U.S. Citizenship and Immigration Services

Non-Precedent Decision of the Administrative Appeals Office

MATTER OF Y-K, INC.

DATE: NOV. 23, 2018

APPEAL OF TEXAS SERVICE CENTER DECISION

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

The Petitioner, an operator of a convenience store/restaurant, seeks to employ the Beneficiary as a cook. It requests her classification under the third-preference, immigrant category as an "other worker." Immigration and Nationality Act (the Act) section 203(b)(3)(A)(iii), 8 U.S.C. § 1153(b)(3)(A)(iii). 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 less than two years of training or experience.

The Director of the Texas Service Center denied the petition. Finding that the Petitioner willfully misrepresented the Beneficiary's family relationship to the company's incorporators, the Director invalidated the accompanying certification from the U.S. Department of Labor (DOL).

On appeal, the Petitioner submits additional evidence. The Petitioner concedes the misrepresentation on the labor certification, but denies that it was willful or material.

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, a prospective 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 approves 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 requirements of a certified position. 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. VALIDITY OF THE LABOR CERTIFICATION

Unless accompanied by an application for Schedule A designation or documentation of a beneficiary's qualifications for a shortage occupation, an EB-3 petition 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 a finding of "fraud or willful misrepresentation of a material fact involving the labor certification application." 20 C.F.R. § 656.30(d).

A misrepresentation is an assertion or manifestation that is not in accord with the true facts. For an immigration officer to find a willful and material misrepresentation of fact, he or she must determine that (1) the petitioner or beneficiary made a false representation to an authorized official of the U.S. government, (2) the misrepresentation was willfully made, and (3) the fact misrepresented was material. *See Matter of M-*, 6 I&N Dec. 149 (BIA 1954); *Matter of Kai Hing Hui*, 15 I&N Dec. 288, 289 (BIA 1975). The term "willfully" means knowing and intentionally, as distinguished from accidentally, inadvertently, or in an honest belief that the facts are otherwise. *See Matter of Healy and Goodchild*, 17 I&N Dec. 22, 28 (BIA 1979). A "material" misrepresentation is one that "tends to shut off a line of inquiry relevant to the alien's eligibility." *Matter of Ng*, 17 I&N Dec. 536, 537 (BIA 1980).

Here, the labor certification application form asked the Petitioner: "[I]s there a familial relationship between the owners, stockholders, partners, corporate officers, or incorporators, and the alien?" The company indicated "No." The Petitioner concedes, however, that the Beneficiary and her spouse incorporated the company about five years before the application's filing. The record therefore establishes the Petitioner's misrepresentation of the Beneficiary's relationship to the company's incorporators.

The record also indicates the willfulness of the misrepresentation. The Petitioner's president and his sister completed purchase of all the company's stock from the Beneficiary and her spouse less than a year before the labor certification application's filing. "[T]he officers and principals of a corporation 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, 404 (Comm'r 1986). The Petitioner's president therefore presumably knew that the Beneficiary and her spouse founded the company. In addition, the president signed the labor certification after its approval, declaring under penalty of perjury that he reviewed the application and that its contents were true and accurate.

On appeal, the Petitioner's president asserts that he signed the labor certification "without reading it carefully." He stated that "all the words looked very complicated to me and I trusted [that] the attorney who had all the necessary information would have prepared the form accurately." The president's unsupported assertion, however, does not establish his ignorance of the misrepresentation on the labor certification. The Petitioner must substantiate the assertion with independent, objective evidence, which may include additional affidavits or declarations.

The Petitioner's president also essentially accuses one or both of the company's prior immigration attorneys of ineffective assistance of counsel. The president states that he truthfully provided all

requested information to the attorneys, who worked at the same firm preparing the labor certification application. One of the attorneys also prepared the Petitioner's prior nonimmigrant petitions obtaining investor visa status for the Beneficiary and her spouse. *See* section 101(a)(15)(E)(ii) of the Act, 8 U.S.C. § 1101(a)(15)(E) (allowing temporary entry of certain foreign nationals to develop and direct the operations of enterprises in which they have invested). The president therefore contends that the attorneys knew that the couple incorporated the Petitioner.

The Petitioner, however, has not perfected a claim of ineffective assistant of counsel. To ensure that we have information needed to evaluate such a claim and to deter meritless allegations, a petitioner must provide: 1) a written affidavit describing the actions that former counsel promised and took, and any representations counsel made about those actions; 2) evidence that the petitioner informed counsel of the allegations of ineffectiveness and provided him or her with an opportunity to respond; and 3) documentation that the petitioner filed a complaint with appropriate disciplinary authorities or an explanation of why it did not. *Matter of Lozada*, 19 I&N Dec. 637, 639 (BIA 1988), *aff'd*, 857 F.2d 10 (1st Cir. 1988). Here, the Petitioner provided affidavits from its president. But the documents do not detail the agreements between the Petitioner and the attorneys. Also, the record lacks evidence that the Petitioner notified counsel of the allegations and provided an opportunity to respond. In addition, the record neither establishes the filing of a disciplinary complaint, nor explains why none was filed. The Petitioner did not comply with the *Lozada* requirements. It thus may not attribute its misrepresentation on the labor certification to ineffective assistance of prior counsel. The record therefore supports the willfulness of the misrepresentation.

The record also indicates the materiality of the misrepresentation. A labor certification employer must attest that its job opportunity is clearly open to U.S. workers. 20 C.F.R. § 656.10(c)(8). A beneficiary's family relationships to an employer's incorporators create a presumption of a position's unavailability to U.S. workers. *See* 20 C.F.R. § 656.17(l) (requiring an employer with family relationships between its principals and a foreign national "to demonstrate the existence of a *bona fide* job opportunity"). Thus, had the labor certification application disclosed the Beneficiary's relationship to the Petitioner's incorporators, the company would have had to establish the *bona fides* of the job opportunity.

To determine the *bona fides* of a job opportunity, adjudicators must consider various factors, including whether a foreign national: is in a position to influence hiring decisions regarding the offered job; is related to the employer's directors, officers, or employees; incorporated or founded the company; has an ownership interest in it; is involved in its management; serves on its board of directors; is one a small number of employees; meets specialized or unusual requirements of the offered job; or would likely cause the employer to cease operations in his or her absence. *Matter of Modular Container Sys., Inc.*, 89-INA-228, 1991 WL 223955 *8 (BALCA July 16, 1991) (*en banc*). An adjudicator must also consider an employer's level of compliance and good faith in the labor certification process. *Id.* Here, multiple factors indicate that the offered position was not clearly open to U.S. workers. As previously discussed, the Beneficiary and her spouse incorporated the Petitioner and invested money in it. The petition and the labor certification state the Petitioner's employment of four people. The record therefore also identifies the Beneficiary as one of a small

number of employees. On appeal, the Petitioner asserts that the job opportunity was *bona fide*. It notes that the Beneficiary and her spouse sold their ownership interests in the Petitioner before it filed the labor certification application. It claims that the couple has not served as company officers since 2013 and submitted evidence that its current president controlled recruitment and hiring for the offered position. While the record does not indicate that the Beneficiary and her spouse owned or managed the company as of the labor certification application's filing, the Petitioner's evidence on appeal indicates that the company did not recruit for the offered position in good faith. Without an interview, the Petitioner rejected the sole U.S. applicant for the offered position because he lacked the requisite six months of experience as a cook. A U.S. worker, however, is able and qualified for a position "if the worker can acquire the skills necessary to perform the duties involved in the occupation during a reasonable period of on-the-job training." 20 C.F.R. § 656.17(g)(2). If a labor certification employer rejects an applicant without an interview, it must establish that the applicant's resume shows "no reasonable possibility" that the applicant can meet the job requirements. *See, e.g., Matter of Montessori of Calabas*, 2016-PER-00167, 2018 WL 3326843 *4 (BALCA June 28, 2018) (citation omitted). Here, the sole applicant's resume states that he has "30 years[']' experience in training personnel on food preparation and cooking" and lists more than 19 years of experience. With extensive experience training cooks, the applicant likely worked at least six months as a cook himself. Otherwise, he could presumably acquire the necessary skills to perform the duties of a cook during a reasonable period of on-the-job training. Thus, a "reasonable possibility" existed that the applicant met the requirements of the offered position. The record therefore does not establish the Petitioner's recruitment for the offered position in good faith.

A totality of circumstances under *Modular Container* does not establish the *bona fides* of the offered position. As of the filing of the labor certification application, the Beneficiary and her spouse had relinquished their ownership and management of the Petitioner. The record, however, identifies the couple as the Petitioner's incorporators and investors, and the Beneficiary as one of a small number of employees. The record also indicates that the Petitioner did not recruit for the offered position in good faith. Had the application disclosed the Beneficiary's relationships to the Petitioner's incorporators, the Petitioner may not have demonstrated the *bona fides* of the job opportunity. The Petitioner's misrepresentation on the labor certification was therefore material.

Based on evidence of the Petitioner's willful misrepresentation of a material fact, the record supports the Director's invalidation of the labor certification. We will therefore affirm the decision.

III. THE REQUIRED EXPERIENCE

Although unaddressed by the Director, the record also does not establish the Beneficiary's qualifying experience for the offered position. A petitioner must establish a beneficiary's possession of all DOL-certified job requirements by a petition's priority date.[1] *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

[1] This petition's priority date is September 28, 2015, 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).

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, as previously indicated, the labor certification states the minimum requirement of the offered position of cook as six months of experience in the job offered. The Beneficiary attested that, by the petition's priority date, she gained about four years of full-time qualifying experience in South Korea. She stated that she worked as a cook at a restaurant in [redacted] from October 1999 through September 2003. Pursuant to 8 C.F.R. § 204.5(l)(3)(ii)(A), the Petitioner submitted a letter from the Beneficiary's former employer in support of her claimed experience.

A review of a nonimmigrant visa application submitted to the U.S. Department of State, however, revealed discrepancies in the Beneficiary's stated work history. On a U.S. visitor's visa application in 2007, the Beneficiary indicated that she worked at an unnamed restaurant in [redacted] from 1996 to 2003 as "president." Assuming the documents refer to the same restaurant, the visa application indicates that, contrary to the Beneficiary's attestation on the labor certification, she did not work in the offered position of cook.[2] The visa application also states a different start date of employment than listed on the labor certification. These discrepancies cast doubt on the Beneficiary's claimed qualifying experience in the job offered. *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).

In addition, the experience letter from the restaurant is unreliable. The letter describes the Beneficiary's experience in language virtually identical to the job duties of the offered position on the labor certification. The letter's word-for-word similarity to the job duties on the labor certification suggests that the letter does not reflect the signatory's personal knowledge of the Beneficiary's experience. Also, the letter indicates that its signatory, the purported general manager of the restaurant, has the same family name as the Beneficiary's spouse. Combined with the Beneficiary's identification on the visa application as "president" of the restaurant, the common family name of the general manager and the Beneficiary's spouse suggests that the Beneficiary's family operated the restaurant. In that case, a letter from a relative of the Beneficiary would not constitute independent, objective evidence of her claimed experience.

For the foregoing reasons, the record does not establish the Beneficiary's possession of the minimum experience required for the offered position. In any future filings in this matter, the Petitioner must explain the discrepancies in the Beneficiary's claimed experience and submit independent, objective evidence of her qualifying experience, such as copies of government, tax, or business records.

[2] If the visa application refers to a different restaurant than the one listed on the labor certification, discrepancies in the Beneficiary's work history would also obviously result.

IV. CONCLUSION

The record on appeal supports the Director's invalidation of the accompanying labor certification and the denial of the petition.

ORDER: The appeal is dismissed.

Cite as *Matter of Y-K, Inc.*, ID# 1767335 (AAO Nov. 23, 2018)