



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

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

MATTER OF T-, INC.

DATE: JULY 25, 2017

APPEAL OF TEXAS SERVICE CENTER DECISION

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

The Petitioner, a financial technology company, seeks to employ the Beneficiary as a general manager. 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 at least five years of experience.

The Director of the Texas Service Center denied the petition, concluding that the record did not establish the required *bona fides* of the job opportunity. The Director found that the Petitioner concealed the Beneficiary’s ownership interest in the company and did not demonstrate the availability of the offered position to U.S. workers.

On appeal, the Petitioner submits additional evidence and asserts that the Director disregarded factors that establish the position’s *bona fides*.

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

I. LAW

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). The 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 the 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.

By signing the labor certification in this case, the Petitioner certified that the offered position of general manager “has been and is clearly open to any U.S. worker.” *See* 20 C.F.R. § 656.10(c)(8)

(requiring labor certification employers to so certify). A beneficiary's ownership interest in a petitioner or close personal relationships with its principals, however, can cast doubt on a position's availability to U.S. workers. *Matter of Modular Container Sys., Inc.*, 89-INA-228, 1991 WL 223955, *7 (BALCA 1991) (*en banc*) (explaining circumstances that render the *bona fides* of a job opportunity questionable).

To determine the *bona fides* of a job opportunity, we must consider the totality of the circumstances. *Id.* at *8. Applicable factors include whether a foreign national: can control or influence hiring decisions regarding the offered position; has a family relationship with an employer's director, officer, or employee; incorporated or founded the company; owns part of it; participates in its management; sits on its board of directors; is one of a small number of employees; meets specialized or unusual requirements of the offered position; or would likely cause the employer to cease operations if he or she left the business. *Id.* We must also consider the employer's compliance with regulations, including whether it recruited for the position in good faith. *Id.*

II. ANALYSIS

A. The *Bona Fides* of the Job Opportunity

As the Petitioner argues, the Director's decision did not address all of the *Modular Container* factors. The record, however, does not support a reversal. While evidence does not indicate the Beneficiary's possession of family relationships with the Petitioner's principals or his service as a company director, multiple factors indicate that the offered position was not clearly open to U.S. workers.

First, as the Director found, the record establishes the Beneficiary's possession of an ownership interest in the Petitioner. On the labor certification application, the petitioning corporation denied that the Beneficiary was one of its owners. As the Petitioner now concedes, however, 21 days before the application's filing in 2015, the Beneficiary exercised a stock option, acquiring shares of the company's common stock.

On appeal, the Petitioner asserts that the Beneficiary's ownership in it is minimal. The Petitioner submits a table and a letter from its chief financial officer, stating that the Beneficiary's 6,667 shares of stock represent 2.28 percent of the corporation's outstanding total of 291,915. The record, however, indicates the Beneficiary's ownership of about 40 percent of the company. The record documents the Petitioner's issuance of only 16,667 shares of stock: the corporation's original 10,000 shares, which a limited partnership bought in 2013; and the shares the Beneficiary's acquired about 18 months later. The record lacks reliable, documentary evidence - such as copies of stock certificates, exercise notices of stock options, stock ledger pages, or minutes of corporate meetings - establishing the Petitioner's issuance of additional stock to others.

The Petitioner also contends that the Beneficiary's shares lack voting rights and that it issued similar stock options to all of its employees. The record, however, does not support these assertions. Upon

the Beneficiary's exercise of his stock option, he agreed in writing to vote his shares in matters regarding the Petitioner's number of directors, increases in its authorized common stock, and proposed acquisitions of the company. The record therefore indicates that the Beneficiary's stock carries voting rights. Also, the record lacks evidence corroborating the Petitioner's assertion that it granted stock options to all of its employees.

In addition, the record indicates the Beneficiary's possession of a prior ownership interest in the Petitioner. An agreement identifies him as one of two "controlling equity holders" of the Colombian company that wholly owned the Petitioner before its 2013 sale. Thus, indirectly through the Colombian company, the Beneficiary owned part of the Petitioner from its incorporation in 2010 until its sale in 2013, and since 2015 when he exercised his stock option. *See Matter of Modular Container*, 1991 WL 223955 at *5 (indicating that, for purposes of establishing the *bona fides* of a job opportunity, shares in a corporation owning a labor certification employer constitute an ownership interest in the employer). The Beneficiary's interest in the company that established the Petitioner also suggests that he co-founded the Petitioner, another factor indicating that the offered position may not be clearly available to U.S. workers.

The record also indicates the Beneficiary's participation in the Petitioner's management. The Beneficiary attested on the labor certification that the Petitioner has employed him in the offered position of general manager since 2011.¹ The labor certification states that the position's job duties include "[m]anag[ing] day-to-day operations and develop[ing] and implement[ing] standards and controls, and systems and procedures."

The Petitioner asserts that the Beneficiary "works under the direction of senior management to implement their vision and policies as they direct." But the job duties of his position on the labor certification state that he works "with" senior management, not under them. The labor certification further states that the position requires at least three years of experience in "providing strategic planning," further indicating his involvement in the company's management.

Evidence also identifies the Beneficiary as part of the Petitioner's senior management. The Petitioner's annual state registrations listed the Beneficiary as its corporate secretary from 2013 through 2016. *See* Ga. Corps. Div., at <https://ecorp.sos.ga.gov/BusinessSearch/BusinessFilings> (last visited May 30, 2017).² In addition, the 2016 registration identifies him as "chief executive officer," and the Beneficiary signed the 2013 and 2014 registrations as the company's "president." *Id.* The record therefore indicates the Beneficiary's involvement in the Petitioner's management, suggesting the non-*bona fides* of the job opportunity.

¹ The Petitioner has temporary authorization to employ the Beneficiary in nonimmigrant visa status. In this petition, the Petitioner seeks permission to employ him on a permanent basis.

² The records indicate that the Petitioner amended its 2016 annual registration on September 22, 2016, deleting the Beneficiary as a corporate officer. *Id.*

The record also establishes the Beneficiary as one of a small number of employees. The Petitioner's Form I-140, Immigrant Petition for Alien Workers, states its employment of eight people. On appeal, the Petitioner asserts 12 employees.

Determinations of a job opportunity's *bona fides* often turn on whether an employer recruited for an offered position in good faith. See, e.g., *Matter of Tyrrell Ltd.*, 2012-PER-01920, 2016 WL 6301784, *5, (BALCA Oct. 21, 2016) (describing a lack of responses from U.S. workers as "significant" in its finding of a *bona fide* job opportunity). The Petitioner here submitted copies of its labor certification documentation, indicating that it rejected the four U.S. workers who applied for the offered position as unqualified. The documentation, however, lacks copies of the applicants' resumes and does not indicate who interviewed the candidates. The documentation therefore does not establish the good-faith nature of the Petitioner's recruitment for the offered position, or the Beneficiary's lack of influence on the hiring decisions.

Based on the Beneficiary's ownership interest in the Petitioner, his involvement in its management, and his membership in a small number of employees, the totality of the circumstances does not establish the *bona fides* of the job opportunity. We will therefore affirm the Director's decision.

B. The Petitioner's Ability to Pay the Proffered Wage

Although not addressed by the Director, the record also does not establish 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.³ 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.*

In this case, the labor certification states the proffered wage of the offered position of general manager as \$151,008 a year. The petition's priority date is May 13, 2015. In support of its ability to pay the proffered wage, the Petitioner submitted financial statements for 2015. Contrary to 8 C.F.R. § 204.5(g)(2), however, the financial statements do not indicate that an accountant audited them. The record therefore lacks required evidence of the Petitioner's ability to pay in 2015, the year of the petition's priority date.

C. The Beneficiary's Possession of the Required Experience

Also beyond the Director's decision, the record does not establish the Beneficiary's possession of the minimum experience required for the offered position or for classification as an advanced degree professional. In order to be eligible for advanced degree classification, a beneficiary must possess a master's degree or bachelor's degree followed by five years of experience. 8 C.F.R. § 204.5(k)(2). A beneficiary must also possess all the job requirements specified on a labor certification by a

³ In this case, the petition's priority date is the date the DOL received the accompanying labor certification application for processing. See 8 C.F.R. § 204.5(d).

petition's priority date. *See, e.g., Matter of Wing's Tea House*, 16 I&N Dec. 158, 160 (Acting Reg'l Comm'r 1977). In evaluating a beneficiary's qualifications, we must examine the job offer portion of a labor certification to determine the minimum requirements of an offered position. We may neither ignore a term of a labor certification, nor impose additional requirements. *See, e.g., Madany v. Smith*, 696 F.2d 1008, 1012-13 (D.C. Cir. 1983).

The labor certification in this case requires a master's degree and three years of experience or a bachelor's degree and five years of experience. The Beneficiary claims to qualify for the offered position and requested classification through a combination of a bachelor's degree followed by five years of experience. The record establishes the Beneficiary's possession of a U.S. bachelor's degree, but, as discussed below, does not demonstrate that he has the required experience.

On the labor certification, the Beneficiary attested to his possession of more than seven years of full-time, post-baccalaureate, qualifying experience before joining the Petitioner in the offered position. To support the Beneficiary's qualifying experience, the Petitioner submitted five letters from his purported, former employers. *See* 8 C.F.R. § 204.5(g)(1) (requiring a petitioner to submit letters from employers, including their names, titles, and addresses, and descriptions of a beneficiary's experience).

One of the letters established the Beneficiary's possession of about a year of qualifying experience. The remaining four letters, however, do not constitute reliable evidence of the Beneficiary's claimed experience. The letter from [REDACTED] states different dates of employment and a different job title than those reported on the labor certification. Thus, this letter does not establish the Beneficiary's qualifying experience. *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).

The letters from [REDACTED] located in the United States, and [REDACTED] located in Spain, also present a number of discrepancies. The two letters from [REDACTED] and the one letter from [REDACTED] are all drafted on [REDACTED] letterhead and all three letters are signed by the same human resources representative. The Petitioner has not explained how the same human resources representative acquired her knowledge of the Beneficiary's employment in both the United States and Spain. Moreover, the letter from [REDACTED] references the Beneficiary's employment with the [REDACTED] rather than employment by [REDACTED] and all three letters misspell the name of [REDACTED]. The discrepancies in the letters cast doubt on the accuracy of their contents and their authenticity. *See Id.* The letters therefore do not establish the Beneficiary's qualifying experience with the affiliated group of companies. As such, the record does not demonstrate that the Beneficiary has the five years of experience required by the labor certification or for classification as an advanced degree professional.

III. CONCLUSION

The record does not establish the availability of the offered position to U.S. workers. We will therefore affirm the Director's decision. We also find that the Petitioner has not demonstrated its ability to pay the proffered wage or that the Beneficiary has the required experience for the offered position or for classification as an advanced degree professional.

ORDER: The appeal is dismissed.

Cite as *Matter of T-, Inc.*, ID# 430616 (AAO July 25, 2017)