U.S. Citizenship and Immigration Services

Non-Precedent Decision of the Administrative Appeals Office

MATTER OF H-K-A-K-, LLC

DATE: NOV. 18, 2019

APPEAL OF TEXAS SERVICE CENTER DECISION

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

The Petitioner, a restaurant, seeks to employ the Beneficiary as head chef. It requests classification of the Beneficiary as a skilled worker 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 positon that requires at least two years of training or experience.

The Director of the Texas Service Center denied the petition. The Director found that the Petitioner did not resolve evidentiary discrepancies regarding the Beneficiary's employment history and therefore did not establish that the Beneficiary had two years of experience as a head chef, as required to meet the terms of the labor certification and qualify for skilled worker classification. The Director also found that the Petitioner and the Beneficiary willfully misrepresented a material fact concerning the Beneficiary's employment history.

On appeal the Petitioner asserts that the Director's findings were in error and that the evidence of record, including the additional documentation submitted in support of the appeal, establishes that the Beneficiary had the two years of qualifying experience required by the labor certification and for skilled worker classification. The Petitioner also asserts that there was no willful misrepresentation of any material fact in this proceeding.

Upon *de novo* review, we will dismiss the appeal, but withdraw the Director's finding that the Petitioner and the Beneficiary willfully misrepresented a material fact.

I. LAW

Employment-based immigration generally follows a three-step process. First, an employer obtains an approved labor certification (ETA Form 9089) from the U.S. Department of Labor (DOL). *See* section 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 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

A. Beneficiary's Experience

To qualify for classification as a skilled worker a beneficiary must have at least two years of training or experience. 8 C.F.R. § 204.5(l)(3)(ii)(B). A beneficiary must also meet the specific educational, training, experience, or other requirements of the labor certification. *Id.* All requirements must be met by the petition's priority date,[1] which in this case is May 24, 2016. *See Matter of Wing's Tea House*, 16 I&N Dec. 158, 159 (Acting Reg'l Comm'r 1977). At issue in this case is whether the Beneficiary has two years of qualifying experience to meet the requirements of the labor certification and to qualify for skilled worker classification.

The labor certification that accompanied the Petitioner's Form I-140, Immigrant Petition for Alien Worker (I-140 petition), states that the minimum experience required for the proffered position of head chef is 36 months in the job offered and that the experience must be in Asian food preparation and cooking with knowledge of Asian seasonings. According to the labor certification the Beneficiary met this requirement by working as an executive chef for [redacted], a restaurant in [redacted] Venezuela, starting on January 10, 2011, and still ongoing at the time the labor certification was filed in May 2016. The job with [redacted] is the only employment experience listed for the Beneficiary on the labor certification. As evidence of this job experience the Petitioner submitted with the I-140 petition in January 2017 a letter dated May 24, 2016, from [redacted] who identified himself as the owner of [redacted] stated that the Beneficiary had been employed as the restaurant's full-time executive chef since January 2011, and indicated that she introduced a "New Style Chinese Fusion menu" in connection with her emphasis on Asian cuisine.

The Director issued a notice of intent to deny (NOID) in May 2018, citing a nonimmigrant visa (NIV) application (Form DS-160) filed by the Beneficiary in February 2013, prior to the instant I-140 petition and associated labor certification, in which she identified another business – [redacted] – as her primary employer and stated that she was employed as its president. The Director indicated that the employment information on the NIV application conflicted with that on the labor certification, as well as with the employment information on the Form G-325A, Biographic Information, submitted with the Beneficiary's application to adjust status (Form I-485) in January 2017. On the Form G-325A the Beneficiary stated that her only employment in the previous five years was with [redacted] restaurant as an

[1] The priority date of a petition is the date the underlying labor certification is filed with the DOL. See 8 C.F.R. § 204.5(d).

executive chef. The Petitioner was advised that unless documentation was submitted to resolve these evidentiary conflicts and establish the Beneficiary's qualifying experience, the labor certification may be invalidated for fraud or willful misrepresentation of a material fact and the petition may be denied.

In response to the NOID the Petitioner submitted the following materials:

- A Spanish-language letter with English translation on the letterhead of [redacted] in [redacted] dated May 30, 2018, signed by [redacted] who identified herself as the human resources manager and stated that the Beneficiary was employed as a "chef manager" starting on January 20, 2011. The letter was supplemented with documentation of two earnings statements for pay periods in November 2015.
- An affidavit from [redacted] the Beneficiary's husband, dated May 30, 2018, stating that he and the Beneficiary were co-owners of [redacted] as of October 10, 2012, and that the Beneficiary, while serving as president/co-owner of that company also worked as head chef at [redacted] restaurant.
- Copies of business and trade registration records of [redacted] from 2012 and 2013, in Spanish with English translations.

In denying the petition the Director found that the documentation submitted in response to the NOID did not resolve the evidentiary discrepancy between the labor certification in the instant proceeding and the previously filed NIV application with regard to the Beneficiary's employment history. The Director noted that the Beneficiary executed her NIV application under penalty of perjury in February 2013, more than two years after she allegedly began working for [redacted] in January 2011, with no claim of any such employment on the NIV application. The Director concluded that the Petitioner and the Beneficiary willfully misrepresented a material fact by asserting in this proceeding that the Beneficiary was employed by [redacted] restaurant as an executive chef, and denied the petition on the ground that the Petitioner did not establish that the Beneficiary qualified for skilled worker classification under the Act.

On appeal the Petitioner submits additional evidence, claims that no willful misrepresentation of a material fact was committed by the Petitioner or the Beneficiary, and asserts that the totality of the evidence demonstrates that the Beneficiary meets the experience requirements of the labor certification, thus qualifying her for skilled worker classification. The additional evidence includes:

- Documentation of selected earnings statements from [redacted] to the Beneficiary for pay periods ranging from January 2011 to December 2013.
- A Spanish-language declaration from the Beneficiary's husband, [redacted] with English translation, on the letterhead of [redacted] in the [redacted] state [redacted] dated October 1, 2015, stating that he was the president of the company and that the Beneficiary had served as the general manager since October 2009, drawing a monthly salary.

- A copy of a bill of sale in April 2008 by which the property where the [redacted] restaurant is located was purchased by the Beneficiary.
- Photographs of [redacted] restaurant.

The Petitioner contends that the Beneficiary worked concurrently at both restaurants – [redacted],[2] which she co-owned with her husband, and [redacted] where she was employed as executive chef – during the years 2013-2015. These years do not comport with the evidence submitted by the Petitioner in this proceeding. If we were to accept the veracity of the documentation alleging that the Beneficiary began working for [redacted] as general manager in 2009, that she and her husband became co-owners in 2012, and that she may still have worked there as president and co-owner as of 2018, then her concurrent employment as executive chef at [redacted] would have spanned the entire time period she claims to have worked there from January 2011 to August 2016 (the end date indicated on the Form G-325A). The Petitioner has not reconciled its documentary evidence with the alleged years of concurrent employment by the Beneficiary. We also note that the 2018 employment verification letter from the human resources manager of [redacted] makes no mention of when, if ever, the Beneficiary's employment ended. These lingering inconsistencies in the record cast doubt on the veracity of the Petitioner's evidence in general.

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.*

In visa petition proceedings, the burden is on the petitioner to establish eligibility for the benefit sought. *Matter of Brantigan*, 11 I&N Dec. 493 (BIA 1966). To meet this burden, the petitioner must prove by a preponderance of evidence that it and the beneficiary are qualified for that benefit. *Matter of Chawathe*, 25 I&N Dec. 369, 376 (AAO 2010). The "preponderance of the evidence" standard requires that the evidence demonstrate that the petitioner's claim is "probably true," where the determination of "truth" is made based on the factual circumstances of each individual case. *Id.* (quoting *Matter of E-M-*, 20 I&N Dec. 77, 79-80 (Comm'r 1989)). In evaluating the evidence, the truth is to be determined not by the quantity of evidence alone but by its quality. *Id.* Thus, in adjudicating the petition pursuant to the preponderance of the evidence standard, USCIS must examine each piece of evidence for relevance, probative value, and credibility, both individually and within the context of the totality of the evidence, to determine whether the fact to be proven is probably true.

With regard to the Beneficiary's alleged employment with [redacted] on which this appeal hinges, evidence submitted by the Petitioner includes two letters, one by the restaurant's owner and

[2] The reference to [redacted] in the appeal brief as a restaurant is the one and only time in these proceedings that the nature of this business was specifically identified.

one by its human resources manager, asserting that the Beneficiary was employed as executive chef for over five years, though the end date of the employment is not identified in either letter. The only corroborating evidence of the Beneficiary's employment with [redacted] are the purported earnings statements dating from January 2011 to November 2015. The earnings statements, however, do not appear to be original documents. They bear no evidence of having been issued contemporaneously with the pay periods in 2011, 2012, 2013, and 2015 they claim to cover. In short, the earnings statements lack crucial indicia of authenticity.

The record lacks any contemporaneous documentation of the Beneficiary's alleged employment as an executive chef with [redacted] restaurant during the years 2011 to 2016. No tax records from the Petitioner or the Beneficiary have been submitted from those years, nor any pay statements verifiably issued to the Beneficiary in the years 2011-2016. Nor have any other employment records or employment related correspondence dating from the years 2011-2016 been submitted. Furthermore, as previously discussed the Petitioner has not resolved the conflicting evidence concerning the overlapping but substantively different experience which the Beneficiary claims to have had as general manager at the [redacted] restaurant. The claimed concurrent employment with both [redacted] and [redacted] further casts doubt on how much time the Beneficiary could have actually spent as an executive chef with [redacted] restaurant, which is the only type of experience that would qualify the Beneficiary for the proffered position.

For all of these reasons we find that the Petitioner has not established that the Beneficiary gained the claimed qualifying experience as an executive chef with [redacted] restaurant. Accordingly, we will dismiss the appeal on the grounds that the record does not establish that the Beneficiary meets the experience requirements of either the labor certification or skilled worker classification under the Act.

B. Willful Misrepresentation of a Material Fact Not Established

Although we find the evidence insufficient to establish the Beneficiary's qualifying experience, we conclude that the record does not support the Director's finding of a willful misrepresentation of material fact by the Petitioner or the Beneficiary. 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 his decision the Director stated that statements and documentary evidence submitted by the Petitioner and the Beneficiary in regard to the Beneficiary's alleged employment as an executive

chef by [redacted] restaurant constituted a willful misrepresentation of a material fact. However, the Director did not analyze the statements and documents provided by the Petitioner in response to the NOID and did not discuss how the noted discrepancies warranted a finding of willful material misrepresentation, in accordance with the factors discussed in the above case law. Accordingly, we will withdraw the Director's finding that the Petitioner and the Beneficiary willfully misrepresented a material fact in regard to the Beneficiary's employment history. But our withdrawal of the Director's finding should not be deemed a conclusion that we find the evidence submitted with the petition to be credible. As noted above, we have found discrepancies that cast doubt on the previously claimed employment and the Beneficiary's eligibility.

III. CONCLUSION

The Petitioner has not established that the Beneficiary had any qualifying employment by the priority date of May 24, 2016. Therefore, the record does not establish that the Beneficiary met either the three-year experience requirement of the labor certification or the two-year experience requirement of the Act to qualify for classification as a skilled worker. The appeal will be dismissed for the above stated reasons, with each considered an independent and alternative basis for the decision. 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. The Petitioner has not met that burden.

ORDER: The appeal is dismissed.

Cite as *Matter of H-K-A-K-, LLC*, ID# 6245917 (AAO Nov. 18, 2019)