U.S. Citizenship and Immigration Services

Non-Precedent Decision of the Administrative Appeals Office

MATTER OF D-O- LLC

DATE: JUNE 7, 2018

APPEAL OF TEXAS SERVICE CENTER DECISION

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

The Petitioner, a designer, importer, and distributor of digital billboards and electronic signs, seeks to employ the Beneficiary as an electrical engineer. 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. § 1153(b)(3)(A)(i). This employment-based, "EB-3" category allows a U.S. business to sponsor a foreign national with at least two years of training or experience for lawful permanent resident status.

The Director of the Texas Service Center denied the petition. Finding that the Petitioner willfully concealed the Beneficiary's ownership interest in the company, the Director invalidated the accompanying labor certification from the U.S. Department of Labor (DOL). The Director also concluded that the Petitioner did not demonstrate its required ability to pay the proffered wage.

On appeal, the Petitioner submits additional evidence and denies that the Beneficiary owned part of the company as of the filing of the labor certification application. The Petitioner also contends that its amended federal income tax returns establish its ability to pay the proffered wage.

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

I. EMPLOYMENT-BASED IMMIGRATION

Employment-based immigration generally follows a three-step process. To permanently fill a position in the United States with a foreign worker, an employer must first obtain DOL certification. *See* section 212(a)(5)(A)(i) of the Act, 8 U.S.C. § 1182(a)(5)(A)(i). DOL approval signifies that insufficient U.S. workers are able, willing, qualified, and available for a position, and that employment of a foreign national will not harm wages and working conditions of U.S. workers with similar jobs. *Id.*

If the DOL certifies a position, an employer must next submit the labor 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 considers whether a beneficiary meets the minimum requirements of a certified position and whether a petitioner can pay the certified proffered wage. 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. THE VALIDITY OF THE LABOR CERTIFICATION

Unless accompanied by an application for Schedule A designation or documentation of a beneficiary's eligibility 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 labor certification after its issuance upon finding fraud or willful misrepresentation of a material fact involving the labor certification application. 20 C.F.R. § 656.30(d).

Fraud "consist[s] of a false representation 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, except that a willful misrepresentation 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)). A misrepresentation is material if it tended to shut off a relevant line of inquiry that would have predictably disclosed other facts affecting eligibility for a benefit request. *Matter of D-R-*, 27 I&N Dec. 105, 113 (BIA 2017).

Here, the labor certification, filed June 9, 2014, asked the Petitioner if it is "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 answered "No." Copies of its federal income tax returns, however, identify the Beneficiary as the minority owner of the two-member, limited liability company (LLC). The Petitioner's 2014 tax returns list the Beneficiary as a partner with 10 percent share of profit, loss, and capital. The Beneficiary's share rose to 15 percent in 2015 and 20 percent in 2016. The Director therefore found that the Petitioner willfully misrepresented the Beneficiary's ownership interest on the labor certification.

On appeal, the Petitioner denies that it concealed the Beneficiary's relationship to the company. As of the filing of the labor certification application in June 2014, the Petitioner asserts that the Beneficiary was not an owner of the . The Petitioner submitted an "Amended & Reinstated Operating Agreement" reflecting the Beneficiary's admission as a "Member," or owner, of the LLC in 2015. Although the agreement describes the Beneficiary's membership as retroactive to 2014, the Petitioner argues that the Beneficiary did not acquire ownership until 2015, after the filing of the labor certification application in June 2014. The Petitioner also submitted evidence of the Beneficiary's amended federal income tax returns for 2014, which he filed in December 2015. The amended returns reflect additional income the Beneficiary received for 2014, purportedly from his retroactive LLC membership.

In corporate records filed before the issuance of the amended and reinstated operating agreement, however, the Petitioner identified the Beneficiary as a "Manager" of the company. The Petitioner

added the Beneficiary as a manager by amending its articles of organization in [redacted] 2013. *See* Fla. Dep't of State, Div. of Corps., http://search.sunbiz.org/Inquiry/CorporationSearch/ByName (last visited Apr. 25, 2018). In April 2014 and January 2015, the Petitioner also filed annual reports, certifying that the Beneficiary remained a company manager. Under Florida law, a manager has or shares responsibility for managing an LLC's activities and affairs, and may be a member. Fla. Stat. §§ 605.0407(3), 605.0472(2).

The Petitioner has not discussed whether the Beneficiary, as its manager, was also a member of the LLC before the issuance of the amended and reinstated operating agreement in [redacted] 2015. Further, the Petitioner has not explained why its company tax returns listed the Beneficiary as a minority owner in 2014, if the Beneficiary was not admitted as a member or owner until August 2015. *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). The record therefore does not establish that the Beneficiary lacked ownership in the Petitioner as of the filing of the labor certification application in June 2014.

Moreover, even if the Beneficiary lacked an ownership interest in the Petitioner as of the filing of the labor certification application, Florida records indicate that, as the LLC's manager, he was a "corporate officer" of the company. *See, e.g., Matter of Kim & Lee Oriental LLC*, 2012-PER-02779, 2017 WL 2414312 *5 (BALCA May 26, 2017) (finding that names of an LLC's managing members satisfied the DOL's request for a list of corporate officers). Thus, contrary to the Petitioner's response on the labor certification application, the record indicates that a family relationship existed between the Beneficiary and a corporate officer of the company, as the Beneficiary himself served as an officer. The record therefore supports the Director's finding of a misrepresentation on the labor certification.

The record also establishes the willfulness of the misrepresentation. As previously discussed, before the filing of the labor certification application, the Petitioner described the Beneficiary as the LLC's manager in multiple corporate documents. *See also Matter of Silver Dragon Chinese Rest.*, 19 I&N Dec. 401, 404 (Comm'r 1988) (holding that "the officers and principals of a corporation are presumed to be aware and informed of the organization and staff of their enterprise"). The Petitioner therefore knew of the falsity of its representation on the labor certification application.

The Petitioner argues that the Beneficiary's relationship to the company was immaterial to the labor certification's approval. The Petitioner provided copies of its recruitment documentation during the labor certification process and notes that all four U.S. workers who applied for the offered position lacked requisite experience in the job offered.

The record, however, does not establish the Petitioner's good-faith recruitment for the offered position. The offered occupation of electrical engineer usually requires a minimum of a bachelor's degree. *See* 20 C.F.R. § 656.3 (defining the term "professional occupation"); *see also* DOL, *Final Rule for the Permanent Employment of Foreign Nationals in the United States*, App'x A, 69 Fed. Reg. 77326, 77377 (Dec. 27, 2004) (listing occupations that customarily require a baccalaureate degree or higher). Contrary to DOL regulations, however, the Petitioner indicated that the offered

position was not a professional occupation and did not undertake additional recruitment steps. *See* 20 C.F.R. § 656.17(e)(1)(ii) (requiring an employer offering a professional position to select three recruitment steps in addition to newspaper advertisements, a job order, and a notice of filing).

Moreover, the nature of a petitioner's recruitment efforts is but one factor in determining the availability of an offered position to U.S. workers. *See Matter of Modular Container Sys., Inc.*, 89-INA-00228, 1991 WL 223955 *8 (BALCA July 16, 1991) (*en banc*) (listing other factors, including whether a foreign national: has family relationships with a company's directors, officers, or employees; founded the company; participates in its management; is one of a small number of employees; or has qualifications matching specialized job duties or requirements of an offered position). Even where advertisements do not generate any applicants for a job opportunity, the Board of Alien Labor Certification Appeals (BALCA) may find a position not clearly open to U.S. workers. *See Matter of Johnman U.S.A., Inc.*, 2012-PER-03149, 2016 WL 6301766 *8 (BALCA Oct. 21, 2016).

Here, multiple *Modular Container* factors indicate that the job opportunity was not *bona fide*. Besides the Petitioner's violation of DOL recruitment regulations and the Beneficiary's relationship to the company, the record identifies the Beneficiary as one of only seven employees. As "manager" of the LLC, he also shared responsibility for the company's management. In addition, the labor certification states that the offered position requires a candidate who is "Expert using Linsn, DBStar, NOVA, and Xixun operating systems, and must be fluent in English, Chinese, and/or Spanish." The Beneficiary's qualifications therefore meet specialized job duties and required skills of the position.

Thus, multiple *Modular Container* factors indicate that the offered position was not clearly open to U.S. workers. The Beneficiary's ownership interest in the Petitioner and/or his status as a company officer was therefore a material factor that predictably would have affected the labor certification decision.

For the foregoing reasons, the record supports the Director's finding that the Petitioner willfully misrepresented a material fact on the accompanying labor certification. The Director therefore properly invalidated the labor certification and denied the petition for lack of a valid labor certification.

III. 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.[1] 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.*

[1] This petition's priority date is June 9, 2014, the date the DOL accepted the accompanying labor certification application for processing. *See* 8 C.F.R. § 204.5(d) (explaining how to determine a petition's priority date).

Here, the labor certification states the proffered wage of the offered position of electrical engineer as $116,667 a year. As of the appeal's filing, required evidence of the Petitioner's ability to pay in 2017 was not yet available. We will therefore consider the Petitioner's ability to pay only from 2014 through 2016.

In determining ability to pay, USCIS examines whether a petitioner paid a beneficiary a full proffered wage each year from a petition's priority date. If a petitioner did not annually pay a full wage, USCIS examines whether it generated annual amounts of net income or net current assets sufficient to pay any differences between a proffered wage and the wages paid. If net income and net current assets are insufficient, USCIS may consider other factors affecting a petitioner's ability to pay a proffered wage. *See Matter of Sonegawa,* 12 I&N Dec. 612 (Reg'l Comm'r 1967).[2]

The Petitioner submitted copies of IRS Forms W-2, Wage and Tax Statements. The forms indicate that it paid the Beneficiary $62,000.12 in 2014, $65,000.10 in 2015, and $87,500.12 in 2016. The Petitioner's president/managing member stated that the company also paid the Beneficiary "living expenses" of $19,257 in 2014, $33,313 in 2015, and $20,095 in 2016. The record, however, lacks documentary evidence of these claimed payments. Without corroboration, the Petitioner has not established its claimed annual payments of the Beneficiary's living expenses. We will therefore not consider them.

The annual amounts on the Forms W-2 do not equal or exceed the proffered wage of $116,667. Based solely on the Petitioner's payments to the Beneficiary, the record therefore does not establish its ability to pay the proffered wage. Nevertheless, we credit the Petitioner's payments to the Beneficiary. It need only demonstrate its ability to pay the differences between the annual proffered wage and the amounts it paid the Beneficiary, or $54,666.88 in 2014, $51,666.90 in 2015, and $29,166.88 in 2016.

Although reflecting a negative amount of net income, the Petitioner's federal income tax returns for 2014 indicate net current assets of $101,189. This amount exceeds the $54,666.88 difference between the proffered wage and the wages paid. Based on the Petitioner's net current assets, the record therefore establishes its ability to pay the proffered wage in 2014.

The Petitioner's federal income tax returns for 2015 and 2016 reflect negative amounts of net income and net current assets. The returns therefore do not establish the Petitioner's ability to pay the proffered wage in those years. Thus, based on examinations of the Petitioner's payments to the Beneficiary, its net income, and its net current assets, the record does not establish its continuing ability to pay the proffered wage.

On appeal, the Petitioner submits copies of amended tax returns for 2015 and 2016, filed in July 2017. Unlike the original returns, the amended versions reflect amounts of net current assets in 2015

[2] Federal courts have upheld USCIS' method of determining a petition's ability to pay a proffered wage. *See, e.g., River St. Donuts, LLC v. Napolitano,* 558 F.3d 111, 118 (1st Cir. 2009).

and 2016 exceeding the annual differences between the proffered wages and the wages paid to the Beneficiary. The Petitioner therefore argues that the amended returns establish its ability to pay the proffered wage.

Both the original and amended returns reflect the same total amounts of liabilities on Schedule L of IRS Form 1065, U.S. Return of Partnership Income. The Schedules L on the amended returns, however, indicate decreased amounts of "Accounts payable," which are current liabilities, and increased amounts of "Other liabilities," which are non-current liabilities. The amended returns attribute the increases in non-current liabilities to loans received from another company.

The information on the Petitioner's amended tax returns for 2015 and 2016 is unreliable. The record lacks documentary evidence of the loans to the Petitioner and its claimed reductions in accounts payable. Also, the record does not explain why the original returns omitted the loans and overstated the accounts payable. *See Matter of Ho*, 19 I&N Dec. at 591 (requiring a petitioner to resolve inconsistencies of record by independent, objective evidence pointing to where the truth lies). We will therefore not credit the information on the Petitioner's amended returns.

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

Here, the record indicates the Petitioner's continuous business operations since 2012 and its employment of seven people. Also, copies of its income tax returns from 2014 through 2016 reflect growing annual amounts of revenues and wages paid. The Petitioner's tax returns, however, reflect losses in two of the three years for which returns were submitted. The petitioner in *Sonegawa* reported a loss in only one of its last ten tax years. Also unlike the petitioner in *Sonegawa*, the Petitioner here did not demonstrate its incurrence of uncharacteristic losses or expenses, or its possession of an outstanding reputation in its industry. In addition, the record does not indicate the Beneficiary's replacement of a current employee or outsourced service. Thus, a totality of circumstances under *Sonegawa* does not establish the Petitioner's ability to pay.

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.

IV. THE REQUIRED EXPERIENCE

Although unaddressed by the Director, the record also does not establish the Beneficiary's possession of the minimum experience required for the offered position. A petitioner must establish a beneficiary's possession, by a petition's priority date, of all DOL-certified job requirements. *Matter of Wing's Tea House*, 16 I&N Dec. 158, 160 (Acting Reg'l Comm'r 1977). In evaluating a

beneficiary's qualifications, USCIS must examine the job offer portion of an accompanying labor certification to determine the minimum requirements of an offered position. USCIS may neither ignore a certification term, nor impose additional requirements. *See, e.g., Madany v. Smith*, 696 F.2d 1008, 1015 (D.C. Cir. 1983) (holding that the "DOL bears the authority for setting the *content* of the labor certification") (emphasis in original).

Here, the labor certification states that the offered position of electrical engineer requires a U.S. bachelor's degree or a foreign equivalent degree in electrical engineering or computer science, and three years of experience in the job offered. The Petitioner stated on the labor certification that it will not accept experience in an alternate occupation.

Experience in a job offered means experience performing the primary duties of an offered position. *Matter of Symbioun Techs., Inc.*, 2010-PER-01422, 2011 WL 5126284 *2 (BALCA Oct. 24, 2011) (citations omitted). The labor certification here states the primary duties of the offered position as: evaluating electrical systems, products, components, and applications; designing research programs and applying knowledge of electricity and materials; developing electrical products; studying customer requirements; researching and testing manufacturing and assembly methods and materials; assuring product quality; designing electrical testing methods; and testing finished products and system capabilities.

On the labor certification, the Beneficiary attested that, before beginning work for the Petitioner in the offered position in December 2012, he gained more than five years of related experience.[3] The Beneficiary stated the following employment:

- About 12 months as an electrical engineer for a commercial display and sign business in the United States, from December 2011 to December 2012;
- About 20 months as an overseas service engineer for a commercial display and sign business in China, from May 2010 to January 2012;
- About 13 months as an overseas service engineer for a semiconductor company in China, from June 2008 to July 2009; and
- About two years as a key account manager for an auto diagnostic and testing equipment company in China, from June 2006 to June 2008.

The Beneficiary stated that all of his experience was full-time, except for his 12-month stint in the United States. In that position, he indicated that he worked 28 hours a week. For labor certification purposes, part-time employment equates to half the value of full-time employment. *See Matter of Cable Television Labs., Inc.*, 2012-PER-00449, 2014 WL 5478115 *2 (BALCA Oct. 23, 2014) (finding that 16 months of part-time employment equated to eight months of full-time employment). The

[3] A labor certification employer cannot rely on experience that a foreign national gained with it, unless he or she obtained the experience in a position substantially different than the job offered, or the employer can demonstrate the impracticality of training a U.S. worker for the offered position. 20 C.F.R. § 656.17(i)(3). The Petitioner here does not assert that the Beneficiary gained qualifying experience with it.

Beneficiary's 12-month period of part-time experience therefore equates to six months of full-time experience.

As evidence of the Beneficiary's claimed experience, the Petitioner submitted letters from three of the Beneficiary's four former employers. *See* 8 C.F.R. § 204.5(l)(3)(ii)(A) (requiring a petitioner to support a beneficiary's claimed experience with letters from former employers). The letters cover the Beneficiary's experience from June 2008 to December 2012. None of the letters, however, establish the Beneficiary's experience with the primary job duties of the offered position.

The letter from the Beneficiary's former U.S. employer states his former duties as: "Hardware and software product design;" "Manufacturing and assembly quality control;" and "Customer technical support." Contrary to the primary duties of the offered position stated on the labor certification, the letter does not establish that the Beneficiary: evaluated electrical systems, products, components, and applications; designed research programs and applied knowledge of electricity and materials; developed electrical products; studied customer requirements; researched and tested manufacturing and assembly methods and materials; assured product quality; designed electrical testing methods; and tested finished products and system capabilities.

Similarly, the letters from the Beneficiary's former employers in China are not detailed enough to establish his performance of the offered position's primary duties. One letter describes his former duties as: "Overseas customer project management;" "Overseas customer technical training and support;" and "Overseas market analysis and product development." The other letter states his former duties as: "Understand customer's application and recommend SoC solutions;" "Follow up with R&D team for custom orders;" and "Follow up with customer for new product development."

The three letters from the Beneficiary's former employers establish his experience with Linsn, DBStar, NOVA, and Xixun operating systems as stated on the labor certification. But none of the letters describe his capabilities as "Expert" as the labor certification requires. The record therefore does not establish the Beneficiary's qualifications for the offered position.

V. CONCLUSION

The record on appeal supports the invalidation of the accompanying labor certification and does not establish the Petitioner's continuing ability to pay the proffered wage from the petition's priority date onward. The record also does not demonstrate the Beneficiary's possession of the required experience. We will therefore affirm the Director's decision.

ORDER: The appeal is dismissed.

Cite as *Matter of D-O- LLC*, ID# 1281346 (AAO June 7, 2018)