U.S. Citizenship and Immigration Services

Non-Precedent Decision of the Administrative Appeals Office

MATTER OF G-USA, INC.

DATE: MAY 5, 2017

APPEAL OF NEBRASKA SERVICE CENTER DECISION

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

The Petitioner, a wholesale agent, seeks to employ the Beneficiary as a regional manager. 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 Nebraska Service Center denied the petition, concluding that the record did not establish, as required, that there was a *bona fide* job opportunity available to U.S. workers. The Director also invalidated the labor certification based on a finding that the Petitioner and the Beneficiary misrepresented a material fact.

On appeal, the Petitioner asserts that there was a *bona fide* job opportunity available to U.S. workers and that neither the Petitioner nor the Beneficiary misrepresented a material fact.

Upon *de novo* review, we will remand the matter to the Director in accordance with the following.

I. LAW

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). *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 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.

II. ANALYSIS

The two issues on appeal are whether the position offered to the Beneficiary is a *bona fide* job opportunity available to U.S. workers; and whether the Petitioner and Beneficiary misrepresented a material fact by not fully disclosing the Beneficiary's role as an executive with the Petitioner. For the reasons explained below, we agree with the Director's finding that there was not a *bona fide* job opportunity available to U.S. workers. However, we remand on the Director's finding of material misrepresentation.

The Petitioner is a two-employee company that was incorporated in California in July 2015. It is a wholly-owned subsidiary of a company based in South Korea. According to the labor certification and a June 14, 2016, employment letter from (president of the Petitioner's parent company), prior to working for the Petitioner, the Beneficiary was employed by the parent company for 18 years. The Beneficiary's last position with the parent company was as a senior manager, where he was responsible for the company's agricultural trade.

According to the labor certification and the Beneficiary's Form G-325A, Biographic Information (submitted with a concurrently-filed application for adjustment of status), the Beneficiary entered the United States in September 2015. The record contains a copy of the Beneficiary's L-1A visa, which is a nonimmigrant classification for intracompany transferees. *See* section 101(a)(15)(L) of the Act, 8 U.S.C. § 1101(a)(15)(L). The L-1A classification allows a corporation or other legal entity (including its affiliate or subsidiary) to transfer a qualifying foreign employee to the United States to work temporarily in a managerial or executive capacity. The visa was issued based on an L-1A petition approved by USCIS on September 14, 2015 The L-1A petition states that the Beneficiary would be employed by the Petitioner as its president, and the letter in support of the petition states that his executive duties would include "managing all functions" of the Petitioner and controlling the company's day-to-day business operations.

The L-1A petition also contains the minutes of the Petitioner's organizational meeting on July 15, 2015. The minutes state that the Beneficiary is the Petitioner's sole director, president, vice president, secretary, chief financial officer/treasurer, and agent for service of process. The Beneficiary signed the minutes as secretary and also signed a document accepting the appointment to serve as the Petitioner's president, vice president, secretary, and chief financial officer.

The Beneficiary is listed on the August 2015 State of California Statement of Information as the company's chief executive officer, secretary, chief financial officer, and agent for service of process. The record also contains a lease for the Petitioner that the Beneficiary signed as the company's president. The Beneficiary signed the Petitioner's 2015 federal income tax return as CEO. The Beneficiary also signed the L-1A petition as the company's president. Based on other documentation submitted, the Petitioner's other employee, is responsible for administrative matters.

The record also contains a copy of a letter dated December 30, 2015, from [redacted] (the president of the Petitioner's parent company), to the Beneficiary. The letter states that, as of January 1, 2016, [redacted] would assume the Beneficiary's role of director, CEO, CFO, and secretary; and the Beneficiary would be employed as the regional manager where he would manage the company's sales activities in the United States.

On January 20, 2016, approximately six months after the company was incorporated, the Petitioner filed a labor certification on behalf of the Beneficiary for the position of regional manager. The duties of the position, detailed at part H.11 of the labor certification, include managing the sales activities of the company (including establishing sales objectives and goals), and analyzing and controlling expenditures to conform to the budgetary requirements of the parent company.

In the section of the labor certification that details the Beneficiary's employment history, the Petitioner states that the Beneficiary has been employed as the Petitioner's regional manager since September 30, 2015. The labor certification omits the Beneficiary's prior documented roles as the company's president, sole director, chief executive officer, secretary, and chief financial officer.

The Petitioner also answered "No" to the following question at part C.9 of the labor certification:

> 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, corporate officers, incorporators, or partners, and the alien?

After the DOL approved the labor certification, the Petitioner filed this immigrant visa petition with USCIS. The Director's decision denying the petition stated that the Petitioner failed to demonstrate that a *bona fide job* opening existed which was open to U.S. workers, because the Beneficiary had served as that company's chief executive officer, president, secretary, chief financial officer, and sole director.

The Director also stated that the Petitioner's answer of "No" to part C.9 of the labor certification deprived the DOL of the opportunity to assess the Beneficiary's influence and control of the job opportunity. The Director concluded that the Petitioner's "intentional failure to disclose" the Beneficiary's executive role with the Petitioner constituted willful misrepresentation of a material fact. Accordingly, the Director denied the petition and invalidated the labor certification under 20 C.F.R. § 656.30(d).[1]

[1] The regulation at 20 C.F.R. § 656.30(d) states that a "labor certification is subject to invalidation by [USCIS] 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. Bona Fide Job Opportunity Open to U.S. Workers

On part N.8 of the labor certification, the Petitioner must certify that the "job opportunity has been and is clearly open to any U.S. worker." This requirement derives from the DOL regulation at 20 C.F.R. § 656.10(c)(8), which requires employers to certify that the job opportunity has been and is clearly open to any U.S. worker in order for the labor certification to be approved.

If the Beneficiary of a labor certification is in a position to control hiring decisions or has such a dominant role in, or close personal relationship with, the Petitioner's business that it would be unlikely that the alien would be replaced by a qualified U.S. applicant, the question arises whether the employer has a *bona fide* job opportunity. *Matter of Modular Container Sys., Inc.*, 89-INA-228, (BALCA July 16, 1991). Stated another way, the question of whether a *bona fide* job opportunity exists depends on whether a genuine opportunity exists for U.S. workers to compete for the opening. *Hall v. McLaughlin*, 864 F.2d 868, 875 (D.C. Cir. 1989).

Under *Matter of Modular Container*, whether or not a job is clearly open to U.S. workers depends on an assessment of the totality of the circumstances. The Board of Alien Labor Certification Appeals' (the Board) decision states that the factors that may be examined to determine whether the job is clearly open to a U.S. worker include, but are not limited to, whether the Beneficiary:

- Is in the position to control or influence hiring decisions regarding the job for which labor certification is sought;
- Is related to the corporate directors, officers, or employees;
- Was an incorporator or founder of the company;
- Has an ownership interest in the company;
- Is involved in the management of the company;
- Is on the board of directors;
- Is one of a small number of employees;
- Has qualifications for the job that are identical to specialized or unusual job duties and requirements stated in the application; and
- Is so inseparable from the sponsoring employer because of his or her pervasive presence and personal attributes that the employer would be unlikely to continue in operation without the alien.

This analysis also includes a consideration of the employer's level of compliance and good faith in the processing of the claim. *Matter of Malone & Associates*, 90-INA-360 (BALCA July 15, 1991).

On July 18, 2016, the Director issued a request for evidence instructing the Petitioner to provide evidence that it is a legally formed organization that is authorized to do business, that it acquired the necessary facilities, equipment and staff to do business, and that it regularly provides goods and services. In response, the Petitioner provided its 2015 federal income tax return, its Articles of Incorporation, and a State of California Statement of Information. After reviewing this information,

the Director, citing to 20 C.F.R. § 656.17(l), concluded that the job opportunity was not clearly open to U.S. workers.[2]

The evidence in the record of proceeding does not establish that the Petitioner was sufficiently independent of the Beneficiary to enable the company to offer a *bona fide* job opportunity which the Petitioner might fill with someone other than the Beneficiary. The Beneficiary is one of two employees.[3] He had previously worked for the Petitioner's parent company for 18 years, where he served in a senior managerial role. He was transferred to the U.S. on a nonimmigrant visa for managers and executives in order to serve as the Petitioner's president. He was responsible for establishing the new company and growing its U.S. business. The Beneficiary served as the company's chief executive officer, secretary, chief financial officer, president, sole director, and agent for service of process. He signed the Petitioner's tax filings and lease, and established the company's banking relationships. The letter in support of the L-1A petition filed on behalf of the Beneficiary describes the Beneficiary as possessing "invaluable leadership and corporate management experience coupled with extensive knowledge of the corporate policies, proprietary procedures and service products necessary for the development and marketing operations in the U.S. market." In addition, the Petitioner has only been in business for a short period of time. For these reasons, it is unlikely that the Petitioner would be able to continue its operations without the Beneficiary.

The certified job opportunity is for a "regional manager," a title which appears to attempt to minimize the importance of the Beneficiary's role. The only other reported employee of the company is an individual who, according to the L-1A petition, oversees administrative issues.

Further, the letter from appears to be specifically drafted to address the factors listed in *Matter of Modular Container* and to create the appearance that the Beneficiary would no longer be employed in a crucial role with the company, purportedly vesting all executive responsibility with the person running the parent company in South Korea. However, the evidence in the record does not establish that has in fact assumed actual executive responsibilities for the Petitioner, that the Petitioner has submitted any corporate filings memorializing this change of leadership, or that the Petitioner has filed for transfer to the United States.

[2] The regulation at 20 C.F.R. § 656.17(l) states:

> 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.

[3] The Petitioner's 2015 tax return shows that one person, likely the Beneficiary, was paid officer compensation in the amount of $32,400, and the other employee was paid $1,875.

Finally, as is addressed in more detail below, the Petitioner does not appear to have shown good faith during the labor certification process by omitting the Beneficiary's executive role with the Petitioner in the description of his employment experience.

On appeal, the Petitioner cites to *Matter of Human Performance Measurement, Inc.*, 89-INA-269 (BALCA Oct. 25, 1991) (en banc), where the Board held that even though the beneficiary was a minority stockholder, member of the board of directors, treasurer, and vice president for finance and marketing, the labor certification should be granted. The Board's decision was based on the fact that the beneficiary only owned four percent of the company's stock; had no familial relationship with stockholders or corporate officers; did not effectively run the company; and no U.S. workers applied for the position. However, the facts of this case are distinguishable from *Matter of Human Performance Measurement.* Here, the Beneficiary performed a more crucial role in the establishment and running of the sponsoring U.S. employer, the Petitioner only has two employees, and had only been in business for a short period of time.

For these reasons, after considering the totality of the circumstances, we concur with the Director's conclusion that there does not exist a *bona fide* job opportunity open to U.S. workers. Therefore, petition was properly denied.[4]

B. Material Misrepresentation

Willful misrepresentation involves willfully making a false representation to a U.S. government official about a material fact while attempting to obtain an immigration benefit.[5]

Section 212(a)(6)(C)(i) of the Act states:

> Any alien who, by fraud or willfully misrepresenting a material fact, seeks to procure (or has sought to procure or has procured) a visa, other documentation, or admission into the United States or other benefit provided under this Act is inadmissible.

The term "willfully" means knowing and intentionally, as distinguished from accidentally, inadvertently, or in an honest belief that the facts are otherwise. *See Matter of Tijam,* 22 I&N Dec. 408, 425 (BIA 1998); *Matter of Healy and Goodchild,* 17 I&N Dec. 22, 28 (BIA 1979). To be considered material, the misrepresentation must be one which "tends to shut off a line of inquiry

[4] The evidence of record also does not establish that the Petitioner possessed the ability to pay the proffered wage. *See* 8 C.F.R. § 204.5(g)(2). A petitioning U.S. employer must submit evidence establishing its ability to pay the proffered wage from the priority date of the petition and continuing until the Beneficiary obtains lawful permanent residence. *Id.* "Evidence of this ability shall be either in the form of copies of annual reports, federal tax returns, or audited financial statements." *Id.* In this case, the priority date (the date the labor certification was filed with the DOL) is January 20, 2016. The record does not contain an annual report, federal tax return, or audited financial statement for 2016. Such evidence would need to be submitted on remand.

[5] *Matter of Y-G-*, 20 I&N Dec. 794 (BIA 1994); *Matter of D-L- & A-M-*, 20 I&N Dec. 409 (BIA 1991); *Matter of L-L-*, 9 I&N Dec. 324 (BIA 1961); *Matter of Tijam*, 22 I&N Dec. 408, 424 (BIA 1998).

which is relevant to the alien's eligibility, and which might well have resulted in a proper determination that he be excluded." *Matter of Ng,* 17 I&N Dec. 536, 537 (BIA 1980).

Accordingly, for an immigration officer to find a willful and material misrepresentation in visa petition proceedings, the officer must determine that the petitioner or beneficiary made a false representation to a United States government official; that the misrepresentation was willfully made; and that the misrepresented fact was material. *See Matter of M-,* 6 I&N Dec. 149 (BIA 1954); *Matter of Kai Hing Hui,* 15 I&N Dec. 288 (BIA 1975).

The Director's decision concludes that the Petitioner and Beneficiary falsely answered "No" to part C.9 of the labor certification as set forth fully above.

In this case, the evidence in the record does not show that the Beneficiary has an ownership interest in the Petitioner. The Petitioner submitted evidence showing the ownership of the Petitioner and the names of the shareholders of the Petitioner's parent company, and the Beneficiary is not listed as one of the shareholders. The evidence in the record also does not show that the Beneficiary is, or has a familial relationship with, the Petitioner's "owners, stockholders, corporate officers, incorporators, or partners." Therefore, the evidence currently in the record of proceedings does not establish that that the answer of "No" to part C.9 was a misrepresentation of a material fact.[6]

However, the Director should request additional evidence to assess whether the president of the Petitioner's parent company, in fact assumed the roles of president, director, CEO, CFO, and secretary of the Petitioner prior to the priority date of the labor certification.[7] This includes corporate documentation establishing that the Beneficiary no longer served in the capacity of an officer on the priority date.

In addition, neither the Director nor the Petitioner addressed the fact that the labor certification did not disclose the Beneficiary's employment as the Petitioner's president, chief executive officer, secretary, chief financial officer, and sole director. Instead, the labor certification states that the Beneficiary had only worked as a regional manager with his job duties partially described as "manage sales activities by establishing sales objectives and goals of USA regional office." This is in contrast to the description of the Beneficiary's prior employment with the Petitioner's parent company on the labor certification, which lists his various roles with that company over time. The Director also did not address the fact that the L-1A petition filed on behalf of the Beneficiary conflicts with the description of the Beneficiary's employment with the Petitioner on the labor

[6] Part C.9 of the labor certification does not include the language of 20 C.F.R. § 656.17(l) about a beneficiary being "one of a small number of employees," which is applicable in this case.

[7] We note that submitted a written statement in support of the Petitioner's response to a request for evidence pertaining to the L-1A petition, which was received by USCIS on September 1, 2015. This letter states that "[a]fter the first year of operation, [the Beneficiary] will be in charge of three departments: Marketing, Sales, and Admin/Financial Management. [The Beneficiary] will have full discretionary authority to decide on strategies, scope and method of [the company's] operations . . . through his management and operation of [the Petitioner]." This statement conflicts with December 30, 2015 letter to the Beneficiary.

certification. These facts raise the question of whether the Petitioner and the Beneficiary omitted material information on the labor certification with the intent to mislead the DOL about the Beneficiary's true role with the company and whether these omissions would constitute willful misrepresentation.

In summary, this matter is remanded to the Director to request additional evidence as set forth above and to consider the omission of the Beneficiary's claimed roles with the Petitioner at part K.9 of the labor certification in order to determine whether the Beneficiary and the Petitioner misrepresented material facts to the DOL, and whether the labor certification remains invalid.

III. CONCLUSION

The Petitioner did not establish that that there was a *bona fide* job opportunity available to U.S. workers. However, the Director's finding that the Petitioner and the Beneficiary misrepresented a material fact is remanded for further consideration.

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 G-USA, Inc.*, ID# 286125 (AAO May 5, 2017)