U.S. Citizenship and Immigration Services

Non-Precedent Decision of the Administrative Appeals Office

MATTER OF R-USA, LLC

DATE: JULY 30, 2019

APPEAL OF TEXAS SERVICE CENTER DECISION

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

The Petitioner, a manager of residential and commercial properties, seeks to employ the Beneficiary as operations manager. It requests his classification under the third-preference, immigrant category as a skilled worker. Immigration and Nationality Act (the Act) section 203(b)(3)(A)(i), 8 U.S.C. § 153(b)(3)(A)(i). This employment-based, "EB-3" category allows a U.S. business to sponsor a foreign national for lawful permanent resident status to work in a job requiring at least two years of training or experience.

The Director of the Texas Service Center denied the petition and the Petitioner's following motions to reopen and reconsider. Finding that the Petitioner willfully concealed the Beneficiary's ownership interest in the company, the Director invalidated the accompanying certification from the U.S. Department of Labor (DOL).

On appeal, the Petitioner submits additional evidence and denies that its labor certification application misrepresented its relationship with the Beneficiary. The Petitioner asserts that, by the application's filing, the Beneficiary no longer owned part of the company.

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

I. THE EMPLOYMENT-BASED IMMIGRATION PROCESS

Immigration as a skilled worker generally follows a three-step process. To permanently employ a foreign national in the United States, a prospective employer must first obtain DOL certification of the job opportunity. *See* section 212(a)(5)(A)(i) of the Act, 8 U.S.C. § 1182(a)(5)(A)(i). DOL certification signifies that the country lacks able, willing, qualified, and available U.S. workers for a position and that employment of a foreign national would not hurt the wages or working conditions of U.S. workers with similar jobs. *Id.*

If DOL approves a position, an 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. Among other things, USCIS determines whether a beneficiary meets the DOL-certified job requirements of a position and the criteria of the requested immigrant classification. If USCIS

approves a petition, a 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.

II. 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 petition for a skilled worker 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 application." 20 C.F.R. § 656.30(d).

A willful misrepresentation of a material fact involves: 1) a false representation to an authorized U.S. government official, *Matter of Y-G-*, 20 I&N Dec. 794, 796 (BIA 1994); 2) that was "deliberately made with knowledge of [its] falsity," *Matters of Valdez*, 27 I&N Dec. 496, 498 (BIA 2018); and 3) has a "natural tendency to influence, or [be] capable of influencing, the decision of the decision-making body." *Id.* (citations omitted).

A. Misrepresentation

Here, the Director found that the Petitioner misrepresented its relationship to the Beneficiary when it filed the accompanying labor certification application in December 2014. Part C.9 of the application form 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?" The Petitioner indicated: "No."

The Petitioner states that the Beneficiary formerly owned 15% of the limited liability company (LLC).[1] But the Petitioner asserts that, in January 2014, almost a year before the filing of the labor certification application, the Beneficiary assigned his ownership interest to the company's two other members, increasing their ownership shares to 50% each. The Petitioner therefore contends that, as of the filing of the labor certification application, it truthfully indicated that the Beneficiary did not own it.

As noted in the Director's notice of intent to deny (NOID) the petition, however, the Petitioner's corporate annual reports for 2014 and 2015 suggest that the Beneficiary retained ownership in the LLC beyond January 2014. The reports bear the Beneficiary's electronic signatures and identify him as the company's registered agent and sole manager. *See Matter of Ho*, 19 I&N Dec. 582, 591 (BIA 1988) (requiring a petitioner to resolve inconsistencies of record by independent, objective evidence pointing to where the truth lies).

[1] The Petitioner states that the Beneficiary controlled another LLC that held the ownership interest. For labor certification purposes, however, a foreign national's ownership of an employer includes indirect ownership through another company. *See Matter of Modular Container Sys., Inc.*, 89-INA-228, 1991 WL 223955, *5 (BALCA July 16, 1991) (*en banc*) (finding that a foreign national's control of a parent company of a labor certification employer constituted an ownership interest in the employer).

The Petitioner contends that its annual reports identifying the Beneficiary as a manager are mistaken. The Petitioner claims that, until receiving the NOID in March 2016, it did not know that the reports identified the Beneficiary as its manager. The record, however, does not explain how company officials remained unaware of the contents of its required, annual reports. *See* Fla. Stat. § 605.0212(6) (stating that an LLC that fails to file an annual report pursuant to Florida regulations risks dissolution and may not maintain or defend lawsuits in the state). Like the Petitioner, the Beneficiary described the corporate reports as "incorrect." But he did not explain why he would have signed reports that falsely identified him as the LLC's sole manager. *See* Fla. Stat. § 605.0205(3) (stating that an individual who signs a required record affirms the accuracy of its information under penalty of perjury).

The Petitioner submitted copies of correction statements and an amendment to its articles of organization that it filed with Florida authorities in May 2016. The filings remove the Beneficiary's listing as the LLC's manager in 2014 and 2015, and indicate that its current manager then held that role. The Petitioner therefore asserts that the filings demonstrate the termination of the Beneficiary's ownership in January 2014.

The 2016 state filings, however, do not establish the Beneficiary's purported divestiture of ownership in 2014. They lack copies of the Beneficiary's purported assignments of his ownership interests or other evidence of such transactions. Without contemporaneous evidence of the purported assignments, the record does not establish the Beneficiary's termination of ownership in the Petitioner before the filing of the labor certification application. *See Matter of Int'l Dadlani, Inc.*, 90-INA-476, 1992 WL 116336, *3 (BALCA May 20, 1992) (finding assertions that a foreign national sold his ownership interest in an employer before the filing of its certification application insufficient to overcome his identification as the company's sole owner on its income tax returns).[2] Also, the Petitioner delayed filing state amendments until after its receipt of the NOID. The timing suggests that the Petitioner submitted the documentation for immigration purposes in an attempt to refute the Beneficiary's continued ownership of the company. *See Matter of Ho*, 19 I&N Dec. at 591 (holding that doubt cast on any aspect of a petitioner's proof may lead to a reevaluation of the reliability and sufficiency of remaining evidence).

The Petitioner also submitted a copy of an operating agreement, purportedly effective on January 2, 2014, omitting the Beneficiary as a manager. But public records indicate that, even after purportedly transferring his ownership interests in the Petitioner in January 2014, the Beneficiary participated in its business transactions. *See* Fla. Div. of Corps., "Search Records," http://dos.myflorida.com/sunbiz/search/ (last visited June 28, 2019). On June 1, 2015, and October 12, 2015, the Beneficiary signed articles of organization creating separate LLCs that the Petitioner managed. *Id.* Thus, the Beneficiary's role in creating these LLCs for the Petitioner in 2015 cast doubts on the authenticity of the operating agreement and the Beneficiary's claimed termination of his company ownership in January 2014. *See Matter of Ho*, 19 I&N Dec. at 591 (holding that doubt cast on any aspect of a petitioner's proof may lead to a reevaluation of the reliability and sufficiency of remaining evidence).

[2] Decisions of the Board of Alien Labor Certification Appeals (BALCA) do not bind us. *See* 8 C.F.R. § 103.10(b) (stating that Department of Homeland Security officers and employees must follow precedent decisions of the Board of Immigration Appeals and U.S. Attorney General). We may, however, find BALCA opinions persuasive.

For the foregoing reasons, the record does not demonstrate the Beneficiary's divestiture of ownership in the Petitioner by the filing of the labor certification application. The record therefore does not establish the Petitioner's truthful description of its relationship to the Beneficiary on the certification.

B. Materiality

A misrepresentation is material if it tends to shut off a relevant line of inquiry that would predictably have disclosed other facts relevant to eligibility for an immigration benefit. *Matter of D-R-*, 27 I&N Dec. 105, 113 (BIA 2017). Here, the relevant inquiry is whether the job offer was *bona fide*. 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 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*, 1991 WL 223955 at *7 (referring to the former, identical regulation at former 20 C.F.R. § 656.20(c)(8)).

To determine the *bona fides* of a job opportunity, an adjudicator must weigh several factors, including, but not limited to, whether the foreign national: is in a position to control or influence hiring for the offered position; has family relationships to company directors, officers, or employees; incorporated or founded the company; has an ownership interest in the company; manages the company; is one of a small group of employees; meets specialized or unusual job requirements of the position; and is so inseparable from the company that it would likely cease operations in his or her absence. *Id.* at *8. An adjudicator must also consider the level of a petitioner's compliance with DOL regulations and good faith in recruiting for the offered position. *Id.*

Here, the Petitioner submitted evidence showing that DOL reviewed documentation of the Petitioner's recruitment efforts for the offered position and found that the company properly rejected all 20 U.S. applicants for the position as unqualified.[3] The Petitioner's compliance with DOL regulations and its good-faith recruitment for the offered position therefore weigh in favor of the *bona fides* of the job opportunity. These factors alone, however, do not determine the position's availability to U.S. workers. *See, e.g., Matter of Universal Trading & Consultation, Inc.*, 2012-PER-03321, 2017 WL 1065656 (BALCA Mar. 13, 2017) (holding that a job opportunity was not *bona fide* even in the absence of U.S. applicants).

The Petitioner asserts that, even if DOL had known of the Beneficiary's prior ownership interest in the company, the *Modular Container* factors as of the filing of the labor certification application demonstrate the *bona fides* of the job opportunity. As discussed above, however, the record does not establish the Beneficiary's divestiture of ownership in the Petitioner by the application's filing. Therefore, contrary to the Petitioner's assertion, multiple *Modular Container* factors indicate that the position was not clearly open to U.S. workers. As of the application's filing, the record indicates

[3] The current labor certification process is an electronic, attestation-based program, designed to favor administrative efficiency. *Matter of HealthAmerica*, 2006-PER-00001, 2006 WL 5040202 (BALCA July 18, 2006) (*en banc*). The DOL, however, may "audit" an application, requesting recruitment documentation to review for compliance with regulations. 20 C.F.R. § 656.20(a).

that the Beneficiary had an ownership interest in the Petitioner and managed the LLC, which, on the Form I-140, indicated its employment of only two employees. These factors indicate that the Beneficiary was in a position to control or influence hiring for the offered position. The record also contains evidence that the Beneficiary founded the Petitioner. On appeal, the Petitioner submits an "expert opinion" from an attorney stating that the Beneficiary owned 15% of the company when it formed in March 2012.

Contrary to the Petitioner's assertion, the record does not establish the *bona fides* of the offered job opportunity. Thus, the Petitioner's concealment of the Beneficiary's ownership interest shut off a line of inquiry that would predictably have disclosed other facts affecting the approvability of the labor certification application. Falsely answering "no" to C.9 on the application deprived DOL of an opportunity to scrutinize the availability of the job opportunity to U.S. workers. The misrepresentation was therefore material

C. Willfulness

The record also demonstrates the willfulness of the Petitioner's misrepresentation on the labor certification. Company officials "are presumed to be aware and informed of the organization and staff of their enterprise." *Matter of Silver Dragon Chinese Rest.*, 19 I&N Dec. 401, 405 (Comm'r 1986). The Petitioner therefore presumably knew of the Beneficiary's ownership interest in it when it filed the labor certification. *See Matters of Valdez*, 27 I&N Dec. at 499 (holding that a signature on an immigration-related form establishes a "strong presumption" that the signatory knew the form's contents and assented to them) (citation omitted).

III. CONCLUSION

The record supports the Director's finding that the Petitioner willfully misrepresented a material fact on the labor certification. We will therefore affirm the Director's invalidation of the labor certification and denial of the petition. Contrary to section 291 of the Act, 8 U.S.C. § 1361, the Petitioner has not demonstrated its eligibility for the requested benefit.

ORDER: The appeal is dismissed.

Cite as *Matter of R-USA, LLC*, ID# 1067769 (AAO July 30, 2019)