U.S. Citizenship and Immigration Services

Non-Precedent Decision of the Administrative Appeals Office

MATTER OF H- LLP

DATE: AUG. 31, 2017

APPEAL OF TEXAS SERVICE CENTER DECISION

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

The Petitioner, an accounting and tax services business, seeks to employ the Beneficiary as a quality control manager. 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. § 1152(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 and invalidated the underlying labor certification for fraud or the willful misrepresentation of a material fact under 20 C.F.R. § 656.30(d). The Director's finding that the Petitioner had engaged in fraud or misrepresentation was based on the fact that the Petitioner did not disclose the family relationship between the Beneficiary and one of its partners during the labor certification process.

On appeal, the Petitioner asserts that it did not intentionally conceal the relationship between the Beneficiary and one of its partners, and that the offered position is a *bona fide* job opportunity, as established by the supervised recruitment for the position that was conducted by the U.S. Department of Labor (DOL) prior to the labor certification's approval.

Upon *de novo* review of the record, we will sustain the appeal.

A job opportunity must exist, be clearly open to U.S. workers, and be offered to U.S. workers with wages, terms, and conditions as favorable as those offered to the beneficiary. 20 C.F.R. §§ 656.3; 656.10(c)(8); 656.17(f)(3); *see also Matter of Silver Dragon Chinese Restaurant,* 19 I&N Dec. 401, 405 (Comm'r 1986). Pursuant to 20 C.F.R. §§ 656.10(c)(8) and 656.3, a petitioner has the burden, when asked, to show that a valid employment relationship exists and that a *bona fide* job opportunity is available to U.S. workers. *Matter of Amger Corp.*, 87-INA-545 1987 WL 341738, *2 (BALCA 1987). A relationship invalidating a *bona fide* job offer may arise where a beneficiary is related to a petitioner by "blood" or it may "be financial, by marriage, or through friendship." *See Matter of Sunmart* 374, 00-INA-93 (BALCA May 15, 2000).

If the Beneficiary of a labor certification is in a position to control hiring decisions or has such a dominant role in, or close personal relationship with, the Petitioner's business that it would be

unlikely that the Beneficiary would be replaced by a qualified U.S. applicant, the question arises whether the employer has a *bona fide* job opportunity. *Matter of Modular Container Sys., Inc.*, 89-INA-228, (BALCA July 16, 1991). Stated another way, the question of whether a *bona fide* job opportunity exists depends on whether a genuine opportunity exists for U.S. workers to compete for the opening. *Hall v. McLaughlin*, 864 F.2d 868, 875 (D.C. Cir. 1989).

Under *Matter of Modular Container*, whether or not a job is clearly open to U.S. workers depends on an assessment of the totality of the circumstances. The Board of Alien Labor Certification Appeals' (the Board) decision states that the factors that may be examined to determine whether the job is clearly open to a U.S. worker include, but are not limited to, whether the Beneficiary:

- Is in the position to control or influence hiring decisions regarding the job for which labor certification is sought;
- Is related to the corporate directors, officers, or employees;
- Was an incorporator or founder of the company;
- Has an ownership interest in the company;
- Is involved in the management of the company;
- Is on the board of directors;
- Is one of a small number of employees;
- Has qualifications for the job that are identical to specialized or unusual job duties and requirements stated in the application; and
- Is so inseparable from the sponsoring employer because of his or her pervasive presence and personal attributes that the employer would be unlikely to continue in operation without the alien.

In the present case, the Director found the offered position was not a *bona fide* job opportunity. He noted that although the Beneficiary was the brother of one of the Petitioner's partners, it had answered "No" to the question in section C.9 of the labor certification, "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 Director concluded that the fact that the Petitioner had not disclosed this relationship during the labor certification process constituted fraud or the willful misrepresentation of a material fact and he invalidated the labor certification on this basis. 20 C.F.R. § 656.30(d). Finding the visa petition to no longer be supported by a valid labor certification, he denied it, entering a finding of fraud or willful misrepresentation pursuant to section 212(a)(6)(C)(i) of the Act, 8 U.S.C. § 1182(a)(6)(C)(i).

On appeal, the Petitioner argues that the Beneficiary's relationship to one of its partners does not mean that the offered position of quality control manager is not a *bona fide* job opportunity. It also maintains that its incorrect response to the question in section C.9 of the labor certification was inadvertent, the result of a "memory lapse" on the part of its managing partner, who forgot about the Beneficiary's sister, one of its eight partners, because of her less than one percent ownership of the company. The Petitioner further asserts that the familial relationship in this matter is immaterial

since the *bona fide* nature of the job offer has been established by DOL's audit of the labor certification and its oversight of the recruitment conducted for the position.

The concealment of a relevant family relationship in labor certification proceedings may constitute fraud or the willful misrepresentation of a material fact and lead to the invalidation of a labor certification. However, after reviewing all of the facts in this case and considering the factors under *Matter of Modular Container*, we do not find that the Petitioner's incorrect response to section C.9 of the labor certification in this matter justifies a finding of fraud or material misrepresentation and the invalidation of the labor certification.

For these reasons, we will withdraw the Director's finding of fraud or willful misrepresentation, as well as his invalidation of the labor certification under 20 C.F.R. § 656.30(d).

ORDER: The appeal is sustained.

FURTHER ORDER: The ETA Form 9089, ETA Case Number [redacted] is reinstated.

Cite as *Matter of H- LLP*, ID# 469946 (AAO Aug. 31, 2017)