U.S. Citizenship and Immigration Services

**Non-Precedent Decision of the Administrative Appeals Office**

In Re: 28560171

Date: OCT. 31, 2023

Appeal of Texas Service Center Decision

Form I-140, Immigrant Petition for Alien Workers (Skilled Worker)

The Petitioner, the operator of a Japanese hibachi restaurant, seeks to employ the Beneficiary as a sushi chef 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).

After initially granting the filing, the Director of the Texas Service Center revoked the petition's approval. The Director concluded that the Petitioner falsely concealed family relationships between the Beneficiary and the company's principal and that the Petitioner didn't demonstrate the required availability of the offered position to U.S. workers. The matter is now before us on appeal. 8 C.F.R. § 103.3.

The Petitioner bears the burden of proof to demonstrate eligibility by a preponderance of the evidence. *Matter of Chawathe*, 25 I&N Dec. 369, 375-76 (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 withdraw the Director's decision to deny the petition and invalidate the labor certification. We will remand the case for adjudication within the statutory and regulatory framework for I-140 immigrant visa petitions.

## I. EMPLOYMENT-BASED IMMIGRATION

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) the employment of a noncitizen in the position won't 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 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.

"[A]t 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 a record, the erroneous nature of a petition's approval justifies its revocation. *Matter of Ho*, 19 I&N Dec. 582 (BIA 1988).

USCIS may issue a notice of intent to revoke (NOIR) a petition if the unexplained and unrebutted record at the time of the NOIR's issuance would have warranted the filing's denial. *Matter of Estime*, 19 I&N Dec. 450, 451 (BIA 1987). USCIS properly revokes a petition's approval if a petitioner's NOIR response doesn't overcome stated revocation grounds. *Id.* at 451-52.

## II. UNDISCLOSED FAMILIAL RELATIONSHIP

On the petition and labor certification, the Petitioner attested to its intent to permanently employ the Beneficiary in the proffered sushi chef position. Asked in part C.9 of the labor certification "is there a familial relationship between the owners, stockholders, partners, corporate officers, or incorporators, and the [noncitizen]?" the Petitioner indicated "No." The Director approved the petition in April 2019.

The Director's notice of intent to revoke the petition (NOIR), however, noted that at the Beneficiary's adjustment interview, he testified that he first met the Petitioner's principal, Mr. C-, in November 2016 while dining at the Petitioner's restaurant, stating that Mr. C- came over and chatted with him and observed that he was having difficulty finding an experienced sushi chef to fill a vacant position at the restaurant. Asked when he was first offered the sushi chef position, the Beneficiary attested that he was offered the job by Mr. C- in November 2016, but he told Mr. C- that he could not take the position at that time because he was not authorized to be employed in the United States. He indicated that Mr. C- offered to have the Petitioner sponsor him for an immigrant visa, so he could work as a sushi chef at the restaurant. He continued to dine at the restaurant thereafter on an ongoing basis, making occasion to visit with Mr. C- when he was there.

The Director issued the NOIR which outlined the statements made by the Beneficiary at his adjustment interview, notifying the Petitioner that the Beneficiary's testimony suggests that the proffered position was created for the Beneficiary and not available to U.S. workers despite the approval of the labor certification by DOL. He concluded that it appeared that Mr. C- and the Beneficiary enjoy a "familial" relationship through their ongoing friendship, and that the Petitioner made a false representation by willfully and knowingly failing to disclose this relationship in the labor certification by answering "No" in part C. 9. The Petitioner provided a brief and evidence in response to the NOIR, including letters from the Beneficiary and Mr. C-, who contended, among other things, that the Director erred in concluding that their friendship at the time the labor certification was filed constituted a familial relationship that required disclosure in part C.9 of the form.

The Director ultimately revoked the petition for the reasons set forth in the NOIR, concluding that the Petitioner's failure to disclose its familial relationship with the Beneficiary shut off a line of inquiry about the bona fide nature of the proffered position and its eligibility for the immigration benefits sought in the petition. However, she also introduced new facts that she considered in revoking the

petition regarding aspects of the Petitioning entity, the proffered position, and the stated relationship between the Petitioner's staff and the Beneficiary in her revocation notice.

For instance, the Director indicated that the Petitioner intends to employ the Beneficiary as a "kitchen helper," not a sushi chef as stated throughout the petition. She also observed that "since the Beneficiary is related to [the Petitioner's] former corporate officer (treasurer), this fact may cast doubt on whether the bona fides of the job was clearly open to [U.S.] workers and whether the U.S. workers who applied for the job were [not offered the job] for [a] lawful job-related reason." The record does not include evidence that reflects the Beneficiary is related to a former corporate officer of the Petitioner. The Director also referenced an analysis focused on an entity called "[redacted]" (T-), concluding that the Petitioner in the instant petition had used the same legal counsel as T-, and that willful misrepresentations had been made by both entities. But neither the revocation notice nor the NOIR offered such an analysis.

USCIS properly revokes a petition's approval if a petitioner's NOIR response doesn't overcome stated revocation grounds. *Matter of Estime*, 19 I&N Dec. at 451-452. Here, we conclude the Director introduced new information and adverse facts unknown to the Petitioner in the revocation notice, (some of which seem unrelated to the case at hand), which were not previously included in the NOIR. The NOIR did not notify the Petitioner of this additional derogatory information and resulting evidentiary deficiencies. *See* 8 C.F.R. § 103.2(b)(16)(i) (requiring USCIS to notify a petitioner of derogatory information of which it is unaware and to provide it with a rebuttal opportunity). Accordingly, we will withdraw the Director's decision, including the Director's misrepresentation finding against the Petitioner, and will remand the matter back to the Director to consider the record anew, including the brief and evidence provided by the Petitioner on appeal, and enter a new decision.

## III. THE REQUIRED EXPERIENCE

To approve a petition, USCIS must determine that "the facts stated in the petition are true." Section 204(b) of the Act. A skilled worker petition comprises its supporting evidence, including an accompanying labor certification. 8 C.F.R. § 103.2(b)(1). Thus, USCIS cannot approve a petition if the facts stated on the labor certification are untrue.

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. This petition's priority date is October 22, 2018, 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). A petitioner must demonstrate a beneficiary's possession of all DOL-certified job requirements of a proffered 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).

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).

Though unaddressed by the Director in her revocation notice and NOIR, we conclude the inconsistent evidence of record casts doubt on the Petitioner's proof of the Beneficiary's claimed qualifying work experience. While we may not discuss every document submitted, we have reviewed and considered each one.

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 as a sushi chef at a Japanese restaurant (C-H-) in South Korea. He stated that he was employed there in that capacity from November 2004 - March 2007. The Beneficiary did not list any other sushi chef work experience on the labor certification, but also noted that from January 2015 - April 2016 he was employed abroad by [redacted] (E-) as a "project manager." The Beneficiary signed the labor certification under penalty of perjury, attesting that all of the information provided by him therein was true and correct.

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 submitted an April 2017 letter from the Beneficiary's former employer, C-H-, which post-dates both the Beneficiary's claimed employment with this restaurant (by ten years) and when the Petitioner first offered employment to the Beneficiary in November 2016 (by six months). The letter reiterated the dates of his qualifying employment and described the Petitioner's job duties for the proffered position in terms nearly verbatim to those specified in the labor certification.

Importantly, the evidence submitted in support of the petition to demonstrate the Beneficiary's qualifying experience is inconsistent with information previously provided by him in the 2005 nonimmigrant visa application he submitted to the U.S. Department of State (DOS). Specifically, when applying for a U.S. visa abroad, the Beneficiary attested in his visa application in October 2005 that he was employed as an "assistant manager" with [redacted] (K-), not as a sushi chef with C-H-. The Beneficiary's answers on the visa application conflict with his claimed, qualifying experience with C-H- from November 2004 – March 2007.

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. Here, the qualifying employment information that the Beneficiary attested to in 2019 under penalty of perjury in the labor certification is inconsistent with the information about his claimed employment with K- that he attested to in his nonimmigrant visa application with DOS in 2005 (at a point in time contemporaneous to the timeframe of his claimed qualifying employment with C-H-.) The Petitioner must resolve these inconsistencies of record with independent, objective evidence pointing to where the truth lies. *See Matter of Ho*, 19 I&N Dec. at 591.

Misrepresentation of a material fact may lead to multiple consequences in immigration proceedings. Under Board of Immigration Appeals precedent, a misrepresentation is material when it tends to shut off a line of inquiry that is relevant to a foreign national's admissibility and that would predictably have disclosed other facts relevant to his or her eligibility for a visa, other documentation, or admission to the United States. *Matter of D-R-*, 27 I&N Dec. 105 (BIA 2017). It appears that the Beneficiary may have willfully misrepresented his qualifying work experience in the labor certification in order to obtain immigration benefits.

A finding of willful misrepresentation in a visa petition may be considered in any future proceeding to determine that the Beneficiary is inadmissible to the United States. Section 212(a)(6)(C)(i) of the Act, 8 U.S.C. § 1182(a)(6)(C)(i). A material misrepresentation requires that a (Beneficiary) willfully make a material misstatement to a government official for the purpose of obtaining an immigration benefit to which one is not entitled. *See generally* 8 *USCIS Policy Manual* J.2, https://www.uscis.gov/policy-manual. *See also Matter of Kai Hing Hui*, 15 I&N Dec. 288, 289-90 (BIA 1975).

The Petitioner also initially submitted the Beneficiary's resume with the petition which noted that he attended university in South Korea, graduating in 1999 with a degree in physical education. No other collegiate-level education was noted. The resume reflects the Beneficiary's claimed qualifying education as a sushi chef with C-H- from November 2004 until March 2007. In addition, the Beneficiary's subsequent employment by other organizations is noted, as follows:

- Sales Representative from October 2007 - June 2009 with [redacted]
- Distribution Representative from July 2009 – August 2013 with [redacted](S-)
- Sales and Distribution Manager from September 2013 - April 2016 with E-

Notably, the Beneficiary's dates of employment with E- listed in the labor certification (January 2015 - April 2016) are inconsistent with his claimed employment with E- on his resume (September 2013 - April 2016). The Beneficiary also without explanation only noted his employment with C-H- and 15 months of his employment with E- in the labor certification, while his resume provides other aspects of his employment history. We acknowledge that the Beneficiary's employment with E- is not qualifying for the purposes of demonstrating that he possesses at least two years of work experience as a sushi chef but these discrepancies raise questions regarding the credibility of the Beneficiary's work experience evidence in the record.

Additionally, the Beneficiary attested to academic and experiential information in a January 2016 nonimmigrant visa application with DOS that is inconsistent with evidence submitted in support of this petition. For instance, in the visa application, he indicated that he attended a university in the United States with an accounting course of study from January 2001 - March 2004, a fact omitted in the labor certification and resume submitted with the petition. In his 2016 application he attested that he was employed at that time by E-, but also noted that he was employed by S- from July 2009 - December 2014, not July 2009 – August 2013 as stated on his resume.

We also note that on appeal, the Petitioner and Beneficiary have provided letters which suggest that the Beneficiary is currently employed by the Petitioner as a sushi chef. However, the Beneficiary's online LinkedIn profile indicates that he is currently employed as a business development director

with S- and his profile makes no mention of his claimed sushi chef employment with the Petitioner. *See* https://sg.linkedin.com/in[redacted]

We acknowledge that Form I-140 petitions represent offers of "prospective employment." *See Final Rule for Retention of EB-1, EB-2, and EB-3 Immigrant Workers*, 81 Fed. Reg. 82398, 82416 (Nov. 18, 2016). The Petitioner therefore need not employ the Beneficiary in the offered position until he obtains lawful permanent residence. *See also Matter of Rajah*, 25 I&N Dec. 127, 132 (BIA 2009) (stating that "[a]n alien is not required to have been employed by the certified employer prior to adjustment of status"). However, where a petitioner claims to employ a beneficiary for the purpose of establishing eligibility for immigration benefits, but other evidence contradicts these claims, the credibility of the petitioner's claims in the petition may come into question.

An immigration officer will deny a visa petition if the petitioner submits evidence that contains false information. *See* section 204(b) of the Act. In general, a few errors or minor discrepancies are not reason to question the credibility of an alien or an employer seeking immigration benefits. *See Spencer Enterprises Inc. v. U.S.*, 345 F.3d 683, 694 (9th Cir., 2003)(upholding the AAO's finding that evidence in that matter was not credible). However, if a petition includes serious errors and discrepancies, and the petitioner fails to resolve those errors and discrepancies after an officer provides an opportunity to rebut or explain, then the inconsistencies will lead USCIS to conclude that the facts stated in the petition are not true. *See Matter of Ho*, 19 I&N Dec. at 591.

Based on our foregoing analysis we will withdraw the Director's decision and remand the matter back to the Director to consider the entire record, including the evidence provided in support of the appeal, and determine whether the Petitioner has demonstrated that the Beneficiary qualifies for the third-preference "skilled worker" visa category, and whether he meets the specific requirements of the labor certification (two years of work experience in the offered position).

On remand, the Director may wish to issue a new NOIR outlining aspects of the evidence in the record that she deems deficient and allowing the Petitioner an opportunity to respond. The Director should consider the entire record, including any new evidence submitted and, if deficient, must state how the record fails to demonstrate eligibility for the classification sought under the pertinent regulatory scheme.

**ORDER:** The Director's decision is withdrawn. The matter is remanded for the entry of a new decision consistent with the foregoing analysis.