U.S. Citizenship and Immigration Services

Non-Precedent Decision of the Administrative Appeals Office

In Re: 19207776

Date: JUL. 28, 2022

Appeal of Nebraska Service Center Decision

Form I-140, Immigrant Petition for Other Worker

The Petitioner seeks to employ the Beneficiary as a truck driver. It requests classification of the Beneficiary under the third preference employment-based immigrant visa category. Immigration and Nationality Act (the Act) section 203(b)(3)(A)(iii), 8 U.S.C. § 1153(b) (3)(A)(iii). This immigrant visa category allows a U.S. business to sponsor a foreign national for lawful permanent resident status based on a job offer requiring less than two years of training or experience.

The petition was initially approved. The Director of the Nebraska Service Center subsequently revoked the approval of the petition concluding that the record did not establish that the Beneficiary met the minimum requirements for the position. The Director further concluded that the Beneficiary misrepresented material facts in order to procure an immigrant visa. On appeal, the Petitioner asserts that the Director failed to consider the Beneficiary's prior experience which was not listed on the labor certification. The Petitioner further states that the Director erred in concluding that the Beneficiary misrepresented material facts.

The 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). It is the Petitioner's burden to establish eligibility for the requested benefit by a preponderance of the evidence. See Section 291 of the Act, 8 U.S.C. § 1361; Matter of Chawathe, 25 I&N Dec. 369, 375 (AAO 2010). 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.

At any time before a beneficiary obtains lawful permanent residence, however, USCIS may revoke a petition's approval for "good and sufficient cause." Section 205 of the Act, 8 U.S.C. § 1155. If supported by the record, a petition's erroneous approval may justify its revocation. Matter of Ho, 19 I&N Dec. 582, 590 (BIA 1988). 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). A notice of intent to revoke (NOIR) "is not properly issued unless there is 'good and sufficient cause' and the notice includes a specific statement not only of the facts underlying the proposed action, but also of the supporting evidence." Matter of Estime, 19 I&N Dec. 450, 451 (BIA 1987). Per Matter of Estime, "[i]n determining what is 'good and sufficient cause' for the issuance of a notice of intention to revoke, we ask whether the evidence of record at the time the notice was issued, if unexplained and unrebutted, would have warranted a denial based on the petitioner's failure to meet his or her burden of proof." Id.

II. ANALYSIS

The Petitioner is a transportation company established in 1999 with 102 employees. The underlying labor certification was filed with DOL in June 2018.[1] The labor certification states that the offered position requires no training or education, but requires 12 months of experience in the offered job of truck driver and commercial driver's license (CDL) within 30 days from employment. No alternate experience is accepted.

On the labor certification, the Petitioner asserts that he gained experience as a truck driver from January 2015 to March 2016 through his employment with [redacted] in [redacted] Poland. No other employment is listed. The initial evidence submitted with the petition included a document entitled "Certification" from this employer, indicating that the Beneficiary was employed as a truck driver from January 11, 2015 to March 30, 2016.

Following the approval of the petition, in October 2019, the Beneficiary attended an immigrant visa interview at a U.S. Embassy. The Embassy refused the Beneficiary's immigrant visa and returned the petition to USCIS recommending revocation. The Embassy noted that the Beneficiary ran his own business during his claimed employment at [redacted] between January 2015 and March 2016. The record contains the original Form DS-5529, Voluntary Statement, signed by the Beneficiary and its English translation stating that the letter submitted by [redacted] was "not consistent with the facts" and the Beneficiary ran his own business during "the discussed period."

The Director sent the Petitioner a NOIR, providing the details of the derogatory information in the U.S. Embassy's findings, and giving the Petitioner an opportunity to respond and establish that the Beneficiary met the requirement of 12 months of experience as a truck driver as of the priority date.

[1] The priority date of a petition is the date the DOL accepted the labor certification for processing. See 8 C.F.R. § 204.5(d).

The Director issued the NOIR for good and sufficient cause. The Beneficiary's voluntary written statement during the immigrant visa interview presents discrepancies regarding the nature of his experience. 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. Thus, the record lacked sufficient reliable evidence of the Beneficiary's qualifying experience for the offered position or the requested visa classification.

In response to the NOIR, the Petitioner submitted a 2021 statement from the Beneficiary stating that he has experience driving trucks "as evidenced by the attached certificates" and that he also drove trucks while employed in a different position and that he has a "truck driving license." The Petitioner submitted a statement from [redacted]' stating that the Beneficiary completed his mandatory military service between 1992 and 1993 during which he worked as a driver. The second statement from the same military command indicated the same service period but stated the Beneficiary's position was a driver with a specialization as a "truck driver (with a load of up to 24 tons)." The Petitioner also resubmitted the statement from [redacted] indicating the Beneficiary's period of employment from January 2015 to March 2016 as a full-time truck driver, as well as a second statement stating that the information contained in its prior statement is "in accordance with the facts."

The response also included another statement from the Beneficiary on the date of his interview at the U.S. Embassy in Poland. In his statement, the Beneficiary stated that he did not "fully understand the officer," he was under a "great pressure and distress, which resulted in writing a statement that caused [his] immigration case to be stopped." He further stated that he was told if he withdrew from the case and write a statement saying, "the data contained in the certificate are not consistent with the facts," there will be "no consequences." In his statement, the Beneficiary stated that his qualifications are supported by the certificate provided, his military assignment as a truck driver, his own business that required him to drive a truck for about two years, and his truck driving license.[2]

The Director questioned the credibility of the Beneficiary's experience not included on the labor certification and therefore, concluded that the evidence did not establish that the Beneficiary met the minimum requirements for the position and revoked the petition's approval.

On appeal, the Petitioner states that the Beneficiary "could not clearly repeat what happened during the interview" but states that the Beneficiary's employment listed on the labor certification "was not based on the books" and therefore the Beneficiary was afraid of the "consequences the employer would have to bear, as threatened by the Consular Employee, retracted the previously submitted experience." The Petitioner further states that the "investigator kept intimidating [the] Beneficiary and pressured him to admit that his work experience letter was false." The Petitioner also asserts that the Beneficiary's employment with [redacted] was questioned because it took place at the same time as the Beneficiary was running his own business. The Petitioner adds that it is not unusual to have an active small business and be employed at the same time. However, the Petitioner does not submit any evidence to substantiate its claims. Going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. Matter of Soffici, 22 I&N

[2] We note that the record contains Polish-language documents without English translations. Documents without English translations cannot be considered in analyzing this case. 8 C.F.R. § 103.2(b). However, the rest of the record was reviewed and all relevant evidence was considered in reaching a decision on the appeal.

Dec. 158, 165 (Comm'r 1998) (citing Matter of Treasure Craft of California, 14 I&N Dec. 190 (Reg. Comm'r 1972)).

Furthermore, the Beneficiary's statement does not persuade us that the consular officer intimidated or pressured the Beneficiary to submit a statement against his will. See United States v. Chemical Foundation, Inc., 272 U.S. 1, 14-15 (1926) ("The presumption of regularity supports the official acts of public officers, and, in the absence of clear evidence to the contrary, courts presume that they have properly discharged their official duties."). To the contrary, records made by public officials in the ordinary course of their duties are generally deemed to evince "strong indicia of reliability." See Felzcerek v. I.N.S., 75 F.3d 112, 116 (2d Cir. 1996). Accordingly, absent evidence to the contrary, we must presume that as public officials, consular officers properly discharged their duties in making the contested report.

On appeal, the Petitioner also asks us to consider his truck driver experience in the military and his business, which were not listed on the labor certification and resubmits the documents provided in response to the NOIR. The Beneficiary, however, did not attest to his experience gained prior to his claimed employment with [redacted] on the labor certification application. The Petitioner asserts that the application omits his experience because it took place almost 30 years ago. But the application's instructions require the listing of "all jobs the alien has held during the past 3 years" and "any other experience that qualifies the alien for the job opportunity" (emphasis added). Thus, the omission from the labor certification application casts doubt on the Beneficiary's prior experience. See Matter of Leung, 16 I&N Dec. 12, 14 (Distr. Dir. 1976), disapp'd of on other grounds by Matter of Lam, 16 I&N Dec. 432, 434 (BIA 1978) (finding a claim of additional qualifying experience by an application for adjustment of status to be unreliable where he did not state the experience on his labor certification application). Therefore, evidence submitted in support of the claimed experience not included on the labor certification does not have significant weight in this matter.

In adjudicating immigration benefit requests, USCIS regularly reviews affidavits, testimonials, and letters from both laypersons and recognized experts. To be probative, a document must generally provide: (1) the nature of the affiant's relationship, if any, to the affected party; (2) the basis of the affiant's knowledge; and (3) a specific - rather than merely conclusory - statement of the asserted facts based on the affiant's personal knowledge. Matter of Chin, 14 I&N Dec. 150, 152 (BIA 1972); see also 8 C.F.R. § 103.2(b)(2)(i) (requiring affidavits in lieu of unavailable required evidence from "persons who are not parties to the petition who have direct personal knowledge of the event and circumstances"); Matter of Kwan, 14 I&N Dec. 175, 176-77 (BIA 1972); Iyamba v. INS, 244 F.3d 606, 608 (8th Cir. 2001); Dabaase v. INS, 627 F.2d 117, 119 (8th Cir. 1980). A petitioner may submit a letter or affidavit that contains hearsay or biased information, but such factors will affect the weight to be accorded the evidence in an administrative proceeding. See Matter of D-R-, 25 I&N Dec. 445, 461 (BIA 2011) (citations omitted). Probative evidence beyond a letter or affidavit may be considered when submitted to resolve inconsistencies or discrepancies in the record. See Matter of Ho, 19 I&N Dec. at 591-92. 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. at 376.

The Director also concluded that the Beneficiary misrepresented material facts. 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).

Accordingly, for an immigration officer to find a willful and material misrepresentation in visa petition proceedings, they 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); Matter of Kai Hing Hui, 15 I&N Dec. at 288.

Here, the Director did not elaborate on the details of the misrepresentation the Beneficiary may have made and did not provide sufficient notice in the NOIR to provide opportunity for the Petitioner to address the issue adequately. Therefore, we withdraw the Director's finding of material misrepresentation by the Beneficiary and will not further address the arguments made on appeal regarding material misrepresentation.

However, we note the record contains inconsistencies regarding the Beneficiary's experience with [redacted] The Petitioner relies on testimonial evidence from the Beneficiary and his former employer to establish his claimed employment experience, without providing independent, objective evidence in support of these testimonies. The Petitioner has not submitted additional evidence such as the Beneficiary's income tax or payroll records to corroborate his claimed employment, or other publicly available records to document his employment. While the Petitioner asserts that the Beneficiary's employment with [redacted] "was not based on the books," it does not further corroborate such claim. 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 met that burden.

III. CONCLUSION

The Petitioner has not established with independent, objective evidence that the Beneficiary possesses the required 12 months of experience in the offered position, as required by the labor certification. The Director properly revoked the approval of the petition on this basis.

ORDER: The appeal is dismissed.