requires 24 months of experience in marketing management to qualify for the proffered position of business development and marketing director.

The regulation at 8 C.F.R. § 204.5(g)(1) sets forth the following evidentiary requirement:

> Evidence relating to qualifying experience or training shall be in the form of letter(s) from current or former employer(s) or trainer(s) and shall include the name, address, and title of the writer, and a specific description of the duties performed by the alien or of the training received.

In this case, the record includes the two letters from managing members of [redacted] dated December 20, 2012, attesting to the Beneficiary's employment with [redacted] in three different jobs from 2003 to 2008 and with [redacted] from 2010 to 2012 in three different positions. One letter states, in pertinent part, as follows:

> This will confirm that [redacted] was employed by [redacted] . . in the full-time position of General Manager at our [redacted] restaurant location from January to August 2008, in the full-time position of General Manager at our [redacted] Virginia restaurant location from November 2006 to December 2007, and in the full-time position of Operations Manager/Gaucho at our [redacted] restaurant location from September 2003 to October 2006. During his 22-month tenure as General Manager in [redacted] and later [redacted] was responsible for marketing management at those new restaurants. He worked closely with the company-wide marketing manager to promote those specific locations, and he

[2] The Petitioner stated that [redacted] was one of the five original partners of the first [redacted] which was opened in [redacted] in 2003, but following a company restructuring is no longer in business

[3] The letter explained that [redacted] was established in 2007 and is owned by two of the five original partners of the first [redacted] opened in [redacted] in 2003.

> supervised sales and marketing staff at his specific locations. His marketing work contributed to the success of the new locations.

The other letter states, in pertinent part, as follows:

> This will confirm that our company, . . currently employs in the position of Director of Sales & Marketing at our headquarters. has been employed in this full-time position since October 18, 2011.
>
> Prior to that, was also employed with but worked out of our restaurant location in the full-time position of Corporate/Marketing Manager from April 19, 2011 to October 17, 2011, and in the part-time position of Corporate/Marketing Management Trainee from June 28, 2010 to December 13, 2010.

Neither of these letters meets the substantive requirement of 8 C.F.R. § 204.5(g)(1) to provide "a specific description of the duties performed" by the Beneficiary. One letter asserts that during the 22 months the Beneficiary spent with as a "general manager" he was "responsible for marketing management." But it provides only a vague description of his tasks – such as working with the company-wide marketing manager on promotional activities and supervising sales and marketing staff – without a detailed description of the specific duties he performed. As for the other letter, it provides even less information about the Beneficiary's work with While asserting that he held positions as a part-time Corporate/Marketing Management Trainee, full-time Corporate/Marketing Manager, and full-time Director of Sales & Marketing, the letter does not describe any specific duties the Beneficiary performed.

Moreover, as was discussed at length in our prior decision, the Beneficiary's past employment between 2003 and 2006 has been described in a number of conflicting ways. While earlier petitions called the job a "meat waiter" or "cook, Brazilian style" and described hands-on food preparation duties, later petitions and the Beneficiary's Form I-485, Application for Adjustment of Status, called the job a "general manager" or "restaurant manager" or "operations manager" or a combination gaucho/manager with managerial duties predominating. Furthermore, the Beneficiary's Forms W-2 for 2003 through 2006 cast doubt on the claimed position description and duties performed by the Beneficiary.[4] While the Petitioner asserted that the job with from 2003 to 2006 started out as a gaucho and evolved into an operations manager, the Petitioner has not sufficiently overcome the noted inconsistencies to establish that the Beneficiary gained qualifying experience from 2003 to 2006.

[4] The Forms W-2 reflect "tips" as part of the wages earned, indicating that the Beneficiary was primarily employed as a "Gaucho," a position similar to a server, rather than as an operations manager.

Thus, the evidence of record does not establish that the Beneficiary has 24 months of experience in marketing management, as required by the labor certification to qualify for the job offered. Accordingly, the petition cannot be approved.

II. CONCLUSION

The finding of fraud or willful misrepresentation of a material fact by the Petitioner and the Beneficiary, initially made by the Director and affirmed by our office, will be withdrawn. The validity of the labor certification will be reinstated. However, the petition will remain denied because the Petitioner has not established that the Beneficiary has the requisite experience to qualify for the proffered position.

ORDER: The appeal is dismissed.

FURTHER ORDER: The ETA Form 9089, case number , is reinstated.

Cite as *Matter of C-C- LLC*, ID# 157837 (AAO Mar. 29, 2017)