U.S. Citizenship and Immigration Services

Non-Precedent Decision of the Administrative Appeals Office

In Re: 33347447

Date: SEPT. 18, 2024

Appeal of Texas Service Center Decision

Form I-140, Immigrant Petition for Alien Workers (Skilled Worker)

The Petitioner operates a convenience store/gas station and seeks to employ the Beneficiary as its "morning store manager." The company requests his classification under the employment-based, third-preference immigrant visa category as a "skilled worker." *See* Immigration and Nationality Act (the Act) section 203(b)(3)(A)(i), 8 U.S.C. 1153(b)(3)(A)(i). Businesses may sponsor noncitizens for U.S. permanent residence in this category to work in jobs requiring at least two years of training or experience. *Id.*

The Director of the Texas Service Center denied the petition. The Director concluded that the Petitioner did not demonstrate the Beneficiary's qualifying experience for the offered job or the requested immigrant visa category. The Director also found that the Beneficiary willfully misrepresented his experience on the accompanying certification from the U.S. Department of Labor (DOL). On appeal, the Petitioner contends that the Director misapplied legal standards, disregarded crucial evidence, and provided explanations that the record does not support.

The Petitioner bears the burden of demonstrating eligibility for the requested benefit by a preponderance of the evidence. *Matter of Chawathe*, 25 I&N Dec. 369, 375-76 (AAO 2010). Exercising de novo appellate review, *see Matter of Christo's, Inc.*, 26 I&N Dec. 537, 537 n.2 (AAO 2015), we conclude that, although the record does not support the Director's misrepresentation finding, the company has not established the Beneficiary's qualifying experience for the offered job and the requested immigrant visa category. We will therefore dismiss the appeal.

I. LAW

Immigration as a skilled worker generally follows a three-step process. First, a prospective employer must obtain DOL certification that: there are insufficient U.S. workers able, willing, qualified, and available for an offered job; and a noncitizen's permanent employment in the job would not harm wages and working conditions of U.S. workers with similar jobs. Section 212(a)(5)(A)(i) of the Act, 8 U.S.C. § 1182(a)(5)(A)(i).

Second, an employer must submit a DOL-approved labor certification with an immigrant visa petition to U.S. Citizenship and Immigration Services (USCIS). Section 204(a)(1)(F) of the Act. 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)(3)(ii)(D), (4).

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(a) of the Act, 8 U.S.C. § 1255(a).

II. ANALYSIS

A. The Required Experience

At the time of filing a skilled-worker petition, a beneficiary must be able to perform "skilled labor (requiring at least 2 years training or experience)." Section 203(b)(3)(A)(i) of the Act. Also, by a petition's priority date, a petitioner must demonstrate a beneficiary's possession of all DOL-certified requirements for an offered job. *See Matter of Wing's Tea House*, 16 I&N Dec. 158, 160 (Acting Reg'l Comm'r 1977). This petition's priority date is June 29, 2017, the date DOL accepted the Petitioner's labor certification application for processing. *See* 8 C.F.R. § 204.5(d) (explaining how to determine a petition's priority date).

When assessing a beneficiary's qualifications, USCIS must examine the job-offer portion of an accompanying labor certification to determine the offered job's minimum requirements. The Agency may neither disregard labor certification terms nor impose unstated 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 Petitioner's labor certification states the minimum requirements of the offered job of morning store manager as 24 months' experience "in the job offered" or as an assistant manager or a related occupation. The labor certification states that the job requires neither education nor training.

On the labor certification, the Beneficiary attested that, by the petition's priority date, he gained more than 24 months' qualifying experience as an assistant manager. He stated that a cell phone retailer employed him part-time (20 hours a week) in Canada for about 12 months, from July 2016 to June 2017. He also stated that a clothing store in Pakistan employed him full-time (45 hours a week) for about 25 months, from January 2011 through February 2013.

Unless otherwise specified, required experience on a labor certification means full-time experience. *See Matter of Boodell & Domanskis, LLC*, 2012-PER-01275, *3 (BALCA May 11, 2016) (accepting part-time experience as qualifying experience only because the labor certification so specified). The Petitioner therefore must demonstrate that, by the petition's priority date, the Beneficiary had at least two years' of full-time, qualifying experience.

Part-time experience gained by a beneficiary equals less than full-time experience. The value of a beneficiary's part-time experience depends on the length of employment and the number of hours worked a week. For example, 29.5 months of part-time, 25-hour-a-week experience equates to 18.4 months of full-time, 40-hour-a-week experience. *Matter of 1 Grand Express*, 2014-PER-00783, *4 (BALCA Jan. 26, 2018) (dividing 25 hours-a-week by 40 hours-a-week to get 0.625 and then multiplying that by 29.5 months to get full-time, equivalent experience of 18.4375 months). Under

that formula, the Beneficiary's 12 months of part-time, 20-hour-a-week experience in Canada equates to six months of full-time experience (dividing 20 hours-a-week by 40 hours-a-week to get 0.5 and then multiplying that by 12 months to get full-time equivalent experience of six).

The record supports the Director's finding that the Petitioner demonstrated the Beneficiary's part-time experience in Canada. But, because his part-time work equates to only six months of full-time experience, his part-time work, alone, does not qualify him for the offered job. Rather, the Petitioner must also demonstrate his possession of at least 18 months of full-time experience at the Pakistani clothing store to establish the requisite 24 months of qualifying experience.

As proof of qualifying experience, petitioners must generally submit letters from beneficiaries' former employers. 8 C.F.R. § 204.5(l)(3)(ii)(A). The letters must include the names, addresses, and titles of the employers, and describe the beneficiaries' experiences. *Id.* "If such evidence is unavailable, other documentation relating to the [noncitizen]'s experience or training will be considered." 8 C.F.R. § 204.5(g)(1).

Consistent with 8 C.F.R. § 204.5(l)(3)(ii)(A), the Petitioner submitted a 2013 letter from the operations and store manager of the Pakistani clothing store. Consistent with the information on the labor certification, the letter states the store's full-time employment of the Beneficiary as an assistant manager from January 2011 through February 2013.

In a notice of intent to deny (NOID) the petition, however, the Director noted evidence contradicting the Beneficiary's claimed qualifying experience. On an application for a U.S. visitor's visa in April 2015, the Beneficiary attested that he then studied at a Canadian university. Asked by the application "Were you previously employed?" he stated: "No." The Beneficiary's negative reply casts doubt on his claimed qualifying experience in Pakistan from January 2011 through February 2013. Petitioners must resolve inconsistencies of record with "independent, objective evidence pointing to where the truth lies." *Matter of Ho*, 19 I&N Dec. 582, 591 (BIA 1988).

After receiving the NOID, the Petitioner submitted additional evidence in support of the Beneficiary's claimed qualifying experience. The additional materials include: a second letter and affidavit from the clothing store's operations and store manager; affidavits from the Beneficiary and a store supervisor; copies of Pakistani tax records showing the store's existence and ownership during the Beneficiary's purported tenure there; and a copy of a social media site of the store.

In his initial affidavit, the Beneficiary stated that he did not believe the 2015 U.S. visa application required the disclosure of his claimed prior employment in Pakistan. He said:

> I honestly did not think it was necessary to include that information because I was getting paid in cash [in Pakistan], so I got nervous and did not know what was the correct response to that question. I did not intend to mislead the U.S. government about my work experience, I simply just did not include it. I was careless with this mistake, and I wish I could correct it, but I cannot. I can only correct it now on this I-140 petition.

In a later affidavit, the Beneficiary stated that he did not "totally understand" the 2015 visa application form. He stated:

> I was particularly confused as to how to answer the question of prior work experience. I wasn't sure what relevance my old work experience back in Pakistan had to a quick pleasure trip to the U.S., and I didn't know if they would count that job anyway, because I was paid in cash, without any formal records. I'd been living in Canada for a couple of years by this point, and I was familiar with the West's more formal way of doing things. I was concerned that if I reported the job and then couldn't produce any pay stubs or other records, I might get in trouble, so I just left the line blank.[1] I now understand that that was the wrong thing to do, but at the time, I was just doing the best I could according to my understanding of what kind of thing the government wanted me to report.

The Petitioner's evidence does not sufficiently demonstrate the Beneficiary's claimed qualifying experience. The Pakistani tax records demonstrate the clothing store's existence and ownership from January 2011 to February 2013. But, despite the letters and affidavits from the Beneficiary and employees of his purported former employer, the record lacks *independent, objective* evidence that he worked for the store. *See Matter of Ho*, 19 I&N Dec. at 591 (requiring a petitioner to resolve inconsistencies with "independent, objective evidence pointing to where the truth lies").

The Petitioner cites newspaper articles regarding Pakistan's "undocumented economy." The articles state that many Pakistani workers, including employees of small businesses, avoid government taxation by working "off-the-books" or for unregistered businesses. These articles lend credence to the Beneficiary's claim that he received cash payment for his work in Pakistan. But the articles do not constitute independent, objective evidence that he worked for that particular clothing store for the claimed period.

The Director had also found inconsistencies in the evidence of the Beneficiary's part-time qualifying experience in Canada. But the Petitioner demonstrated his Canadian experience by submitting evidence beyond letters from his former employer. The company submitted copies of his payroll records and Canadian government-issued wage statements for the relevant employment period. In contrast, the Petitioner has not submitted sufficient independent, objective evidence of his claimed qualifying experience in Pakistan.

On appeal, the Petitioner argues that it satisfied the regulatory requirement by documenting the Beneficiary's claimed qualifying experience with letters from his former employer. *See* 8 C.F.R. § 204.5(l)(3)(ii)(A). The company asserts that USCIS impermissibly required documentary proof beyond that stated in the regulation.

To demonstrate beneficiaries' qualifying experiences, the regulation requires a minimum of letters from former employers. But the Petitioner's case requires additional proof because it contains contradictory evidence of the Beneficiary's claimed qualifying experience from January 2011 to

[1] Government records show that the Beneficiary answered the question on the visa application form. Asked "Were you previously employed?" he indicated "No."

February 2013. As previously discussed, on his 2015 U.S. visitor visa application, he attested to no prior employment. Faced with the inconsistent evidence, USCIS properly requested additional "independent, objective evidence pointing to where the truth lies." *Matter of Ho*, 19 I&N Dec. at 591. Thus, USCIS followed relevant case law by requesting evidence beyond the letters from the Beneficiary's claimed former Pakistani employer.

In support of its argument, the Petitioner cites two federal court decisions overruling USCIS findings of insufficient evidence of qualifying experience. *See Diamond Miami Corp. v. USCIS*, No. 18 - 24411-Civ-Scola, 2019 WL 4954807 (S.D. Fl. Oct. 8, 2019); *Betancur v. Roark*, No. 10-11131-RWZ, 2012 WL 4862774 (D. Mass. Oct. 15, 2012).

These cases, however, are not persuasive. First, we need not follow the cited U.S. district court decisions in this matter. *See Matter of Duarte-Gonzalez*, 28 I&N Dec. 688, 690 n.2 (BIA 2023) (indicating that U.S. district court decisions lack precedential value).

Second, the U.S. district court decisions are distinguishable from this case. Neither decision discusses *Ho*, which requires USCIS to resolve evidentiary inconsistencies regarding qualifying experience with independent, objective evidence beyond regulatory required letters from employers. *See Matter of Ho*, 19 I&N Dec. at 591; *see also* 8 C.F.R. § 103.10(b) (requiring Department of Homeland Security officers to follow precedent cases of the Board of Immigration Appeals (BIA) and the U.S. Attorney General in all proceedings involving the same issue). Other U.S. district courts have cited *Ho* and affirmed USCIS findings of insufficient evidence of qualifying experience. *See Advanced Cabinets Corp. v. Mayorkas*, No. 19 C 5930, 2021 WL 825608, *5 (N.D. Ill. Mar. 4, 2021) ("[I]t is well established that 'it is incumbent upon the petitioner' to resolve any ambiguities or inconsistencies in the record 'by independent objective evidence.'") (quoting *Matter of Ho*, 19 I&N Dec. at 591); *Estrada-Hernandez v. Holder*, 108 F.Supp.3d 936, 946-48 (S.D. Cal. 2015) ("Petitioner is responsible for 'ambiguities in the record and it is incumbent upon the petitioner to resolve the inconsistencies with independent objective evidence.'" (quoting *Matter of Ho*, 19 I&N Dec. at 591).

U.S. courts of appeal have also relied on *Ho* when addressing evidentiary inconsistencies in employment-based immigrant visa petition proceedings. *See AB Discount Depot, LLC v USCIS*, 20-3245-cv, 2022 WL 453378, *1 (2d Cir. Feb. 15, 2022) (affirming denial of a petition for a multinational manager under section 203(b)(1)(C) of the Act); *Love Korean Church v. Chertoff*, 549 F.3d 749, 754 (9th Cir. 2008) (remanding a petition for a special immigrant religious worker under section 203(b)(4) of the Act); *Marllantas, Inc. v. Rodriguez*, 806 Fed.Appx. 864, 869 (11th Cir. 2020) (affirming denial of a petition for a multinational manager or executive under section 203(b)(1)(C) of the Act). Thus, the Petitioner's citations to the two U.S. district court decisions do not persuade us.

For the foregoing reasons, the Petitioner has not demonstrated the Beneficiary's qualifying experience for the offered job and the requested immigrant visa category. We will therefore affirm the petition's denial.

B. The Alleged Misrepresentation

The Director did not deny the petition based on her finding that the Beneficiary willfully misrepresented his qualifying experience on the labor certification.[2] But the determination jeopardizes his U.S. admissibility. *See* section 212(a)(6)(C)(i) of the Act, 8 U.S.C. § 1182(a)(6)(C)(i) (rendering noncitizens inadmissible if they fraudulently or willfully misrepresented material facts while seeking visas, other documentation, U.S. admissions, or other U.S. immigration benefits). We will therefore review the finding.

Misrepresentations are willful if they are "deliberately made with knowledge of their falsity." *Matter of Valdez*, 27 I&N Dec. 496, 498 (BIA 2018) (citations omitted). 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.* Because of the potential, severe consequences to noncitizens and their petitioning employers, we must "closely scrutinize" the factual bases of material misrepresentation findings. *See Matter of Y-G-*, 20 I&N Dec. 794, 797 (BIA 1994).

The Petitioner contests the Director's finding that the Beneficiary misrepresented his qualifying experience on the labor certification. The company contends that "the recitation of [the Beneficiary]'s work history [on the labor certification] was accurate." The company states:

> The only contrary information anywhere in the record is a stray comment, in an entirely different application, made under a mistaken interpretation of the question, which has been satisfactorily explained by [the Beneficiary]. This is not enough to hang a finding of misrepresentation on.

As previously discussed, we find insufficient independent objective evidence to demonstrate the Beneficiary's claimed qualifying experience at the Pakistani clothing store. But the Beneficiary has offered a plausible explanation for his omission of the purported qualifying experience from the U.S. visa application. We will therefore withdraw the willful misrepresentation finding against him.

III. CONCLUSION

The record does not support the willful misrepresentation finding against the Beneficiary. But the Petitioner has not sufficiently demonstrated his qualifying experience for the offered job and the requested immigrant visa category.

ORDER: The appeal is dismissed.

[2] As the Petitioner notes on appeal, the Director's decision alternates between accusing the Beneficiary and the Petitioner of the alleged misrepresentation. The record lacks evidence that the Petitioner had reason to doubt the Beneficiary's claimed qualifying experience in Pakistan. We therefore interpret the Director's decision to allege the Beneficiary's misrepresentation of his qualifying experience on the labor certification.