U.S. Citizenship and Immigration Services

Non-Precedent Decision of the Administrative Appeals Office

MATTER OF J-D-D-, INC.

DATE: JULY 28, 2017

APPEAL OF TEXAS SERVICE CENTER DECISION

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

The Petitioner, an operator of a franchise restaurant, seeks to employ the Beneficiary as a quality control 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 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.

The Director of the Texas Service Center denied the petition, concluding that the Petitioner did not demonstrate its ability to pay the proffered wage. On appeal, we found evidence that the Beneficiary lacked the minimum experience required for the offered position and that the Petitioner did not intend to employ the Beneficiary in the position. We therefore remanded the matter to the Director for further fact-finding.

After considering the Petitioner's responses to the additional issues raised on remand, the Director denied the petition again. He concluded that the record did not establish the Beneficiary's possession of the minimum required experience, the Petitioner's ability to pay the proffered wage, or the *bona fides* of the job offer. The Director also invalidated the accompanying ETA Form 9089, Application for Permanent Employment Certification (labor certification), finding that the Petitioner and the Beneficiary willfully misrepresented material facts.

Once again before us on appeal, the Petitioner submits additional evidence and asserts the Director's erroneous denial of the petition.

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

I. LAW

Employment-based immigration generally follows a three-step process. First, an employer files a labor certification application with 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). DOL must certify that the United States lacks enough able, willing, qualified, and available workers for an offered position, and that a foreign national's permanent employment will not harm the wages and working conditions of U.S. workers with similar jobs. Section 212(a)(5)(A)(i)(I)-(II) of the Act. If DOL certifies a position, the

employer must then 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 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

A. The Beneficiary's Possession of the Minimum Experience Required for the Offered Position

A petitioner must establish a beneficiary's possession of all the education, training, and experience specified on an accompanying labor certification by a petition's priority date. 8 C.F.R. § 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).

In evaluating a beneficiary's qualifications, we must examine the job offer portion of a labor certification to determine the minimum requirements of an offered position. We may neither ignore a term of the labor certification, nor impose additional requirements. *See K.R.K. Irvine, Inc. v. Landon,* 699 F.2d 1006, 1009 (9th Cir. 1983); *Madany v. Smith,* 696 F.2d 1008, 1012-13 (D.C. Cir. 1983); *Stewart Infra-Red Commissary of Mass., Inc. v. Coomey,* 661 F.2d 1, 3 (1st Cir. 1981).

In this case, the petition's priority date is April 11, 2008. This is the date the DOL accepted the labor certification application for processing. *See* 8 C.F.R. § 204.5(d) (explaining how to determine a petition's priority date). The labor certification states the minimum requirements of the offered position of quality control manager as 48 months of experience in the job offered. The labor certification states that the position requires no training or education. The Petitioner also indicated on the labor certification that it would not accept experience in an alternate occupation.

The labor certification identifies the job duties of the offered position as:

> setting up and directing the dev[e]lopment, execution, and maintenance of quality control standards. Assess and test equipment for quality standards. Will establish and enforce quality control procedures. Will scrutinize, test and evaluate person[n]el[] and work sites to ensure quality control standards are being met. Will direct activities that ensure quality control standards of company are met.

The labor certification states that the Petitioner began employing the Beneficiary as an industrial engineer on October 5, 2005. But because this experience is not if the job offered, the Petitioner does not assert that its employment of the Beneficiary constitutes qualifying experience. Rather, the Petitioner relies on the Beneficiary's claim to possess more than 10 years of qualifying experience with [redacted] as a shift manager of quality control from February 1, 1995, to September 30, 2005.

A petitioner must support a beneficiary's claimed qualifying experience with a letter from an employer. 8 C.F.R. § 204.5(l)(3)(ii)(A). The letter must provide the name, address, and title of the employer, and describe the beneficiary's experience. *Id.*

Here, the Petitioner submitted a March 10, 2005, letter from a human resources manager on the stationery of [redacted] The letter states the company's employment of the Beneficiary since February 1995. Contrary to the Beneficiary's attestation on the labor certification, however, the letter states that [redacted] began employing the Beneficiary in the position of shift manager coordinator, rather than as shift manager of quality control. The letter describes the job duties of the initial position as "assisting in the planning and directing of activities concerned with the development, implementation, application and maintenance of quality control standards with regard to our company's plastic materials." The letter also states that the Beneficiary "evaluated precision and accuracy of production equipment and testing."

On an unspecified date in 2002, the [redacted] letter states that the company promoted the Beneficiary to shift manager of quality control, the position to which he attested on the labor certification. In that position, the letter states the Beneficiary:

> establishes procedures for maintaining high standards of quality and reliability. He determines and enforces quality and safety requirements. [The Beneficiary] develops and initiates standards and methods for inspection, testing and evaluating, utilizing knowledge gained from his previous position as Quality Control Manager. [He] establishes a program to evaluate precision and accuracy of production equipment. He directs activities with regard to the development, implementation and maintenance of quality standards such [as] those concern[ed] by the international specification of [redacted] (production quality controls), [redacted] (production quality controls), [redacted] (environmental quality controls) and [redacted] (2004 new edition of production quality controls).

To possess experience in a job offered, a foreign national must have performed the primary duties of the job opportunity listed on the labor certification. *Matter of Symbioun Techs., Inc.*, 2010-PER-01422, *2 (BALCA Oct. 24, 2011) (citations omitted). Here, the labor certification states the duties of the offered position of quality control manager as: establishing and directing the development, execution, and maintenance of quality control standards; assessing and testing equipment for compliance with standards; establishing and enforcing quality control procedures; and scrutinizing, testing, and evaluating personnel and work sites to ensure compliance with standards.

The [redacted] letter does not establish that the Beneficiary "directed" the development, execution, and maintenance of quality control standards in his initial position of shift manager coordinator. Rather, the letter states that the Beneficiary merely "assisted" in the direction of those activities. The letter also does not indicate that the Beneficiary's initial position included establishing and enforcing quality control procedures, or scrutinizing, testing, and evaluating personnel and work sites. The record

therefore does not establish the Beneficiary's performance of the primary job duties of the offered position as a shift manager coordinator with [redacted] from February 1995 to 2002.

However, the [redacted] letter does establish that the Beneficiary gained experience in the job offered in his later position as shift manager of quality control. But the letter states that the Beneficiary worked in that position from 2002 through March 10, 2005, less than the four-year period specified on the labor certification. The record therefore does not establish the Beneficiary's possession of the minimum experience required for the offered position.

On appeal, the Petitioner submits two additional letters from [redacted] including a 2016 letter from the company's chief executive officer. The additional letters, however, echo [redacted] prior letter and do not establish the Beneficiary's possession of at least four years of experience in the job offered.

The Petitioner also submits a letter from a secretary of an [redacted] stating that the Beneficiary served as "quality controller of chicken" in the collective settlement's chicken hatchery from 1989 to 1993. In this position, the letter states that he vaccinated and sorted chicks, and controlled the quality of eggs.

The [redacted] letter indicates that the Beneficiary enforced quality control standards regarding eggs. However, contrary to the job duties of the offered position stated on the labor certification, the letter does not indicate that he established quality control standards or procedures. The letter also does not indicate that he assessed or tested equipment, or scrutinized, tested, or evaluated personnel and work sites. The [redacted] letter therefore does not establish the Beneficiary's qualifying experience in the job offered.

The Petitioner further submits copies of the Beneficiary's foreign educational credentials and an expert opinion evaluating those credentials. The opinion states that the Beneficiary completed the equivalent of four years of U.S. university studies in Venezuela and one year of U.S. university study in Israel. Combined with his more than 10 years of experience at [redacted] the opinion concludes that the Beneficiary's foreign education equates to a U.S. bachelor's degree in industrial management.

The educational documents and the opinion also do not establish the Beneficiary's qualifying experience in the job offered. The opinion does not discuss the Beneficiary's job duties at [redacted] or indicate that he gained at least four years of experience in the job offered. Also, because the offered position does not require education, the Beneficiary's educational credentials do not establish his qualifications for the job opportunity.

For the foregoing reasons, the record does not establish the Beneficiary's possession of the minimum experience required for the offered position by the petition's priority date. We will therefore affirm the Director's decision and dismiss the appeal.

B. The Petitioner's Ability to Pay the Proffered Wage

A petitioner must demonstrate its continuing ability to pay a proffered wage from a petition's priority date until a beneficiary obtains lawful permanent residence. 8 C.F.R. § 204.5(g)(2). Evidence of ability to pay must include copies of annual reports, federal income tax returns, or audited financial statements. *Id.*

In this case, the labor certification states the proffered wage of the offered position of quality control manager as $56,000 a year. As previously indicated, the petition's priority date is April 11, 2008. The Petitioner submitted copies of its federal income tax returns from 2007 through 2015. The Petitioner's fiscal year runs from October 1 through September 30. We will therefore consider the Petitioner's ability to pay the proffered wage from the petition's priority date of April 11, 2008, to September 30, 2015.

In determining ability to pay, we first examine whether a petitioner paid a beneficiary the full proffered wage each year from a petition's priority date. If a petitioner did not pay a beneficiary the full proffered wage each year, we examine whether it generated sufficient annual amounts of net income or net current assets to pay any differences between the proffered wage and the wages paid. If net income and net current assets are insufficient, we may consider other factors based on the magnitude of its business activities. *See Matter of Sonegawa,* 12 I&N Dec. 612, 614-15 (Reg'l Comm'r 1967).[1]

Here, the Petitioner submitted evidence of its payments to the Beneficiary from calendar years 2008 through 2012. Copies of payroll records and IRS Forms W-2, Wage and Tax Statements, indicate that the Petitioner paid the Beneficiary: $41,597.34 in 2008; $43,742.40 in 2009; $43,742.40 in 2010; and $52,460 in 2011. The Petitioner did not submit a Form W-2 for 2012. However, the payroll records indicate that the Petitioner paid the Beneficiary $46,482.77 that year. None of the annual amounts on the Forms W-2 or payroll records equal or exceed the annual proffered wage of $56,000. These materials therefore do not demonstrate the Petitioner's ability to pay the proffered wage. Thus, the record does not establish the Petitioner's ability to pay the proffered wage in any year based on its payments to the Beneficiary.[2]

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[1] Federal courts have upheld our method of determining a petitioner's ability to pay a proffered wage. *See, e.g., River St. Donuts, LLC v. Napolitano*, 558 F.3d 111, 118 (1st Cir. 2009); *Estrada-Hernandez v. Holder*, 108 F. Supp. 3d 936, 942-43 (S.D. Cal. 2015); *Z-Noorani, Inc. v. Richardson*, 950 F. Supp. 2d 1330, 1345-46 (N.D. Ga. 2013).

[2] If a petitioner documents its payment of wages or generation of income, or assets after a petition's priority date, we may allow it to prorate a proffered wage in a given year. The payroll records document the Petitioner's 2008 payments to the Beneficiary after the petition's priority date of April 11. We may therefore consider the Petitioner's ability that year to pay a prorated proffered wage, the portion of the proffered wage that accrued after the April 11 priority date. The annual proffered wage of $56,000 equals about $1,076.92 a week ($56,000 divided by 52 weeks per year). In 2008, 38 weeks followed the petition's priority date of Friday, April 11. Thus, the prorated proffered wage for 2008 is about $40,923.08 ($1,076.92 multiplied by 38). The Petitioner's 2008 payroll records indicate that, after April 11, it paid the Beneficiary $31,965.60, an amount less than the prorated proffered wage.

Nevertheless, we credit the Petitioner's payments to the Beneficiary. It need only demonstrate annual amounts of net income or net current assets sufficient to pay the annual differences between the proffered wage and the amounts paid to the Beneficiary. Those annual differences are: $14,402.66 in 2008; $12,257.60 in 2009; $12,257.60 in 2010; $3,540.00 in 2011; and $9,517.23 in 2012. Because the record lacks evidence of payments to the Beneficiary after 2012, the Petitioner must demonstrate its ability to pay the full proffered wage of $56,000 in 2013, 2014, and 2015.

Except for one fiscal year, the Petitioner's tax returns reflect negative or $0 amounts of net income. Based largely on the Petitioner's January 27, 2012, sale of the first restaurant it operated, its tax return for fiscal year October 1, 2011, through September 30, 2012, reflects annual net income of $227,751. This amount exceeds the annual difference of $9,517.23 between the proffered wage and the actual wages paid to the Beneficiary in 2012. The record therefore establishes the Petitioner's ability to pay the proffered wage in 2012 based on net income.

The Petitioner's tax returns reflect annual net current asset amounts of: $13,325 in 2007-08; $11,092 in 2008-09; $25,550 in 2009-10; $38,270 in 2010-11; $16,187 in 2011-12; -$675 in 2012-13; -$8,182 in 2013-14; and -$11,597 in 2014-15. The Petitioner's annual net current assets for 2009-10 and 2010-11 exceed the annual differences between the proffered wage and the actual wages paid in 2010 and 2011. The record therefore establishes the Petitioner's ability to pay the proffered wage in 2010 and 2011.

Thus, based on examinations of the Petitioner's payments to the Beneficiary and its annual amounts of net income and net current assets, the record establishes its ability to pay the proffered wage from 2010 through 2012. The record, however, does establish its ability to pay in 2008, 2009, and from 2013 through September 30, 2015.

As previously indicated, we may consider a petitioner's ability to pay a proffered wage beyond its net income and net current assets. Under *Sonegawa*, we may consider such factors as: the number of years a petitioner has conducted business; its number of employees; the growth of its business; its reputation in its industry; the occurrence of uncharacteristic expenses or losses; a beneficiary's replacement of a current employee or outsourced service; or other evidence of a petitioner's ability to pay. *Sonegawa*, 12 I&N Dec. at 614-15.

Here, the record indicates the Petitioner's continuous business operations since 2002 and its employment of eight people in 2010.[3] The Petitioner's 2011-12 tax return, however, reports a significant drop in gross annual revenues, perhaps resulting from its restaurant sale on January 27,

[3] Copies of IRS Forms 941, Employer's Quarterly Federal Tax Returns, state the Petitioner's employment of eight people, including the Beneficiary, in all four quarters of 2010. Contrary to the Forms 941, however, the Petitioner's 2010-11 tax return, which covers the fourth quarter of 2010, states that the Petitioner paid no wages or labor costs. As indicated in our prior appellate decision, the Petitioner's 2010-11 tax return also lists a $122,386 deduction for "payroll services." The record does not indicate whether the payroll services amount includes wages paid. *See Matter of Ho*, 19 I&N Dec. 582, 591-92 (BIA 1988) (requiring a petitioner to resolve inconsistencies of record by independent, objective evidence pointing to where the truth lies).

2012. For 10 of 11 years, the petitioner in *Sonegawa* reported profits. *Sonegawa*, 12 I&N Dec. at 614. In contrast, only one of the Petitioner's annual tax returns over an eight-year period reflects a profit. Also, unlike in *Sonegawa*, the record does not indicate the Petitioner's possession of an outstanding reputation in its industry or its incurrence of uncharacteristic expenses or losses. In addition, the record does not establish the Beneficiary's replacement of a current employee or outsourced service. Thus, consideration of the totality of the circumstances under *Sonegawa* does not establish the Petitioner's ability to pay the proffered wage.

For the foregoing reasons, the record does not establish the Petitioner's continuing ability to pay the proffered wage from the petition's priority date onward. For this additional reason, we will affirm the Director's decision and dismiss the appeal.

C. The *Bona Fides* of the Job Offer

Unless accompanied by an application for Schedule A designation or documentation of a beneficiary's qualifications for a shortage occupation, a petition for a skilled worker must include a valid, individual labor certification. 8 C.F.R. § 204.5(l)(3)(i).

A labor certification remains valid only for the particular job opportunity, the foreign national, and the geographic area of intended employment stated on it. 20 C.F.R. § 656.30(c)(2). The term "area of intended employment" means "the area within normal commuting distance of the place (address) of intended employment" and includes any place within the same metropolitan statistical area (MSA). 20 C.F.R. § 656.3 (defining the term "area of intended employment" for labor certification purposes).

In this case, DOL approved the labor certification for the offered position of quality control manager in Florida. However, the Petitioner sold its first restaurant in in 2012. In a nonimmigrant work visa petition filed for the Beneficiary in 2014, the Petitioner stated that it acquired other franchise restaurants and that the Beneficiary works at its new restaurant outside in Florida. The Petitioner also stated that it operates three restaurants in Florida.

On appeal, the president/director/sole shareholder states that the company operates only one restaurant: the franchise restaurant in The president/director/sole shareholder indicates, and online government records confirm, that he owns the three restaurants through other entities. Thus, the record establishes the Petitioner's intention to employ the Beneficiary at the only restaurant it operates in which is in the same MSA as the original location. Contrary to the Director's decision, therefore, the record establishes the continued validity of the labor certification for the area of intended employment.

The Director also found that the record did not establish the continuing validity of the labor certification for the particular job opportunity. As previously indicated, the job duties of the offered position involve managing quality control at a restaurant. Based on the contents of a standard

franchise agreement of the Petitioner's franchisor, however, the Director found that the franchisor, rather than the Petitioner, manages quality control at the Petitioner's restaurant. The Director also concluded that because the position was for one restaurant, the record did not establish the offered position as a full-time job opportunity.

On appeal, the Petitioner's president/director/sole shareholder states that its franchisor supervises franchisees' quality control managers, but that the Petitioner needs a quality control manager at its restaurant and the standard franchise agreement cited by the Director did not specify the degree of on-site quality control required of franchisees. Moreover, the DOL approved the full-time job opportunity for a single restaurant, and the record lacks evidence that the offered position has materially changed.

For the foregoing reasons, the record on appeal establishes the *bona fides* of the job offer. We will therefore withdraw the Director's contrary finding.

D. Invalidation of the Labor Certification

USCIS may invalidate a labor certification after its issuance upon a finding of "fraud or willful misrepresentation of a material fact involving the labor certification application." 20 C.F.R. § 656.30(d). Substantial evidence must support a labor certification's invalidation. *Sugule v. Frazier*, 639 F.3d 406, 411 (8th Cir. 2011).

Fraud "consist[s] of false representations of a material fact made with knowledge of its falsity and with intent to deceive the other party." *Ortiz-Bouchet v. U.S. Att'y Gen.*, 714 F.3d 1353, 1356 (11th Cir. 2013) (quoting *Matter of G-G-*, 7 I&N Dec. 161, 164 (BIA 1956)). "The representation must also be believed and acted upon by the party deceived to his disadvantage." *Id.* A willful misrepresentation of a material fact includes the same elements as fraud, but does not require intent to deceive or proof of a successful deception. *Id.* at 1356-57 (citing *Matter of Kai Hing Hui*, 15 I&N Dec. 288, 290 (BIA 1975)).

In this case, the Director found evidence of the Petitioner's submission of a false letter in support of the Beneficiary's claimed qualifying experience. The Director questioned the authenticity of the March 10, 2005, letter from [redacted] describing its letterhead as "faded and hard to read." The Director also noted that the record contains different spellings of the company's name: '[redacted]' on the labor certification; and '[redacted]' on the letterhead. The Director concluded that the Beneficiary did not work for [redacted] and that he and the Petitioner willfully misrepresented the Beneficiary's qualifying experience on the labor certification. However, the letter and the labor certification identify [redacted] by the same address, telephone number, and company representative. Also, the company's name on the labor certification appears to be an inadvertent, typographical error that simply omitted the letter [redacted] In addition, as previously discussed, the Petitioner on appeal submits additional letters from [redacted] that corroborate the initial letter. A preponderance of the evidence therefore indicates the letter's authenticity and the Beneficiary's employment by [redacted]

The Director also found that the Petitioner submitted copies of false income tax returns. As previously indicated, the record indicates the Petitioner's payments to the Beneficiary of more than $40,000 a year. The Petitioner's tax returns from 2007-08 through 2009-10 report total annual wages paid of about $100,000. Given the proportion of the Petitioner's total wages paid to the Beneficiary, the Director doubted the Petitioner's ability to pay seven other employees as it claimed. As previously noted, the Petitioner's tax returns contain inconsistencies. *See* n.2. However, even assuming that the Petitioner willfully misrepresented information on the returns, the record does not establish, as 20 C.F.R. § 656.30(d) requires, that the misrepresentations "involv[ed] the labor certification application." The discrepancies on the Petitioner's tax returns therefore do not support invalidation of the labor certification.

The Director also found that the Petitioner misrepresented its relationship to the Beneficiary on the labor certification. In response to question C.9 on the ETA Form 9089, which asks: "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 Petitioner responded "No."

Before the labor certification's filing on April 11, 2008, however, the record establishes that the Petitioner's president/director/sole shareholder married the Beneficiary's sister, began serving as the company's president and director, and acquired all of its stock. Thus, contrary to the Petitioner's response to question C.9 on the labor certification, a familial relationship existed between the Beneficiary and the Petitioner's sole owner and corporate officer.

DOL specifically defines the term "familial relationship" to include "relationships established through marriage, such as in-laws and step-families." DOL, Office of Foreign Labor Certification, "OFLC Frequently Asked Questions and Answers," at https://www.foreignlaborcert.doleta.gov/faqsanswers.cfm (last visited July 25, 2017). DOL, however, did not publish its definition of the term until July 28, 2014, more than six years after the Petitioner filed its labor certification application. Because the meaning of the term "familial relationship" was unclear as of the labor certification's filing, the record does not support the Petitioner's knowing concealment of its relationship to the Beneficiary. In addition, as stated in our prior appellate decision, DOL declined to initiate labor certification revocation proceedings when told of the Petitioner's misrepresentation of the relationship between the Beneficiary and its president/director/sole shareholder. *See* section 204(b) of the Act, 8 U.S.C. § 1154(b) (requiring USCIS to consult with DOL when adjudicating I-140 petitions). The misrepresentation was therefore immaterial.

For the foregoing reasons, the record does not support the invalidation of the labor certification. We will therefore withdraw the Director's contrary finding and reinstate the labor certification's validity.

E. The *Bona Fides* of the Job Opportunity

Although unaddressed by the Director, the record also does not establish the *bona fides* of the job opportunity. USCIS may deny a petition accompanied by a labor certification that violates DOL

regulations. *See Sunoco Energy*, 17 I&N Dec. at 284. DOL regulations require a labor certification employer to 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 provision 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, *X (BALCA 1991) (*en banc*) (referring to the former, identical regulation at 20 C.F.R. § 656.20(c)(8)).

To determine the *bona fides* of a job opportunity, we must weigh various factors. We must consider whether a beneficiary: is in a position to control or influence hiring decisions regarding the offered position; has a familial relationship to a petitioner's director, officer, or employee; incorporated or founded a petitioner; has an ownership interest in it; is involved in its management; sits on its board of directors; is one of a small number of employees; has specialized or unusual qualifications for the offered position; or has personal attributes that, in their absence, would likely cause the petitioner to cease operations. *Modular Container*, at *8. We must also consider a petitioner's compliance with DOL regulations and whether it recruited for the offered position in good faith. *Id.*

In this case, multiple *Modular Container* factors support the Petitioner's attestation that the offered position is clearly available to U.S. workers. The record does not indicate that the Beneficiary: incorporated or founded the Petitioner; has an ownership interest in it; sits on its board of directors; possesses specialized or unusual qualifications for the offered position; or has personal attributes that, in their absence, would likely cause the Petitioner to cease operations.

However, multiple factors also weigh against the *bona fides* of the job opportunity. As previously indicated, the record establishes the Petitioner's president/director/sole shareholder as the Beneficiary's brother-in-law. Thus, the Beneficiary has a familial relationship with the Petitioner's sole owner and corporate officer. In addition, the record indicates the Petitioner's employment of the Beneficiary's father from 2006 to 2007. USCIS records indicate that, in 2004, the Petitioner successfully petitioned the Beneficiary's father to immigrate to the United States. The record also identifies the Beneficiary as one of a small number of employees. As previously discussed, the record indicates that the Beneficiary is one of the Petitioner's eight employees. Thus, multiple *Modular Container* factors indicate that the offered position is not clearly available to U.S. workers.

Determinations regarding the *bona fides* of a job opportunity often turn on whether qualified U.S. workers applied for a position. *See, e.g., Matter of Tyrell Ltd.*, 2012-PER-01920, *5 (BALCA Oct. 21, 2016) (finding the absence of qualified applicants for the offered position to be a "significant" indicator of the *bona fides* of the job opportunity). Here, the Petitioner's president/director/sole shareholder stated that the company received an application for the offered position from only one person, whom the company purportedly rejected because his salary requirements exceeded the proffered wage.[4] Also, in response to our notice of intent to dismiss of November 23, 2012, prior

[4] A labor certification employer may reject an applicant unwilling to work at a proffered wage, but the employer must first document its offer of the position to the applicant at the proffered rate and the applicant's refusal. *See, e.g., Matter of Infosys Ltd.*, 2015-PER-00107, *4 (BALCA Jan. 20, 2017).

counsel asserted that the DOL audited the Petitioner's labor certification application and determined the job opportunity to be *bona fide*.

The record, however, lacks documentation to support the Petitioner's assertions regarding the results of its recruitment and DOL's audit of the application. The record therefore does not establish the Petitioner's compliance with DOL regulations and the good-faith nature of its recruitment efforts.

Neither we nor the Director instructed the Petitioner to submit documentation of its recruitment efforts during the labor certification process. Because the Petitioner did not receive an opportunity to submit this potentially significant evidence, this decision will not express an opinion on the *bona fides* of the job opportunity. In any future filings in this matter, however, the Petitioner must submit documentation of its recruitment efforts during the labor certification process, including copies of: its notice of filing (posting notice); prevailing wage determination; job order filed with a state workforce agency; newspaper advertisements; ads on job search websites; radio or television ads; pursuant to 20 C.F.R. § 656.17(g)(1), its recruitment report; resumes or applications received; and all correspondence with DOL during the labor certification process.

III. CONCLUSION

The record does not support the invalidation of the labor certification and it will be reinstated. Although, the record does establish the *bona fides* of the job offer, it does not establish the Beneficiary's possession of the minimum experience required for the offered position or the Petitioner's ability to pay the proffered wage. We will therefore affirm the Director's decision and dismiss the appeal.

ORDER: The appeal is dismissed.

FURTHER ORDER: The ETA Form 9089, case number [redacted] is reinstated.

Cite as *Matter of J-D-D-, Inc.*, ID# 430616 (AAO July 28, 2017)