U.S. Citizenship and Immigration Services

Non-Precedent Decision of the Administrative Appeals Office

In Re: 8419703

Date: MAR. 16, 2022

Appeal of Texas Service Center Decision

Form I-140, Immigrant Petition for Skilled Worker

The Petitioner, the operator of a restaurant, seeks to employ the Beneficiary as head chef under the third-preference, immigrant visa category for skilled workers. *See* Immigration and Nationality Act (the Act) section 203(b)(3)(A)(i), 8 U.S.C. § 1153(b)(3)(A)(i).

The Director of the Texas Service Center denied the petition, concluding that the Petitioner did not demonstrate the Beneficiary's possession of the minimum employment experience required for the offered position or requested visa category. The Director also found that the Petitioner and Beneficiary willfully misrepresented the Beneficiary's experience on the accompanying certification from the U.S. Department of Labor (DOL).

The Petitioner bears the burden of establishing eligibility for the requested benefit by a preponderance of evidence. *See* section 291 of the Act, 8 U.S.C. § 1361 (discussing the burden of proof); *see also Matter of Chawathe*, 25 I&N Dec. 369, 375 (AAO 2010) (discussing the standard of proof). Upon *de novo* review, we will dismiss the appeal.

I. EMPLOYMENT-BASED IMMIGRATION

Immigration as a skilled worker generally follows a three-step process. First, a prospective employer must apply to DOL for certification that: (1) there are insufficient U.S. workers able, willing, qualified, and available for an offered position; and (2) the employment of a noncitizen in the position would not harm wages and working conditions of U.S. workers with similar jobs. *See* section 212(a)(5) of the Act, 8 U.S.C. § 1182(a)(5).

Second, an employer must submit an approved labor certification 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 determines whether a noncitizen beneficiary meets the requirements of a DOL-certified position and a requested immigrant visa category. 8 C.F.R. § 204.5(l).

Finally, if USCIS approves a petition, a designated noncitizen 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. THE REQUIRED EXPERIENCE

A skilled worker must be able to perform "skilled labor (requiring at least 2 years training or experience)." Section 203(b)(3)(A)(i) of the Act. A petitioner must also demonstrate 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). This petition's priority date is December 1, 2017, the date 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).

In evaluating a beneficiary's qualifications, USCIS must examine the job-offer portion of an accompanying labor certification to determine the minimum requirements of an offered position. 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 "DOL bears the authority for setting the *content* of the labor certification") (emphasis in original).

The accompanying labor certification states the minimum requirements of the offered position of head chef as two years of experience "in the job offered." The term "in the job offered" means "experience performing the key duties of the job opportunity" as listed on the certification. *See, e.g., Matter of Symbioun Techs., Inc.*, 2010-PER-01422, slip op. *4 (BALCA Oct. 24, 2011) (citations omitted). The listed duties of the offered position of head chef include: supervising and coordinating the activities of cooks and workers engaged in Chinese food preparation; determining presentation of food; instructing employees in the preparation, cooking, garnishing, and presentation of Chinese food; and collaborating with others to plan and develop unique recipes and menus.

The labor certification indicates that the offered position requires neither education nor training. The Petitioner further stated that it will not accept experience in an alternate occupation. Additionally, parts H.13 and H.14 of the certification indicate the position's need for "[f]luency in the Mandarin Chinese language."

On the labor certification, the Beneficiary attested that, by the petition's priority date, he gained more than five years of full-time, qualifying experience in Suriname. He stated that a restaurant employed him as a chef from October 2012 until the petition's priority date of December 1, 2017. The Beneficiary did not list any other experience on the certification.

To support 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 describe the beneficiary's experience. *Id.* "If such evidence is unavailable, other evidence relating to the alien's experience . . . will be considered." 8 C.F.R. § 204.5(g)(1).

The Petitioner submitted a letter from the Beneficiary's claimed former employer. The letter indicates the restaurant's full-time employment of him as a chef from October 2012 through September 2017. But, as noted in the Director's notice of intent to deny (NOID) the petition, the letter does not demonstrate the Beneficiary's qualifying experience. Specifically, the letter does not state the Beneficiary's former job duties or the type of food he prepared at the restaurant. Thus, the document neither describes the Beneficiary's experience nor demonstrates his prior performance of duties "in

the job offered." Additionally, the restaurant's name and address on the letter's stationery do not match those of the Beneficiary's former employer listed on the labor certification. The unexplained discrepancies cast doubt on the letter's accuracy and reliability. *See Matter of Ho*, 19 I&N Dec. 582, 591 (BIA 1988) (requiring a petitioner to resolve inconsistencies of record by independent, objective evidence pointing to where the truth lies).

The NOID also notes discrepancies between the Beneficiary's claimed experience and information on his 2015 application for a U.S. visitor's visa. On the visa application, the Beneficiary attested that he worked at a Surinamese supermarket that he had owned for about six years. Asked on the application if he had a prior employer, he answered "No." Thus, the application's information contradicts the Beneficiary's claimed continuous qualifying experience at the restaurant from 2012 to 2017.

The Petitioner's NOID response included an affidavit from its sole shareholder. After receiving the NOID, the shareholder stated that he contacted the Beneficiary, who affirmed his employment at the restaurant "as explained in the experience letter." The shareholder stated: "He told me that the restaurant is located across the street from his other business, a supermarket that he operates." The Applicant also reportedly told the shareholder that the Applicant lacks additional evidence of his restaurant experience "due to the normal practices of employment" in Suriname.

The Petitioner's NOID response does not establish the Beneficiary's claimed qualifying experience at the restaurant from 2012 to 2017. The Petitioner has not explained why the Beneficiary's 2015 visa application identifies the supermarket as his sole employer and states "No" prior employment. *See Matter of Ho*, 19 I&N at 591 (requiring a petitioner to resolve inconsistencies with independent, objective evidence).

Also, by describing the restaurant where the Beneficiary purportedly worked as across the street from "his other business," the shareholder's affidavit indicates that the Beneficiary owned the eatery. If the Beneficiary owned his former employer, its letter would not reliably demonstrate his experience there. As owner of the restaurant, he may have influenced the letter's content. As a beneficiary in these proceedings, he is a biased, non-objective party.

A petitioner may submit a letter or affidavit containing biased information, but its subjectivity will affect the weight 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. at 591-92. 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. at 376. Thus, in any future filings in this matter, the Petitioner must submit independent, objective evidence of the restaurant's ownership and the Beneficiary's purported employment there.

Further, by describing the restaurant's location as across the street from the supermarket and indicating the Beneficiary's ownership of both businesses, the shareholder's affidavit suggests that the Beneficiary might have worked concurrently for both entities. But the record lacks independent, objective evidence - such as tax records or contemporaneous business documents - supporting the

Beneficiary's concurrent employment. The Petitioner also has not explained whether he worked full-time for the businesses, or part-time at one or both. For labor certification purposes, part-time experience equals less than full-time experience. *See, e.g.*, *Matter of 1 Grand Express*, 2014-PER-00783, slip op. at **3-4 (BALCA Jan. 26, 2018) (equating a noncitizen's 25-hour-a-week job to 62.5% of full-time, 40-hour-a-week experience). Thus, even if the Beneficiary simultaneously worked for both businesses, the record would not indicate the number of hours the restaurant employed him or establish his acquisition of sufficient, qualifying experience by the petition's priority date.

The shareholder's affidavit asserts that additional evidence of the Beneficiary's restaurant experience is unavailable. But the Petitioner has not explained the purported unavailability of additional evidence or documented attempts to obtain corroborating proof of the Beneficiary's claimed employment. Moreover, the Petitioner has not explained the discrepancies regarding the restaurant's name and address or established the Beneficiary's experience "in the job offered."

On appeal, the Petitioner asserts that "USCIS failed to provide an opportunity to the petitioner to present information on [its] own behalf." The Petitioner notes that, before issuing an adverse decision, USCIS must generally notify a petitioner of derogatory information of which it is unaware and afford the business an opportunity to respond. *See* 8 C.F.R. § 103.2(b)(16)(i).

The NOID, however, satisfied the regulation's requirements. The notice informed the Petitioner of the derogatory information regarding the Beneficiary's claimed experience and provided the company an opportunity to respond. Thus, the record demonstrates that the Petitioner had a sufficient chance to present evidence on its own behalf.

For the foregoing reasons, the record does not demonstrate the Beneficiary's possession of the minimum experience required for the offered position or the requested visa category. We will therefore affirm the petition's denial.[1]

III. THE ALLEGED, WILLFUL MISREPRESENTATIONS

Noncitizens render themselves inadmissible to the United States if they seek to obtain U.S. visas, other documents, U.S. admission, or other benefits under the Act by fraudulently or willfully misrepresenting material facts. Section 212(a)(6)(C)(i) of the Act. Misrepresentations are willful if they are "deliberately made with knowledge of their falsity." *Matter of Valdez*, 27 I&N Dec. 596, 598 (BIA 2018) (citations omitted). A misrepresentation is material if it has a "natural tendency to influence, or [be] capable of influencing, the decision of the decision-making body to which it was addressed." *Id.* Petitioners who submit applications or documents with knowledge or reckless

[1] The Petitioner also has not established the Beneficiary's required "[f]luency in the Mandarin Chinese language." The Form I-140 and labor certification application state the Beneficiary's birth in China. But the record lacks evidence of his possession of the required language capability. The Director did not notify the Petitioner of this deficiency. Thus, in any future filings in this matter, the Petitioner must submit evidence establishing the Beneficiary's fluency in the requisite language.

disregard of their containment of false information may face fines or criminal penalties. Section 274C of the Act.[2]

The record supports the Director's conclusion that the Beneficiary willfully misrepresented a material fact on the accompanying labor certification. On the certification, the Beneficiary attested that a Surinamese restaurant employed him full-time as a chef from October 2012 to December 2017. But a letter from the purported restaurant inexplicably states a different name and address of the business than listed on the certification. Also, in 2015, during the Beneficiary's purported tenure at the restaurant, he inexplicably attested on a U.S. visa application that he worked for a supermarket he owned and that he had "No" prior employer. In addition, an affidavit from the Petitioner's shareholder indicates the Beneficiary's ownership of the restaurant where he purportedly worked, casting further doubt on the reliability of the restaurant's letter absent further independent objective evidence. The affidavit suggests the Beneficiary's concurrent employment by both the supermarket and the restaurant. But the Petitioner has not provided sufficient evidence of simultaneous work by the Beneficiary, his number of hours at each business, or the unavailability of additional proof of his work. Thus, a preponderance of evidence indicates that the Beneficiary misrepresented his qualifying experience on the labor certification.

The record also supports the misrepresentation's materiality. Both the offered position and the requested visa category require the Beneficiary's possession of at least two years of experience. *See* section 203(b)(3)(i) of the Act (describing the immigrant visa category for skilled workers). The Beneficiary listed only one former employer on the labor certification. His misrepresentation of that employment therefore naturally influences a decision on his required qualifications for the offered position and the requested visa category.

The Beneficiary's misrepresentation also appears to be willful. He signed the labor certification application declaring under penalty of perjury that he reviewed the document and that its information was true and correct. *See Matter of Valdez*, 27 I&N Dec. at 499 (holding that a noncitizen's signature on an immigration filing creates a "strong presumption" that they knew and assented to the filing's contents). Thus, the Beneficiary likely knew that he misrepresented his experience on the labor certification.

As the Petitioner argues, however, the record does not support the Director's finding that the company willfully misrepresented the Beneficiary's experience. The Petitioner's shareholder attested that the Beneficiary repeatedly told him that the Beneficiary worked at the restaurant. The record lacks sufficient evidence that the Petitioner knew of the Beneficiary's misrepresentation of his experience. Thus, we will withdraw the Director's misrepresentation finding against the Petitioner and his invalidation of the labor certification. But we will uphold the Director's misrepresentation finding against the Beneficiary.

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[2] Visa petition proceedings are inappropriate fora for determining beneficiaries' admissibility. *Matter of O-*, 8 I&N Dec. 295, 296-97 (BIA 1959). Thus, our review of the Beneficiary's alleged misrepresentation is a "finding of fact," not an admissibility determination. All USCIS decisions should include specific findings on material issues of law or fact that arise, including determinations of fraud or material misrepresentation. *See* 8 C.F.R. § 103.3(a)(1)(i); *see also* 5 U.S.C. § 557(c). After we enter a finding here, USCIS or another agency may consider the Beneficiary's admissibility in separate proceedings.

Although unaddressed by the Director, evidence indicates the Petitioner's misrepresentation of a different fact on the labor certification application. Asked on the application "is there a familial relationship between the owners, stockholders, partners, corporate officers, or incorporators, and the alien?" the Petitioner indicated "No." USCIS records, however, indicate that the Beneficiary and the spouse of the Petitioner's shareholder are siblings. The Beneficiary's 2015 visa application and a 2007 application for adjustment of status by the shareholder's spouse list their respective parents with the same names and dates of birth. Thus, the Beneficiary appears to be the brother-in-law of the Petitioner's shareholder. "A familial relationship includes any relationship establish by blood, marriage, or adoption, even if distant." DOL, Office of Foreign Labor Certification Frequently Asked Questions and Answers, "Family Relationships," Q.1, https://www.foreignlaborcert.doleta.gov/faqsanswers.cfm. Also, the adjustment application of the shareholder's spouse indicates that the couple married before the filing of the labor certification application. Thus, the Petitioner appears to have concealed the relationship between its shareholder and the Beneficiary on the labor certification.

The Petitioner's misrepresentation appears to be willful. "[T]he officers and principals of a corporation are presumed to be aware and informed of the organization and staff of their enterprise." *Matter of Silver Dragon Chinese Rest.*, 19 I&N Dec. 401, 404 (Comm'r 1986). The Petitioner's owner therefore likely knew that the Beneficiary was his spouse's brother.

The misrepresentation also appears to be material. Had DOL known of the family relationship between the Petitioner's shareholder and the Beneficiary, the Agency would have likely required the company to demonstrate the availability of the offered position to U.S. workers. *See* 20 C.F.R. § 656.17(l). Labor certification employers must meet all regulatory requirements. 20 C.F.R. § 656.24(b)(1). The misrepresentation therefore could have influenced the outcome of the labor certification application.

The Director did not notify the Petitioner of this derogatory information. Thus, in any future filings in this matter, the Petitioner must submit any evidence rebutting its alleged concealment of the family relationship between its shareholder and the Beneficiary.

IV. CONCLUSION

The Petitioner has not demonstrated the Beneficiary's possession of the minimum experience required for the offered position or requested visa classification. We will therefore affirm the petition's denial.

ORDER: The appeal is dismissed.