U.S. Citizenship and Immigration Services

Non-Precedent Decision of the Administrative Appeals Office

In Re: 19693002

Date: AUG. 30, 2022

Appeal of Texas Service Center Decision

Form I-140, Immigrant Petition for Skilled Worker

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

The Director of the Texas Service Center denied the petition, determining that both the Petitioner and the Beneficiary willfully made material misrepresentations on the labor certification regarding the Beneficiary's education. Subsequently, the Director also dismissed the Petitioner's motions and affirmed the prior decision.

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

I. LAW

Employment-based immigration generally follows a three-step process. First, an employer obtains an approved labor certification (ETA Form 9089) from the U.S. Department of Labor (DOL). *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* section 212(a)(5)(A)(i)(I)-(II) of the Act. Second, the employer files an immigrant visa petition (Form I-140) 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 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. ANALYSIS

The issue on appeal is whether the Director properly dismissed the motions. A motion to reopen must state new facts and be supported by affidavits or other documentary evidence. 8 C.F.R. § 103.5(a)(2). A motion to reconsider must state the reasons for reconsideration; be supported by any pertinent precedent decision to establish that the decision was based on an incorrect application of law or policy; and establish that the decision was incorrect based on the evidence in the record at the time of the decision. 8 C.F.R. § 103.5(a)(3).

The Director denied the motions stating that none of the new evidence demonstrates that USCIS's finding of willful misrepresentation. Upon review, we conclude that the Director properly dismissed the motions and the Petitioner and the Beneficiary willfully made material misrepresentations on the labor certification.

A. Procedural Background

A skilled worker means an individual who is capable, at time of filing, of performing skilled labor (requiring at least two years of training or experience), not of a temporary or seasonal nature, for which qualified workers are not available in the United States. 8 C.F.R. § 204.5(l)(2). A petition for skilled worker classification must be accompanied by evidence that the individual meets the educational, training, or experience, and any other requirements of the individual labor certification. 8 C.F.R. § 204.5(l)(3)(ii)(B). All requirements must be met by the petition's priority date. *Matter of Wing's Tea House,* 16 I&N Dec. 158, 159 (Acting Reg'l Comm'r 1977).

Any U. S. employer desiring and intending to employ an individual entitled to immigrant classification under the Act may file a petition for classification. Section 204(a)(1)(F) of the Act, 8 U.S.C. § 1154(a)(1)(F); *see* 8 C.F.R. § 204.5(c). Such petitions must be accompanied by a labor certification from the DOL. *See* section 212(a)(5) of the Act, 8 U.S.C. § 1182(a)(5); *see also* 8 C.F.R. § 204.5(l)(3)(i). The Act requires USCIS to determine eligibility for the visa classification requested. *See* section 204(a)(1)(F) of the Act, 8 U.S.C. § 1154(a)(1)(F). Certain classifications require a labor certification to establish eligibility. *See* section 203(b)(3)(C) of the Act, 8 U.S.C. § 1153(b)(3)(C); 8 C.F.R. § 204.5(a)(2); 8 C.F.R. § 204.5(l)(3)(i). Section 204(b) of the Act[1] allows a petition's approval only after an investigation of the facts in each case to ensure that the facts stated in the petition, which necessarily includes the labor certification, are true. Section 204(b) of the Act, 8 U.S.C. § 1154(b). For those petitions requiring a labor certification, USCIS' investigation into the facts must include

[1] Section 204(b) of the Act, 8 U.S.C. § 1154(b), states:

> After an investigation of the facts in each case, and after consultation with the Secretary of Labor with respect to petitions to accord a status under section 203(b)(2) or 203(b)(3), the Attorney General shall, if he determines that the facts stated in the petition are true and that the alien in behalf of whom the petition is made is an immediate relative specified in section 201(b) or is eligible for preference under subsection (a) or (b) of section 203, approve the petition and forward one copy thereof to the Department of State. The Secretary of State shall then authorize the consular officer concerned to grant the preference status.

consultation with DOL. *Id.* Thus, the labor certification is not conclusive evidence of eligibility; instead, it is a pre-condition to being eligible to file a Form I-140. USCIS is responsible for reviewing the Form I-140, and the labor certification is incorporated into the Form I-140 by statute and regulation. *See* section 203(b)(3)(C) of the Act, 8 U.S.C. § 1153(b)(3)(C); 8 C.F.R. § 204.5(a)(2); 8 C.F.R. §103.2(b)(i). USCIS is required to approve an employment-based immigrant visa petition only where it is determined that the facts stated in the petition, which incorporates the labor certification, are true and the foreign worker is eligible for the benefit sought. Section 204(b) of the Act, 8 U.S.C. § 1154(b).

The labor certification in this case requires a minimum of a high school education (H.4) and at least 24 months experience in managing a gas station (H.6). As relevant here, the answers to the following questions are indicated below:

- J.11 Education: highest level achieved as required by the requested job opportunity – High School
- J.12 Specify major field(s) of study – General
- J.13 Year relevant education completed – 12
- J.14 Institution where relevant education specified in question 11 was received – [redacted] High School
- J.15 Address 1 of conferring institution – [redacted]
- J.16 City/State/Country/Postal Code – [redacted] VA United States of America [redacted]

The Director issued a request for evidence (RFE) informing the Petitioner to submit the Beneficiary's high school diploma. In response, the Petitioner provided a letter stating:

> [The Beneficiary] completed his high school from the Federal Board of Intermediate and Secondary Education, [redacted] Pakistan in April-June 2012. Copy of the mark sheet is enclosed. He went on to do bachelor's degree from [redacted] University of [redacted] Pakistan. Copy of this diploma is enclosed.
>
> [The Beneficiary] had his education from [redacted] evaluation and was found to have U.S. equivalence of Bachelor's degree from a regionally accredited College/University. Copy of the General Evaluation report is enclosed.
>
> The job offered to [the Beneficiary] only requires a High School Diploma, which he clearly has and it does not matter where he obtained his education from, so long as it is U.S. equivalent. Before he was offered the job his work experience and education were thoroughly evaluated. In the labor certification a different institution was inadvertently stated, this oversight does not in any way change the educational requirement stated for the job.

In denying the petition, the Director determined that the Petitioner and Beneficiary willfully misrepresented material information on the labor certification regarding where the Beneficiary completed his high school education and the highest level of education he attained. On motion, the Petitioner offered a letter indicating:

> When the labor certification was filed by the attorney [redacted], he mistakenly stated [the Beneficiary's] educational level as high school and mentioned a different institute name in the PERM labor certification. He didn't verify these details before submitting the form for labor certification. [The Petitioner] was notified about the inaccuracy by [the Beneficiary] when he received the approved labor certification. [The Beneficiary] and [the Petitioner] informed the attorney of the inaccuracy, the attorney admitted the mistake made during filing because of having too much work load. But he characterized the inaccuracy as a typographical error and said he would correct it so that it doesn't affect the case.
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> . . . .
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> There was no intention of ours to willfully misrepresent any information. We provided the information to our attorney, however due to an honest mistake, the education information was mixed up with another individual's information. [The Beneficiary] has the necessary qualifications for the position, thus there was no reason for us to willfully misrepresent his education. Rather, this was an honest mistake that unfortunately was not seen until it was too late. It was a human error mistakenly done by our attorney and he regretted the error.

In addition, the Petitioner submitted a letter from the Beneficiary generally repeating the Petitioner's claims and stating:

> When the labor certification got approved and I received the copy, I identified that the education level and Institution were inaccurate in the certificate. When the inaccuracy was pointed out to the attorney, he admitted the mistake while filing the paperwork and stated that he made a typographical error by mistakenly put the same institution "[redacted] School" and education level "High School" as my brother . . . who is also represented by the same attorney in a different case. His paperwork was also filed at that time. But the attorney led me to believe that this mistake is a typographical mistake and therefore there is no need to file for a new labor certificate and to wait until the filing of Form I-140 to address it.

Further, the Petitioner presented a letter from [redacted] indicating:

> While completing the labor certification a different education institution "[redacted] School" was erroneously stated and the education level of [the Beneficiary] was mentioned as "High School." This happened due to the fact that I am representing [the Beneficiary's] brother . . . in a different case and I was in the process of filing [the brother's] paperwork, in addition to preparing [the Beneficiary's] case. In fact, [the brother] was the one attending High School at [redacted] School at that particular time. [The Beneficiary] pointed out the discrepancy to me regarding the academic details after he received the approved labor certification.

> This discrepancy was an unintentional typographical mistake on my part and is greatly regretted. Usually, I am very thorough and careful in checking and filing all my clients papers and forms but in this particular instance, this inaccuracy slid through the cracks.

The Petitioner also provided an academic equivalency evaluation for the Beneficiary's educational documents and a copy of a high school diploma from [redacted] High School for [redacted] In dismissing the motions, the Director concluded that since both the Petitioner and the Beneficiary signed the labor certification under penalty of perjury and that all information was true, correct, and accurate, the Petitioner did not overcome the prior willful material misrepresentation finding.

B. Willful Misrepresentation of Material Facts

On appeal, the Petitioner submits a nearly identical brief that it provided on motion. USCIS will deny a visa petition if the petitioner submits evidence which contains false information. In general, a few errors or minor discrepancies are not reason to question the credibility of an alien or an employer seeking immigration benefits. *See Spencer Enterprises Inc. v. U.S.*, 345 F.3d 683, 694 (9th Cir. 2003). However, if a petition includes serious errors and discrepancies, and the petitioner fails to resolve those errors and discrepancies after an officer provides an opportunity to rebut or explain, then the inconsistencies will lead USCIS to conclude that the claims stated in the petition are not true. *See Matter of Ho*, 19 I&N Dec. 582, 591-92 (BIA 1988). Unresolved material inconsistencies may lead us to reevaluate the reliability and sufficiency of other evidence submitted in support of the requested immigration benefit. *Id.*

Section 212(a)(6)(C)(i) of the Act, 8 U.S.C. § 1182(a)(6)(C)(i), states that "in general – any alien, who by fraud or willfully misrepresenting a material fact, seeks (or has sought to procure, or who has procured) a visa, other documentation, or admission to the United States or other benefit provided under the Act is inadmissible." 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;
- The petitioner or beneficiary made a false representation;
- The false representation was willfully made;
- The false representation was material; and
- The false representation was made to a U.S. government official.

See 8 *USCIS Policy Manual* J.2(B), https://www.uscis.gov/policymanual.

A misrepresentation is willful if it is "deliberately made with knowledge of [its] falsity." *Matter of S- and B-C-*, 9 I&N Dec. 436, 445 (BIA 1960; A.G. 1961); *see also Matter of Kai Hing Hui*, 15 I&N Dec. 288, 289-90 (BIA 1975) (noting that, unlike fraud, a finding of willfulness does not require an "intent to deceive"). To be considered material, the misrepresentation must be one which "tends to shut off a line of inquiry which is relevant to the alien's eligibility, and which might well have resulted in a proper determination that he be excluded." *Matter of Ng*, 17 I&N Dec. 536, 537 (BIA 1980).

Here, the Petitioner indicated on the labor certification that the Beneficiary completed his high school education at [redacted] High School in [redacted] Virginia, and the highest level of education he achieved was high school. However, the Beneficiary never attended [redacted] High School, never received a diploma from the institution, and earned a bachelor's degree in Pakistan. Therefore, the answers at Part J on the ETA Form 9089 were not correct and constitute false representations. A misrepresentation can be made to a government official in an oral interview, on the face of a written application or petition, or by submitting evidence containing false information. INS Genco Op. No. 91-39, 1991 WL 1185150 (April 30, 1991). For the reasons discussed above, because the Beneficiary's education information was untrue, the false attestations on the labor certification constitute a false representation on the face of a written petition.

Second, we conclude that the Beneficiary and the Petitioner willfully made the misrepresentations. The Beneficiary signed Part L of the labor certification, "declar[ing] under penalty of perjury that Section J and K are true and correct." Moreover, [redacted] owner for the Petitioner, signed Part N, acknowledging "full responsibility for the accuracy of any representations made by agent or attorney" and "declar[ing] under penalty of perjury that I have read and reviewed this application and that to the best of my knowledge the information contained herein is true and accurate." Both parties signed the labor certification attesting to the accuracy contained on the form even though it included false information. Furthermore, as it relates to [redacted] assertion of "an unintentional typographical mistake," the record reflects that he signed Part M "certify[ied] that I have prepared this application at the direct request of the employer listed in Section C and that to the best of my knowledge the information contained herein is true and correct." In addition, although the Petitioner and Beneficiary point to [redacted] as the reason for the misrepresentations, the record does not contain a claim of ineffective assistance of counsel. *See Matter of Lozada*, 19 I&N Dec. 637 (BIA 1988), *aff'd*, 857 F.2d 10 (1st Cir. 1988).

Third, the evidence is material to the Beneficiary's eligibility. To be considered material, a false statement must be shown to have been predictably capable of affecting the decision of the decision-making body. *Kungys v. U.S.*, 485 U.S. 759 (1988). In the context of a visa petition, a misrepresented fact is material if the misrepresentation cut off a line of inquiry which is relevant to the eligibility criteria and that inquiry might well have resulted in the denial of the visa petition. *See Ng*, 17 I&N Dec. at 537. If the Director would not have issued an RFE, then he could have approved the petition based on the false information. Part H.4 of labor certification indicated that the managerial job required at least a high school education, and according to Parts J.11-16, the Beneficiary met the education requirement through his purported attendance and completion at [redacted] High School. Only after the issuance of the RFE and because the Petitioner could not produce a diploma or similar evidence from [redacted] High School for the Beneficiary did the Petitioner indicate that the Beneficiary did not attend or complete his high school education at [redacted] High School. In addition, the Petitioner and Beneficiary indicated on the labor certification that the Beneficiary's highest education he received was at the high school level when, in fact, he received a bachelor's degree. The Beneficiary's attendance at [redacted] University [redacted] in [redacted] Pakistan, according to the provided transcripts, occurred from February 2013 – January 2017. Both the labor certification and job letter from [redacted] asserts the Beneficiary's employment from January 2015 – March 2017, during the same time he earned his bachelor's degree. The omission of the Beneficiary's college education cut off a line of inquiry into the authenticity of his job experience.

For the reasons discussed above, we affirm the Director's finding that the Petitioner and Beneficiary willfully made material misrepresentations on the labor certification. Alternatively, as noted above, USCIS is responsible for reviewing the Form I-140, and the labor certification is incorporated into the Form I-140 by statute and regulation. *See* section 203(b)(3)(C) of the Act; 8 C.F.R. § 204.5(a)(2); 8 C.F.R. § 103.2(b)(1) (which states that "[a]ny evidence submitted in connection with a benefit request is incorporated into and considered part of the request."). USCIS must investigate the facts in each case and determine "whether the facts stated in the petition are true." Section 204(b) of the Act, 8 U.S.C. § 1154(b). It is clear under the statute that USCIS may reject a fact stated in the petition if it does not believe that fact to be true. *Id.*; *see also Anetekhai v. I.N.S.*, 876 F.2d 1218, 1220 (5th Cir. 1989); *Lu-Ann Bakery Shop, Inc. v. Nelson,* 705 F. Supp. 7, 10 (D.D.C. 1988); *Systronics Corp. v. INS,* 153 F. Supp. 2d 7, 15 (D.D.C. 2001). As set forth above, after examination and investigation of the facts in this matter, the facts stated in this petition are not true with respect to the Beneficiary's education history on the labor certification. Therefore, following USCIS' investigation into the facts, this petition cannot be approved. This forms a separate and distinct basis for dismissal.

C. Ability to Pay the Proffered Wage

Although not discussed by the Director, the Petitioner did not establish its continuing ability to pay the proffered wage from the petition's priority date of September 25, 2019. The proffered wage is $57,720 per year.

The regulation at 8 C.F.R. § 204.5(g)(2) states in pertinent part:

> *Ability of prospective employer to pay wage.* Any petition filed by or for an employment-based immigrant which requires an offer of employment must be accompanied by evidence that the prospective United States employer has the ability to pay the proffered wage. The petitioner must demonstrate this ability at the time the priority date is established and continuing until the beneficiary obtains lawful permanent residence. Evidence of this ability shall be either in the form of copies of annual reports, federal tax returns, or audited financial statements.

The record contains the Petitioner's tax return for calendar year 2019. It does not contain regulatory-prescribed evidence of the Petitioner's continuing ability to pay the proffered wage after 2019. Thus, the Petitioner has not established its continuing ability to pay the proffered wage from the petition's priority date onward.

III. CONCLUSION

The facts in the petition are not true, as required by section 204(b) of the Act. We conclude that the Director properly determined that the Petitioner and Beneficiary willfully misrepresented material facts.

ORDER: The appeal is dismissed.