



**U.S. Citizenship
and Immigration
Services**

**Non-Precedent Decision of the
Administrative Appeals Office**

In Re: 20633721

Date: OCT. 13, 2022

Appeal of Nebraska Service Center Decision

Form I-140, Immigrant Petition for Skilled Worker

The Petitioner, a dry cleaner, sought to employ the Beneficiary as a skilled worker under the third preference immigrant category. 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 foreign national for lawful permanent residence to work in a position that requires at least two years of training or experience.

After the filing’s initial grant, the Director of the Nebraska Service Center revoked the petition’s approval, concluding that the record at the time of approval did not establish that 1) the job offer was *bona fide* and 2) the Beneficiary possessed the minimum experience required for the offered position.

The Petitioner bears the burden of establishing eligibility for the requested benefit by a preponderance of evidence. *See Matter of Ho*, 19 I&N Dec. 582, 589 (BIA 1988) (discussing the burden of proof in petition revocation proceedings); *see also Matter of Chawathe*, 25 I&N Dec. 369, 375 (AAO 2010) (discussing the standard of proof). Upon *de novo* review, we will withdraw the Director’s decision and remand the matter for entry of a new decision consistent with the following analysis.

I. EMPLOYMENT-BASED IMMIGRATION

Immigration as a skilled worker generally follows a three-step process. First, a prospective employer must obtain U.S. Department Of Labor (DOL) certification that: (1) there are insufficient U.S. workers able, willing, qualified, and available for an offered position; and (2) employment of a noncitizen in the position will 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 beneficiary 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.

At any time before a beneficiary obtains lawful permanent residence, USCIS may revoke a petition's approval for "good and sufficient cause." Section 205 of the Act, 8 U.S.C. § 1155. If supported by a record, the erroneous nature of a petition's approval justifies its revocation. *Matter of Ho*, 19 I&N Dec. at 590.

USCIS properly issues a notice of intent to revoke (NOIR) if the unexplained and unrebutted record at the time of the notice's issuance would have warranted the petition's denial. *Matter of Estime*, 19 I&N Dec. 450, 451 (BIA 1987). The Agency properly revokes a petition's approval if a petitioner's NOIR response does not rebut or resolve the stated revocation grounds. *Id.* at 451-52.

II. *BONA FIDE* JOB OFFER

For the reasons explained in the NOIR, the Director questioned whether the job offer for an "alteration tailor"¹ is *bona fide*. The Director's decision did not, however, address the Petitioner's response. For example, although the Petitioner claims that it requires the Beneficiary's services because she is a "specialist in replacing zippers, buttons, and overlocking holes,"² the labor certification does not indicate that the position has any "[s]pecific skills or other requirements," nor is there any mention of specializing in zippers, buttons, or overlocking holes in the "job duties section."³

On remand, the Director should 1) address the Petitioner's arguments in response to the NOIR and on appeal and 2) determine whether the labor certification accurately reflects the requirements and duties of the proffered position.

III. THE BENEFICIARY'S QUALIFICATIONS

A petitioner must establish a beneficiary's possession of all DOL-certified job requirements 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 October 28, 2015, 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 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 "DOL bears the authority for setting the *content* of the labor certification") (emphasis in original).

The labor certification indicates that the offered position requires at least two years of experience in the job offered and that the Beneficiary satisfied this requirement based upon her employment as a

¹ The job title used on the labor certification is "custom tailor." On the Form I-140, Immigrant Petition for Alien Worker, it is "alteration tailor."

² The Petitioner also states that it "hired [the Beneficiary] solely based on her excellent skills in zippers, buttons, and overlocking."

³ It, therefore, would also appear that the Petitioner did not accurately describe the offered position on the labor certification.

“custom tailor” in South Korea from January 17, 2010, until February 18, 2013. The Director concluded that the Beneficiary provided “conflicting information” and thus, “may have” submitted a “fabricated” experience letter and “misrepresented a material fact involving the labor certification.”

The NOIR, however, did not notify the Petitioner of additional derogatory evidence regarding her claimed prior experience. On her February 7, 2013, and June 5, 2013, E-2 nonimmigrant visa (NIV) applications,⁴ the Beneficiary indicated that her “primary occupation” was “homemaker” and answered “no” to the question “[w]ere you previously employed?” As noted above, the documentation regarding her employment in South Korea stated that she was employed until February 18, 2013. In addition, the Beneficiary did not include the claimed experience on the Form G-325A, Biographic Information, despite the clear instructions to list her employment for the last five years.⁵

The Beneficiary’s responses on her NIV application and Form G-325A directly contradict her subsequent claims regarding her previous employment and qualifications for the proffered position. These inconsistencies must be resolved with independent, objective evidence pointing to where the truth lies. *See Matter of Ho*, 19 I&N Dec. at 591.

We would also note that the job duties as described on the labor certification are as follows:

Provide alterations and adjustments, and redesign and resize clothing on clients’ demands. Make made-to-measure clothing available to customer’s specifications and measurements with high regards to garment, detail, design, and fit.

According to the February 5, 2021 employment verification letter, the Beneficiary’s “job was to tailor[,] specifically [the] replacement of zippers and overlocking.” Thus, on remand the Director should also determine whether, even if the Beneficiary were able to resolve the above inconsistencies and establish that she was employed as a tailor in South Korea, she held the requisite two years of experience in the job offered at the time of filing.

IV. ABILITY TO PAY THE PROFFERED WAGE

A petitioner must demonstrate its continuing ability to pay a proffered wage, from a petition’s priority date until a beneficiary obtains lawful permanent residence. 8 C.F.R. § 204.5(g)(2). Evidence of ability to pay must generally include copies of annual reports, federal income tax returns, or audited financial statements. *Id.* Although the Director’s revocation indicated that the Petitioner had established its ability to pay, we withdraw the Director’s conclusion on this issue.

The labor certification states the proffered wage is \$28,496 a year. According to the 2015 Form W-2, the Petitioner paid the Beneficiary a total of \$30,000. However, the record indicates that the Beneficiary did not begin her employment with the Petitioner until July 1, 2015. As the Petitioner has not provided any explanation for this, we are left to question whether it actually paid the Beneficiary more than the proffered annual salary for six months of work.

⁴ The Beneficiary is the spouse of an E-2 visa holder who owns a dry-cleaning business.

⁵ The G-325A, which the Beneficiary signed on August 29, 2016, indicates that “[s]evere penalties are provided by law for knowingly and willfully falsifying or concealing a material fact.”

We also note additional discrepancies among the tax documents which the Director did not address. For example, Line 13 of the 2015 Form 1120, U.S. Corporation Income Tax Return, lists the “Salaries and wages (less employment credits)” as \$42,707, but according to the NYS-45, Quarterly Combined Withholding, Wage Reporting, and Unemployment Insurance Return, the Petitioner paid a total of \$68,498.40 in wages in 2015. Based upon the documentation provided, we are unable to determine the accuracy of Line 13 of the Form 1120.

The record lacks sufficient and credible evidence of the company’s continuing ability to pay the proffered wage. *See* 8 C.F.R. § 205.5(g)(2). Further, given the numerous discrepancies and inconsistencies in the record, the Director may wish to request that the Petitioner provide official transcripts from the Internal Revenue Service for any and all required years.⁶

IV. MISREPRESENTATION

To approve a Form I-140 petition, USCIS must determine that “the facts stated in the petition are true.” Section 204(b) of the Act. A petition comprises its supporting evidence, including an accompanying labor certification. 8 C.F.R. § 103.2(b)(1). Thus, USCIS cannot approve a petition if the facts stated on the labor certification are untrue.

Misrepresentations are willful if they are “deliberately made with knowledge of their falsity.” *Matters of Valdez*, 27 I&N Dec. 496, 498 (BIA 2018) (cleaned up). A misrepresentation is material when 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.* Noncitizens’ signatures on immigration applications establish “strong presumptions” that they knew the contents of the applications and assented to them. *Id.* at 499.

For the reasons discussed above, it appears that the Beneficiary willfully misrepresented a material fact: her claimed, qualifying employment experience for the offered position. In addition, questions remain regarding the Petitioner’s tax returns. The Director, therefore, should determine whether the Beneficiary and/or the Petitioner willfully misrepresented a material fact.

VI. CONCLUSION

Because the Director did not sufficiently address the response to the NOIR or notify the Petitioner of additional derogatory information and evidentiary deficiencies, we will remand the matter for issuance of a new NOIR and decision which consider both the Petitioner’s responses and its arguments on appeal. *See* 8 C.F.R. § 103.2(b)(16)(i) (requiring USCIS to notify a petitioner of derogatory information of which it is unaware and to provide it with a rebuttal opportunity). The Director should also determine whether the Petitioner and/or the Beneficiary willfully misrepresented a material fact.

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

⁶ We would also note that most of the submitted tax documentation was not signed by either the authorized representative of the petitioning entity or the tax preparer.