U.S. Citizenship and Immigration Services

Non-Precedent Decision of the Administrative Appeals Office

In Re: 10547691

Date: OCT. 16, 2020

Appeal of Texas Service Center Decision

Form I-140, Immigrant Petition for Skilled Worker

The Petitioner seeks to employ the Beneficiary as a tailor/alterations. It requests classification of the Beneficiary under the third-preference, immigrant category as a skilled worker. 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" category allows a U.S. business to sponsor a foreign national for lawful permanent resident status based on a job offer requiring at least two years of training or experience.

After the filing's initial grant, the Director of the Texas Service Center revoked the petition's approval. The Director concluded that the Petitioner did not provide objective evidence of the Beneficiary's qualifying experience for the offered position. The Director also found that the Petitioner and the Beneficiary willfully misrepresented a material fact and invalidated the labor certification. The Director dismissed a subsequent motion to reopen and reconsider.

In these proceedings, it is the Petitioner's burden to establish eligibility for the requested benefit. Section 291 of the Act, 8 U.S.C. § 1361. Upon *de novo* review, we will dismiss the appeal.

I. EMPLOYMENT-BASED IMMIGRATION

Employment-based immigration generally follows a three-step process. To permanently fill a position in the United States with a foreign worker, a prospective employer must first 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 a position. *Id*. Labor certification also indicates that the 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 considers whether a beneficiary meets the requirements of a certified position and a requested immigrant visa classification. If USCIS approves the petition, a foreign national may finally 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.

Section 205 of the Act, 8 U.S.C. § 1155, provides that the Secretary of Homeland Security may "for good and sufficient cause, revoke the approval of any petition." By regulation this revocation authority is delegated to any USCIS officer who is authorized to approve an immigrant visa petition "when the necessity for the revocation comes to the attention of [USCIS]." 8 C.F.R. § 205.2(a). USCIS must give the petitioner notice of its intent to revoke the prior approval of the petition and the opportunity to submit evidence in opposition thereto, before proceeding with written notice of revocation. *See* 8 C.F.R. § 205.2(b) and (c). A notice of intent to revoke (NOIR) "is not properly issued unless there is 'good and sufficient cause' and the notice includes a specific statement not only of the facts underlying the proposed action, but also of the supporting evidence." *Matter of Estime*, 19 I&N Dec. 450, 451 (BIA 1987). Per *Matter of Estime*, "[i]n determining what is 'good and sufficient cause' for the issuance of a notice of intention to revoke, we ask whether the evidence of record at the time the notice was issued, if unexplained and unrebutted, would have warranted a denial based on the petitioner's failure to meet his or her burden of proof." *Id.*

II. THE BENEFICIARY'S EXPERIENCE

The accompanying labor certification was filed on January 15, 2013. The labor certification states that the offered position requires 24 months of experience in the offered job of tailor/alterations, and no alternate experience is accepted. The duties and required skills for the offered position are stated as:

> Fits garments on customers to determine the required alterations. Examines tag or garment to ascertain necessary alterations. Alters clothing to fit customers or repairs defective garments per orders. Shortens and lengthens sleeves and legs, expands or narrows waist and chest, raises or lowers collar, and inserts or eliminates padding in shoulders while maintaining drape and proportions. Re-sews garment, using needles and thread or sewing machine. Alters garments and joins parts, using needle and thread or sewing machine. Sews buttons and buttonholes to finish garment.

On the labor certification, the Petitioner asserts that the Beneficiary gained experience as tailor/alterations from January 1, 2004 to March 31, 2007 with [redacted] in [redacted] South Korea. The initial evidence submitted with the petition included a notarial certificate of career issued on January 18, 2008, indicating that the Beneficiary was employed as a tailor/alteration from January 2004 to May 2007 with [redacted].

The Director requested additional evidence of the Beneficiary's qualifying experience, noting that the notarial certificate of career listed dates of employment inconsistent with the labor certification and did not describe the job duties performed or the title of the signor in accordance with the regulatory requirements at 8 C.F.R. § 204.5(l)(3). The Director also noted that the Beneficiary's claimed employment was inconsistent with a nonimmigrant visa application she submitted in April 2007. In her prior nonimmigrant visa application, the Beneficiary listed her present occupation as "housewife," and her last two employers as foreign language institutes where she was employed as a "lecturer" from February 1992 to November 1999.

In response to the Director's request, the Petitioner submitted a notarial certificate of employment. The certificate of employment, issued by the owner of [redacted] on November 23, 2016,

reaffirms the Beneficiary's position as tailor and alteration specialist from January 1, 2004 to May 30, 2007, and provides a description of her job duties as "cutting, sewing and alteration of the garment clothing to fit customers and repairing defective garments." The response also included a statement from the Beneficiary, asserting that the prior nonimmigrant visa application was prepared and submitted by a travel agent who did not ask for her employment history.

Following the approval of the petition, the Director sent the Petitioner a NOIR stating that, upon further review, the petition was approved in error. The Director reiterated the inconsistencies with the Beneficiary's qualifying employment and noted the following:

1. The notarial certificate of career (2008) and the notarial certificate of employment (2016) were translated and submitted to the notary office for verification by the same individual.
2. Neither certificate includes a signature or other indication that they were authored or provided by the owner of [redacted].
3. The Beneficiary's assertion that the travel agent did not request her employment history in completing her prior nonimmigrant visa application does not explain how the agent was aware of her two previous positions as "lecturer" more than ten years earlier.
4. A USCIS office overseas contacted the owner of [redacted] by telephone and the owner stated that the Beneficiary was not employed as tailor and alterations specialist, but that she was a laundry worker who performed washing, drying, folding, sorting and mending of clothes and linen.

The Director instructed the Petitioner to submit independent, objective evidence that the Beneficiary satisfies all of the requirements of the offered position and to overcome the conflicting evidence and statements discussed in the NOIR by submitting documents "such as tax records, pay statements, etc."

In response to the NOIR, the Petitioner submitted a 2019 statement from the owner of [redacted], listing the Beneficiary's dates of employment as January 1, 2004 to May 31, 2007 in the position of "tailor and cloth alteration, patch repairer." The owner also states that he issued the certificate of employment "only dated on November 23, 2016," and that no one contacted him, or anyone employed by [redacted] either in writing or verbally, about the Beneficiary's employment or the certificate of employment. The Petitioner again submitted the same statement from the Beneficiary asserting that the agent preparing and submitting the nonimmigrant visa application never asked for her employment history.

The Director concluded that the Petitioner did not submit objective evidence of the Beneficiary's qualifying employment, such as tax or payment records from [redacted] and that the Beneficiary did not explain how the agent assisting her with her nonimmigrant visa application could have knowledge of some of her employment history if she was never asked to provide that information. The Director revoked the petition and invalidated the labor certification, finding that both the Beneficiary and the Petitioner misrepresented a material fact to obtain an immigration benefit.

With its motion to reopen and reconsider, the Petitioner again submitted the same 2019 statement from the owner of [redacted] and the same statement from the Beneficiary. The Director dismissed

the motion, finding that the requirements for filing a motion to reopen had not been met, as the Petitioner resubmitted the same evidence and the same argument initially provided in the NOIR response.

On appeal, the Petitioner submits the same evidence and argument as submitted in response to the NOIR and on motion.

The Director issued the NOIR for good and sufficient cause. The prior employment information and claim to have been a housewife on the Beneficiary's prior nonimmigrant visa application contradicts the employment listed on the labor certification and in the notarial certificates. Further, the dates of the Beneficiary's claimed previous employment in the notarial certificates (May 30, 2007 and May 31, 2007) and the labor certification (March 31, 2007) are discrepant. The Petitioner must resolve inconsistencies with independent, objective evidence pointing to where the truth lies. *Matter of Ho*, 19 I&N Dec. 582, 591-92 (BIA 1988). As noted above, the Director requested evidence in the NOIR, such as tax records or pay statements to confirm such employment, but the Petitioner did not submit such evidence to resolve the discrepancies. Unresolved material inconsistencies may lead us to reevaluate the reliability and sufficiency of other evidence submitted in support of the requested immigration benefit. *Id.* Thus, the record lacked sufficient reliable evidence of the Beneficiary's qualifying experience for the offered position or the requested visa classification.

The Petitioner's NOIR response presents additional ambiguities. The job title and description in the notarial certificate of employment ("tailor/alteration – cutting, sewing and alteration of the garment clothing to fit customers and repairing defective garments") and the 2019 statement of the owner of [redacted] ("tailor and cloth alteration, patch repairer") are inconsistent. The 2019 statement from the owner does not indicate that the Beneficiary performed any work fitting garments to customers, but only repairing and altering cloth. These descriptions are also inconsistent with the information given to the USCIS overseas office that contacted the owner directly by telephone ("laundry worker who performed washing, drying, folding, sorting and mending of clothes and linen"). Any attempt to explain or reconcile such inconsistencies will not suffice unless the petitioner submits competent objective evidence pointing to where the truth lies. *Id.*

In its NOIR response, its motion to reopen and on appeal, the Petitioner asserts that the owner of [redacted] did not receive a phone call from anyone, including USCIS, regarding the Beneficiary's employment and that, "[i]f a USCIS officer called, he or she must have a phone log or an official transcript about the conversation made with the employer overseas." However, 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). Here, the Petitioner relies only on testimonial evidence of the owner of [redacted] to establish the Beneficiary's claimed employment experience, without providing independent, objective evidence in support of this testimony. As noted by the Director, the record does not include the Beneficiary's income tax or payroll records. Nor does the Petitioner assert that these records are unavailable for any reason.

As the inconsistencies in the record have not been resolved, the Petitioner has not established with independent, objective evidence that the Beneficiary possesses the required 24 months of experience

in the offered position, as required by the labor certification. The Director properly revoked the approval of the petition on this basis.

III. WILFULL MISREPRESENTATION OF A MATERIAL FACT

To find a willful and material misrepresentation of fact an immigration officer 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).

Accordingly, for an immigration officer to find a willful and material misrepresentation in visa petition proceedings, they must determine: 1) that the petitioner or beneficiary made a false representation to an authorized official of the United States government; 2) that the misrepresentation was willfully made; and, 3) that the fact misrepresented was material. *See Matter of M-*, 6 I&N Dec. 149 (BIA 1954); *Matter of L-L-*, 9 I&N Dec. 324 (BIA 1961); *Matter of Kai Hing Hui*, 15 I&N Dec. at 288.

Here, the Director found that the Beneficiary willfully misrepresented her qualifying experience on the labor certification, and that the Petitioner, in signing the labor certification, took responsibility for the truth and accuracy of any evidence submitted in support of the petition. Based on the misrepresentation, the Director invalidated the labor certification.

As noted above, the Beneficiary stated on her nonimmigrant visa application completed in April 2007 that her current occupation was "housewife." However, on the labor certification filed on her behalf, she claimed employment experience as tailor/alterations from January 1, 2004 until March 31, 2007. The misrepresentation was material to whether she qualified for the labor certification. The information submitted does not resolve the inconsistency in her claimed experience. As such, substantial evidence supports the Beneficiary's willful misrepresentation of her experience on the labor certification.

Although we agree with the Director that a petitioner's signature on the labor certification is an attestation, under penalty of perjury, that its contents are true and correct, we do not find that the Petitioner willfully misrepresented a material fact in the instant case. The record does not demonstrate that the Petitioner had knowledge of the Beneficiary's misrepresentation of her employment history at the time it signed the labor certification. Therefore, any misrepresentation made by the Petitioner cannot be considered willful, and we will withdraw the Director's finding of willful misrepresentation against the Petitioner.

IV. INVALIDATION OF THE LABOR CERTIFICATION

The regulation at 20 C.F.R. § 656.30(d) provides, in pertinent part:

> (d) Invalidation of labor certifications. After issuance, a labor certification may be revoked by ETA using the procedures described in Sec. 656.32. Additionally, after issuance, a labor certification is subject to invalidation by the DHS 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.

As discussed above, we have withdrawn the finding of misrepresentation against the Petitioner. Therefore, we will reinstate the labor certification.

V. INCONSISTENCIES IN THE RECORD

Because we conclude that the Petitioner did not demonstrate that the Beneficiary met the minimum requirements for the offered position or the requested visa classification, we need not fully address other issues evident in the record. That said, we will briefly identify an additional ground of ineligibility to inform the Petitioner that this issue should be addressed in future proceedings.

The regulation at 20 C.F.R. § 656.3 states, in part:

> Employer means:
>
> (1) A person, association, firm, or a corporation that currently has a location within the United States to which U.S. workers may be referred for employment and that proposes to employ a full-time employee at a place within the United States, or the authorized representative of such a person, association, firm, or corporation. An employer must possess a valid Federal Employer Identification Number (FEIN). …

The evidence in the record reveals inconsistencies in the Petitioner's FEIN. Here, the Petitioner is a corporation with its business registered in Massachusetts. The record includes the Petitioner's IRS Forms 1120S, U.S. Income Tax Return for an S Corporation, for years 2013 through 2015, and the Beneficiary's 2016 through 2018 IRS Forms W-2, Wage and Tax Statements, issued by the Petitioner.

The FEIN listed in the record (on the petition, the labor certification, the tax returns, and the Forms W-2) is XX-XXX7510. An online search of the Corporations Division, Secretary of the Commonwealth of Massachusetts, does not find any records related to this FEIN. However, the online search reveals a different FEIN for the Petitioner, XX-XXX8717. This inconsistency must be addressed in any future filings.

VI. CONCLUSION

The record does not support the Director's finding of willful misrepresentation against the Petitioner and this finding is withdrawn and the labor certification is reinstated. However, for the reasons discussed above, we conclude that the NOIR was properly issued and the Director properly revoked the petition's approval. The record includes inconsistencies with respect to the Beneficiary's claimed employment history and the Petitioner has not met its burden in resolving those inconsistencies. The Petitioner did not establish that the Beneficiary met the minimum requirements for the offered position

or the requested visa classification. Further, the Petitioner's arguments do not overcome the substantial evidence that led the Director to find that the Beneficiary willfully misrepresented a material fact.

ORDER: The appeal is dismissed.