U.S. Citizenship and Immigration Services

Non-Precedent Decision of the Administrative Appeals Office

In Re: 13010814

Date: AUG. 23, 2021

Appeal of Nebraska Service Center Decision

Form I-140, Immigrant Petition for Alien Worker (Advanced Degree, Exceptional Ability, National Interest Waiver)

The Petitioner, a teacher, seeks second preference immigrant classification as an individual of exceptional ability, as well as a national interest waiver of the job offer requirement attached to this EB-2 classification. *See* Immigration and Nationality Act (the Act) section 203(b)(2), 8 U.S.C. § 1153(b)(2).

The Director of the Nebraska Service Center denied the petition, concluding that the Petitioner did not qualify for classification as an individual of exceptional ability, and that she had not established that a waiver of the required job offer, and thus of the labor certification, would be in the national interest. The matter is now before us on appeal.

On appeal, the Petitioner asserts that she qualifies for both the underlying classification and a national interest waiver.

On June 7, 2021, we issued a notice of intent to dismiss (NOID). In response, the Petitioner submitted a notarized statement. For the reasons below, we will dismiss the appeal and enter a separate finding of willful misrepresentation of a material fact against the Petitioner.

I. LAW

To establish eligibility for a national interest waiver, a petitioner must first demonstrate qualification for the underlying EB-2 visa classification, as either an advanced degree professional or an individual of exceptional ability in the sciences, arts, or business. Because this classification requires that the individual's services be sought by a U.S. employer, a separate showing is required to establish that a waiver of the job offer requirement is in the national interest.

Section 203(b) of the Act sets out this sequential framework:

> (2) Aliens who are members of the professions holding advanced degrees or aliens of exceptional ability. –

(A) In general. – Visas shall be made available . . . to qualified immigrants who are members of the professions holding advanced degrees or their equivalent or who because of their exceptional ability in the sciences, arts, or business, will substantially benefit prospectively the national economy, cultural or educational interests, or welfare of the United States, and whose services in the sciences, arts, professions, or business are sought by an employer in the United States.

(B) Waiver of job offer –

(i) National interest waiver. . . . [T]he Attorney General may, when the Attorney General deems it to be in the national interest, waive the requirements of subparagraph (A) that an alien's services in the sciences, arts, professions, or business be sought by an employer in the United States.

Section 101(a)(32) of the Act provides that "[t]he term 'profession' shall include but not be limited to architects, engineers, lawyers, physicians, surgeons, and teachers in elementary or secondary schools, colleges, academics, or seminaries."

The regulation at 8 C.F.R. § 204.5(k)(2) contains the following relevant definitions:

Advanced degree means any United States academic or professional degree or a foreign equivalent degree above that of baccalaureate. A United States baccalaureate degree or a foreign equivalent degree followed by at least five years of progressive experience in the specialty shall be considered the equivalent of a master's degree. If a doctoral degree is customarily required by the specialty, the alien must have a United States doctorate or a foreign equivalent degree.

Exceptional ability in the sciences, arts, or business means a degree of expertise significantly above that ordinarily encountered in the sciences, arts, or business.

Profession means one of the occupations listed in section 101(a)(32) of the Act, as well as any occupation for which a United States baccalaureate degree or its foreign equivalent is the minimum requirement for entry in the occupation.

In addition, to demonstrate eligibility as an individual of exceptional ability, a petitioner must submit documentation that satisfies at least three of the six categories of evidence listed at 8 C.F.R. § 204.5(k)(3)(ii).

Furthermore, while neither the statute nor the pertinent regulations define the term "national interest," we set forth a framework for adjudicating national interest waiver petitions in the precedent decision *Matter of Dhanasar*, 26 I&N Dec. 884 (AAO 2016).[1] *Dhanasar* states that after a petitioner has established eligibility for EB-2 classification, U.S. Citizenship and Immigration Services (USCIS)

[1] In announcing this new framework, we vacated our prior precedent decision, *Matter of New York State Department of Transportation*, 22 I&N Dec. 215 (Act. Assoc. Comm'r 1998) (*NYSDOT*).

may, as matter of discretion[2], grant a national interest waiver if the petitioner demonstrates: (1) that the foreign national's proposed endeavor has both substantial merit and national importance; (2) that the foreign national is well positioned to advance the proposed endeavor; and (3) that, on balance, it would be beneficial to the United States to waive the requirements of a job offer and thus of a labor certification.[3]

II. ANALYSIS

A. Member of the Professions Holding an Advanced Degree

The Director concluded that the Petitioner did not establish that she is an advanced degree professional. On appeal, the Petitioner does not address this issue. We, therefore, consider this claim abandoned. *See Matter of R-A-M-*. 25 I&N Dec. 657. 658 n.2 (BIA 2012) (stating that when a filing party fails to appeal an issue addressed in an adverse decision, that issue is waived). *See also Sepulveda v. U.S. Atty Gen.,* 401 F.3d 1226. 1228 n. (11th Cir. 2005). citing *United States v. Cunningham,* 161 F.3d 1343, 1344 (11th Cir. 1998); *Hristov v. Roark,* No. 09-CV-27312011, 2011 WL 4711885 at *1. *9 (E.D.N.Y. Sept. 30, 2011) (plaintiff's claims were abandoned as he failed to raise them on appeal to the AAO).

B. Exceptional Ability

On appeal, the Petitioner asserts that she meets five of the six criteria. As the Petitioner does not address the Director's conclusion that she does not meet the criterion at 8 C.F.R. § 204.5(k)(3)(ii)(C), we will consider this issue abandoned. *Id.*

> *An official academic record showing that the alien has a degree, diploma, certificate, or similar award from a college, university, school, or other institution of learning relating to the area of exceptional ability.* 8 C.F.R. § 204.5(k)(3)(ii)(A).

The Petitioner's foreign bachelor's degree meets the plain language of this criterion.

> *Evidence in the form of letter(s) from current or former employer(s) showing that the alien has at least ten years of full-time experience in the occupation for which he or she is being sought.* 8 C.F.R. § 204.5(k)(3)(ii)(B)

As explained by the Director, the two submitted letters regarding the Petitioner's employment from November 2, 2015 until March 19, 2016 and November 21, 2016 until June 1, 2018[4] do not establish ten years of full-time experience. Although the Petitioner claims she "has worked since 2007[5] as an English teacher" and "held various administrative roles," without "letter(s) from current of former employers"

---

[2] *See also Poursina v. USCIS*, 936 F.3d 868, 2019 WL 4051593 (9th Cir. 2019) (finding USCIS' decision to grant or deny a national interest waiver to be discretionary in nature).

[3] *See Dhanasar*, 26 I&N Dec. at 888-91, for elaboration on these three prongs.

[4] This letter was written by the Petitioner.

[5] We note that the Petitioner was born on [redacted] 1992 and her resume lists her first date of employment as 2010, not 2007.

which document "ten years of full-time experience in the occupation," we cannot conclude that she meets the requirements of this regulatory criterion.[6]

> *Evidence that the alien has commanded a salary, or other remuneration for services, which demonstrates exceptional ability.* 8 C.F.R. § 204.5(k)(3)(ii)(D).

To satisfy this criterion, the evidence must show that an individual has commanded a salary or remuneration for services that is indicative of her claimed exceptional ability relative to others working in the field.[7] The record does not contain any documentation which makes such a showing.

> *Evidence of membership in professional associations.* 8 C.F.R. § 204.5(k)(3)(ii)(E).

The Petitioner contends that her membership in the Association of American Educators satisfies this criterion. As explained by the Director, the submitted letter and membership card indicate that she did not become a member until January 10, 2020., almost 8 months after the date of filing. Eligibility for a requested immigration benefit must be established at the time of filing. 8 C.F.R. §§ 103.2(b)(1), (12); *Matter of Katigbak,* 14 I&N Dec. 45, 49 (Reg'l Comm'r 1971). A petition cannot be approved at a future date after the petitioner becomes eligible under a new set of facts. *Matter of Izwnmi,* 22 I&N Dec. 169, 175 (Comm 'r 1998). That decision, citing *Matter of Bardouille,* 18 I&N Dec. 114 (BIA 1981), further provides that USCIS cannot "consider facts that come into being only subsequent to the filing of a petition." *Id.* at 176. Accordingly, the Petitioner has not established that she meets this criterion.

> *Evidence of recognition for achievements and significant contributions to the industry or field by peers, governmental entities, or professional or business organizations.* 8 C.F.R. § 204.5(k)(3)(ii)(F).

As evidence, the Petitioner provided complimentary recommendation letters[8] from a number of her instructors, but they are not sufficient to demonstrate that she meets the plain language requirements of this criterion.[9] The evidence does not show that the Petitioner's work as a teacher has had an impact beyond her students at a level indicative of achievements and significant contributions to the industry or field. [10] For these reasons, the Petitioner has not established that she fulfills this criterion.

---

[6] The Form I-140, Immigrant Petition for Alien Worker, in this matter was filed on May 29,2019. The Petitioner, therefore, must demonstrate that she had at least ten years of full-time experience at the time of filing. *See* 8 C.F.R. § 103.2(b)(1).

[7] *See* USCIS Policy Memorandum PM-602-0005.1, *Evaluation of Evidence Submitted with Certain Form I-140 Petitions; Revisions to the Adjudicator's Field Manual (AFM) Chapter 22.2, AFM Update AD11-14* 21 (Dec. 22, 2010), https://www.uscis.gov/legal-resources/policy-memoranda.

[8] We note that the Petitioner asserts that she is a teacher of exceptional ability. Therefore, she cannot rely on, and we will not address, letters submitted regarding her work in the technology field.

[9] Although the Petitioner also submitted four publications, as will be discussed below, she is not the author and we will not consider them here. Similarly, although one of the letters claims that the Petitioner's "achievements [] include two publications in the magazine of Education," there is no credible documentary evidence to support the statement.

[10] Formal recognition that is contemporaneous with the individual's claimed contributions and achievements may have more weight than letters prepared for the petition "recognizing" the individual's achievements. *See* USCIS Policy Memorandum PM 602-0005.1, *supra*, at 23.

For the reasons set forth above, the Petitioner has not shown that she meets at least three of the six regulatory criteria at 8 C.F.R. § 204.5(k)(3)(ii).

C. National Interest Waiver

As the Petitioner has not met the threshold requirement for this classification, further analysis of her eligibility for a national interest waiver would serve no meaningful purpose.

III. WILLFUL MISREPRESENTATION

As mentioned above, we sent the Petitioner a notice of intent to dismiss (NOID) the appeal based on findings outside of the record of proceeding. By issuing a NOID, we gave the Petitioner an opportunity to respond to the adverse findings, as required by 8 C.F.R. § 103.2(b)(16)(i). We also advised the Petitioner that, if she did not overcome the adverse findings, then we would make a finding of willful misrepresentation of a material fact. We further advised that, while the Petitioner had the right to withdraw the petition, such a withdrawal would not prevent a finding of willful misrepresentation of a material fact. The Petitioner responded to the NOID with a notarized statement. For the reasons discussed below, we find that the Petitioner willfully misrepresented her authorship of four publications, which is material to the adjudication of the instant petition.

A. Evidence of Record

As documentation of her exceptional ability, the Petitioner submitted four "publications," which she claimed to have written. As discussed in our NOID, further research did not corroborate the Petitioner's claimed authorship. [redacted] one of the submitted publications, is virtually identical to an article entitled *Lying and Misleading in Discourse* that was written by Andreas Stokke and published in the *Philosophical Review*, 125(1), 2016, 83–134.[11] Similarly [redacted] is identical to an article written by Saadia Mahmood-ul-Hassan and two other individuals. *Sci.Int.(Lahore)*, 27(2), 1539-1544, 2015.[12] Finally, the Petitioner also presented two versions of [redacted], both of which contain verbatim language from *The Use of Computer Software in Teaching Foreign Language Elementary School Learners* by Umit I. Kopzhasarova, Marina Y. Vaslyayeva, Aida K. Shakimova, Togzhan B. Mukanova.[13]

B. Analysis

In response to our NOID, the Petitioner submitted a notarized statement indicating that she "did not intend to claim or state that" she had "authored these articles." She attributes the "confusion" to having emailed her attorney "a folder titled 'My publications'" which "included the articles on which I relied when developing my teaching materials." She further "note[s] that the copies of the materials [she]

[11] *See* http:/[redacted] and (visited June 7, 2021, copy attached to this notice and incorporated into the record of proceedings).

[12] See https:/[redacted] (visited June 7, 2021, copy attached to this notice and incorporated into the record of proceedings).

[13] *See* https:[redacted] (visited June 7, 2021, copy attached to this notice and incorporated into the record of proceedings).

submitted did not contain any indicia of the published articles," such as "publisher data, publication dates, covers, ISBN numbers, or any other attributes that one would expect[] . . . to prove the fact of publication."

Upon review, we do not find the Petitioner's response credible. For example, the Petitioner did not provide any evidence, such as a copy of the email to her attorney or even a statement from her attorney, to support her claim. Further, the Director's decision listed the submitted documents, noted that "the publications did not indicate where, when, or how they were published" and informed the Petitioner that a search of "Google Scholar on May 4, 2020 found no publications or citations" attributed to her. In other words, the Petitioner had an opportunity to address the claimed "confusion" on appeal, but failed to do so.[14] In addition, the Petitioner's statement does not explain why, if these were simply materials she "relied" on "when developing [her] teaching materials" as claimed, she removed the information that identified the true authors and changed some of the titles, wording, and reference sections. We also note the recommendation letter from [redacted] which references the Petitioner's "achievements, which include two publications in the magazine of Education." The Petitioner's statement does not address this letter. Finally, regarding the lack of publication information, while we would look to such information to verify a petitioner's claim of publication, the lack of such information does not absolve the Petitioner from her false claim.

For the above reasons, the facts and evidence presented in the instant matter warrant a finding of willful misrepresentation of a material fact against the Petitioner.

A misrepresentation is an assertion or manifestation that is not in accord with the true facts. As outlined by the Board of Immigration Appeals (BIA), a material misrepresentation requires that the foreign national willfully make a material misstatement to a government official for the purpose of obtaining an immigration benefit to which one is not entitled. *See Matter of Kai Hing Hui*, 15 I&N Dec. 288, 289-90 (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). 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).

USCIS will deny a visa petition if a petitioner submits evidence which contains false information. In general, a few errors or minor discrepancies are not reason to question the credibility of a foreign national or an employer seeking immigration benefits. *See Spencer Enters. Inc. v. U.S.*, 345 F.3d 683, 694 (9th Cir. 2003). However, if a petition includes serious errors and discrepancies, and the petitioner does not resolve those errors and discrepancies when given the 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 (BIA 1988).

[14] While an alien's timely and voluntary retraction of a false statement may serve to excuse the misrepresentation, the retraction may not simply be in response to the actual or imminent exposure of the falsehood. *See Rahman v. Mukasey*, 272 Fed. Appx. 35, 39 (2nd Cir. 2008) (unpublished) (citing *Matter of Namio*, 14 I&N Dec. 412, 414 (BIA 1973); *Matter of Ngan*, 10 I&N Dec. 725, 727 (BIA 1964); *Matter of M-*, 9 I&N Dec. 118, 119 (BIA 1960)).

In this case, the discrepancies in the documents relating to the petition constitute substantial and probative evidence. The Petitioner submitted falsified evidence purporting to show her authorship of these publications, which is material to her exceptional ability claim.

Beyond the adjudication of the visa petition, a misrepresentation may lead USCIS to enter a finding that an individual foreign national sought to procure a visa or other documentation by willful misrepresentation of a material fact. This finding of fact may lead USCIS to determine, in a future proceeding, that the foreign national is inadmissible to the United States based on the past misrepresentation.

Section 212(a)(6)(C) of the Act, 8 U.S.C. § 1182(a)(6)(C), provides:

> Misrepresentation – (i) In general – Any alien 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 this Act is inadmissible.

To find a willful and material misrepresentation in visa petition proceedings, an immigration officer 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); *Kai Hing Hui*, 15 I&N Dec. at 288.

First, the Petitioner's submission of plagiarized material in support of her immigrant visa petition constitutes a false representation to a government official.

Second, the Petitioner willfully made the misrepresentations. The Petitioner has not provided a credible explanation or rebuttal that she submitted the evidence accidentally, inadvertently, or in an honest belief that the assertions previously offered in support of the petition were true.

Furthermore, the Petitioner signed Form I-140, Immigrant Petition for Alien Worker, certifying under penalty of perjury that the visa petition and the submitted evidence are all true and correct. *See* section 287(b) of the Act, 8 U.S.C. § 1357(b); *see also* 8 C.F.R. § 103.2(a)(2). Accompanying the signed petition, the Petitioner submitted the evidence in support of the petition. Part 8 of Form I-140 requires a petitioner to make the following affirmation: "I certify, under penalty of perjury, that I have reviewed this petition. I understand all of the information contained in, and submitted with, my petition, and all of this information is complete, true, and correct." On the basis of this affirmation, made under penalty of perjury, we find that the Petitioner willfully and knowingly made the misrepresentations.

Third, the misrepresented facts are material. 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). The regulation at 8 C.F.R. § 204.5(k)(3)(ii) calls for evidence "that the alien is an alien of exceptional ability in the sciences, arts, or business." As evidence of her exceptional ability, the Petitioner submitted the plagiarized documents. The Petitioner's misrepresentations could have affected the outcome of the petition because they purported to address, and to satisfy, her

eligibility under section 203(b)(2) of the Act. In light of the falsified evidence we described above and in the NOID, we find that the Petitioner's misrepresentations were material to her eligibility.

IV. CONCLUSION

By filing the instant petition and falsely claiming authorship of the publications, the Petitioner sought to procure a benefit provided under the Act through willful misrepresentation of a material fact. This finding may be considered in any future proceeding where admissibility is an issue.

ORDER: The appeal is dismissed.