U.S. Citizenship and Immigration Services

Non-Precedent Decision of the Administrative Appeals Office

In Re: 1623075

Date: SEPT. 29, 2020

Appeal of Texas Service Center Decision

Form I-140, Immigrant Petition for Professional

The Petitioner seeks to employ the Beneficiary as a public relations specialist. It requests classification of the Beneficiary as a professional under the third preference immigrant classification. Immigration and Nationality Act (the Act), section 203(b)(3)(A)(ii), 8 U.S.C. § 1153(b)(3)(A)(ii). This employment-based immigrant classification allows a U.S. employer to sponsor a professional with a baccalaureate degree for lawful permanent resident status.

The Director of the Texas Service Center revoked the petition's approval, concluding that the Petitioner and the Beneficiary willfully misrepresented the Beneficiary's employment history and that the Beneficiary engaged in unauthorized employment prior to the Form I-140 being approved. He also invalidated the labor certification based on willful misrepresentation of material facts.

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 remand the matter to the Director for further consideration and entry of a new decision.

I. THE EMPLOYMENT-BASED IMMIGRATION PROCESS

Employment-based immigration generally follows a three-step process. First, an employer obtains an approved labor certification from the U.S. Department of Labor (DOL).[1] *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 id*. Second, the employer files an immigrant visa petition 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 applies 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.

[1] The priority date of a petition is the date the DOL accepted the labor certification for processing, which in this case is July 7, 2010. *See* 8 C.F.R. § 204.5(d).

II. REVOCATION OF A PETITION'S APPROVAL

After granting a petition, USCIS may revoke the petition's approval "at any time" for "good and sufficient cause." Section 205 of the Act, 8 U.S.C. § 1155. If supported by the record, a director's realization that a petition was erroneously approved may justify revocation. *Matter of Ho*, 19 I&N Dec. 582, 590 (BIA 1988).

Good and sufficient cause exists to issue a notice of intent to revoke (NOIR) where the record at the time of the notice's issuance, if unexplained or unrebutted, would have warranted the petition's denial. *Matter of Estime*, 19 I&N Dec. 450, 451 (BIA 1987). Similarly, revocation is proper if the record at the time of the decision, including any explanation or rebuttal evidence provided by a petitioner, warranted a petition's denial. *Id.* at 452.

III. THE BENEFICIARY'S EXPERIENCE

A beneficiary must meet all of the requirements of the offered position set forth on the labor certification by the priority date of the petition. 8 C.F.R. § 103.2(b)(1), (12); *Matter of Wing's Tea House*, 16 I&N Dec. 158, 159 (Acting Reg'l Comm'r 1977). Section H of the labor certification states that the offered position of public relations specialist requires a bachelor's degree in any field and 24 months of experience in the job offered. Experience in an alternate occupation is not acceptable. At issue in this case is the Beneficiary's qualifying experience.

The labor certification states that the Beneficiary was unemployed from June 20, 2009, to July 5, 2010; that he worked full-time (40 hours per week) as a teacher for a public school in [redacted] Texas, from August 5, 2005, to June 19, 2009; and that he worked as a full-time (40 hours per week) as a public relations specialist at [redacted] in Spain from February 1, 2000, to June 30, 2005.

Evidence relating to qualifying experience must be in the form of a letter from a current or former employer and must include the name, address, and title of the writer, and a specific description of the duties performed by the beneficiary. *See* 8 C.F.R. § 204.5(l)(3). With the petition, the Petitioner submitted a letter dated May 12, 2008, with English translation, from the President of [redacted], stating that the Beneficiary "worked from June 2000 through June 2005 as a public relations specialist." The letter listed his duties.

In the NOIR, the Director indicated that the Beneficiary was interviewed by a consular officer in Spain on May 3, 2016; that he stated under oath that he worked as a teacher in Spain from 2000 to 2005; and that he stated that he was a member of [redacted] during that time, but he did not indicate that he worked full-time as a public relations specialist for them. Further, the Director noted that the Beneficiary's [redacted], his employment history document from Spain, does not list his employment with [redacted] Instead, the document shows that the Beneficiary held other jobs between 2000 and 2005 and that his primary employment was as a teacher. The Director also stated in the NOIR that the Beneficiary's LinkedIn account lists his employment as a teacher from 2000 to 2005 but makes no reference to his employment with [redacted] The Director indicated that the Beneficiary presented an email stating that the irregular hours of a teacher and summer vacations permitted him to work for [redacted] full-time for five years. The Director also indicated that Spanish law prohibits the number of hours a worker can work, "making his claim of holding two full-time jobs an impossibility." Further,

the Director stated that Spanish employers must provide a contract to employees and register the contract with Spanish social security authorities, and that the record did not indicate that [redacted] ever registered the working relationship and contract with the Spanish social security authorities. The Director additionally stated that the Beneficiary provided a letter from the Secretary of [redacted] stating that the Beneficiary worked full-time as a public relations specialist from 2000 to 2005 and that he received compensation of 400 euros per month in cash in lieu of a salary, but that this amount is well below Spain's minimum wage. The Director further noted that the Beneficiary stated in a phone conversation with the consular officer that he was paid under the table with petty cash to avoid leaving records of payments. However, the Director noted that the President of [redacted] could not confirm in a phone call with the consular officer that the Beneficiary was a full-time employee, and that no paystubs were submitted following the Beneficiary's interview as requested by the consular officer.

The Director further stated in the NOIR that the Beneficiary worked for the Petitioner concurrent to his full-time employment as a teacher in the State of Texas from November 2007 to October 2008, and that the Beneficiary stated that he worked without pay until his petition to work two concurrent jobs was authorized in July 2008. The Director stated that this evidence of unauthorized employment further calls into question the integrity of the petition. The Director asserted in the NOIR that the Petitioner must resolve incongruities in the record with independent, objective evidence pointing to where the truth lies. *Matter of Ho*, 19 I&N Dec. 582, 591-92 (BIA 1988). Doubt cast on any aspect of the Petitioner's proof may undermine the reliability and sufficiency of the remaining evidence offered in support of the visa petition. *Id.* The Director further asserted in the NOIR that the evidence suggests that the Petitioner and the Beneficiary willfully misrepresented professional experience to qualify for an immigration benefit, and that USCIS may invalidate the labor certification based upon a finding of fraud or willful misrepresentation.

In response to the NOIR, the Petitioner asserted that the Beneficiary worked on a full-time basis for [redacted] as a volunteer from 2000 to 2005. It submitted additional documents supporting the Beneficiary's experience, including an affidavit from the Beneficiary; a letter from the President of [redacted], a letter from the Secretary of [redacted]; a letter from the Second Vice President of the [redacted]; a letter from the General Secretary of [redacted], a legal report from [redacted], a letter from the Director of the [redacted] Newspaper Today; and a letter from the President of the Press Association o[redacted] The President of [redacted] stated that he serves in a full-time, voluntary role at [redacted] while working full-time as a surgeon and serving as head of the surgery service at Hospital [redacted] and he confirmed that that the Beneficiary also worked full-time for [redacted] from 2000 to 2005 on a similar voluntary basis. The Secretary of [redacted] confirmed that the Beneficiary worked full-time as a volunteer for [redacted] from 2000 to 2005, and that he was paid a "gratuity" of "400 monthly cash" to cover his expenses. The General Secretary of [redacted] stated that [redacted] is a nonprofit political entity; that Spanish law requires volunteer organizations to be integrated or have volunteers and to develop part or all of its actions through volunteer programs; that such entities have the right to issue volunteers a certificate detailing their activities; that [redacted] cannot offer a labor contract to its volunteers or register them for social security; that such volunteer activities "are carried out without economic or material consideration, without prejudice to payment of the reimbursable expenses;" that the Beneficiary was a voluntary worker for [redacted] from 2000 to 2005; and that the Beneficiary received 400 euros per month for reimbursable expenses as permitted under Spanish law. The legal report described the legal nature of volunteer activities in nonprofit entities in Spain and stated that the Beneficiary legally provided volunteer services without a work contract or

salary for [redacted] between 2000 and 2005 while also providing renumerated services to a public entity under a work contract. Additionally, in response to the NOIR, the Petitioner denied that it employed the Beneficiary on an unauthorized basis between 2007 and 2008, and the Beneficiary denied that he ever told the consular officer that he was employed by the Petitioner without authorization.

The Director revoked the approval of the petition on March 15, 2018, concluding that the Petitioner and the Beneficiary willfully misrepresented the Beneficiary's employment history and that the Beneficiary engaged in unauthorized employment prior to the Form I-140 being approved. He also invalidated the labor certification based on the willful misrepresentation of material facts. He stated in the notice of revocation (NOR) that the Petitioner failed to provide the Beneficiary's government-issued work history document and noted that the letters submitted contradict the Beneficiary's official [redacted] He focused on the lack of renumeration provided to the Beneficiary by [redacted] and the lack of payroll documentation provided to the record, but he did not appear to consider the claims in the NOIR response that the Beneficiary's experience with [redacted] was gained on a volunteer basis without a salary or work contract.

In the NOR, the Director also noted the Beneficiary's employment with the Petitioner concurrent to his full-time employment as a teacher in the State of Texas from November 2007 to October 2008. The Director stated that in response to the NOIR, the Beneficiary denied that he engaged in unauthorized employment despite previously indicating to the consular officer that he worked without pay until his petition to work two concurrent jobs was authorized in July 2008. The Director determined that the Beneficiary's statement in response to the NOIR was insufficient to overcome his statement to the consular officer, as evidence of unauthorized employment calls into question the integrity of the petition.

On appeal, the Petitioner submits additional evidence of the Beneficiary's experience, including an email from the Beneficiary; an email from the Petitioner's counsel; a letter from the editor of [redacted] Television News; a certificate from the current head of the communications office of the Delegation of the Government of Spain [redacted] a copy of a newspaper clipping; and an affidavit from the Petitioner regarding the Beneficiary's employment. The Petitioner asserts that the Director failed to consider the evidence submitted in response to the NOIR indicating that the Beneficiary's experience with [redacted] was gained on a volunteer basis without a salary or work contract and, therefore, the experience was not legally required to be listed on his [redacted] It also asserts that it provided sufficient documentation establishing the Beneficiary's legal authority to hold two full-time positions from 2000 to 2005 – one paid and one voluntary.

In his NOR, the Director did not analyze whether the claims of volunteer work were legitimate and sufficiently documented, and if so, whether volunteer experience can qualify the Beneficiary for the offered job. Unpaid work can constitute qualifying experience. *Matter of B&B Residential Facility*, 0l-INA-146 *4 (BALCA July 16, 2002).[2] Thus, we will remand the matter to the Director to review the Petitioner's claim that the Beneficiary qualifies for the offered job based on volunteer experience.

[2] Decisions of the Board of Alien Labor Certification Appeals, a part of DOL, do not bind us. *See* 8 C.F.R. §§ 103.10(b), (e) (stating that all Department of Homeland Security employees must follow precedent decisions of the Board of Immigration Appeals and the Attorney General in proceedings involving the same or similar issues). As previously indicated, however, Congress directed DOL to determine the availability of qualified U.S. workers for positions offered to

The Director noted the Beneficiary's alleged unauthorized employment with the Petitioner in his NOR. However, while the Beneficiary's unauthorized employment may result in his inadmissibility to the United States, his unauthorized employment does not support revocation of the petition's approval and findings of willful misrepresentation of material facts. *See Matter of O-*, 8 I&N Dec. 295, 296 (BIA 1959) (holding that visa petition proceedings are not the appropriate forum for determining a beneficiary's admissibility). The Petitioner seeks to qualify the Beneficiary as a professional, and the position of public relations specialist requires a bachelor's degree and 24 months of experience in the job offered. The Petitioner does not claim that the Beneficiary gained qualifying experience with it. Rather, to support the Beneficiary's claimed experience, the Petitioner submitted letters related to his employment with a different employer. *See* 8 C.F.R. § 204.5(l)(3). Thus, the nature of the Petitioner's employment of the Beneficiary does not affect his qualifications for the offered position and the requested classification. Because the Beneficiary's prior role with the Petitioner is immaterial to his qualifications for the offered position, his alleged unauthorized employment does not support the Director's revocation of the petition's approval and his findings of willful misrepresentation of material facts.

In sum, we will remand the matter to the Director to review the Petitioner's claim that the Beneficiary qualifies for the offered job based on volunteer experience with [redacted].

IV. WILLFUL MISREPRESENTATION OF A MATERIAL FACT

The Director also entered findings of willful misrepresentation of material facts against the Petitioner and the Beneficiary. A finding of willful misrepresentation of material fact against a petitioner or beneficiary requires the following elements:

- The petitioner or beneficiary procured, or sought to procure, a benefit under U.S. immigration laws;[3]
- The petitioner or beneficiary made a false representation;[4]
- The false representation was willfully made;[5]
- The false representation was material;[6] and
- The false representation was made to a U.S. government official.[7]

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qualifying immigrants. *See* section 212(a)(5)(A) of the Act. We therefore defer to DOL's reasonable determinations regarding position qualifications. *See Martin v. Occupational Safety & Health Review Comm 'n*, 499 U.S. 144, 157-59 (1991) (requiring one agency to defer to a reasonable regulatory interpretation of another charged with promulgating and enforcing a statute).

[3] *See* 8 *USCIS Policy Manual*, *supra*, at J.3(B).

[4] A misrepresentation is an assertion or manifestation that is not in accordance with the true facts. A false representation may be made in oral interviews, written applications, or by submitting evidence containing false information. *See* 8 *USCIS Policy Manual*, *supra*, at J.3(C); *see also* Legacy INS Genco Op. No. 91-39, 1991 WL 1185150 (April 30, 1991).

[5] *See* 8 *USCIS Policy Manual*, *supra*, at J.3(D). 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).

[6] A material misrepresentation is a false representation concerning a fact that is relevant to the petitioner's or beneficiary's eligibility for an immigration benefit. *See* 8 *USCIS Policy Manual*, *supra*, at J.3(E). A material misrepresentation is one that "tends to shut off a line of inquiry relevant to" eligibility. *Matter of Ng*, 17 I&N Dec. 536, 537 (BIA 1980).

[7] *See* 8 *USCIS Policy Manual*, *supra*, at J.3(F); *see also Matter of Y-G-*, 20 I&N Dec. 794, 796 (BIA 1994).

See 8 *USCIS Policy Manual* J.2(B), https://www.uscis.gov/policymanual; *see also Matter of M-*, 6 I&N Dec. 149 (BIA 1954); *Matter of Kai Hing Hui,* 15 I&N Dec. 288 (BIA 1975).

As detailed above, the Director did not analyze whether the claims of volunteer work were legitimate and sufficiently documented, and if so, whether volunteer experience can qualify the Beneficiary for the offered job. Further, as noted above, the Beneficiary's alleged unauthorized employment by the Petitioner does not support the Director's findings of willful misrepresentation of material facts. Thus, we will withdraw the Director's findings of willful misrepresentation of material facts against the Petitioner and the Beneficiary related to the Beneficiary's prior experience listed on the labor certification. However, on remand, if the Director determines that the claims of volunteer work are false and otherwise meet the elements of willful misrepresentation of material facts, the Director may reinstate the findings of willful misrepresentation against one or both parties.

V. 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.

Based on our withdrawal of the findings of willful misrepresentation of material facts against the Petitioner and the Beneficiary involving the labor certification application, we will withdraw the Director's invalidation of the labor certification and reinstate it.

VI. ABILITY TO PAY THE PROFFERED WAGE

The Petitioner must establish its continuing ability to pay from the priority date in 2010.[8] The regulation at 8 C.F.R. § 204.5(g)(2) requires that "[e]vidence of this ability shall be either in the form of copies of annual reports, federal tax returns, or audited financial statements." The regulation further provides that if a petitioner employs 100 or more workers, we may accept a statement from a financial officer of the petitioner which establishes its ability to pay the proffered wage. *Id.*

The record does not contain the Petitioner's annual reports, federal tax returns, or audited financial statements from the priority date in 2010 onward. Instead, it contains a letter dated March 25, 2011, from the Petitioner's owner stating that the Petitioner has the ability to pay the proffered wage. The Petitioner asserts that it employs over 200 employees and that it had gross income for 2009 of $20 million. However, given the Petitioner's history of filing petitions detailed below, on remand, the Director should request additional evidence of the Petitioner's continuing ability to pay.

[8] The proffered wage is $16.95 per hour.

Where a petitioner has filed Form I-140 petitions for multiple beneficiaries, it must demonstrate that its job offer to each beneficiary is realistic, and that it has the ability to pay the proffered wage to each beneficiary. *See* 8 C.F.R. § 204.5(g)(2); *see also Patel v. Johnson*, 2 F. Supp. 3d 108, 124 (D. Mass. 2014) (upholding our denial of a petition where a petitioner did not demonstrate its ability to pay multiple beneficiaries). USCIS records show that the Petitioner has filed multiple Form I-140 petitions for other beneficiaries. Thus, the Petitioner must establish its ability to pay this Beneficiary as well as the beneficiaries of the other Form I-140 petitions that were pending or approved as of, or filed after, the priority date of the current petition.[9] We do not consider the other beneficiaries for any year that the Petitioner has paid the Beneficiary a salary equal to or greater than the proffered wage.

The Petitioner must document the receipt numbers, names of beneficiaries, priority dates, and proffered wages of these other petitions, and indicate the status of each petition and the date of any status change (i.e., pending, approved, withdrawn, revoked, denied, on appeal or motion, beneficiary obtained lawful permanent residence). To offset the total wage burden, the Petitioner may submit documentation showing that it paid wages to other beneficiaries. To demonstrate that it has the ability to pay the Beneficiary and the other beneficiaries, the Petitioner must, for each year at issue (a) calculate any shortfall between the proffered wages and any actual wages paid to the primary Beneficiary and its other beneficiaries, (b) add these amounts together to calculate the total wage deficiency, and (c) demonstrate that its net income or net current assets exceed the total wage deficiency.[10] Without this information, we cannot determine the Petitioner's ability to pay the combined proffered wages of all of its applicable beneficiaries.

We cannot affirmatively find that the Petitioner has the continuing ability to pay the combined proffered wages of all of its applicable beneficiaries from the priority date in 2010. On remand, the Director should request additional evidence of the Petitioner's ability to pay and allow the Petitioner reasonable time to respond.

VII. CONCLUSION

In conclusion, we will remand the matter to the Director to review the Petitioner's claim that the Beneficiary qualifies for the offered job based on his volunteer experience with [redacted]. On remand, the Director should also request additional evidence of the Petitioner's ability to pay and allow the Petitioner reasonable time to respond. Additionally, we withdraw the Director's findings of willful misrepresentation of material facts against the Petitioner and the Beneficiary involving the labor certification application, and we withdraw the Director's invalidation of the labor certification and reinstate it.

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[9] The Petitioner's ability to pay the proffered wage of one of the other I-140 beneficiaries is not considered:

- After the other beneficiary obtains lawful permanent residence;
- If an I-140 petition filed on behalf of the other beneficiary has been withdrawn, revoked, or denied without a pending appeal or motion; or
- Before the priority date of the I-140 petition filed on behalf of the other beneficiary.

[10] 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).

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

FURTHER ORDER: The ETA Form 9089, case number [redacted], is reinstated.