U.S. Citizenship and Immigration Services

Non-Precedent Decision of the Administrative Appeals Office

MATTER OF U- CORP.

DATE: JUNE 14, 2017

APPEAL OF TEXAS SERVICE CENTER DECISION

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

The Petitioner, an owner and operator of a retail market, seeks to permanently employ the Beneficiary as an assistant retail manager. It seeks classification of the Beneficiary as a skilled worker under the third preference immigrant classification. *See* Immigration and Nationality Act (the Act) section 203(b)(3)(A)(i), 8 U.S.C. § 1153(b)(3)(A)(i). This classification allows a U.S. employer to sponsor a foreign national for lawful permanent resident status to work in a position requiring at least two years of training or experience.

The Director of the Texas Service Center initially approved the petition but later revoked its approval. The Petitioner appealed the revocation to our office and we withdrew the revocation decision and remanded the matter. Next, the Director again revoked the petition's approval, concluding that the Petitioner willfully misrepresented the availability of the offered position to U.S. workers on the accompanying labor certification, based on the Beneficiary's relationship to one of the Petitioner's principals.

Once again on appeal, the Petitioner asserts that, despite a familial relationship between one of the Petitioner's owners/corporate officers and the Beneficiary, the job opportunity was clearly available to U.S. workers.

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

I. LAW AND ANALYSIS

A. Notice of Intent to Revoke

U.S. Citizenship and Immigration Services (USCIS) may revoke a petition's approval "at any time" for "good and sufficient cause." Section 205 of the Act, 8 U.S.C. § 1155. A director's realization that a petition was erroneously approved may constitute good and sufficient cause for revocation if supported by the record. *Matter of Ho*, 19 I&N Dec. 582, 590 (BIA 1988).

USCIS properly issues a notice of intent to revoke if the record at the time of the notice's issuance, if unexplained and unrebutted, would have warranted the petition's denial. *Matter of Estime*, 19 I&N Dec. 450, 451 (BIA 1987). Similarly, a petition's approval is properly revoked if the record at the

time of the notice's issuance, including any rebuttal evidence or explanation submitted by a petitioner, warranted a petition's denial. *Id.* at 452.

In this case, the record indicates the Director's proper issuance of the notice of intent to revoke (NOIR). The notice stated evidence that the Beneficiary's brother was a shareholder of the petitioning corporation.

A petition for a skilled worker must be accompanied by a valid, individual labor certification, an application for Schedule A designation, or evidence of a beneficiary's qualifications for a shortage occupation. 8 C.F.R. § 204.5(l)(3)(i). A special relationship between a petitioner and a beneficiary is a material fact, the misrepresentation of which may lead to the invalidation of a labor certification. *Matter of Silver Dragon Chinese Rest.*, 19 I&N Dec. 401, 404 (Comm'r 1986).

Therefore, the record at the time of the NOIR's issuance, if unexplained and unrebutted, would have warranted the petition's denial.

B. Invalidation of the Labor Certification and the *Bona Fides* of the Job Opportunity

As previously indicated, a petition for a skilled worker must be accompanied by a valid, individual labor certification, application for Schedule A designation, or documentation of a beneficiary's qualifications for a shortage occupation. 8 C.F.R. § 204.5(l)(3)(i). USCIS may invalidate an individual labor certification after its issuance "upon a determination . . . of fraud or willful misrepresentation of a material fact involving the labor certification." 20 C.F.R. § 656.30(d) (2004).[1]

A willful misrepresentation of a material fact requires a deliberate and voluntary misrepresentation made with knowledge of its falsity. *Toribio-Chavez v. Holder*, 611 F.3d 57, 63 (1st Cir. 2010). A misrepresentation is material if it "had a natural tendency to influence" the government's decisions. *Id.* (citing *Kungys v. United States*, 485 U.S. 759, 772 (1988)).

Here, the Petitioner attested on the accompanying labor certification, which was filed on August 23, 2001, that "[t]he job opportunity has been and is clearly open to any qualified U.S. worker." *See* former 20 C.F.R. § 656.20(c)(8) (requiring a labor certification employer to certify that "[t]he job opportunity has been and is clearly open to any qualified U.S. worker").

However, the Petitioner concedes that the signatory of its portion of the labor certification and its Form I-140, Immigrant Petition for Alien Worker, is the Beneficiary's brother. It also concedes that

[1] The Petitioner filed the accompanying Form ETA 750, Application for Alien Employment Certification (labor certification), approved by the U.S. Department of Labor (DOL), before March 28, 2005. Thus, the DOL's prior regulations govern the labor certification. *See* Final PERM Rule, 69 Fed. Reg. 77326, 77326 (Dec. 27, 2004) (stating a March 28, 2005, effective date for the current regulations). We therefore cite to DOL regulations at 20 C.F.R. § 656, *et seq.*, as they existed in 2004.

the Beneficiary's brother was and remains its corporate treasurer/director and the owner of 50 percent of its capital stock.

Under former 20 C.F.R. §§ 626.20(c)(8) and 656.3, a petitioner bears the burden when asked to show that a *bona fide* job opportunity is available to U.S. workers. *See Matter of Amger Corp.*, 87-INA-545, 1987 WL 341738 (BALCA 1987) (*en banc*). A relationship invalidating a *bona fide* job offer may arise where a beneficiary is related to a petitioner by "blood" or where the relationship is "financial, by marriage, or through friendship." *See Matter of Sunmart 374*, 00-INA-93, 2000 WL 707942 (BALCA May 15, 2000).

As the Board of Alien Labor Certification Appeals (BALCA) explained in *Matter of Modular Container Systems, Inc.*, the former regulation at 20 C.F.R. § 656.20(c)(8) "infuses the recruitment process with the requirement of a *bona fide* job opportunity: not merely a test of the job market." 89-INA-228, 1991 WL 223955, *7 (BALCA 1991) (*en banc*).

> Where the alien for whom labor certification is sought is in a position to control hiring decisions or where the alien has such a dominant role in, or close personal relationship with, the sponsoring employer's business that it would be unlikely that the alien would be replaced by a qualified U.S. applicant, the question arises whether the employer has a *bona fide* job opportunity.

Id.

Thus, if the job opportunity was not clearly open to qualified U.S. workers, then the Petitioner misrepresented the *bona fides* of the job opportunity on the accompanying labor certification.

To determine the *bona fides* of a job opportunity, we must consider multiple factors, including but not limited to, whether a foreign national: is in a position to control or influence hiring decisions regarding an offered position; is related to corporate directors, officers, or employees; incorporated or founded a company; has an ownership interest in it; is involved in its management; 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 on an accompanying labor certification. *Id.* at *8. We must also consider whether a foreign national's pervasive presence and personal attributes would likely cause a petitioner to cease operations in the foreign national's absence and whether the employer complied with DOL regulations and otherwise acted in good faith. *Id.*

In this case, several factors indicate that the offered position was not clearly available to U.S. workers. The Petitioner concedes that its corporate treasurer/director is the Beneficiary's brother and the owner of 50 percent of its stock.[2] The Petitioner also concedes that the Beneficiary is one of a small group of employees. The record indicates that, since incorporating in 2000, the Petitioner

[2] The record indicates that two other officers/shareholders of the Petitioner respectively own 30 percent and 20 percent of its remaining stock.

employed only one person during its first few years of operation and a maximum of five people in 2015. The record further indicates that the Beneficiary was involved in the Petitioner's management, another factor indicating the unavailability of the position to U.S. workers. Specifically, the labor certification states managerial job duties of the offered position of assistant retail manager, including: scheduling employees; sales promotions; inventory; customer issues; and overseeing maintenance, upkeep, and equipment. The labor certification also states that the offered position involved supervision of two employees. Further, in letters of March 4, 2009, and March 26, 2012, the Petitioner's president stated that the Beneficiary handled general, day-to-day store operations.

In addition, the record suggests that the Beneficiary's brother managed the company's day-to-day operations indicating his influence over the decision to hire the Beneficiary. On appeal, the Petitioner maintains that only its president, and not the Beneficiary's brother, has overseen the company's day-to-day operations. It provides copies of numerous business documents in support of its claim. However, the accompanying labor certification identifies the Beneficiary's brother as the Petitioner's "General Manager" and states that he will supervise the Beneficiary. The statements on the labor certification suggest that the Beneficiary's brother, rather than the Petitioner's president, managed the company on a day-to-day basis.

Moreover, the evidence of record raises doubt about the role of any other officer in the company. Copies of the Petitioner's federal income tax returns identify the Beneficiary's brother as the only recipient of compensation from the Petitioner at the time of the labor certification's filing. The 2002 tax return indicates no wages paid, but states payment of the entire $18,000 amount of officer compensation to the Beneficiary's brother. The 2001 and 2003 tax returns similarly indicate no wages paid and state annual officer compensation amounts of $18,000. However, they do not indicate the recipient(s) of the compensation. Our notice of intent to dismiss (NOID) specifically asked the Petitioner to identify the recipient(s) of its officer compensation in 2001 and 2003. In response, the Petitioner provided a chart of its shareholders/officers and the annual amounts of the corporation's business income they received. However, the record does not identify the recipient(s) of officer compensation in 2001 and 2003, which was awarded in addition to the shares of business income.

In response to our NOID, counsel asserts that, as general manager of the Petitioner, the Beneficiary's brother planned, directed, and coordinated the company's operations. Counsel asserts that the roles of the Beneficiary's brother as general manager and corporate treasurer prevented his involvement in the company's day-to-day operations. However, the assertions of counsel do not constitute probative evidence. *Matter of Obaigbena*, 19 I&N Dec. 533, 534 (BIA 1988); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980). Counsel's statement must be substantiated in the record with independent evidence, which may include affidavits and declarations.

The Petitioner submits evidence of other corporate documents signed by the Beneficiary's brother as a company officer. Because the Beneficiary's brother signed other corporate documents as a

company officer, the Petitioner asserts that his signatures on the Form I-140 and accompanying labor certification do not indicate his involvement in the company's day-to-day affairs.

However, the record contains evidence that the Beneficiary's brother was involved in the Petitioner's day-to-day operations beyond his signatures on the Form I-140 and accompanying labor certification. The identification of the Beneficiary's brother as the Petitioner's general manager on the labor certification, his stated supervision of the Beneficiary in the offered position, and his status as the only identified recipient of employment compensation from the Petitioner at the time of the labor certification's filing all suggest his involvement in the company's day-to-day operations and his influence in the decision to hire the Beneficiary. The Beneficiary's brother's influence over the company's management and hiring indicate that the offered job was not open to U.S. workers.

Evidence of the Petitioner's recruitment efforts for the offered position also indicates that the job opportunity was not clearly available to U.S. workers. The Petitioner's president stated in affidavits that the company did not receive any applications for the offered position from willing and qualified U.S. workers. However, in a March 4, 2009, letter in response to the Director's first NOIR, he stated: "[W]e did get people who were interested to work at my store."

In response to our NOID, counsel asserts that the Petitioner "did receive a few walk-ins who expressed interest in working as store clerks/cashiers," but that it "did not receive any applications for the job offered." Again, however, counsel's assertions do not constitute evidence. *See Obaigbena*, 19 I&N Dec. at 534; *Ramirez-Sanchez*, 17 I&N Dec. at 506. The Petitioner has not resolved the inconsistencies of record with independent, objective evidence pointing to where the truth lies. *See Ho*, 19 I&N Dec. at 591. If the Petitioner did not consider qualified applicants for the offered position, then the job opportunity was not clearly open to U.S. workers.

Thus, several *Modular Container* factors indicate the unavailability of the job opportunity to U.S. workers. The record establishes the Beneficiary's familial relationship to the Petitioner's corporate treasurer/director, who owns 50 percent of the company's stock and signed the Form I-140 and accompanying labor certification. The record establishes the Beneficiary as one of a small group of employees and indicates his involvement in the company's management. The record also indicates that the Beneficiary's brother was involved in the Petitioner's day-to-day operations at the time of the labor certification's filing and does not establish the Petitioner's good-faith recruitment for the offered position.

In response to our NOID, the Petitioner cites several BALCA cases in support of the proposition that the existence of a familial relationship between a beneficiary and a principal of a petitioner does not alone negate the *bona fides* of a job opportunity. *See Matter of Paris Bakery Corp.*, 1988-INA-337, 1988 WL 1232931 (BALCA 1990) (*en banc*); *Matter of H&R Auto Paint & Auto Body Repair*, 2002-INA-169, 2003 WL 21946713 (BALCA Aug. 5, 2003); *Matter of Guven Fine Jewelry*, 1992-INA-52, 1992 WL 335127 (BALCA Aug. 31, 1993); *Matter of Altobelli's Fine Italian Cuisine*, 1990-INA-130, 1991 WL 239636 (BALCA Oct. 16, 1991).

However, in all of the cases cited by the Petitioner, no willing and qualified U.S. workers applied for the offered positions. As previously discussed, the record does not establish whether willing and qualified U.S. workers applied for the offered position. The Petitioner had an opportunity to establish its good-faith recruitment for the offered position in response to our NOID. However, it did not resolve the inconsistent statements of record. We therefore do not find the cases cited by the Petitioner to be applicable or persuasive. Moreover, we do not base our decision on the familial relationship alone, but rather consider the other factors discussed above.

The record contains substantial evidence that the Petitioner willfully misrepresented the availability of the job opportunity to U.S. workers on the labor certification. The record indicates that the Beneficiary's brother knew of his involvement in the Petitioner's day-to-day operations, its small number of employees, and his familial relationship with the Beneficiary. *See Silver Dragon*, 19 I&N Dec. at 404 (stating that officers and principals of a corporation are presumed to be aware of the organization and staff of their enterprise). In signing the labor certification application, he also declared under penalty of perjury that its contents were true and correct.

The involvement of the Beneficiary's brother in the Petitioner's day-to-day operations, its small number of employees, and his familial relationship to the Beneficiary were material facts, as they had a natural tendency to influence the DOL's decision on the labor certification. *Id.* (holding that concealment of special relationships between a foreign national and an employer's principal on an accompanying labor certification constitutes willful misrepresentation of a material fact).

The record thus contains substantial evidence of the Petitioner's willful misrepresentation of a material fact on the accompanying labor certification. We will therefore affirm the Director's decision and dismiss the appeal. The accompanying labor certification remains invalidated pursuant to 20 C.F.R. § 656.30(d).

II. CONCLUSION

The record establishes the Director's proper issuance of the NOIR. The record also establishes the Petitioner's willful misrepresentation on the accompanying labor certification of the availability of the job opportunity to U.S. workers. We will therefore affirm the Director's decision and dismiss the appeal. The invalidation of the labor certification is also affirmed.

ORDER: The appeal is dismissed.

Cite as *Matter of U- Corp.*, ID# 123484 (AAO June 14, 2017)