U.S. Citizenship and Immigration Services

Non-Precedent Decision of the Administrative Appeals Office

In Re: 23099370

Date: JAN. 6, 2023

Appeal of Texas Service Center Decision

Form I-140, Immigrant Petition for Skilled Worker

The Petitioner, the operator of a martial arts instruction facility, seeks to employ the Beneficiary as hapkido instructor 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).

The Director of the Texas Service Center denied the petition, concluding that the Petitioner did not demonstrate the Beneficiary's possession of the minimum employment experience required for the offered position or requested visa category. The Director also found that the Petitioner and Beneficiary willfully misrepresented the Beneficiary's experience on the accompanying certification from the U.S. Department of Labor (DOL). On appeal, the Petitioner asserts that the Director erred in denying the petition.

In these proceedings, it is the Petitioner's burden to establish eligibility for the requested benefit by a preponderance of evidence. 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. EMPLOYMENT-BASED IMMIGRATION

Immigration as a skilled worker generally follows a three-step process. First, a prospective employer must apply to DOL for certification that: (1) there are insufficient U.S. workers able, willing, qualified, and available for an offered position; and (2) the 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 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 designated noncitizen 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.

II. THE REQUIRED EXPERIENCE

A skilled worker must be able to perform "skilled labor (requiring at least 2 years training or experience)." Section 203(b)(3)(A)(i) of the Act. A petitioner must also demonstrate a beneficiary's possession of all DOL-certified job requirements of an offered position by a petition's priority date. *Matter of Wing's Tea House*, 16 I&N Dec. 158, 160 (Acting Reg'l Comm'r 1977). This petition's priority date is August 13, 2019, the date DOL accepted the accompanying labor certification application for processing. *See* 8 C.F.R. § 204.5(d) (explaining how to determine a petition's priority date).

In evaluating a beneficiary's qualifications, USCIS must examine the job-offer portion of an accompanying labor certification to determine the minimum requirements of an offered position. USCIS may neither ignore a certification term, nor impose additional requirements. *See, e.g., Madany v. Smith*, 696 F.2d 1008, 1015 (D.C. Cir. 1983) (holding that "DOL bears the authority for setting the *content* of the labor certification") (emphasis in original).

The accompanying labor certification states the minimum requirements of the offered position are two years of work experience "in the job offered," and requires neither education nor training. The Petitioner further stated that it will not accept experience in an alternate occupation. On the labor certification, the Beneficiary attested that, by the petition's priority date, he gained more than two years of full-time, qualifying experience at a hapkido training center [training center] in South Korea. He stated that he was employed there from January 2016 until August 2018. The Beneficiary did not list any other experience on the certification.

To support claimed qualifying experience, a petitioner must submit a letter from a beneficiary's former employer. 8 C.F.R. § 204.5(l)(3)(ii)(A). The letter must state the employer's name, title, and address, and describe the beneficiary's experience. *Id.* "If such evidence is unavailable, other evidence relating to the alien's experience . . . will be considered." 8 C.F.R. § 204.5(g)(1).

The Petitioner initially submitted a letter from the Beneficiary's claimed former employer. The letter reiterated verbatim the dates of his qualifying employment and the Petitioner's job duties for the proffered position specified in the labor certification. But, as noted in the Director's notice of intent to deny (NOID) the petition, the evidence submitted in support of the petition to demonstrate the Beneficiary's qualifying experience is inconsistent with information previously provided by the Beneficiary in the nonimmigrant student visa application he submitted in July 2018 to the U.S. Department of State (DOS).

Specifically, when applying for a U.S. student visa abroad, the Beneficiary described himself as a student, indicating that from March 2017 through the date of the visa application he attended [Y-S-] university. He stated from March 2010 through mid-February 2016 he had attended [Y-G-] university. During his visa interview he explained to the consular officer that he intended to study English as a second language for one to two years, then pursue graduate school education thereafter. Asked on the application "Were you previously employed?" he indicated "No," but disclosed that he had "worked as a soldier for two years in the [navy] to fulfill my military duties" when asked in the application if he had specialized skills involving explosives, among other things. (The Beneficiary later stated in the petition that his period of military service was from August 2011 through July 2013.)

The Beneficiary's answers on the visa application conflict with his claimed, qualifying experience at the training center from January 2016 to August 2018. These discrepancies are especially concerning because he claims in the labor certification that he was employed at the training center at the time of filing his visa application.

The Director raised these concerns in his NOID and asked the Petitioner to provide documentary evidence which would explain these conflicts in the record, as well as independent and objective evidence to establish the Beneficiary's qualifying employment at the training center for the entire duration of time listed in the labor certification. A petitioner must resolve inconsistencies of record with independent, objective evidence pointing to where the truth lies. *Matter of Ho*, 19 I&N Dec. 582, 591 (BIA 1988).

The Petitioner's NOID response included a variety of evidence, including birth records and business records that show the training center where the Beneficiary claims to have obtained his qualifying experience is owned and operated by the Beneficiary's maternal uncle; statements from the Beneficiary, his uncle, the Petitioner, and an instructor who was previously employed at the uncle's training center; undated pictures of the Beneficiary standing near martial arts students, as well as copies of his hapkido certifications. The Director examined the documentation and denied the petition, concluding that the evidence did not establish the Beneficiary's qualifying employment. For the following reasons, we agree with the Director that the evidence of record casts doubt on the Petitioner's proof of the Beneficiary's claimed experience.[1]

To begin with, the statements provided by the Petitioner in the NOID response and on appeal to address the inconsistencies in the record about the Beneficiary's qualifying work experience are not credible, as the record lacks sufficient corroborating evidence to support the assertions made therein. For instance, the Beneficiary explains in his statement that he started studying hapkido at his uncle's training center when he was young, that over time he earned various hapkido belt degrees and was granted the rank of master by the Federation of Korea Hapkido [federation] in June 2018, which is documented in the record. He asserts that "without my previous employment experience and credentials I would not have been invited by the [federation] to even apply for the title of master." His uncle also states that the Beneficiary's master rank qualifies him to run his own hapkido training center. Beyond these statements the Petitioner has not provided evidence about the hapkido federation in South Korea to show what its requirements are to apply for the hapkido master's rank, that the Beneficiary was invited by the federation to apply for master's rank, and the documentation that he submitted to the federation in support of his master rank application. Without more, the Petitioner has not substantiated that the Beneficiary's master rank establishes that he has the requisite experience for the offered position and the requested visa category, which both require the Beneficiary's possession of at least two years of experience. *See* section 203(b)(3)(i) of the Act (describing the immigrant visa category for skilled workers).

Additionally, the Beneficiary and his uncle indicate that the Beneficiary worked for his uncle's business as an instructor during the time period specified in the labor certification, but that he was paid cash wages so the business could avoid paying payroll taxes to the South Korean government. They further insist that the Beneficiary used the cash earned through this employment to fund the college

[1] While we may not discuss every document submitted, we have reviewed and considered each one.

tuition, books and other expenses associated with his studies. But the Petitioner has not submitted evidence sufficient to support these assertions. For example, it did provide documentation of the training center's finances, nor has it submitted evidence of the Beneficiary's receipt of cash proceeds from the business during his asserted period of employment, such as bank statements reflecting ongoing cash deposits into the Beneficiary's account, or other evidence of his receipt of the claimed cash wages. While the Beneficiary and his uncle allude to the Beneficiary's payment of his college expenses through his employment at the training center, the Petitioner has not submitted the Beneficiary's college tuition bills and payment receipts, college course transcripts, and the diplomas, if any, that he obtained through his university studies. The Beneficiary also alleges that he attended a master's degree program part-time from March 2017 to August 2018 while employed fulltime by his uncle's business as an instructor, but the submitted evidence does not substantiate his allegations.

In the NOID response and on appeal the Beneficiary and his uncle also assert that he was employed fulltime as an instructor at the training center for cash wages from August 2013 to September 2014 - while he pursued undergraduate degree studies, but they do not indicate whether he attended the university on a full-time or part-time basis during this time period. Importantly, the Beneficiary did not include this period of employment in the labor certification that he signed under penalty of perjury, even though the labor certification required him in Part K to "list any other experience that qualifies [him] for the job opportunity for which the employer is seeking certification." The Petitioner did not address this inconsistency in the record in the NOID response or on appeal. *Matter of Ho*, 19 I&N Dec. at 591.

Beyond the lack of corroborative evidence of the Beneficiary's qualifying employment as specified on the labor certification, the Director also questioned the reliability of the documentation from the Beneficiary's former employer because of his initially undisclosed familial relationship with the owner of the training center – his uncle. We agree that since the training center is owned and operated by the Beneficiary's uncle, the letters and other materials from the employer may be biased in favor of the Beneficiary and wouldn't constitute independent, objective evidence of his qualifying experience. *See Matter of Ho*, 19 I&N Dec. at 591 (requiring a petitioner to resolve inconsistencies of record "by independent objective evidence"). The ownership and control of the former employer by the Beneficiary's uncle casts doubt on the reliability of the business's evidence, to include the supporting statements provided by the training center's former employees and students submitted in the NOID response and on appeal. Without more, we conclude that this material is of little probative value to the matter here. *Matter of Chawathe*, 25 I&N Dec. at 376.

For the foregoing reasons, the record does not demonstrate the Beneficiary's possession of the minimum experience required for the offered position or the requested visa category. We will therefore affirm the petition's denial.

III. THE ALLEGED, WILLFUL MISREPRESENTATIONS

Noncitizens render themselves inadmissible to the United States if they seek to obtain U.S. visas, other documents, U.S. admission, or other benefits under the Act by fraudulently or willfully misrepresenting material facts. Section 212(a)(6)(C)(i) of the Act. Misrepresentations are willful if they are "deliberately made with knowledge of their falsity." *Matter of Valdez*, 27 I&N Dec. 596, 598 (BIA 2018) (citations omitted). A misrepresentation is material if it has a "natural tendency to

influence, or [be] capable of influencing, the decision of the decision-making body to which it was addressed." *Id.* Petitioners and applicants who submit applications or documents with knowledge or reckless disregard of their containment of false information may face fines or criminal penalties. Section 274C of the Act.[2]

The record supports the Director's conclusion that the Beneficiary willfully misrepresented material facts in the pursuit of obtaining U.S. immigration benefits. As discussed, the NOID addressed discrepancies between the Beneficiary's claimed experience and information on his 2018 application for a U.S. student visa. In response to the NOID the Beneficiary explains:

> The reason I did not list my previous employment history at [the] training center was due to the fact that my family did not pay the required taxes on the wages I earned during the times I worked [there]. I was concerned that if I had disclosed my previous employment history on my DOS nonimmigrant visa application, this information would have been made available to the South Korean tax authorities which could have potentially created tax issues for my family's business.

The U.S. Department of State (DOS) clearly advises visa applicants that, by submitting applications, they certify under penalty of perjury that they have read and understood the applications' questions and that their answers are true and correct to the best of their knowledge and beliefs. *See, e.g.,* DOS, "DS-160: Frequently Asked Questions," https://travel.state.gov/content/travel/en/us-visas/visa-information-resources/forms/ds-160-online-nonimmigrant-visa-application/ds-160-faqs.html.

In his student visa application, the Beneficiary claimed attendance at universities in his home country and indicated that he was not otherwise employed. During his visa interview he told the consular officer that he intended to attend school in the United States to learn English in order to apply to and attend graduate school, claiming that he had not been previously employed with the exception of complying with his country's military service requirements. He attested in the application that he was solely a student at the time the application was filed in July 2018 – which may have influenced the consular officer's decision to approve his student visa application. He acknowledges in his statement in the petition that he intentionally provided false information in his visa application. *Matter of Valdez*, 27 I&N Dec. at 596.

The record supports the Director's conclusion that the Beneficiary willfully misrepresented material facts relating to his claimed qualifying work experience in the petition. On the accompanying labor certification, the Beneficiary attested that he had been employed at his uncle's business as a hapkido instructor from January 2016 to August 2018. In 2018 he attested on a U.S. visa application that he was solely a student and had "No" prior employer. Later, the Petitioner submitted evidence in which the Beneficiary claimed that he had also worked on a full-time basis for the training center from August

[2] Visa petition proceedings are inappropriate fora for determining beneficiaries' admissibility. *Matter of O-*, 8 I&N Dec. 295, 296-97 (BIA 1959). Thus, our review of the Beneficiary's alleged misrepresentation is a "finding of fact," not an admissibility determination. All USCIS decisions should include specific findings on material issues of law or fact that arise, including determinations of fraud or material misrepresentation. *See* 8 C.F.R. § 103.3(a)(1)(i); *see also* 5 U.S.C. § 557(c). After we enter a finding here, USCIS or another agency may consider the Beneficiary's admissibility in separate proceedings.

2013 to September 2014. However, the Beneficiary did not include this period of employment in the labor certification that he signed under penalty of perjury, even though the labor certification required him in Part K to "list any other experience that qualifies [him] for the job opportunity for which the employer is seeking certification."

Additionally, the uncle's initially undisclosed ownership of the training center where the Beneficiary purportedly worked, casts doubt on the reliability of the letters provided by the uncle, his employees and his clients, absent further independent objective evidence. We determine the preponderance of evidence indicates that the Beneficiary misrepresented his employment history in evidence submitted in support of the petition and in his U.S. student visa application.

Here, the record also supports the misrepresentation's materiality. Both the offered position and the requested visa category require the Beneficiary's possession of at least two years of experience. Section 203(b)(3)(i) of the Act. His misrepresentation about his former employment therefore naturally influences a decision on his required qualifications for the offered position and the requested visa category.

The Beneficiary's misrepresentations also appear to be willful. He acknowledged that he intentionally and willfully provided false information in his student visa application. He signed the labor certification application declaring under penalty of perjury that he reviewed the document and that its information was true and correct. *See Matter of Valdez*, 27 I&N Dec. at 499 (holding that a noncitizen's signature on an immigration filing creates a "strong presumption" that they knew and assented to the filing's contents). Thus, the Beneficiary knew that he misrepresented his employment history in pursuit of U.S. immigration benefits.

As the Petitioner argues, however, the record does not support the Director's finding that the company willfully misrepresented the Beneficiary's experience. The record lacks sufficient evidence that the Petitioner knew of the Beneficiary's misrepresentation of his experience. Thus, we will withdraw the Director's misrepresentation finding against the Petitioner. But we will uphold the Director's misrepresentation finding against the Beneficiary.

IV. CONCLUSION

The Petitioner has not demonstrated the Beneficiary's possession of the minimum experience required for the offered position or requested visa classification.

ORDER: The appeal is dismissed.