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U.S. Citizenship
and Immigration
Services

INVASION OF PERSONAL PRIVACY

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APR 2 2008



FILE: [REDACTED] Office: VERMONT SERVICE CENTER Date:
EAC 03 069 54875

IN RE: Petitioner: [REDACTED]
Beneficiary: [REDACTED]

PETITION: Immigrant Petition for Alien Worker as a Skilled Worker or Professional Pursuant to
Section 203(b) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)

ON BEHALF OF PETITIONER:
[REDACTED]

INSTRUCTIONS:

This is the decision of the Administrative Appeals Office in your case. All documents have been returned to the office that originally decided your case. Any further inquiry must be made to that office.

Robert P. Wiemann
Robert P. Wiemann, Director
Administrative Appeals Office

DISCUSSION: The preference visa petition was denied by the Director, Vermont Service Center, and is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be summarily dismissed.

The petitioner is a restaurant. It seeks to employ the beneficiary permanently in the United States as a specialty cook. As required by statute, a Form ETA 750, Application for Alien Employment Certification, approved by the Department of Labor, accompanies the petition. The director determined that the petitioner had not established that it had the continuing ability to pay the beneficiary the proffered wage beginning on the priority date of the visa petition.

On appeal, counsel submits a statement and indicates that a brief would be submitted within thirty days. To date, no additional documentation has been received; therefore, a decision will be determined based on the record, as it is currently constituted.

Section 203(b)(3)(A)(i) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(3)(A)(i), provides for the granting of preference classification to qualified immigrants who are capable, at the time of petitioning for classification under this paragraph, of performing skilled labor (requiring at least two years training or experience), not of a temporary nature, for which qualified workers are not available in the United States.

The regulation at 8 C.F.R. § 204.5(g)(2) states, in pertinent part:

Ability of prospective employer to pay wage. Any petition filed by or for an employment-based immigrant which requires an offer of employment must be accompanied by evidence that the prospective United States employer has the ability to pay the proffered wage. The petitioner must demonstrate this ability at the time the priority date is established and continuing until the beneficiary obtains lawful permanent residence. Evidence of this ability shall be in the form of copies of annual reports, federal tax returns, or audited financial statements.

Eligibility in this matter hinges on the petitioner's continuing ability to pay the wage offered beginning on the priority date, the day the request for labor certification was accepted for processing by any office within the employment system of the Department of Labor. *See* 8 C.F.R. § 204.5(d). Here, the request for labor certification was accepted on April 27, 2001. The proffered salary as stated on the labor certification is \$11.90 per hour or \$24,752 per year.

With the petition, the petitioner, through counsel, submitted a copy of the petitioner's 2001 Form 1065, U.S. Return of Partnership Income. The tax return reflected an ordinary income of \$25,390 and net current assets of \$8,000. On March 31, 2003 and July 29, 2003, the director requested additional evidence pertinent to the petitioner's continuing ability to pay the proffered wage. The director specifically requested that the petitioner provide copies of the beneficiary's Forms W-2, Wage and Tax Statements, for the years 2000, 2001, and 2002 and a copy of the petitioner's 2002 Form 1065. The director also requested a list of the petitioning shareholders' monthly expenses, a copy of the petitioner's partnership agreement, and an explanation of the petitioner's type of partnership

In response, the petitioner submitted a copy of its 2002 Form 1065, U.S. Partnership Return of Income, a copy of the petitioner's partnership agreement, and a list of monthly expenses. The petitioner's 2002 federal tax return reflected an ordinary income of -\$2,494, and net current assets of \$8,000. The partnership agreement for the petitioner showed that it was organized as a limited liability corporation. The petitioner stated that since the beneficiary (his brother) did not have work authorization, the beneficiary was paid in cash, and room and board, and, therefore, did not possess Forms W-2 for 2000, 2001, and 2002.

The director determined that the evidence submitted did not establish that the petitioner had the continuing ability to pay the proffered wage beginning on the priority date and, on September 18, 2003, denied the petition.

On appeal, counsel does not address the issue of the petitioner's ability to pay the proffered wage and simply states, "Additional evidence will be submitted to establish that the petitioner had the ability to pay the wage." However, as of this date, approximately one year and seven months later, no additional evidence has been received in this office.

The regulation at 8 C.F.R. § 103.3(a)(1)(v) provides that "[a]n officer to whom an appeal is taken shall summarily dismiss any appeal when the party concerned fails to identify specifically any erroneous conclusion of law or statement of fact for the appeal."

In this case, there is no assertion of error that would constitute a sufficient basis for a substantive appeal. Nowhere on the appeal form does counsel specifically address errors in the director's decision.

As the petitioner has failed to identify specifically an erroneous conclusion of law or a statement of fact as a basis for the appeal, the appeal must be summarily dismissed.

Beyond the decision of the director, the record in this case lacks conclusive evidence as to whether the petition is based on a bona fide job offer or whether a pre-existing family or business relationship may have influenced the labor certification. Since the beneficiary is the brother of the petitioner, whether a bona fide job opportunity is available to U.S. workers is questionable.

Under 20 C.F.R. §§ 626.20(c)(8) and 656.3, the petitioner has the burden when asked to show that a valid employment relationship exists, that a *bona fide* job opportunity is available to U.S. workers. See *Matter of Amger Corp.*, 87-INA-545 (BALCA 1987). A relationship invalidating a *bona fide* job offer may arise where the beneficiary is related to the petitioner by "blood" or it may "be financial, by marriage, or through friendship." See *Matter of Summart 374*, 00-INA-93 (BALCA May 15, 2000). Where the person applying for a position owns the petitioner, it is not a *bona fide* offer. See *Bulk Farms, Inc. v. Martin*, 963 F.2d 1286 (9th Cir. 1992) (denied labor certification application for president, sole shareholder and chief cheese maker even where no person qualified for position applied). In *Matter of Silver Dragon Chinese Restaurant*, 19 I&N Dec. 401 (Comm. 1986), the commissioner noted that while it is not an automatic disqualification for an alien beneficiary to have an interest in a petitioning business, if the alien beneficiary's true relationship to the petitioning business is not apparent in the labor certification proceedings, it causes the certifying officer to fail to examine more carefully whether the position was clearly open to qualified U.S. workers and whether U.S.

workers were rejected solely for lawful job-related reasons. That case relied upon a Department of Labor advisory opinion in invalidating the labor certification. The regulation at 20 C.F.R. § 656.30(d) provides that [CIS], the Department of State or a court may invalidate a labor certification upon a determination of fraud or willful misrepresentation of a material fact involving the application for labor certification.

In *Hall v. McLaughlin*, 864 F.2d 868 (D.C. Cir. 1989), the court affirmed the district court's dismissal of the alien's appeal from the Secretary of Labor's denial of his labor certification application. The court found that where the alien was the founder and corporate president of the petitioning corporation, absent a genuine employment relationship, the alien's ownership in the corporation was the functional equivalent of self-employment.

Given that the beneficiary is the brother of the petitioner, the facts of the instant case suggest that further investigation, including consultation with the Department of Labor may be warranted, in order to determine whether any family or business relationship between the petitioner and the beneficiary represents an impediment to the approval of any employment-based visa petition filed by this petitioner on behalf of the this beneficiary.

ORDER: The appeal is summarily dismissed.