U.S. Citizenship and Immigration Services

Non-Precedent Decision of the Administrative Appeals Office

In Re: 17294743

DATE: Sept. 7, 2021

Motion on Administrative Appeals Office Decision

Form I-140, Immigrant Petition for a Skilled Worker

The Petitioner, a Japanese restaurant, seeks to employ the Beneficiary as a sushi chef. 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 petition was initially approved, but the approval was subsequently revoked by the Director of the Texas Service Center on multiple grounds. The Director determined that the evidence of record did not establish that the Beneficiary met the minimum experience requirement of the labor certification. The Director also found that the Petitioner and the Beneficiary willfully misrepresented a material fact in the labor certification with respect to the Beneficiary's work experience, and invalidated the labor certification on that basis. A motion to reopen was dismissed by the Director.

The Petitioner filed an appeal, which we also dismissed. In our decision we determined that the record did not establish that the Beneficiary met the experience requirement of the labor certification. We agreed with the Director that the Beneficiary willfully misrepresented a material fact in the labor certification regarding his experience. But we withdrew the Director's finding that the Petitioner also willfully misrepresented a material fact in the labor certification, as well as the Director's invalidation of the labor certification, which we reinstated.[1]

The matter is now before us on a motion to reconsider. Upon review, we will dismiss the motion.

I. MOTION REQUIREMENTS

A motion to reconsider must establish that our previous decision was based on an incorrect application of law or policy and that the decision was incorrect based on the evidence in the record of proceedings at the time of the decision. 8 C.F.R. § 103.5(a)(3). We may grant a motion that satisfies these requirements and demonstrates eligibility for the requested immigration benefit.

[1] In addition, we noted that the documentation of record did not establish the Petitioner's ability to pay the proffered wages of the instant Beneficiary and the beneficiaries of all its other I-140 petitions, and indicated that the Petitioner must do so in future proceedings.

II. ANALYSIS

A. Beneficiary's Experience

The labor certification underlying the instant petition states in section H.6 that the proffered position of sushi chef – the duties of which are described in section H.11 as "Plan and price menu and daily specials, direct and cook Sushi and other specialty Japanese cuisine." – requires two years of experience in the job offered. A beneficiary must meet all of the job requirements set forth in the labor certification by the priority date of the petition,[2] which in this case is May 13, 2013. *See Matter of Wing's Tea House*, 16 I&N Dec. 158, 159 (Acting Reg'l Comm'r 1977). That two-year requirement in the labor certification is also the minimum experience required for the requested classification of skilled worker. *See* 8 C.F.R. § 204.5(l)(3)(ii)(B). The labor certification states that the Beneficiary had over two years of qualifying experience by virtue of his full-time employment as a sushi chef at [redacted] a Japanese restaurant in [redacted] South Korea, from December 2001 to January 2004.

In revoking the petition's approval, and dismissing the motion to reopen, the Director determined that the Beneficiary had not resolved evidentiary inconsistencies concerning the operation of [redacted] the Beneficiary's job duties and work schedule, and the restaurant's payments to the Beneficiary.

In our decision dismissing the appeal we reviewed statements from the restaurant's owner asserting that the Beneficiary was paid 50,000 won per day during his employment from December 2001 to January 2004 and assorted bank statements from the Beneficiary recording deposits of "salary" in 2002 and 2003, which the Petitioner claimed were earnings from the restaurant. We noted that the periodic deposit records were insufficient to show that the Beneficiary was employed full-time by [redacted] during the entire 25-month time frame asserted in the labor certification. We also referred to evidence in the record that the Beneficiary attended a university in 2002, evidently full-time, and indicated that the Petitioner had not explained how the Beneficiary could have worked full-time for the restaurant at the same time he was attending the university full-time. In addition, we reviewed a series of statements from the restaurant's owner and the Beneficiary which provided varying descriptions of the Beneficiary's job duties during his period of employment, and determined that they did not demonstrate that the Beneficiary worked as a sushi chef during his entire time with the [redacted]. Finally, we stated that the Petitioner had submitted no independent, objective evidence that the Beneficiary was qualified to be hired as a full-fledged sushi chef at the age of 18, which was his age in December 2001 when his employment at the restaurant allegedly began. Based on the foregoing review of the evidence we concluded that the Petitioner did not establish that the Beneficiary had the requisite two years of experience as a sushi chef to qualify for the job offered under the terms of the labor certification.

On motion the Petitioner submits a brief and copies of some materials already in the record. The Petitioner contends that we made an erroneous conclusion of fact that the Beneficiary did not have

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

two years of qualifying experience because there were no material inconsistencies in the documents describing the Beneficiary's job duties at [redacted] which included (1) the labor certification, (2) the first "career certificate" of the restaurant's owner in 2010, (3) the second "career certificate" of the restaurant's owner in 2016, (4) a letter from the Beneficiary in 2017, and (5) the statement by the restaurant's owner in 2017. The Petitioner analyzes the job duties described in these five documents and concludes that each one is consistent with the overall job title of sushi chef, regardless of whether some of that experience included a training period. The Petitioner also asserts that we erroneously concluded that the Beneficiary did not work full-time at [redacted] The Petitioner alludes to the previous statements of the restaurant owner and the Beneficiary that the Beneficiary worked in the range of 30 to 60 hours per week, which averages out to full-time employment, and that the bank deposits of "salary" did not represent all of the Beneficiary's compensation from the restaurant because he was partially paid in cash. The Petitioner does not address the issue we discussed in our appellate decision as to how the Beneficiary could work full-time for the restaurant in 2002 at the same time he was attending university full-time.

As summarized above, the Petitioner's motion asserts that we made erroneous factual conclusions in our appellate decision because we misinterpreted the documentary evidence of the Beneficiary's work experience. A motion to reconsider, however, must be based on an incorrect application of law or policy in our prior decision. The Petitioner does not identify any law or any policy that we incorrectly applied in reviewing the documentary evidence of the Beneficiary's experience and determining whether it established that the Beneficiary met the experience requirement of the labor certification.

Thus, the Petitioner has not shown proper cause for us to reconsider our decision on the issue of whether the Beneficiary met the experience requirement of the labor certification. The failure to establish that the Beneficiary met the two-year experience requirement of the labor certification also means that he is not eligible for the requested classification of skilled worker. Accordingly, we will dismiss the motion to reconsider.

B. Willful Misrepresentation of a Material Fact

The Petitioner asserts that the Beneficiary has not willfully misrepresented any material fact in these proceedings. Echoing its argument with regard to the Beneficiary's qualifying experience, the Petitioner asserts that we made an erroneous factual conclusion in our appellate decision that the Beneficiary misrepresented a material fact about his work experience because we misinterpreted the documentary evidence. A motion to reconsider, however, must be based on an incorrect application of law or policy in our prior decision. The Petitioner does not identify any law or any policy that we incorrectly applied in our review of the documentation of record and our determination that the Beneficiary misrepresented a material fact concerning his work experience. Thus, the Petitioner has not shown proper cause for us to reconsider our decision on the issue of the Beneficiary's willful misrepresentation of a material fact concerning his work experience.

III. CONCLUSION

The Petitioner has not shown proper cause for reconsideration of our previous decision. Therefore, the Petitioner has not established eligibility for the benefit sought.[3]

ORDER: The motion to reconsider is dismissed.

[3] The petitioner bears the burden of proof to demonstrate eligibility by a preponderance of the evidence. Section 291 of the Act; *Matter of Chawathe*, 25 I&N Dec. 369, 375 (AAO 2010).