U.S. Citizenship and Immigration Services

Non-Precedent Decision of the Administrative Appeals Office

In Re: 17773679

Date: SEPT. 20, 2021

Appeal of Texas Service Center Decision

Form I-140, Immigrant Petition for an Alien Worker

The Petitioner, a service station, seeks to employ the Beneficiary as an assistant manager. It requests "other worker" classification for the Beneficiary under the third preference immigrant category. Immigration and Nationality Act (the Act) section 203(b)(3)(A)(iii), 8 U.S.C. § 1153(b)(3)(A)(iii). This employment-based "EB-3" immigrant classification allows a U.S. employer to sponsor for lawful permanent resident status a foreign national who is capable of performing unskilled labor that requires less than two years of training or experience and is not of a temporary or seasonal nature.

The Director of the Texas Service Center initially denied the petition on the ground that the Petitioner and the Beneficiary willfully misrepresented the Beneficiary's employment history. On appeal we determined that the misrepresentation finding alone did not warrant the petition's denial. Accordingly, we withdrew the Director's decision and remanded the case for further consideration.

After issuing a notice of intent to deny (NOID) the petition, and reviewing the Petitioner's response thereto, the Director issued a new decision denying the petition on the ground that the evidence of record did not establish that the Beneficiary gained at least 12 months of experience in the job offered, as required to meet the terms of the labor certification and to qualify for the requested visa classification.[1] In addition, the Director found that the Beneficiary willfully misrepresented a material fact regarding his work experience on the labor certification, and stated that this finding must be considered in any future proceeding involving his admissibility to the United States.

The matter is once more before us on appeal. The Petitioner asserts that the Director's decision was erroneous, that its previously submitted evidence establishes that the Beneficiary has the qualifying experience required by the labor certification, and that the Beneficiary did not willfully misrepresent his employment history on the labor certification.

The AAO reviews the questions in this matter *de novo*. *See Matter of Christo's Inc.*, 26 I&N Dec. 537, 537 n.2 (AAO 2015). It is the Petitioner's burden to establish eligibility for the requested benefit by a preponderance of the evidence. *See* Section 291 of the Act, 8 U.S.C. § 1361; *Matter of Chawathe*, 25 I&N Dec. 369, 375 (AAO 2010). Upon *de novo* review, we will dismiss the appeal.

[1] The Director also determined that the Petitioner established its ability to meet its proffered wage obligations to the instant Beneficiary and another I-140 beneficiary in accordance with the requirements of 8 C.F.R. § 204.5(g)(2).

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) 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 (Form I-140) 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 April 12, 2018, accompanied by a labor certification that was filed with the DOL on September 22, 2017, and certified by the DOL in March 2018.

A. Labor Certification Requirements and the Beneficiary's Experience

The regulation at 8 C.F.R. § 204.5(l)(3)(ii)(D) states that "[i]f the petition is for an unskilled (other) worker, it must be accompanied by evidence that the alien meets any educational, training and experience, and other requirements of the labor certification." All requirements must be met by the petition's priority date,[2] which in this case is September 22, 2017. *See Matter of Wing's Tea House*, 16 I&N Dec. 158, 159 (Acting Reg'l Comm'r 1977). The only requirement for the proffered position of assistant manager, as indicated in section H of the labor certification, is 12 months of experience in the job offered. According to sections J and K of the labor certification the Beneficiary met the experience requirement of section H by virtue of a job with [redacted] in [redacted] Bangladesh, working as a manager from July 15, 2010 to November 30, 2012.

As its initial evidence of the Beneficiary's work experience the Petitioner submitted a letter dated 07/11/16 from [redacted] Proprietor, on the letterhead of [redacted]), in [redacted] stating that the Beneficiary was employed as a manager from July 2010 to November 2012 and listing the job duties he allegedly performed. In response to the Director's initial NOID in March 2019 the Petitioner submitted some additional documentation, including a second letter from [redacted]'s proprietor, [redacted], stating that the Beneficiary "used to manage our store every day after he finished his school . . . [and] I used to pay him cash . . . " [redacted] also stated that "[a]s a small business, we are not required from Bangladesh government to pay payroll taxes, so we don't have any payroll system in our company." The Petitioner also submitted a letter from another employee of [redacted] who asserted that he had worked for the company since 2009 and that the Beneficiary was his supervisor from July 2010 to November 2012. In addition, the Petitioner submitted two ledgers, in a foreign language (presumably Bengali) with English translations, which

[2] 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).

listed monthly salary payments purportedly made by [redacted] to the Beneficiary during the years 2011 and 2012.

Following the AAO's remand decision and the issuance of a second NOID by the Director in July 2020, the Petitioner submitted a third letter from [redacted]'s proprietor, [redacted] with a more comprehensive description of the job duties allegedly performed by the Beneficiary as a manager during the years 2010-2012. In addition, the Petitioner submitted a second letter from the employee of [redacted] who claimed to have been supervised by the Beneficiary in the years 2010-2012 and now stated that he was a manager himself, as well as a letter from a nearby store owner who did business with [redacted] and stated that he remembered the Beneficiary working there as a manager for approximately two years during the time frame of 2010-2012.

In a decision dated January 19, 2021, the Director denied the petition. Noting that the labor certification requires experience in the job offered, the Director indicated that the Beneficiary's alleged experience as the manager of a store selling electronics products is not the same experience as managing, or assistant managing, a service station. Even if managerial experience at an electronics store would be considered qualifying experience for the job offered, the Director stated that the record lacked objective independent evidence that the Beneficiary was actually employed by [redacted] The Director indicated that the Petitioner had not identified the provision in Bangladeshi law which allegedly exempted the Petitioner and the Beneficiary from reporting the Beneficiary's income in the years 2010-2012, despite being requested to do so in the previous NOID. The Director alluded to the fact that the Beneficiary did not claim any work experience at [redacted] on an earlier nonimmigrant visa (NIV) application filed in 2012 for an F-1 (student) visa. While the Beneficiary claimed that the omission of the alleged work experience on the NIV application was a mistake and that he did not think his employment history was relevant to a student visa application, the Director indicated that the record did not establish what was relevant and what was not in an F-1 visa application, and that the Beneficiary's explanation for the non-inclusion of his alleged work experience in that application was "not persuasive." The Director determined that the Petitioner had not resolved the evidentiary discrepancies regarding the Beneficiary's alleged experience with [redacted] and cited the legal authority for USCIS to "reject a fact stated in the petition if it does not believe it to be true." Section 204(b) of the Act; *see also Anetekhai v. INS*, 876 F.2d 1218, 1220 (5th Cir. 1989); *Lu-Ann Bakery Shop, Inc. v. Nelson*, 705 F. Supp. 7, 10 (D.D.C. 1988); *Systronics Corp. v. INS*, 153 F. Supp. 2d 7, 15 (D.D.C. 2001). The Director concluded that the Petitioner did not establish that the Beneficiary had the requisite experience, as claimed in the labor certification, to qualify for the proffered position.

On appeal the Petitioner asserts that the Director did not provide a legal basis for the denial of the petition because he did not specify which statement of the Beneficiary's employment history was false – whether on the NIV application in 2012 stating that the Beneficiary had no employment experience, or the labor certification application in 2017 stating that the Beneficiary was employed by [redacted] in the years 2010-2012. According to the Petitioner, if the denial of any current or prior employment on the NIV application of 2012 was invalid, then the employment history as stated on the subsequent labor certification application (that the Beneficiary worked for [redacted] in the years 2010-2012) would be correct. The Petitioner also contends that the Director did not give proper consideration to the documentation it submitted concerning the Beneficiary's alleged employment with [redacted]

We do not agree with the Petitioner's claims. First of all, the Director did not have to determine which of the inconsistent employment histories stated in the prior applications[3] was true and which was not. It was sufficient for the Director to conclude, as he did, that the Petitioner did not resolve the inconsistencies in the record with the evidence it submitted and therefore did not meet its burden, *per Matter of Chawathe*, to establish that the Beneficiary gained the 12 months of experience required by the labor certification to qualify for the job offered. At the same time, it is clear from the decision as a whole that the Director gave considerable weight to the Beneficiary's initial denial of any employment history on his NIV application in 2012, which preceded by five years the labor certification application on which the Beneficiary claimed for the first time that he was previously employed by [redacted] Contrary to the Petitioner's charge, the language of the Director's decision indicates that he did consider the documentation submitted by the Petitioner in support of the Beneficiary's claim to have worked for [redacted] as well as the Beneficiary's explanation(s) for the omission of his alleged employment with [redacted] from the NIV application in 2012, filed at a time when he was allegedly working there. Moreover, we agree with the Director's assessment of that evidence.

In its appeal brief the Petitioner asserts that the Director failed to acknowledge that the salary ledgers listing the alleged monthly payments by [redacted] to the Beneficiary in 2011 and 2012 were copies of the company's "actual detailed payroll records for [the Beneficiary] recorded near the actual time of (contemporaneously with) his employment." It is not at all clear from an inspection of those ledgers, however, that they are in fact contemporaneous payroll records, as claimed. The Bengali language documents bear no authenticating marks, such as notary seals from 2011 and 2012, certifying that the payments listed for each month during those two years were actually recorded at that time.[4] No other documentary evidence been submitted to corroborate the Beneficiary's alleged salary payments from [redacted] in 2011 and 2012. While the Petitioner asserts that no such documentation was generated in 2010, 2011, and 2012 because [redacted] and the Beneficiary were exempted under Bangladeshi law from reporting the Beneficiary's income, the only supporting evidence submitted by the Petitioner is a circular from Bangladesh's National Board of Revenue dated 12/08/2012, in Bengali with an English translation,[5] whose substance does not appear to support the reporting exemption claim. The Petitioner has not explained how the information provided in the circular exempted [redacted] and the Beneficiary from reporting the Beneficiary's alleged income in 2010, 2011, and 2012.

The Petitioner asserts in the appeal brief that the three letters from [redacted]'s owner, supplemented by the letters of an employee of [redacted] and a nearby shop owner, contain detailed information about the Beneficiary's employment and establish that the job duties he performed as a manager with [redacted] qualify him for the job offered under the terms of the labor certification. The probative value

[3] In addition to the F-1 visa application in 2012 which stated that the Beneficiary had no employment history, and the labor certification application in 2017 which stated that the Beneficiary was employment by [redacted] in the years 2010-2012, the Beneficiary filed an adjustment of status application (Form I-485) concurrently with the instant I-140 petition in 2018 on which he stated, consistent with the labor certification application, that he was employed by [redacted] in the years 2010-2012.

[4] We also note that the English translations of the Bengali language documents do not comport with the requirements of 8 C.F.R. § 103.2(b)(3), which provides that "[a]ny document containing foreign language submitted to USCIS shall be accompanied by a full English language translation which the translator has certified as complete and accurate, and by the translator's certification that he or she is competent to translate from the foreign language into English."

[5] This translation also fails to comport with the requirements of 8 C.F.R. § 103.2(b)(3).

of these letters is tempered, however, by the fact that the Beneficiary denied any such employment in the F-1 visa application he filed in 2012, at the exact time he now claims to have been working for [redacted] Not until five years later, on the labor certification application underlying the current I-140 petition, did the Beneficiary claim that he worked for [redacted] in the years 2010-2012. We also note that the Beneficiary's birthdate was November 8, 1994, which means that he was only 15 years old when he allegedly began working at Lutfullah in July 2010, and that he had just turned 18 at the time his employment allegedly ended in November 2012. Despite his young age, [redacted]'s owner asserts that the Beneficiary worked the entire time as a manager.[6] While perhaps not impossible, the Beneficiary's age raises additional concerns about the veracity of his claimed experience.

For the reasons discussed above, we conclude that the evidence of record does not establish that the Beneficiary gained any experience in a managerial position with [redacted] during the years 2010-2012. Therefore, the Petitioner has not met its burden of establishing that the Beneficiary had at least 12 months of qualifying experience by the priority date of September 22, 2017, as the labor certification requires. We will dismiss the appeal on that ground.

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 the 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 denial decision issued on January 19, 2021, the Director found that the Beneficiary willfully misrepresented a material fact in the labor certification by claiming work experience that he did not have.[7] The Director referred to the Beneficiary's NIV application in May 2012 in which he stated that he was "not employed" currently and that he had not been "previously employed." The Director cited the Beneficiary's statement that he had no independent objective evidence of his claimed employment with [redacted] such as wages reported to the Bangladeshi government. The Director referred to the affidavits submitted by the Beneficiary in which he indicated that a third-party company, [redacted], assisted him in preparing the NIV application, which he claims not to have read himself before it was submitted to the U.S. Consulate. The Director stated that the Beneficiary did not claim, and the record did not indicate, that [redacted] completed the NIV application without relying upon information furnished by the Beneficiary, and that the Beneficiary's claim not to have

[6] At the end of his third and final letter [redacted]'s owner stated that the Beneficiary was hired as an assistant manager and promoted to manager, though everywhere else in his three letters he referred to the Beneficiary's job just as manager.

[7] While stating that the Petitioner, by signing the I-140 petition, took legal responsibility for the truth and accuracy of all the evidence submitted in support thereof (including the labor certification), the Director made no finding that the Petitioner willfully misrepresented any material fact in this proceeding.

read the contents of his NIV application was "not persuasive." Since the NIV application specifically asked for information about the applicant's work experience, the Director stated that it would have been provided by the Beneficiary on his NIV application in May 2012. As no such information was provided on the NIV application, the Director determined that the Beneficiary "knowingly and intentionally misrepresented his work experience on the labor certification" filed in 2017 by claiming that he was employed by [redacted] in the years 2010-2012. Finally, the Beneficiary's claim that his work history was irrelevant in his application for an F-1 student visa was rejected by the Director because the record did not establish that the Beneficiary was not required to accurately report his work history on his NIV application. The Director concluded that the willful misrepresentation of a material fact finding against the Beneficiary "shall be considered in any future proceeding where admissibility is an issue."

On appeal the Petitioner reiterates its contentions that the Beneficiary's failure to "mention his employment" on his NIV application was (1) incorrect, but not a knowing or intentional misrepresentation, and (2) not material to the Beneficiary's application for an F-1 student visa. The Petitioner requests that we refer to the notarized statement submitted by the Beneficiary in response to the Director's initial NOID, which is the first of three statements submitted by the Beneficiary during these proceedings. In that initial statement the Beneficiary indicated that after his application for admission to a U.S. university was accepted he was referred to [redacted] for assistance in preparing his NIV application for an F-1 student visa. According to the Beneficiary, he was given a two-page questionnaire by [redacted] which was filled out for him by [redacted], a consultancy in [redacted] for students wanting to study abroad, and returned by him to [redacted] which utilized the questionnaire to complete the Beneficiary's NIV application. The Beneficiary asserted that he did not read the contents of either the two-page questionnaire filled out by [redacted] or the NIV application completed by [redacted] In a subsequent statement submitted with the Petitioner's appeal of the Director's initial decision the Beneficiary asserted that the [redacted] agent did not ask about his employment history and did not mention the need for any employment information in filling out his NIV application. In his third statement, submitted in response to the Director's second NOID, the Beneficiary acknowledged his mistake in not reviewing the NIV application before its submission, but reiterated his claim that he did not think that whether or not he had worked was relevant to his application for an F-1 student visa.

We are not persuaded by the Beneficiary's statements. It is not plausible that the two-page questionnaire allegedly filled out by [redacted] and the NIV application allegedly filled out by [redacted] were completed without direct input from the Beneficiary, including information about his employment history since that information would not have been known to [redacted] or [redacted] Therefore, the statements on the Beneficiary's NIV application that he was not currently employed or previously employed must have been based on information provided by the Beneficiary. No other explanation has been provided for those answers on the NIV application. The Beneficiary's claim that he did not think his alleged employment history was relevant in the NIV application seeking an F-1 student visa is unconvincing. The Beneficiary had no discretion to decide on his own what requested information was relevant, and what not, on his application. In any event, the Beneficiary did not leave the employment questions blank on the NIV application, which might support his claim that he thought the information was irrelevant. Instead, the Beneficiary answered the questions by stating that he was not currently and had not previously been employed. Not until five years later, in completing the labor certification

application requiring 12 months of qualifying experience for the proffered position of assistant manager, did the Beneficiary for the first time claim that he had previously been employed by [redacted]

Based on the evidence of record and for the reasons discussed above, we conclude that Beneficiary willfully misrepresented a material fact on the labor certification by claiming previous experience with [redacted] and that this finding must be considered in any future proceeding involving the Beneficiary's admissibility to the United States.

III. CONCLUSION

The Petitioner has not established that the Beneficiary had at least 12 months of experience in the job offered by the priority date of September 22, 2017. Therefore, the Beneficiary does not meet the labor certification's minimum experience requirement and does not qualify for the requested visa classification. The appeal is dismissed on that ground.

The evidence of record also establishes that the Beneficiary willfully misrepresented a material fact regarding his employment history on the labor certification.

ORDER: The appeal is dismissed.