U.S. Citizenship and Immigration Services

Non-Precedent Decision of the Administrative Appeals Office

MATTER OF N-M- CORP.

DATE: MAR. 30, 2018

APPEAL OF TEXAS SERVICE CENTER DECISION

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

The Petitioner, a clothing manufacturer, seeks to employ the Beneficiary as an assistant designer. It requests classification of the Beneficiary as a skilled worker under the third preference immigrant classification. 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 Director of the Texas Service Center initially approved the petition. Subsequently, the Director revoked the approval of the petition, concluding that the record did not establish that the Beneficiary possessed the experience required by the labor certification as of the priority date. The Director noted unresolved inconsistencies regarding the Beneficiary's prior work experience in the record and on her prior nonimmigrant visa application. In addition, the Director invalidated the labor certification, concluding that the Beneficiary misrepresented her experience. The Director also determined that the Petitioner did not establish that it had the continuing ability to pay the wages of all of its Form I-140 beneficiaries.

On appeal, the Petitioner asserts that the Beneficiary's representations on her nonimmigrant visa were not willfully falsely made because the application was prepared by someone on her behalf; and that it has established its ability to pay because it has been paying the proffered wage to the Beneficiary. Upon *de novo* review, we will dismiss the appeal.

I. LAW

A. The Employment-Based Immigration Process

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).[1] *See* section

[1] The priority date of a petition is the date the DOL accepted the labor certification for processing, which in this case is February 11, 2005. *See* 8 C.F.R. § 204.5(d). The current DOL regulations concerning labor certifications went into effect on March 28, 2005. The new regulations are referred to by the DOL by the acronym PERM, for Program

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 applies 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.

B. Revocation of a Petition's Approval

After granting a petition, USCIS may revoke the petition's approval "at any time" for "good and sufficient cause." Section 205 of the Act, 8 U.S.C. § 1155. If supported by the record, a director's realization that a petition was erroneously approved may justify revocation. *Matter of Ho*, 19 I&N Dec. 582, 590 (BIA 1988).

Good and sufficient cause exists to issue a notice of intent to revoke (NOIR) where the record at the time of the notice's issuance, if unexplained or unrebutted, would have warranted the petition's denial. *Matter of Estime*, 19 I&N Dec. 450, 451 (BIA 1987). Similarly, revocation is proper if the record at the time of the decision, including any explanation or rebuttal evidence provided by a petitioner, warranted a petition's denial. *Id.* at 452.

II. THE BENEFICIARY'S EXPERIENCE

The Director revoked the petition's approval, in part, because the Petitioner did not establish that the Beneficiary possessed the experience required by the labor certification as of the priority date. A beneficiary must meet all of the requirements of the offered position set forth on the labor certification by the priority date of the petition. 8 C.F.R. § 103.2(b)(1), (12); *Matter of Wing's Tea House*, 16 I&N Dec. 158, 159 (Acting Reg'l Comm'r 1977).

In this case, the labor certification requires 24 months of experience as an assistant designer. Regarding the experience requirement, the labor certification states that the Beneficiary qualifies for the offered position based on experience as a full-time assistant designer with the collection in South Korea, from February 1992 to May 1994. Evidence relating to qualifying experience must be in the form of a letter from a current or former employer and must include the name, address, and title of the writer, and a specific description of the duties performed by the beneficiary. *See* 8 C.F.R. § 204.5(l)(3).

Electronic Review Management. *See* 69 Fed. Reg. 77325, 77326 (Dec. 27, 2004). The PERM regulation was effective as of March 28, 2005, and applies to labor certification applications filed on or after that date. However, the labor certification application in this case was filed prior to March 28, 2005, and is governed by the prior regulations.

With the petition, the Petitioner submitted a certificate of career dated December 7, 2004, attesting to the Beneficiary's experience as an assistant designer with the [redacted] Collection in [redacted] South Korea, from February 1, 1992, to May 31, 1994. In his first NOIR in 2014, the Director noted that the certificate of career did not list the Beneficiary's job duties as required by regulation. The Director also noted that the job description provided on the labor certification for the Beneficiary's job with the [redacted] Collection was identical to the job duties listed for the offered position on the labor certification, which casts doubt on the veracity of the Beneficiary's claimed employment. The Director indicated that the Petitioner must resolve any inconsistencies with independent, objective evidence pointing to where the truth lies. *Matter of Ho*, 19 I&N Dec. at 591-592.

In response to the first NOIR, the Petitioner provided a letter dated April 22, 2014, from the former owner of the [redacted] Collection attesting to the Beneficiary's experience as an assistant designer from February 1, 1992, to May 31, 1994; and a tax certificate stating that the [redacted] Collection closed on December 31, 1995. In his second NOIR in 2017, the Director noted that the job description provided on the 2014 letter from the former owner of the [redacted] Collection was identical to the job duties listed for the offered position on the labor certification. *See id.* The Director also noted that although the [redacted] Collection closed in 1995, the 2004 certificate of career submitted with the petition does not mention that the business had closed. *See id.*

The Director also indicated that the information provided on the Beneficiary's J-2 nonimmigrant visa application submitted in 2006 conflicts with the information provided on the labor certification in this case. The Beneficiary indicated on the nonimmigrant visa application that she was a housewife. She also indicated that she had no previous employers and had no specialized skills or training. She signed the application on June 21, 2006, thereby certifying that its contents were correct and that any false or misleading statement may result in the permanent refusal of a visa or denial of entry in the United States. In his second NOIR, the Director stated that the Petitioner must resolve these inconsistencies with independent, objective evidence pointing to where the truth lies. *Id.* The second NOIR requested copies of paystubs, payroll records, personnel records, tax documents, and/or affidavits from non-parties to this case relating to the Beneficiary's prior work experience.

In response to the second NOIR, the Petitioner submitted an affidavit from the Beneficiary. In her affidavit, the Beneficiary asserted that her nonimmigrant visa form was prepared and submitted by a travel agency, and that she signed the form "without explanation or translation of the contents of the form."

In his notice of revocation (NOR), the Director stated that the Beneficiary's affidavit was not properly translated pursuant to 8 C.F.R. § 103.2(b)(3). He further stated that the Beneficiary's nonimmigrant visa form indicates that it was prepared by the Beneficiary's spouse, and not a travel agency, as claimed in her affidavit. Even if a travel agency had prepared her forms, she would be responsible for the content and accuracy of the information contained therein. He further noted that the nonimmigrant visa forms are dual language forms, in English and Korean, and that the Beneficiary signed the forms certifying that she understood the information listed on the forms and that the

information was true and correct. He indicated that the Petitioner's response to the second NOIR contained none of the requested supplementary documentation of the Beneficiary's prior employment. Although the Petitioner's counsel asserted that such documents are not available, the assertions of counsel do not constitute evidence. *Matter of Obaigbena*, 19 I&N Dec. 533, 534 n.2 (BIA 1988) (citing *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980)).

Thus, the Director determined that the Petitioner had not established that the Beneficiary had the required two years of experience as an assistant designer. He further determined that the Beneficiary willfully misrepresented her employment with the Collection and, therefore, he entered a finding of misrepresentation against the Beneficiary and invalidated the labor certification.

On appeal, the Petitioner provides no additional evidence of the Beneficiary's experience and asserts that the Beneficiary's representations on her nonimmigrant visa application were not willfully falsely made because the application was prepared by someone on her behalf. However, as discussed above, the Petitioner has not demonstrated that the employment history claimed on the labor certification is correct. We agree with the Director's determination that the evidence submitted to the record regarding the Beneficiary's prior work experience is not credible.[2] The Petitioner has not resolved the inconsistencies and ambiguities in the record with independent, objective evidence, such as the evidence requested by the Director in the second NOIR (i.e., paystubs, payroll records, personnel records, tax documents, and/or affidavits from non-parties to this case relating to the Beneficiary's prior work experience). Thus, the Petitioner has not established that the Beneficiary possessed the experience required by the labor certification as of the priority date. We therefore affirm the Director's determination that the Beneficiary did not have the required two years of experience as an assistant designer.

III. WILLFUL MISREPRESENTATION OF A MATERIAL FACT AND INVALIDATION OF LABOR CERTIFICATION

The Director also found that the Beneficiary willfully misrepresented her employment with the Collection on the labor certification, and as such invalidated the labor certification. USCIS may invalidate a labor certification after its issuance upon a determination of "fraud or willful misrepresentation of a material fact involving the labor certification application." 20 C.F.R. § 656.30(d).[3]

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[2] The Petitioner must support assertions with relevant, probative, and credible evidence. *See Matter of Chawathe*, 25 I&N Dec. 369, 376 (AAO 2010).

[3] The pre-PERM regulation at 20 C.F.R. § 656.30(d) provides, in part:

> (d) After issuance labor certifications are subject to invalidation by the INS or by a Consul of the Department of State upon a determination, made in accordance with those agencies, procedures or by a Court, of fraud or willful misrepresentation of a material fact involving the labor certification application.

A material issue in this case is whether the Beneficiary is qualified to perform the duties of the proffered position. A misrepresentation made in connection with an application for a visa or other document, or with entry into the United States, is material if either: (1) the beneficiary is excludable on the true facts, or (2) the misrepresentation tends to shut off a line of inquiry which is relevant to the beneficiary's eligibility and which might well have resulted in a proper determination that he be excluded. *Matter of S & B-C-*, 9 I&N Dec. 436, 447 (A.G. 1961). Accordingly, the materiality test has three parts. First, if the record shows that the beneficiary is inadmissible on the true facts, then the misrepresentation is material. *Id.* at 448. If the beneficiary would not be inadmissible on the true facts, then the second and third questions must be addressed. The second question is whether the misrepresentation shut off a line of inquiry relevant to the beneficiary's admissibility. *Id.* Third, if the relevant line of inquiry has been cut off, then it must be determined whether the inquiry might have resulted in a proper determination that the beneficiary should have been excluded. *Id.* at 449.

As discussed above, in light of the contradictory information presented and lack of corroborating documentation, we agree that the Beneficiary willfully misrepresented her experience with the Collection on the labor certification. The listing of such experience misrepresented the Beneficiary's actual qualifications in a willful effort to procure a benefit ultimately leading to permanent residence under the Act. *See Kungys v. U.S.*, 485 U.S. 759 (1988). Here, the listing of false experience is a willful misrepresentation of the Beneficiary's qualifications that adversely impacted DOL's adjudication of the ETA 750 and USCIS's immigrant petition analysis. We therefore affirm the Director's finding that the Beneficiary willfully misrepresented a material fact on the labor certification. Due to the Beneficiary's[4] willful misrepresentation of a material fact involving the labor certification application, we also affirm the Director's invalidation of the labor certification. *See* 20 C.F.R. § 656.31(d).

IV. ABILITY TO PAY THE PROFFERED WAGE

The Director revoked the petition's approval, in part, because the Petitioner did not establish that it had the continuing ability to pay the wages of all of its Form I-140 beneficiaries. The proffered wage in this case is $9.09 per hour ($18,907.20 per year based on a 40-hour work week).

The regulation at 8 C.F.R. § 204.5(g)(2) states in pertinent part:

> *Ability of prospective employer to pay wage.* Any petition filed by or for an employment-based immigrant which requires an offer of employment must be accompanied by evidence that the prospective United States employer has the ability to pay the proffered wage. The petitioner must demonstrate this ability at the time the priority date is established and continuing until the beneficiary obtains lawful

[4] Section 212(a)(6)(C) of the Act, 8 U.S.C. § 1182(a)(6)(C)(i), states that "[a]ny alien, who by fraud or willfully misrepresenting a material fact, seeks (or has sought to procure, or who has procured) a visa, other documentation, or admission to the United States or other benefit provided under the Act is inadmissible."

> permanent residence. Evidence of this ability shall be either in the form of copies of annual reports, federal tax returns, or audited financial statements.

In determining a petitioner's ability to pay, we first examine whether it paid a beneficiary the full proffered wage each year from a petition's priority date. If a petitioner did not pay a beneficiary the full proffered wage, we next examine whether it had sufficient annual amounts of net income or net current assets to pay the difference between the proffered wage and the wages paid, if any. If a petitioner's net income or net current assets are insufficient, we may also consider other evidence of its ability to pay the proffered wage.[5]

In this case, the Petitioner did not establish that it paid the Beneficiary any wages in 2005, 2006, 2007, and 2008. Therefore, it must demonstrate its ability to pay the full proffered wage in those years.

The Petitioner submitted copies of IRS Forms W-2, Wage and Tax Statements, and paychecks demonstrating that it employed the Beneficiary in 2009, 2010, 2011, 2012, 2013, 2014, 2015, 2016, and 2017. The Forms W-2 and paychecks reflect that the Petitioner paid the Beneficiary as follows:

- $14,960 in 2009;
- $20,240 in 2010;
- $21,120 in 2011;
- $21,120 in 2012;
- $18,480 in 2013;
- $18,492 in 2014;
- $24,524 in 2015;
- $25,344 in 2016; and
- $8,448.00 in 2017.[6]

The Petitioner paid the Beneficiary more than the proffered wage in 2010, 2011, 2012, 2015, and 2016. However, the amounts on the Forms W-2 and paychecks do not equal or exceed the annual proffered wage of $18,907.20 in 2009, 2013, 2014, and 2017. The record therefore does not establish the Petitioner's ability to pay the proffered wage based on the wages it paid to the Beneficiary. But we credit the Petitioner's payments to the Beneficiary. The Petitioner must demonstrate its ability to pay the difference between the annual proffered wage and the amounts it paid to the Beneficiary in 2009, 2013, 2014, and 2017, which is $3,947.20, $427.20, $415.20, and $10,459.20, respectively.

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[5] Federal courts have upheld our method of determining a petitioner's ability to pay a proffered wage. *See, e.g., River St. Donuts, LLC v. Napolitano*, 558 F.3d 111, 118 (1st Cir. 2009); *Tongatapu Woodcraft Haw., Ltd. v. Feldman*, 736 F.2d 1305, 1309 (9th Cir. 1984); *Estrada-Hernandez v. Holder*, -- F. Supp. 3d --, 2015 WL 3634497, *5 (S.D. Cal. 2015); *Rizvi v. Dep't of Homeland Sec.*, 37 F. Supp. 3d 870, 883-84 (S.D. Tex. 2014), *aff'd*, -- Fed. Appx. --, 2015 WL 5711445, *1 (5th Cir. Sept. 30, 2015).

[6] The Petitioner provided paychecks through April 28, 2017.

The Petitioner's federal tax returns state net income[7] amounts as follows:

- $70,815 in 2005;
- $88,573 in 2006;
- $107,193 in 2007;
- $109,486 in 2008;
- $107,819 in 2009; and
- $46,174 in 2013.

The Petitioner did not provide regulatory-prescribed evidence of its ability to pay the proffered wage in 2014, 2015, 2016, and 2017. *See* 8 C.F.R. § 204.5(g)(2). Therefore, it has not established its ability to pay the proffered wage in those years. For the years 2005, 2006, 2007, and 2008, the Petitioner had sufficient net income to pay the proffered wage; and for the years 2009 and 2013, the Petitioner had sufficient net income to pay the difference between the proffered wage and the amounts it paid to the Beneficiary.

However, where a petitioner has filed Form I-140 petitions for multiple beneficiaries, it must demonstrate that its job offer to each beneficiary is realistic, and that it has the ability to pay the proffered wage to each beneficiary. *See* 8 C.F.R. § 204.5(g)(2); *see also Patel v. Johnson*, 2 F. Supp. 3d 108, 124 (D. Mass. 2014) (upholding our denial of a petition where a petitioner did not demonstrate its ability to pay multiple beneficiaries). USCIS records show that the Petitioner has filed over 100 Form I-140 petitions for other beneficiaries since 2001. Thus, the Petitioner must establish its ability to pay this Beneficiary as well as the beneficiaries of the other Form I-140 petitions that were pending or filed after the priority date of the current petition.[8] We do not consider the other beneficiaries for any year that the Petitioner has paid the Beneficiary a salary equal to or greater than the proffered wage, which in this case is 2010, 2011, 2012, 2015, and 2016.

The Petitioner must document the receipt numbers, names of beneficiaries, priority dates, and proffered wages of these other petitions, and indicate the status of each petition and the date of any status change (i.e., pending, approved, withdrawn, revoked, denied, on appeal or motion, beneficiary obtained lawful permanent residence). To offset the total wage burden, the Petitioner may submit

[7] Where an S corporation's income is exclusively from a trade or business, USCIS considers net income to be the figure for ordinary income, shown on line 21 of page 1 of a petitioner's IRS Form 1120S, U.S. Income Tax Return for an S Corporation. However, where an S corporation has income, credits, deductions, or other adjustments from sources other than a trade or business, net income is found on line 18 of Schedule K to Form 1120S. *See* Internal Revenue Serv., Instructions to Form 1120S, 22, at https://www.irs.gov/pub/irs-pdf/i1120s.pdf (last visited Mar. 7, 2018).

[8] The Petitioner's ability to pay the proffered wage of one of the other I-140 beneficiaries is not considered:

- After the other beneficiary obtains lawful permanent residence;
- If an I-140 petition filed on behalf of the other beneficiary has been withdrawn, revoked, or denied without a pending appeal or motion; or
- Before the priority date of the I-140 petition filed on behalf of the other beneficiary.

documentation showing that it paid wages to other beneficiaries. To demonstrate that it has the ability to pay the Beneficiary and the other beneficiaries, the Petitioner must, for each year at issue (a) calculate any shortfall between the proffered wages and any actual wages paid to the primary Beneficiary and its other beneficiaries, (b) add these amounts together to calculate the total wage deficiency, and (c) demonstrate that its net income or net current assets exceed the total wage deficiency.[9] Without this information, we cannot determine the Petitioner's ability to pay the combined proffered wages of all of its applicable beneficiaries.

In response to the Director's request for evidence in 2008, the Petitioner submitted a chart identifying 35 other Form I-140 petitions that it has filed between 2005 and 2008. The Petitioner also submitted evidence indicating its payments to the beneficiaries of the petitions. In response to the Director's first NOIR, the Petitioner provided additional evidence regarding Form I-140 petitions that it has filed between 2005 and 2014. The Director noted that the response did not include information regarding several additional beneficiaries. In response to the Director's second NOIR, the Petitioner did not provide complete information regarding several additional beneficiaries.

The record does not document the priority dates or proffered wages of these other petitions, or whether the Petitioner paid wages to their beneficiaries. The record also does not indicate whether any of these other petitions were withdrawn, revoked, or denied, or whether any of the other beneficiaries obtained lawful permanent residence. Without this information, we cannot determine the Petitioner's ability to pay the combined proffered wages of all of its applicable beneficiaries.

On appeal, the Petitioner states that it has been paying the proffered wage to the Beneficiary. Pursuant to a memorandum dated May 4, 2004, from William R. Yates, Associate Director of Operations, USCIS, regarding the determination of ability to pay, the Petitioner asserts it has established its continuing ability to pay the proffered wage beginning on the priority date. *See* Memorandum from William R. Yates, Associate Director for Operations, USCIS, HQOPRD 90/16.45, *Determination of Ability to Pay under 8 CFR 204.5(g)(2)* 2 (May 4, 2004), http://www.uscis.gov/laws/policy-memoranda.

The Yates Memorandum provides guidance to adjudicators to review a record of proceedings and make a positive determination of a petitioner's ability to pay if, in the context of the beneficiary's employment, "[t]he record contains credible verifiable evidence that the petitioner not only is employing the beneficiary but also has paid or currently is paying the proffered wage." *Id.* The regulation at 8 C.F.R. § 204.5(g)(2) requires that a petitioner demonstrate its *continuing* ability to pay the proffered wage beginning on the priority date. Thus, in this case, the Petitioner must show its ability to pay the proffered wage from 2005 onward. While the Petitioner established that it paid the Beneficiary more than the proffered wage in 2010, 2011, 2012, 2015, and 2016, it did not establish that it paid the Beneficiary more than the proffered wage in 2005, 2006, 2007, 2008, 2009,

[9] It is the Petitioner's burden to establish eligibility for the immigration benefit sought. Section 291 of the Act, 8 U.S.C. § 1361; *Matter of Skirball Cultural Ctr.*, 25 I&N Dec. 799, 806 (AAO 2012).

2013, 2014, and 2017. Further, the Petitioner did not provide regulatory-prescribed evidence of its ability to pay the proffered wage in 2014, 2015, 2016, and 2017. *See* 8 C.F.R. § 204.5(g)(2).

We may consider evidence of a petitioner's ability to pay beyond its net income and net current assets, including such factors as: the number of years it has conducted business; the growth of its business; its number of employees; the occurrence of any uncharacteristic business expenditures or losses; its reputation in its industry; whether a beneficiary will replace a current employee or outsourced service; or other evidence of its ability to pay a proffered wage. *See Matter of Sonegawa*, 12 I&N Dec. 612, 614-615 (Reg'l Comm'r 1967).

In this case, the Petitioner indicated that it was established in 1991. Its tax returns indicate that it was established in 1993. However, online records show that the Petitioner was incorporated in Virginia on [redacted] 2006, after the labor certification was filed. Commonwealth of Virginia State Corp. Commission, https://cisiweb.scc.virginia.gov/z_container.aspx (last visited Mar. 7, 2018). The Petitioner must resolve any inconsistencies with independent, objective evidence pointing to where the truth lies. *Matter of Ho*, 19 I&N Dec. at 591-592. Further, the Petitioner's tax returns indicate that its sales fluctuated between 2005 and 2013, with sales declining steadily each year from 2009 to 2013. Its payroll also declined each year from 2009 to 2013. The record does not contain regulatory-prescribed evidence of its ability to pay the proffered wage in 2014, 2015, 2016, and 2017. *See* 8 C.F.R. § 204.5(g)(2). The record does not demonstrate the occurrence of any uncharacteristic business expenditures or losses or the Petitioner's reputation in its industry. Also, unlike in *Sonegawa*, the Petitioner in this case must demonstrate its ability to pay multiple beneficiaries. Thus, assessing the totality of circumstances in this individual case, the record does not establish the Petitioner's continuing ability to pay the proffered wage pursuant to *Sonegawa*.

The Petitioner has not established its continuing ability to pay the proffered wage from the petition's priority date onward.

V. CONCLUSION

The Petitioner has not demonstrated the Beneficiary's' possession of the required experience or its ability to pay the proffered wage. Furthermore, the Beneficiary willfully misrepresented her experience on the labor certification. Therefore, we affirm the Director's finding of willful misrepresentation of a material fact against the Beneficiary, and we affirm his invalidation of the labor certification.

ORDER: The appeal is dismissed.

Cite as *Matter of N-M- Corp.*, ID# 1036693 (AAO Mar. 30, 2018)