



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

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

In Re: 25680074

Date: MAY 18, 2023

Appeal of Texas Service Center Decision

Form I-140, Immigrant Petition for Alien Workers (Other Worker)

The Petitioner seeks to permanently employ the Beneficiary as a private household cook. The Petitioner requests the Beneficiary's classification under the third-preference, immigrant visa category as an "other worker" requiring less than two years of training or experience. *See* Immigration and Nationality Act (the Act) section 203(b)(3)(A)(iii), 8 C.F.R. § 1153(b)(3)(A)(iii).

The Director of the Texas Service Center denied the petition, concluding that the Petitioner did not make a bona fide job offer to the Beneficiary and that they misrepresented a material fact in not disclosing their familial relationship.¹ The matter is now before us on appeal.

The Petitioner bears the burden of proof to demonstrate eligibility by a preponderance of the evidence. *Matter of Chawathe*, 25 I&N Dec. 369, 375-76 (AAO 2010). We review the questions in this matter de novo. *Matter of Christo's, Inc.*, 26 I&N Dec. 537, 537 n.2 (AAO 2015). Upon de novo review, we will withdraw the Director's decision and remand the matter for entry of a new decision consistent with the following analysis.

I. LAW

Employment-based immigration generally follows a three-step process. First, an employer obtains an approved labor certification (ETA Form 9089) from the U.S. Department of Labor (DOL). *See* section 212(a)(5) of the Act, 8 U.S.C. § 1182(a)(5). 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. *See* section 212(a)(5)(A)(i)(I)-(II) of the Act. Second, the employer files an immigrant visa petition (Form I-140) 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.

¹ Specifically, the Petitioner's sister is married to the Beneficiary's brother.

II. ANALYSIS

A. Ability to Pay

A petitioner must demonstrate its continuing ability to pay an offered position's 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 generally include copies of a business's annual reports, federal tax returns, or audited financial statements. *Id.*

The Petitioner's accompanying labor certification states the proffered wage of the offered position of private household cook as \$35,000.00 a year. The petition's priority date is March 1, 2019, the date 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 Petitioner filed the Form I-140 on July 12, 2019.²

While the Petitioner submitted his 2018 and 2019 federal income tax returns, the record does not include evidence of his ability to pay from 2020 onward. We will therefore remand the matter for the Director to render a determination regarding the Petitioner's continuing ability to pay. The Director should request the Petitioner to submit additional evidence of his ability to pay the proffered wage starting in 2020 and thereafter. *See* 8 C.F.R. § 204.5(g)(2) (requiring a petitioner to demonstrate their ability to pay "continuing until the beneficiary obtains lawful permanent residence").

B. Bona Fide Job Offer

The Director's decision discussed an undisclosed familial relationship involving the Petitioner's sister's marriage to the Beneficiary's brother. The Director concluded that the record did not establish that the Petitioner made a bona fide job offer to the Beneficiary or that the job was clearly open to any U.S. worker. 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, at 7 (BALCA 1991) (*en banc*); *see* 20 C.F.R. § 656.17(l).

To assess whether a bona fide job offer may be at issue, section C.9 of the labor certification asks, "Is the employer a closely held corporation ... in which the alien has an ownership interest, or is there a familial relationship between the owners, stockholders, partners, corporate officers, incorporators, and the alien?" The Petitioner checked "No" in response to this question. Based on the Petitioner's response, the Director concluded the evidence did not show that the Petitioner made a bona fide job offer to the Beneficiary or that he intended to employ her in the offered position.

On appeal, the Petitioner contends that he truthfully responded "No" to section C.9 of the labor certification, asserting that "no family relationship that is currently defined by the DOL exists between the Petitioner and Beneficiary. They are not blood relatives nor can they be considered cousins, aunts, uncles, grandparents, in-laws or stepfamilies." The Petitioner further argues that "having siblings who

² The regulation at 8 C.F.R. § 204.5(l)(3)(ii)(D) requires that a petition filed under this classification must be accompanied by evidence meeting "any educational, training and experience, and other requirements of the labor certification." Form I-140, Part 6 indicates that the position is for full-time employment.

are married is so *de minimus* and separated by so many familial degrees that no word currently exists for this kind of alleged relationship. Furthermore, the DOL instructions do not clearly indicate if the alleged relationship between the Petitioner and Beneficiary clearly represents a familial relationship.”

The DOL, however, requires the disclosure of “any” familial relationships between the noncitizen and the owners, stockholders, partners, corporate officers, and incorporators at section C.9 on the labor certification. As emphasized by the Petitioner on appeal, published DOL guidance on this issue states that a familial relationship includes “**any** relationship established by blood, marriage, or adoption, **even if distant**” (emphasis added). For example, the guidance indicates that a familial relationship includes cousins of all degrees, aunts, uncles, grandparents, and grandchildren as well as relationships established through marriage, such as in-laws and stepfamilies. See DOL, Office of Foreign Labor Certification, “OFLC Frequently Asked Questions and Answers,” at <https://www.foreignlaborcert.doleta.gov/faqsanswers.cfm>).

The Petitioner and Beneficiary’s familial relationship, however, represents only one factor to be considered among multiple other factors when determining whether the Petitioner made a bona fide job offer. These other factors include, but are not limited to, whether a noncitizen: is in a position to control or influence hiring decisions regarding the offered position; incorporated or founded the company; has an ownership interest in the company; is involved in the management of the company; sits on its board of directors; is one of a small group of employees; has qualifications matching specialized or unusual job duties or requirements stated in the labor certification; and is so inseparable from the sponsoring employer because of his or her pervasive presence that the employer would be unlikely to continue in operation without the noncitizen. *Modular Container*, 1991 WL 223955 at 8-10. The DOL adopted the holding in *Modular Container* at 20 C.F.R. § 656.17(1).

Here, the Director did not fully consider other factors beyond the Petitioner and Beneficiary’s familial relationship to determine whether the Petitioner made a bona fide job offer. See *Modular Container*, 1991 WL 223955 at 8-10. We will not make a totality of the circumstances determination regarding the bona fides of the job offer here, in the first instance, as that is in the Director’s purview. For this reason, we will withdraw the Director’s determination on this issue and remand the matter for further consideration of whether a bona fide job offer was made by the Petitioner.

C. Willful Misrepresentation of a Material Fact

A misrepresentation is an assertion or manifestation that is not in accord with the true facts. For an immigration officer to find a willful and material misrepresentation of fact, he or she must determine that (1) the petitioner or beneficiary made a false representation to an authorized official of the U.S. government, (2) the misrepresentation was willfully made, and (3) the fact misrepresented was material. See *Matter of M-*, 6 I&N Dec. 149 (BIA 1954); *Matter of Kai Hing Hui*, 15 I&N Dec. 288, 289 (BIA 1975). 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 Healy and Goodchild*, 17 I&N Dec. 22, 28 (BIA 1979). A “material” misrepresentation is one that “tends to shut off a line of inquiry relevant to the alien’s eligibility.” *Matter of Ng*, 17 I&N Dec. 536, 537 (BIA 1980).

The Director determined that both the Petitioner and the Beneficiary willfully misrepresented a material fact by not disclosing their familial relationship. In the appeal brief, the Petitioner contends that “DOL instructions do not clearly indicate if the alleged relationship between the Petitioner and Beneficiary clearly represents a familial relationship. Here, the Petitioner answered Part C.9 of the labor certification according to his reasonable, honest belief that he was doing so correctly.” The Petitioner therefore requests that the finding of willful misrepresentation be withdrawn.

With respect to the Beneficiary, her signature in section L of ETA Form 9089 declared “under penalty of perjury that Sections J and K are true and correct.” The Beneficiary did not attest to the truthfulness or correctness of the response provided in section C.9 and therefore it cannot be concluded that she made a false representation to an authorized official of the U.S. government. Accordingly, we withdraw the Director’s finding of willful material misrepresentation relating to the Beneficiary.

We also withdraw the Director’s finding relating to the Petitioner’s willful misrepresentation. While the record raises some serious questions, the Director’s decision did not specifically articulate how the Petitioner’s response to section C.9 represented a willful misrepresentation of a material fact on the labor certification.³ The Director should determine if the Petitioner’s misrepresentation was knowing and intentional, as distinguished from accidental, inadvertent, or in an honest belief that there was no familial relationship. We are therefore remanding for the Director to fully consider the Petitioner’s arguments on this issue and determine if his misrepresentation was willfully made.

III. CONCLUSION

For the reasons discussed above, we will remand this case for further consideration of whether the Petitioner and the Beneficiary meet all eligibility requirements, including, but not limited to, the bona fide nature of the job offer, ability to pay, and full-time employment. If supported by the record, the Director may notify the Petitioner of any other potential denial grounds, including willful misrepresentation of a material fact. The Director, however, must afford the Petitioner a reasonable opportunity to respond to all issues raised on remand. Upon receipt of a timely response, the Director should review the entire record and enter a new decision.

ORDER: The Director’s decision is withdrawn. The matter is remanded for entry of a new decision consistent with the foregoing analysis.

³ The Director’s decision also indicated that “[t]he Petitioner and Beneficiary have submitted conflicting testimony, under penalty of perjury,” but it does not explain how their statements were contradictory.