U.S. Citizenship and Immigration Services

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

In Re: 11879078

Date: JUL. 14, 2022

Appeal of Texas Service Center Decision

Form I-140, Immigrant Petition for Skilled Worker

The Petitioner seeks to employ the Beneficiary as an administrative assistant. It requests classification of the Beneficiary under the third-preference, immigrant category as a skilled worker. 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" category allows a U.S. business to sponsor a foreign national for lawful permanent resident status based on a job offer requiring at least two years of training or experience.

The Director of the Texas Service Center denied the petition, concluding that the Petitioner did not establish that the Beneficiary met the minimum requirements of the offered position. The Director also determined that the record demonstrated that the Petitioner and the Beneficiary were involved in a business relationship before filing the accompanying labor certification, and that the Petitioner willfully misrepresented a material fact in not disclosing this relationship. The Director concluded, therefore, that the Petitioner did not intend to employ the Beneficiary in the position listed on the labor certification.

In these proceedings, it is the Petitioner's burden to establish eligibility for the requested benefit by a preponderance of the evidence. Section 291 of the Act, 8 U.S.C. § 1361; *Matter of Chawathe*, 25 I&N Dec. 369, 375 (AAO 2010). The Administrative Appeals Office (AAO) reviews the questions in this matter *de novo*. *See Matter of Christo's Inc.*, 26 I&N Dec. 537, 537 n.2 (AAO 2015). Upon *de novo* review, we will dismiss the appeal.

## I. LAW

Employment-based immigration 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 foreign national 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 foreign national 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.

## II. THE BENEFICIARY'S QUALIFICATIONS

The Petitioner requests classification of the Beneficiary as a skilled worker. The regulation at 8 C.F.R. § 204.5(l)(3)(ii)(B) states that to qualify for skilled worker classification:

> ... the petition must be accompanied by evidence that the [beneficiary] meets the educational, training or experience, and any other requirements of the individual labor certification ... The minimum requirements for this classification are at least two years of training or experience.

To be eligible for skilled worker classification, therefore, the Beneficiary must meet all specific requirements of the labor certification and have at least two years of relevant experience (or training). All requirements must be met by the petition's priority date, which in this case is June 30, 2019.[1] *See Matter of Wing's Tea House*, 16 I&N Dec. 158, 159 (Acting Reg'l Comm'r 1977).

In this case section H of the labor certification (Job Opportunity Information) specifies the following with respect to the requirements for the job of administrative assistant:

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|---|---|---|
| 4. | Education: Minimum level required: | None |
| 5. | Is training required for the job? | No |
| 6. | Is experience in the job offered required? | Yes |
| 6-A. | Number of months required? | 24 |
| 10. | Is experience in an alternate occupation acceptable? | No |
| 11. | Job Duties: Perform routine clerical and administrative tasks such as using computers for various applications such as database management, communicating with existing and prospective customers, suppliers, and trade regulators. Conferring with sales team members, preparing and collecting invoices, and pay bills. | |
| 12. | Are the job opportunity's requirements normal for the occupation? | No |

On the labor certification, the Petitioner asserts that the Beneficiary was employed as an administrative assistant with [redacted] business) in Brazil, from April 1, 1999 to April 30, 2007, performing the following job duties:

> Performed routine clerical and administrative tasks, communicating with existing and prospective customers, suppliers and trade regulators. Conferred with sales team members, prepared and collected invoices, and paid bills.

[1] The "priority date" of a petition is the date the underlying labor certification is filed with the DOL. *See* 8 C.F.R. § 204.5(d). The Petitioner must establish that all eligibility requirements for the petition have been satisfied as of the priority date.

The initial evidence submitted with the petition included a letter from this employer, indicating that the Beneficiary was employed as a full-time administrative assistant with the same dates and job duties listed in the labor certification. No other work experience is listed on the labor certification.[2]

After the petition's initial filing, the Director issued a request for evidence (RFE). In the RFE, the Director noted the following:

- The job duties of the offered position of administrative assistant mirror the job duties of the Beneficiary's claimed previous employment, however it is unclear that the Petitioner, with only two employees, has a "sales team" or is involved with "trade regulators."
- Section K of the labor certification instructs a petitioner to list a beneficiary's employment history for the three years prior to filing, in this case prior to June 30, 2019, even if not related to the offered position; here, the Petitioner listed only the Beneficiary's employment from 1999 to 2007.

The Director requested that the Petitioner provide evidence to establish that it intends to employ the Beneficiary in the offered position under the terms of the labor certification.[3] The Director also requested that the Petitioner submit independent, objective evidence that the Beneficiary possesses the required two years of experience in the job offered.

To support the Beneficiary's claimed experience, the Petitioner submitted copies of the Beneficiary's occupational health reports dated 2002, 2003, 2005 and 2007, and listing his employer as [redacted][4] After reviewing the Petitioner's response to the RFE, the Director issued a notice of intent to deny (NOID) the petition. In the NOID the Director notified the Petitioner that the record was not sufficient to establish the Beneficiary's qualifying experience for the offered position or the skilled worker classification. The Director again noted that the labor certification does not list any other work experience for the Beneficiary, which is inconsistent with other evidence in the record, including:

- The Beneficiary's 2012 nonimmigrant visa application listing his present employment as his financial manage position with [redacted]
- A search of the Brazil Labor Database (CAGED) listing the Beneficiary's employment with [redacted] from April 26, 2000 to September 21, 2012 in the starting position of credit supervisor; and

[2] The Beneficiary signed the labor certification, taking responsibility for the truth and accuracy of the information provided in Sections J (Alien Information) and K (Alien Work Experience). The Beneficiary's signature on the labor certification establishes a strong presumption that he knew the contents of the labor certification application and assented to them. *See Matter of A. J. Valdez*, 27 I&N Dec. 496, 502 (BIA 2018).

[3] We recognize that that the Director raised significant if somewhat speculative concerns. While not sufficiently developed for purposes of this visa petition, the Director is not barred from further inquiry, investigation, or the development of questions for consular processing or adjustment of status proceedings.

[4] The English translations of the reports state that the listed position is "administrative assistant," however we note that the original 2005 and 2003 reports in Portuguese do not include a field for the position title, and the 2002 report states a different position in Portuguese. The Petitioner must resolve inconsistencies with independent, objective evidence pointing to where the truth lies. *Matter of Ho*, 19 I&N Dec. 582, 591-92 (BIA 1988).

- A statement from the Petitioner's previous representative claiming that the Beneficiary was the owner and administrator of his own business from 2007 to 2017.

In response to the NOID, the Petitioner submitted a second letter from [redacted] stating that the Beneficiary was employed from April 26, 2000 to November 26, 2012 in several capacities, including office assistant, financial planner, and head of the financial department. The letter also states that the Petitioner's representative prepared the letter in English with no accompanying Portuguese translation, and requested signature. The Petitioner also submitted a letter from the Beneficiary attesting to his multiple positions with [redacted], as listed on his labor record. The Beneficiary states, "I worked there until November 26." No year is provided.

The Petitioner also submitted the Beneficiary's labor record issued by the Brazilian Ministry of Labor, with portions of an English Translation. The translated excerpts of the labor record indicate that the Beneficiary was employed with [redacted] from April 26, 2000 to November 26, 2012 in the following occupations:

- Courier from April 26, 2000 to January 1, 2002
- Office Assistant from January 1, 2002 to May 1, 2008
- Financial Assistant from May 1, 2008 to October 1, 2011
- Financial Department Head from October 1, 2011 to November 26, 2012

In the NOID response, counsel for the Petitioner states that the Petitioner's previous representative made several errors in preparing and filing the labor certification and the petition. He asserts that the Beneficiary's labor record demonstrates his experience as an office assistant for more than six years, a position that "can be considered substantially similar to an Administrative Assistant position." The Petitioner did not, however, submit any evidence describing the Beneficiary's duties as office assistant. Assertions of counsel do not constitute evidence. *Matter of Obaigbena*, 19 I&N Dec. 533, 534 n.2 (BIA 1988) (citing *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980)). Counsel's statements must be substantiated in the record with independent evidence, which may include affidavits and declarations.

The Director concluded that the Petitioner did not submit independent objective evidence to resolve the inconsistencies and verify the Beneficiary's qualifying employment. The Director noted that the letter and the labor record do not identify the Beneficiary's job duties or describe any of his positions as an administrative assistant, the type of experience required for the offered position. He further noted that the Petitioner did not provide an explanation for the inconsistency in the Beneficiary's occupation listed in CAGED as credit supervisor and his labor record listing multiple positions, none titled credit supervisor.

On appeal, the Petitioner submits the same evidence already in the record, as well as an affidavit signed by the Petitioner's manager. The Petitioner's manager asserts that he does not write, read or speak English, and that he hired "a professional immigration assistance business" to assist him "with the green card process for [the Beneficiary]." He further asserts that his previous representative provided "incorrect information" on the labor certification, including the Beneficiary's dates of employment,

and did not properly explain or advise him, including when another attorney submitted the labor certification.[5]

The brief submitted with the appeal again states that the Beneficiary's employment as an office assistant with [redacted] meets the requirements of two years of experience as an administrative assistant as required by the labor certification. However, the Petitioner again has not provided a description of the Beneficiary's duties as an office assistant, or sufficiently resolved inconsistencies in the record.

The brief also states that the Petitioner's previous representative did note, in response to the Director's RFE, that the Beneficiary "has also acquired business administrative experience from the work he provided to his foreign company, ... from 2007 until 2017." The Petitioner does not submit any evidence in support of this assertion, however. The record does not include a description of the Beneficiary's duties and responsibilities with his business, or an explanation of how this experience qualifies as experience as an administrative assistant. Further, any duties or responsibilities with the Beneficiary's company were not listed on the labor certification, were not confirmed in CAGED, and were not confirmed by the prior visa application.

The Petitioner did not submit additional evidence of the Beneficiary's qualifying experience as an administrative assistant. Nor did the Petitioner submit evidence to resolve the inconsistencies noted by the Director, which are above and beyond the incorrect dates of employment listed on the labor certification. The Petitioner must resolve inconsistencies with independent, objective evidence pointing to where the truth lies. *Matter of Ho*, 19 I&N Dec. at 591-92 (BIA 1988). Unresolved material inconsistencies may lead us to reevaluate the reliability and sufficiency of other evidence submitted in support of the requested immigration benefit. *Id.*

The Beneficiary claims to have at least two years of experience as an administrative assistant, both with his own business and with [redacted] Ultimately, to determine whether a petitioner has established eligibility for a requested benefit by a preponderance of the evidence, USCIS must examine each piece of evidence - both individually and within the context of the entire record - for relevance, probative value, and credibility. *Matter of Chawathe*, 25 I&N Dec. 369, 376 (AAO 2010). Here, the record does not include any description of the Beneficiary's job duties with his own business. The only description of the Beneficiary's job duties with [redacted] are

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[5] The Board's decision in *Matter of Lozada*, 19 I&N Dec. 637, 639 (BIA 1988), *aff'd*, 857 F.2d 10 (1st Cir. 1988), sets forth the following threshold documentary requirements for asserting a claim of ineffective assistance:

- A written affidavit of the petitioner attesting to the relevant facts. The affidavit should provide a detailed description of the agreement with former counsel, the specific actions actually taken by former counsel, and any representations that former counsel made about his or her actions. On appeal, the Petitioner submits an affidavit from its manager attesting to the relevant facts.
- Evidence that the petitioner informed former counsel of the allegation of ineffective assistance and was given an opportunity to respond. Any response by prior counsel should be submitted with the claim.
- If the petitioner asserts that the handling of the case violated former counsel's ethical or legal responsibilities, evidence that the petitioner filed a complaint with the appropriate disciplinary authorities or an explanation why the petitioner did not file a complaint.

The Petitioner did not submit evidence that the requirements of *Lozada* have been met.

found on the labor certification and in the first employment letter, both of which the Petitioner asserts were prepared by its previous representative in English and without proper translation or explanation. Based on inconsistencies in information from the Beneficiary's labor record, his nonimmigrant visa application, and the CAGED database, further independent evidence is required but was not provided.[6] Thus, the record lacks sufficient reliable evidence of the Beneficiary's qualifying experience for the offered position or the requested visa classification. It is the Petitioner's burden to establish eligibility for the immigration benefit sought. Section 291 of the Act, 8 U.S.C. § 1361; *Matter of Skirball Cultural Ctr.*, 25 I&N Dec. 799, 806 (AAO 2012).

The Petitioner has not established with independent, objective evidence that the Beneficiary possesses the required 24 months of experience in the offered position, as required by the labor certification. Therefore, we will dismiss the appeal on this basis.

## III. THE OFFERED POSITION AND WILFULL MISREPRESENTATION OF A MATERIAL FACT

Pursuant to the statutory framework for the granting of immigrant status, 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). Such petitions must be accompanied by a labor certification from the DOL. *See* section 212(a)(5) of the Act, 8 U.S.C. § 1182(a)(5); *see also* 8 C.F.R. § 204.5(l)(3)(i). The Petitioner must intend to employ a beneficiary under the terms and conditions of an accompanying labor certification. *See Matter of Izdebska*, 12 I&N Dec. 54, 55 (Reg'l Comm'r 1966) (affirming denial where, contrary to an accompanying labor certification, a petitioner did not intend to employ a beneficiary under the terms of the labor certification); s*ee also Matter of Sunoco Energy Dev. Co.*, 17 I&N Dec. 283, 284 (Reg'l Comm'r 1979) (affirming a petition's denial under 20 C.F.R. § 656.30(c)(2) where the labor certification did not remain valid for the intended geographic area of employment). Because the filing of a labor certification establishes a priority date for any immigrant petition later based on the labor certification, the petitioner must establish that the job offer was realistic as of the priority date and that the offer remained realistic for each year thereafter, until the beneficiary obtains lawful permanent residence. *See Matter of Great Wall*, 16 I&N Dec. 142 (Acting Reg'l Comm'r 1977).

Further, the Act requires USCIS to determine eligibility for the visa classification requested. *See* section 204(a)(1)(F) of the Act, 8 U.S.C. § 1154(a)(1)(F). Certain classifications require a labor certification to establish eligibility. *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. § 204.5(l)(3)(i). Section 204(b) of the Act allows a petition's approval 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). For those petitions requiring a labor certification, USCIS' investigation into the facts must include consultation with DOL. *Id.* Thus, the labor certification is not conclusive evidence of eligibility. Instead, it is a pre-condition to being eligible to file a Form I-140. USCIS is responsible for reviewing the Form I-140, and the labor certification is incorporated into the Form I-140 by statute

[6] Probative evidence beyond a letter or affidavit may be considered when submitted to resolve inconsistencies or discrepancies in the record. *Matter of Ho*, 19 I&N Dec. at 591-92.

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 required to approve an employment-based immigrant visa petition only where it is determined 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).

On the accompanying labor certification and on the petition the Petitioner states that it is a business management consulting service with two employees. The Petitioner checked "no" to question C.9 on the labor certification, "Is the employer a closely held corporation, partnership, or sole proprietorship in which the alien has an ownership interest, or is there a familial relationship between the owners, stockholders, corporate officers, incorporators, or partners, and the alien?"[7]

Here, the Director noted in the NOID a number of factors in the record that cast doubt that the Petitioner intended to employ the Beneficiary as an administrative assistant. Following review and consideration of the Petitioner's response to the NOID, the Director also determined that the Petitioner and the Beneficiary made a false representation regarding the Beneficiary's experience and the business relationship between them. However, it is not clear from the Director's decision whether a finding of willful material misrepresentation was made and if it was made, whether the finding pertains to the Petitioner, the Beneficiary, or both.

To find a willful and material misrepresentation of fact an immigration officer must determine that (1) the petitioner or beneficiary made a false representation to an authorized official of the U.S. government, (2) the misrepresentation was willfully made, and (3) the fact misrepresented was material. *See Matter of M-*, 6 I&N Dec. 149 (BIA 1954); *Matter of Kai Hing Hui*, 15 I&N Dec. 288, 289 (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). A "material" misrepresentation is one that "tends to shut off a line of inquiry relevant to the alien's eligibility." *Matter of Ng*, 17 I&N Dec. 536, 537 (BIA 1980).

Although we agree with the Director that a petitioner's signature on the labor certification is an attestation, under penalty of perjury, that its contents are true and correct, we do not find that the Petitioner or the Beneficiary willfully misrepresented a material fact in the instant case. Therefore, we will withdraw the portion of the director's decision that relates to misrepresentation and invalidation.

## VI. ABILITY TO PAY

Because we conclude that the Petitioner did not demonstrate that the Beneficiary met the minimum requirements for the offered position or the requested visa classification, we need not fully address other issues evident in the record. That said, we will briefly identify an additional ground of ineligibility to inform the Petitioner that this issue should be addressed in future proceedings.

[7] 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. § 626.10(c)(8); *see also* 20 C.F.R. § 626.17(l).

Although not discussed by the Director, the record does not contain regulatory-required evidence of the Petitioner's ability to pay the proffered wage of $37,066 per year, from the priority date on June 30, 2019, and continuing until the Beneficiary obtains lawful permanent residence. The regulation at 8 C.F.R. § 204.5(g)(2) requires that "[e]vidence of this ability shall be either in the form of copies of annual reports, federal tax returns, or audited financial statements."

The record does not contain regulatory-prescribed evidence of the Petitioner's ability to pay for 2019 onward. Without this regulatory-required evidence, we cannot affirmatively find that the Petitioner has the continuing ability to pay the proffered wage from the priority date. This must be addressed in any future filings.

## VII. CONCLUSION

The record does not support the Director's finding of willful misrepresentation and this finding is withdrawn. However, for the reasons discussed above, we conclude that the record includes unresolved inconsistencies with respect to the Beneficiary's claimed employment history, and the Petitioner did not establish that the Beneficiary met the minimum requirements for the offered position or the requested visa classification.

**ORDER**: The appeal is dismissed.