



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

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

MATTER OF Z-USA, INC.

DATE: DEC. 7, 2015

APPEAL OF NEBRASKA SERVICE CENTER DECISION

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

The Petitioner, an international trade financing business, sought to permanently employ the Beneficiary as a market research analyst under the immigrant classification of skilled worker or professional. *See* Immigration and Nationality Act (the Act) § 203(b)(3)(A), 8 U.S.C. § 1153(b)(3)(A). The Director, Nebraska Service Center, denied the petition. The matter is now before us on appeal. The appeal will be dismissed.

I. THE PETITIONER'S WITHDRAWAL OF ITS APPEAL

On November 16, 2015, in response to our notice of intent to dismiss (NOID) of October 16, 2015, we received the Petitioner's request to withdraw the appeal. The appeal will be dismissed based on its withdrawal by the Petitioner. The withdrawal may not be retracted. 8 C.F.R. § 103.2(b)(6).

II. INVALIDATION OF THE LABOR CERTIFICATION

As indicated in our NOID, a petitioner's withdrawal of an appeal does not prevent a finding of fraud or willful misrepresentation of a material fact on the accompanying labor certification.

A petition for a skilled worker or professional must be accompanied by a valid individual labor certification, application for Schedule A designation, or evidence of a beneficiary's qualifications for a shortage occupation. 8 C.F.R. § 204.5(l)(3)(i). We may invalidate a labor certification after its issuance upon a determination of "fraud or willful misrepresentation of a material fact involving the labor certification application." 20 C.F.R. § 656.30(d).

A willful misrepresentation of a material fact requires knowledge of its 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 contains the same elements as a willful misrepresentation of a material fact. However, fraud also requires an intention to deceive a government official and success in the deception. *Parlak v. Holder*, 578 F.3d 457, 464 (6th Cir. 2009) (citations omitted).

A U.S. Department of Labor (DOL) website states that "failure to disclose familial relationships or ownership interests when responding to Question C.9 [on an ETA Form 9089, Application for

Permanent Employment Certification, (labor certification)] is a material misrepresentation” and may lead to denial, revocation, or invalidation of the labor certification. U.S. Dep’t of Labor, Office of Foreign Labor Certification, “OFLC Frequently Asked Questions & Answers,” at <http://www.foreignlaborcert.doleta.gov/faqanswers.cfm> (accessed Nov. 30, 2015).

In the instant case, a labor certification - filed on December 7, 2005, approved by the DOL on January 12, 2006, and signed under penalty of perjury by the Petitioner on March 15, 2006 - accompanied the petition. Question C.9 on the ETA Form 9089 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, incorporators, and the alien?” The Petitioner responded: “No.”

Despite its negative response to Question C.9 on the accompanying labor certification, the Petitioner’s 2005 federal tax return, dated March 14, 2006, and stating its submission to the Internal Revenue Service under penalty of perjury, indicates the Beneficiary’s ownership of 15 percent of the Petitioner’s stock. The record therefore indicates the Petitioner’s misrepresentation of the Beneficiary’s ownership interest in it on the labor certification, as its tax return identifies her as an owner at the time of the application’s filing. See *Matter of Silver Dragon Chinese Rest.*, 19 I&N Dec. 401, 404-05 (Comm’r 1986) (holding that an employer willfully misrepresented a material fact on a labor certification when it concealed a beneficiary’s ownership interest, which was stated on its tax returns).

The misrepresentation regarding the Beneficiary’s ownership interest appears to be willful because “officers and principals of a corporation are presumed to be aware and informed of the organization and staff of their enterprise.” *Id.* at 404. Therefore, the record indicates the Petitioner’s knowing misrepresentation of the Beneficiary’s ownership interest on the accompanying labor certification.

The misrepresentation also appears to be material. Had the DOL known of the Beneficiary’s ownership interest, it would not likely have granted certification until the Petitioner demonstrated the *bona fides* of the job opportunity. See 20 C.F.R. § 656.17(l) (requiring an employer in the event of an audit to demonstrate the existence of a *bona fide* job opportunity “[i]f the employer is a closely held corporation or partnership in which the alien has an ownership interest”).

On appeal, the Petitioner argued that it is not a closely held corporation because its sole owner is a publicly traded company in China. However, 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 record indicates that the Petitioner has relatively few shareholders. The record also does not indicate that the Petitioner’s shares, as opposed to those of its purported parent company, trade in a securities market. Therefore, contrary to the Petitioner’s argument, the record indicates its status as a closely held corporation.

The Petitioner also argued that the Beneficiary has no ownership interest in it. The Petitioner submitted letters of August 11, 2008 and September 26, 2008 from its administrative manager,

stating that the Chinese company wholly owns the Petitioner. The letters do not indicate when the Chinese company acquired sole ownership of the Petitioner.

The Petitioner also submitted brochures of the Chinese company. A 2006 brochure contains the Petitioner's name and address in the United States, suggesting its affiliation with the Chinese company. A 2008 brochure also identifies the Petitioner as an "overseas investment" of the Chinese company.

However, neither of the brochures identifies the Chinese company as the Petitioner's sole owner as the Petitioner alleges. The Petitioner's evidence therefore does not rebut the information on its 2005 tax return identifying the Beneficiary as an owner. The record lacks evidence to corroborate the Petitioner's claimed sole ownership by a Chinese company either at the time of the labor certification's filing or since. *See Matter of Soffici*, 22 I&N Dec. 158, 165 (Comm'r 1998) (citation omitted) (finding that unsupported assertions are insufficient to meet the burden of proof in visa petition proceedings).

The Petitioner has also not explained why, if it was solely owned by the Chinese company, its 2005 tax return identifies the Beneficiary as an owner. *See Matter of Ho*, 19 I&N Dec. 582, 591-92 (BIA 1988) (requiring a petitioner to resolve inconsistencies of record by independent, objective evidence).

The record contains substantial evidence of the Petitioner's willful misrepresentation of the Beneficiary's ownership interest in it on the accompanying labor certification. Our NOID provided the Petitioner an opportunity to respond. *See* 8 C.F.R. § 103.2(b)(16)(i) (requiring us to afford a petitioner an opportunity to respond to material, derogatory evidence before issuing an unfavorable decision). However, the Petitioner has not rebutted or explained the derogatory evidence. We will therefore invalidate the labor certification pursuant to 20 C.F.R. § 656.30(d) and dismiss the appeal for the additional reason that it lacks a valid individual labor certification.

III. CONCLUSION

The Petitioner has withdrawn the appeal. We will therefore dismiss the appeal based on its withdrawal. The record also contains substantial evidence of the Petitioner's willful misrepresentation of a material fact on the accompanying labor certification. We notified the Petitioner of the derogatory information and afforded it an opportunity to respond. Thus, despite the Petitioner's withdrawal of the appeal, we will invalidate the labor certification and dismiss the appeal for lack of a valid, individual labor certification.

The petition will be denied for the reasons discussed above, with each considered an independent and alternative basis for denial. In visa petition proceedings, a petitioner bears the burden of establishing eligibility for the requested benefit. *See* INA § 291, 8 U.S.C. § 1361; *Matter of Otiende*, 26 I&N Dec. 127, 128 (BIA 2013). Here, the Petitioner has not met that burden.

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ORDER: The appeal is dismissed.

FURTHER ORDER: The approval of the ETA Form 9089, case number [REDACTED], is invalidated under 20 C.F.R. § 656.30(d), based on the Petitioner's willful misrepresentation of a material fact.

Cite as *Matter of Z-USA, Inc.*, ID# 15985 (AAO Dec. 7, 2015)