U.S. Citizenship and Immigration Services

Non-Precedent Decision of the Administrative Appeals Office

In Re: 19240911

Date: SEP. 28, 2022

Motion on Administrative Appeals Office Decision

Form I-140, Immigrant Petition for Skilled Worker

The Petitioner, a gas station and grocery store, seeks to employ the Beneficiary as a manager. 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 initially approved the Form I-140, Immigrant Petition for Skilled Worker (Form I-140), but subsequently revoked the petition's approval on notice. The Director concluded that the Petitioner did not establish that the Beneficiary possessed the minimum experience required for the offered position or demonstrate that a *bona fide* job offer existed. The Director also determined that the Petitioner and the Beneficiary had willfully misrepresented a material fact with respect to the Beneficiary's employment history. We dismissed the Petitioner's subsequent appeal of the Director's decision and affirmed the Director's conclusions. The matter is now before us on a combined motion to reopen and motion to reconsider.

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). Upon review, we will dismiss the combined motions.

I. MOTION REQUIREMENTS

A motion to reopen must state new facts and be supported by documentary evidence. 8 C.F.R. § 103.5(a)(2). A motion to reconsider must state the reasons for consideration, establish that the prior decision was based on an incorrect application of law or U.S. Citizenship and Immigration Services (USCIS) policy and demonstrate that the decision was incorrect based on the evidence in the record of proceedings at the time of the decision. 8 C.F.R. § 103.5(a)(3). We may grant motions that meet these requirements and demonstrate eligibility for the requested benefit.

II. EMPLOYMENT-BASED IMMIGRATION

Immigration as a skilled worker usually follows a three-step process. First, to permanently fill a position in the United States with a foreign worker, a prospective employer must 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). If the Department of Labor approves a position, an employer must next submit the certified labor application with an immigrant visa petition to USCIS. Section 204 of the Act, 8 U.S.C. § 1154. Finally, if USCIS approves the immigrant petition, the beneficiary may apply abroad for an immigrant visa or, if eligible, for adjustment of status in the United States. *See* section 245 of the Act, 8 U.S.C. § 1255.

"[A]t any time" before a beneficiary obtains lawful permanent residence, USCIS may revoke a petition's approval for "good and sufficient cause." Section 205 of the Act, 8 U.S.C. § 1155. USCIS may issue a notice of intent to revoke (NOIR) a petition's approval if the unexplained and unrebutted record at the time of the notice's issuance would have warranted the petition's denial. *Matter of Estime*, 19 I&N Dec. 450, 451 (BIA 1987). If a petitioner's NOIR response does not overcome the stated revocation grounds, USCIS may revoke a petition's approval. *Id.* at 451–52.

III. ANALYSIS

The issues before us on motion are whether the Petitioner has (1) submitted new facts to warrant reopening and (2) established that our decision to dismiss its appeal was based on an incorrect application of law or USCIS policy based on the record before us at the time of the decision. To succeed on a motion to reconsider, 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 affirmed the Director's revocation of the petition's approval because: (1) the Petitioner did not establish that the Beneficiary meets the minimum experience requirements for the requested classification or the experience requirement stated on the accompanying labor certification as required under 8 C.F.R. § 204.5(l)(3); (2) the record did not establish the existence of a *bona fide* job offer; and (3) the record contained unresolved inconsistencies regarding the Beneficiary's claimed employment history which supported the Director's determination that the Petitioner and the Beneficiary willfully misrepresented this information on the labor certification. We address the Petitioner's contentions on motion with respect to each of these issues below.

A. The Beneficiary's Experience

The Petitioner has offered the Beneficiary a position as the manager of its gas station and convenience store. The labor certification, filed with DOL on February 18, 2004,[1] states that this position requires 24 months of experience in the offered job of "manager" and no training or education. The labor certification states that the Beneficiary gained the experience as a manager with:

- [redacted] in Texas from September 2000 to February 2004;
- [redacted] in India from May 1997 to August 2000.

[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 initial evidence submitted with the Form I-140 included a letter from the president of [redacted] dated June 8, 2004. The letter states that the Beneficiary was employed as a store manager from November 2000 to May 2004, which differ from the dates of employment on the labor certification. The Petitioner's initial filing did not include evidence supporting the Beneficiary's claimed employment with [redacted]

In the notice of intent to revoke (NOIR), the Director identified inconsistencies in the Petitioner's claimed employment history and therefore determined that the record lacked sufficient reliable evidence of the Beneficiary's experience for the offered position. First, the Director found that [redacted] (which does business as [redacted]) was incorporated in Texas in May 2001. The labor certification indicates that the Beneficiary started working there in September 2000, and the letter from the president of [redacted] (the Beneficiary's paternal uncle) states that the Beneficiary commenced his employment in November 2000. Further, the Director emphasized that the record did not include evidence to support the Beneficiary's claimed employment with [redacted] in India. The NOIR provided the Petitioner an opportunity to submit additional evidence to demonstrate that the Beneficiary had the required 24 months of experience in the job offered as of the priority date. The Director specifically requested independent, objective evidence of the Beneficiary's previous employment, including, but not limited to, his wage and tax statements and individual income tax returns for the years 2000 to 2019.

In response to the NOIR, the Petitioner did not address the inconsistencies in the record regarding the Beneficiary's dates of employment with [redacted] Rather, the Petitioner asserted that the information provided regarding his employment with [redacted] "is not being used for the purpose of demonstrating that the Beneficiary meets the minimum work experience requirements under the Labor Certification." The Petitioner's response also included evidence intended to establish the ongoing existence of the Beneficiary's claimed prior employer in India. However, the Petitioner did not submit any evidence confirming his employment as a manager for [redacted] from May 1997 to August 2000, as stated on the labor certification. Further, the Petitioner did not submit any of the Beneficiary's income tax returns or wage and tax statements.

The Director revoked the petition's approval, concluding that the Petitioner did not submit independent objective evidence to resolve the inconsistencies in the record and did not establish that the Beneficiary had the required 24 months of experience in the job offered.

On appeal, the Petitioner did not dispute that the Beneficiary's dates of employment were listed incorrectly on the labor certification. The Petitioner asserted that the record nevertheless established that he gained at least 24 months of experience as a manager with [redacted] The Petitioner provided evidence that [redacted] was incorporated in May 2001 and submitted federal tax returns for [redacted] for the years 2002 to 2004 to demonstrate that it was doing business during that period. However, the Petitioner did not submit the Beneficiary's tax or pay records to corroborate his claimed employment with [redacted] nor did it submit a new letter from this employer.

The Petitioner also offered for the first time on appeal an employment letter addressing the Beneficiary's employment with [redacted] The letter is from the owner of [redacted] who states that this business was formerly known as [redacted] He states that the Beneficiary was employed as a full-time manager from May 1997 to August 2020. Finally, the

Petitioner's appeal included affidavits from four individuals who state that they worked in sales positions for [redacted] during that period and that the Beneficiary was their manager.

In our decision dismissing the appeal, we addressed the evidence that was in the record before the Director at the time of revocation and acknowledged the newly submitted evidence. With respect to the new evidence, we emphasized that the Petitioner did not indicate that the evidence was previously unavailable or otherwise explain why it was not submitted in response to the NOIR, in which the Director had specifically requested evidence regarding the Beneficiary's prior employment. Citing to *Matter of Soriano*, 19 I&N Dec. 764, 766 (BIA 1988), we noted that, under the circumstances, we need not consider evidence submitted for the first time on appeal. Nevertheless, we explained that, even if we did consider the new evidence, it would not be sufficient to establish that the Beneficiary had the required 24 months of experience in the job offered as of the priority date. Further, with respect to the previously submitted evidence, we acknowledged the Petitioner's assertion, through counsel, that the dates of employment were incorrectly listed on the labor certification. However, we emphasized that the Petitioner did not further explain the error, state the actual dates of the Beneficiary's employment with [redacted] or provide any objective evidence to resolve the inconsistencies in the record.

On motion, the Petitioner objects to our citation to *Matter of Soriano* and asserts that the instructions to Form I-290B, Notice of Appeal or Motion, specifically allow the filing party to submit new evidence in support of an appeal. The Petitioner asserts that the new evidence provided on appeal was not submitted in response to the NOIR because it had only a limited period to respond and that it provided what was available at the time. The Petitioner requests that we reconsider our prior determination regarding the Beneficiary's experience based on a complete review of the record. It re-submits the evidence previously provided on appeal and offers a new letter from the president of [redacted] who states that the Beneficiary worked there from May 2001 to May 2004.

The Petitioner further asserts that we incorrectly indicated that the testimonial evidence in the record, attesting to the Beneficiary's prior employment, does not carry sufficient weight to meet the Petitioner's burden of proof. The Petitioner emphasizes that the regulation at 8 C.F.R. § 204.5(l)(3)(ii)(A) requires letters from employers and that applicable caselaw provides that letters from former co-workers may be submitted. In addition, the Petitioner states that the Beneficiary's employment with [redacted] ended more than 20 years ago and independent, objective evidence of his employment there is no longer available.

Upon review, the Petitioner has not established that our prior determination on this issue was based on an incorrect application of law or USCIS policy or that it was incorrect based on the evidence before us at the time of the decision. 8 C.F.R. § 103.5(a)(3). Further, the newly submitted evidence (the letter from [redacted] does not overcome the basis for our adverse determination regarding the Beneficiary's experience.

The Petitioner asserts we improperly disregarded evidence submitted for the first time on appeal and in doing so, incorrectly concluded that the record does not establish that the Beneficiary has the minimum 24 months experience in the job offered. However, we explained in our decision why the new evidence submitted on appeal was not sufficient to overcome the deficiencies and unresolved inconsistencies in the record.

Specifically, with respect to the Beneficiary's claimed employment with [redacted], the labor certification indicates that he commenced employment with this company in September 2000, while a June 2004 letter from president of [redacted] and a Form G-325A, Biographic Information, signed by the Beneficiary in 2009 both indicate that he started work for this company in November 2000. The Petitioner concedes that [redacted] was not incorporated until May 2001 and did not try to resolve these inconsistent dates in response to the NOIR. Further, the evidence submitted on appeal did not attempt to resolve these inconsistent dates. Rather, the new evidence submitted on appeal only corroborated that [redacted] was incorporated in 2001 and that it was doing business between 2002 and 2004.

At the time we issued our decision, the only evidence of the Beneficiary's employment with [redacted] was the June 2004 letter from the company president (the Beneficiary's uncle) who provided dates of employment that were inaccurate. The Petitioner correctly states that the regulations require submission of letters from employers describing the beneficiary's prior experience. However, it remains the Petitioner's burden to satisfy the eligibility requirements for the requested classification by a preponderance of the evidence; submission of a letter from a prior employer does not automatically satisfy this burden. The "preponderance of the evidence" standard requires that the evidence demonstrate that the claim is "probably true," where the determination of "truth" is made based on the factual circumstances of each individual case. *Matter of Chawathe*, 25 I&N Dec. 369, 376 (AAO 2010) (quoting *Matter of E-M-*, 20 I&N Dec. 77, 79-80 (Comm'r 1989)). In adjudicating the petition pursuant to the preponderance of the evidence standard, USCIS must examine each piece of evidence for relevance, probative value, and credibility, both individually and within the context of the totality of the evidence, to determine whether the fact to be proven is probably true. *Id.*

Where, as here, a letter from a prior employer contains an unresolved inconsistency, it is reasonable for the Director to request additional independent, objective evidence, in addition to the letter, pointing to where the truth lies. *See Matter of Ho*, 19 I&N Dec. 582, 591-92 (BIA 1988). The Petitioner was instructed to provide pay statements, tax returns or other objective evidence of the Beneficiary's employment with [redacted] did not respond to that request, and instead opted to rely solely on a letter from this employer which contained inaccurate dates. While the new employer letter submitted on motion indicates that the Beneficiary commenced employment with [redacted] in May 2021, the letter alone is not sufficient to resolve the inconsistencies noted above and to corroborate the Beneficiary's 24 months of experience with [redacted] Neither the employer nor the Beneficiary have explained their previous statements that he started working for [redacted] in November 2020, prior to the company's incorporation.

The Petitioner has also claimed that the Beneficiary does not need to rely on his experience with [redacted] to meet the requirements stated on the labor certification because he gained more than 24 months of experience in the job offered as an employee of [redacted] between 1997 and 2000. The Petitioner maintains that we should have accepted new evidence submitted on appeal (the employment letter and affidavits from former co-workers) as evidence of the Beneficiary's qualifying experience and that we improperly excluded this documentation.

However, we specifically addressed this evidence in our decision and explained why it was insufficient to corroborate the Beneficiary's 24 months of qualifying experience in the job offered. As noted in our decision, neither the employer letter nor the affidavits from co-workers include a description of

the Beneficiary's job duties; they simply identify his job title as "manager." The regulations state that any experience requirements for skilled workers must be supported by letters from employers that include a description of the beneficiary's experience. 8 C.F.R. § 204.5(l)(3)(ii)(A). Further the letter is from [redacted] and is not accompanied by evidence that [redacted] and [redacted] are in fact the same business, or by evidence that the person who signed the letter was an owner or officer of [redacted] during the Beneficiary's claimed dates of employment there.

For the reasons discussed, the Petitioner has not established on motion that our prior determination was based on an application of the law or USCIS policy or that it was incorrect based on the evidence before us at the time of the decision. Moreover, the Petitioner has not submitted new evidence that would give us proper cause to reverse our decision on this issue. The record does not establish that the Beneficiary meets the experience requirements stated on the labor certification or the experience requirements for the requested classification.

B. *Bona Fide* Job Offer

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).

In the NOIR, the Director emphasized that there is a familial relationship between the Beneficiary and several of the Petitioner's officers, and that such relationships cast doubt on whether a *bona fide* job offer existed, whether the Beneficiary intended to work for the Petitioner and whether the Petitioner intended to hire the Beneficiary in the offered position. The Director requested evidence of the recruitment conducted for the offered position before the labor certification filing. The Director also specifically requested that the Petitioner provide a statement to show that a *bona fide* job offer exists, issued by an authorized official, on official letterhead, listing the Petitioner's name and address, the date and the signer's name and title.

The Petitioner's response to the NOIR included copies of its recruitment efforts, its articles of incorporation and business registration documents, its 2004 income statement and unaudited balance sheet, and its quarterly federal tax returns for some quarters in 2006, 2017 and 2018. The Petitioner also asserted that it currently employs the Beneficiary in the offered position and it provided copies of six checks made payable to him from its operating account, which were identified by counsel as the Beneficiary's pay stubs.

In the revocation decision, the Director found the Petitioner's evidence insufficient to establish that a *bona fide* job opportunity existed and emphasized that the decision was "not based on the familial relationship alone." We affirmed the Director's determination, noting that the record at the time of the NOIR's issuance did not demonstrate the existence of a *bona fide* job offer, and that the Petitioner did not submit all requested evidence in response to the NOIR. We specifically noted that the Petitioner did not address or provide additional evidence to establish the level of control or influence of the Beneficiary in hiring decisions, or other factors set forth in *Matter of Modular Container*

Systems, Inc.[2] Further, while we acknowledged that the Petitioner submitted several "paystubs" as evidence that it already employed the Beneficiary in the offered position, we noted that the handwritten paychecks submitted were not accompanied by evidence that the Beneficiary had cashed or deposited them, or evidence of actual payment of wages, such as IRS Form W-2, Wage and Tax Statement, or quarterly wage reports or tax returns listing the Beneficiary as one of the Petitioner's employees.

On motion, the Petitioner asserts that the familial relationship between the Beneficiary and its owner should not result in a determination that the Petitioner does not intend to hire him in the offered position. The Petitioner also contends that the lack of the requested statement from the employer should not have led to a conclusion that there is a lack of a *bona fide* job opportunity. The Petitioner maintains that it provided pay stubs showing that it already employs the Beneficiary, evidence that it is doing business, and evidence that it completed the recruitment efforts required for the labor certification. The Petitioner maintains that the previously submitted evidence was therefore sufficient to show that the job was open to any qualified U.S. worker, and that the company intends to employ the Beneficiary in the position. However, the Director clearly requested a letter from the Petitioner in the NOIR, explained the reasons for requesting it, and asked that it include specific information which would aid in conducting the analysis described in *Modular Container Systems*. While the Petitioner questions the need for such a letter, we note that the Director advised the Petitioner that failure to fully respond to the NOIR may result in the revocation of the I-140 approval. The Petitioner has not established how we incorrectly applied the law or USCIS policy by determining that it had not met its burden to rebut the findings stated in the NOIR.

On motion, the Petitioner submits a new letter signed by its president and co-owner, who confirms the Petitioner's intent to permanently employ the Beneficiary based on the terms and conditions set forth in the labor certification and states that a review of his job duties reflects that he does not control the hiring and firing process. The Petitioner states that "[t]his is a bona fide job offer and one that has been bona fide because we have had [the Beneficiary] on our payroll while his lawful permanent residence application remained pending." The Petitioner has consistently emphasized that it already employs the Beneficiary in support of its claim that it has a *bona fide* job opportunity. However, as discussed, it has not sufficiently corroborated his employment with probative evidence such as cashed paychecks, wage and tax statements, or federal or state tax filings identifying the Beneficiary as an employee of the company. Therefore, the new letter alone does not overcome our prior determination that the Director properly revoked the approval on this ground.

C. Willful Misrepresentation of a Material Fact

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 U.S. government; 2) that the misrepresentation was willfully made; and 3) that the fact

[2] Those factors include whether the beneficiary (a) is in the position to control or influence hiring decisions regarding the job for which labor certification is sought; (b) is related to the corporate directors, officers, or employees; (c) was an incorporated or founder of the company; (d) has an ownership interest in the company; (3) is involved in the management of the company; (f) is on the board of directors; (g) is one of a small number of employees; (h) has qualifications for the job that are identical to specialized or unusual job duties and requirements stated in the application; and (i) is so inseparable from the sponsoring employer because of his or her persuasive presence and personal attributes that the employer would be unlikely to continue in operation without the beneficiary. *Modular Container*, 1991 WL 223955, at *8-10.

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. 288 (BIA 1975).

In revoking the approval of the petition, the Director found that the Petitioner and the Beneficiary willfully misrepresented the Beneficiary's qualifying employment on the labor certification. This determination was based on the unresolved discrepancies in the Beneficiary's dates of employment with [redacted] We affirmed the Director's determination, noting that the Petitioner had not resolved the inconsistencies in the record with respect to the Beneficiary's experience with [redacted] and had not provided evidence to support its claim that the inconsistency was the result of an inadvertent error. We concluded that substantial evidence supported the Director's determination that the Petitioner and the Beneficiary had willfully misrepresented his employment experience.

On motion, the Petitioner repeats its previous claims that any inconsistencies in the Beneficiary's dates of employment with [redacted] were both immaterial and not willful; however, we addressed these claims in our prior decision. The Petitioner maintains that "[t]he reality is that the Beneficiary meets the requirements with his first employer, [redacted] However, the Petitioner did not attempt to document the Beneficiary's employment with this employer until appealing the revocation decision, when it submitted a letter from the owner of [redacted].[3] The Petitioner's claim that the Beneficiary's employment with [redacted] was immaterial to an evaluation of his qualifying experience remains unpersuasive.

The Petitioner also attributes the employment dates provided on the labor certification to "a mistake committed by the petitioner's former attorney." However, the Petitioner does not explain why both the Beneficiary (on his Form G-325A, Biographic Information), and the former employer (in a June 2020 letter), also listed employment dates that have since been confirmed to be inaccurate. As discussed above, the record includes no independent, objective evidence of the Beneficiary's employment with [redacted] and the new letter from this employer, submitted on motion, is not sufficient to overcome the inconsistencies in the record.

Finally, the Petitioner asserts, without citing to any relevant authority, that "USCIS is charged with demonstrating with clear, unequivocal and convincing evidence that there is a material misrepresentation." As noted above, the Petitioner has the burden to establish eligibility for the benefit sought. Section 291 of the Act. That burden does not shift to the government in cases where, as here, USCIS notifies a petitioner of its intention to make a finding of willful misrepresentation of a material fact.

The Petitioner has not submitted new evidence to warrant the reversal of our prior determination on this issue or established that our determination that it willfully mispresented material facts was based on a misapplication of law or USCIS policy based on the record before us at the time of the decision.

[3] As noted above, the letter submitted to corroborate the Beneficiary's employment with [redacted] does not meet the requirements for an experience letter provided at 8 C.F.R. § 204.5(l)(3)(ii)(A) and could not have established the Beneficiary's 24 months of experience in the job offered even if submitted as initial evidence with the Form I-140.

IV. CONCLUSION

For the reasons discussed, the Petitioner has not show proper cause for the reopening or reconsideration of our decision to dismiss its appeal. Accordingly, the motions will be dismissed.

ORDER: The motion to reopen is dismissed.

FURTHER ORDER: The motion to reconsider is dismissed.