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U.S. Citizenship and Immigration Services

Non-Precedent Decision of the Administrative Appeals Office

MATTER OF C-C-, INC.

DATE: FEB. 10, 2017

APPEAL OF NEBRASKA SERVICE CENTER DECISION

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

The Petitioner, a car wash business,[1] seeks to employ the Beneficiary as a car wash manager. It requests classification of the Beneficiary as an unskilled worker under the third preference immigrant classification. *See* Immigration and Nationality Act (the Act) section 203(b)(3)(A)(iii), 8 U.S.C. § 1152(b)(3)(A)(iii). 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 less than 2 years of training or experience.

The Director, Nebraska Service Center, revoked the approval of the visa petition, finding the Petitioner to have willfully misrepresented its relationship to the Beneficiary on the labor certification. On this same basis, the Director invalidated the labor certification.

The matter is now before us on appeal. The Petitioner contends that the Director did not have good and sufficient cause to revoke the petition's approval.

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

I. LAW

Employment-based immigration is generally a three-step process. First, an employer must obtain an approved ETA Form 9089, Application for Permanent Employment Certification (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). Next, 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. Finally, if USCIS approves the immigrant visa petitioner, the foreign national must apply

[1] In any future proceedings, the Petitioner must submit evidence establishing where it is conducting business and where the Beneficiary will work. Business records maintained by the Massachusetts Secretary of State report the Petitioner's address as , Massachusetts, not the address reflected on the visa petition and labor certification. Additionally, Massachusetts records also reflect that another business, was located at the address until December 13, 2012, when it appears to have ended operations. Please explain the relationship, if any, between these previously co-located businesses, and whether is currently operating.

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.

By approving the labor certification in this case, DOL certified that there are insufficient U.S. workers who are able, willing, qualified, and available for the offered position. Section 212(a)(5)(A)(i)(I) of the Act. The DOL also certified that the employment of a foreign national in the position will not adversely affect the wages and working conditions of domestic workers similarly employed. Section 212(a)(5)(A)(i)(II) of the Act.

In visa petition proceedings, USCIS determines whether a foreign national meets the job requirements specified in the underlying labor certification and the requirements of the requested immigrant classification. *See* section 204(b) of the Act (stating that USCIS must approve a petition if the facts stated in it are true and the foreign national is eligible for the requested preference classification); *see also, e.g., Tongatapu Woodcraft Haw., Ltd. v. Feldman,* 736 F. 2d 1305, 1309 (9th Cir. 1984); *Madany v. Smith*, 696 F.2d 1008, 1012-13 (D.C. Cir. 1983) (both holding that USCIS has authority to make preference classification decisions).

The priority date of a petition is the date that DOL accepts the labor certification for processing. *See* 8 C.F.R. § 204.5(d). A petitioner must establish the elements for the approval of the petition at the time the priority date is established and continuing until the beneficiary obtains lawful permanent residence. *See* 8 C.F.R. §§ 204.5(g)(2), 103.2(b)(l), (12); *see also Matter of Wing's Tea House,* 16 I&N Dec. 158, 159 (Acting Reg'l Comm'r 1977); *Matter of Katigbak,* 14 I&N Dec. 45, 49 (Reg'l Comm'r 1971).

II. PROCEDURAL HISTORY AND EVIDENCE OF RECORD

The Petitioner filed the Form I-140, Immigrant Petition for Alien Worker, and USCIS initially approved the visa petition. Subsequently, the Director issued a notice of intent to revoke to the Petitioner. The notice informed the Petitioner that the Beneficiary, in applying for his immigrant visa in Manila, had indicated that one of the Petitioner's owners was his brother-in-law. This relationship had not been disclosed on the labor certification in response to the question in Part 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, incorporators, and the alien?" The Director indicated that he found the Petitioner's negative response to this question to constitute a willful misrepresentation of a material fact, which supported the revocation of the petition's approval and the invalidation of the underlying labor certification.[2]

In its response to the notice, the Petitioner asserted that the Beneficiary was not an immediate or blood relative of one of its owners and that, at the time the visa petition was filed, there was no guidance that indicated a "familial relationship" included a relationship created by marriage, noting

[2] USCIS records show that the relationship pre-dated the filing of the labor certification in 2007. Specifically, in 2005 the Petitioner's owner filed a marriage based I-130, Petition for Immigrant Relative, on behalf of the Beneficiary's sister.

that DOL had not clarified that this was the case until July 2014. The Petitioner contended that, as it was unaware that it should have answered the question in Part C.9. affirmatively, it had not willfully misrepresented the relationship between the Beneficiary and one of its owners in the labor certification. In support of its claims, the Petitioner submitted a copy of the instructions for the ETA Form 9089, Application for Permanent Employment Certification; the Frequently Asked Question (FAQ) on the meaning of familial relationship issued by DOL on July 28, 2014; and a June 8, 2015, letter from the Beneficiary's brother-in-law stating that their relationship was not relevant to his decision to hire the Beneficiary for the offered position.

After considering the Petitioner's response to his notice, the Director revoked the approval of the petition and invalidated the underlying labor certification. The Petitioner then filed an appeal, supported by a brief, a second copy of the instructions for the ETA Form 9089, and a second copy of the FAQ published on July 28, 2014, by DOL. Subsequently, the Petitioner supplemented the appeal with a copy of a decision from the Board of Alien Labor Certification Appeals (BALCA).

III. ANALYSIS

A. Revocation of the Visa Petition's Approval

On appeal, the Petitioner asserts that the Director did not have good and sufficient cause to revoke the approval of the visa petition. It maintains that, in the absence of any published DOL guidance on the meaning of familial relationship, its negative response to the question in Part C.9. of the labor certification "does not rise to the level necessary to revoke the approved petition."

Section 205 of the Act provides that "[t]he Attorney General [now Secretary, Department of Homeland Security], may at any time, for what he deems to be good and sufficient cause, revoke the approval of any petition approved by him under section 204." This means that notice must be provided to the petitioner before a previously approved petition may be revoked. More specifically, the regulation at 8 C.F.R. § 205.2 reads:

> (a) *General.* Any [USCIS] officer authorized to approve a petition under section 204 of the Act make revoke the approval of that petition upon notice to the petitioner on any ground other than those specified in § 205.1 when the necessity for the revocation comes to the attention of this [USCIS].

The regulation at 8 C.F.R. § 103.2(b)(16) further requires:

> (i) *Derogatory information unknown to petitioner or applicant.* If the decision will be adverse to the applicant or petitioner and is based on derogatory information considered by [USCIS] and of which the applicant or petitioner is unaware, he/she shall be advised of this fact and offered an opportunity to rebut the information and present information in his/her own behalf before the decision is rendered, except as provided in paragraphs (b)(16)(ii), (iii), and (iv) of this section. Any explanation,

> rebuttal, or information presented by or in behalf of the applicant or petitioner shall be included in the record of proceeding.

Moreover, *Matter of Arias*, 19 I&N Dec. 568 (BIA 1988); *Matter of Estime*, 19 I&N Dec. 450 (BIA 1987) provide that:

> A notice of intention to revoke the approval of a visa petition is properly issued for "good and sufficient cause" when the evidence of record at the time of issuance, if unexplained and unrebutted, would warrant a denial of the visa petition based upon the petitioner's failure to meet his burden of proof. However, where a notice of intention to revoke is based upon an unsupported statement, revocation of the visa petition cannot be sustained.

Here, the notice of intent to revoke issued by the Director stated the following:

> The petitioner answered "No" to Part C, Question 9 of the ETA Form 9089 . . . .
>
> The beneficiary was interviewed at the US Embassy in Manila in conjunction with his application for an E31 employment-based immigrant visa. During the interview, the beneficiary admitted that the owner of the petitioning business . . . is a relative, which was not disclosed on the labor certification. The relationship must be disclosed to the Department of Labor during the labor certification process so that the question of whether a bona fide job opportunity exists may be addressed. Since the subject is the brother-in-law of the . . . owner of 50% of the petitioning business, the "No" answer to question 9 of Part C of ETA Form 9089 constitutes a willful misrepresentation of a material fact.

Based on the above, we find that the Director's notice specifically advised the Petitioner of an issue that, if "unexplained and unrebutted," would have warranted the denial of the petition, i.e., the existence of a family relationship that was not identified by the Petitioner at the time it filed the labor certification. Accordingly, we find the notice was properly issued for good and sufficient cause, and that the Petitioner received adequate notice of the Director's intent to revoke the approval of the petition.

Having found the notice to have been properly issued, we will consider the Director's revocation of the petition's approval.

On appeal, the Petitioner contends that its negative response to the question in Part C.9. of the labor certification does not constitute the willful misrepresentation of a material fact. As previously noted, it maintains that the Beneficiary is not an immediate or blood relative of one of its owners and that at the time it filled out the labor certification in 2007, there was no indication that an "in-law" relationship required it to respond affirmatively and that it was not until 2014, when DOL issued the previously noted FAQ, that it could have been expected to understand the meaning of familial relationship. The Petitioner contends, therefore, that it should not be penalized for its negative

response to the question in Part C.9. of the labor certification. It also asserts that the fact that Beneficiary revealed his relationship to one of its owners at the time of his visa interview in Manila is proof that its response to Part C.9. was not intended to mislead. These assertions are not, however, persuasive.

At the time that the Petitioner filed the labor certification, the DOL regulation at 20 C.F.R. § 656.17(l), alien influence and control over job opportunity, made clear that the intention behind the inquiry in Part C.9. was to ensure that a job opportunity was open to all workers by identifying any relationships, business or familial, that might affect job availability.[3] We find DOL's interest in knowing about family relationships beyond those based on blood to be clear from the regulation's requirement that in the event of an audit, an employer with 10 or fewer employers "document any family relationship between [its] employees and the alien." We also note that in *Matter of Sunmart* 374, 00-INA-93 (BALCA May 15, 2000), BALCA concluded that a relationship invalidating a *bona fide* job offer might arise where a beneficiary was related to a petitioner by "blood" but also noted that such a relationship might be "financial, by marriage, or through friendship." Therefore, we do not accept the Petitioner's argument that at the time it filed the labor certification in 2007 it could not have been expected to know that the familial relationship referred to in Part C.9. of the labor certification encompassed family relationships other than those created by blood.

We also observe that as one of the Petitioner's owners had the relationship with the Beneficiary, the Petitioner knew of the existence of this relationship at the time the labor certification was filed. Moreover, the Beneficiary's brother-in-law, in the June 8, 2015, letter submitted in response to the notice of intent to revoke, asserts that "this matter was fully disclosed at all times including at the

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[3] The regulation at 20 C.F.R. § 656.17 states in pertinent part:

> (l) *Alien influence and control over job opportunity.* If the employer is a closely held corporation or partnership in which the alien has an ownership interest, or if there is a familial relationship between the stockholders, corporate officers, incorporators, or partners, and the alien, or if the alien is one of a small number of employees, the employer in the event of an audit must be able to demonstrate the existence of a bona fide job opportunity, i.e., the job is available to all U.S. workers and must provide to the Certifying Officer, the following supporting documentation:
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> (1) A copy of the articles of incorporation, partnership agreement, business license or similar documents that establish the business entity;
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> (2) A list of all corporate/company officers and shareholders/partners of the corporation/firm/business, their titles and positions in the business' structure, and a description of the relationships to each other and to the alien beneficiary;
>
> (3) The financial history of the corporation/company/partnership, including the total investment in the business entity and the amount of investment of each officer, incorporator/partner and the alien beneficiary; and
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> (4) The name of the business' official with primary responsibility for interviewing and hiring applicants for positions within the organization and the name(s) of the business' official(s) having control or influence over hiring decisions involving the position for which labor certification is sought.
>
> (5) If the alien is one of 10 or fewer employees, the employer must document any family relationship between the employees and the alien.

Consular interview," indicating that his relationship to the Beneficiary was known to the Petitioner at the time it filed the labor certification.

For the reasons just discussed, we conclude that at the time it filed the labor certification, the Petitioner was aware that the Beneficiary was the brother-in-law of one of its owners and that it was required it to answer "Yes" to the question in Part C.9. of the labor certification. Accordingly, we find the Petitioner's "No" response to the question in Part C.9., which concealed the family relationship between the Beneficiary and one of the Petitioner's owners from DOL during the labor certification process, to constitute the willful misrepresentation of a material fact. *See Matter of Silver Dragon Chinese Restaurant*, 19 I&N Dec. 401 (Comm'r 1986).

Section 212(a)(6)(C) of the Act, 8 U.S.C. § 1182(a)(6)(C), states in pertinent part:

> (i) **In general.** Any alien who, by fraud or willfully misrepresenting a material fact, seeks to procure (or has sought to procure or has procured) a visa, other documentation, or admission into the United States or other benefit provided under this chapter is inadmissible.

The Attorney General has held that a misrepresentation made in connection with an application for a visa or other document, or with entry into the United States is material if either the alien is excludable on the true facts, or the misrepresentation tends to shut off a line of inquiry which is relevant to the alien's eligibility and which might well have resulted in a proper determination that he be excluded. *Matter of S & B-C*, 9 I&N Dec. 436, 447 (A.G. 1961). Here, by checking "No" in response to the question in Part C.9., the Petitioner cut off a potential line of inquiry into the *bona fide* nature of the offer of employment, which was directly material to whether the Petitioner intended to employ the Beneficiary as required by section 204(a)(1)(F) of the Act and, therefore, also material to whether the Beneficiary was eligible for the benefit sought. *See S & B-C*, 9 I&N Dec. at 447.

Having found the Petitioner's negative response to the question in Part C.9. of the labor certification to constitute the willful misrepresentation of a material fact under section 212(a)(6)(C) of the Act, we also find the labor certification to be subject to invalidation under the regulation at 20 C.F.R. § 656.30(d), which provides:

> (d) Invalidation of labor certifications. After issuance, a labor certification may be revoked by ETA using the procedures described in Sec. 656.32. Additionally, after issuance, a labor certification is subject to invalidation by the DHS or by a Consul of the Department of State upon a determination, made in accordance with those agencies' procedures or by a court, of fraud or willful misrepresentation of a material fact involving the labor certification application. If evidence of such fraud or willful misrepresentation becomes known to the CO or to the Chief, Division of Foreign Labor Certification, the CO, or the Chief of the Division of Foreign Labor Certification, as appropriate, shall notify in writing the DHS or Department of State,

> as appropriate. A copy of the notification must be sent to the regional or national office, as appropriate, of the Department of Labor's Office of Inspector General.

Therefore, we will affirm the Director's revocation of the visa petition's approval and his invalidation of the underlying labor certification.

Moreover, we also find that record does not demonstrate that, at the time of the visa petition's approval, the offered position in this matter was a *bona fide* job opportunity. 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), (5). *See Silver Dragon,* 19 I&N Dec. at 405 (quoting a DOL advisory opinion that "requiring the job opportunity to be bona fide clarifies that a true opening must exist, and not be the functional equivalent of self-employment"). Pursuant to 20 C.F.R. §§ 656.10(c)(8), 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. *See Matter of Amger Corp.*, 87-INA-545 (BALCA 1987). 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." *See Sunmart* 374, 00-INA-93. Where a beneficiary and petitioner have a familial relationship, there is a presumption that a job opportunity is not *bona fide*.

On appeal, the Petitioner submits a recently issued BALCA decision, *Matter of Tyrrell Limited*, 2012-PER-01920 (Oct. 21, 2016), in which BALCA reversed the denial of a labor certification application where DOL had found the familial relationship between the employer and the foreign worker to establish that the offered position was not a *bona fide* job opportunity. The Petitioner asserts that when the evidence of record and this decision are considered cumulatively, no good and sufficient cause for revocation has been established.

However, the facts in *Tyrrell Limited* are not those in the case before us. Unlike the Petitioner, the employer in *Tyrrell Limited*, answered "Yes" to the question in Part C.9. of the labor certification and, in the resulting audit, submitted its recruitment materials for DOL review. Here, however, because of the Petitioner's negative response in Part C.9., DOL did not have the opportunity to audit the labor certification. DOL therefore did not have the chance to assess the nature of the familial relationship between the Petitioner and Beneficiary or to review the Petitioner's recruitment process. Accordingly, the materials on which BALCA relied to determine that the employer in *Tyrrell Limited* had conducted its recruitment for the job opportunity in "good faith" are not found in the record. Therefore, while we note BALCA's consideration of the job opportunity in *Tyrrell Limited,* under the totality of circumstances test introduced in *Modular Container Systems, Inc.*, 1989-INA-228 (BALCA July 16, 1991)(*en banc*), the record in the present case does establish the existence of a *bona fide* job offer.[4]

[4] In *Modular Container Systems, Inc.*, BALCA identified factors to be considered in determining whether a job opportunity is *bona fide*, i.e., clearly open to U.S. workers, including whether the beneficiary of a labor certification: is in a 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 present case, the Petitioner concealed the familial relationship between the Beneficiary and one of its owners when filing the labor certification with DOL, and no evidence in the record demonstrates that, despite the relationship, it recruited in good faith for the job opportunity. Therefore, the Petitioner has not overcome the presumption that the offered position of car wash manager was not a *bona fide* job opportunity at the time of the visa petition's approval. Accordingly, we find that the visa petition was approved in error and that its approval is subject to revocation for this reason as well. In *Matter of Ho*, 19 I&N Dec. 582 (BIA 1988), the Board of Immigration Appeals (the Board) held that the realization that a petition was approved in error may "in and of itself" be good and sufficient cause for revoking the approval of that petition, "provided the . . . revised opinion is supported by the record."

B. Beneficiary Qualifications

Although not addressed by the Director in his revocation of the petitioner's approval, we also conclude that the evidence of record does not demonstrate that the Beneficiary is qualified for the offered position. Therefore, even if the Petitioner overcame the reasons for revocation noted above, the petition would still not be approvable for this reason.

A petitioner must establish a beneficiary's possession of all the education, training, or experience stated on an accompanying labor certification by a petition's priority date. 8 C.F.R. § 103.2(b)(1), (12); *see also Matter of Wing's Tea House*, 16 I&N Dec. 158, 159 (Acting Reg'l Comm'r 1977); *Matter of Katigbak*, 14 I&N Dec. 45, 49 (Reg'l Comm'r 1971).

In the present case, the job offer portion of the labor certification, Part H., requires the Beneficiary to have 36 months of experience in the offered position of car wash manager or another managerial occupation. In Part K. of the labor certification, the Beneficiary claimed the following qualifying employment:

- Restaurant manager, [redacted], full-time from March 2, 1999, to January 10, 2002; and
- Restaurant manager, [redacted] full-time from August 16, 1997, to March 4, 1999.

The regulation at 8 C.F.R. § 204.5(g)(1) states the following regarding the evidence required to establish employment experience:

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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.

> [E]vidence relating to qualifying experience or training shall be in the form of letter(s) from current or former employer(s) or trainer(s) and shall include the name, address, and title of the writer, and a specific description of the duties performed by the alien or of the training received. If such evidence is unavailable, other documentation relating to the alien's experience or training will be considered.

To establish that the Beneficiary has the required 36 months of managerial experience, the Petitioner submitted the following: a November 3, 1990, statement from the food and beverage manager at [redacted] restaurant, who reports that the Beneficiary has been employed as a supervisor in charge for the last year; a July 18, 1996, certificate signed by the human resources director of the [redacted], who states that the Beneficiary is employed as its restaurant manager in the [redacted]; a March 4, 1999, letter from the area general manager at the [redacted], confirming the Beneficiary's employment as its restaurant manager at its [redacted] from August 16, 1997, to March 4, 1999; a January 10, 2002, statement from the general manager of the [redacted], who reports that the Beneficiary worked as a manager in its Italian restaurant, [redacted] from March 2, 1999, to January 10, 2002; and a March 2, 1999, offer of employment to the Beneficiary, signed by the general manager at [redacted] offering the Beneficiary the position of manager at [redacted] which reflects that the restaurant is located at the [redacted]

The above experience letters do not, however, establish that the Beneficiary has the required 36 months of managerial experience required by the labor certification. Although we note the statements signed by the general manager at the [redacted] and the general manager of the [redacted] in support of the employment claimed by the Beneficiary on the labor certification, neither provides a "specific description" of the duties he performed, as required by the regulation at 8 C.F.R. § 204.5(g)(1). The other letters/statements submitted by the Petitioner also offer no description of the Beneficiary's duties. Moreover, they reference employment not claimed by the Beneficiary in the labor certification, making them of limited evidentiary value in this matter. The Board observed in *dicta* in *Matter of Leung*, 16 I&N Dec. 2530 (BIA 1976) that the credibility of evidence and facts asserted regarding a beneficiary's employment is lessened if that experience is not certified by DOL on the labor certification.

Therefore, as the record does not establish the Beneficiary's qualifying experience in this matter, we find USCIS to have erred in approving the visa petition on April 16, 2008. In *Ho*, 19 I&N Dec. at 582, the Board held that the realization that a petition was approved in error may "in and of itself" be good and sufficient cause for revoking the approval of that petition, "provided the . . . revised opinion is supported by the record." *Id.* Accordingly, the petition's approval would also be subject to revocation on this basis.

IV. CONCLUSION

We find that the Petitioner willfully misrepresented a material fact in this matter, pursuant to section 212(a)(6)(C)(i) of the Act. Therefore, we will affirm the Director's revocation of the visa petition's approval and his invalidation of the underlying labor certification. We also find that the record does

not establish that the offered position was a *bona fide* job opportunity at the time of its approval by USCIS or that the Beneficiary had the employment experience required by the labor certification.

In visa proceedings, it is the petitioner's burden to establish eligibility for the immigration benefit sought. Section 291 of the Act, 8 U.S.C. § 1361. Here, that burden has not been met.

ORDER: The appeal is dismissed.

Matter of C-C-, Inc., ID# 96450 (AAO Feb. 10, 2017)