U.S. Citizenship and Immigration Services

Non-Precedent Decision of the Administrative Appeals Office

In Re: 1256266

Date: SEP. 30, 2020

Appeal of Texas Service Center Decision

Form I-140, Immigrant Petition for Skilled Worker

The Petitioner, a restaurant, seeks to employ the Beneficiary as a sushi chef. 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 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. Subsequently, the Director of the Texas Service Center revoked the approval of the petition, concluding that the record of proceedings did not demonstrate that the Beneficiary possessed the experience required by the labor certification as of the priority date. The Director noted inconsistencies in the evidence submitted regarding the claimed work experience. In addition, the Director invalidated the labor certification, concluding that the Beneficiary and the Petitioner willfully misrepresented the Beneficiary's employment experience on the labor certification. The Director denied a subsequent motion to reopen. The matter is now before us on appeal.

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. LAW

A. 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 USCIS. See section 204 of the Act, 8 U.S.C. § 1154. Third, if USCIS approves the petition, the

[1] The priority date of a petition is the date the DOL accepted the labor certification for processing, which in this case is May 13, 2013. See 8 C.F.R. § 204.5(d).

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.

B. 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.

II. THE BENEFICIARY'S EXPERIENCE

The Director determined that the Petitioner did not establish that the Beneficiary possessed the experience required by the labor certification as of the priority date.[2] 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)(l), (12); Matter of Wing's Tea House, 16 I&N Dec. 158, 159 (Acting Reg'l Comm'r 1977). In this case, the labor certification requires two years of experience in the job offered of sushi chef. The job duties include: plan and price daily specials, and direct and cook sushi and other specialty Japanese cuisine. The labor certification states that the Beneficiary qualifies for the offered position based on experience as a sushi chef with [redacted] in South Korea from December 10, 2001, to January 15, 2004.

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). The record contains a career certificate dated December 17, 2010, from [redacted], President of [redacted], stating that it employed the Beneficiary as a "Sush man" from December 10, 2001, to January 15, 2004. It lists his duties as preparing side dishes, "handling fresh fish and sush," and ordering food materials. In the NOIR, the Director noted inconsistencies in the record regarding the Beneficiary's claimed employment. Following the Petitioner's response to the NOIR, the Director determined in the notice of revocation (NOR) that the Petitioner did not resolve the inconsistencies with independent, objective evidence. Matter of Ho, 19 I&N Dec. at 591-92. Specifically, the Director noted inconsistencies in documents submitted regarding the operation of [redacted] in South Korea, its payments to the Beneficiary, and the Beneficiary's work schedule and duties there; and inconsistencies regarding how and

[2] The regulation at 8 C.F.R. § 205.2 states:

> (a) General. Any [USCIS] officer authorized to approve a petition under section 204 of the Act may revoke the approval of that petition upon notice to the petitioner on any ground other than those specified in § 205.1 when the necessity for the revocation comes to the attention of [the USCIS].

when the Beneficiary learned how to make sushi. Unresolved material inconsistencies may lead us to reevaluate the reliability and sufficiency of other evidence submitted in support of the requested immigration benefit. Id.

The Director dismissed the subsequent motion because it did not meet applicable regulatory requirements. 8 C.F.R. § 103.5(a). The Director also noted that the Petitioner had failed to resolve the inconsistencies in the Beneficiary's prior employment experience. Specifically, he noted that the Beneficiary's wage information provided by [redacted] is inconsistent with the Beneficiary's bank deposit statements and his attendance at a university in 2002. The Director also noted that a new experience certificate submitted to the record indicated that the Beneficiary worked as a cook's assistant, and not as a cook as previously indicated. On appeal, the Petitioner states the Beneficiary's bank deposit statements do not reflect all of the Beneficiary's earnings from [redacted] because he did not deposit all of his earnings; that it is "unrealistic to expect [the Beneficiary or [redacted] to produce evidence of wire transfers" of his earnings; and that the new experience certificate did not state the Beneficiary's job title was that of a cook's assistant.[3]

The record contains the following documentation regarding the Beneficiary's wages at [redacted]:

- Certificate of Wage dated April 28, 2016, from [redacted] stating that the Beneficiary received 50,000 won per day in wages from December 10, 2001, to January 15, 2004.
- Statement from [redacted] owner of [redacted] dated April 18, 2017, indicating that it paid the Beneficiary about 50,000 won per day, mainly in cash; that sometimes it would issue wire transfers to pay his paycheck and bonus; and that the Beneficiary worked over 40 hours per week.
- Statement listing the Beneficiary's bank deposits from January 5, 2002, to July 6, 2003. The statements show deposits of "salary" made on January 10, 2002 (275,625 won); February 9, 2002 (335,000 won); March 9, 2002 (315,000 won); April 10, 2002 (296,250 won); February 14, 2003 (400,000 won); and March 14, 2003 (840,000 won).

The bank deposit record does not provide independent, objective evidence of the Beneficiary's full-time employment with as a sushi chef with [redacted] in South Korea from December 10, 2001, to January 15, 2004. The record covers only a portion of the Beneficiary's purported period of employment, and it does not reflect payments to the Beneficiary totaling 50,000 won per day. See Matter of Ho, 19 I&N Dec. at 591-92. Although the Petitioner asserts that the Beneficiary did not deposit all of his cash earnings, and that evidence of wire transfers is unavailable, these assertions are not sufficient to meet the burden of proof in this case. 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).

Additional inconsistencies in the record also remain unresolved. The record indicates that the Beneficiary graduated high school in February 2002 and attended two semesters of college in 2002. He completed 18 credit hours in the first semester of 2002, and 16 credit hours in the second semester

[3] We agree that the certificate does not explicitly state that the Beneficiary worked as a "cook's assistant." It does not list a job title for the Beneficiary, but instead lists his duties as discussed further herein.

of 2002. The Petitioner has not explained how the Beneficiary could have attended school full-time and worked full-time during those periods.[4] See id.

Further, the description of the Beneficiary's duties at [redacted] varies throughout the record. The original December 2010 career certificate from [redacted], President of [redacted], submitted with the petition listed his duties as preparing side dishes; "handling fresh fish and sush;" and ordering food materials. A career certificate issued on April 28, 2016, by [redacted] states that the Beneficiary's major duties included: preparing side dishes, checking the menu, handling fresh fish and making sushi and sashimi, ordering food materials, and cleaning. This certificate adds duties to the Beneficiary's job that were not included in the 2010 certificate, including checking the menu, making sushi and sashimi, and cleaning. An April 18, 2017, statement from [redacted] submitted on motion indicates that the Beneficiary's duties included "making side dishes, handling and cutting fishes, making sushi and sashimi." It indicates that the Beneficiary took over the "seafood portion of the menu" in 2003. It is not clear if "taking over the seafood portion of the menu" includes making the sushi and sashimi.[5] The April 18, 2017, certificate does not indicate that the Beneficiary checked the menu, ordered food materials, or cleaned. In an undated letter from the Beneficiary submitted in response to the NOIR, the Beneficiary stated that at [redacted] he "used to help other chef's side work first and prepare side dishes and take an inventory of food materials" and that for the "first three months, [he] pretty much learned about how to set up the food of [sic] menu." After that, he states that he "was able to serve the foods on my way." Thus, his letter indicates that he assisted the other chef for the first three months, and does not indicate that he made sushi and sashimi or cleaned. The Petitioner has not resolved the inconsistencies in the record with independent, objective evidence. Id.

Additionally, the Petitioner has not established how the Beneficiary was qualified to become a sushi chef in South Korea in 2001 at the age of 18. The Beneficiary claimed that he helped his parents in their fish business during his high school years, but the record shows that his parents ran a fruit and vegetable stand during that time. The Petitioner has provided no independent, objective evidence to establish that the Beneficiary learned how to make sushi prior to his purported employment with [redacted] Id.

In sum, the Petitioner has not established that the Beneficiary possessed the experience required by the labor certification as of the priority date.

III. WILLFUL MISREPRESENTATION OF A MATERIAL FACT

The Director also found that the Beneficiary and the Petitioner willfully misrepresented the Beneficiary's employment on the labor certification. Any foreign person who, by fraud or willfully misrepresenting a material fact, seeks to procure (or has sought to procure or has procured) a visa, other documentation, or admission into the United States or other benefit provided under the Act is inadmissible. See section 212(a)(6)(C)(i) of the Act, 8 U.S.C. § 1182(a)(6)(C)(i).

[4] A statement from [redacted] dated May 4, 2016, in the record indicates that he knew the Beneficiary during high school and afterward; and that the Beneficiary had a "little hard time" working and attending school in 2002, so he took a break from school to solely concentrate on his work at [redacted] The statement does not indicate how the Beneficiary was able to work 40 hours per week and successfully complete high school and 34 credit hours of college, in 2002. For example, the record does not indicate the days and times of his classes and his work schedule.

[5] If so, the Beneficiary was not employed as a sushi chef from 2001 to 2004 as stated on the labor certification.

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;[6]
- The petitioner or beneficiary made a false representation;[7]
- The false representation was willfully made;[8]
- The false representation was material;[9] and
- The false representation was made to a U.S. government official.[10]

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).

A. The Beneficiary's Willful Misrepresentation of a Material Fact

The Beneficiary indicated on the labor certification that he worked as a sushi chef with [redacted] in South Korea from December 10, 2001, to January 15, 2004. The Beneficiary provided USCIS with false documents intended to establish that he has at least two years of qualifying experience as a sushi chef. In light of the contradictory information presented and lack of independent, objective evidence regarding the Beneficiary's prior work experience as detailed above, the entry at Part K on the ETA Form 9089 was not correct and constitutes a false representation. The two years of experience is required for the classification, and also a requirement for the offered position on the labor certification. Here, the submission of employment documents containing false experience attestations and certifications to support this immigrant petition constitutes a false representation to a government official. In addition, because the claims regarding the Beneficiary's qualifying foreign employment are on the signed labor certification submitted to support the immigrant visa petition, they constitute false representation on the face of a written application or petition.

Next, we find that the Beneficiary willfully made the misrepresentation regarding his experience with [redacted]. When given the opportunity to address the derogatory information in response to the NOIR, the Beneficiary reaffirmed his claims regarding his foreign employment. He signed the labor certification attesting to the veracity of the claims on the labor certification, and provided additional statements in which he falsely asserted that he has more than two years of qualifying experience as a sushi chef. In this way, the Beneficiary directly participated in the preparation and

---

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

[7] 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).

[8] 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).

[9] 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).

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

submission of documents that exist for no discernible purpose except to convey the false impression that he has at least two years of qualifying experience, as required on the labor certification and for the requested immigrant classification. We conclude that the Beneficiary provided employment verification letters specifically for the purpose of supporting the petition and, thereby, procuring immigration benefits.

Further, the evidence is material to the Beneficiary's eligibility. Here, the Beneficiary's experience with [redacted] is material to the whether he meets the minimum requirements of the offered position, as the labor certification requires two years of experience in the job offered. The evidence submitted is also directly material to the Beneficiary's eligibility under the statutory requirement that he have at least two years of experience or training for the classification. Section 203(b)(3)(A)(i) of the Act. The misrepresentation regarding the Beneficiary's experience on the labor certification cut off a potential line of inquiry regarding her claimed experience. See Matter of Ng, 17 I&N Dec. at 537. In light of the contradictory evidence and information we described above, we conclude that the Beneficiary's misrepresentations were material to his eligibility.

The Beneficiary sought to procure a benefit provided under the Act through the willful misrepresentation of a material fact. Accordingly, we agree with the Director's determination that the Beneficiary made willful misrepresentations of material fact. This finding of willful material misrepresentation shall be considered in any future proceeding where the Beneficiary's admissibility is an issue.

B. The Petitioner's Willful Misrepresentation of a Material Fact

The Director's analysis of the record related to the Beneficiary's willful misrepresentation of material facts related to his prior work experience, yet the Director made a formal finding of willful misrepresentation of a material fact against the Petitioner in addition to the Beneficiary. The information and documentation supporting the Beneficiary's purported employment with [redacted] in South Korea appears to have been provided by the Beneficiary, and the Director did not analyze the Petitioner's willfulness in the submission of the false documentation. As previously noted, 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. at 28. We will therefore withdraw the Director's finding of willful misrepresentation of a material fact 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.

We will withdraw the Director's invalidation of the labor certification and reinstate it.

V. ABILITY TO PAY THE PROFFERED WAGE

Although not addressed by the Director in his decision, the Petitioner has not established its continuing ability to pay the combined proffered wages of all of its applicable beneficiaries. See 8 C.F.R. § 204.5(g)(2). The proffered wage is $44,179 per year.

In determining a petitioner's ability to pay, we first examine whether it paid a beneficiary the full proffered wage each year from a petition's priority date. If a petitioner did not pay a beneficiary the full proffered wage, we next examine whether it had sufficient annual amounts of net income or net current assets to pay the difference between the proffered wage and the wages paid, if any. If a petitioner's net income or net current assets are insufficient, we may also consider other evidence of its ability to pay the proffered wage.[11]

In this case, the Petitioner submitted copies of IRS Forms W-2, Wage and Tax Statements, and paychecks demonstrating that it employed the Beneficiary in 2015 and 2016. The Forms W-2 and paychecks reflect that the Petitioner paid the Beneficiary as follows:

- $4,262 in 2015; and
- $15,774 in 2016.[12]

The amounts on the Forms W-2 and paychecks do not equal or exceed the annual proffered wage of $44,179. The record therefore does not establish the Petitioner's ability to pay the proffered wage based on the wages it paid to the Beneficiary. But we credit the Petitioner's payments to the Beneficiary. The Petitioner need only demonstrate its ability to pay the difference between the annual proffered wage and the amounts it paid to the Beneficiary, which is $39,917 in 2015 and $28,405 in 2016.

The Petitioner's federal tax returns state net income[13] amounts as follows:

- $64,239 in 2013;
- $125,560 in 2014; and
- $81,888 in 2015.

---

[11] Federal courts have upheld our method of determining a petitioner's ability to pay a proffered wage. See, e.g., River St. Donuts, LLC v. Napolitano, 558 F.3d 111, 118 (1st Cir. 2009); Tongatapu Woodcraft Haw., Ltd. v. Feldman, 736 F.2d 1305, 1309 (9th Cir. 1984); Estrada-Hernandez v. Holder, -- F. Supp. 3d --, 2015 WL 3634497, *5 (S.D. Cal. 2015); Rizvi v. Dep't of Homeland Sec., 37 F. Supp. 3d 870, 883-84 (S.D. Tex. 2014), aff'd, 627 Fed. App'x. 292, 294-295 (5th Cir. 2015).

[12] The Beneficiary's final paycheck in the record covered the pay period ending April 11, 2016.

[13] For a limited liability company taxed as a partnership, where the partnership's income is exclusively from a trade or business, USCIS considers net income to be the figure shown on Line 22 of page one of the Petitioner's IRS Form 1065, U.S. Return of Partnership Income. However, where the Petitioner has income, credits, deductions, or other adjustments from sources other than a trade or business, net income is found on page 5 of IRS Form 1065 at line 1 of the Analysis of Net Income (Loss) of Schedule K. See Internal Revenue Serv., Instructions for Form 1065, https://www.irs.gov/pub/irs-pdf/i1065.pdf (last visited Apr. 27, 2018). In this case, the Petitioner's net income is found on line 22 of page one of its Form 1065.

The Petitioner had sufficient net income to pay the proffered wage in 2013 and 2014, and the difference between the annual proffered wage and the amounts it paid to the Beneficiary in 2015.

However, 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 filed a Form I-140 petition for another beneficiary. Thus, the Petitioner must establish its ability to pay this Beneficiary as well as the beneficiary of the other Form I-140 petition that was pending or approved as of, or filed after the priority date of the current petition.[14]

The Petitioner must document the receipt number, name of the beneficiary, priority date, and proffered wage of the other petition, and indicate the status of the 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 the other beneficiary. To demonstrate that it has the ability to pay the Beneficiary and the other beneficiary, 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 beneficiary, (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. Without this information, we cannot determine the Petitioner's ability to pay the combined proffered wages of all of its applicable beneficiaries.

In any future proceedings, the Petitioner must establish its continuing ability to pay the combined proffered wages of all of its applicable beneficiaries.

VI. CONCLUSION

We conclude that the Director properly revoked the approval of the petition because the Petitioner did not establish that the Beneficiary possessed the experience required by the labor certification as of the priority date. We further conclude that the Director properly determined that the Beneficiary willfully misrepresented the Beneficiary's prior work experience. However, we withdraw the Director's finding of willful misrepresentation of a material fact against the Petitioner. Additionally, we withdraw the Director's invalidation of the labor certification and reinstate it.

ORDER: The appeal is dismissed.

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

[14] 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.