U.S. Citizenship and Immigration Services

Non-Precedent Decision of the Administrative Appeals Office

In Re: 20486842

Date: MAR. 31, 2022

Motion on Administrative Appeals Office Decision

Form I-140, Immigrant Petition for Skilled Worker

The Petitioner, a plastic bag manufacturer, seeks to employ the Beneficiary as an operator. 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 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 possessed the minimum experience required for the offered position. The Director also found that the Petitioner and the Beneficiary willfully misrepresented a material fact, the Beneficiary's qualifying work experience for the offered position. We dismissed a subsequent appeal and found that the Beneficiary did not have the required experience and that he willfully misrepresented his qualifying work experience but withdrew the misrepresentation against the Petitioner. The matter is now before us on a motion to reconsider.

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; *Matter of Skirball Cultural Ctr.*, 25 I&N Dec. 799, 806 (AAO 2012); *Matter of Chawathe*, 25 I&N Dec. 369, 375-76 (AAO 2010). Upon review, we will dismiss the motion.

I. MOTION REQUIREMENTS

A motion to reconsider must demonstrate that our decision was based on an incorrect application of law or policy and that the decision was incorrect based on the evidence in the record of proceedings at the time of the decision. *See* 8 C.F.R. § 103.5(a)(3). A motion to reconsider must be supported by a pertinent precedent or adopted decision, statutory or regulatory provision, or statement of U.S. Citizenship and Immigration Services (USCIS) or Department of Homeland Security policy.

II. ANALYSIS

The issue before us is whether the Petitioner has established that our decision to dismiss the appeal was based on an incorrect application of law or USCIS policy. The Petitioner must specify the factual and legal issues raised on appeal that were decided in error or overlooked in our initial decision.

In our previous decision, we explained that the record did not support a finding that the Beneficiary, more likely than not, possessed the minimum experience required for the offered position as required under 8 C.F.R. § 204.5(l)(3). We considered all evidence of the Beneficiary's qualifying experience in the record, including letters from his previous foreign employer, letters from his former coworkers, and an "expert opinion evaluation" of the Beneficiary's education and work experience. However, we concluded that the evidence was insufficient to establish that the Beneficiary possessed the required 24 months of experience in the offered position of operator. We specifically noted, as did the Director before us, the inconsistencies in the letters from the Beneficiary's former employer which cast doubt on the authenticity of those letters. The Petitioner must resolve these inconsistencies with independent, objective evidence pointing to where the truth lies. *Matter of Ho*, 19 I&N Dec. 582, at 591-92. Unresolved material inconsistencies may lead us to reevaluate the reliability and sufficiency of other evidence submitted in support of the requested immigration benefit. Probative evidence beyond a letter or affidavit may be considered when submitted to resolve inconsistencies or discrepancies in the record. *Id.*

On motion, the Petitioner does not address the inconsistencies in the letters from the Beneficiary's former foreign employer or provide additional evidence to resolve these inconsistencies. Nor does the Petitioner address our finding that the Beneficiary willfully misrepresented his qualifying experience. Rather, the Petitioner continues to rely on the evidence already in the record and asserts that we erred in concluding that the Petitioner did not establish by a preponderance of the evidence that the Beneficiary possessed the minimum required experience, and that we incorrectly applied a higher standard of proof higher.

Our prior decision and the Director's decision provided detailed discussions of the inconsistencies in two letters from the Beneficiary's former foreign employer and the reasons these letters are not considered probative evidence of the Beneficiary's qualifying work experience. Our decision also explains the reasons that the secondary evidence, letters from the Beneficiary's former coworkers, was insufficient to meet the Petitioner's burden of proof. We noted that 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). We also stated that further independent evidence, such as a notarial certificate accompanied by the Beneficiary's income tax or payroll records, or business registration information to verify the existence and correct name of the foreign business, could be submitted to corroborate his claimed employment. The Petitioner does not submit additional independent evidence on motion. Counsel for the Petitioner states in the brief on motion that the former foreign employer is no longer in existence and, due to the passage of time, no other evidence is available. However, the Petitioner does not explain or document any attempts to procure additional evidence to verify the Beneficiary's employment beyond that already in the record. Nor does the Petitioner provide any

precedent decision, statutory or regulatory provision, or statement of USCIS policy to demonstrate that we erred in our conclusions.

The Petitioner asserts on motion that we erred in not considering other qualifying experience that the Beneficiary possessed as a mechanical engineer. In our prior decision we noted that, although the Petitioner claimed that the Beneficiary was employed as a machinist and a mechanical engineer with two other employers in the United States, the record did not include evidence to document the Beneficiary's job title or job duties with these employers. Rather, the record included only Internal Revenue Service (IRS) Forms W-2, Wage and Tax Statements, issued to the Beneficiary by [redacted] and [redacted][1] The Petitioner states on motion that, "even if the Service were to completely dismiss [the Beneficiary's experience with his former foreign employer], he would still qualify for the position of a machinist because of his experience working as a mechanical engineer." However, the Petitioner still does not provide any regulatory prescribed evidence in accordance with 8 C.F.R. § 204.5(l)(3) of the Beneficiary's employment with either claimed U.S. employer or explain how our decision was in error.[2]

In addition to the evidence of the Beneficiary's qualifying experience, we also examined evidence of the Beneficiary's qualifying education in our prior decision. We noted that the evidence in the record did not conclusively demonstrate that the Beneficiary possessed the minimum education required for the offered position, a high school diploma. As we noted in our decision, the record does not include the Beneficiary's actual bachelor's degree or transcripts, or his high school diploma or any official academic record. On motion, the Petitioner asserts that we erred in not considering the Beneficiary's "graduation certificate" from [redacted] University as conclusive evidence of his high school diploma. Although the "graduation certificate" states that the Beneficiary completed a four-year undergraduate program for a bachelor's degree, the record does not demonstrate the entry requirements for the Beneficiary's program at [redacted] University.[3] Also, the Petitioner does not address why the Beneficiary's actual bachelor's degree, or his high school diploma was not provided or state that it is unavailable, and it does not explain how our decision was in error.

In our appellate decision, we noted that the original petition was filed by an entity identified as [redacted] and that the Petitioner identified itself as [redacted] on appeal. Noting that, where the petitioner is a different entity than the labor certification employer, it must establish that it is a successor-in interest to that entity, we stated that this issue requires resolution in any other filings. *See Matter of Dial Auto Repair Shop, Inc.*, 19 I&N Dec. 481 (Comm'r 1986). In the brief in support of the motion to reconsider, counsel states that [redacted] changed its legal name to [redacted], but that it remains the same entity and is not a successor-in-interest. However, assertions of counsel do not constitute evidence. *Matter of Obaigbena*, 19 I&N Dec. 533,

[1] While the record includes a letter from the Petitioner explaining that it and [redacted] are owned by the same individual, the letter does not describe the Beneficiary's job title or job duties with [redacted]

[2] In our appellate decision, we noted that, even if we considered the Beneficiary's experience with [redacted] as being in the offered position of operator, it would total less than the required 24 months of experience.

[3] The record includes an evaluation of the Beneficiary's education from [redacted] dated March 17, 2003. While the evaluation states that graduation from high school and entrance examinations are requirements for admission and enrollment at [redacted] University, the evaluation does not provide a source for this statement. The evaluation further states that it "relies upon copies of the original documents provided by [the Beneficiary]," but does not list the specific documents reviewed, including an academic record, if any.

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.

As we noted in our previous decision, a search of taxable entities in Texas identifies both [redacted] and [redacted] as separate businesses with two different state taxpayer numbers.[4] *See* Texas Comptroller of Public Accounts, Taxable Entity Search, https://mycpa.cpa.state.tx.us/coa/coaSearchBtn (accessed February 28, 2022). At the time of our appellate decision, the Texas Comptroller of Public Accounts listed both [redacted] and [redacted] as active businesses. A current search, however, indicates that [redacted] has now forfeited its right to transact business in Texas. The date of forfeiture was not available as public information. The Petitioner did not submit evidence of its legal name change or that it remains the same entity operating the same type of business.

Moreover, on motion, the Petitioner has not addressed another issue that we raised in our appellate decision regarding its ability to pay the proffered wage to the Beneficiary as required by 8 C.F.R. § 204.5(g)(2). We noted that where a petitioner has filed I-140 petitions for multiple beneficiaries, it must demonstrate that its job offer to each beneficiary is realistic, and that it has the ability to pay the proffered wage to each beneficiary. *See Patel v. Johnson*, 2 F.Supp.3d 108, 124 (D. Mass. 2014) (affirming our revocation of a petition's approval where, as of the filing's grant, a petitioner did not demonstrate its ability to pay the combined proffered wages of multiple petitions). We further noted that USCIS records show that the Petitioner has filed Form I-140 petitions for at least three other beneficiaries and that the Petitioner must establish its ability to pay this Beneficiary as well as the beneficiaries of the other Form I-140 petitions that were pending or approved as of, or filed after, the priority date of the current petition. Although we specifically stated that, "with any further filings the Petitioner must include complete copies of its tax returns for all years," it did not submit the requested tax returns or other regulatory prescribed evidence of its ability to the proffered wage. Nor does the Petitioner explain how we erred in our decision on this issue.

The Petitioner has not shown on motion that our determination concerning the Beneficiary's qualifications for the offered position "was based on an incorrect application of law or policy" or that our "decision was incorrect based on the evidence in the record of proceedings at the time of the decision." *See* 8 C.F.R. § 103.5(a)(3). Nor has the Petitioner provided specifically requested evidence to establish its eligibility for the benefit sought, including evidence that it remains the same entity as the business that filed the original petition, and that it has the ability to pay the proffered wage to the beneficiaries of all of the petitions it filed. Accordingly, we will dismiss the Petitioner's motion to reconsider the matter.

ORDER: The motion to reconsider is dismissed.

[4] We further note that the entities have two different mailing addresses and two different registered agents.