MATTER OF S-C-T-, LLC

DATE: APR. 25, 2017

APPEAL OF TEXAS SERVICE CENTER DECISION

PETITION: FORM I-140, IMMIGRANT PETITION FOR ALIEN WORKER

The Petitioner, a commercial construction company, seeks to employ the Beneficiary as a supervisor. It requests classification of the Beneficiary as a skilled worker under the third preference immigrant classification. *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 immigrant classification allows a U.S. employer to sponsor a foreign national for lawful permanent resident status to work in a position that requires at least two years of training or experience.

The Director of the Texas Service Center denied the petition with a finding of fraud or willful misrepresentation of a material fact involving the labor certification. The Director found that the Petitioner did not reveal to the Department of Labor (DOL) during the labor certification process the fact that there is a the familial relationship between the employer and the Beneficiary, and concluded that the supervisor position was not a *bona fide* job opportunity open to all qualified applicants. The Director determined that the DOL would not have approved the labor certification application if all the facts had been presented, and therefore invalidated the labor certification. The Director then denied the petition on the ground that it was not accompanied by the required labor certification.

On appeal, the Petitioner contends that no fraud or willful misrepresentation of a material fact was committed during the labor certification process, that the labor certification should be revalidated, that the Beneficiary meets the labor certification requirements for the job offered, and that he should be approved for skilled worker classification.

Upon *de novo* review, we will dismiss the appeal.

I. LAW

A. Employment-Based Immigration

Employment-based immigration generally follows a three-step process. First, an employer must obtain an approved labor certification from the DOL.[1] *See* section 212(a)(5)(A)(i) of the Act,

[1] The date the labor certification is filed, in cases such as this one, is called the "priority date." *See* 8 C.F.R. § 204.5(d).

8 U.S.C. § 1182(a)(5)(A)(i). By approving the labor certification, the DOL certifies that there are insufficient U.S. workers who are able, willing, qualified, and available for the offered position and that employing a foreign national in the position will not adversely affect the wages and working conditions of domestic workers similarly employed. *See* section 212(a)(5)(A)(i)(I)-(II) of the Act. Second, the employer may file an immigrant visa petition with U.S. Citizenship and Immigration Services (USCIS). *See* section 204 of the Act, 8 U.S.C. § 1154. Third, if USCIS approves the petition, the foreign national 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.

B. Invalidation of Labor Certification

The regulation at 8 C.F.R. § 204.5(l)(3)(i) provides that every petition for skilled worker classification "must be accompanied by an individual labor certification from the Department of Labor." A petition that lacks a required individual labor certification is not considered properly filed. *See* 8 C.F.R. § 204.5(a)(2).

The regulation at 20 C.F.R. § 656.30(d) provides, in pertinent part, that "after issuance, a labor certification is subject to invalidation by the DHS [Department of Homeland Security] . . . . upon a determination, made in accordance with [its] procedures or by a court, of fraud or willful misrepresentation of a material fact involving the labor certification application."

A willful misrepresentation of a material fact "made in connection with an application for visa or other documents" is one which "tends to shut off a line of inquiry which is relevant to the alien's eligibility." *Matter of S- and B-C-*, 9 I&N Dec. 436, 447 (BIA 1961).

II. ANALYSIS

A. Validity of the Labor Certification

The Petitioner's Form I-140, Immigrant Petition for Alien Worker, was accompanied by an ETA Form 9089, Application for Permanent Employment Certification (labor certification), which had been filed with the DOL and certified by the DOL. At section C.9 of the labor certification the following question is posed:

> Is the employer a closely held corporation, partnership, or sole proprietorship in which the alien has an ownership interest, or is there a familial relationship between the owners, stockholders, partners, corporate officers, or incorporators, and the alien?

The Petitioner answered "No" to this question.

The Petitioner must establish that all eligibility requirements for the petition have been satisfied from the priority date onward.

The Director issued a request for evidence (RFE) which requested the submission of "credible evidence that the beneficiary does not have a familial relationship with the petitioner" or, if a familial relationship does exist between the Beneficiary and the Petitioner, the submission of "credible evidence that this information was disclosed to the [DOL] at the time that the [labor certification application] was filed." In response to the RFE the Petitioner submitted an affidavit from its sole owner, [redacted] (at that time its general manager, now its managing member) who acknowledged that the Beneficiary is his cousin. [redacted] did not indicate in the affidavit that this information about the familial relationship between the Beneficiary and himself was disclosed to the DOL when the labor certification application was filed, or any time during the labor certification process.

The Director found that the Petitioner willfully misrepresented a material fact, invalidated the labor certification, and denied the petition. Noting that the Petitioner has the burden of proving that a *bona fide* job opportunity is available to U.S. workers, the Director found no evidence that the Petitioner disclosed to the DOL the fact of the familial relationship between the employer and the Beneficiary at any time during the labor certification process. "Such disclosure may have caused the [DOL] to look more closely at the job offer," the Director stated, "and could have affected the outcome of the labor certification proceedings." The Director concluded that the supervisor position at issue in this proceeding was not available to all qualified applicants and the labor certification application would not have been approved had all the facts been presented to the DOL.

On appeal the Petitioner contends that the Director's reasoning was faulty. The Petitioner claims that its answer of "No" at section C.9 of the labor certification was not incorrect given the ambiguous language and disjunctive nature of the question. The Petitioner also claims that its non-disclosure to the DOL of the familial relationship between [redacted] and the Beneficiary was not a material misrepresentation of fact in the labor certification process because the Petitioner was unable to find any qualified U.S. worker for the job offered. The Petitioner asserts that the supervisor position was and is a *bona fide* job opportunity open to U.S. workers.

We are not persuaded by the Petitioner's claim that it was logically impossible to correctly and completely answer the question at C.9 of the labor certification. While the question is certainly voluminous, it is easily divided into two distinct parts:

> (1) Is the employer a closely held corporation, partnership, or sole proprietorship in which the alien has an ownership interest?
> (2) Is there a familial relationship between the owners, stockholders, partners, corporate officers, or incorporators, and the alien?

While "No" is clearly the correct answer to part (1), "Yes" is just as clearly the correct answer to part (2). The Petitioner points out that "familial relationship" is not defined on the ETA Form 9089, and asserts that his attorney did not interpret the term broadly to include a cousin relationship, thus justifying a "No" answer. We are not persuaded. The Petitioner acknowledges that [redacted]

and the Beneficiary are cousins, and we find that this relationship constitutes a "familial relationship between the owner . . . . and the alien" as contemplated in part (2) of the question at C.9.

Since the correct answer to one part of the two-part question was "Yes," the correct answer to the entire question would also be "Yes." The Petitioner asserts that answering "Yes" in C.9 would have left the DOL unclear as to whether the Petitioner was affirming the first or second part of the question, or both. While this point is correct, it is not important because either way the DOL would have been put on notice that there was a close relationship of some kind between the Petitioner and the Beneficiary which the DOL could investigate further at its discretion to ascertain whether a *bona fide* job opportunity existed for U.S. workers. As described in *Matter of Sunmart 374*, 00-INA-93 (BALCA May 15, 2000), a relationship invalidating a *bona fide* job offer may arise where the beneficiary is related to the petitioner by "blood" or it may "be financial, by marriage, or through friendship."

The Petitioner claims that there was no place on the ETA Form 9089 to provide separate answers to the two parts of C.9. While technically correct, this problem could have been easily remedied with a simple notation next to the "Yes" and "No" boxes, or an addendum to the labor certification, explaining the separate answers to the two-part question.

Based on the foregoing analysis, we conclude that the Petitioner's answer of "No" to the question at C.9 of the labor certification was a willful misrepresentation of fact because it denied the familial relationship between and the Beneficiary. We also find that the misrepresentation was material to the question of whether the supervisor position was a *bona fide* job opportunity open to U.S. workers because, although the Petitioner states that only one application was received from an unqualified individual, the DOL may nonetheless have scrutinized the labor certification materials more closely had it been properly informed of the familial relationship between and the Beneficiary.

The petitioner has the burden of establishing that a *bona fide* job opportunity exists when it is asked to show that the job is clearly open to U.S. workers. *See Matter of Amger Corp.*, 87-INA-545 (BALCA 1987); *see also* 8 U.S.C. § 1361. The factors to be examined in determining whether a *bona fide* job offer exists are set forth in a decision by the Board of Alien Labor Certification Appeals (BALCA) in *Matter of Modular Container Systems, Inc.* 89-INA-288 (BALCA 1991). Those factors include such items as 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 incorporator or founder of the company; (d) has an ownership interest in the company; (e) 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.

Among the foregoing factors, two certainly apply in this case. The Beneficiary is related to the Petitioner's sole owner and managing member, and is one of a small number of employees (which number six, according to the labor certification and the petition). Had the DOL been apprised of the familial relationship between the Petitioner's owner and managing member and the Beneficiary, and considering the Petitioner's small employee roster, the DOL may have decided to investigate more deeply whether the proffered position of supervisor was a *bona fide* job opportunity open to U.S. workers. By withholding information about the familial relationship, therefore, the Petitioner may have shut off a line of inquiry by the DOL that was relevant to the Beneficiary's eligibility for classification as a skilled worker.

Accordingly, we determine that the Petitioner has not overcome the Director's finding that the Petitioner willfully misrepresented a material fact involving the labor certification process. Therefore, we will not reinstate the validity of the labor certification and will not disturb the Director's decision to deny the petition for lack of a valid labor certification and the finding that the Petitioner did not establish that a *bona fide* job opportunity existed.

B. Beneficiary Qualifications

In addition to the above basis for denial, we find that the Petitioner has not established that the Beneficiary had two years of qualifying experience as a supervisor, as required by the terms of the labor certification and to be eligible for classification as a skilled worker. The Petitioner must establish that the Beneficiary possessed all the education, training, and experience specified on the labor certification as of the petition's priority date, which is the date the underlying labor certification was received for processing by the DOL. *See Matter of Wing's Tea House,* 16 I&N Dec. 158, 159 (Acting Reg. Comm. 1977). In this case, the priority date is August 10, 2015.

The labor certification indicates that the proffered position requires 24 months of experience in the job offered of supervisor, and that experience in another occupation is not acceptable. In box H.11 of the labor certification the job duties of the supervisor are described as follows:

> Supervise, coordinate, inspect and schedule the activities of construction workers. Review drawings, plans and direct subordinates. Direct and monitor excavation and mixing of decomposed granite with stabilizing agent and compact subgrade. Conduct and monitor moisture content tests to decide volume percentage for mixing. Estimate and order material. Estimate worker requirements to complete jobs. Will supervise a crew of 4.

The labor certification asserts that the Beneficiary gained the required experience while working with a company called in United Arab Emirates (UAE), from October 2011 to January 2015. As part of its initial evidence the Petitioner submitted a letter from the general manager of who stated that the Beneficiary worked for the company as a project manager from October 21, 2011, to January 15, 2015, and described his job duties as follows:

> Successfully led crew of 5 construction workers. He reviewed drawings and plans and executed turnkey projects for numerous clients. [The Beneficiary] was an expert in choosing, mixing and installation of decomposed granite. He reviewed, coordinated and inspected schedule of activities and scopes of work. Monitored excavations and content tests to decide the volume percentage for mixing.
>
> Responsible for choosing the right decomposed granite based on the quality and nature of the surface texture and using the correct stabilizing agents and compact sub-grade. Adding the right agent to allow minimum maintenance.

We sent a notice of intent to dismiss and request for evidence (NOID and RFE) to the Petitioner stating that: "In view of apparent line of business – furniture and equipment trading – we question why the Beneficiary's job duties would have been in the construction field. An internet extract on 'UAE Contracts and Business Locations' (attached to this NOID) confirms that the business activity of ' is office furniture trading." We requested that specific documentation be submitted to verify business activity and the nature of the Beneficiary's job with the company, including:

- a recent annual report from
- other company publications or documents that describe business activities;
- business and trade journals that describe business activities;
- letters, employee records, or other official documents from that were issued during the Beneficiary's alleged period of employment from October 2011 to January 2015 and identify his job title and job duties.

In response to the NOID and RFE the Petitioner submitted license documents issued in 2011 and 2014 which describe business activities as "Import" and "Office Furniture Trading." The Petitioner also submitted two letters from officials of other companies in UAE, who stated that their companies worked with in various "projects" during the years 2011-2014, and that the Beneficiary served as Modulo's project manager overseeing a team of construction workers. In addition, the Petitioner submitted an unaudited balance sheet for " dated December 2014, as well as business records of an unidentified company in 2014.

None of this documentation resolves the fundamental evidentiary conflict between official line of business and the Beneficiary's alleged work for the company. While the documents identify business variously as importing, office furniture, and equipment trading, the Petitioner claims that the Beneficiary's work for the company was as a manager of construction projects. The Petitioner has not resolved this discrepancy in the record with independent, objective evidence pointing to where the truth lies. *Matter of Ho*, 19 I&N Dec. 582, 591-92 (BIA 1988).

In view of the conflicting evidence in the record, we find that the Petitioner has not established that the Beneficiary has two years of experience as a supervisor of construction projects, as required by

the terms of the labor certification to qualify for the job offered. For lack of the requisite two years of qualifying experience, we also find that the Beneficiary is not eligible for skilled worker classification. On these grounds as well the petition is not approvable.

III. CONCLUSION

The Petitioner has not overcome the Director's findings that the Petitioner willfully misrepresented a material fact involving the labor certification process and that no *bona fide* job opportunity existed for all qualified applicants. Therefore, we will not disturb the Director's decisions to invalidate the labor certification and deny the petition for lack of a valid labor certification. In addition, we find that the Petitioner has not established that the Beneficiary had two years of qualifying experience as required by the terms of the labor certification and for the requested classification of the Beneficiary as a skilled worker.

ORDER: The appeal is dismissed.

Cite as *Matter of S-C-T-, LLC*, ID# 10739 (AAO Apr. 25, 2017)