U.S. Citizenship and Immigration Services

Non-Precedent Decision of the Administrative Appeals Office

MATTER OF MRCP-, INC.

DATE: OCT. 16, 2017

APPEAL OF NEBRASKA SERVICE CENTER DECISION

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

The Petitioner is staffing agency that seeks to employ the Beneficiary in the United States as an accountant. It requests 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 employment-based immigrant classification allows a U.S. employer to sponsor a foreign national for lawful permanent resident status to work in a position that requires at least two years of training or experience.

The petition was initially approved. Subsequently, the Director of the Nebraska Service Center revoked the approval of the petition, concluding that the Petitioner willfully misrepresented a material fact by not disclosing the familial relationship between the Petitioner's owners and the Beneficiary on the labor certification accompanying the petition, which raises the issue of whether the position offered was open to U.S. workers. The Director also noted several discrepancies in the record that the Petitioner had not resolved.

On appeal, the Petitioner states that the fact that the Beneficiary is the Petitioner's owner nephew does not constitute a "familial relationship" that must be disclosed on the labor certification. The Petitioner states that the job was open to U.S. workers and submits additional evidence on appeal to resolve the discrepancies noted by the Director.

I. LAW

Employment-based immigration generally follows a three-step process. First, an employer obtains an approved ETA Form 9089, Application for Permanent Employment Certification (labor certification) from the U.S. Department of Labor (DOL).[1] *See* section 212(a)(5)(A)(i) of the Act, 8 U.S.C. § 1182(a)(5)(A)(i). By approving the labor certification, DOL certifies that there are insufficient U.S. workers who are able, willing, qualified, and available for the offered position and that employing a foreign national in the position will not adversely affect the wages and working conditions of domestic workers similarly employed. Section 212(a)(5)(A)(i)(I)-(II) of the Act. Second, the employer files an immigrant visa petition with U.S. Citizenship and Immigration Services

[1] The date the labor certification is filed, in cases such as this one, is called the "priority date."

(USCIS). *See* section 204 of the Act, 8 U.S.C. § 1154. Third, if USCIS approves the petition, the foreign national applies 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.

Section 205 of the Act, 8 U.S.C. § 1155, provides that "[t]he Attorney General [now Secretary, Department of Homeland Security], may, at any time, for what he deems to be good and sufficient cause, revoke the approval of any petition approved by him under section 204." The realization by the director that the petition was approved in error may be good and sufficient cause for revoking the approval. *Matter of Ho*, 19 I&N Dec. 582, 590 (BIA 1988).

II. ANALYSIS

A. Willful Misrepresentation of a Material Fact

The Director revoked the approval of the petition after concluding that the Petitioner had willfully misrepresented a material fact by not disclosing the familial relationship between its owner and the Beneficiary, thereby calling into question whether a *bona fide* job opportunity was available to U.S. workers as required by 20 C.F.R. § 656.10(c)(8). A willful misrepresentation of a material fact "made in connection with an application for visa or other documents" is one that "tends to shut off a line of inquiry which is relevant to the alien's eligibility." *Matter of S- and B-C-*, 9 I&N Dec. 436, 447 (BIA 1961).

In order to assess whether a *bona fide* job offer may be at issue, Section C.9 of the labor certification asks, "Is the employer a closely held corporation . . . 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 checked "No" in response to this question, indicating that there is no relationship between the Beneficiary and the owners, stockholders, partners, corporate officers, or incorporators. However, the record reflects, and the Petitioner admits, that the Beneficiary's uncle is the Petitioner's owner and president and his aunt is a part-owner.

In the matter at hand, the Petitioner should have marked "Yes" to the question at line C.9 because the Beneficiary has a familial relationship with the Petitioner's president and two owners. The DOL regulation at 20 C.F.R. § 656.17(1), alien influence and control over job opportunity, made clear that the intention behind the inquiry at line C.9 of the labor certification was to ensure that a job opportunity was open to all workers by identifying any relationships, business or familial, that might affect job availability.[2]

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[2] The PERM regulation at 20 C.F.R. § 656.17(l) states in pertinent part:

> (l) Alien influence and control over job opportunity. If the employer is a closely held corporation or partnership in which the alien has an ownership interest, or if there is a familial relationship between the stockholders, corporate officers, incorporators, or partners, and the alien, or if the alien is one of a small number of employees, the employer in the event of an audit must be able to demonstrate the existence of a bona fide job opportunity, i.e., the job is available to all U.S. workers, and must provide to the Certifying Officer, the

On appeal, the Petitioner asserts that it did not understand the question to include any relationship beyond immediate family members and points to DOL issued frequently asked questions on the topic that were not published until 2014. In the FAQ, DOL specified that "A familial relationship includes any relationship established by blood, marriage, or adoption, even if distant. ... It also includes relationships established through marriage, such as in-laws and step-families." OFLC Frequently Asked Questions & Answers, Familial Relationships, at http://www.foreignlaborcert.doleta.gov/faqsanswers.cfm (last visited Oct. 10, 2017). The Petitioner maintains that because it filed the labor certification before the FAQ was published, it could not be expected to know that "Yes" was the correct answer to the question at C.9. However, in several decisions which predate the filing of the labor certification, the Board of Alien Labor Certification Appeals (BALCA) has indicated that familial relationships, created by blood or by marriage, between foreign nationals and their prospective employers constitute familial relationships that trigger concerns about the *bona fides* of the job opportunities. *See, e.g., Matter of Sunmart 374*, 2000-INA-93, 2000 WL 707942 *3 (BALCA May 15, 2000) (stating that a suspect relationship between an employer and a foreign national "is not only of the blood; it may also be financial, by marriage, or through friendship"); *Matter of Topco USA, Inc.*, 93-INA-00516, 1996 WL 86214 *4 (BALCA Feb. 23, 1996) (upholding a certification denial based solely on a "family relationship" between a foreign national and his sister-in-law, an officer and director of the employer); *Matter of Altobelli's Fine Italian Cuisine*, 90-INA-130, 1991 WL 239636 **3-4 (BALCA Oct. 16, 1991) (finding that a foreign national's relationship to his sister-in-law, the employer's corporate secretary, constituted a "family relationship").[3] As such, the Petitioner should have responded "Yes" to the question at C.9, as it was clearly applicable to the relationship between the Petitioner and Beneficiary.

Here, the Petitioner's concealment of the Beneficiary's familial relationship to the Petitioner's president and owners constitutes a willful misrepresentation. We also find that this misrepresentation was material to the current petition and to the question of whether the position was

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following supporting documentation:

(1) A copy of the articles of incorporation, partnership agreement, business license or similar documents that establish the business entity;

(2) A list of all corporate/company officers and shareholders/partners of the corporation/firm/business, their titles and positions in the business' structure, and a description of the relationships to each other and to the alien beneficiary;

(3) The financial history of the corporation/company/partnership, including the total investment in the business entity and the amount of investment of each officer, incorporator/partner and the alien beneficiary; and

(4) The name of the business' official with primary responsibility for interviewing and hiring applicants for positions within the organization and the name(s) of the business' official(s) having control or influence over hiring decisions involving the position for which labor certification is sought.

(5) If the alien is one of 10 or fewer employees, the employer must document any family relationship between the employees and the alien.

[3] While we are not bound by BALCA decisions, we, nevertheless, may take note of the reasoning in such decisions when considering issues that arise in the employment-based immigrant visa process.

a *bona fide* job opportunity open to U.S. workers. A fact's materiality is determined according to its effect on the ultimate decision had the truth been known. *Bazzi v. Holder*, 746 F.3d 640, 645-646 (6th Cir. 2013) (citations omitted). The Petitioner's misrepresentation of the Beneficiary's relationship to the president of the company and two of the Petitioner's owners shut off a line of inquiry into the *bona fide* nature of the job and its eligibility for the benefit sought. Labor certification employers 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 Sys., Inc.*, 89-INA-228, 1991 WL 223955, *7 (BALCA July 16, 1991) *(en banc)* (referring to the former, identical regulation at 20 C.F.R. § 656.20(c)(8)). USCIS may deny a petition accompanied by a labor certification that violates DOL regulations. *See Sunoco Energy Development Company*, 17 I&N Dec. 283, 284 (Reg'l Comm'r 1979) (affirming a petition's denial where the accompanying labor certification was invalid for the geographical area of intended employment).

In determining the *bona fides* of a job opportunity, adjudicators must consider multiple factors, including but not limited to, whether a foreign national: is in a position to control or influence hiring decisions regarding the offered position; is related to corporate directors, officers, or employees; incorporated or founded the company; has an ownership interest in it; is involved in the management of the company; 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 in the labor certification. *See Modular Container*, 1991 WL 223955 at *8; *see* also 20 C.F.R. § 656.17(l) (describing the documents required to establish the existence of a *bona fide* job opportunity).

Adjudicators 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 regulations and otherwise acted in good faith. *See Modular Container*, 1991 WL 223955 at *8. A beneficiary's familial relationship or employment within a small group of employees is an important factor in determining the *bona fides* of a job opportunity. *See* 20 C.F.R. § 656.17(l)(5).

In this case, the Beneficiary's familial relationship to the Petitioner's president and owners, in conjunction with the fact that the Beneficiary is one of only two employees, indicates that the Petitioner has not established a *bona fide* job opportunity in this matter. Had DOL been apprised of the familial relationship between the Beneficiary and the Petitioner's president and owners, DOL may have decided to investigate more deeply whether the proffered position was a *bona fide* job opportunity open to U.S. workers. By withholding information about the familial relationship, therefore, the Petitioner shut off a line of inquiry by the DOL that was relevant to the Beneficiary's eligibility.

Based on the foregoing, we find that the Director correctly determined that the Petitioner willfully misrepresented a material fact by not disclosing the familial relationship between its president and

owners and the Beneficiary. On this basis, the Director properly concluded that there was good and sufficient cause to revoke the petition's approval.

B. Other Grounds for Revocation

The Director also identified several discrepancies in the record and concluded that the Petitioner had not provided sufficient evidence to establish the Petitioner's ability to pay or to demonstrate that the Beneficiary had the required education and experience. The Director further found that the Petitioner willfully misrepresented the Beneficiary's immigration filing history on the Form I-140, Immigrant Petition for Alien Worker. On appeal, the Petitioner has submitted evidence to establish that it more likely than not had the ability to pay and to demonstrate that the Beneficiary has the required experience. We are also persuaded that the Petitioner's omission on the Form I-140, while incorrect, was not a willful misrepresentation of a material fact. However, the record does not establish the Beneficiary's possession of the required education.

The labor certification states in Section H that an associate's degree is required. Section J states that the Beneficiary meets this requirement by possessing an associate's degree from the [redacted] completed in 1993. The record contains a bachelor's degree diploma and marks certificate that appears to have been issued to the Beneficiary from the [redacted] in Pakistan. The Director noted that the diploma appeared to have been altered in that several of the dates contain handwriting over the typed numbers.

On appeal, the Petitioner states that the handwritten alterations were made by the university and that it is a common practice in Pakistan to handwrite parts of a student's educational credentials. The Petitioner has submitted a certified copy of the Beneficiary's degree and marks certificate from the Higher Education Commission of Pakistan under seal. However, the registered number stated on the certified copy of the degree differs from the number stated on the marks certificate and the degree is dated 1992 but states that the final examination was held in 1993. The inconsistencies in the educational documents raise doubt about the veracity of the evidence. The Petitioner has not resolved or overcome these discrepancies to establish that the Beneficiary has the required education. Therefore we also affirm the revocation of the petition's approval on this ground.

III. CONCLUSION

The record shows that the Petitioner willfully misrepresented a material fact and does not establish that the Beneficiary has the required education. As such, the Director properly revoked the petition's approval.

ORDER: The appeal is dismissed.

Cite as *Matter of MRCP-, Inc.*, ID# 703233 (AAO Oct. 16, 2017)