U.S. Citizenship and Immigration Services

Non-Precedent Decision of the Administrative Appeals Office

MATTER OF H-F-, INC.

DATE: AUG. 8, 2019

APPEAL OF TEXAS SERVICE CENTER DECISION

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

The Petitioner, a convenience store and gasoline station, seeks to employ the Beneficiary as a store clerk (night shift). It requests classification of the Beneficiary as an "other worker" under the third preference immigrant category. Immigration and Nationality Act (the Act) section 203(b)(3)(A)(iii), 8 U.S.C. § 1153(b)(3)(A)(iii). This employment-based "EB-3" immigrant classification allows a U.S. employer to sponsor for lawful permanent resident status a foreign national who is capable of performing unskilled labor that requires less than two years of training or experience and is not of a temporary or seasonal nature.

The Director of the Texas Service Center denied the petition for two reasons, both of which are grounded in the Director's finding that the Petitioner willfully misrepresented a fact in the labor certification regarding a familial relationship with the Beneficiary which was material to the question of whether the proffered position was a *bona fide* job opportunity open to U.S. workers. The Director stated that the Petitioner's failure to resolve the misrepresentation issue involving the familial relationship between its owner and the Beneficiary was the first reason for denying the petition. The Director also invalidated the labor certification based on the willful misrepresentation finding, and proceeded to deny the petition for the additional reason that it was not supported by a valid labor certification.

On appeal the Petitioner asserts that it did not willfully misrepresent any fact on the labor certification regarding the relationship between its owner and the Beneficiary, that there is no binding legal authority on what constitutes a familial relationship, and that even if there were an inadvertent misrepresentation, it was not material in any event because the store clerk position was a *bona fide* job opportunity open to U.S. workers.

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

I. LAW

Employment-based immigration generally follows a three-step process. First, an employer obtains an approved labor certification from the U.S. Department of Labor (DOL). *See* section 212(a)(5)(A)(i) of the Act, 8 U.S.C. § 1182(a)(5)(A)(i). By approving the labor certification, 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 U.S. workers similarly employed. *See* section 212(a)(5)(A)(i)(I)-(II) of the Act. Second, the employer files 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.

II. ANALYSIS

The issues on appeal are whether the Petitioner and the Beneficiary willfully misrepresented a fact on the labor certification regarding a familial relationship between the Petitioner's owner/president and the Beneficiary, and if so whether the misrepresentation was material to the question of whether the store clerk (night shift) position was a *bona fide* job opportunity open to all qualified applicants at the time it was advertised by the Petitioner.

The regulation at 8 C.F.R. § 204.5(a)(2) provides that petitions for employment-based immigrant classifications, including those for "other worker" classification, must generally 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 id.*

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).

In section C of the labor certification (Employer Information) the Petitioner answered "No" to the following question at C.9:

> 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?

In a notice of intent to deny (NOID), however, the Director cited USCIS records indicating that the Beneficiary is the uncle of the Petitioner's owner/president, which appeared to contradict the Petitioner's answer at section C.9 of the labor certification denying a familial relationship between the Petitioner and the Beneficiary. The Director stated that in view of this misrepresentation of the familial relationship between the Petitioner and the Beneficiary and the Petitioner's indication (on both the labor certification and the petition) that it had only one employee, it was not reasonable to conclude that the store clerk position was a *bona fide* job offer available to any U.S. worker. The Director requested that evidence be submitted to address the apparent misrepresentation of the

familial relationship between the Petitioner's owner/president and the Beneficiary and to establish that a *bona fide* job opportunity was available to U.S. workers.

In response to the NOID the Petitioner submitted documentation relating to its recruitment efforts for the store clerk position. The Petitioner also submitted a memorandum from counsel asserting that the term "familial relations" is not defined in section C.9 of the labor certification or in DOL regulations, and a letter from the Petitioner's owner/president stating that he "did not consider" his particular relationship to the Beneficiary – nephew and uncle through the Beneficiary's mother – to be a familial relationship by "blood or marriage" under Pakistani or Islamic tradition. The Petitioner also asserted that its answer to the question at C.9 of the labor certification was not material in any event because the Petitioner's recruitment efforts produced no qualified applicants for the store clerk position.

In his decision the Director indicated that the complete text of the question at C.9 of the labor certification makes it clear that the DOL is attempting to determine if there is any interest or relationship between the Petitioner and the Beneficiary that might have an influence on the availability of the job offer to U.S. workers. Given the fact that the Beneficiary is the maternal uncle of the Petitioner's president/owner, the Director found the Petitioner's claim that it did not consider its owner/president and the Beneficiary to be in a "familial relationship" for the purposes of the C.9 question not credible. The Director stated that answering "No" to the question at C.9 cut off a line of inquiry that the DOL might have wanted to pursue to determine whether U.S. workers were fairly considered for the job. The Director concluded that the Petitioner did not resolve the misrepresentation issue regarding the familial relationship between the Petitioner's owner/president and the Beneficiary, which constituted grounds for denying the petition in accord with *Matter of Chawathe*, 25 I&N Dec. 369 (AAO 2010). The Director also invalidated the labor certification for the willful misrepresentation of a material fact, which constituted a second ground for denying the petition because it was not accompanied by a valid labor certification.

On appeal the Petitioner reasserts that it did not willfully misrepresent a material fact. For the reasons discussed below, however, we conclude that the record supports the Director's findings. A misrepresentation is an assertion or manifestation that is not in accord with the true facts. For an immigration officer to find a willful and material misrepresentation of fact, he or she must determine that (1) the petitioner or beneficiary made a false representation to an authorized official of the U.S. government, (2) the misrepresentation was willfully made, and (3) the fact misrepresented was material. *See Matter of M-,* 6 I&N Dec. 149 (BIA 1954); *Matter of Kai Hing Hui,* 15 I&N Dec. 288, 289 (BIA 1975). The term "willfully" means knowing and intentionally, as distinguished from accidentally, inadvertently, or in an honest belief that the facts are otherwise. *See Matter of Healy and Goodchild*, 17 I&N Dec. 22, 28 (BIA 1979). A "material" misrepresentation is one that "tends to shut off a line of inquiry relevant to the alien's eligibility." *Matter of Ng,* 17 I&N Dec. 536, 537 (BIA 1980).

We find that all three of these factors are met in this case. First, the Petitioner made a false representation to the DOL at section C.9 of the labor certification application by failing to

acknowledge a "familial relationship" between the Petitioner's owner/president and his uncle, the Beneficiary. On appeal, the Petitioner reiterates its contention that it did not consider its owner/president to have a "familial relationship" with the Beneficiary within the context of question C.9 of the labor certification. The Petitioner refers once again to cultural and religious traditions in Pakistan in which familial relationships are viewed on a patrilineal rather than a matrilineal basis, and alleges that because the blood link between the Petitioner's owner and the Beneficiary is a female it is not considered to establish a familial relationship between the two. Whatever the merits of the Petitioner's claims concerning "familial relationships" in Pakistan, we find that they have no bearing in this proceeding. The question at C.9 of the labor certification must be viewed through the prism of the country in which it was drafted and in which the Petitioner seeks an immigration benefit on behalf of the Beneficiary. We are not persuaded that the Petitioner, assisted throughout this proceeding by American legal counsel, failed to realize that the term "familial relationship" in the context of the question at C.9 of the labor certification would encompass a close family tie like the one the Petitioner's owner/president has with the Beneficiary – nephew and uncle – linked by the blood relative who is sister to the Beneficiary and mother to the Petitioner's owner.

The Petitioner asserts that there is no binding legal authority regarding the definition of "familial relationship" and that it was improper for the Director to rely on non-binding guidance. While the Director did discuss certain non-binding interpretations of "familial relationship" in his decision, the Director did not rely primarily on such guidance in his decision, but rather on the language of the C.9 question itself. Taking the question as a whole, the Director concluded that the DOL is trying to cast as broad a net as possible to determine if there is any sort of relationship between a petitioner and a beneficiary which could influence the availability of a proffered position to U.S. workers. The Director also quoted the DOL's answer in its website section on frequently asked questions (FAQs) to the question "When should an employer mark 'yes' when responding to the Question C.9?" The first sentence of DOL's answer states that "[a] familial relationship includes any relationship established by blood, marriage, or adoption, even if distant." This DOL interpretation certainly encompasses the relationship in this case between the Petitioner's owner/president and the Beneficiary.[1] We agree with the Director that it "is simply not credible" that the Petitioner's owner/president did not realize that the nephew/uncle relationship he has with the Beneficiary would be considered a "familial relationship" under C.9 of the labor certification.

Second, we find that the misrepresentation was willfully made by the Petitioner without a persuasive rationale for believing that the nephew/uncle relationship between the Petitioner's owner/president and the Beneficiary did not constitute a "familial relationship" as contemplated in the question at C.9 of the labor certification. Although, the Petitioner claims that it was unreasonable for the Director to find that the Petitioner willfully misrepresented a material fact because the Petitioner had no intent to deceive, the Petitioner signed the form attesting to the truthfulness of the information provided. The

[1] In line with the DOL's interpretation regarding the question at C.9 of the labor certification application, the Board of Alien Labor Certification Appeals (BALCA) held that 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." *Matter of Sunmart,* 374, 00-INA-93 (BALCA May 15, 2000).

signature on the petition by the Petitioner's owner/president established a strong presumption that he knew its contents and accepted them. *See Matter of A. J. Valdez*, 27 I&N Dec. 496, 502 (BIA 2018).

Third, we conclude that the misrepresentation of fact was material because it cut off a line of inquiry the DOL may have pursued, had it known of the nephew/uncle relationship between the Petitioner's owner/president and the Beneficiary, to determine whether the store clerk position was a *bona fide* job offer open to U.S. workers. On appeal, the Petitioner states that even if there was a familial relationship between the Petitioner's owner/president and the Beneficiary, it was not a material misrepresentation because it did not influence the recruitment process and therefore did not undermine the *bona fides* of the job opportunity for U.S. workers. The efficacy of the recruitment process, however, is not the only factor to consider in determining whether the misrepresentation of a familial relationship is material in the labor certification process. As referenced earlier in this decision, 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-*. While the Petitioner states that its recruitment process did not yield any qualified applicants for the store clerk position, its failure to acknowledge the close ties between the Petitioner's owner/president and the Beneficiary as a "familial relationship" cut off a line of inquiry the DOL may have pursued, had it known about that relationship, to determine whether the store clerk position was a *bona fide* job offer open to U.S. workers.

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; 20 C.F.R. § 656.17(l). 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 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, at least two apply in this case. The Beneficiary is closely related to the Petitioner's owner/president and is, or would be, one of a small number of employees. A beneficiary's familial relationship or employment within a small group of employees is an important factor in determining the *bona fides* of a job opportunity. *See* 20 C.F.R. § 656.17(l)(5). Had the DOL been apprised of the familial relationship between the Petitioner's owner/president 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 store clerk (night shift) was a *bona fide* job opportunity open to all qualified applicants. By withholding information about the familial

relationship, therefore, the Petitioner shut off a line of inquiry by the DOL that was relevant to the Beneficiary's eligibility for the requested classification of "other worker" under the Act.

Based on the foregoing analysis, we conclude that by answering "No" to the question at C.9 of the labor certification the Petitioner willfully misrepresented a material fact concerning the familial relationship between its owner/president and the Beneficiary, and has not established that the proffered position of store clerk (night shift) is a *bona fide* job offer open to U.S. workers.

III. CONCLUSION

The Petitioner has not overcome the Director's findings that the Petitioner willfully misrepresented the familial relationship between its owner/president and the Beneficiary and that this misrepresented fact is material to the issue of whether the proffered position is a *bona fide* job offer open to U.S. workers. Nor has the Petitioner overcome the Director's ground for invalidating the labor certification. Therefore, we will not disturb the Director's decision to deny the petition for the willful misrepresentation of a material fact and for lack of a valid labor certification.

ORDER: The appeal is dismissed.

Cite as *Matter of H-F- Inc.*, ID# 4699729 (AAO Aug. 8, 2019)