U.S. Citizenship and Immigration Services

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

MATTER OF A-M- CO.

DATE: DEC. 12, 2017

APPEAL OF TEXAS SERVICE CENTER DECISION

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

The Petitioner, a provider of janitorial services, seeks to employ the Beneficiary as an assistant manager. It requests his classification as a skilled worker under the third-preference, immigrant category. *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, "EB-3" category allows a U.S. business to sponsor a foreign national with at least two years of training or experience for lawful permanent resident status.

After first granting the petition, the Director of the Texas Service Center revoked its approval. The Director invalidated the accompanying employment certification from the U.S. Department of Labor (DOL), finding that the petitioning corporation willfully concealed the identity of a co-shareholder as the Beneficiary's father. The Director therefore concluded that the petition lacked a valid labor certification.

On appeal, the Petitioner submits additional evidence and denies concealing the relationship between the co-shareholder and the Beneficiary.

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

## I. THE EMPLOYMENT-BASED IMMIGRATION PROCESS

Employment-based immigration generally follows a three-step process. First, an employer files a labor certification application with DOL. *See* section 212(a)(5)(A)(i) of the Act, 8 U.S.C. § 1182(a)(5)(A)(i). DOL must determine whether the United States lacks able, willing, qualified, and available workers for an offered position, and whether employment of a foreign national would hurt the wages and working conditions of U.S. workers with similar jobs. *Id.*

If DOL certifies a foreign national to permanently fill an offered position, the employer must next submit the 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. If USCIS approves a petition, the foreign national may finally 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.

At 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. USCIS properly issues a notice of intent to revoke where the record as of the notice's issuance, if unrebutted and unexplained, would have warranted the petition's denial. *Matter of Estime*, 19 I&N Dec. 450, 451 (BIA 1987). Similarly, good and sufficient cause supports revocation of a petition's approval where the record as of the decision, including any rebuttal evidence or argument submitted by a petitioner, would have warranted a denial. *Id.* at 451-52.

## II. THE INVALIDATION OF THE LABOR CERTIFICATION

Unless accompanied by an application for Schedule A designation or documentation of a beneficiary's qualifications for a shortage occupation, a skilled worker petition must include a valid, individual labor certification. 8 C.F.R. § 204.5(l)(3)(i). USCIS may invalidate a certification after its issuance upon a finding of "fraud or willful misrepresentation of a material fact involving the labor certification." 20 C.F.R. § 656.30(d). If the labor certification is invalidated after a finding of fraud or willful misrepresentation of material fact, the petition's approval may be revoked because it is no longer supported by a valid labor certification.

Here, the Director issued the notice of intent to revoke (NOIR) for good and sufficient cause and informed the Petitioner that the record indicated the willful misrepresentation of a material fact. A willful misrepresentation of a material fact requires a deliberate and voluntary misrepresentation made with knowledge of its falsity. *Xing Yang Yang v. Holder*, 770 F.3d 294, 303 (4th Cir. 2014). Fraud requires an additional intention to deceive. *Id.* A misrepresentation is material if it tends to shut off a line of inquiry that would predictably have disclosed facts relevant to eligibility for an immigration benefit. *Matter of D-R-*, 27 I&N Dec. 105, 113 (BIA 2017). The Petitioner answered "No" to Part C.9 on the labor certification application form, which asked: "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, incorporators, and the alien?" Contrary to the Petitioner's response, evidence identified a co-shareholder of the company as the Beneficiary's father. The Petitioner submitted copies of its federal income tax returns for 2011, the year of the labor certification's filing, listing the company's two shareholders at that time. In 2013, the Beneficiary filed an application for adjustment of status containing a Form G-325A, Biographic Information, and a copy of his family register from South Korea. Both of these documents identify one of the Petitioner's shareholders as the Beneficiary's father. USCIS records also indicate that, in an unrelated application in 2007, the shareholder identified the Beneficiary as his son. Thus, evidence indicated that, on the labor certification, the Petitioner concealed a family relationship between the shareholder and the Beneficiary.

The misrepresentation appears to be willful. The Petitioner presumably knew of the family relationship between its shareholder and the Beneficiary. *See Matter of Silver Dragon Chinese Rest.*, 19 I&N Dec. 401, 404 (Comm'r 1986) (finding that "the officers and principals of a corporation are presumed to be aware and informed of the organization and staff of their enterprise").

The misrepresentation is also material. A labor certification employer must attest to the clear availability of an offered position to U.S. workers. 20 C.F.R. § 656.10(c)(8). If a family relationship exists between a shareholder and a foreign national, an employer must be able to demonstrate the *bona fides* of a job opportunity. 20 C.F.R. § 656.17(l). Thus, the Petitioner's concealment of the relationship terminated a line of inquiry that would predictably have disclosed facts relevant to the Petitioner's eligibility for the labor certification. If unrebutted or unexplained, the record therefore would have warranted the invalidation of the labor certification and the petition's denial.

In response to the NOIR, the Petitioner did not deny the family relationship between the shareholder and the Beneficiary. Rather, it asserted its disclosure of the relationship on the labor certification application. The Petitioner submitted a copy of the application form it purportedly mailed to the DOL in 2011, indicating "Yes" to Part C.9's question.[1] It also provided a copy of a 2017 letter that its counsel purportedly sent to the DOL, asking the agency to confirm the Petitioner's disclosure of the family relationship on the application form.[2]

When the DOL receives a labor certification application by mail, agency employees enter data from the filing into the DOL's online system. *See, e.g., Matter of Youth Soccer All., LLC*, 2011-PER-01349, 2012 WL 4339020 *1 (BALCA Sept. 18, 2012). In *Youth Soccer*, the Board of Alien Labor Certification Appeals (BALCA) reversed a certification denial where the DOL mistakenly omitted information in a mailed-in application from the online system. 2012 WL 4339020 at *3. The discrepancy between the date on the mailed application and the information entered online was clear because BALCA's record contained both forms: the one mailed to the DOL; and the online version the DOL created. *Id.*

Here, our record contains the online form the DOL created and certified, but not the form the Petitioner mailed to the agency. The Petitioner has not established the authenticity of its copy of the purported mailed-in application. The record lacks documentary proof of the application's mailing and receipt on the designated dates, or affidavits from the Petitioner and counsel regarding the filing's preparation, signing, copying, and submission.

Also, counsel and a representative of the Petitioner signed the online form after its certification, attesting under penalty of perjury to their review of the form and to the truth and accuracy of the data on it. If the DOL erroneously listed the Petitioner's response to Part C.9 on the certified form, the record does not explain why counsel and the company's representative signed it and submitted the allegedly erroneous labor certification with the immigrant petition.

[1] The DOL encourages online filing of labor certification applications, but also accepts them by mail. If mailed, an application must contain original signatures of the employer, the foreign national, and the application's preparer (if different than the employer). 20 C.F.R. § 656.17(a).

[2] The Petitioner stated that it would notify USCIS once the DOL responded to its letter. As of this decision, we have not received any notice from the Petitioner of a response.

On appeal, the Petitioner "concedes" that its C.9 response on the labor certification should have been corrected before the company's representative signed the approved document. But counsel asserts that this was an "inadvertent oversight." Counsel's assertion, however, does not constitute evidence explaining why the Petitioner signed an incorrect labor certification. *See Matter of Obaigbena*, 19 I&N Dec. 533, 534 n.2 (BIA 1988) (citing *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980)). Counsel's statement must be substantiated in the record with independent evidence, which may include affidavits and declarations. Thus, a preponderance of evidence establishes the Petitioner's willful concealment on the labor certification of the family relationship between the shareholder and the Beneficiary.

The Petitioner also contends that the misrepresentation was immaterial. It notes that a family relationship between an employer and a foreign national does not automatically bar the existence of a *bona fide* job opportunity. *See, e.g., Matter of Paris Bakery Corp.*, 88-INA-337, 1990 WL 1232931 (1990) (*en banc*) (finding a *bona fide* job opportunity despite the position's offer to the brother of an employer's president/sole shareholder). On appeal, the Petitioner submitted evidence of its recruitment in response to a DOL audit, arguing that the audit established the existence of a *bona fide* job opportunity. However, there is no indication that the Petitioner sought to correct the erroneous information provided in part C.9 during the audit process or that DOL was otherwise made aware of the relationship between the Beneficiary and the Petitioner. Had DOL been made aware of the familial relationship, it may have further analyzed the Petitioner's compliance with the labor certification process and more closely examined whether or not a *bona fide* job opportunity exists.

A labor certification employer with a shareholder related to a foreign national, however, must be able to demonstrate the *bona fides* of the offered position. 20 C.F.R. § 656.17(l). The relationship therefore creates a "presumption that the job opportunity is not *bona fide*." *Matter of Transmark Real Estate*, 2011-PER-00475, 2012 WL 2192303 *2 (BALCA June 8, 2012). The Director's NOIR provided the Petitioner with an opportunity to rebut this presumption. But the Petitioner's response did not establish the clear availability of the position to U.S. workers. In addition to the family relationship between the shareholder and the Beneficiary, the record indicates that the Beneficiary would serve as part of a small group of employees. *See Matter of Modular Container Sys., Inc.*, 89-INA-228, 1991 WL 223955, *8 (BALCA 1991) (*en banc*) (listing factors to be considered in determining the *bona fides* of a job opportunity). The Director directly requested evidence to establish the *bona fide* nature of the job opportunity in the NOIR, but the Petitioner declined to present evidence regarding whether the Beneficiary has other relatives who invested or worked for the company or which company official(s) interviewed applicants and made hiring decisions regarding the offered position.[3] Given the Beneficiary's father's position in the company as an owner, director, and vice president, it appears that he may have influenced the hiring decisions being made. The Petitioner's

[3] Copies of the Petitioner's tax returns after 2011 indicate that the Beneficiary's father held 49 percent of the corporation's stock in 2015 and that the other shareholder owned all of the company's stock in 2013 and 2014. Online public records also identify the Beneficiary's father as the Petitioner's registered agent from 2012 to 2016, and as a vice president and director of the company in 2015 and 2016. *See* Va. State Corp. Comm'n, Bus. Entity Search, at https://sccefile.scc.virginia.gov/Find/Business (last visited Nov. 27, 2017).

other stockholder also shares the same family name as the Beneficiary and his father, but the record does not establish whether family relationships exist among them. The Petitioner has therefore not met its burden to establish the *bona fides* of the job opportunity. *See, e.g., Matter of Orly Beauty Salon & Barber Shop*, 2013-PER-02548 (BALCA Feb. 24, 2017) (finding no *bona fide* job opportunity where, despite an absence of U.S. applicants, the employer's owner/president, owner/vice president, and owner/partner were the foreign national's sister, spouse, and son, respectively).

For the foregoing reasons, the record establishes the Petitioner's willful misrepresentation of a material fact on the labor certification.

## III. CONCLUSION

The record supports the Director's invalidation of the accompanying labor certification based on the Petitioner's willful misrepresentation of a material fact. The petition therefore lacks a valid labor certification.

**ORDER:** The appeal is dismissed.

Cite as *Matter of A-M- Co.*, ID# 743577 (AAO Dec. 12, 2017)