U.S. Citizenship and Immigration Services

Non-Precedent Decision of the Administrative Appeals Office

MATTER OF SSA-, LLC

DATE: JUNE 2, 2017

APPEAL OF TEXAS SERVICE CENTER DECISION

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

The Petitioner, a multi-family rental and leasing business, seeks to employ the Beneficiary in the United States as a financial analyst. It requests classification of the Beneficiary as a member of the professions holding an advanced degree under the second preference immigrant classification. *See* Immigration and Nationality Act (the Act) section 203(b)(2), 8 U.S.C. § 1153(b)(2). This employment-based immigrant classification allows a U.S. employer to sponsor a professional with an advanced degree for lawful permanent resident status.

The Director of the Texas Service Center determined that the Petitioner had not established that a *bona fide* job offer existed that was open to qualified U.S. workers. The Director found that the Petitioner misrepresented a material fact in that it had not disclosed the familial relationship between its owners and the Beneficiary. Accordingly, the Director denied the petition and invalidated the labor certification.

On appeal, the Petitioner asserts that it did not misrepresent a material fact, but merely misunderstood the question that was asked on the labor certification regarding the familial relationship. The Petitioner states that the totality of the circumstances establishes that it made a good faith effort to recruit qualified workers.

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

I. LAW

A. Employment-Based Immigration

Employment-based immigration generally follows a three-step process. First, an employer must obtain an approved 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, the DOL certifies that there are insufficient U.S. workers who are able, willing, qualified, and available

[1] The date the labor certification is filed is called the "priority date." *See* 8 C.F.R. § 204.5(d). A beneficiary must be eligible as of that date. The priority date in this matter is December 22, 2015.

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 may file an immigrant visa petition with U.S. Citizenship and Immigration Services (USCIS). *See* section 204 of the Act, 8 U.S.C. § 1154. Third, if USCIS approves the 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.

B. Invalidation of Labor Certification

The regulation at 8 C.F.R. § 204.5(k)(4)(i) provides that every petition for classification as a professional holding an advanced degree "must be accompanied by an individual labor certification from the Department of Labor." A petition that lacks a required individual labor certification is not considered properly filed. *See* 8 C.F.R. § 204.5(a)(2). The regulation at 20 C.F.R. § 656.30(d) provides, in pertinent part, that "after issuance, a labor certification is subject to invalidation by the DHS [Department of Homeland Security] . . . upon a determination, made in accordance with [its] procedures or by a court, of fraud or willful misrepresentation of a material fact involving the labor certification application." 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).

II. ANALYSIS

A. Misrepresentation on the Labor Certification

As required by statute, the I-140, Immigrant Petition for Alien Worker filed in this matter is accompanied by an ETA Form 9089, Application for Permanent Employment Certification (labor certification), certified by the DOL.[2] At line C.9 of the labor certification the employer is asked, "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, or incorporators, and the alien?" The Petitioner answered "No" to this question.

The Director issued a request for evidence (RFE) which noted that, contrary to the Petitioner's answer to C.9 on the labor certification, the Beneficiary appeared to be related to at least one of the Petitioner's owners. In response to the RFE, the Petitioner acknowledged that the person identified as the company's president and owner on the Form I-140 petition is the Beneficiary's uncle. The Petitioner also acknowledged that the Beneficiary's uncle owns 5% of the company, and that his wife (the Beneficiary's aunt) owns 17% of the petitioning company. The Petitioner further claimed that it misunderstood the question asked at line C.9 of the labor certification and did not think it applied to their situation. The Petitioner described the recruitment process it undertook to fill the offered job and stated that none of the other candidates for the position possessed the minimum

[2] *See* Section 212(a)(5)(D) of the Act, 8 U.S.C. § 1182(a)(5)(D); *see also* 8 C.F.R. § 204.5(a)(2).

education and employment experience required by the labor certification. The Petitioner asserted that it had made a good faith recruitment effort, and that the familial relationship between the Beneficiary and two of the owners of the Petitioner does not necessarily preclude the existence of a *bona fide* job opportunity.

The Director found that the Petitioner had not at any time during the labor certification process disclosed to the DOL the fact of the familial relationship between itself and the Beneficiary. The Director stated that given the relationship between the Beneficiary and the Petitioner's owners, the Petitioner should have answered "Yes" to C.9 and found that "[h]ad the DOL known of the pre-existing, familial relationship between the beneficiary and the petitioner's owner, it would not likely have certified the labor application without further inquiry." As such, the Director found that the Petitioner willfully misrepresented a material fact and he therefore invalidated the labor certification and denied the petition.

On appeal, the Petitioner contends that its answer at line C.9 of the labor certification was the result of a misreading of the question, not an attempt to misrepresent the *bona fide* nature of the job offer. The Petitioner claims that the language of the question led the Petitioner to believe that both parts of the question needed to be true to require a "Yes" answer. We are not persuaded by the Petitioner's claim. While the question at line C.9 is voluminous, it is easily divided into two distinct parts and uses the conjunction "or" to indicate that either part could independently warrant a positive response from the employer. Thus, the employer should answer "Yes" if either: (1) the employer is a closely held corporation, partnership, or sole proprietorship in which the alien has an ownership interest; or, (2) there is a familial relationship between the owners, stockholders, partners, corporate officers, or incorporators, and the alien.

As noted in the Director's decision, the Petitioner could have referred to the DOL Frequently Asked Questions (FAQs) on how to answer question C.9, if it found the format confusing. On appeal, the Petitioner asserts that the Director's reference to the DOL's Frequently Asked Questions (FAQs) in the denial runs counter to a number of Board of Alien Labor Certification Appeals (BALCA) cases dealing with FAQs. Citing to *Matter of University of Texas at Brownsville*, 2010-PER-00887 (BALCA July 20, 2011), the Petitioner states that FAQs cannot create a substantive rule without first undergoing notice and comment rulemaking. Citing to *Matter of HealthAmerica*, 2006-PER-1 (BALCA July 18, 2006), the Petitioner states that while FAQs "are a very powerful method of disseminating information and undoubtedly provide helpful guidance to applicants and their representatives, they are not a method by which an agency can impose substantive rules that have the force of law." However, the Petitioner's assertion that the Director unjustly created a substantive rule out of the quoted FAQ is not supported by the record. The FAQ in this case does not create a substantive requirement but instead clarifies how to understand and answer the question at line C.9 of the labor certification, the very question that the Petitioner claims to have found confusing.[3]

[3] We note that the DOL's FAQ on familial relationships states: "A familial relationship includes any relationship established by blood, marriage, or adoption, even if distant. For example, cousins of all degrees, aunts, uncles, grandparents and grandchildren are included." https://www.foreignlaborcert.doleta.gov/faqsanswers.cfm.

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 of the 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.[4] As described in *Matter of Sunmart*, 374, 00-INA-93 (BALCA May 15, 2000), relationships that may affect the Beneficiary's influence over the job opportunity include those where the beneficiary is related to the petitioner by "blood" and relationships that may "be financial, by marriage, or through friendship."[5] The Beneficiary's familial relationship with the president and two of the Petitioner's owners constitutes a "familial relationship between the owners, stockholders, partners, corporate officers, or incorporators, and the alien" as contemplated in part (2) of the question at line C.9. Therefore, the Petitioner's answer of "No" to the question at line C.9 of the labor certification was a willful misrepresentation of fact.

We must also examine whether the misrepresentation was material to the current petition and to the question of whether the position was 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 asserts that its "No" answer to C.9 was not material in this case because it made a good faith recruitment effort and because the Beneficiary qualifies for classification as a professional holding an advanced degree based on an examination of the totality of the circumstances. We disagree. The Petitioner's misrepresentation of the Beneficiary's relationship to the president of the company and two of the

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[4] The PERM regulation specifically addresses this issue at 20 C.F.R. § 656.17(l) and 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 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.

[5] While we are not bound by BALCA decisions, we, nevertheless, may take note of the reasoning in such decisions when, as here, they offer insight into issues that arise in the employment-based immigrant visa process.

Petitioner's owners shut off a line of inquiry into the *bona fide* nature of the job and its eligibility for the benefit sought. Had the DOL been apprised of the familial relationship between the Beneficiary and the Petitioner's president and part-owners, the DOL may have decided to investigate more deeply whether the proffered position of financial analyst 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[6] that was relevant to the Beneficiary's eligibility. As such, the Director correctly found that the Petitioner willfully misrepresented a material fact on the labor certification and properly invalidated the labor certification.

B. *Bona Fide* Job Opportunity

The Director also found that the Petitioner had not established that there was a *bona fide* job opportunity available to U.S. workers. By signing the labor certification, the Petitioner attested that "[t]he job opportunity 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). The Petitioner has the burden of establishing that a *bona fide* job opportunity exists when it is asked to show that the job is clearly open to U.S. workers. *See Matter of Amger Corp.*, 87-INA-545 (BALCA 1987); see also 8 U.S.C. § 1361. The factors to be examined in determining whether a *bona fide* job offer exists are set forth in a decision by the Board of Alien Labor Certification Appeals (BALCA) in *Matter of Modular Container Systems, Inc.,* 89-INA-288 (BALCA 1991). As cited by the Petitioner on appeal, those factors include such items as whether the beneficiary (a) is in the position to control or influence hiring decisions regarding the job for which labor certification is sought; (b) is related to the corporate directors, officers, or employees; (c) was an incorporator or founder of the company; (d) has an ownership interest in the company; (e) is involved in the management of the company; (f) is on the board of directors; (g) is one of a small number of employees; (h) has qualifications for the job that are identical to specialized or unusual job duties and requirements stated in the application; and (i) is so inseparable from the sponsoring employer because of his or her persuasive presence and personal attributes that the employer would be unlikely to continue in operation without the beneficiary. *Id.*

Among the foregoing factors, several certainly apply in this case. The Beneficiary is related to the officer identified on the petition as the "PRESIDENT AND OWNER," and is one of a small number of employees (the Petitioner claimed 13 employees on the labor certification, and 14 employees on the petition). While the Petitioner stresses on appeal that the "[b]eneficiary was not in a position to influence or control the hiring decisions for the position," the Petitioner makes no such statements regarding the involvement of the Beneficiary's aunt and uncle with the hiring process; in fact, the job notice posting that was submitted by the Petitioner specifically instructs potential applicants to contact the Beneficiary's uncle to apply for the position. We note, again, that the Beneficiary's

[6] The Petitioner suggests on appeal that the Director's discovery that the Beneficiary had previously used the Petitioner's address was proof that the misrepresentation did not cut off a line of inquiry. However, that discovery was made by USCIS and not the DOL, and was made only after the labor certification had been approved by the DOL. Therefore, the DOL was unaware of the relationship when it adjudicated the labor certification.

uncle is the president of the Petitioner and owns 5% of the company, while the Beneficiary's aunt owns 17% of the company and is the largest shareholder among the 19 owners.[7] As such, we agree with the Director that the Petitioner has not established the existence of a *bona fide* job opportunity.

III. CONCLUSION

The Petitioner has not overcome the Director's finding that the Petitioner willfully misrepresented a material fact involving the labor certification process. Therefore, we will not reinstate the validity of the labor certification. In addition, the Petitioner did not establish that a *bona fide* job opportunity existed.

ORDER: The appeal is dismissed.

Cite as *Matter of SSA-, LLC*, ID# 356805 (AAO June 2, 2017)

[7] The Petitioner provides on appeal a list of the names and addresses of these 19 owners. While the Beneficiary stated that he is not related to any of the other 17 owners; we note that one of the listed owners (with 4% of the ownership) has the same surname as the Beneficiary.