U.S. Citizenship and Immigration Services

Non-Precedent Decision of the Administrative Appeals Office

MATTER OF A-S- INC.

DATE: OCT. 19, 2015

APPEAL OF NEBRASKA SERVICE CENTER DECISION

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

The Petitioner, a provider of speech pathology, occupational therapy, and special education services, seeks to permanently employ the Beneficiary as a speech language pathologist under the immigrant classification of member of the professions holding an advanced degree pursuant to the Immigration and Nationality Act (the Act) § 203(b)(2)(A), 8 U.S.C. § 1153(b)(2)(A). The Director, Nebraska Service Center, revoked the petition's approval. The matter is now before us on appeal. The matter will be remanded to the Director for further proceedings consistent with the following opinion and for the entry of a new decision.

U.S. Citizenship and Immigration Services (USCIS) may revoke a petition's approval "at any time" for "good and sufficient cause." INA § 205, 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).

In the instant case, the Director approved the petition on June 9, 2009. However, he later concluded that the Petitioner misrepresented the Beneficiary's relationship to its chief executive officer (CEO)/minority shareholder on the accompanying ETA Form 9089, Application for Permanent Employment Certification (labor certification). Accordingly, on December 2, 2013, the Director invalidated the labor certification and revoked the petition's approval.

On appeal, the Petitioner admits providing incorrect information. However, it argues that its false statement was inadvertent and did not merit invalidation of the labor certification or revocation of the petition's approval.

The record indicates that the appeal is properly filed and alleges specific errors in law and fact. The record documents the procedural history of the case, which will be incorporated into the decision. We will elaborate on the procedural history only as necessary.

We conduct appellate review on a *de novo* basis. *See, e.g., Soltane v. Dep't of Justice*, 381 F.3d 143, 145 (3d Cir. 2004). We consider all relevant evidence of record, including new evidence properly submitted on appeal.[1]

I. THE NOTICE OF INTENT TO REVOKE

Good and sufficient cause exists to issue a notice of intent to revoke if the record at the time of the notice's issuance, if unexplained or unrebutted, would warrant the petition's denial. *Matter of Estime*, 19 I&N Dec. 450, 451 (BIA 1987). Similarly, USCIS properly revokes a petition's approval if the record at the time of the decision, including any explanation or rebuttal submitted by the petitioner, would warrant the petition's denial. *Id.* at 452.

In the instant case, the Director issued a notice of intent to revoke (NOIR) on September 20, 2013. Citing USCIS records, the NOIR alleges that the Beneficiary is the sister of the Petitioner's CEO/minority shareholder.[2] The NOIR also alleges the Petitioner's false statement on the accompanying labor certification that the Beneficiary lacked familial relationships with its officers or shareholders.

A petition for an advanced degree professional must be accompanied by a valid individual labor certification, an application for designation under Schedule A, or evidence of a beneficiary's qualifications for a shortage occupation. 8 C.F.R. § 204.5(k)(4)(i). USCIS may invalidate a 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).

An alien's relationship to a labor certification employer is material because the job opportunity must be "clearly open to any U.S. worker." 20 C.F.R. § 656.10(c)(8); *see also Matter of Silver Dragon Chinese Rest.*, 19 I&N Dec. 401, 404 (Comm'r 1986) (holding that a shareholder's concealment in labor certification proceedings of his ownership interest in the petitioning corporation constituted willful misrepresentation of a material fact and a ground for invalidation of the accompanying labor certification). Misrepresentations regarding a beneficiary's relationship to a petitioning corporation may be willful because "the officers and principals of a corporation are presumed to be aware and informed of the organization and staff of their enterprise." *Id.*

Thus, the Director properly issued the NOIR. The Petitioner's misrepresentation of the Beneficiary's relationship to its CEO/minority shareholder on the labor certification, if unexplained or unrebutted, would have warranted invalidation of the labor certification, and revocation of the petition's approval for lack of a valid labor certification.

---

[1] The instructions to Form I-290B, Notice of Appeal or Motion, which are incorporated into the regulations by 8 C.F.R. § 103.2(a)(1), allow the submission of additional evidence on appeal.

[2] Copies of the Petitioner's federal income tax returns of record indicate that it has two shareholders. The returns indicate that the Petitioner's CEO owns 49 percent of the corporation's stock.

II. INVALIDATION OF THE LABOR CERTIFICATION

As previously indicated, USCIS may invalidate a 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).

A willful misrepresentation of a material fact must be voluntary and deliberate, made with knowledge of its falsity. *Forbes v. INS*, 48 F.3d 439, 442 (9th Cir. 1995). A misrepresentation is material if it has "a natural tendency to influence the decisions" of the government. *Id.* at 442-43 (citing *Kungys v. United States*, 485 U.S. 759, 772 (1988)).

Fraud includes the same elements as willful misrepresentation of a material fact. However, a fraud finding also requires evidence of intent to deceive government officials and the government's reliance on the deception. *See Matter of G-G-*, 7 I&N Dec. 161, 164 (BIA 1956).

In the instant case, Part C.9 of the accompanying ETA Form 9089 asks: "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 answered: "No."

The Petitioner's CEO/minority shareholder admitted in an October 17, 2013, letter that the Beneficiary is his sister. The Petitioner concedes its misrepresentation on the labor certification, which another officer signed on its behalf and declared to be true and accurate under penalty of perjury. However, the Petitioner argues that its misrepresentation of the Beneficiary's relationship to its CEO/minority shareholder was immaterial.

A. The Materiality of the Misrepresentation

The CEO/minority shareholder described the Petitioner's misrepresentation as "harmless." However, the Director's decision rejects that characterization. The decision states: "When the Department of Labor (DOL) is presented with a Form 9089 that has a familial relationship between the petitioner and the beneficiary, it goes through a different process than one that does not have the relationship."

The Petitioner argues that the DOL does not treat labor certification applications indicating a familial relationship differently than other applications. The Petitioner notes that the DOL does not publicly discuss its criteria for determining whether to audit a labor certification application. *See* U.S. Dep't of Labor, Office of Foreign Labor Certification, "OFLC Frequently Asked Questions and Answers," at http://www.foreignlaborcert.doleta.gov/faqsanswers.cfm#q!82 (accessed Oct. 6, 2015) (stating that disclosure of audit criteria would undermine the program's effectiveness and integrity).

The Petitioner also submits evidence of a shortage of speech language pathologists in the United States.[3] If the DOL had known of the relationship between the Petitioner's CEO/minority shareholder and the Beneficiary, the Petitioner argues that the agency may have opted against auditing the labor certification application because of the need for the offered position's services.[4]

Contrary to the Petitioner's argument, case law indicates the DOL's scrutiny of labor certification applications that state ownership or familial relationships between beneficiaries and their labor certification employers. Quoting a DOL advisory opinion, *Silver Dragon* states that, "[w]here . . . an alien beneficiary's association with the petitioning corporation is concealed in labor certification proceedings, the Department of Labor is prevented from discharging its function of '*examin[ing] more carefully* whether the job opportunity is clearly open to qualified U.S. workers, and whether U.S. workers applying for the job were rejected solely for lawful job-related reasons.'" *Silver Dragon*, 19 I&N Dec. at 404 (emphasis added).

Silver Dragon involved a beneficiary with an ownership interest in a petitioning corporation, rather than a familial relationship to a corporation's principal as in the instant case. However, Part C.9 on ETA Form 9089 asks about both ownership interests and familial relationships. Thus, a "Yes" response to question C.9 would trigger the scrutiny referenced in *Silver Dragon* even if based on a familial relationship. *Silver Dragon* therefore indicates that the instant Petitioner's misrepresentation on the labor certification prevented DOL from more carefully examining the *bona fides* of the job opportunity.

Also, a DOL website states that a "failure to disclose familial relationships or ownership interests when responding to question C.9 [on ETA Form 9089] *is a material misrepresentation* and may therefore be grounds for denial, revocation or invalidation in accordance with the Department's regulations." U.S. Dep't of Labor, Office of Foreign Labor Certification, "OFLC Frequently Asked Questions and Answers," at http://www.foreignlaborcert.doleta.gov/ faqsanswers.cfm (accessed Oct. 6, 2015) (emphasis added). The FAQ posting suggests that the DOL would likely audit a labor certification application answering "Yes" to Part C.9 and that it considers misrepresentations in response to Part C.9 to be material.

---

[3] Although the record contains evidence of the need for Speech Language Pathologists in the United States, the DOL has not included the occupation on Schedule A or identified it as a shortage occupation within the Labor Market Information Pilot Program. Thus, a valid, individual labor certification must still accompany the petition. *See* 8 C.F.R. § 204.5(k)(4)(i).

[4] The Petitioner also asserts that DOL officials stated in an April 7, 2011, meeting that they will not determine the materiality of errors on ETA Forms 9089. However, the meeting minutes indicate that DOL officials made the statement in response to a question regarding whether they would correct a petitioner's typographical error on an ETA Form 9089 *after the DOL's certification of the application.* The officials appear to have responded in the negative pursuant to 20 C.F.R. § 656.11(b), which bars modifications to labor certification applications filed after July 16, 2007. The response does not indicate that DOL officials will refrain from determining the materiality of misrepresentations on *pending* applications.

Therefore, based on case law and stated DOL policy, we find that the Petitioner's misrepresentation on the ETA Form 9089 had "a natural tendency to influence" the DOL's labor certification decision. We therefore reject the Petitioner's argument that its misrepresentation was immaterial.

B. The Willfulness of the Misrepresentation

The Petitioner also argues that it did not willfully misrepresent the Beneficiary's familial relationship to its CEO/minority shareholder. In an undated statement, the officer who signed the labor certification on behalf of the Petitioner stated: "When I reviewed and signed the PERM labor application for [the Beneficiary], there were several other PERM labor applications that were prepared and given to me for my review and signature. Unfortunately, during this process, I accidentally missed the incorrect response in Part C, Question #9 in connection with [the Beneficiary's] PERM labor application."[5]

In his decision, the Director did not consider the statement of the officer who signed the accompanying labor certification. The decision also appears to assert that any misrepresentation on a labor certification subjects it to invalidation. The decision states: "It is not [USCIS]'s place to accept a[n ETA Form] 9089 that was certified by DOL with incorrect information, and possibly [an] incorrect determination."

USCIS may invalidate a labor certification only upon a determination of "fraud or willful misrepresentation of a material fact." 20 C.F.R. § 656.30(d); *see also Tongatapu Woodcraft Haw., Ltd. v. Feldman*, 736 F.2d 1305, 1309 (9th Cir. 1984) (stating that USCIS "is bound by the DOL's certification and may invalidate it only upon determining that it was procured through fraud or willful misrepresentation of a material fact"); *K.R.K. Irvine, Inc. v. Landon*, 699 F.2d 1006, 1009 (9th Cir. 1983) (stating that USCIS "is prohibited from *invalidating* a labor certification unless it uncovers fraud or willful misrepresentation in connection with the labor certification application") (emphasis in original).

As the Petitioner argues, the Director's decision does not discuss the willfulness of the Petitioner's misrepresentation on the labor certification. Also, the Director did not consider the statement of the officer who signed the accompanying labor certification and its relevancy to the willfulness of the Petitioner's misrepresentation.

Because the Director did not consider the officer's statement, or the willfulness of the Petitioner's misrepresentation in general, we will withdraw the Director's decision and reinstate the validity of the accompanying labor certification.

[5] Neither the CEO/minority shareholder nor the officer who signed the accompanying labor certification identifies who prepared the ETA Form 9089.

III. THE BENEFICIARY'S EDUCATIONAL QUALIFICATIONS

Although we will withdraw the Director's decision, the record indicates the erroneous approval of the petition on other grounds.

Section 203(b)(2) of the Act provides preference classification to eligible immigrants who are members of the professions holding advanced degrees. *See also* 8 C.F.R. § 204.5(k)(1). The term "advanced degree" means "any United States academic or professional degree or a foreign equivalent degree above that of baccalaureate. A United States baccalaureate degree or a foreign equivalent degree followed by at least five years of progressive experience in the specialty shall be considered the equivalent of a master's degree." 8 C.F.R. § 204.5(k)(2).

A petition for an advanced degree professional must be accompanied by: an official academic record showing the alien's possession of a United States advanced degree or a foreign equivalent degree; or an official academic record showing the alien's possession of a United States baccalaureate degree or a foreign equivalent degree, and evidence in the form of letters from current or former employer(s) showing the alien's possession of at least five years of progressive post-baccalaureate experience in the specialty. 8 C.F.R. § 204.5(k)(3)(i). In addition, the job offer portion of the accompanying labor certification must require the services of a professional holding an advanced degree. 8 C.F.R. § 204.5(k)(4)(i).

A petitioner must also establish a beneficiary's possession of all the education, training, and experience specified on an accompanying labor certification by a petition's priority date onward. 8 C.F.R. §§ 103.2(b)(l), (12); *see also Matter of Wing's Tea House,* 16 I&N Dec. 158, 159 (Acting Reg'l Comm'r 1977); *Matter of Katigbak,* 14 I&N Dec. 45, 49 (Reg'l Comm'r 1971). In evaluating a beneficiary's qualifications, we must examine the job offer portion of the labor certification to determine the minimum requirements of the offered position. We may neither ignore a term of the labor certification, nor impose additional requirements. *See K.R.K. Irvine,* 699 F.2d at 1009; *see also Madany* v. *Smith,* 696 F.2d 1008, 1012-13 (D.C. Cir. 1983); *Stewart Infra-Red Commissary of Mass., Inc.* v. *Coomey,* 661 F.2d 1, 3 (1st Cir. 1981).

In the instant case, the petition's priority date is May 8, 2008, the date the DOL accepted the accompanying labor certification application for processing. *See* 8 C.F.R. § 204.5(d). The labor certification states that the offered position of speech language pathologist requires a Master's degree or a foreign equivalent degree in speech language pathology and hearing. The labor certification does not require any qualifying experience.

The Petitioner asserts that the Beneficiary's educational credentials from India equate to a U.S. Master's degree in speech language pathology and hearing. The record indicates the Beneficiary's receipt of a three-year Bachelor of Science degree in speech, language and hearing from the [redacted] in 1999, followed by a two-year Master of Science in speech language and hearing sciences from [redacted] University in 2001.

The record contains a November 5, 2008, evaluation of the Beneficiary's foreign educational credentials prepared by [redacted] for [redacted] The evaluation concludes that the Beneficiary possesses the equivalent of a U.S. Master of Science degree in speech, language and hearing sciences.

USCIS may treat expert testimony as an advisory opinion. *See Matter of Caron Int'l, Inc.*, 19 I&N Dec. 791, 795 (Comm'r 1988). However, USCIS may afford less weight to expert testimony that is uncorroborated, inconsistent with other information, or questionable in any way. *Id.; see also Matter of D-R-*, 25 I&N Dec. 445, 460 n.13 (BIA 2011) (stating that expert testimony may be given different weight depending on the extent of the expert's qualifications or the relevance, reliability, and probative value of the testimony).

In the instant case, the record does not explain how the Beneficiary's Indian Master of Science degree, which she obtained after earning a three-year Bachelor's degree, equates to a U.S. Master of Science degree, which typically follows a four-year Bachelor's degree. *See Matter of Shah*, 17 I&N Dec. 244, 245 (Reg'l Comm'r 1977) (stating that a U.S. Bachelor's degree generally requires four years of university study); *see also Tisco Grp., Inc. v. Napolitano*, No. 09-10072, 2010 WL 3464314 *4 (E.D. Mich. Aug. 30, 2010) (upholding our determination that a beneficiary's two-year Master's degree from India, which followed a three-year Bachelor's degree from India, equated to a U.S. Bachelor's degree).

The education evaluation states: "The curriculum and graduation requirements of Indian universities are based on British educational models which require only 3 years of study for a bachelor's degree." The evaluation asserts that, like their British counterparts, Indian students pass "O" and "A" level examinations before completing secondary school. The evaluation asserts that passage of those exams are "commonly accepted" as the equivalent of a freshman year in U.S. university.

However, the record does not indicate the Beneficiary's passage of "O" or "A" level examinations before completing secondary school. The record contains a 1994 "Secondary School Leaving Certificate" and certificates indicating the Beneficiary's passage of exams in 1995 and 1996. Thus, contrary to the educational evaluation, the certificates indicate the Beneficiary's passage of exams after her completion of secondary school. The certificates also identify the exams as "pre-degree examinations," not as "O" or "A" level exams as indicated in the educational evaluation.

In addition, the record indicates that the Beneficiary was [redacted] years old when she received her Secondary School Leaving Certification and [redacted] when she completed her pre-degree certificates in 1996. U.S. students are usually 17 or 18 years old when they complete high school. Therefore, the record does not establish the Beneficiary's completion of the equivalent of one year of college study before entering university in India.

The evaluation also states that many U.S. students complete Bachelor's degrees in three years, including those who completed "advanced placement" courses in high school, attended summer school, or passed the College-Level Examination Program (CLEP). However, the record does not

establish the Beneficiary's receipt of college credits in secondary or summer school, or her passage of college-level examinations before entering university in India. *See Ho*, 19 I&N Dec. at 591-92 (requiring a petitioner to resolve inconsistencies of record by independent, objective evidence).

Because of the inconsistencies between the education evaluation and the Beneficiary's foreign educational credentials, we reviewed the Electronic Database for Global Education (EDGE) created by the American Association of Collegiate Registrars and Admissions Officers (AACRAO). AACRAO's website identifies the organization as "a nonprofit, voluntary, professional association of more than 11,000 higher education admissions and registration professionals who represent more than 2,600 institutions and agencies in the United States and in over 40 countries around the world." *See* http://www.aacrao.org/membership/join-aacrao (accessed Oct. 6, 2015). Its mission "is to serve and advance higher education by providing leadership in academic and enrollment services." *Id.* EDGE is "a web-based resource for the evaluation of foreign educational credentials." *See* http://edge.aacrao.org/info.php (accessed Oct. 6, 2015).[6]

EDGE indicates that a Secondary School Leaving Certificate in India is awarded after two or three years of secondary education and represents less than completion of U.S. high school. EDGE also states that pre-degree examinations are awarded after two years of study beyond a secondary school certificate and are comparable to completion of U.S. high school.

Further, EDGE indicates that an Indian Bachelor of Science degree is comparable to three years of university studies in the United States and that an Indian Master of Science degree equates to a U.S. Bachelor of Science degree. Thus, EDGE indicates that the Beneficiary's Master of Science degree equates to a U.S. Bachelor's degree, not a U.S. Master's degree.

Therefore, based in part on the conclusions of EDGE, the record at the time of the petition's approval did not establish the Beneficiary's possession of the foreign equivalent of a U.S. Master's degree.

In response to the Director's request for evidence (RFE) dated March 25, 2009, the Petitioner alternatively argued that the Beneficiary possessed the foreign equivalent of a U.S. Bachelor's degree followed by five years of progressive experience in the specialty. However, the accompanying labor certification does not allow the advanced degree equivalency of a Bachelor's degree followed by five years of experience to qualify for the offered position. In response to Part H.8 on the ETA Form 9089, which asks whether the employer will accept "an alternate combination of education and experience," the Petitioner answered "No." Therefore, the Beneficiary may not

---

[6] Federal courts have found EDGE to be a reliable, peer-reviewed source of information about foreign educational equivalencies. *See, e.g., Viraj, LLC v. U.S. Att'y Gen.*, 578 Fed. Appx. 907, 910 (11th Cir. 2014) (finding that USCIS has discretion to discount letters and evaluations submitted by a petitioner if they differ from reports in EDGE, which is "a respected source of information"); *Sunshine Rehab Servs., Inc. v. USCIS*, No. 09-13605, 2010 WL 3325442, **8-9 (E.D. Mich. Aug. 20, 2010) (finding USCIS's entitlement to prefer EDGE information in determining that a three-year foreign Bachelor's degree did not equate to a U.S. Bachelor's degree).

qualify for the offered position based on her possession of the foreign equivalent of a Bachelor's degree followed by five years of experience.

Even if the Petitioner indicated its acceptance of an advanced degree equivalency, the record does not establish the Beneficiary's possession of at least five years of progressively responsible experience in the specialty. The record contains a November 25, 2007, service certificate from the [redacted] indicating the Beneficiary's employment as a speech and audiology specialist since September 14, 2002. However, the certificate does not describe the Beneficiary's experience. *See* 8 C.F.R. § 204.5(g)(1) (requiring evidence of a beneficiary's qualifying experience to include "a specific description of the duties performed by the alien"). The record therefore would not establish the Beneficiary's possession of a Bachelor's degree followed by at least five years of progressively responsible experience as required for the requested classification.

The record at the time of the petition's approval did not establish the Beneficiary's educational qualifications for the required classification or for the offered position specified on the accompanying labor certification. We will therefore remand this matter. On remand, the Director should afford the Petitioner a reasonable opportunity to submit additional evidence and argument in support of the Beneficiary's claimed qualifying education.

IV. THE PETITIONER'S ABILITY TO PAY THE PROFFERED WAGE

The record at the time of the petition's approval also did not establish the Petitioner's continuing ability to pay the Beneficiary's proffered wage.

A petitioner must demonstrate its continuing ability to pay a beneficiary's proffered wage from a petition's priority date until the beneficiary obtains lawful permanent residence. 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.*

The accompanying labor certification states the proffered wage of the offered position of speech language pathologist as $36 per hour, or $74,880 per year based on a 40-hour work week. As previously indicated, the petition's priority date is May 8, 2008.

At the time of the petition's approval on June 9, 2009, USCIS records indicate the Petitioner's filing of I-140 petitions for at least 20 other beneficiaries that remained pending after the petition's priority date.[7] A petitioner must demonstrate its ability to pay the proffered wage of each petition it files. *See* 8 C.F.R. § 204.5(g)(2); *Matter of Great Wall*, 16 I&N Dec. 142, 144-45 (Acting Reg'l Comm'r 1977). Thus, the instant Petitioner must demonstrate its ability to pay the combined proffered wages of the instant Beneficiary and the beneficiaries of its other petitions that remained pending after the instant petition's priority date. The Petitioner must establish its ability to pay the combined proffered wages from the instant petition's priority date until the other beneficiaries obtained lawful

[7] A list of the receipt numbers of the petitions identified in USCIS records is attached.

permanent residence, or until their petitions were denied, withdrawn, or revoked. *See Patel v. Johnson*, 2 F. Supp. 3d 108, 124 (D. Mass. 2014) (upholding our denial of a petition where the petitioner did not demonstrate its ability to pay multiple beneficiaries).

At the time of the petition's approval, the record did not indicate the priority dates and proffered wages of the Petitioner's other petitions. The record also did not indicate whether the Petitioner paid wages to the other beneficiaries, whether the other beneficiaries obtained lawful permanent residence, or whether the other petitions were denied, withdrawn, or revoked. Without this information, the record did not establish the Petitioner's ability to pay the combined proffered wages of the instant Beneficiary and the beneficiaries of its other petitions. The record therefore did not establish the Petitioner's continuing ability to pay the instant Beneficiary's proffered wage.

On remand, the Director should notify the Petitioner of the additional information needed regarding its other petitions and afford it a reasonable opportunity to establish its ability to pay the combined proffered wages of its beneficiaries at the time of the petition's approval.

Pursuant to *Matter of Sonegawa*, 12 I&N Dec. 612, 614-15 (Reg'l Comm'r 1967), the Director should also consider the totality of the Petitioner's business circumstances at the time of the petition's approval. He should allow the Petitioner to submit additional evidence of its ability to pay the combined proffered wages, including: how many years it had conducted business; its number of employees; the growth of its business; uncharacteristic losses or expenses; its reputation in its industry; and the Beneficiary's replacement of employees or outsourced services.

V. THE BONA FIDES OF THE JOB OPPORTUNITY

Also on remand, the Director should consider whether the record established the *bona fides* of the job opportunity at the time of the petition's approval.

As previously indicated, 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 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 does not comply with DOL regulations. *See, e.g., Matter of Sunoco Energy Dev. Co.*, 17 I&N Dec. 283, 284 (Reg'l Comm'r 1979) (upholding a petition's denial where the accompanying labor certification was invalid for the area of intended employment).

To provide an "opportunity to evaluate whether the job opportunity has been and is clearly open to qualified U.S. workers, an employer must disclose any familial relationship(s) between the foreign worker and the owners, stockholders, partners, corporate officers, and incorporators by marking 'yes' to Question C.9 on the ETA Form 9089." U.S. Dep't of Labor, Office of Foreign Labor

Certification, "OFLC Frequently Asked Questions & Answers," at http://www.foreignlaborcert.doleeta.gov/faqsanswers.cfm (accessed July 17, 2015).

> A familial relationship between the alien and the employer does not establish the lack of a *bona fide* job opportunity *per se*. Ultimately, the question of whether a *bona fide* job opportunity exists in situations where the alien has a familial relationship with the employer depends on 'whether a genuine determination of need for alien labor can be made by the employer corporation and whether a genuine opportunity exists for American workers to compete for the opening.' *[citing Matter of Modular Container Sys., supra, at *7].* Therefore, the employer must disclose such relationships, and the [adjudicator] must be able to determine that there has been no undue influence and control and that these job opportunities are available to U.S. workers. When the employer discloses a family relationship, and the application raises no additional denial issues, the employer will be given an opportunity to establish, to the [adjudicator's] satisfaction, that the job opportunity is legitimate and, in the context of the application, does not pose a bar to certification. The [adjudicator] will consider the employer's information and the totality of the circumstances supporting the application in making this determination.

Id.

In determining whether a *bona fide* job opportunity exists, adjudicators must consider multiple factors, including but not limited to, whether the beneficiary: 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. *Matter of Modular Container Sys.*, *supra*, at *8. Adjudicators must also consider whether the beneficiary's pervasive presence and personal attributes would likely cause the petitioner to cease operations in the alien's absence and whether the employer complied with regulations and otherwise acted in good faith. *Id.*

In the instant case, the Petitioner attested on the accompanying labor certification that "[t]he job opportunity has been and is clearly open to any qualified United States worker." ETA Form 9089, Question N.8.; 20 C.F.R. § 656.10(c)(8). In response to Part C.9 on the ETA Form 9089, which asks: "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." Despite its negative response to Question C.9 on the ETA Form 9089, however, the Petitioner concedes that the Beneficiary is the sister of its CEO/minority shareholder.

The record contains evidence in support of the *bona fides* of the job opportunity, including statements from officers of the Petitioner, articles indicating the unavailability of speech language pathologists in the United States, and documentation of the company's recruitment efforts for the

offered position. On remand, the Director should consider this evidence and afford the Petitioner an opportunity to submit additional evidence in support of the *bona fides* of the job opportunity.

We note that USCIS records and an organizational chart submitted by the Petitioner indicate its employment of the Beneficiary's husband, the brother-in-law of its CEO/minority shareholder. For labor certification purposes, "familial relationships" include in-laws. *See* U.S. Dep't of Labor, Office of Foreign Labor Certification, "OFLC Frequently Asked Questions and Answers," at http://www.foreignlaborcert.doleta.gov/faqsanswers.cfm (accessed Oct. 6, 2015) (stating that the term "familial relationship" includes "relationships established through marriage, such as in-laws and step-families");[8] *see also Matter of Marie Jean Fabroa*, 2010-PER-01071, 2011 WL 5375174 *3 (BALCA Nov. 3, 2011) (upholding certification denial where the adjudicator considered the "familial relationship" between the employer and the beneficiary, the employer's sister-in-law, as a factor indicating a non-*bona fide* job opportunity); *Matter of Sunmart 374*, 2000-INA-93, 2000 WL 707942 *3 (BALCA May 15, 2000) (stating that a relationship between a beneficiary and his or her employer that triggers concerns about a job opportunity's validity "is not only of the blood; it may also be financial, by marriage, or through friendship"). Therefore, pursuant to *Modular Container*, the Director should consider the Beneficiary's relationship to her husband, who was also an employee of the Petitioner.

In addition, contact information on the accompanying labor certification states the email address of the officer who signed the labor certification as [redacted] The email address appears to relate to the Petitioner's CEO/minority shareholder or his sister, the Beneficiary. The email address therefore may indicate the influence of the Petitioner's CEO/minority shareholder or the Beneficiary in the recruitment process for the offered position.

The Director should consider this additional information in determining the *bona fides* of the instant job opportunity. The Director should also provide the Petitioner with an opportunity to explain or rebut the information. *See* 8 C.F.R. § 103.2(b)(16)(i) (requiring USCIS, before issuing an adverse decision, to notify a petitioner of derogatory information of which it is unaware and to afford it an opportunity to respond).

VI. CONCLUSION

The Director's revocation decision did not consider the willfulness of the Petitioner's misrepresentation on the accompanying labor certification. We will therefore withdraw the Director's decision and reinstate the validity of the accompanying labor certification.

[8] The DOL website indicates that the agency did not publish the FAQ answer regarding familial relationships until July 28, 2014, after our receipt of this appeal. However, we must apply the law as it exists at the time of adjudication. *See, e.g., Matter of Alarcon*, 20 I&N Dec. 557, 562 (BIA 1992) (citing *Ziffrin, Inc. v. United States*, 318 U.S. 73, 78 (1943)) (holding that a federal agency must follow a change in law during its proceedings because it cannot issue decisions contrary to existing legislation).

However, the record at the time of the petition's approval did not establish the Beneficiary's educational qualifications for the requested classification or for the offered position specified on the labor certification. The record at the time of the petition's approval also did not establish the Petitioner's continuing ability to pay the proffered wage from the petition's priority date onward. We will therefore remand the petition to the Director for further consideration.

In addition to the issues stated above, the Director on remand should consider the *bona fides* of the job opportunity. The Director may also advise the Petitioner of any additional potential grounds of revocation that he may find. He should afford the Petitioner an opportunity to submit evidence or argument regarding all issues raised.

Upon receipt of all the evidence and argument, the Director should review the entire record and enter a new decision.

ORDER: The matter is remanded to the Director, Nebraska Service Center, for further proceedings consistent with the foregoing opinion and for the entry of a new decision.

FURTHER ORDER: The accompanying ETA Form 9089, Application for Employment Certification, ETA Case Number [redacted] is reinstated.

Cite as *Matter of A-S- Inc.*, ID# 12023 (AAO Oct. 19, 2015)