U.S. Citizenship and Immigration Services

Non-Precedent Decision of the Administrative Appeals Office

In Re: 19445649

Date: MAR. 10, 2022

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 cook. It requests classification of the Beneficiary under the third-preference, immigrant category as a skilled worker. Immigration and Nationality Act (the Act) section 203(b)(3)(A)(i), 8 U.S.C. § 1153(b)(3)(A)(i). This employment-based category allows a U.S. business to sponsor a foreign national for lawful permanent resident status based on a job offer requiring at least two years of training or experience.

The Director of the Texas Service Center denied the petition, concluding that the Petitioner did not demonstrate the Beneficiary's possession of the minimum experience required for the offered position. The Director also found that the Petitioner willfully misrepresented the Beneficiary's experience, a material fact.

In these proceedings, it is the Petitioner's burden to establish eligibility for the requested benefit by a preponderance of the evidence. Section 291 of the Act, 8 U.S.C. § 1361; *Matter of Chawathe*, 25 I&N Dec. 369, 375 (AAO 2010). 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). Upon *de novo* review, we will dismiss the appeal.

I. LAW

Employment-based immigration generally follows a three-step process. To permanently fill a position in the United States with a foreign worker, a prospective employer must first obtain certification from the U.S. Department of Labor (DOL). *See* 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 foreign national 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). *See* 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 foreign national may finally 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. THE BENEFICIARY'S QUALFIYING EXPERIENCE

A skilled worker must be capable of "performing skilled labor (requiring at least 2 years training or experience)." Section 203(b)(3)(A)(i) of the Act. A petitioner must establish a beneficiary's possession of all 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] In evaluating a beneficiary's qualifications, USCIS must examine the job-offer portion of an accompanying labor certification to determine a position's minimum requirements. USCIS may neither ignore a certification term, nor impose additional requirements. *See, e.g., Madany* v. *Smith,* 696 F.2d 1008, 1015 (D.C. Cir. 1983) (holding that the "DOL bears the authority for setting the *content* of the labor certification") (emphasis in original).

The accompanying labor certification states that the offered position requires a high school, or foreign equivalent, diploma and 24 months of experience "in the job offered." The labor certification states that the Petitioner will not accept experience in an alternate occupation. The duties and required skills for the offered position of cook are stated as, "Prepare, season, cook *Kosher and Asian dishes*, including appetizers, soups, salads, seafood, and meats. Assist Restaurant Manager with requisitions of fresh ingredients and supplies. Assist management and executive chef in the planning of menus." (Emphasis added).

On the labor certification, the Petitioner asserts that the Beneficiary's highest level of education required for the job opportunity is high school and states that he completed his culinary education at [redacted] in Israel in 2001. The Petitioner also asserts that the Beneficiary gained the following experience in Israel:

- As an executive chef from August 5, 2016 to February 3, 2018 with [redacted]
- As an executive chef from July 24, 2015 to July 24, 2016 with [redacted] and,
- As an executive chef from July 10, 2011 to July 22, 2015 with [redacted]

The initial evidence submitted with the petition included the following:

- A confirmation of graduation certificate verifying the Beneficiary's graduation from [redacted] School in Israel 1996;
- Letters from the [redacted] Hospitality Training School verifying the Beneficiary's attendance from January 25, 2004 to September 14, 2004 and his completion of "a pastry, baking and conditory course";[2]
- A letter dated February 11, 2018 on [redacted] letterhead verifying the Beneficiary's employment as an executive chef from January 1, 2017 to February 3, 2018, "including cooking manager of Asian style dishes and Kosher dishes";

[1] This petition's priority date is October 3, 2018, the date the DOL accepted the accompanying labor certification application for processing. *See* 8 C.F.R. § 204.5(d) (explaining how to determine a petition's priority date).

[2] We note that neither the Beneficiary's 1996 graduation from [redacted] School nor the 2004 completion of a culinary course supports the Petitioner's claim on the labor certification that the Beneficiary completed "culinary education" in 2001. The Petitioner must resolve this inconsistency with any further filings.

- An undated letter on [redacted] letterhead verifying the Beneficiary's employment from July 2011 to July 2015, "cooking for 1300 people in average every day in different sorts of functions and Koshers, such as [redacted] and [redacted] Israel"; and,
- An undated certificate stating the Beneficiary's membership in the Israeli Chef and Cook Association.

Neither experience letter identifies the Beneficiary's employment as full-time, and only the letter from [redacted] describes the Beneficiary's experience with cooking Asian dishes. Further, the employment listed on the labor certification and in the letter from [redacted] describes the Beneficiary's job title as *executive chef* rather than in the offered position of *cook*.[3]

The Director sent the Petitioner a Request for Evidence (RFE) informing the Petitioner that the Beneficiary's claimed employment was inconsistent with a nonimmigrant visa application he submitted in November 2013. In his prior nonimmigrant visa application, the Beneficiary listed his present occupation as chef with [redacted] in Israel and answered "No" when asked whether he was previously employed. The Director identified additional inconsistencies regarding the Beneficiary's claimed employment with [redacted] noting that the labor certification listed his employment start date as August 5, 2016, while the letter listed the start date as January 1, 2017. *See Matter of Ho*, 19 I&N Dec. at 591 (requiring a petitioner to resolve inconsistencies by independent, objective evidence pointing to where the truth lies). Unresolved material inconsistencies may lead us to reevaluate the reliability and sufficiency of other evidence submitted in support of the requested immigration benefit. *Id.*

In response to the RFE, the Petitioner stated that the employment verification letters incorrectly listed the Beneficiary's dates of employment and the Beneficiary's nonimmigrant visa application instead reflected the correct information. The Petitioner explained that it relied on the incorrect dates in the employment letters in preparing the labor certification and it provided revised letters with revised dates of employment. The revised letter from [redacted] dated January 27, 2020, stated the Beneficiary's employment as executive chef from March 2, 2014 to January 15, 2015 (approximately 10 months). The dates of the revised letter show the Beneficiary's start date as almost three years later than initially submitted. The letter also states additional employment with [redacted] from May 1, 2015 to May 7, 2015 (six days). A revised letter from [redacted] (doing business as [redacted], undated, stated the Beneficiary's employment as executive chef from May 8, 2016 to July 24, 2016 (approximately 2.5 months), and from August 17, 2016 to February 3, 2018 (approximately 17.5 months). The Petitioner also submitted pay records and a record of the Beneficiary's employment history from the [redacted] – Social Security Agency in support of

[3] On the labor certification the DOL assigned Standard Occupational Classification (SOC) code of the offered position is 35-2014.00 with the occupation title of *cook*. The DOL's occupational codes are assigned based on normalized occupational standards. The occupational classification of the offered position is determined by the DOL during the labor certification process, and the applicable occupational classification code is noted on the labor certification form. O*NET is the current occupational classification system used by the DOL. Located online at http:// online.onetcenter.org, O*NET is described as "the nation's primary source of occupational information, providing comprehensive information on key attributes and characteristics of workers and occupations." We note that O*NET includes a separate entry and code for a *chef* under 35-1011.00 with job duties different than those listed for a cook under SOC 35-2014.00.

these revised employment dates. The revised letters and additional evidence do not identify the Beneficiary's employment as full-time.

After reviewing the Petitioner's response to the RFE, the Director noted additional inconsistencies in the Beneficiary's employment details. The Director issued a Notice of Intent to Deny (NOID) the petition, informing the Petitioner that it intended to enter a finding of willful misrepresentation of a material fact against it based on its claim that the Beneficiary gained qualifying experience with [redacted] and [redacted] The Director found that neither of the revised letters included an explanation of why the incorrect dates were used in the original letters and why the revised dates varied so significantly. Further, he noted that the dates in the revised letters were not supported by the pay records, which listed yet another set of employment dates for both [redacted] and [redacted]

The Director also noted additional discrepancies in the business names of the claimed former employers as listed on the labor certification, in the letters and in the pay and social security records. Specifically the Director noted the following:

- The employment letter and labor certification list the Beneficiary's employer as [redacted] while the pay and social security records list the business name as [redacted]."
- The labor certification lists the Beneficiary's employment with [redacted] while the employment letter references [redacted] doing business as [redacted] and the pay and social security records reference only [redacted]
- The labor certification lists the Beneficiary's employment with [redacted] but no supporting employment letter from this employer was submitted, and the dates of employment with [redacted] as listed on the social security records (four months, from February 1, 2016 to May 31, 2016) conflict with the dates on the labor certification (one year, from July 24, 2015 to July 24, 2016).

Thus, the Director concluded that the record lacked sufficient reliable evidence of the Beneficiary's qualifying experience for the offered position or the requested visa classification.

The Petitioner provided a response to the NOID. To clarify the business names, the Petitioner provided evidence that some of the Beneficiary's former employers operated under fictitious names and were part of a family of companies. The Petitioner also submitted copies of the social media pages for [redacted] dated June 2016 which included pictures of the Beneficiary preparing food, as well as additional pay records for the Beneficiary's employment with [redacted] and [redacted]

The Director concluded that the Petitioner did not submit sufficient independent objective evidence to resolve all the inconsistencies and verify the Beneficiary's qualifying employment, and to establish that he met all of the requirements stated on the labor certification as of the October 3, 2018 priority date. The Director also found that the Petitioner willfully misrepresented the Beneficiary's qualifying employment on the labor certification, a material fact.

On appeal, the Petitioner submits a brief from counsel, a statement from the Beneficiary's spouse detailing his employment history, and evidence previously in the record. The Petitioner asserts that the Beneficiary was qualified for the offered position as of the priority date, with "over 10 years of experience with Kosher and Asian-style cooking." The Petitioner also asserts that any misrepresentation of the Beneficiary's qualifying experience was not knowing or intentional, and was not material, as there was no benefit gained in presenting "any false facts."

As noted above, the labor certification specifies that the Petitioner will not accept experience in a related occupation. Experience "in the job offered" means experience "performing the key duties of the job opportunity." *Matter of Symbioun Techs., Inc.*, 2010-PER-01422, slip op. at 4 (BALCA Oct. 24, 2011) (citations omitted). A key job duty, as stated on the labor certification, is to "[p]repare, season, cook *Kosher* and *Asian* dishes." (Emphasis added). Therefore, experience in the job offered of cook must include the key job duties of preparing both Kosher and Asian food.

In support of claimed qualifying experience, a petitioner must submit a letter from a beneficiary's former employer. 8 C.F.R. § 204.5(l)(3)(ii)(A). The letter must state the employer's name, title, and address, and "a description of . . . the experience of the alien." *Id.* If such a letter is unavailable, USCIS will consider other evidence of a beneficiary's experience. 8 C.F.R. § 204.5(g)(1).

In adjudicating immigration benefit requests, USCIS regularly reviews affidavits, testimonials, and letters from both laypersons and recognized experts. To be probative, a document must generally provide: (1) the nature of the affiant's relationship, if any, to the affected party; (2) the basis of the affiant's knowledge; and (3) a specific - rather than merely conclusory - statement of the asserted facts based on the affiant's personal knowledge. *Matter of Chin*, 14 I&N Dec. 150, 152 (BIA 1972); *see also* 8 C.F.R. § 103.2(b)(2)(i) (requiring affidavits in lieu of unavailable required evidence from "persons who are not parties to the petition who have direct personal knowledge of the event and circumstances"); *Matter of Kwan*, 14 I&N Dec. 175, 176-77 (BIA 1972); *Iyamba v. INS*, 244 F.3d 606, 608 (8th Cir. 2001); *Dabaase v. INS*, 627 F.2d 117, 119 (8th Cir. 1980). A petitioner may submit a letter or affidavit that contains hearsay or biased information, but such factors will affect the weight to be accorded the evidence in an administrative proceeding. *See Matter of D-R-*, 25 I&N Dec. 445, 461 (BIA 2011) (citations omitted). Probative evidence beyond a letter or affidavit may be considered when submitted to resolve inconsistencies or discrepancies in the record. *See Matter of Ho*, 19 I&N Dec. 582, 591-92 (BIA 1988). Ultimately, to determine whether a petitioner has established eligibility for a requested benefit by a preponderance of the evidence, USCIS must examine each piece of evidence - both individually and within the context of the entire record - for relevance, probative value, and credibility. *Matter of Chawathe*, 25 I&N Dec. 369, 376 (AAO 2010).

Here, the record includes four letters from two previous employers, multiple pay records, and a record of employment history from a government agency in attempt to support the Beneficiary's claim of 24 months of qualifying experience. Although pay and employment history records constitute independent, objective evidence of the Beneficiary's dates of employment, these records do not demonstrate the Beneficiary's job duties in these positions. Further, we note that the dates in the social security records are not consistent with the claimed dates in the revised employment letters, and the social security records show overlapping employment during some periods, casting doubt as to whether the Beneficiary's employment with each employer was full-time. None of the letters address whether the employment was full-time or part-time either. Therefore, we must look at the totality of

the evidence to determine whether the Petitioner has established that the Beneficiary met the minimum requirements for the offered position.

The revised employment letter and the pay and employment history records corroborate the Beneficiary's claim of employment with [redacted] although the dates of employment are listed inconsistently in these documents and this remains unresolved. Additionally, none of the evidence in the record demonstrates that the Beneficiary's employment with [redacted] was full-time. Accordingly, we are unable to determine his total amount of employment with this employer. Also, the letters from [redacted] do not support the Beneficiary's claim of experience in the offered job, as neither letter describes his experience cooking Asian dishes.

Although the employment letters from [redacted] describe the Beneficiary's experience cooking Asian dishes, the pay and employment history records do not resolve the inconsistencies in the Beneficiary's dates of employment or demonstrate that his employment was full-time. The pay and employment history records state the Beneficiary's employment as May 8, 2016 to February 3, 2018 (approximately 21 months if full-time experience). However, the revised employment letter from [redacted] states two periods of employment as May 8, 2016 to *July* 24, 2016, and *August* 17, 2016 to February 3, 2018 (approximately 20 months, 17 days if full-time experience).[4] A petitioner must resolve inconsistencies by independent, objective evidence pointing to where the truth lies. *Matter of Ho*, 19 I&N Dec. at 591. Despite the inconsistency, none of the documentation in the record demonstrates that the Beneficiary was employed for at least 24 months full-time with [redacted] the only employment in which the Beneficiary claims experience in cooking Asian dishes.[5]

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). As the inconsistencies in the record have not been resolved, the Petitioner has not established with independent, objective evidence that the Beneficiary possesses the required 24 months of experience "in the job offered," specifically "prepar[ing], season[ing], cook[ing] *Kosher and Asian dishes*" as required by the labor certification. Therefore, the appeal is dismissed on this basis.

III. WILFULL MISREPRESENTATION OF A MATERIAL FACT

To find a willful and material misrepresentation of fact an immigration officer must determine that (1) the petitioner or 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

[4] The statement from the Beneficiary's spouse submitted on appeal lists the same dates of employment with [redacted] as the revised employment letter, which remain inconsistent with the pay and employment history records.

[5] We further note that the employment history record reflects that the Beneficiary had employment with another restaurant in May 2016 and still another restaurant in August 2016. This overlapping employment casts doubt on the Petitioner's claim of full-time employment with [redacted] (70 hours per week, as listed on the labor certification) during these months.

off a line of inquiry relevant to the alien's eligibility." *Matter of Ng*, 17 I&N Dec. 536, 537 (BIA 1980).

Accordingly, for an immigration officer to find a willful and material misrepresentation in visa petition proceedings, they must determine: 1) that the petitioner or beneficiary made a false representation to an authorized official of the United States government; 2) that the misrepresentation was willfully made; and, 3) that the fact misrepresented was material. *See Matter of M-*, 6 I&N Dec. 149 (BIA 1954); *Matter of L-L-*, 9 I&N Dec. 324 (BIA 1961); *Matter of Kai Hing Hui*, 15 I&N Dec. at 288.

Here, the Director found that the Petitioner willfully misrepresented the Beneficiary's qualifying experience on the labor certification, and that the Petitioner, in signing the labor certification, took responsibility for the truth and accuracy of any evidence submitted in support of the petition.

As noted above, the Petitioner listed incorrect dates of employment for the Beneficiary's claimed experience on the labor certification. The incorrect dates were material to whether he qualified for the offered position. Although we agree with the Director that a petitioner's signature on the labor certification is an attestation, under penalty of perjury, that its contents are true and correct, we do not find that the Petitioner willfully misrepresented a material fact in the instant case. Therefore, we will withdraw the Director's finding of willful misrepresentation against the Petitioner.

IV. CONCLUSION

The record does not support the Director's finding of willful misrepresentation against the Petitioner and this finding is withdrawn. However, for the reasons discussed above, we conclude that the record includes inconsistencies with respect to the Beneficiary's claimed employment history and the Petitioner has not met its burden in resolving those inconsistencies. The Petitioner did not establish that the Beneficiary met the minimum requirements for the offered position or the requested visa classification.

ORDER: The appeal is dismissed.