U.S. Citizenship and Immigration Services

Non-Precedent Decision of the Administrative Appeals Office

In Re: 26377982

Date: SEP. 26, 2023

Appeal of Texas Service Center Decision

Form I-140, Immigrant Petition for Alien Workers (Skilled Worker)

The Petitioner, a stone fabrication business, seeks to employ the Beneficiary as a sales manager. It requests classification of the Beneficiary as a skilled worker under the third preference immigrant classification. Immigration and Nationality Act (the Act) section 203(b)(3)(A)(i), 8 U.S.C. § 1153(b)(3)(A)(i). This employment-based immigrant classification allows a U.S. employer to sponsor a noncitizen for lawful permanent resident status to work in a position that requires at least two years of training or experience.

The Director of the Texas Service Center denied the petition, concluding that the record did not establish that the Beneficiary was qualified for the offered position. The Director also found that the Petitioner willfully misrepresented the Beneficiary's qualifying work experience. The matter is now before us on appeal. 8 C.F.R. § 103.3.

The Petitioner bears the burden of proof to demonstrate eligibility by a preponderance of the evidence. *Matter of Chawathe*, 25 I&N Dec. 369, 375-76 (AAO 2010). We review the questions in this matter de novo. *Matter of Christo's, Inc.*, 26 I&N Dec. 537, 537 n.2 (AAO 2015). 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. LAW

Employment-based immigration generally follows a three-step process. To permanently fill a position in the United States with a noncitizen, a prospective employer must first obtain certification from the U.S. Department of Labor (DOL). 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 noncitizen 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). 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 noncitizen may finally apply for an immigrant visa abroad or, if eligible, adjustment of status in the United States. Section 245 of the Act, 8 U.S.C. § 1255.

A petition for a skilled worker must establish that the beneficiary meets the educational, training, experience, and any other requirements on the labor certification. 8 C.F.R. § 204.5(l)(3)(ii)(B). Further, a petitioner must establish a beneficiary's possession of the 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] A beneficiary's qualifying work experience should be documented by a letter from the former employer which includes the name, address, and title of the writer, as well as a specific description of the beneficiary's work duties. 8 C.F.R. § 204.5(g)(1). If such evidence is unavailable, the qualifying work experience may be documented using other evidence. *Id.*

II. ANALYSIS

In November 2022, the Petitioner filed the present petition, seeking to sponsor the Beneficiary for an immigrant visa. The Director issued a request for evidence (RFE) requesting documentation showing that the Petitioner has the ability to pay the proffered wage. After receiving the Petitioner's response, the Director denied the petition on the ground that the Beneficiary does not have the work experience required for the offered position and found that the Petitioner willfully misrepresented the Beneficiary's work experience in the labor certification.

A. Beneficiary's Work Experience

On appeal, the Petitioner submits new documentation regarding the Beneficiary's work experience. While we generally do not consider new evidence provided on appeal, in this instance we will do so because the Director did not put the Petitioner on notice of the evidentiary issues regarding the Beneficiary's work experience before denying the petition. *See Matter of Soriano*, 19 I&N Dec. 764, 766 (BIA 1988) (citing *Matter of Obaigbena*, 19 I&N Dec. 533 (BIA 1988)). ("Where a visa petition is denied based on a deficiency of proof, the petitioner was not put on notice of the deficiency and given a reasonable opportunity to address it before the denial, and the petitioner offers additional evidence addressing the deficiency with the appeal, then in the ordinary course we will remand . . ."). Upon review, we conclude that the new evidence regarding the Beneficiary's work experience is material to the ground of denial and will therefore remand this matter so the Director can review this evidence in the first instance.

B. Willful Misrepresentation

The Director found that the Petitioner willfully misrepresented the Beneficiary's qualifying work experience in the labor certification and Form I-140, Immigrant Petition for Alien Workers.[2] The Director also stated at various points that the Beneficiary misrepresented his work history, but the Director did not appear to make a formal finding of willful misrepresentation of a material fact against the Beneficiary. To the extent that such a finding has been entered against the Beneficiary, we hereby

[1] The petition priority date is the date the underlying labor certification was filed with DOL. 8 C.F.R. § 204.5(d). In this case, the priority date is February 12, 2022.

[2] Form I-140 does not contain any questions about the Beneficiary's work history, and the Director did not clarify what false representations on that form, if any, are attributable to the Petitioner in this case.

withdraw it. On remand, the Director should determine whether the Beneficiary willfully misrepresented a material fact and, if so, enter that finding against him. On appeal, the Petitioner provides a Brazilian business registration document and an affidavit from the Beneficiary addressing the Director's allegations. We will withdraw the finding of willful misrepresentation of a material fact against the Petitioner for the reasons below.

The labor certification in this case states that the offered position requires 24 months of experience as a sales manager, and that no other education, training, or experience is required or acceptable. The labor certification further states that the Beneficiary fulfilled this requirement through his work experience as a sales manager with [redacted] from September 1, 1993, to November 30, 1996. The petition also includes a letter from [redacted] stating the same employment dates and including the information required by 8 C.F.R. § 204.5(g)(1).

However, the Director found that another labor certification application that was filed on the Beneficiary's behalf in 2007 stated the Beneficiary's former employer was called [redacted] and that he worked there from September 20, 1993, to November 1, 1996. The older labor certification also stated that the employer sold kitchen items, whereas the current labor certification states that it was a book and magazine distributor. Finally, the two labor certifications list two different street addresses for the employer. Due to these inconsistencies, the Director concluded that the Petitioner had willfully misrepresented the Beneficiary's work history.[3]

A finding of willful misrepresentation of a material fact requires the following elements: the party procured or sought to procure a benefit under U.S. immigration laws; they made a false representation; and the false representation was willfully made, material to the benefit sought, and made to a U.S. government official. Section 212(a)(6)(C)(i) of the Act, 8 U.S.C. § 1182(a)(6)(C)(i); *see Matter of Y-G-*, 20 I&N Dec. 794, 796 (BIA 1994); *see generally* 8 *USCIS Policy Manual* J.2(B), https://www.uscis.gov/policymanual. The record indicates, and the parties do not dispute, that the Petitioner made representations to U.S. government officials while seeking to procure an immigrant visa, which is a benefit under U.S. immigration laws.

However, the Director did not adequately support her finding that the Petitioner willfully misrepresented the Beneficiary's work history on the labor certification and the Form I-140. A false representation is considered willful if it is made knowingly, as opposed to accidentally, inadvertently, or in a good faith belief that the factual claims are true. *See Matter of Healy and Goodchild,* 17 I&N Dec. 22 (BIA 1979); *see generally* 8 *USCIS Policy Manual*, *supra* at J.3(D)(1). The Director noted that the Petitioner declared under penalty of perjury that the contents of the labor certification and the I-140 petition were true and correct, and found that this fulfilled the requirement of willfulness.

[3] Where there are material inconsistencies in the evidence, such inconsistencies must be resolved using independent, objective evidence pointing to where the truth lies. *Matter of Ho*, 19 I&N Dec. 582, 591-92 (BIA 1988). Unresolved material discrepancies may lead us to reevaluate the reliability and sufficiency of the other evidence submitted in support of the requested immigration benefit. *Id.* However, as noted above, the Director did not afford the Petitioner the opportunity to resolve the evidentiary inconsistencies in this case because her RFE did not mention the issue or identify examples of evidence that could be submitted to resolve it, and the subsequent denial did not explain the need for independent, objective evidence pointing to where the truth about the Beneficiary's work history lies. 8 C.F.R. §§ 103.2(b)(8)(i)-(iv), 103.3(a)(1)(i); *see generally* 1 *USCIS Policy Manual*, *supra* at E.6(F)(1), (3).

However, the record does not establish that the Petitioner had knowledge that the certification's statements regarding the Beneficiary's work history were untrue.[4] Form I-140 does not contain any questions about the Beneficiary's work history, and the Director did not clarify what false representations on that form, if any, are attributable to the Petitioner in this case.

The qualifying work history in this case occurred 25 years prior to the petition's filing, well before the Petitioner began the process of hiring the Beneficiary, and the work experience information in the labor certification was therefore presumably obtained from the Beneficiary rather than from the Petitioner's direct knowledge.[5] The record therefore does not support a finding that the Petitioner willfully made any false statements regarding the Beneficiary's work experience. We will withdraw the finding of willful misrepresentation of a material fact against the Petitioner.

Further, as noted above, the Director stated that the Beneficiary misrepresented his work history, but the Director did not appear to make a formal finding of willful misrepresentation of a material fact against the Beneficiary. For example, after describing the inconsistencies between the two labor certifications, the decision states in relevant part:

> The employment information for the previous employer has discrepancies in the name of the company, the type of business the company is operating, and the dates of employment. Based on the evidence submitted with the current and previous filings, it does show that the beneficiary misrepresented his work history to qualify for the classification.
>
> By claiming the Beneficiary has twenty-four months of work experience, the petitioner willfully made a false representation, and it is material to whether the beneficiary is eligible for the requested benefit.
>
> USCIS will enter a finding of willful misrepresentation of a material fact against the petitioner.

To the extent that such a finding has been entered against the Beneficiary, we hereby withdraw it. On remand, the Director should determine whether the Beneficiary willfully misrepresented a material fact and, if so, enter that finding against him.

C. Ability to Pay

Although not addressed by the Director in her decision, the Petitioner has not established its continuing ability to pay the proffered wage. A petitioner must establish its ability to pay the proffered wage from the priority date of the petition until the beneficiary obtains lawful permanent residence. 8 C.F.R. § 204.5(g)(2). Evidence of ability to pay must generally include annual reports, federal tax returns, or audited financial statements. *Id.* If a petitioner employs 100 or more workers, USCIS may accept a

[4] Notably, the employer declaration in the labor certification states in relevant part: "I declare under penalty of perjury that I have read and reviewed this application and that *to the best of my knowledge* the information contained herein is true and accurate." (emphasis added).

[5] The Beneficiary certified under penalty of perjury that Sections J and K of the labor certification, which address his personal information and work history, are true and correct.

statement from a financial officer attesting to the petitioner's ability to pay the proffered wage. *Id.* In appropriate cases, additional evidence, such as profit/loss statements, bank account records, or personnel records, may be submitted by the petitioner or requested by USCIS. *Id.*

To establish its ability to pay the proffered wage, the Petitioner provided its 2021 federal tax return. However, the petition's priority date was in 2022. Because the record does not include regulatorily-prescribed evidence of ability to pay for the priority date year, we will remand the matter to the Director for further consideration. On remand, the Director should request evidence of the Petitioner's continuing ability to pay the proffered wage from 2022 onwards.

III. CONCLUSION

Because the Petitioner has provided new material evidence that was not before the Director at the time the decision was issued, we will remand the matter so the Director can review this evidence in the first instance and determine whether the Petitioner has met the requirements for classifying the Beneficiary as a skilled worker. On remand, the Director should request evidence of the Petitioner's continuing ability to pay the proffered wage and any other evidence considered relevant to the new determination. The Director should also determine whether the Beneficiary willfully misrepresented a material fact and, if so, enter that finding against him. We express no opinion regarding the ultimate resolution of this case on remand.

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