U.S. Citizenship and Immigration Services

Non-Precedent Decision of the Administrative Appeals Office

MATTER OF E-, INC.

DATE: MAR. 10, 2017

APPEAL OF NEBRASKA SERVICE CENTER DECISION

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

The Petitioner, a developer of enhanced ultrasound imaging systems, seeks to employ the Beneficiary as chief technology officer (CTO). It requests classification of the Beneficiary as a professional holding an advanced degree under the second preference immigrant category. *See* Immigration and Nationality Act (the Act) section 203(b)(2), 8 U.S.C. § 1153(b)(2). This category allows a U.S. business to sponsor a professional with an advanced degree or its equivalent for lawful permanent resident status.

The Director, Nebraska Service Center, denied the petition. The Director concluded that the record did not establish the Petitioner's ability to pay the proffered wage or the *bona fides* of the job opportunity.

The Director also found that the Petitioner willfully misrepresented a material fact on the accompanying ETA Form 9089, Application for Permanent Employment Certification (labor certification), approved by the U.S. Department of Labor (DOL).

The matter is now before us on appeal. The Petitioner asserts that the Director disregarded evidence of record and submits additional evidence that it claims demonstrates its ability to pay the proffered wage and the *bona fide* nature of the job.

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

I. LAW AND ANALYSIS

A. The Employment-Based Immigration Process

Employment-based immigration is generally a three-step process. First, an employer must obtain an approved labor certification from the DOL. *See* section 212(a)(5)(A)(i) of the Act, 8 U.S.C. § 1182(a)(5)(A)(i). Next, the employer files a Form I-140, Immigrant Petition for Alien Worker, with U.S. Citizenship and Immigration Services (USCIS). *See* section 204(a) of the Act, 8 U.S.C. § 1154(a). Finally, if USCIS approves the petition, a 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 approving the labor certification in this case, the DOL certified that there are not U.S. workers who are able, willing, qualified, and available for the offered position of CTO. *See* section 212(a)(5)(A)(i)(I) of the Act. The DOL also certified that the employment of a foreign national in the position will not adversely affect the wages and working conditions of domestic workers similarly employed. *See* section 212(a)(5)(A)(i)(II).

In visa petition proceedings, USCIS must determine whether the Beneficiary meets the requirements of the offered position certified by the DOL. We must also determine whether the Petitioner and the Beneficiary qualify for the requested immigrant classification. *See, e.g., Tongatapu Woodcraft Haw., Ltd. v Feldman*, 736 F.2d 1305, 1309 (9th Cir. 1984) (holding that the immigration service "makes its own determination of the alien's entitlement to [the requested] preference status").

B. 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. 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 petition's priority date is August 24, 2015. This is the date the DOL accepted the labor certification application for processing. *See* 8 C.F.R. § 204.5(d) (explaining how to determine a petition's priority date). The labor certification states the proffered wage of the offered position of CTO as $150,000 to $200,000 per year.

At the time of the appeal's filing, required initial evidence of the Petitioner's ability to pay the proffered wage in 2016 was not yet available. We will therefore consider the Petitioner's ability to pay only in 2015, the year of the petition's priority date.

In determining ability to pay, we first examine whether a petitioner paid a beneficiary the full proffered wage each year from a petition's priority date. If a petitioner did not annually pay a beneficiary the full proffered wage, we next examine whether it generated sufficient net income or net current assets to pay any difference between the annual proffered wage and the wages paid. If a petitioner's net income and net current assets are insufficient, we may also consider the overall magnitude of its business activities. *See Matter of Sonegawa*, 12 I&N Dec. 612, 614-15 (Reg'l Comm'r 1967).[1]

[1] Federal courts have upheld our method of determining a petitioner's ability to pay a proffered wage. *See, e.g., River St. Donuts, LLC v. Napolitano*, 558 F.3d 111, 118 (1st Cir. 2009); *Estrada-Hernandez v. Holder*, 108 F. Supp. 3d 936, 942-43 (S.D. Cal. 2015); *Rivzi v. Dep't of Homeland Sec.*, 37 F. Supp. 3d 870, 883-84 (S.D. Tex. 2014), *aff'd*, 627 Fed. App'x. 292 (5th Cir. 2015); *Taco Especial v. Napolitano*, 696 F. Supp. 2d 873, 881 (E.D. Mich. 2010), *aff'd*, No. 10-1517 (6th Cir. Nov. 10, 2011).

The record indicates the Petitioner's employment of the Beneficiary since February 25, 2008. The Petitioner submitted a copy of an IRS Form W-2, Wage and Tax Statement, for 2015. The Form W-2 indicates that the Petitioner paid the Beneficiary $138,788.93 that year. The amount on the Form W-2 does not equal or exceed the minimum annual proffered wage of $150,000. The form therefore does not establish the Petitioner's ability to pay the proffered wage in 2015.

On appeal, the Petitioner submits a letter from its interim chief financial officer (CFO). The letter states that the Petitioner intended to pay the Beneficiary the annual proffered wage of $150,000 in 2015, but that "a timing difference between our operating cash needs and our investment" delayed payments to him. The letter states that the Petitioner paid the remainder of the Beneficiary's 2015 wages in 2016. The Petitioner's payment of a portion of the Beneficiary's 2015 wages the following year does not demonstrate its ability to pay the proffered wage in 2015. The record therefore does not establish the Petitioner's ability to pay in 2015 based on its payments to the Beneficiary.

Nevertheless, we credit the Petitioner's payment to the Beneficiary. The Petitioner need only demonstrate net income or net current assets sufficient to pay the difference between the proffered wage and the amount it paid the Beneficiary in 2015, or $11,211.07. The Petitioner submitted copies of its federal income tax return and audited financial statements for 2015. Both of these documents report negative amounts of net income and net current assets. The record therefore does not demonstrate the Petitioner's ability to pay the proffered wage in 2015 based on its net income and net current assets.

Thus, based on a review of the Petitioner's payments to the Beneficiary and its annual amounts of net income and net current assets, the record does not establish its ability to pay the proffered wage in 2015.

On appeal, the Petitioner asserts that the Director erred in disregarding its equity funding. Since its founding in 2007, the Petitioner states that individuals and companies have paid almost $7.5 million for its stock, including more than $2.5 million in 2014 and 2015. The interim CFO's letter states that the Petitioner's "normal operations are supported by a group of investors who have routinely and consistently maintained adequate capital within the company for its normal operations."

The record, however, does not establish the Petitioner's ability to pay the Beneficiary's proffered wage based on its equity funding. Despite raising more than $800,000 from investors in 2015, the record indicates the Petitioner's inability to pay the Beneficiary the minimum annual proffered wage that year. As previously indicated, the Petitioner deferred payment of a portion of the Beneficiary's wage until 2016. The record therefore does not establish the Petitioner's continuing ability to pay the annual proffered wage based on its equity funding.

The Petitioner further asserts that its payments to the Beneficiary in 2014 and 2016 support its ability to pay. A copy of an IRS Form W-2 indicates that the Petitioner paid the Beneficiary $216,270.01 in 2014. Copies of payroll records also indicate the Petitioner's payment of $151,388.92 to the Beneficiary in 2016 as of August 31.

Except for the $11,211.07 shortfall in 2015, the Petitioner states that its payments to the Beneficiary would have exceeded the minimum annual proffered wage for the past 3 years, demonstrating its ability to pay. The Petitioner states:

> For a company with millions of dollars in investments and venture funding, this marginal amount of $11,212 (which is less than .07% of the proffered wage) could easily be covered by moving funds around, reducing employee bonuses for the year, etc.

We acknowledge the Petitioner's payments to the Beneficiary in 2014 and 2016. The 2014 payment, however, occurred before the petition's August 24, 2015, priority date. Contrary to 8 C.F.R. § 204.5(g)(2), the 2014 payment therefore does not establish the Petitioner's ability to pay the proffered wage "at the time the priority date is established and continuing until the beneficiary obtains lawful permanent residence."

Also, as previously indicated, the record lacks regulatory required evidence of the Petitioner's ability to pay the proffered wage in 2016. *See* 8 C.F.R. § 204.5(g)(2) (stating that evidence of ability to pay "shall be either in the form of copies of annual reports, federal tax returns, or audited financial statements"). Thus, the 2016 payroll records do not independently establish the Petitioner's ability to pay in 2016.

In addition, the record does not support the Petitioner's assertion that it could have "mov[ed] funds around" or "reduc[ed] employee bonuses" to pay the remainder of the minimum annual proffered wage to the Beneficiary in 2015. The Petitioner does not specify any additional funds available at that time, nor does it document their existence. Thus, the Petitioner's payments to the Beneficiary in 2014 and 2016 do not establish its ability to pay the proffered wage as of the petition's priority date in 2015. *See Matter of Great Wall*, 16 I&N Dec. 142, 145 (Acting Reg'l Comm'r 1977) (holding that a petitioner "cannot expect to establish a priority date for visa issuance for the beneficiary when at the time of making the job offer . . . [it] could not, in all reality, pay the salary as stated in the job offer").

As the Petitioner asserts on appeal and as previously indicated, we may consider evidence of ability to pay beyond a petitioner's net income and net current assets. Under *Sonegawa*, we may consider such factors as: the number of years a petitioner has conducted business; the growth of its business; its number of employees; the occurrence of uncharacteristic business expenditures or losses; its reputation in its industry; a beneficiary's replacement of a current employee or outsourced service; or other evidence of a petitioner's ability to pay a proffered wage.

Here, the record indicates the Petitioner's continuous business operations since 2007 and its current employment of nine people. Its financial documentation indicates increases in revenues and wages paid from 2014 to 2015. The Petitioner also submitted evidence of its possession of numerous patents and a 2016 research collaboration agreement between it and a large, well-known U.S. company. But unlike in *Sonegawa*, the record does not indicate the Petitioner's incurrence of

uncharacteristic business expenditures or losses. The record also does not indicate the Beneficiary's replacement of a current employee or outsourced service. Moreover, in *Sonegawa*, until recording a "down year" at the time of the petition's filing, the petitioner had reported 10 years of profits "without any evidence of financial difficulties." *Sonegawa*, 12 I&N Dec. at 614. In contrast, the record here indicates that the Petitioner has never been profitable. In its SEC registration, the Petitioner reported an accumulated deficit of almost $12 million since its founding.[2]

In the notes to the Petitioner's financial statements, the auditor states:

> The ability of the Company to continue as a going concern is dependent on the Company obtaining adequate capital to fund operating losses until it establishes a revenue stream and becomes profitable. Management's plans to continue as a going concern include raising additional capital through borrowing and sales of common stock. However, management cannot provide any assurances that the Company will be successful in accomplishing any of its plans.

Thus, unlike the petitioner in *Sonegawa*, the record indicates the consistent unprofitability of the Petitioner and the uncertainty of sufficient, future funding. The totality of the Petitioner's circumstances under *Sonegawa* therefore does not establish its ability to pay the proffered wage.

The Petitioner has not demonstrated its continuing ability to pay the proffered wage from the petition's priority date onward. We will therefore affirm the Director's decision.

C. The *Bona Fides* of the Job Opportunity

A petition for an advanced degree professional must be accompanied by a valid individual labor certification, an application for Schedule A designation, or documentation of a beneficiary's qualifications for a shortage occupation. 8 C.F.R. § 204.5(k)(4)(i). If a labor certification does not comply with DOL regulations, we may deny the corresponding petition. *See Matter of Sunoco Energy Dev. Co.*, 17 I&N Dec. 283, 284 (Reg'l Comm'r 1979) (affirming a petition's denial under 20 C.F.R. § 656.30(c)(2) where a labor certification did not authorize a beneficiary to work at the intended jobsite).

In this case, the Petitioner attested on the labor certification 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 an employer to so certify). The Director, however, found that the record did not support the claimed *bona fides* of the job opportunity.

In determining the *bona fides* of a job opportunity, we must consider several factors, including whether the foreign national: is in a position to control or influence hiring decisions regarding the offered

[2] *See* SEC, Company Filings Search, at https://www.sec.gov/edgar/ searchedgar/companysearch.html (accessed Jan. 24, 2017).

position; is related to the employer's owners, officers, or employees; incorporated or founded the employer; has an ownership interest in it; is involved in its management; is on its board of directors; is one of a small number of employees; possesses specialized or unusual job requirements of the offered position; or has personal attributes that, in the foreign national's absence, would likely cause the employer to cease operations. *Matter of Modular Container Sys., Inc.*, 89-INA-228, 1991 WL 223955, *8 (BALCA 1991) (*en banc*). We must also consider the employer's level of compliance and good faith in processing the labor certification. *Id.*

Here, the record does not indicate that the Beneficiary incorporated or founded the Petitioner, or has ever sat on its board of directors. The record also lacks evidence that the Petitioner would cease operations in the Beneficiary's absence. These *Modular Container* factors therefore weigh in favor of the *bona fides* of the job opportunity.

Evidence, however, indicates that the Beneficiary served as a corporate officer of the Petitioner and was involved in its management. Copies of the Petitioner's annual corporate reports in Massachusetts for 2011 and 2012, respectively dated February 28, 2012 and February 28, 2013, and its 2012 annual report in Michigan, dated November 7, 2012, list the Beneficiary as the company's president.[3] The Beneficiary also signed the Petitioner's annual corporate reports in Michigan for 2013 through 2015, all dated November 8, 2015, representing himself as the company's president.[4]

The record also contains copies of other documents signed by the Beneficiary representing him as the Petitioner's president. The documents include: stock certificates from September 2013 through October 2014; stock subscription agreements, dated January 2014 through April 2014; a March 25, 2014, Form D, Notice of Exempt Offering of Securities, filed with the SEC; a , 2015, lease; and a January 16, 2015, amendment to the Petitioner's certificate of incorporation. In addition, an April 16, 2010, company press release regarding the commercial launch of its scanner quoted the Beneficiary and identified him as the Petitioner's "[p]resident and [c]hief [o]perating [o]fficer."[5]

In response to the Director's request for evidence (RFE) of March 30, 2016, the Petitioner's current president and chief executive officer (CEO) stated that the Beneficiary has "primarily" served as the company's CTO since February 2008.[6] For a "short period" while the Petitioner was searching for a

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[3] *See* Mass. Sec'y of the Commonwealth, Corps. Div., Bus. Entity Search, at https://www.sec.state.ma.us/cor/ corsearch.htm (accessed Jan. 26, 2017); Mich. Dep't of Licensing & Regulatory Affairs, Bus. Entity Search, at http://www.dleg.state.mi.us/bcs_corp/ sr_corp.asp (accessed Jan. 24, 2017).

[4] *See* Mich. Dep't of Licensing & Regulatory Affairs, Bus. Entity Search, at http://www.dleg.state.mi.us/bcs_corp/ sr_corp.asp (accessed Jan. 24, 2017).

[5] *See* at http: / (accessed Jan. 26, 2017).

[6] The Form I-140 and labor certification state the title of the Petitioner's current president/CEO as CEO. The Petitioner's by-laws, however, state: "Unless the Board of Directors has designated another person as the corporation's Chief Executive Officer, the President shall be the Chief Executive Officer of the corporation." The Petitioner's SEC registration statement also identifies the president/CEO as chairman of the company's board of directors.

new president, however, the current president/CEO stated that the Beneficiary "temporarily was listed on certain corporate documents as President."

On appeal, the Petitioner further asserts that the Beneficiary did not participate in the company's management, but rather only performed the duties of CTO. The Petitioner states that most of the Beneficiary's presidential signatures occurred before the petition's August 24, 2015, priority date and the labor certification recruitment period for the offered position.

In visa petition proceedings, a petitioner bears the burden of establishing eligibility for a requested benefit. Section 291 of the Act, 8 U.S.C. § 1361. A petitioner must therefore resolve inconsistencies of record by independent, objective evidence, pointing to where the truth lies. *Matter of Ho*, 19 I&N Dec. 582, 591 (BIA 1988). Here, the Petitioner has not resolved all the inconsistencies regarding the Beneficiary's position with it. The Petitioner describes the period of the Beneficiary's presidential signatory authority as "short." But the dates of documentation identifying the Beneficiary as president range from April 16, 2010, to November 8, 2015, a span of more than 5 years. Also, the Petitioner states that its current president/CEO agreed to his position on April 16, 2015. The record therefore does not explain why the Beneficiary represented himself as the Petitioner's president on the annual reports filed in Michigan for 2013 through 2015, which were all dated November 8, 2015, after the current president/CEO presumably began work.

Even if the Beneficiary did not serve as the Petitioner's president, the record indicates that his duties as CTO involved him in the Petitioner's management. Part H.11 of the labor certification states that the position's job duties include developing a "technology and product roadmap" and an "operating plan" to support it. The labor certification also states that the position involves "[r]ecruit[ing] and lead[ing] the technology team" and "[c]reating new intellectual property [IP] and in-license key patents." Further, Part H.14 of the labor certification states that the CTO position requires "7 years of leadership and executive-level responsibility in the technological development of medical imaging systems" and demonstrated experience in the development of "a marketing plan" and "an IP strategy."

Thus, as CTO, the record indicates the Beneficiary's involvement in managing essential functions of the Petitioner, including product development, marketing, and intellectual property. As the leader of the Petitioner's technology team, the record also indicates his supervision of others. The record therefore indicates the Beneficiary's involvement in the company's management. *See Matter of West End Publ'g, LLC*, 2011-PER-01046, 2012 WL 2964106, *3 (BALCA July 16, 2012) (finding a foreign national's involvement in his employer's management where he oversaw three independent contractors and reported to the company's managing member).[7]

Noting that most of the documents identifying the Beneficiary as the Petitioner's president predate the petition's August 24, 2015, priority date, the Petitioner asserts the Beneficiary's lack of control or influence over hiring decisions for the offered position. During the labor certification process, the

[7] While we are not bound by Board of Alien Labor Certification Appeals (BALCA) decisions, we, nevertheless, we may take note of their reasoning when considering issues that arise in the employment-based immigrant visa process.

Petitioner states that its current president/CEO screened applicants for the offered position. But the labor certification indicates that recruitment for the position began in March 2015, before the purported April 16, 2015, hiring date of the Petitioner's current president/CEO. The record does not indicate who interviewed applicants for the offered position before the current president/CEO began work for the Petitioner.

Further, the Petitioner's corporate by-laws state that its board of directors annually elects a president. Therefore, minutes of the board meetings would presumably prove the Petitioner's claim that the Beneficiary never served as its president. But, contrary to the request in the Director's RFE, the Petitioner did not submit copies of it corporate meeting minutes.

The record also indicates the Beneficiary's possession of an ownership interest in the Petitioner, another *Modular Container* factor indicating that the job opportunity was not clearly available to U.S. workers. Copies of stock transfer records indicate the Beneficiary's ownership of 17,386 shares of the Petitioner. The Petitioner notes that the Beneficiary's shares represent only 0.69 percent of its more than 2.5 million outstanding shares of stock. The Petitioner states: "Such a minute percentage fails to prove that the job offer was not *bona fide* at the time of the filing." The Petitioner's SEC registration, however, identifies the Beneficiary as the "beneficial owner" of 256,113 shares, or 9.2% of the total outstanding.[8] In addition to directly owning 17,386 shares in the Petitioner, the registration statement indicates the Beneficiary's authorization to obtain additional shares through stock options, warrants, and convertible promissory notes. Thus, the Beneficiary's ownership interest in the Petitioner may be more substantial then the Petitioner states.

The record also indicates the Beneficiary's possession of specialized qualifications for the offered position of CTO. In addition to a master's degree and 7 years of experience in a related occupation, the offered position requires experience in specified fields and technologies. Part H.14 of the labor certification states that the offered position's qualifying experience must include:

> 7 years of leadership and executive-level responsibility in the technological development of medical imaging systems; demonstrated experience in development of biomedical devices and applications relevant including intellectual property (IP), systems, hardware, software, and development program leadership in at least one of the following fields: optics, x-ray imaging, computed tomography, ultrasound or PET imaging; demonstrated experience in developing a marketing plan to support the commercialization of an imaging technology; demonstrated experience in the development of an IP strategy; demonstrated experience in image reconstruction and image quality analysis is required; and demonstrated experience leading software teams with a working knowledge of: commercial and open source APIs, version control systems, testing and bug tracking methods, and computational methods. *Experience may be gained concurrently.

[8] *See* SEC, Company Filings Search, at https://www.sec.gov/edgar/searchedgar/companysearch.html (accessed Jan. 24, 2017).

The Beneficiary's possession of these specialized job requirements is a *Modular Container* factor suggesting that the offered position was not clearly available to U.S. workers.

The Petitioner asserts that we "overreach" in finding that the offered position has specialized or unusual job requirements. Citing *Hoosier Care, Inc. v. Chertoff*, 482 F.3d 987 (7th Cir. 2007), the Petitioner contends that USCIS lacks authority to make that determination and that the DOL "already determined that a *bona fide* job existed." However; the Petitioner's reliance on *Hoosier Care* is misplaced. *Hoosier Care* limited USCIS' ability to interpret "relevant" post-secondary education requirements for skilled workers. Unlike in *Hoosier Care*, we do not find the Beneficiary unqualified for the offered position. Rather, we find that he meets the job requirements stated on the labor certification. For purposes of determining the *bona fides* of the job opportunity, however, we note that the Beneficiary meets specialized job requirements. Specifically, the requirements listed in Part H.14 of the labor certification limit qualifying experience to certain fields and technologies. Thus, under *Modular Container*, the Beneficiary's possession of the specialized requirements suggests that the position was not clearly available to U.S. workers.

The size of the Petitioner's workforce is also a *Modular Container* factor indicating that the offered position was not clearly available to U.S. workers. The record identifies the Beneficiary as one of a small number of employees. On the Form I-140 and labor certification, the Petitioner indicates its employment of only nine people.

Determinations on the *bona fides* of job opportunities often turn on the degree of good faith employers exercised in recruiting for offered positions. *See, e.g., Matter of Tyrell Ltd.*, 2012-PER-01920, 2016 WL 6301784, *5 (BALCA Oct. 21, 2016) (finding an employer's attestation that it received no applications from U.S. workers to be "significant"). In this case, the Petitioner did not submit documentation of its compliance with labor certification regulations during its recruitment for the offered position. We are therefore unable to determine the Petitioner's good faith in processing the labor certification application.

The Beneficiary's ownership interest in the Petitioner, his possession of specialized qualifications for the offered position, and his membership in a small group of employees suggest that the offered position was not clearly available to U.S. workers. Because questions remain about the extent of the Beneficiary's role as the Petitioner's president and the good-faith nature of the company's recruitment for the offered position, the record does not establish the *bona fides* of the job opportunity.[9] We will therefore affirm the Director's decision.

[9] We also reject the Petitioner's assertion that we lack of authority to determine the *bona fides* of a job opportunity. As previously indicated, we may deny a petition accompanied by a labor certification that violates DOL regulations. *See Sunoco Energy*, 17 I&N Dec. at 284 (affirming a petition's denial under 20 C.F.R. § 656.30(c)(2) where a petitioner intended to employ a beneficiary in another state than listed on the labor certification). Moreover, Congress directed us to "determine[] that the facts stated in a petition are true." Section 204(b) of the Act, 8 U.S.C. § 1154(b). We may therefore consider whether the Petitioner complied with DOL regulations by truthfully attesting on the labor certification to the clear availability of the offered position to U.S. workers.

D. Misrepresentation on the Labor Certification

A willful misrepresentation of a material fact requires knowledge of the representation's falsity. *Bazzi v. Holder*, 746 F.3d 640, 645 (6th Cir. 2013) (citations omitted). A fact's materiality is determined according to its effect on the ultimate decision had the truth been known. *Id.* at 645-46 (citation omitted). Fraud additionally requires an intention to deceive a government official and the deception's success. *Parlak v. Holder*, 578 F.3d 457, 464 (6th Cir. 2009) (citations omitted).

In this case, the Petitioner answered "No" to Part C.9 of the labor certification, 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, or incorporators, and the alien?"

The Director found that the Petitioner "should have answered 'yes' [to Part C.9] because the beneficiary was fulfilling the duties of President during that period of time, 2014 and 2015, shortly before the submission of the application for permanent employment certification."

As the Petitioner asserts on appeal, however, the Petitioner does not meet the premise of Part C.9's question as "a closely held corporation, partnership, or sole proprietorship." The Petitioner is a corporation, rather than a partnership or sole proprietorship. For labor certification purposes, the term "closely held corporation" means "a corporation that typically has relatively few shareholders and whose shares are not generally traded in the securities market." 20 C.F.R. § 656.3. The Petitioner submitted evidence of 69 individuals and entities who owned stock in it, with none owning more than 8.13 percent of the total.

We do not consider 69 shareholders to constitute "relatively few shareholders" as stated in 20 C.F.R. § 656.3. We therefore find that the Petitioner was not a closely held corporation under the DOL's definition of that term. Moreover, the record lacks evidence of familial relationship between the owners, stockholders, partners, corporate officers, or incorporators, and the alien. As such, the Petitioner's negative response to Part C.9 of the labor certification was not a misrepresentation. We will therefore withdraw the finding of willful misrepresentation of a material fact on the labor certification.

II. CONCLUSION

The record does not establish the Petitioner's ability to pay the proffered wage or the *bona fides* of the job opportunity. However, the record does not support a finding of a willful misrepresentation of a material fact on the labor certification application.

ORDER: The appeal is dismissed.

Cite as *Matter of E-, Inc.*, ID# 122819 (AAO Mar. 10, 2017)