U.S. Citizenship and Immigration Services

Non-Precedent Decision of the Administrative Appeals Office

In Re: 4987296

Date: MAR. 29, 2021

Appeal of Nebraska Service Center Decision

Form I-140, Immigrant Petition for Skilled Worker

The Petitioner seeks to employ the Beneficiary as a machinist under the third-preference, immigrant classification 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).

After initially granting the filing, the Director of the Nebraska Service Center revoked the petition's approval. The Director concluded that the Petitioner did not establish the Beneficiary's possession of the minimum employment experience required for the offered position or the requested immigrant visa classification. We rejected the Petitioner's appeal as untimely, before reopening the filing on our own motion.[1]

In these revocation proceedings, the Petitioner bears the burden of establishing eligibility for the requested benefit. *See Matter of Ho*, 19 I&N Dec. 582, 589 (BIA 1988) (citation omitted). Upon *de novo* review, we will dismiss the appeal.

I. EMPLOYMENT-BASED IMMIGRATION

Immigration as a skilled worker generally follows a three-step process. First, to permanently fill a position in the United States with a foreign worker, a prospective employer must 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 signifies 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

[1] Before we reopened the appeal, the Director treated the Petitioner's untimely filing as a motion to reopen and dismissed the motion. *See* 8 C.F.R. § 103.3(a)(2)(v)(B)(*2*) (requiring treatment of an untimely appeal that meets motion requirements as a motion). The Petitioner also submitted motions to reopen and reconsider our rejection of its appeal. Because we have since reopened the appeal on our own motion, the Director's motion decision and the Petitioner's motions have no legal effect on this matter.

requirements of a DOL-certified position and a requested immigrant visa classification. Finally, if USCIS grants a petition, a 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.

"[A]t any time" before a beneficiary obtains lawful permanent residence, however, USCIS may revoke a petition's approval for "good and sufficient cause." Section 205 of the Act, 8 U.S.C. § 1155. If supported by a record, the erroneous nature of a petition's approval justifies its revocation. *Matter of Ho*, 19 I&N Dec. at 590.

USCIS may issue a notice of intent to revoke (NOIR) a petition's approval if the unexplained and unrebutted record at the time of the NOIR's issuance would have warranted the petition's denial. *Matter of Estime*, 19 I&N Dec. 450, 451 (BIA 1987). If a petitioner's NOIR response does not overcome revocation grounds stated in the notice, USCIS properly revokes a petition's approval. *Id.* at 451-52.

II. THE REQUIRED EXPERIENCE

A position for a skilled worker must require at least two years of training or experience. Section 203(b)(3)(A)(i) of the Act; 8 C.F.R. § 204.5(l)(3)(ii)(B). A petitioner must also demonstrate that a beneficiary met all DOL-certified job requirements of an offered position by a petition's priority date. *Matter of Wing's Tea House*, 16 I&N Dec. 158, 160 (Acting Reg'l Comm'r 1977).[2]

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*, 656 F.Supp.2d 1008, 1015 (D.C. Cir. 1983) (holding that "DOL bears the burden of setting the *content* of the labor certification") (emphasis in original).

The accompanying labor certification states the minimum requirements of the offered position of machinist as a U.S. technical or vocational, high school diploma, or a foreign educational equivalent, and two years of experience "in the job offered." For labor certification purposes, experience "in the job offered" means experience performing the key duties of the offered position. *See, e.g., Matter of Symbioun Techs, Inc.*, 2010-PER-01422, slip op. at *4 (BALCA Oct. 24, 2011) (citations omitted). The labor certification states that the Petitioner will not accept experience in a related occupation.

On the labor certification, the Beneficiary attested that, by the petition's priority date, he studied at a technical/vocational high school and gained more than two years of full-time qualifying experience in Poland. He stated that he worked as a machinist at a machine shop for about 28 months, from September 2001 through December 2003. The Beneficiary did not list any other qualifying experience on the labor certification.

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, title, and address, and a

[2] This petition's priority date is September 12, 2014, the date DOL accepted the labor certification application for processing. *See* 8 C.F.R. § 204.5(d) (explaining how to determine a petition's priority date).

description of a beneficiary's experience. *Id.* If that evidence is unavailable, USCIS will consider other documentation. 8 C.F.R. § 204.5(g)(1).

The Petitioner submitted an employment certificate from the Beneficiary's claimed former employer in Poland, stamped with the company's name and address. As noted in the Director's NOIR, however, USCIS officers in Poland telephoned and emailed the company after the petition's approval. The company's owner told the officers that the business did not issue the type of certificate the Petitioner submitted to USCIS and that the company did not hire machinists at the time of the Beneficiary's claimed employment.[3]

The owner's statements cast significant doubt on the authenticity of the employment certification and the Beneficiary's claimed qualifying experience. A petitioner must resolve inconsistencies of record with independent, objective evidence pointing to where the truth lies. *Matter of Ho*, 19 I&N Dec. at 591. Thus, at the time of the NOIR's issuance, the record did not establish the Beneficiary's possession of the minimum experience required for the offered position or the requested immigrant visa classification. The Director therefore issued the NOIR for good and sufficient cause.

In its NOIR response, the Petitioner submitted a letter from another U.S. business stating its employment of the Beneficiary as a machinist from June 2011 until beyond the petition's September 2014 priority date. The Petitioner, however, has not explained why the Beneficiary omitted this purported experience from the labor certification application. The application, which was filed in September 2014, instructed the Beneficiary to list "all jobs the alien has held during the past 3 years" and "any other experience that qualifies [him] for the job opportunity." The Petitioner did not mention the Beneficiary's purported, additional experience in the United States until after the NOIR questioned his listed work in Poland. These unresolved discrepancies and the timing of the new claim cast doubt on the purported, additional experience. *See Matter of Ho*, 19 I&N Dec. at 591; *see also Matter of Leung*, 16 I&N Dec. 12, 14-15 (Distr. Dir. 1976), *disapp'd of on other grounds by Matter of Lam*, 16 I&N Dec. 432, 434 (BIA 1978) (finding testimony of qualifying experience by an applicant for adjustment of status to be not credible where he omitted the purported employment from the labor certification application on his behalf). The letter from the other U.S. employer therefore does not establish the Beneficiary's qualifying experience for the offered position and the request immigrant visa classification.

In addition, neither the employment certificate from the Polish company nor the letter from the other U.S. business describes the Beneficiary's experiences. The documents therefore do not comply with 8 C.F.R. § 204.5(l)(3)(ii)(A) or demonstrate the Beneficiary's qualifying experience "in the job offered." For these additional reasons, the Petitioner has not demonstrated the Beneficiary's possession of the minimum experience required for the offered position or the requested immigrant visa classification.

On appeal, counsel claims that the Beneficiary "is not able to further confirm his experience." Counsel's assertion, however, does not constitute evidence. *Matter of Obaigbena*, 19 I&N Dec. 533,

[3] Although omitted from the NOIR, the owner of the Polish company also expressly told USCIS officers that it never employed the Beneficiary. According to the owner, from 1998 to 2004, the company engaged in trading and did not hire machinists. Since 2004, the company has operated as a gas station. The owner further told officers that the business last used the stamp shown on the 2013 employment certificate in 2004.

534 n.2 (BIA 1988) (citing *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980)). The Petitioner must substantiate counsel's statement in the record with independent evidence, which may include affidavits or declarations.

The Petitioner also argues that the Beneficiary qualifies for the offered position and the requested immigrant visa classification by virtue of his education. The Petitioner notes that, for skilled worker purposes, "[r]elevant post-secondary education may be considered as training." *See* 8 C.F.R. § 204.5(l)(2) (defining the term "skilled worker"). The record contains evidence that, in Poland, the Beneficiary completed one year of post-secondary studies at a technical university and two years of post-secondary courses at an agricultural institution.

The Petitioner, however, has not demonstrated how the Beneficiary's education relates to the offered position of machinist. The educational documents indicate the Beneficiary's study of computer science at the university and agriculture at the other school. The Petitioner has offered him work as a machinist. Thus, contrary to 8 C.F.R. § 204.5(l)(2), the record does not establish the Beneficiary's possession of "relevant," post-secondary education countable as training for skilled worker purposes. Also, the labor certification did not state the offered position's requirement of any training. Rather, the certification indicates the job's requirement of two years of experience in the position offered. The regulation does not allow "relevant post-secondary education" to be considered as experience. 8 C.F.R. § 204.5(l)(2).

In addition, the record indicates that the Beneficiary's post-secondary education overlaps his claimed, full-time, employment experience from September 2001 through December 2003. The submitted, educational documents indicate the Beneficiary's studies at the university and agricultural school from 2001 to 2005. According to one document, in the 2001-02 semester at the university, he took five courses, each entailing at least 14 hours of lectures or practical instruction a week. The Petitioner has not explained how the Beneficiary simultaneously studied and worked full-time for more than two years.

For the foregoing reasons, the record does not establish the Beneficiary's possession of the minimum experience required for the offered position or the requested immigrant visa classification. We will therefore affirm the petition's denial.

III. MISREPRESENTATION OF A MATERIAL FACT

Noncitizens who fraudulently or willfully misrepresent material facts in immigration proceedings render themselves inadmissible to the United States. Section 212(a)(6)(C)(i) of the Act, 8 U.S.C. § 1182(a)(6)(C)(i). 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). In addition to willful misrepresentation of a material fact, fraud requires an intention to deceive and a successful deception. *Matter of G-G-*, 7 I&N Dec. 161, 164 (BIA 1956).

Both the Director's NOIR and decision, in discussing inconsistencies in the Beneficiary's claimed experience, state: "It appears the beneficiary fraudulently claimed the required 24 months of previous

work experience." This statement, however, lacks sufficient clarity to constitute a fraud finding. Neither the NOIR nor the decision further discusses fraud or willful misrepresentation or the elements of the offenses.

Regardless, significant evidence supports the Beneficiary's willful misrepresentation of his qualifying experience on the labor certification and in immigrant visa petition proceedings.[4] He stated that the Polish company employed him full-time as a machinist from September 2001 through December 2003 and provided an employment certificate from the company as proof. The company's owner, however, told USCIS officers that the business neither issued the type of certificate submitted nor employed machinists. Thus, the record supports the Beneficiary's misrepresentation of his qualifying experience. The statements of the company owner contradict those of the Beneficiary. The Petitioner also submitted documents indicating the Beneficiary's studies during his purported, full-time tenure at the Polish company. Although provided an opportunity in revocation proceedings to explain the inconsistencies of record or provide additional evidence of the Beneficiary's purported experience, the Petitioner has not done so.

Evidence also indicates the willfulness of a misrepresentation. On the labor certification application, the Beneficiary attested under penalty of perjury to the truth and accuracy of the application's contents. A noncitizen's signature on an application establishes a strong presumption that they knew of, and assented to, the filing's contents. *Matter of Valdez*, 27 I&N Dec. at 499-501.

Evidence further supports the materiality of a misrepresentation. Both the offered position and the requested immigrant visa classification require a beneficiary's possession of at least two years of experience. The Beneficiary's purported, 28-month tenure at the Polish company constituted the only experience he listed on the labor certification. A misrepresentation of the Beneficiary's experience therefore had a natural tendency to influence the decisions on the labor certification application and the petition.

Thus, in any future filings in this matter, the Petitioner must explain the inconsistencies of record, provide independent, objective evidence of the Beneficiary's claimed qualifying experience, or both. Otherwise, USCIS or another federal agency may find the Beneficiary inadmissible to the United States based on willful misrepresentation of a material fact.

IV. ABILITY TO PAY THE PROFFERED WAGE

Although unaddressed by the Director, the record also does not establish the Petitioner's ability to pay the proffered wage of the offered position. A petitioner must demonstrate its continuing ability to pay a proffered wage, from a petition's priority date until a beneficiary obtains lawful permanent residence. 8 C.F.R. § 204.5(g)(2). If a petitioner employs less than 100 people, as here, evidence of ability to pay must include copies of annual reports, federal tax returns, or audited financial statements. *Id.*

[4] A misrepresentation determination in this matter would be a "finding of fact," not an admissibility determination. Visa petition proceedings are inappropriate fora for deciding substantive issues of admissibility. *Matter of O-*, 8 I&N Dec. 295, 296-97 (BIA 1959). USCIS benefit request decisions, however, should include specific findings and conclusions on any material issues of law or fact that arise. *See* 8 C.F.R. § 103.3(a)(1)(i); *see also* 5 U.S.C. § 557(c). In later, separate proceedings, USCIS or another federal agency may find the Beneficiary inadmissible.

The labor certification states the proffered wage of the offered position of machinist as $42,515 a year. As previously noted, the petition's priority date is September 12, 2014.

At the time of the petition's approval in March 2015, the Petitioner had to demonstrate its continuing ability to pay the proffered wage in 2014, the year of the petition's priority date, and in 2015. The petition included a copy of the Petitioner's federal income tax return for 2013. The record, however, lacked regulatory required evidence of the company's ability to pay in 2014 or 2015. The record therefore did not establish the Petitioner's continuing ability to pay the proffered wage from the petition's priority date onward.

Thus, pursuant to 8 C.F.R. § 204.5(g)(2), the Petitioner must submit copies of annual reports, federal tax returns, or audited financial statements for 2014 and 2015 in any future filings in this matter. The Petitioner may also submit additional evidence of its ability to pay the proffered wage in those years, including proof of any wages it paid the Beneficiary and materials supporting the factors stated in *Matter of Sonegawa*, 12 I&N Dec. 612, 614-15 (Reg'l Comm'r 1967).

IV. CONCLUSION

The record on appeal does not establish the Beneficiary's qualifying experience for the offered position or the requested visa classification. We will therefore affirm the petition's denial.

ORDER: The appeal is dismissed.