U.S. Citizenship and Immigration Services

Non-Precedent Decision of the Administrative Appeals Office

In Re: 12565250

DATE: MAY 13, 2021

Appeal of Texas Service Center Decision

Form I-140, Immigrant Petition for a Skilled Worker

The Petitioner, a wholesaler of cellphones and cellphone accessories, seeks to employ the Beneficiary as a cell technician. It requests skilled worker classification for the Beneficiary under the third preference immigrant category. Immigration and Nationality Act (the Act) section 203(b)(3)(A)(i), 8 U.S.C. § 1153(b)(3)(A)(i). This employment-based "EB-3" 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 denied the petition on multiple grounds. The Director determined that the Petitioner did not establish that the Beneficiary had at least two years of qualifying experience as required to meet the minimum requirement of the labor certification and to qualify for skilled worker classification. The Director also found that the Petitioner and the Beneficiary willfully misrepresented a material fact regarding the Beneficiary's employment history in the labor certification that accompanied the instant petition, and invalidated the labor certification on that basis, which constituted another ground for denying the petition.

On appeal the Petitioner submits a brief and supporting documentation, much of which was already in the record. The Petitioner asserts that the evidence establishes that the Beneficiary has the requisite experience to qualify for the job offered and the requested classification. The Petitioner also asserts that neither it nor the Beneficiary misrepresented any material fact in the labor certification accompanying the instant petition.

In visa petition proceedings it is the petitioner's burden to establish eligibility for the immigration benefit sought. Section 291 of the Act, 8 U.S.C. § 1361. Upon *de novo* review, we will dismiss the appeal. We determine that the Petitioner has not established that the Beneficiary gained the requisite experience to qualify for skilled worker classification and for the proffered position under the terms of the labor certification. We also determine that the Beneficiary willfully misrepresented a material fact regarding her employment history in the labor certification filed with this petition, and affirm the Director's decision to invalidate the labor certification. However, we will withdraw the Director's finding that the Petitioner also willfully misrepresented a material fact in this petition.

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) of the Act, 8 U.S.C. § 1182(a)(5). 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.

II. ANALYSIS

The instant petition was filed with USCIS on July 16, 2018, accompanied by a labor certification that was filed with the DOL on January 5, 2018, and certified on May 15, 2018. A beneficiary must meet the specific educational, training, experience, and other requirements of the labor certification, regardless of the classification requested. *See* 8 C.F.R. § 204.5(l)(3)(i). To be eligible for classification as a skilled worker, a beneficiary must have at minimum two years of training or experience. *See* 8 C.F.R. § 204.5(l)(3)(ii)(B). All requirements must be met by the petition's priority date,[1] which in this case is January 5, 2018. *See Matter of Wing's Tea House*, 16 I&N Dec. 158, 159 (Acting Reg'l Comm'r 1977).

A. Labor Certification Requirements and the Beneficiary's Experience

The requirements for the proffered position of cell technician are indicated in section H of the labor certification (Job Opportunity Information), which specifies that two years of experience as a cell technician or in the alternate occupation of technical support are required to qualify for the job. According to sections J and K of the labor certification the Beneficiary met the experience requirements of section H by virtue of two prior jobs, including:

- with [redacted] Electronis in [redacted] India, as a technician, from January 8, 2007, to October 31, 2013; and before that
- with [redacted] Computers in [redacted] India, as a mobile technician, from March 15, 1999, to November 30, 2005.

As its initial evidence of the Beneficiary's work experience the Petitioner submitted two letters, including:

- a letter purportedly from [redacted] Electronis in [redacted] India – dated November 6, 2013, and signed by the "proprietor" – stating that the Beneficiary was employed as a "technician

[1] The priority date of an employment-based immigrant petition is the date the underlying labor certification is filed with the DOL. *See* 8 C.F.R. § 204.5(d).

for mobile phone repairing and quality control" from January 8, 2007, to October 31, 2013; and

- a letter purportedly from [redacted] Computers in [redacted] India – dated December 5, 2005, and likewise signed by the "proprietor" – stating that the Beneficiary was employed as a "mobile phone repairing technician" from March 15, 1999, to November 30, 2005, and describing her job duties as "mainly responsible to repair and use mobile accessories from the company stock and produce detail report in coordination with Marketing Planning, Production and Q.A. Department."

The Director issued a notice of intent to deny (NOID) in September 2019. After reviewing the experience claimed and evidence submitted in this petition, the Director discussed a previous application by the Beneficiary for an F-1 nonimmigrant (student) visa on October 20, 2014, at which time the Beneficiary claimed that she worked at [redacted] and responded "No" to the question "were you previously employed?" The Director indicated that the conflicting information provided with the F-1 visa application cast doubt on the veracity of the Beneficiary's employment history as provided in the current proceeding's labor certification.

In response to the NOID the Petitioner acknowledged that the Beneficiary "failed to accurately complete her employment history" on the DS-160 application form for her F-1 visa, but asserted that it "was not her intent to misrepresent or mislead in any form or fashion" and the issue of the Beneficiary's prior employment was not raised in the consular interview or by U.S. Customs and Border Protection (CBP) at the port of entry. The Petitioner submitted additional documentation as evidence of the Beneficiary's claimed employment with [redacted] Electronics[2] and [redacted] Computers in India, including affidavits from alleged co-workers at those two companies attesting to the Beneficiary's employment and pages from a bank account statement recording deposits from [redacted] Electronic.[3]

In denying the petition the Director determined that the Petitioner's response to the NOID, supplementing its initial evidence, did not resolve the discrepancy between the labor certification in the instant proceeding and the previously filed application for an F-1 nonimmigrant visa with regard to the Beneficiary's alleged employment history. The Director discussed certain substantive deficiencies in the letters from [redacted] Electronics[4] and [redacted] Computers such as the illegible signatures of the "proprietors" and the lack of any description of the Beneficiary's job duties in the [redacted] Electronis letter, which undermined the credibility of the letters. As for the affidavits from alleged co-workers of the Beneficiary at [redacted] Electronics and [redacted] Computers, the Director stated that they lacked specificity with regard to the Beneficiary's job title and duties as well as the affiants' own jobs with those companies, and were not supported by any independent objective evidence of the Beneficiary's employment with either company. The Director also reviewed the bank account records, noted that they were partly hand-written and contained conflicting dates, and indicated that they were not credible evidence of the Beneficiary's employment with [redacted] Electronics, as alleged. Based on

[2] In its response to the NOID, as well as in its subsequent appeal, the Petitioner referred to the Beneficiary's alleged employer in the years 2007-2013 as [redacted] Electronics, not [redacted] Electronis as the company was called in the labor certification and in the Petitioner's initial support letter to the Texas Service Center.

[3] The bank account statement contains deposit entries from [redacted] Electronic, which constitutes yet another version of this company's name – identified elsewhere in this proceeding as [redacted] Electronis and [redacted] Electronics.

[4] The Director referred to this company as [redacted] Electronics in the decision, as well as in the foregoing NOID.

the foregoing analysis the Director concluded that the Petitioner did not establish that the Beneficiary gained any experience with [redacted] Electronics or [redacted] Computers. Therefore, the Beneficiary did not have the requisite 24 months of qualifying experience to meet the terms of the labor certification and qualify for skilled worker classification.

On appeal the Petitioner asserts that the employment verification letters it submitted with its initial evidence satisfied the evidentiary requirements of 8 C.F.R. § 204.5(g)(2) and should be accepted as establishing the Beneficiary's qualifying experience with [redacted] Electronics and [redacted] Computers. The regulation at 8 C.F.R. § 204.5(g)(2) states that:

> 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.

The letters ostensibly from [redacted] Computers and [redacted] Electronics (the name we will use for this company hereinafter) do not satisfy all of the substantive requirements of the regulation. For example, the signatures of the "proprietors" of each company are illegible, and their names are not otherwise identified in the letters. In addition, the letter from [redacted] Electronics does not contain a specific description of the duties performed by the Beneficiary. Furthermore, the letterhead of this letter actually reads [redacted] Electron**is**" which conflicts with the proprietor's reference to the company in the body of the letter as [redacted] Electron**ics**. The letterhead of the [redacted] Computers letter also looks questionable with the word "Services" in red lettering printed below the blue lettering of [redacted] Computers." For all of these reasons we conclude that the letters from [redacted] Computers and [redacted] Electronics, dated December 5, 2005, and November 6, 2013, respectively, are questionable as to their authenticity and are not persuasive evidence that the Beneficiary was employed by either company.

The Petitioner refers to the previously submitted affidavits from alleged co-workers of the Beneficiary at [redacted] Electronics and [redacted] Computers. The affidavits do not qualify as employment verification letters under 8 C.F.R. § 204.5(g)(2) because they are not from the companies themselves (the affiants are not "current or former employers," as the regulation prescribes). Furthermore, neither of the affiants identifies his own position with the respective company or describes the Beneficiary's job duties there. Moreover, the affidavit from the [redacted] Electronics employee conflicts with the employment verification letter from that company which is identified in the letterhead as [redacted] Electronis. Thus, the affidavits have little or no evidentiary weight.

The Petitioner also refers to its previously submitted bank account records, including a "savings account statement" in the Beneficiary's name from [redacted] (in India) with entries labeled "Chq. By [redacted] electronic"[5] which allegedly confirm the Beneficiary's employment by [redacted] Electronics. There is a disconnect, however, between the date of the bank statement – October 22, 2019 – and the dates of the deposits and withdrawals, which range from May 2012 to October 2013. The Petitioner has not explained why a bank statement issued in

[5] These deposit entries present a final variation of the company's name, with "electronic" beginning with a lower case "e" instead of a capital "E."

2019 would list deposits and withdrawals from six and seven years earlier. Furthermore, the savings account number on the "savings account statement" does not match the identification number of a "savings bank pass book" bearing the date May 8, 2012, which is also in the record. The Petitioner has not explained the significance of the savings bank pass book, given that the identity of the bank is unclear and no deposits from [redacted] Electronics (or any other deposits and withdrawals) are associated with that pass book. Thus, the bank account records have little probative value as evidence of the Beneficiary's employment by [redacted] Electronics (or [redacted] Electronic, or [redacted] Electronis).

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.*

The Petitioner has not resolved the myriad inconsistencies in this case. The Petitioner has not submitted any independent objective evidence of the Beneficiary's employment by either [redacted] Electronics or [redacted] Computers, such as pay statements from those companies, employment records or employment-related correspondence from those companies during the time periods of the Beneficiary's alleged employment, tax records of those companies or of the Beneficiary, or any other credible documentation confirming the Beneficiary's employment and the nature of her jobs. We conclude, therefore, that the Petitioner has not established that the Beneficiary worked for or gained any qualifying experience with [redacted] Electronics or [redacted] Computers. Accordingly, the Petitioner has not established that the Beneficiary gained the requisite two years of experience to meet the terms of the labor certification and qualify for skilled worker classification. The appeal will be dismissed on these grounds.

B. Willful Misrepresentation of a Material Fact

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 the NOID the Director alluded to the Beneficiary's nonimmigrant visa application in which she claimed to work for [redacted] and answered "No" to the question of whether she had any previous employment. This answer, the Director noted, conflicted with the subsequent claim in the labor certification underlying the instant petition that the Beneficiary worked for [redacted] Electronics and [redacted] Computers. Accordingly, the Director questioned the validity of the letters from [redacted] Electronics and [redacted] Computers attesting to the Beneficiary's employment with those

companies, and whether the Petitioner and the Beneficiary willfully misrepresented a material fact in the labor certification by claiming work experience with [redacted] Electronics and [redacted] Computers. The Director cited the regulation at 8 C.F.R. § 656.30(d) which provides, in pertinent part, that "after issuance, a labor certification is subject to invalidation by the DHS [Department of Homeland Security] . . . upon a determination, made in accordance with [its] procedures or by a court, of fraud or willful misrepresentation of a material fact involving the labor certification application." The Director also cited the regulation at 8 C.F.R. § 204.5(a)(2), which provides that a Form I-140 petition must be accompanied by any required labor certification to be considered properly filed. The Director then advised the Petitioner that "USCIS may invalidate this labor certification based upon a finding of willful misrepresentation of a material fact," which would constitute an additional ground for dismissing the appeal under 8 C.F.R. § 204.5(a)(2).

In response to the NOID the Petitioner indicated that the Beneficiary was mistaken in her nonimmigrant visa petition by not including all of her employment in the DS-160 application, but asserted that she correctly identified her past employment with [redacted] Electronics and [redacted] Computers in the labor certification underlying the current immigrant visa petition. According to the Petitioner, therefore, there has been no willful misrepresentation of any material fact in the current proceedings involving the immigrant visa petition.

In his decision the Director indicated that the evidence of record was insufficient to establish the Beneficiary's claimed experience with [redacted] Computers, 1999-2005, and [redacted] Electronics, 2007-2013, and recounted the Beneficiary's answer of "No" in her 2014 nonimmigrant visa application to the question of whether she had any work experience prior to her present job with [redacted] The Director stated that the Petitioner did not provide an adequate explanation for the Beneficiary's answer of "No" to the question of previous employment in the nonimmigrant visa application, or why the Beneficiary stated that she worked for [redacted] "at the time of the application [in 2014] rather than the claimed employers in the [labor certification]." The Director concluded that the Beneficiary misrepresented her employment history in the labor certification by claiming to have experience with [redacted] Computers and [redacted] Electronics, that this misrepresentation was willfully made since she signed a declaration on the labor certification that the information about her employment history was true and correct, and that the misrepresentation was material to the Beneficiary's ability to meet the experience requirements of the labor certification and skilled worker classification. Having determined that the three elements discussed in *Matter of M-* and *Matter of Kai Hing Hui* were met, the Director found that the Beneficiary willfully misrepresented a material fact regarding her claimed experience in the labor certification in order to obtain the immigration benefit sought in the instant petition.

The Director then added that the Petitioner also willfully misrepresented a material fact "regarding the Beneficiary's claimed employment history in the instant petition." However, the Director did not analyze the Petitioner's actions in accordance with the three elements discussed in *Matter of M-* and *Matter of Kai Hing Hui*. Rather, the Director appears to have linked the Petitioner to the finding against the Beneficiary by noting that the Petitioner's president certified as "true and correct" the Form I-140 petition and associated evidence, which included the labor certification with the Beneficiary's unsubstantiated employment history and a declaration by the Petitioner that "to the best of my

knowledge the information contained herein is true and accurate," as well as the dubious employment verification letters from [redacted] Computers and [redacted] Electronics.

Having concluded that both the Petitioner and the Beneficiary willfully misrepresented a material fact in the labor certification, the Director determined that the Petitioner filed an invalid labor certification, and that the petition was deniable on this ground as well.

On appeal the Petitioner contends that neither it nor the Beneficiary willfully misrepresented a material fact in this proceeding because the Beneficiary was previously employed by [redacted] Computers and [redacted] Electronics, in accordance with the information provided in the labor certification and supporting documentation.

The Director's findings that the Petitioner and the Beneficiary willfully misrepresented a material fact are based on the conclusion that the Beneficiary did not work for [redacted] Computers from 1999 to 2005 or with [redacted] Electronics from 2007 to 2013, as claimed in the labor certification. This conclusion stems from the Beneficiary's prior statement in her nonimmigrant visa application in 2014 that she was not employed before her then current job with [redacted] There is clearly a gaping inconsistency here, and the Beneficiary has not provided a convincing explanation for her failure to identify her purported employment experience with two Indian companies that allegedly spanned 13 1/2 years and ended just one year before her application for the nonimmigrant F-1 visa. We conclude that the most credible explanation for the omission of this employment experience in the 2014 application, consistent with the evidentiary shortcomings discussed in this decision, is that the Beneficiary did not actually work for [redacted] Computers or [redacted] Electronics. Accordingly, we will not disturb the Director's finding that the Beneficiary willfully misrepresented a material fact regarding her employment history in the labor certification, and the consequential invalidation of the labor certification in accordance with 8 C.F.R. § 656.30(d). Since the petition is not accompanied by a valid labor certification, it cannot be approved. *See* 8 C.F.R. § 204.5(a)(2). The appeal will be dismissed on this ground as well.

With respect to the Petitioner, however, we conclude that the Director's misrepresentation finding was not well grounded because the Petitioner's actions were not analyzed in accordance with the three elements discussed in *Matter of M-* and *Matter of Kai Hing Hui*. In particular, the Director did not determine whether the Petitioner "knew" as in *Matter of Healy and Goodchild*, *id.*, that the Beneficiary's employment history was misrepresented in the labor certification. If the Petitioner's president had no such knowledge at the time he signed the labor certification, and the evidence does not demonstrate that he did, then his declaration that the contents of the labor certification were "to the best of my knowledge . . . true and accurate"[6] would not constitute a "willful" misrepresentation of the Beneficiary's work experience. Therefore, based on the evidence of record we will withdraw the Director's finding that the Petitioner willfully misrepresented a material fact regarding the Beneficiary's employment history.

[6] As previously mentioned, the Petitioner's president also certified that the I-140 petition and associated evidence was "true and correct." The date of this certification preceded by two weeks, and was thus roughly simultaneous with, the date of the labor certification declaration. (The I-140 petition was filed two months after the labor certification's approval.)

III. CONCLUSION

The Petitioner has not established that the Beneficiary had at least two years of experience as a cell technician or in a related technical support job as of the petition's priority date. Therefore, the Beneficiary does not meet the labor certification's minimum experience requirement and does not qualify for skilled worker classification. The evidence of record also establishes that the Beneficiary willfully misrepresented a material fact regarding her employment history in the labor certification, and that the labor certification must be invalidated on that basis. Thus, the petition is not accompanied by a valid labor certification, as required for approval. We will dismiss the appeal for all of the above stated reasons. However, we withdraw the Director's finding that the Petitioner also willfully misrepresented a material fact regarding the Beneficiary's employment history as claimed in the labor certification.

ORDER: The appeal is dismissed.