



**U.S. Citizenship
and Immigration
Services**

**Non-Precedent Decision of the
Administrative Appeals Office**

MATTER OF C-I-S- INC.

DATE: AUG. 18, 2017

APPEAL OF TEXAS SERVICE CENTER DECISION

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

The Petitioner, a provider of information technology services, seeks to permanently employ the Beneficiary as a senior programmer analyst. It requests his classification as a member of the professions holding an advanced degree under the second-preference, immigrant category. *See* Immigration and Nationality Act (the Act) section 203(b)(2)(A), 8 U.S.C. § 1153(b)(2)(A). This employment-based, “EB-2” category allows U.S. businesses to sponsor foreign nationals for lawful permanent resident status if they have master’s degrees, or bachelor’s degrees followed by five years of experience.

After first granting the petition, the Director of the Texas Service Center revoked its approval. The Director concluded that, as of the petition’s approval, the Beneficiary concealed his role with the Petitioner as a corporate officer.

On appeal, the Petitioner submits additional evidence and asserts that the Beneficiary did not knowingly misrepresent any material facts.

Upon *de novo* review, we will withdraw the Director’s decision and remand the matter for further consideration consistent with the following opinion.

I. EMPLOYMENT-BASED IMMIGRATION

Employment-based immigration generally follows a three-step process. First, an employer files a labor certification application with the U.S. Department of Labor (DOL). *See* section 212(a)(5)(A)(i) of the Act, 8 U.S.C. § 1182(a)(5)(A)(i). DOL must certify that the United States lacks able, willing, qualified, and available workers for an offered position, and that employment of a foreign national will not hurt the wages and working conditions of U.S. workers with similar jobs. *Id.* If DOL approves the labor certification application, the employer then files an immigrant visa petition with U.S. Citizenship and Immigration Services (USCIS). *See* section 204 of the Act, 8 U.S.C. § 1154. Finally, if USCIS approves a petition, the foreign national may 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.

USCIS, however, may revoke a petition's approval "at any time" for "good and sufficient cause." Section 205 of the Act, 8 U.S.C. § 1155. USCIS properly notifies a petitioner of the agency's intention to revoke where the record - if unexplained and unrebutted - would have warranted a petition's denial. *Matter of Estime*, 19 I&N Dec. 450, 451 (BIA 1987). Similarly, revocation will lie if the record as of the decision - including any explanation or rebuttal evidence submitted by a petitioner - would have warranted a denial. *Id.* at 452. In addition, a decision must "explain[] the specific reasons for the revocation." 8 C.F.R. § 205.2(c).

II. LAW AND ANALYSIS

A. The Sufficiency of the Notice of Intent to Revoke and the Revocation Decision

Here, the Beneficiary attested that the Petitioner employed him, for about six years immediately preceding the filing of the labor certification application, as a programmer analyst. The notice of intent to revoke (NOIR) alleged that, during about nine months of that period, the Beneficiary lacked authorization to work for the Petitioner in the United States.

Because unauthorized employment of the Beneficiary would not have warranted the petition's denial, however, the NOIR improperly asserted the infraction. The Petitioner seeks to qualify the Beneficiary as an advanced degree professional based on his possession of a bachelor's degree followed by five years of experience. But the Petitioner does not claim that the Beneficiary gained qualifying experience with it. Rather, to support the Beneficiary's claimed experience, the Petitioner submitted letters from his prior employers. *See* 8 C.F.R. § 204.5(k)(3)(i)(B) (requiring letters from current or former employers to establish a beneficiary's possession of five years of post-baccalaureate experience). Thus, the nature of the Petitioner's employment of the Beneficiary does not affect his qualifications for the offered position and the requested classification.

Even if the Petitioner relied on the Beneficiary's experience with it, qualifying experience need not stem from authorized employment. *See Matter of B&B Residential Facility*, 01-INA-00146, 2002 WL 1586297, *3 (July 16, 2002) (holding that unpaid or "under the table" employment experience may qualify a foreign national for a labor certification position). The Beneficiary's unauthorized employment may result in inadmissibility to the United States, but unauthorized employment would not support revocation of the petition's approval. *See Matter of O-*, 8 I&N Dec. 295, 296 (BIA 1959) (holding that visa petition proceedings are not the appropriate forum for determining a beneficiary's admissibility).

The NOIR also alleged that, contrary to the Beneficiary's attestation, he did not work for the Petitioner as a programmer analyst, but rather as a vice president. The NOIR asserted that, before the labor application's filing, the Petitioner appointed the Beneficiary to that position as an additional corporate officer.¹

¹ The NOIR asserted the Beneficiary's appointment as a vice president in an amendment to the Petitioner's certificate of incorporation. The record, however, indicates that the Petitioner listed the Beneficiary in that position in its corporate

The revocation decision, however, did not explain how the Beneficiary's purported role as a vice president warranted the petition's denial. *See* 8 C.F.R. § 205.2(c) (requiring a decision to explain the specific reasons for a revocation). As previously discussed, the Petitioner does not rely on the Beneficiary's experience with it. Thus, the company's employment of the Beneficiary as a vice president, rather than as a programmer analyst, would not affect his qualifications for the offered position and the requested classification. Because the Beneficiary's prior role with the Petitioner is immaterial to his qualifications for the offered position, his alleged concealment of his position title on the labor certification does not support the Director's finding of fraud or misrepresentation.

The Beneficiary's appointment as a vice president could cast doubt on the *bona fide* nature of the job opportunity of senior programmer analyst. The Petitioner's misrepresentation of the *bona fide* nature of the job opportunity could warrant invalidation of the labor certification and revocation of the petition's approval. *See* 20 C.F.R. § 656.30(d) (authorizing USCIS to invalidate a labor certification after its issuance upon a finding of fraud or willful misrepresentation of a material fact). An invalid labor certification, in turn, would merit revocation of a petition's approval. *See* 8 C.F.R. § 204.5(k)(4)(i) (generally requiring a valid labor certification to accompany an advanced degree professional petition). But, in this case, the decision did not base the revocation on lack of a *bona fide* job opportunity.

For the foregoing reasons, USCIS did not properly revoke the petition's approval. We will therefore withdraw the Director's decision and the finding of fraud or willful misrepresentation of a material fact.

B. Potential Revocation Grounds

Although we will withdraw the revocation decision, the record as of the petition's approval did not support the filing's grant. We will therefore remand this matter for the issuance of a new NOIR, informing the Petitioner of the following potential revocation grounds.

1. The *Bona Fides* of the Job Opportunity

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 (Reg'l Comm'r 1979) (affirming a petition's denial where a labor certification was invalid for the intended, geographic area of employment). 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 attestation "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 1991) (*en banc*). A relationship between a petitioner and a beneficiary triggering concerns about the *bona fides* of a job opportunity "is not only of the blood; it may also be financial, by marriage, or

by-laws, which the Petitioner issued in the same month as the amendment. Both the by-laws and the amendment also list the Beneficiary as a director of the Petitioner.

through friendship.” *Matter of Sunmart* 374, 2000-INA-93, 2000 WL 707942, *3 (BALCA May 15, 2000).

To determine the *bona fides* of a job opportunity, USCIS must consider numerous factors, including whether a foreign national: is in a position to control or influence hiring decisions regarding an offered position; is related to a business’s directors, officers, or employees; incorporated or founded the business; sits on its board of directors; has an ownership interest in it; is involved in its management; is one of a small group of employees; or has qualifications matching specialized or unusual job duties or requirements of an offered position. *Matter of Modular Container*, 1991 WL 223955 at *8. USCIS must also consider whether a foreign national’s absence would likely cause a petitioner to cease operations, and whether the employer complied with DOL regulations and recruited for an offered position in good faith. *Id.*

Here, multiple *Modular Container* factors cast doubt on the availability of the offered position of senior programmer analyst to U.S. workers. On appeal, the Petitioner and the Beneficiary concede that he is the brother of the corporation’s sole shareholder. The record also indicates that, as of the labor application’s filing, the siblings lived together. In addition, the Beneficiary’s identification as a vice president and director of the Petitioner suggests that he sat on the company’s board and participated in its management. Further, copies of the Petitioner’s federal income tax returns from before the labor application’s filing identified the Beneficiary as one of three company shareholders.

On remand, the Director should detail these factual allegations in a new NOIR, affording the Petitioner a reasonable opportunity to respond. To determine the Petitioner’s compliance with DOL regulations and the nature of the company’s recruitment efforts for the offered position, the NOIR should ask the Petitioner to provide copies of its labor certification documentation, including: the notice of filing; the job order; the prevailing wage determination; advertisements of the offered position; the recruitment report; resumes or applications received from U.S. workers; and any correspondence between the company and the DOL.

2. Invalidation of the Labor Certification

As previously suggested, unless accompanied by an application for Schedule A designation or documentation of a beneficiary’s qualifications for a shortage occupation, a petition for an advanced degree professional must include a valid labor certification. 8 C.F.R. § 204.5(k)(4)(i). Upon a finding of fraud or willful misrepresentation of a material fact involving the document, USCIS may invalidate a labor certification after its issuance. 20 C.F.R. § 656.30(d). Substantial evidence must support invalidation. *Sugule v. Frazier*, 639 F.3d 406, 411 (8th Cir. 2011).

A willful misrepresentation must be deliberate and voluntary, made with knowledge of its falsity. *Mwongera v. INS*, 187 F.3d 323, 330 (3d Cir. 1999) (citations omitted). A misrepresentation is material if an applicant is ineligible on the true facts, or the misrepresentation tended to shut off a line of inquiry relevant to eligibility that might well have resulted in a proper denial. *Id.* (citing *Matter of Kai Hing Hui*, 15 I&N Dec. 288, 289 (BIA 1975)).

Here, as previously discussed, the Petitioner attested on the labor certification to the clear availability of the offered position to U.S. workers. Multiple *Modular Container* factors, however, including the fraternal relationship between the Petitioner's sole shareholder and the Beneficiary and the Beneficiary's ownership and management role in the company, cast doubt on the *bona fides* of the job opportunity. Thus, if substantial evidence indicates the unavailability of the offered position to U.S. workers, the Petitioner may have materially misrepresented a material fact on the labor certification, subjecting the certification to invalidation and the petition's approval to revocation.

On remand, the Director should detail these factual allegations in a new NOIR, affording the Petitioner a reasonable opportunity to respond.

3. The Petitioner's 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.² 8 C.F.R. § 204.5(g)(2). Here, USCIS records indicate the Petitioner's filing of at least 10 other petitions that remained pending or approved as of this petition's priority date.³

As ability to pay encompasses the proffered wage of each petition until a beneficiary obtains lawful permanent residence, the Petitioner here must demonstrate its ability to pay the combined proffered wages of this petition and the other petitions that remained pending or approved. The Petitioner must demonstrate its ability to pay the combined proffered wages from this petition's priority date of June 30, 2012, until its approval on March 7, 2013, or, if earlier, until the other beneficiaries obtained lawful permanent residence or their petitions were denied, withdrawn, or revoked. *See Patel v. Johnson*, 2 F. Supp. 3d 108, 124 (D. Mass. 2014) (affirming a revocation where a petitioner, as of the petition's approval date, did not demonstrate its ability to pay combined proffered wages of multiple, pending petitions).

The record as of the petition's approval did not document the proffered wages of the other pending petitions, or whether the Petitioner paid wages to any of the other beneficiaries. The record also did not indicate whether any of the other petitions were denied, withdrawn, or revoked, or whether any of their beneficiaries obtained lawful permanent residence. The record as of the petition's approval therefore did not establish the Petitioner's ability to pay the proffered wage.

² The priority date of a petition accompanied by a labor certification is the date DOL accepted the labor application for processing. 8 C.F.R. § 204.5(d). The Beneficiary here seeks to retain the priority date of a previous petition approved for him. *See* 8 C.F.R. § 204.5(e) (entitling a beneficiary of multiple, approved petitions to the earliest priority date). Despite the Beneficiary's ability to retain an earlier priority date, this petition's priority date, for adjudication purposes, remains the date the DOL received the labor application.

³ USCIS records identify the other petitions by the following receipt numbers:

[REDACTED]
[REDACTED] and [REDACTED]

On remand, the new NOIR should request the required information about the Petitioner's other pending petitions. The Petitioner may also submit additional evidence of its ability to pay as of the petition's approval, including materials supporting the additional factors described in *Matter of Sonegawa*. 12 I&N Dec. 612, 614-15 (Reg'l Comm'r 1967).

If supported by the record, the new NOIR may allege other potential revocation grounds. Upon the Petitioner's timely response to the notice, the Director should review the entire record and enter a new decision. If revoking the petition's approval, the new decision must specify the basis of the action.

III. CONCLUSION

The Director's NOIR and revocation did not specify reasons that would have warranted the petition's denial. Therefore, the petition's approval was improperly revoked. The record, however, did not support the petition's approval.

ORDER: The decision of the Director is withdrawn. The matter is remanded for further proceedings consistent with the foregoing opinion and for the entry of a new decision.

Cite as *Matter of C-I-S-, Inc.*, ID# 535229 (AAO Aug. 18, 2017)