U.S. Citizenship and Immigration Services

Non-Precedent Decision of the Administrative Appeals Office

In Re: 16063400

Date: NOV. 10, 2022

Appeal of Texas Service Center Decision

Form I-140, Immigrant Petition for Skilled Worker

The Petitioner seeks to employ the Beneficiary as a Thai cook under the third-preference, immigrant visa category for skilled workers. *See* 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 with at least two years of training or experience for lawful permanent resident status. The Texas Service Center Director issued a notice of intent to deny (NOID) the Form I-140, Immigrant Petition for Alien Workers, then denied the petition and dismissed a subsequent motion. The matter is now before us on appeal. The Petitioner bears the burden of proof to demonstrate eligibility by a preponderance of the evidence. Section 291 of the Act; *Matter of Chawathe*, 25 I&N Dec. 369, 375 (AAO 2010). We review the questions in this matter *de novo*. *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. THE EMPLOYMENT-BASED IMMIGRATION PROCESS

Immigration as a skilled worker generally follows a three-step process. First, a prospective employer must apply to the U.S. Department of Labor (DOL) for certification that: (1) there are insufficient U.S. workers able, willing, qualified, and available for an offered position; and (2) employment of a noncitizen in the position would not harm wages and working conditions of U.S. workers with similar jobs. *See* section 212(a)(5) of the Act, 8 U.S.C. § 1182(a)(5). Second, an employer must submit an approved DOL ETA Form 9089, Application for Permanent Employment Certification (labor certification) 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 determines whether a noncitizen beneficiary meets the requirements of a DOL-certified position and a requested immigrant visa category. 8 C.F.R. § 204.5(l). Finally, if USCIS approves a petition, a noncitizen beneficiary may 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.

To be eligible for classification as a skilled worker a beneficiary must have at least two years of training or experience. *See* 8 C.F.R. § 204.5(l)(3)(ii)(B). A beneficiary must also meet the specific educational, training, experience, and other requirements of the labor certification underlying the

petition. *Id.* All requirements must be met by the petition's priority date,[1] which in this case is December 4, 2017. *See Matter of Wing's Tea House*, 16 I&N Dec. 158, 159 (Acting Reg'l Comm'r 1977).

II. ANALYSIS

A. Background

The Beneficiary claims the following foreign employment:

- [redacted]: August 7, 2007 - September 9, 2008;
- [redacted] (Restaurant): April 1, 2008 - April 30, 2012;
- [redacted]: September 16, 2008 - September 30, 2010;
- [redacted]: 2013 - 2014; and
- Self-employed: 2014 - 2017.

It is the work at the Restaurant the Beneficiary claims as the qualifying work experience on the labor certification. The Beneficiary applied for nonimmigrant visitor visas in 2008 and 2009. She signed the first visa application on September 5, 2008, and listed her current employer as [redacted] On this application, the Beneficiary made no mention of her work at the Restaurant where she now claims she had been working for almost a year and a half. The Beneficiary signed the second visa application on October 13, 2009, and again did not identify the Restaurant as her current employer. Instead, she listed her employer as [redacted]

Moving to the labor certification, the Petitioner was only required to include the employment that qualified the Beneficiary for the offered position as well as all jobs she held during the most recent three years. Section K. of the labor certification provides the following: "List all jobs the alien has held during the past 3 years. Also list any other experience that qualifies the alien for the job opportunity for which the employer is seeking certification." The Petitioner only included the Beneficiary's work at the Restaurant and did not include her work described as self-employed. Within the motion brief the Petitioner filed before the Director, they stated:

> Pursuant to the instructions, the beneficiary was required to list their jobs between 2014 to 2017 and any other experience that qualifies the alien for the job opportunity. The beneficiary did not list any job between 2014 and 2017 as she was self-employed in the qualifying experience from the [Restaurant] was listed.

As evidence of her experience at the Restaurant, the Beneficiary provided two letters from this organization that detailed the years she worked for them as a Thai cook, that the work was full time,

[1] The priority date of an employment-based immigrant petition is the date the underlying labor certification is filed with the DOL. *See* 8 C.F.R. § 204.5(d).

the duties she performed for the organization, as well as the author's name, title, and address. The Petitioner also provided evidence relating to two other positions that are not pertinent to this decision.

The Director issued the NOID, which among other issues, noted the discrepancy between the Beneficiary's claimed work experience on the labor certification when compared with her nonimmigrant visa applications. That discrepancy called into doubt whether she possessed the claimed experience as a Thai cook. Within this notice, the Director also alleged the Petitioner and the Beneficiary misrepresented material facts as it relates to her claimed work experience.

After considering the Petitioner's NOID response, the Director denied the petition for multiple bases including: (1) the Beneficiary did not possess the required experience, (2) the Petitioner and the Beneficiary misrepresented a material fact as described in section 212(a)(6)(C)(i) of the Act relating to her qualifying experience, (3) the Petitioner did not make a *bona fide* job offer, and (4) the Petitioner did not file and submit a valid labor certification resulting in the Director invalidating it.

The Petitioner filed a motion to reopen and reconsider and the Director dismissed those motions. In part, the Director continued to find that: (1) the discrepant information about the Beneficiary's qualifying work experience undermined their eligibility claims, (2) the record did not demonstrate she met the minimum requirements for the offered position, and (3) statements of fact presented by the Petitioner's counsel were not tantamount to evidence. We note that in the motion dismissal, the Director did not convey their fraud or material misrepresentation finding and it is unclear whether the Director continued to attribute those adverse concepts to the Petitioner's and Beneficiary's claims and evidence. On appeal, the Petitioner continues to claim the Beneficiary possesses the required work experience, the Director misunderstood some of the facts and evidence relating to her work experience, and before the Director they established that no fraud or material misrepresentation was committed.

B. Appellate Determination

After reviewing the record and the appeal brief, we conclude the Petitioner has neither resolved the material inconsistencies in the record, nor have they demonstrated the Beneficiary possessed the required work experience when they filed the labor certification. 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 24 months of experience in the job offered as a Thai cook.

As we described above, the Beneficiary claimed she was working at the Restaurant when she filed both nonimmigrant visa applications, yet she failed to list that employment on either application. This creates doubt as it relates to the veracity and credibility of the claims presented in both letters from the Restaurant, especially when the first instance she claimed to work there was on the labor certification when she needed to rely on that experience to qualify for the offered position. When the Director raised this issue in the NOID, the Petitioner simply refuted the allegation of misrepresentation and provided a second letter from the Restaurant containing mostly the same information as the first letter the Director determined was inadequate to resolve the inconsistency. The Petitioner did not offer any additional evidence beyond the two employment letters to demonstrate she was actually employed in the claimed position during the relevant timeframe, nor do they indicate any such evidence exists.

Consistent with regulations, the letters from the Restaurant provide the names, addresses, and titles of the employers, and descriptions of the Beneficiary's experience. *See* 8 C.F.R. §§ 204.5(g)(1), (l)(3)(ii)(A). However, a petitioner does not satisfy its burden of proof by simply meeting the regulatory requirement for evidence. In addition to meeting the *prima facie* documentary requirements, when adverse elements are present in the case it may be necessary for an employer to explain and demonstrate how the totality of their evidence should result in a favorable decision. In other words, simply producing evidence is not always adequate. A petitioner's burden of proof comprises both the initial burden of production, as well as the ultimate burden of persuasion. *Matter of Y-B-*, 21 I&N Dec. 1136, 1142 n.3 (BIA 1998).

Even if we accept the veracity of the Restaurant's letters, the Petitioner has been afforded multiple opportunities to offer an explanation of why—in two instances—the Beneficiary failed to include her employment at the Restaurant on her nonimmigrant visa applications. Even on appeal, the Petitioner discusses evidence from the Beneficiary's previous employers, returns the discussion to the two letters from the Restaurant, and states those letters establish the Beneficiary possessed the required experience, as claimed. But the Petitioner never addresses why the Beneficiary omitted her employment at the Restaurant on both visa applications. When a petitioner refuses to provide this reasoning, it can raise questions concerning the letters from the Restaurant, leaving us unable to consider their content as fully credible. This deficiency undermines the claims of qualifying experience due to the incongruences in the evidence and the absence of corroboration on the nonimmigrant visas. And because the evidentiary value of the Restaurant letters is diminished by the inconsistency, the Petitioner's claims regarding the Beneficiary's work experience are undermined to even a greater extent.

When there is a material inconsistency in the record, the Petitioner must ameliorate this discordant information. Such a correction must be demonstrated through the submission of relevant, independent, and objective evidence that reveals which information is the truth. *Matter of Ho*, 19 I&N Dec. 582, 591–92 (BIA 1988). Such ameliorative evidence must be probative. Probative evidence is the type that "must tend to prove or disprove an issue that is material to the determination of the case." *Matter of E-F-N-*, 28 I&N Dec. 591, 593 (BIA 2022) (quoting *Matter of Ruzku*, 26 I&N Dec. 731, 733 (BIA 2016)); *see also Evidence*, *Black's Law Dictionary* (11th ed. 2019). Therefore, if some form of the Petitioner's evidence does not adequately demonstrate their contention, then it is not considered to be probative. When combined with other favorable material, evidence that is not probative on its own could exist on a palette in which the Petitioner "paints a mosaic" that sufficiently demonstrates their claims. The Petitioner has not pieced together that portrait here.

False, contradictory, or unverifiable claims inherently prevent a finding that a petitioner's claims are true. *See Anetekhai v. I.N.S.*, 876 F.2d 1218, 1220 (5th Cir. 1989); *Systronics Corp. v. I.N.S.*, 153 F. Supp. 2d 7, 15 (D.D.C. 2001); *Lu-Ann Bakery Shop, Inc. v. Nelson*, 705 F. Supp. 7, 10 (D.D.C. 1988). Due to the lack of corroborating and probative evidence, the Petitioner and the Beneficiary have presented contradictory claims (those on the labor certification versus those on the nonimmigrant visa applications) and we do not find that they have established the Beneficiary's work experience claims are true. Additionally, factual ambiguities are weighed against foreign nationals when the burden of proof rests with them. *Cf. Pereida v. Wilkinson*, 141 S. Ct. 754, 763 (2021); *Ramirez-Medina v. Garland*, No. 16-73325, 2021 WL 6061562, at *4 (9th Cir. Dec. 22, 2021) (finding where the foreign

person applying for an immigration benefit bears the burden of proof, factual ambiguities are weighed against them). Those ambiguities, and the attendant effects on this case, will be weighed and considered with the rest of the record. As a result, any factual ambiguity between the Beneficiary's experiential claims and what the government requires is weighed in favor of the government's requirements and against the filing party because the burden of proof is on the filing party.

Where a record contains inconsistencies, the fact that a filing party offers explanations for discrepancies is not necessarily sufficient to meet their burden of proof and we are not required to accept their explanations. *See E-F-N-*, 28 I&N Dec. at 593 (citing *Matter of Y-I-M-*, 27 I&N Dec. 724, 726 (BIA 2019)). Part of our function is to separate the explanations that are most plausible from those that are not to evaluate the persuasive force a petitioner offers for their apparent inconsistencies. The final determination of whether evidence satisfies the requirements of a regulation or meets the burden of proof lies with USCIS. *See Matter of Caron International*, 19 I&N Dec. 791, 795 (Comm'r 1988) (finding that the appropriate entity to determine eligibility is USCIS). Here, the Petitioner doesn't offer an explanation for the inconsistencies between the information on the visa applications and the rest of the record.

As the inconsistencies in the record have not been resolved, the Petitioner has not established with relevant, independent, and objective evidence that—as of the priority date—the Beneficiary possessed the required 24 months of experience in the offered position, as required by the labor certification. The Director properly denied the petition on this basis.

Because the above basis for the petition's denial is dispositive of this appeal, we decline to reach and hereby reserve the Applicant's remaining appellate arguments. *See INS v. Bagamasbad*, 429 U.S. 24, 25 (1976) ("courts and agencies are not required to make findings on issues the decision of which is unnecessary to the results they reach"); *see also Matter of M-F-O-*, 28 I&N Dec. 408, 417 n.14 (BIA 2021) (declining to reach alternative issues on appeal where an applicant is otherwise ineligible). However, we will withdraw both the Director's invalidation of the labor certification and reinstate it as well as its *bona fide* job offer determination.

C. Additional Determinations

We reiterate that it is unclear whether the Director continued to conclude that the Beneficiary or the Petitioner misrepresented a material fact. Presuming they continued to apply this finding to this case after their decision on the motions, we withdraw that determination. Although the Petitioner and the Beneficiary have not demonstrated she gained at least 24 months of experience at the Restaurant, the inconsistencies and the information the Director noted do not appear to rise to the level necessary to apply this inadmissibility ground to this case. In particular, their failure to establish a claimed fact as true does not constitute that claim was false. "False representation, or usually called 'misrepresentation,' is an assertion or manifestation that is not in accordance with the true facts." 8 *USCIS Policy Manual* J.3(K)(C)(1), https://www.uscis.gov/policymanual. Here, the Director did not sufficiently establish the Beneficiary's claims of work experience at the Restaurant were "not in accordance with the true facts."

We further withdraw the Director's determinations regarding a lack of *bona fide* job offer. And finally, we withdraw the Director's decision to invalidate the labor certification and we reinstate it.

III. CONCLUSION

The appeal will be dismissed for the above stated reasons, with each considered an independent and alternative basis for the decision. In visa petition proceedings, it is a petitioner's burden to establish eligibility for the immigration benefit sought. The Petitioner has not met that burden.

ORDER: The appeal is dismissed.