U.S. Citizenship and Immigration Services

Non-Precedent Decision of the Administrative Appeals Office

In Re: 01156318

Date: JULY 22, 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 market research analyst. 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 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 Acting Director of the Texas Service Center revoked the approval of the petition, concluding that the record did not establish that (1) the Beneficiary possessed the required experience for the offered job; (2) the Petitioner had the continuing ability to pay the proffered wage; and (3) a *bona fide* job offer existed. The Director entered findings of willful misrepresentation of material facts against the Petitioner and the Beneficiary, and he invalidated the labor certification. 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

Employment-based immigration generally follows a three-step process. First, an employer obtains an approved labor certification from the U.S. Department of Labor (DOL).[1] *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 noncitizen in the position will not adversely affect the wages and working conditions of domestic workers similarly employed. *See id.* Second, the employer files an immigrant visa petition with U.S. Citizenship and Immigration Services (USCIS) with the certified labor certification. *See* section 204 of the Act, 8 U.S.C. § 1154. Third, upon approval of the petition, a noncitizen may apply for an immigrant visa abroad, or if eligible, adjust status in the United States to lawful permanent resident. *See* section 245 of the Act, 8 U.S.C. § 1255.

[1] The priority date of a petition is the date the DOL accepted the labor certification for processing, which in this case is December 10, 2010. *See* 8 C.F.R. § 204.5(d).

Section 205 of the Act, 8 U.S.C. § 1155, provides that the Secretary of Homeland Security may "for good and sufficient cause, revoke the approval of any petition." By regulation, this revocation authority is delegated to any USCIS officer who is authorized to approve an immigrant visa petition "when the necessity for the revocation comes to the attention of [USCIS]." 8 C.F.R. § 205.2(a). USCIS must give the petitioner notice of its intent to revoke the prior approval of the petition and the opportunity to submit evidence in opposition thereto, before proceeding with written notice of revocation. *See* 8 C.F.R. § 205.2(b) and (c). Here, the Director relied on the regulation at 8 C.F.R. § 205.2 by providing proper notice to the Petitioner and giving it an opportunity to offer evidence in support of the petition and in opposition to the ground of revocation listed in the NOIR.

II. THE BENEFICIARY'S EXPERIENCE

The Director concluded in his notice of revocation (NOR) that the Petitioner did not establish that the Beneficiary possessed the experience required by the labor certification as of the priority date. A beneficiary must meet all of the requirements of the offered position set forth on the labor certification by the priority date of the petition. 8 C.F.R. § 103.2(b)(l), (12); *Matter of Wing's Tea House*, 16 I&N Dec. 158, 159 (Acting Reg'l Comm'r 1977). In this case, the labor certification requires a U.S. bachelor's degree in English or business, or foreign equivalent; and 60 months of experience in the job offered or as a managing director or CEO. Part 14 of the labor certification states that "[a]ny suitable combination of education, training, and experience is acceptable."

The labor certification also states that the Beneficiary has the following experience:

- as a full-time managing director with [redacted] in [redacted] South Korea, from October 1, 2004, to December 16, 2008; and
- as the full-time CEO of [redacted] in [redacted] South Korea, from June 1, 1999, to September 30, 2004.

Evidence relating to qualifying experience must be in the form of a letter from a current or former employer and must include the name, address, and title of the writer, and a specific description of the duties performed by the beneficiary. *See* 8 C.F.R. § 204.5(g)(1). The record contains the following evidence relating to the Beneficiary's experience:

- Certificate from [redacted] dated December 10, 2010, signed by [redacted] as the company's President. The certificate states that it employed the Beneficiary as a managing director from October 1, 2004, to December 16, 2008, and it described his duties.
- Statement from [redacted] CEO of [redacted] stating that the Beneficiary works as a branch manager and is a full-time employee. The statement does not provide a description of the Beneficiary's duties or provide the Beneficiary's work location.
- Receipt for Wage and Salary Income Tax Withholding from South Korea for the years 2010 through 2016. The Director noted in the NOR that the Beneficiary has been residing in the United States since 2009.
- Certificate on [redacted] letterhead, dated January 5, 2011, signed by the Beneficiary as CEO of the company. The certificate states that the company employed the Beneficiary as

CEO from June 1, 1999, to September 30, 2004, and it lists his duties.

- Statement from [redacted] who is identified as an employee of the Trade Department at [redacted] from March 2001 to February 2004. [redacted] states that the Beneficiary was employed as a representative of [redacted] during this time and listed his duties.

In his NOR, the Director stated that while the Beneficiary's testimony should not be disregarded simply because it is self-serving, the introduction of corroborative testimonial and documentary evidence is encouraged. *See Matter of S-A-*, 22 I&N Dec. 1328, 1332 (BIA 2000). He further stated that if testimonial evidence lacks specificity, detail, or credibility, there is a greater need for the Petitioner to submit corroborative evidence. *Matter of Y-B-*, 21 I&N Dec. 1136 (BIA 1998). He identified discrepancies between the statement from [redacted] and the Beneficiary's statement. Specifically, the statement from [redacted] identified the Beneficiary as a "representative" rather than CEO of [redacted] and the statement describes the Beneficiary as a supervisor rather than a CEO. The Director also noted that the statement from [redacted] only accounts for two years and eleven months of the Beneficiary's employment experience, not the sixty month required by the labor certification.

On appeal, the Petitioner, through counsel, states that while "the Petitioner may not have absolutely satisfied its burden of proof," [redacted] statement is not inconsistent with the Beneficiary's statement and covers the period from March 2001 to February 2004. It asserts that the statement from [redacted] confirms the Beneficiary's employment at [redacted] "even if it is not for the entire time claimed." The Petitioner further states that a representative of a business entity can serve as CEO, and that the positions are not mutually exclusive. The Petitioner further asserts on appeal that the Director's reference to *Matter of S-A-* is inapplicable and that the Beneficiary has supplied corroborating evidence according to *Matter of Y-B-*, 21 I&N Dec. 1136 (BIA 1998). However, the Petitioner provides no evidence on appeal to support the assertion that the Beneficiary served simultaneously as the representative and CEO of [redacted] Further, the Petitioner agrees on appeal that it has not met its burden of proof. Therefore, we must dismiss the appeal. *See* section 291 of the Act, 8 U.S.C. § 1361.

In his NOR, the Director also addressed the Petitioner's assertion in response to the NOIR that the Beneficiary gained qualifying employment with it. The Director stated that the Petitioner did not list any employment with the Petitioner on the labor certification. The omission of the Beneficiary's claimed experience from the labor certification application casts doubt on the experience's validity. *See Matter of Leung*, 16 I&N Dec. 12, 14-15 (Distr. Dir. 1976), *disapproved of on another ground by Matter of Lam*, 16 I&N Dec. 432 (BIA 1978) (finding a noncitizen's claim of qualifying experience to lack credibility where he omitted the experience from a labor certification application). Further, at Part J.21. which asks whether the Beneficiary gained any qualifying experience with the Petitioner, the Petitioner answered "No." The Director noted that the DOL would not have had the opportunity to review any qualifying evidence relating to the Beneficiary's experience with the Petitioner. He also noted that the Beneficiary had gained less than two years of employment experience with the Petitioner on the priority date, which is less than the required sixty months of experience for the offered job.

On appeal, the Petitioner asserts that the "Director's statement that the failure to list the latest experience on ETA 9089 would have affected [DOL's] determination is totally unrealistic." However, it does not provide any further explanation, and it has not met its burden of proof on this issue. *See*

section 291 of the Act, 8 U.S.C. § 1361. The Petitioner additionally asserts that the record confirms the Beneficiary's five years of qualifying experience with [redacted] and [redacted] "independent of any need to establish experience with the Petitioner." As noted above, the Petitioner has not met its burden of proof on this issue.

In sum, the Petitioner has not established that the Beneficiary possessed the experience required by the labor certification as of the priority date.

III. ABILITY TO PAY THE PROFFERED WAGE

The Director concluded in the NOR that the Petitioner did not establish its continuing ability to pay the proffered wage from the petition's priority date onward. The proffered wage is $87,277 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.

In determining a petitioner's ability to pay, we first examine whether it paid a beneficiary the full proffered wage each year from a petition's priority date. If a petitioner did not pay a beneficiary the full proffered wage, we next examine whether it had sufficient annual amounts of net income or net current assets to pay the difference between the proffered wage and the wages paid, if any. If a petitioner's net income or net current assets are insufficient, we may also consider other evidence of its ability to pay the proffered wage.[2]

In this case, the Petitioner demonstrated that it paid the Beneficiary as follows:[3]

- $40,200 in 2010;
- $36,700 in 2011;
- $33,000 in 2012;
- $24,000 in 2013;
- $6,000 in 2014;
- $0 in 2015; and
- $0 in 2016.

[2] Federal courts have upheld our method of determining a petitioner's ability to pay a proffered wage. *See, e.g., River St. Donuts, LLC v. Napolitano*, 558 F.3d 111, 118 (1st Cir. 2009); *Tongatapu Woodcraft Haw., Ltd. v. Feldman*, 736 F.2d 1305, 1309 (9th Cir. 1984); *Estrada-Hernandez v. Holder*, 108 F. Supp. 3d 936, 942-946 (S.D. Cal. 2015); *Rizvi v. Dep't of Homeland Sec.*, 37 F. Supp. 3d 870, 883-84 (S.D. Tex. 2014), *aff'd*, 627 Fed. App'x 292, 294-295 (5th Cir. 2015).

[3] The Director noted that the salaries and wages shown on the Petitioner's tax returns do not match the amounts listed on the Beneficiary's tax returns. He stated that this brings into question the Petitioner's tax returns.

These amounts do not equal or exceed the annual proffered wage. The record therefore does not establish the Petitioner's ability to pay the proffered wage based on the wages it paid to the Beneficiary. The Petitioner must demonstrate its ability to pay the difference between the annual proffered wage and the amounts it paid to the Beneficiary from 2010 to 2014, and the full proffered wage in 2015 and 2016.

The record indicates that the Petitioner is a C corporation. The Petitioner's federal tax returns state net income/loss[4] amounts as follows:

- -$33,189 in 2010;
- -$51,305 in 2011;
- -$50,091 in 2012;
- -$37,950 in 2013;
- -$12,992 in 2014;
- -$892 in 2015; and
- -$249 in 2016.

Therefore, the Petitioner did not have sufficient net income to pay the difference between the annual proffered wage and the amounts it paid to the Beneficiary from 2010 to 2014, or the full proffered wage in 2015 and 2016.

As an alternate means of determining a petitioner's ability to pay the proffered wage, USCIS may review its net current assets. Net current assets are the difference between a petitioner's current assets and current liabilities.[5] A corporation's year-end current assets are shown on Schedule L, lines 1 through 6. Its year-end current liabilities are shown on lines 16 through 18. If the total of a corporation's end-of-year net current assets and the wages paid to the beneficiary (if any) are equal to or greater than the proffered wage, the petitioner is expected to be able to pay the proffered wage using those net current assets. The Petitioner's tax returns state end-of-year net current assets/liabilities as follows:

- $107,773 in 2010;
- $64,957 in 2011;
- $42,822 in 2012;
- -$10,111 in 2013;
- -$10387 in 2014;
- -$10,881 in 2015; and
- -$11,130 in 2016.

Therefore, for the years 2012 through 2014, the Petitioner did not have sufficient net current assets to pay the difference between the annual proffered wage and the amounts it paid to the Beneficiary. For 2015 and 2016, the Petitioner did not have sufficient net current assets to pay the proffered wage. For

[4] Net income/loss is shown on Line 28 of the IRS Form 1120, U.S. Corporation Income Tax Return.

[5] Current assets consist of items having (in most cases) a life of one year or less, such as cash, marketable securities, inventory, and prepaid expenses. Joel G. Siegel & Jae K. Shim, *Barron's Dictionary of Accounting Terms* 117 (3d ed. 2000). Current liabilities are obligations payable (in most cases) within one year, such as accounts payable, short-term notes payable, and accrued expenses (such as taxes and salaries). *Id.* at 118.

the years 2010 and 2011, the Petitioner had sufficient net current assets to pay the difference between the annual proffered wage and the amounts it paid to the Beneficiary.

The Director rejected the Petitioner's assertion that it is able to meet the ability to pay requirement through money transfers from an affiliated overseas company. He indicated that its reliance on *Matter of Pozzoli*, 14 I&N Dec. 569 (BIA 1974), was misplaced because that case explicitly relates to L-1 nonimmigrant visa petitions, which do not have ability to pay as an eligibility requirement. He stated that USCIS does not consider wages paid by a foreign entity when determining whether a petitioner has the ability to pay the proffered wage. On appeal, the Petitioner states that the Director "lightly dismisses the point" made in *Matter of Pozzoli*, 14 I&N Dec. 569 (BIA 1974), and asserts that the case is "relevant to the case at bar." However, it does not indicate how the case is relevant to the Petitioner's ability to pay the proffered wage.

We may consider evidence of a petitioner's ability to pay beyond its net income and net current assets, including such factors as: the number of years it has conducted business; the growth of its business; its number of employees; the occurrence of any uncharacteristic business expenditures or losses; its reputation in its industry; whether a beneficiary will replace a current employee or outsourced service; or other evidence of its ability to pay a proffered wage. *See Matter of Sonegawa*, 12 I&N Dec. 612, 614-615 (Reg'l Comm'r 1967). In this case, the Director noted in his decision that the Petitioner was dissolved in California in February 2017. Before its dissolution, it had not established the growth of its business; the occurrence of any uncharacteristic business expenditures or losses; or its reputation in its industry. It listed only three employees on the petition, including the Beneficiary. Thus, assessing the totality of circumstances in this individual case, the record does not establish the Petitioner's continuing ability to pay the proffered wage pursuant to *Sonegawa*.

In sum, the Petitioner has not established its continuing ability to pay the proffered wage from the petition's priority date onward.

IV. BONA FIDE JOB OFFER

In the NOR, the Director determined that due to an undisclosed relationship between the Petitioner and the Beneficiary, the record does not establish that the Petitioner made a *bona fide* job offer to the Beneficiary. A labor certification employer must attest that "[t]he job opportunity has been and is clearly open to any U.S. worker." 20 C.F.R. § 656.10(c)(8). This attestation "infuses the recruitment process with the requirement of a *bona fide* job opportunity: not merely a test of the job market." *Matter of Modular Container Sys., Inc.*, 89-INA-228, 1991 WL 223955, at 7 (BALCA 1991) (en banc); *see* 20 C.F.R. § 656.17(l).[6]

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[6] The regulation at 20 C.F.R. § 656.17(l) states in pertinent part:

> (l) Alien influence and control over job opportunity. If the employer is a closely held corporation or partnership in which the alien has an ownership interest, or if there is a familial relationship between the stockholders, corporate officers, incorporators, or partners, and the alien, or if the alien is one of a small number of employees, the employer in the event of an audit must be able to demonstrate the existence of a bona fide job opportunity, i.e., the job is available to all U.S. workers, and must provide to the Certifying Officer, the following supporting documentation:

In order to assess, in part, whether a job offer is *bona fide*, Part C.9 of the labor certification asks, "Is the employer a closely held corporation... in which the [Beneficiary] has an ownership interest, or is there a familial relationship between the owners, stockholders, partners, corporate officers, incorporators, and the [Beneficiary]?" The Petitioner checked 'No' in response to this question. However, the record establishes that the Beneficiary was the President/CEO of the Petitioner when the labor certification and petition were filed. He was also its incorporator and had the responsibility of hiring and directing its personnel. By checking the box 'No' at Part C.9, the Petitioner did not disclose this relationship to DOL on the labor certification. The Director rejected the Petitioner's assertion that another individual, [redacted] was the person in charge the hiring process for the offered job. A screen print from the New York job bank shows that all resumes had to be forwarded to the Beneficiary at the Petitioner's address, and the evidence in the record does not show that [redacted] was employed by the Petitioner during the dates he purportedly was overseeing the hiring process for the offered job.

On appeal, the Petitioner asserts that "sufficient evidence has been submitted to show a test of the labor market requirement was satisfied without response."[7] It asserts that it properly tested the labor market and that no qualifying applicants were found. It submits a "Rider to a License Agreement" on appeal as evidence of "actual compliance with the recruitment process. The parties to the Rider are [redacted] as licensor and [redacted] ([redacted]) and references a premises located in [redacted] New Jersey. However, the Petitioner did not submit the License Agreement, so it is unclear how the Rider relates to that Agreement or the recruitment process.

Any United States employer desiring and intending to employ an alien 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).[8] A petition may be approved 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). USCIS is responsible for reviewing the Form I-140, and the labor certification is incorporated into the Form I-

(1) A copy of the articles of incorporation, partnership agreement, business license or similar documents that establish the business entity;
(2) A list of all corporate/company officers and shareholders/partners of the corporation/firm/business, their titles and positions in the business' structure, and a description of the relationships to each other and to the alien beneficiary;
(3) The financial history of the corporation/company/partnership, including the total investment in the business entity and the amount of investment of each officer, incorporator/partner and the alien beneficiary; and
(4) The name of the business' official with primary responsibility for interviewing and hiring applicants for positions within the organization and the name(s) of the business' official(s) having control or influence over hiring decisions involving the position for which labor certification is sought.
(5) If the alien is one of 10 or fewer employees, the employer must document any family relationship between the employees and the alien.

[7] On appeal, the Petitioner submits quarterly federal employment tax returns for a different entity, and the Beneficiary's federal income tax returns for 2009 through 2013. The Petitioner also submits income tax documents from South Korea for the Beneficiary. These documents do not establish that an individual other than the Beneficiary was the person in charge the hiring process for the offered job.

[8] The Petitioner asserts on appeal that a *bona fide* job offer does exist by virtue of it "continuing to do business and file taxes." However, as noted by the Director in the NOR, the Petitioner was dissolved in California in February 2017. In any further filings, the Petitioner must submit evidence to demonstrate its good standing and ongoing business operations, or that it has a valid successor-in-interest.

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 only required to approve an employment-based immigrant visa petition when it determines 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).

In determining the *bona fides* of a job opportunity, we must consider multiple factors, including but not limited to, whether a noncitizen: is in a position to control or influence hiring decisions regarding the offered position; is related to corporate directors, officers, or employees; incorporated or founded the company; has an ownership interest in the company; is involved in the management of the company; sits on its board of directors; is one of a small group of employees; has qualifications matching specialized or unusual job duties or requirements stated in the labor certification; and is so inseparable from the sponsoring employer because of his or her pervasive presence that the employer would be unlikely to continue in operation without the noncitizen. *Modular Container*, 1991 WL 223955, at *8-10. DOL adopted the holding in *Modular Container* at 20 C.F.R. § 656.17(l).

Upon review of the totality of the circumstances in this case and consideration of the *Modular Container* factors, we will affirm the Director's finding that the job offer was not *bona fide*. The Beneficiary was the President/CEO of the Petitioner when the labor certification and petition were filed. He was also its incorporator and had the responsibility of hiring and directing its personnel. He was also one of a small group of employees. His relationship to the Petitioner diminishes the credibility of the Petitioner's certification that the job offer in this case was *bona fide* and clearly open to any U.S. worker.

In sum, the Petitioner has not established that the job offer was *bona fide*.

V. WILLFUL MISREPRESENTATION OF A MATERIAL FACT

The Director entered findings of willful misrepresentation of material facts against the Petitioner and the Beneficiary, and he invalidated the labor certification. 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).

As detailed above, the Director made formal findings of willful misrepresentation of material facts against the Petitioner and the Beneficiary in his NOR based on the following: the Petitioner's submission of reference letters misrepresenting the Beneficiary's experience; the misrepresentation of the Beneficiary's experience on the labor certification by the Petitioner and the Beneficiary; the Petitioner and the Beneficiary submitted evidence portraying the business as an active entity currently doing business when it had been dissolved; and the Petitioner misrepresented its relationship to the Beneficiary by checking "No" at Part C.9 of the labor certification.

On appeal, the Petitioner states that while "the Petitioner may not have absolutely satisfied its burden of proof," the Petitioner has established that the Beneficiary has the required experience for the offered position. It does not contest the Director's determinations that it and the Beneficiary misrepresented the Beneficiary's experience on the labor certification; that it represented itself as an active entity currently doing business when it was dissolved; or that the Petitioner misrepresented its relationship to the Beneficiary by checking "No" at Part C.9 of the labor certification. Therefore, we deem the issue of willful misrepresentation to be waived. *See, e.g.*, *Matter of M-A-S-*, 24 I&N Dec. 762, 767 n.2 (BIA 2009). We affirm the Director's findings of willful misrepresentation of a material fact against the Petitioner and the Beneficiary. However, we will withdraw the Director's invalidation of the labor certification and reinstate it.[9]

VI. CONCLUSION

We conclude that the Director properly revoked the approval of the petition because the record does not establish that: the Beneficiary possessed the experience required by the labor certification as of the priority date; the Petitioner had the continuing ability to pay the proffered wage from the petition's priority date onward; and the job offer was *bona fide*. The facts in the petition are not true, as required by section 204(b) of the Act, and the Petitioner does not realistically intend to employ the Beneficiary in accordance with the terms and conditions set forth in the labor certification, as required by section 204(a)(1)(F) of the Act. We further conclude that the Director properly found that the Petitioner and the Beneficiary willfully misrepresented material facts on the labor certification. The appeal will be dismissed for these reasons, with each considered an independent and alternative basis for the decision.

ORDER: The appeal is dismissed.

[9] We note that the Petitioner asserts in the conclusion to its appeal brief that the Beneficiary "can rely on the portability act" as long as he is employed in the same or related field. However, it does not indicate how the portability provisions apply in this case.