U.S. Citizenship and Immigration Services

Non-Precedent Decision of the Administrative Appeals Office

In Re: 18743488

Date: AUG. 10, 2022

Appeal of Texas Service Center Decision

Form I-140, Immigrant Petition for Advanced Degree Professional

The Petitioner seeks to employ the Beneficiary as a senior software engineer. It requests classification of the Beneficiary as a member of the professions holding an advanced degree under the second preference immigrant classification. Immigration and Nationality Act (the Act) section 203(b)(2), 8 U.S.C. § 1153(b)(2). This employment-based immigrant classification allows a U.S. employer to sponsor a professional with an advanced degree for lawful permanent resident status.

The Director of the Texas Service Center denied the petition, concluding that the record did not establish that the Beneficiary meets the experience requirements of the labor certification and, therefore, the Beneficiary is ineligible for the offered position. The Director further entered a finding of willful misrepresentation of a material fact against the Petitioner. The matter is now before us on appeal.

In these proceedings, it is the Petitioner's burden to establish eligibility for the requested benefit. Section 291 of the Act, 8 U.S.C. § 1361. Upon *de novo* review, we will dismiss the appeal.

I. THE EMPLOYMENT-BASED IMMIGRATION PROCESS

Immigration as an advanced degree professional generally follows a three-step process. To permanently fill a position in the United States with a foreign worker, a prospective employer must first obtain certification from the U.S. Department of Labor (DOL). *See* section 212(a)(5) of the Act, 8 U.S.C. § 1182(a)(5). DOL approval signifies that insufficient U.S. workers are able, willing, qualified, and available for a position. *Id*. Labor certification also indicates that the employment of a noncitizen will not harm wages and working conditions of U.S. workers with similar jobs. *Id*.

If DOL approves a position, an employer must next submit the certified labor application 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 considers whether a beneficiary meets the requirements of a certified position and a requested immigrant visa classification. If USCIS approves the petition, a noncitizen may finally 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.

The term "advanced degree" is defined in the regulation at 8 C.F.R. § 204.5(k)(2) as follows:

> *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.

The regulations at 8 C.F.R. § 204.5(k)(3)(i) state that a petition for an advanced degree professional must be accompanied by either:

> (A) An official academic record showing that the alien has a United States advanced degree or a foreign equivalent degree; or
> (B) An official academic record showing that the alien has a United States baccalaureate degree or a foreign equivalent degree, and evidence in the form of letters from current or former employer(s) showing that the alien has at least five years of progressive post-baccalaureate experience in the specialty.

In addition, a beneficiary must meet all of the education, training, experience, and other requirements specified on the labor certification as of the petition's priority date. *See Matter of Wing's Tea House*, 16 I&N Dec. 158, 159 (Acting Reg'l Comm'r 1977).

II. ANALYSIS

As noted above, the Director concluded that the record did not establish that the Beneficiary was qualified for the position, and the Director further "enter[ed] a finding of willful misrepresentation of a material fact against the [P]etitioner." We address the issues separately below.

A. Beneficiary Qualifications

As noted above, the Director concluded that the Beneficiary is ineligible for the requested benefit because the Beneficiary did not meet the minimum experience requirements for the offered position on the priority date of February 7, 2020. Prior to denying the Form I-140, Immigrant Petition for Alien Workers, the Director sent the Petitioner a notice of intent to deny (NOID) the petition. The NOID noted that Section H of the Department of Labor (DOL) ETA Form 9089, Application for Permanent Employment Certification, submitted with the petition indicates that the offered position requires the following: a minimum of a master's degree in computer science, engineering, or a closely related field, with 24 months of experience in the job offered or in "related IT positions;" or a bachelor's degree with five years of experience. The record establishes that the Beneficiary earned a Master of Science in Electrical Engineering degree from the University of [redacted] in December 2014; therefore, the remaining issue regarding the beneficiary's qualifications is whether the record establishes that the Beneficiary had the requisite 24 months of experience as of the priority date.

Section J.20 of the ETA Form 9089 asserted that the Beneficiary has experience in an alternate occupation, as specified in Section H. Section K of the ETA Form 9089 listed the Beneficiary's work experience as follows:

- From September 1, 2019, through the time of filing in October 2020, the Petitioner employed the Beneficiary as a software engineer, working 40 hours per week;
- From October 1, 2016, through August 31, 2019, the Petitioner employed the Beneficiary as a WebSphere administrator, working 40 hours per week;
- From April 9, 2015, through September 30, 2016, [redacted] employed the Beneficiary as a software engineer, working 40 hours per week; and
- From June 1, 2012, through December 15, 2012, [redacted] employed the Beneficiary as a software engineer, working 40 hours per week.

The Director noted in the NOID that Section K does not list any other employment held by the Beneficiary. The Director further noted that the record contains a letter from the human resources manager for [redacted] stating that it employed the Beneficiary from June 1, 2012, through December 15, 2012, as a software engineer, as reported in Section K. However, the Director noted that a Department of State (DOS) Form DS-160, Nonimmigrant Visa Application, submitted by the Beneficiary on November 6, 2012, stated that the Beneficiary had not been employed prior to submitting the application.

Based on the Beneficiary's inconsistent statements in immigration benefit requests regarding his employment history, the Director advised the Petitioner in the NOID that the Beneficiary's asserted work history bears less credibility. In light of the doubt cast on the Beneficiary's work experience, the Director concluded that the record did not establish that the Beneficiary meets the experience requirements of the labor certification and, therefore, the Beneficiary is ineligible for the offered position. The Director further stated in the NOID that, on the ETA Form 9089, the Beneficiary willfully misrepresented that he had been employed by [redacted] in 2012 and that his work experience is material to whether he is eligible for the benefit requested in the Form I-140, citing *Matter of M-*, 6 I&N Dec. 149 (BIA 1954); *Matter of L-L-*, 9 I&N Dec. 324 (BIA 1961); *Matter of Kai Hing Hui*, 15 I&N Dec. 288 (BIA 1975); *Matter of Ng*, 17 I&N Dec. 536 (BIA 1980). The Director further advised the Petitioner, "[U.S. Citizenship and Immigration Services (USCIS)] intends to enter a finding of willful misrepresentation of a material fact against the [P]etitioner," having submitted the ETA Form 9089 in support of the petition.

In response to the NOID, the Petitioner asserted that the Beneficiary did not willfully misrepresent a material fact in either the Form DS-160 or the ETA Form 9089, despite the directly conflicting statements therein. The NOID response contained an affidavit from the Beneficiary stating, in relevant part, that the 2012 Form DS-160 "was the first time I was completing the DS-160 form, and I thought I only needed to add my previous education as a requirement to apply for the F-1 student visa. Given that, I overlooked the 'experience' section as I believed it was not relevant for my further studies." The Petitioner asserted that the Beneficiary did not "willfully" misrepresent his employment history on the Form DS-160, as addressed in *Matter of Kai Hing Hui*, 15 I&N Dec. at 289-90. The Petitioner also submitted an updated letter from the human resources manager for [redacted] reasserting that it employed the Beneficiary from June 1, 2012, through December 15, 2012, attaching copies of pay statements for the Beneficiary from [redacted] for the periods of "JUL 2012," "AUG 2012," "SEP 2012," "OCT 2012," "NOV 2012," and for 15 days during "DEC 2012." The pay statements contain identical grammatical and punctuation errors, such as "Computer generated Payslip . No Seal or Signature is required," and "Do you have further questions, please do not hesitate to Contact us info@[redacted].]"

In the decision, the Director acknowledged the Beneficiary's assertions regarding his confusion in completing the 2012 Form DS-160; however, the Director noted that the Beneficiary also "did not disclose the information regarding his employment with [redacted], in his Forms DS-160 submitted in March 2018, and February 2020." The Director noted that the Forms DS-160 that the Beneficiary submitted in 2018 and 2020 both listed the Beneficiary's work experience as follows:

- From October 1, 2016, through the respective Forms DS-160 filing dates, the Petitioner employed the Beneficiary; and
- From April 9, 2015, through September 30, 2016, [redacted] employed the Beneficiary.

In addition to the Beneficiary's three Forms DS-160 omitting any employment by [redacted] the Director noted that the pay statements submitted in response to the NOID "contain the same abbreviation and grammatical errors, which indicate that they were generated for a different purpose." The Director cited *Matter of Ho*, 19 I&N Dec. 582 (BIA 1988), and concluded that, because of the doubt cast on the credibility of the pay statements and the Beneficiary's stated employment history on the ETA Form 9089, the record does not demonstrate that the Beneficiary satisfies the experience requirements provided on the ETA Form 9089.

On appeal, the Petitioner asserts that the 2018 and 2020 Forms DS-160 also omitted the Beneficiary's employment with [redacted] because "[the] Beneficiary also completed those forms himself unlike Form 9089, which was accurately completed by his attorney and included the employment with [redacted]." The Petitioner also asserts that the Beneficiary's omission of his employment with [redacted] on the Forms DS-160:

> was not outcome-determinative of his eligibility for visas. Had he included the employment with [redacted] on any of the DS-160's, there is no possible line of inquiry which would have led to a finding of inadmissibility because prior employment is not a pre-requisite for a student visa and it was not critical for his H-1B applications.

The Petitioner further asserts that, because the Beneficiary's employment with [redacted], was not a pre-requisite for a student visa, "there was no material misrepresentation in this case and the omission should be considered harmless error." The Petitioner additionally asserts on appeal that the Director erred by concluding that the statements and evidence regarding the Beneficiary's employment history bears reduced credibility.

On appeal, the Petitioner resubmits the Beneficiary's affidavit submitted in response to the NOID; however, the Petitioner does not submit a new affidavit from the Beneficiary in support of the appeal that may clarify whether he had any assistance with completing the 2018 and 2020 Forms DS-160 and the reason(s) for his repeated omission of employment with [redacted] in 2012. Given the lack of credible, probative evidence in the record from the Beneficiary regarding his omission of employment with [redacted] on several immigration benefit requests, before asserting on the ETA Form 9089 that he had been employed by [redacted] in 2012, the Petitioner has not overcome the Director's conclusion that the Petitioner has not credibly

established that the Beneficiary is qualified for the offered position. *See Matter of Wing's Tea House*, 16 I&N Dec. at 159.

On appeal, the Petitioner also resubmits the photocopies of pay statements bearing grammatical and punctuation errors, submitted earlier in response to the NOID. In addition to the Director's observation that the pay statements' grammatical errors reduce their credibility, we also note that the pay statements reference 2012 and the number of "paid days" per period (either 31, 30, or 15 for "DEC 2012"); however, none of the pay statements indicate the actual pay dates or the dates on which the pay statements were generated. The pay statements' omission of the dates on which the company paid the Beneficiary or the dates on which the statements were generated cast doubt on whether they were actually generated in 2012. *See Matter of Ho*, 19 I&N Dec. at 591 (providing that doubt cast on any aspect of a petitioner's proof may lead to a reevaluation of the reliability and sufficiency of the remaining evidence offered in support of the visa petition). We also note that, despite the Beneficiary's assertion that he had been employed by [redacted] from June 1, 2012, through December 15, 2012, the Petitioner did not submit a pay statement that may correspond to June 2012, which also raises questions about the Beneficiary's actual period of employment, if any, at that company. In light of these issues, the pay statements' probative value for establishing whether [redacted] employed the Beneficiary in 2012 is further reduced, particularly in the absence of other, probative, corroborating evidence, and the reliability and sufficiency of the remaining evidence also is reduced. *See id.*

Even if the Petitioner sufficiently clarified the numerous inconsistencies and errors reducing the reliability and sufficiency of evidence discussed above, the record would not otherwise establish that the Beneficiary had sufficient experience required by the ETA Form 9089. In support of the petition, the Petitioner specifically asserted, "It is during [the Beneficiary's] prior employments with [redacted] and [redacted] that he gained the required experience with the skills stipulated on Form ETA9089 [*sic*] Section H-14," excluding experience during his employment with the Petitioner. The record contains a letter from the "H R Manager [*sic*]" of [redacted] dated "Aug 27,2020 [*sic*]," addressed "to whom soever it concern [*sic*]," stating that the company employed the Beneficiary "as a [s]oftware [e]ngineer on a full-time basis from 09th April 2015 to 30th September 2016," a period of 17 months and three weeks. The record also contains a letter from the "Manager-HR" of [redacted]" dated July 22, 2020, addressed "to whom soever [*sic*] it may concern," stating that the company employed the Beneficiary "as a [s]oftware [e]ngineer from 01 June, 2012 to 15 December, 2012," a period of six months and two weeks. Unlike the letter from [redacted], the letter from [redacted] does not specify whether the Beneficiary worked on a full-time basis. Because the Petitioner specified that the Beneficiary acquired the experience that would satisfy the ETA Form 9089 requirement through his asserted employment at [redacted], and [redacted] and because his full-time employment at [redacted], alone was less than the 24 months of experience, whether the Beneficiary worked for [redacted] on a full-time basis—if at all—is essential for determining whether the Beneficiary met the 24-month requirement. *See* 8 C.F.R. § 204.5(l)(3)(ii)(A) (requiring a sufficient "description of the training received or experience").

Petitioners bear the burden to establish eligibility for the requested benefit. Section 291 of the Act, 8 U.S.C. § 1361. In this case, the Petitioner has not met the burden of proving that the Beneficiary

was employed by [redacted] in 2012, as asserted in the ETA Form 9089. Accordingly, the Director's conclusion regarding the diminished credibility of the Beneficiary's statements regarding the nature and duration of his employment experience remains, and the record does not establish that the Beneficiary meets the experience requirements of the labor certification. *See Matter of Wing's Tea House*, 16 I&N Dec. at 159.

B. Willful Misrepresentation of a Material Fact

The Director further concluded in the decision that the Beneficiary's statement on the ETA Form 9089 that he had been employed by [redacted], in 2012 was willful, false, and material to whether he is eligible for the benefit requested by the Form I-140. However, the Director mistakenly entered the finding of willful misrepresentation of a material fact against the Petitioner instead of the Beneficiary. Therefore, we will withdraw the finding of willful misrepresentation of material fact entered against the Petitioner.

III. CONCLUSION

The record does not establish that the Beneficiary meets the experience requirements of the labor certification; therefore, the Beneficiary is ineligible for the offered position.

ORDER: The appeal is dismissed.