U.S. Citizenship and Immigration Services

Non-Precedent Decision of the Administrative Appeals Office

In Re: 8993529

Date: NOV. 19, 2021

Appeal of Texas Service Center Decision

Form I-140, Immigrant Petition for Other Worker

The Petitioner, an operator of an insurance agency, seeks to employ the Beneficiary as a manager under the third-preference, immigrant visa category for "other workers." *See* Immigration and Nationality Act (the Act) section 203(b)(3)(A)(iii), 8 U.S.C. § 1153(b)(3)(A)(iii).

The Director of the Texas Service Center denied the petition. The Director concluded that the Petitioner didn't demonstrate the Beneficiary's possession of the minimum employment experience required for the offered position. The Director also found that the Petitioner and the Beneficiary misrepresented the Beneficiary's qualifying experience on the accompanying certification from the U.S. Department of Labor (DOL).

The Petitioner bears the burden of establishing eligibility for the requested benefit by a preponderance of evidence. *See* section 291 of the Act, 8 U.S.C. § 1361 (discussing the burden of proof); *see also Matter of Chawathe*, 25 I&N Dec. 369, 375 (AAO 2010) (discussing the standard of proof). 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 an "other," or unskilled, worker generally follows a three-step process. First, a prospective employer must apply to DOL for certification that: (1) there are insufficient U.S. workers able, willing, qualified, and available for an offered position; and (2) the employment of a noncitizen in the position won't harm wages and working conditions of U.S. workers with similar jobs. *See* section 212(a)(5) of the Act, 8 U.S.C. § 1182(a)(5).

Second, an employer must submit an approved labor certification 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 noncitizen beneficiary meets the requirements of a certified position and a requested immigrant visa category. 8 C.F.R. § 204.5(l).

Finally, if USCIS approves a petition, a designated noncitizen 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. THE REQUIRED EXPERIENCE

A petitioner must establish a beneficiary's possession of 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).[1] When evaluating a beneficiary's qualifications, USCIS must examine the job-offer portion of an accompanying labor certification to determine a position's minimum requirements. 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).

The accompanying labor certification states the minimum requirements of the offered position of manager as one year of experience "in the job offered." Experience "in the job offered" on a labor certification means "experience performing the key duties of the job opportunity" listed on the labor certification. *See, e.g., Matter of Symbioun Techs., Inc.*, 2010-PER-01422, slip op. at 4 (BALCA Oct. 24, 2011). The certification states that the position requires neither training, experience, special skills, nor other requirements. The certification also indicates that the Petitioner won't accept experience in an alternate occupation.

On the labor certification, the Beneficiary attested that, by the petition's priority date, he gained about 15 months of full-time, qualifying experience. He stated that a store in Pakistan employed him as a manager from June 2014 to September 2015.

Pursuant to 8 C.F.R. § 204.5(l)(3)(ii)(A), the Petitioner submitted a letter from the Beneficiary's claimed former employer. Consistent with the information on the labor certification, the letter from a store manager states the Beneficiary's former position and employment dates and describes his experience.

The Director's notice of intent to deny (NOID) the petition, however, notes a discrepancy in the Beneficiary's claimed experience. On applications for a U.S. student visa in Pakistan in November and December of 2015, the Beneficiary described himself as a student. Asked on the applications "Were you previously employed?" he indicated "No." The Beneficiary's answers on the visa applications conflict with his claimed, qualifying experience at the store from June 2014 to September 2015. The discrepancies are especially concerning because he purportedly ended his qualifying experience just a few months before filing his visa applications. A petitioner must resolve inconsistencies of record with independent, objective evidence pointing to where the truth lies. *Matter of Ho*, 19 I&N Dec. 582, 591 (BIA 1988).

The Petitioner's NOID response included a written statement from the Beneficiary. Because he had never applied for a visa before, the Beneficiary stated that he first obtained guidance from officials at the U.S. university where he planned to study. He said he relied on the advice of school officials, who purportedly told him that he needn't disclose his prior employment experience on the visa application because the work didn't relate to his intended field of study. The Beneficiary also stated: "I really thought that my prior work experience of 1 year as Manager in retail wasn't material and didn't matter

[1] This petition's priority date is March 29, 2019, the date DOL accepted the accompanying labor certification application for processing. *See* 8 C.F.R. § 204.5(d) (explaining how to determine a petition's priority date).

since I was applying for the engineering field of study." The Beneficiary stated that, in hindsight, he realizes that he should've disclosed his prior employment, but said: "There was no intent to misrepresent the facts."

The Petitioner also submitted another letter from the manager of the store where the Beneficiary purportedly worked. The manager reiterated the information in the prior letter and stated that the store paid the Beneficiary and other employees in cash. The manager said the employees received monthly, written "vouchers" stating their earnings, which they submitted to him in exchange for cash. The record contains copies of vouchers in the Beneficiary's name that he purportedly received from June 2014 to September 2015. The Petitioner also provided copies of the Beneficiary's purported offer letter, employment agreement, and a letter from the store's purported tax advisor. The advisor stated that Pakistani law didn't require the Beneficiary to pay income taxes on his wages because his pay didn't exceed the minimum taxable amount of 300,000 Pakistani rupees.[2]

The tax advisor's statements are consistent with online information from the Pakistani government. We therefore accept the unavailability of the Beneficiary's Pakistani income tax returns. The Director faulted the vouchers for omitting the number of hours and days the Beneficiary worked, and his "year-to-date" income. The offer letter and employment agreement, however, state the full-time position's monthly salary and workdays. The vouchers indicate that the Beneficiary received the full salary each month from June 2014 to September 2015. The vouchers therefore support a reasonable inference that he worked every day on a full-time basis during the period.

The Director rejected the letters from the store manager. Finding that the manager's signatures on the letters don't match, the Director questioned the authenticity and reliability of the documents. Adjudicators may discount documents without the need for expert, forensic evidence if the materials contain obvious "hallmarks of fraud," such as misspellings, overwriting, incorrect information, alterations, or unexplained similarities to other documents of record. *Matter of O-M-O-*, 28 I&N Dec. 191, 194-95 (BIA 2021). But the differences in the signatures on the letters from the Beneficiary's purported former employer aren't obvious or extreme enough to render the documents facially unreliable. As the Petitioner argues, signatures can vary over time and depending on circumstances. The record lacks other indicia of a false signature. The record therefore doesn't support the Director's rejection of the letters from the store manager.

For the foregoing reasons, the record doesn't support the Director's denial based on insufficient evidence of the Beneficiary's experience. We will therefore withdraw that portion of the decision.

Other evidence, however, casts doubt on the Petitioner's proof of the Beneficiary's claimed experience. First, the Beneficiary's affidavit isn't credible. The record lacks corroborating evidence that U.S. university officials advised him on completing the student visa application. Moreover, U.S. school officials wouldn't likely tell a foreign student to knowingly misrepresent information on a visa application. The U.S. Department of State (DOS) clearly advises visa applicants that, by submitting applications, they certify under penalty of perjury that they have read and understood the applications' questions and that their answers are true and correct to the best of their knowledge and beliefs. *See, e.g.*, DOS, "DS-160: Frequently Asked Questions," https://travel.state.gov/content/travel/en/us-

[2] Based on current exchange rates, that monthly amount equals about $1,714, or $20,568 a year.

visas/visa-information-resources/forms/ds-160-online-nonimmigrant-visa-application/ds-160-faqs.html (last visited Nov. 19, , 2021).

In addition, the Beneficiary had no reason to conceal prior employment on the visa applications, as it would have likely bolstered his visa eligibility. Student visa applicants must demonstrate their intentions to return to their home countries after completing U.S. studies. *See* section 101(a)(15)(F) of the Act, 8 U.S.C. § 1101(a)(15)(F) (requiring a nonimmigrant student to have "a residence in a foreign country which he [or she] has no intention of abandoning"). The Beneficiary's prior employment in Pakistan represented an additional connection to his home country, increasing the likelihood of his return. *See* DOS, "Student Visa," https://travel.state.gov/content/travel/en/us-visas/study/student-visa.html (last visited Nov. 19, 2021) (stating that a consular officer may request additional evidence of a student visa applicant's "intent to depart the United States upon completion of the course of study").

The record also contains additional derogatory information. A commercial database of global business information describes a Pakistani business with the same name and address as the Beneficiary's former employer as a "wholesaler" of "auto parts/supplies." On the labor certification and in his affidavit, the Beneficiary referred to his former employer as a "retail store." The record, however, doesn't establish that his purported former employer operated a retail store.

In addition, in support of the visa applications, the Beneficiary reportedly told U.S. officials that his father owns a "spare parts" business in Pakistan. If the business of the Beneficiary's father is the same one operated by the Beneficiary's former employer, the letters and materials from the employer may be biased in favor of the Beneficiary and wouldn't constitute independent, objective evidence of his qualifying experience. *See Matter of Ho*, 19 I&N Dec. at 591 (requiring a petitioner to resolve inconsistencies of record "by independent objective evidence"). The possible ownership and control of the former employer by the Beneficiary's father cast doubt on the reliability of the business's evidence.

The Director didn't notify the Petitioner of this additional, derogatory evidence or provide the company an opportunity to respond to it. *See* 8 C.F.R. § 103.2(b)(16)(i) (requiring USCIS, before issuing an adverse decision, to inform a petitioner of material derogatory information of which it may not be aware and an opportunity to respond). We will therefore remand the matter.

On remand, the Director should issue the Petitioner a new NOID discussing the relevant, derogatory evidence and explaining why the record doesn't establish the Beneficiary's possession of the minimum experience required for the offered position. The Petitioner must resolve the discrepancies of record, including the nature of his purported former employer's business and his father's influence on it, if any. The Petitioner must submit independent, objective evidence of his claimed qualifying experience.

III. THE ALLEGED MISREPRESENTATIONS

USCIS approves a filing if "the facts stated in the petition are true" and the beneficiary qualifies for the requested immigrant visa category. Section 204(b) of the Act. A petition includes any supporting evidence - including a labor certification. 8 C.F.R. § 103.2(b)(1). Thus, USCIS can't approve a petition if the facts stated on an accompanying labor certification are untrue.

The Director concluded that the Petitioner and Beneficiary misrepresented the Beneficiary's qualifying experience on the labor certification application. As previously discussed, despite the purported termination of the Beneficiary's qualifying employment at a Pakistani store just a few months before he sought a U.S. student visa, he attested on visa applications that he had no prior work experience.

The Petitioner didn't demonstrate the Beneficiary's possession of the qualifying experience to which he attested on the labor certification. But the record lacks sufficient evidence of a misrepresentation. The Director must fully consider the letters and vouchers from the Beneficiary's purported, former employer. Also, the Petitioner hasn't yet had an opportunity to respond to the additional, derogatory information regarding the nature of his former employer's business and his father's possible influence on the enterprise.

If the Director believes that the record supports a finding of a misrepresentation of the Beneficiary's experience on the labor certification application, the new NOID should so state and explain, allowing the Petitioner a chance to respond.[3]

IV. ABILITY TO PAY THE PROFFERED WAGE

Although unaddressed by the Director, the record also doesn't 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.*

The labor certification states the proffered wage of the offered position of manager as $46,654 a year. As previously noted, the petition's priority date is March 29, 2019.

The Petitioner submitted copies of its federal income tax returns for 2017 and 2018. Contrary to 8 C.F.R. § 204.5(g)(2), however, the record lacks regulatory required evidence of the Petitioner's ability to pay in 2019, the year of the petition's priority date, or thereafter. The Petitioner therefore hasn't demonstrated its ability to pay the proffered wage from the petition's priority date onward.

On remand, the new NOID should ask the Petitioner to submit copies of annual reports, federal tax returns, or audited financial statements for 2019, 2020, and, if available, 2021. The Petitioner may also submit additional evidence of its ability to pay in those years, including proof of any wages it

[3] A finding of willful misrepresentation in these proceedings wouldn't constitute a determination of the Beneficiary's admissibility to the United States. *See* section 212(a)(6)(C)(i) of the Act (stating that noncitizens who willfully misrepresent material facts when seeking visas render themselves inadmissible). Visa petition proceedings are inappropriate fora for making substantive, admissibility determinations. *Matter of O-*, 8 I&N Dec. 295, 296 97 (BIA 1959). USCIS decisions, however, should include specific findings and conclusions on any material issues of law or fact that arise in a case, including issues of fraud or material misrepresentation. *See* 8 C.F.R. § 103.3(a)(1)(i); *see also* 5 U.S.C. § 557(c). Thus, if USCIS determines that the Beneficiary willfully misrepresented his qualifying experience, he may later be found inadmissible in separate proceedings.

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).

Also, as the Director found, the Petitioner must demonstrate its ability to pay the combined proffered wages of this and another petition it filed after this petition's priority date.[4] *See Patel v. Johnson*, 2 F.Supp.3d 108, 124 (D. Mass. 2014) (affirming our revocation of a petition's approval where, as of the filing's grant, a petitioner didn't demonstrate its ability to pay the combined proffered wages of multiple petitions). To enable USCIS to calculate the total amount of combined proffered wages the Petitioner must demonstrate its ability to pay, the company must provide the proffered wage and priority date of its other petition.

If supported by the record, the new NOID may notify the Petitioner of any additional, potential grounds of denial. The Director, however, must provide the Petitioner a reasonable opportunity to respond to all issues raised on remand. Upon receipt of a timely response, the Director should review the entire record and enter a new decision.

V. CONCLUSION

Based in part on additional derogatory information of which the Petitioner may not be aware, the record doesn't establish the Beneficiary's qualifying experience for the offered position. The Petitioner also hasn't demonstrated its required ability to pay the combined proffered wages of this and another petition from this petition's priority date onward.

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

[4] USCIS records identify the Petitioner's other petition by the receipt number [redacted]