U.S. Citizenship and Immigration Services

Non-Precedent Decision of the Administrative Appeals Office

MATTER OF A-B-, INC.

DATE: JULY 19, 2018

MOTION ON ADMINISTRATIVE APPEALS OFFICE DECISION

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

The Petitioner, a telecommunications corporation, seeks to employ the Beneficiary as director of quality assurance engineering. It requests classification of the Beneficiary as a professional under the third preference immigrant classification. Immigration and Nationality Act (the Act), section 203(b)(3)(A)(ii), 8 U.S.C. § 1153(b)(3)(A)(ii). This employment-based immigrant classification allows a U.S. employer to sponsor a professional with a baccalaureate degree for lawful permanent resident status.

The Director of the Texas Service Center denied the petition on October 24, 2011, concluding that the Beneficiary did not meet the minimum requirements of the labor certification. The Petitioner appealed the matter, and we rejected the appeal as improperly filed. We denied a subsequent motion to reconsider. The Director subsequently certified his October 24, 2011, decision to us for review. We affirmed the Director's decision in part and withdrew it in part. We denied a subsequent motion to reopen and motion to reconsider, finding that the Beneficiary did not meet the minimum requirements of the labor certification, and that the job offered did not constitute a *bona fide* job offer that was open to U.S. workers. The matter is now before us on a motion to reopen and a motion to reconsider.

On motion, the Petitioner asserts that we incorrectly denied the motion based on legal and factual error. It states that the Beneficiary had the required experience for the offered job based on his experience with [redacted] and [redacted] S.A., and that there was a *bona fide* job offer because the Beneficiary was not shown any favoritism during his employment.

Upon review, we will deny the motion to reopen and deny the motion to reconsider.

I. MOTION REQUIREMENTS

A petitioner must meet the formal filing requirements of a motion and show proper cause for granting the motion. 8 C.F.R. § 103.5(a)(1). A motion to reopen must state new facts and be supported by documentary evidence. 8 C.F.R. § 103.5(a)(2). The regulation at 8 C.F.R. § 103.5(a)(2) does not define what constitutes a "new" fact, nor does it mirror the Board of Immigration Appeals' (the Board) definition of "new" at 8 C.F.R. § 1003.23(b)(3) (stating that a motion to reopen will not be granted unless the evidence "was not available and could not have been

discovered or presented at the former hearing"). Unlike the Board regulation, we do not require the evidence of a "new fact" to have been previously unavailable or undiscoverable. Instead, we interpret "new facts" to mean facts that are relevant to the issue(s) raised on motion and that have not been previously submitted in the proceeding, which includes the original petition. Reasserting previously stated facts or resubmitting previously provided evidence does not constitute "new facts." On its motion to reopen, the Petitioner has not asserted new facts supported by documentary evidence. Thus, the motion to reopen will be denied.

A motion to reconsider must establish that our decision was based on an incorrect application of law or policy and that the decision was incorrect based on the evidence in the record of proceedings at the time of the decision. 8 C.F.R. § 103.5(a)(3). A motion to reconsider must also be supported by a pertinent precedent or adopted decision, statutory or regulatory provision, or statement of U.S. Citizenship and Immigration Services (USCIS) or Department of Homeland Security policy.

On motion, the Petitioner asserts that our prior decision was legally and factually incorrect based on the record at the time of filing. We will address the Beneficiary's qualifications and the existence of a *bona fide* job opportunity below.

II. BENEFICIARY'S QUALIFICATIONS

We denied the prior motion, in part, because the Petitioner did not establish that the Beneficiary possessed the experience required by the labor certification as of the priority date.[1] A beneficiary must meet all of the requirements of the offered position set forth on the labor certification by the priority date of the petition. 8 C.F.R. § 103.2(b)(1), (12). *See Matter of Wing's Tea House*, 16 I&N Dec. 158, 159 (Act. Reg'l Comm'r 1977); *see also Matter of Katigbak*, 14 I&N Dec. 45, 49 (Reg'l Comm'r 1971).

In this matter, regarding the experience requirements, the labor certification requires three years of experience in the job offered of director of quality assurance engineering. On motion, the Petitioner states that the Beneficiary qualifies for the offered position based on the following work experience:

[redacted]

[1] The priority date of a petition is the date the U.S. Department of Labor (DOL) accepted the labor certification for processing, which in this case is March 21, 2005. *See* 8 C.F.R. § 204.5(d). New DOL regulations concerning labor certifications went into effect on March 28, 2005. The new regulations are referred to by the acronym PERM. *See* 69 Fed. Reg. 77325, 77326 (Dec. 27, 2004). The PERM regulation was effective as of March 28, 2005, and applies to labor certification applications filed on or after that date. The instant petition is governed by the prior regulations.

[2] The labor certification also lists his position as director of [redacted] and [redacted] from November 2000 to December 2001, and his position as general manager of [redacted] from August 1964 to July 1966.

First, regarding the Beneficiary's employment with [redacted] we stated in our previous decisions that the credibility of the Beneficiary's experience with [redacted] is lessened by the discovery of the Beneficiary's purported simultaneous full-time employment as the Executive Vice [redacted] for approximately 15 years while he allegedly also worked full-time as [redacted] The Filanbanco employment was not listed on the labor certification.[4] The omission of the Beneficiary's claimed experience from the labor certification application casts doubt on the validity of the Beneficiary's claimed full-time experience with [redacted]

In our previous decisions, we noted that it is incumbent upon the petitioner to resolve any inconsistencies in the record by independent objective evidence, and attempts to explain or reconcile such inconsistencies, absent competent objective evidence pointing to where the truth, in fact, lies, will not suffice. *Matter of Ho*, 19 I&N Dec. 582, 591-92 (BIA 1988). A petitioner bears the burden of establishing eligibility for the immigration benefit sought. Section 291 of the Act, 8 U.S.C. § 1361; *Matter of Skirball Cultural Ctr.*, 25 I&N Dec. 799, 806 (AAO 2012). On motion, the Petitioner has not resolved the inconsistencies regarding the Beneficiary's employment with [redacted] with independent objective evidence, such as payroll records, paychecks, or tax records, to demonstrate the Beneficiary's employment from July 1966 through November 2000. Further, as noted in our prior decisions, the record does not establish that the Beneficiary's job as [redacted] was similar to the offered job of director of quality assurance engineering. The Petitioner submitted no evidence on motion demonstrating similarities in the job duties. Therefore, the evidence in the record does not demonstrate that the Beneficiary gained three years of experience as a director of quality assurance engineering with [redacted]

Second, the record does not establish that the Beneficiary's experience as [redacted] satisfies the experience requirements for the position offered. The labor certification indicates that the Beneficiary "designed and implemented the engineering development programs to maximize productivity strategies" and that he "formulated and maintained the engineering operational procedures and goals." As noted in our prior decision, this implies that the textile engineering system was instituted and that the Beneficiary was responsible for maximizing production from December 2001 until August 2003. We noted in our previous decision that the credibility of this experience is questionable due to evidence in the record that U.S. Customs and Border Protection did not find any import or export records in its databases for [redacted] from December 2001 to December 2004, and due to the Beneficiary's brothers' ownership in the business. However, the Petitioner states on motion that the Beneficiary was responsible for setting up the textile business but

[3] In 2009, a government agency of Ecuador filed a complaint against the Beneficiary and his brother in the [redacted] Circuit in [redacted], Florida, alleging that the defendants, as administrators of [redacted] the largest bank in Ecuador in the mid-1990s, made fraudulent loans and other transactions. In an answer to the complaint, the Beneficiary admitted that he served as [redacted] from the mid-1980s to December 2, 1998.

[4] The Beneficiary's [redacted] employment was not mentioned in the May 7, 2007, letter from the general manager of [redacted] describing the Beneficiary's full-time employment.

that changed its operations and abandoned the actual production of textiles.

A letter dated 2007, from to USCIS describing the Beneficiary's duties as does not mention that the company abandoned its plans for a textile business. Instead, it states that the Beneficiary "established the quality control system of all import and export of raw textile material and finished textile products...." However, a later affidavit from dated 2011, states that "economic conditions did not warrant initiating full scale textile production in the United States" and that the company changed the focus of the Beneficiary's job from textiles to real estate in 2003. In his affidavit, he references the company's undated internal memo relating to textiles. The memo refers to years "1, 2, 3 and 4" but does not indicate which years these numbers signify. Therefore, although the Petitioner asserts that the memo confirms that it was developing a textile business in 2001, the undated memo does not verify that fact. The inconsistencies and ambiguities in the evidence have not been resolved with independent, objective evidence pointing to where the truth lies. *Matter of Ho*, 19 I&N Dec. at 591-92.

Third, on motion, the Petitioner asserts that the Beneficiary's position as constituted qualifying experience for the position offered. In a letter dated November 17, 2011, from Pedro Reyes, the job duties for the position of Vice President for Engineering describe only real estate duties, including preparing leases and rental receipts and managing real estate holdings. The job description does not mention any engineering duties.[5] In our previous decisions, we noted that the job duties of Vice President for Engineering closely resemble that of a manager of real estate investments, and these differ significantly from the duties of the offered job. On motion, the Petitioner states that the Beneficiary's duties as were that of a managing engineer in a real estate environment, which it asserts are similar to the duties of the offered job, but in a telecommunications environment. However, the Petitioner has provided no independent, objective evidence to support this assertion. *Id.* The Petitioner cites its website in support of its claim that it is an application service provider of telecommunications solutions. However, the Petitioner's website is not independent, objective evidence of the operations of or of the Beneficiary's proposed job duties or his job duties as the *Id.* The inconsistencies in the job descriptions have not been resolved with independent, objective evidence pointing to where the truth lies. *Id.*

On motion, the Petitioner claims that the affidavit, the company's internal memo, the letter from to USCIS, and the Petitioner's job description for the Beneficiary's H-1B nonimmigrant

[5] In 2003, filed an H-1B nonimmigrant petition on behalf of the Beneficiary for the position of Vice President of Engineering. As noted by the Director in her October 24, 2011, denial decision, "there are no engineering duties listed and the agency has concluded that the duties more accurately reflect those of a property manager."

visa petition,[6] establish that the job duties qualify the Beneficiary for the offered job. It claims that rejection of the evidence is unlawful without a specific finding that the evidence was not accurate or not credible. *See Lu-Ann Bakery Shop, Inc. v. Nelson,* 705 F. Supp. 7, 10 (D.D.C. 1988). The decision in *Lu-Ann Bakery Shop* is not binding here. Although we may consider the reasoning of the decision, we are not bound to follow the published decision of a United States district court in cases arising within the same district. *See Matter of K-S-,* 20 I&N Dec. 715 (BIA 1993). Further, in our prior decisions, citing inconsistencies in the record regarding the Beneficiary's experience, we determined that the Petitioner had not resolved the inconsistencies with independent, objective evidence pointing to where the truth lies. *Matter of Ho*, 19 I&N Dec. at 591-92. In other words, we made a specific finding that the evidence was not credible. See *Matter of Chawathe*, 25 I&N Dec. 369, 375-76 (AAO 2010). Therefore, the evidence in the record does not demonstrate that the Beneficiary gained three years of experience in the job offered (Director of Quality Assurance Engineering) with

The evidence submitted on motion does not demonstrate that our prior decision was legally or factually incorrect based on the record at the time of filing. The Petitioner has not established that the Beneficiary met the experience requirements of the labor certification as of the priority date.

III. *BONA FIDE* JOB OPPORTUNITY

We also denied the prior motion, in part, because the Petitioner has not established that the instant petition constitutes a *bona fide* job opportunity that is open to U.S. workers.

A labor certification employer must attest that "[t]he job opportunity has been and is clearly open to any U.S. worker." 20 C.F.R. § 656.10(c)(8). This attestation "infuses the recruitment process with the requirement of a *bona fide* job opportunity: not merely a test of the job market." *Matter of Modular Container Sys., Inc.,* 89-INA-228, 1991 WL 223955, *7 (BALCA 1991) *(en banc)*; *see* 20 C.F.R. § 656.17(l).[7] A relationship between a petitioner and a beneficiary triggering concerns about

[6] In 2001, filed an H-1B nonimmigrant petition on behalf of the Beneficiary for the position of Director of Textile Technology Engineering Operations. As noted by the Director in her October 24, 2011, denial decision, "it has not been established that ever had any textile import/export or manufacturing operations in the United States and that the beneficiary ever performed any textile engineering duties."

[7] In determining whether a job opportunity is *bona fide*, we look to the totality of the circumstances. *See Modular Container*1991 WL 223955 at *8. The same standard has been incorporated into the PERM regulations. *See* 69 Fed. Reg. 77326, 77356 (ETA) (Dec. 27, 2004). The regulation at 20 C.F.R. § 656.17(l) 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;

the *bona fides* of a job opportunity "is not only of the blood; it may also be financial, by marriage, or through friendship." *Matter of Sunmart 374,* 2000-INA-93, 2000 WL 707942, *3 (BALCA May 15, 2000). We may deny a petition accompanied by a labor certification that violates DOL regulations. *See Sunoco Energy Dev. Co.*, 17 I&N Dec. 283, 284 (Reg'l Comm'r 1979) (affirming a petition's denial where the accompanying labor certification was invalid for the geographical area of intended employment).

In this case, (Iceland) is the parent company of the Petitioner. The ownership of is shared by and who are the Beneficiary's brothers. The Beneficiary's brothers were also listed as directors of the Petitioner in its Florida annual report filings from 2004 through 2008.[8] In our prior decision, we concluded that these facts, viewed in the totality of the circumstances, indicate that there is not a *bona fide* job opportunity.

In determining the *bona fides* of a job opportunity, adjudicators must consider multiple factors including, but not limited to, whether a foreign national: is in a position to control or influence hiring decisions regarding the offered position; is related to corporate directors, officers, or employees; incorporated or founded the company; has an ownership interest in it; is involved in the management of the company; sits on its board of directors; is one of a small group of employees; and has qualifications matching specialized or unusual job duties or requirements stated in the labor certification. *Modular Container*, 1991 WL 223955 at *8; 20 C.F.R. § 656.17(l). In this case, the factors indicating that the position offered does not constitute a *bona fide* job opportunity include:

- The Beneficiary's brothers have a significant ownership interest in the Petitioner's parent company.
- The Beneficiary's brothers were listed as the Petitioner's directors from 2004 to 2008.
- The Beneficiary was involved in the management of the Petitioner's holding company, during the period of recruitment for the job offered. According to the labor certification, the Beneficiary was the Vice President for Engineering who oversaw and directed operations, and managed and supervised staff.

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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
(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.

[8] *See* Florida Dep't of State Div. of Corporations, http (as of Mar. 9, 2018).

- The Beneficiary is a director of [redacted]
- The Petitioner claimed on the petition to employ only eight U.S. employees.

On motion, the Petitioner asserts that the evidence in the record demonstrates that there is a *bona fide* job offer. The Petitioner states that although there is a familial relationship between the Petitioner and the Beneficiary, the Petitioner granted no favoritism to the Beneficiary. For example, it states that it placed the Beneficiary on leave at least two times in response to immigration developments – once when his H-1B nonimmigrant visa was revoked in 2005, and again in 2011 when his employment authorization lapsed between expiration of his H-1B nonimmigrant visa and the granting of employment authorization as an E-2 nonimmigrant dependent. However, these actions were taken by the employer due to the Beneficiary's lack of valid employment authorization in the United States. If a beneficiary works without valid work authorization in the United States, there are significant legal consequences for the employer and the beneficiary. Placing a beneficiary on leave because he lacked valid employment authorization does not establish the *bona fides* of a job opportunity. Further, the 2011 incident occurred well after recruitment for the offered position had ended.

The Petitioner also states that it cut the Beneficiary's salary during his employment – his salary was reduced each year between 2001 and 2005. However, it does not indicate a reason for the cuts, or whether other employees' salaries were also reduced during this timeframe.[10] Reducing a beneficiary's salary does not, by itself, establish the *bona fides* of a job opportunity.

The Petitioner again asserts that rejection of the [redacted] affidavit is unlawful without a specific finding that the affidavit was not accurate or not credible. *See Lu-Ann Bakery Shop, Inc.*, 705 F. Supp. at 10. It asserts that the affidavit establishes the *bona fides* of the job opportunity. As previously noted, the decision in *Lu-Ann Bakery Shop* is not binding here. Additionally, we previously articulated the reasons why the Reyes affidavit is not credible.

The Petitioner has not provided evidence to establish that the position offered constitutes a *bona fide* job opportunity. The Petitioner cannot meet the burden of proof simply by claiming a fact to be true, without supporting documentary evidence. *See Matter of Chawathe*, 25 I&N Dec. at 369. The Petitioner must support its assertions with relevant, probative, and credible evidence. *Id.* at 376. In this case, the record reflects that Beneficiary was employed in a position to control or influence hiring decisions regarding the offered position; is related to corporate shareholders and directors; was involved in the management of the company during the recruitment process; was a director of the company; and was one of a small group of employees. Based on the totality of these circumstances, Petitioner has not established that the job opportunity is not *bona fide*.

[9] The Beneficiary's brothers are also long-time directors of [redacted]

[10] The cuts appear to have been economic in nature, as the [redacted] affidavit states that [redacted] changed the Beneficiary's focus from textiles to real estate in 2003 because "economic conditions did not warrant initiating full scale textile production in the United States."

The evidence submitted on motion does not demonstrate that our prior decision was legally or factually incorrect based on the record at the time of filing. The Petitioner has not established that the job opportunity was *bona fide*.

IV. CONCLUSION

The evidence in the record does not establish that the Beneficiary met the experience requirements of the labor certification or that the job offered constituted a *bona fide* job opportunity.

ORDER: The motion to reopen is denied.

FURTHER ORDER: The motion to reconsider is denied.

Cite as *Matter of A-B-, Inc.*, ID# 1034192 (AAO July 19, 2018)