U.S. Citizenship and Immigration Services

Non-Precedent Decision of the Administrative Appeals Office

In Re: 11093153

Date: MAR. 29, 2021

Appeal of Texas Service Center Decision

Form I-140, Immigrant Petition for Skilled Worker

The Petitioner, a restaurant operator, seeks to employ the Beneficiary as a cook specializing in South Asian cuisine. It requests her classification under the third-preference, immigrant category for skilled workers. *See* Immigration and Nationality Act (the Act) section 203(b)(3)(A)(i), 8 U.S.C. § 1153(b)(3)(A)(i).

The Director of the Texas Service Center denied the petition and dismissed the Petitioner's following motions to reopen and reconsider. The Director concluded that the Beneficiary willfully misrepresented her employment experience. Thus, inherently, the Director also found that the Petitioner did not demonstrate the Beneficiary's possession of the minimum experience required for the offered position or the requested immigrant visa classification.

The Petitioner bears the burden of establishing eligibility for the requested benefit. *See* section 291 of the Act, 8 U.S.C. § 1361. Upon *de novo* review, we will withdraw the Director's decision and remand the matter for entry of a new decision consistent with the following analysis.

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) of the Act, 8 U.S.C. § 1182(a)(5). DOL approval signifies that insufficient U.S. workers are able, willing, qualified, and available for an offered position. *Id.* Labor certification also indicates 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 certified labor application 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 a requested immigrant visa 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 skilled worker must have at least two years of training or experience. 8 C.F.R. § 204.5(l)(2) (defining the term "skilled worker"). A petitioner must also establish a Beneficiary's possession of all DOL-certified job requirements of an offered position by a petition's priority date. 8 C.F.R. § 204.5(l)(3)(ii)(B); *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 the minimum requirements of an offered position. 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 accompanying labor certification states the minimum requirements of the offered position of cook specializing in South Asian cuisine as two years of experience in the job offered. The labor certification states that the position requires neither education nor training. In addition, the certification states that the Petitioner will not accept experience in an alternate occupation.

On the labor certification, the Beneficiary attested that, by the petition's priority date, she gained more than two years of full-time, qualifying experience in Pakistan. She stated that a hotel employed her as a cook for about 26 months, from March 2008 to May 2010.

To support claimed experience, a petitioner must submit a letter from a beneficiary's former employer. 8 C.F.R. § 204.5(l)(3)(ii)(A). The letter must include the employer's name, address, and title, and a description of the beneficiary's experience. *Id.*

The Petitioner submitted a letter from the Beneficiary's claimed, former employer in Pakistan. In a written notice of intent to deny (NOID) the petition, however, the Director noted conflicting information on the Beneficiary's 2015 application for a U.S. nonimmigrant visa. On the visa application, the Beneficiary described herself as a "housewife" who did not work outside her home. She also stated that she had "no" prior employment. The Director found that the Beneficiary's statement of no previous employment on the 2015 nonimmigrant visa application casts doubt on her claimed qualifying experience from 2008 to 2010. *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).

In response to the NOID, the Beneficiary denied that she willfully misrepresented her employment history on the labor certification. She stated that, at the time of the visa application in July 2015, she truly was a homemaker. She said that she indicated no previous employment on the application because it asked for her employment only during the prior five years. The Beneficiary explained that her employment at the hotel ended in May 2010, more than five years before she filed her visa application in July 2015. The Petitioner also submitted an updated letter from the Beneficiary's

[1] This petition's priority date is October 1, 2018, 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).

claimed former employer reiterating the Beneficiary's position title and dates of employment. Both letters have the same signatory, a purported manager at the hotel. Unlike the previous letter of January 2017, however, the second letter of March 2019 is not on the hotel's stationery. The Petitioner explained that "[t]he statement is not on previous employer's letterhead as that [hotel] restaurant has been closed."

Reviewing the Beneficiary's visa application, the Director found that it did not limit its request for the Beneficiary's prior employment to the five-year period before the application's filing. The information viewed by the Director indicates that the Beneficiary responded "no" to the question: "Were you previously employed?" In support of its motion to reopen, however, the Petitioner submitted a copy of a blank, sample nonimmigrant visa application form. Above the question "Were your previously employed?" the sample form includes a note stating: "Provide your employment information for the last five years that you were employed, if applicable." The Petitioner also submitted copies of online queries on immigration-related websites from other nonimmigrant visa applicants as far back as 2014. The queries seek clarification on whether the applicants' applications should list employment they gained more than five years before their applications.

Based on the materials provided regarding the nonimmigrant form then in use, a preponderance of evidence indicates that the Beneficiary's visa application likely included a note limiting the request for her prior work experience to the five-year period immediately preceding the application's filing. This supports the Beneficiary's claim that she did not willfully misrepresent her qualifying experience on the labor certification. We will therefore withdraw the Director's inherent finding that the Petitioner did not demonstrate the Beneficiary's qualifying experience for the offered position or the requested immigrant visa classification.

The record, however, includes other, unresolved inconsistencies regarding the Beneficiary's claimed, qualifying experience. The Petitioner's motion to reopen included a third, updated letter from the Beneficiary's purported, former employer. A different manager at the hotel purportedly signed the new letter. Also, unlike the second letter, the most recent document of December 2019 is on hotel stationery. But, if the hotel restaurant closed as the Petitioner's NOID response indicates, the record does not explain why the most recent letter is on hotel stationery. The unexplained inconsistency casts doubt on the authenticity and veracity of the hotel letters. *See Matter of Ho*, 19 I&N Dec. at 591 (requiring petitioners to resolve inconsistencies of record).

The Petitioner's motion to reopen also included copies of pay receipts purportedly showing the Beneficiary's claimed, qualifying experience from March 2008 to May 2010. The records, however, consist of only seven, monthly receipts dating from June 2008 through March 2010. The pay receipts therefore do not establish the Beneficiary's continuous employment for the requisite two-year period. Also, the Petitioner has not explained why it submitted records documenting only seven of the Beneficiary's claimed 26 months of qualifying experience.

The Director did not notify the Petitioner of these discrepancies regarding the Beneficiary's claimed qualifying experience. We will therefore remand the matter. On remand, the Director should inform the Petitioner of the inconsistencies and afford it a reasonable opportunity to respond. The Petitioner must explain the inconsistencies of record and provide independent, objective evidence of the Beneficiary's claimed, qualifying experience.

III. WILLFUL MISREPRESENTATION OF A MATERIAL FACT

Misrepresentations are willful if they are "deliberately made with knowledge of their falsity." *Matter of Valdez*, 27 I&N Dec. 496, 498 (BIA 2018) (citations omitted). A misrepresentation is material when it has a "natural tendency to influence, or [be] capable of influencing, the decision of the decision-making body to which it was addressed." *Id.* (citation omitted). "Any alien who, by fraud or willfully misrepresenting a material fact, seeks to procure (or has sought to procure or has procured) a visa, other documentation, or admission into the United States or other benefit provided under this Act is inadmissible." Section 212(a)(6)(C)(i) of the Act.[2]

Based on the Beneficiary's answers to questions on the U.S. visa application in July 2015, the Director found that the Beneficiary willfully misrepresented her qualifying experience on the labor certification. As discussed above, however, the record does not currently support the Beneficiary's alleged misrepresentation. The record indicates that, on the visa application, the Beneficiary indicated her unemployment for only the prior five years. Thus, the Beneficiary's qualifying experience from March 2008 to May 2010, as listed on the labor certification, does not appear to conflict with the information on her visa application. We will therefore withdraw the Director's finding of willful misrepresentation.

As previously discussed, the record contains other discrepancies regarding the Beneficiary's qualifying experience. The Petitioner, however, did not receive notification of these inconsistencies or an opportunity to explain them. The discrepancies therefore currently do not establish the Beneficiary's misrepresentation of a material fact.

IV. THE BONA FIDES OF THE JOB OFFER

Although unaddressed by the Director, the record also does not establish the *bona fides* of the job offer. A business may file a petition if it is "desiring and intending to employ [a foreign national] within the United States." Section 204(a)(1)(F) of the Act. A petitioner must intend to employ a beneficiary pursuant to the terms and conditions of an accompanying labor certification. *See Matter of Izdebska*, 12 I&N Dec. 54, 55 (Reg'l Comm'r 1966) (affirming denial where, contrary to the terms of an accompanying labor certification, a petitioner did not intend to employ a beneficiary as a domestic worker on a full-time, live-in basis).

Here, the petition indicates the Petitioner's intention to employ the Beneficiary as a specialty cook. The labor certification states that the job duties of the offered position include cooking "South Asian style dishes, kabobs, & other foods" and "BBQ[ing] meat in oven clay (Tandoor)."

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[2] In these visa petition proceedings, USCIS' determination of a willful misrepresentation is a "finding of fact," not an admissibility finding. Visa petition proceedings are not the appropriate fora for determining admissibility. *Matter of O-*, 8 I&N Dec. 295, 296-97 (BIA 1959). All USCIS decisions, however, should include specific findings and conclusions on any material issues of law or fact that arise in the case, necessarily including findings of fraud or material misrepresentation. *See* 8 C.F.R. § 103.3(a)(1)(i); *see also* 5 U.S.C. § 557(c). After entry of a finding of willful misrepresentation in visa petition proceedings, USCIS or another government agency may find a beneficiary inadmissible in separate proceedings.

A copy of the Petitioner's federal income tax return for 2018, however, describes the company's business activity as "fast food restaurant" and its product or service as "pizza place." As of February 19, 2021, the menu on the Petitioner's website did not include South Asian style dishes, kabobs, or Tandoor meat as indicated in the position's job duties. Also, asked on the Form I-140 "Is this a new position?" the Petitioner indicated "No." Thus, the record does not identify the offered position as part of a plan to expand the Petitioner's menu. The record therefore does not establish the Petitioner's intention to employ the Beneficiary in the offered position of specialty cook. *See Matter of Ho*, 19 I&N Dec. at 591 (requiring a petitioner to resolve inconsistencies of record).

On remand, the Director should notify the Petitioner of these inconsistencies and provide it a reasonable opportunity to resolve them. The company must submit independent, objective evidence of its intention to employ the Beneficiary in the offered position.

If supported by the record, the Director may notify the Petitioner of any additional, potential grounds of denial. The Director must afford the company a reasonable opportunity to respond to all issues on remand. Upon receipt of a timely response, the Director should review the entire record and enter a new decision. The new decision should expressly state whether the Petitioner demonstrated the Beneficiary's possession of the minimum experience required for the offered position and the requested immigrant visa classification.

V. CONCLUSION

The record does not currently support the Director's finding that the Beneficiary willfully misrepresented her qualifying experience on the labor certification. But the Petitioner has not demonstrated the Beneficiary's possession of the minimum employment experience required for the offered position or the requested immigrant visa classification. The record also does not demonstrate the *bona fides* of the job offer.

ORDER: The decision of the Director is withdrawn. The matter is remanded for entry of a new decision consistent with the foregoing analysis.