

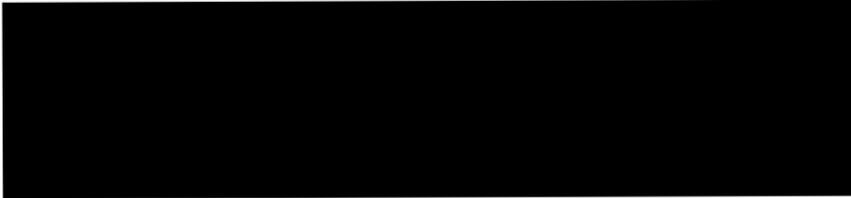


U.S. Citizenship
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FILE: [REDACTED] Office: VERMONT SERVICE CENTER
EAC-02-231-51613

Date: AUG 09 2007

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

PETITION: Immigrant petition for Alien Worker as a Skilled Worker or Professional pursuant to section 203(b)(3) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)(3)

ON BEHALF OF PETITIONER:



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, Chief
Administrative Appeals Office

DISCUSSION: The employment-based preference visa petition was initially approved by the Director, Vermont Service Center. The director subsequently revoked the approval of the petition. The matter is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed and the approval of the petition will remain revoked.

The petitioner is a computer software and services company. It seeks to employ the beneficiary permanently in the United States as a database administrator. As required by statute, a Form ETA 750, Application for Alien Employment Certification approved by the Department of Labor (DOL), accompanied the petition. The petitioner filed the instant petition on June 28, 2002 and the director approved the petition on June 15, 2004. Based on the widespread scope of the malfeasance perpetrated by ██████████¹ Citizenship and Immigration Services (CIS) determined that it should scrutinize all visa petitions for immigrant workers represented by ██████████. On September 30, 2005, the director consequently served the petitioner with notice of intent to revoke the approval of the petition (NOIR) since ██████████ was the recorded attorney for the instant petition. In a Notice of Revocation (NOR), the director ultimately revoked the approval of the Immigrant Petition for Alien Worker (Form I-140) because the record did not include a response to the NOIR and thus the grounds of revocation had not been overcome.

The record shows that the appeal is properly filed, timely and makes a specific allegation of error in law or fact. The procedural history in this case is documented by the record and incorporated into the decision. Further elaboration of the procedural history will be made only as necessary.

As set forth in the director's April 17, 2006 NOR, the single issue in this case is whether or not the petitioner has overcome the grounds of revocation in the director's NOIR dated September 30, 2005.²

The regulation at 8 C.F.R. § 103.2(b)(16)(i) states in pertinent part:

If the decision will be adverse to the applicant or petitioner and is based on derogatory information considered by [CIS] and of which the applicant or petitioner is unaware, he/she shall be advised of this fact and offered an opportunity to rebut the information and present information in his/her own behalf before the decision is rendered, ...

On appeal counsel asserts that the petitioner did not have the opportunity to submit any evidence to overcome grounds of revocation because it did not receive a timely NOIR. Counsel did not submit any evidence to support his assertion. The assertions of counsel do not constitute evidence. *Matter of Obaighena*, 19 I&N Dec. 533, 534 (BIA 1988); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980). Going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. *Matter of Soffici*, 22 I&N Dec. 158, 165 (Comm. 1998) (citing *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm. 1972)). Instead, the record shows that the director issued and served a NOIR on September 30, 2005 and granted 30 days to rebut the

¹ On April 14, 2005, after a ju trial in the United States District Court for the District of Maryland, Northern Division, ██████████ was convicted in multiple counts of immigration fraud. ██████████ was convicted of various counts regarding the falsifying of Labor Certification applications and conspiracy to submit false Labor Certifications. ██████████ was formerly counsel of record in these proceedings.

² The NOIR requested evidence to demonstrate the bona fides of the job offer and stated that invalidation of the labor certification would occur if the director determined that the labor certification was not based on a *bona fide* job offer.

grounds of revocation. The record shows that the NOIR was mailed to the petitioner's then address in the record at [REDACTED]. It is noted that the petitioner submitted an affidavit on appeal claiming that the petitioner's address has been changed. However, the record shows that the petitioner received the NOR at the same address six months after the director sent the NOIR. The fact that counsel submits a response to the director's NOIR dated September 30, 2005 as part of supporting documentation to the appeal also indicates that the petitioner was informed of the grounds of the director's intent to revoke the approval of the petition.

In addition, it is the petitioner's responsibility to timely update contact information. The petitioner did not provide its new address until submitting the affidavit on appeal. This office finds that the petitioner even did not report its address change to the Virginia State Corporation Commission. The Virginia State Corporation Commission's website still indicates [REDACTED] as the petitioner's current business address³.

Therefore, counsel's assertion that the petitioner did not receive the NOIR is not acceptable, and the assertion that the petitioner was not advised of the grounds of the director's intent to revoke and offered an opportunity to rebut the information and present information in his/her own behalf before the decision was rendered is misplaced. However, the AAO will review and consider all evidence submitted on appeal with respect to the merits of the revocation.

The AAO takes a *de novo* look at issues raised in the denial of this petition. See *Dor v. INS*, 891 F.2d 997, 1002 n. 9 (2d Cir. 1989)(noting that the AAO reviews appeals on a *de novo* basis). The AAO considers all pertinent evidence in the record, including new evidence properly submitted upon appeal⁴. On appeal, counsel submits a brief, a notice to the petitioner from the Virginia State Corporation Commission, and an affidavit and signature samples of [REDACTED]. Other relevant evidence in the record includes the petitioner's corporate tax return for 2001.

Section 205 of the Act, 8 U.S.C. § 1155, provides that "[t]he Attorney General [now Secretary, Department of Homeland Security], may, at any time, for what he deems to be good and sufficient cause, revoke the approval of any petition approved by him under section 204." The realization by the director that the petition was approved in error may be good and sufficient cause for revoking the approval. *Matter of Ho*, 19 I&N Dec. 582, 590 (BIA 1988). The AAO will first discuss the issue whether or not the director had good and sufficient cause to revoke the approval of this petition.

In the instant case, [REDACTED] represented the petitioner in filing the Application for Alien Employment Certification, Form ETA-750, on April 16, 2001, and in filing Form I-140 Immigrant Petition on behalf of the beneficiary and represented the beneficiary in concurrently filing the adjustment of status application on June 28, 2002. On appeal counsel asserts that where there is an absence of negative evidence, this case must be adjudicated on an individual basis, based on the merits of each case, and not be subject to a blanket intention to revoke. Counsel states that the director should not have issued the NOIR based on the unrelated conduct

³ See <https://www.scc.virginia.gov/division/clk/diracc.htm> (accessed on July 25, 2007).

⁴ The submission of additional evidence on appeal is allowed by the instructions to the Form I-290B, which are incorporated into the regulations by the regulation at 8 C.F.R. § 103.2(a)(1). The record in the instant case provides no reason to preclude consideration of any of the documents newly submitted on appeal. See *Matter of Soriano*, 19 I&N Dec. 764 (BIA 1988).

of the petitioner's prior counsel and without any direct evidence of falsification in this case. While the AAO concurs with counsel's assertion that a case should be adjudicated on an individual basis, not be subject to a blanket intention to revoke just because a convicted attorney represented the petitioner earlier in these proceedings, we find that the director had good and sufficient cause to revoke the approval of this petition.

8 C.F.R. § 204.5(l)(1) provides that a United States employer may file a petition on Form I-140 for classification of an alien under section 203(b)(3) as a skilled worker. However, a Form I-140 is not properly filed unless it is actually signed by the petitioner. See 8 C.F.R. §§ 103.2(a)(2) and (7)(i). DOL regulations also require the intending employer to "sign by hand" the labor certification application. See 20 C.F.R. § 656.17(a)(1). As a part of response to the director's NOIR dated September 30, 2005, counsel submits an affidavit from [REDACTED] with his signature samples on appeal. In his affidavit, Mohammed Huda attests that "I personally signed the Form ETA-750 as Manager Human Resources of the company and was based on a *bona fide* job offer" and that "[t]he Form I-140 was based on a *bona fide* job offer and was personally signed by me as Manager Human Resources of the company." The record shows that [REDACTED] signed the Form ETA 750 as Manager Human Resources on April 3, 2001 and [REDACTED] signed the instant Form I-140 on June 26, 2002 without indicating his title in the company. The AAO notes that [REDACTED] and [REDACTED] is the same person and that the signatures on the Form ETA 750 and Form I-140 appear as same as the signatures provided as samples on appeal.

However, it is not clear whether or not [REDACTED] is the petitioner's authorized legal representative. This office accessed Virginia State Corporation Commission's record. The record does not list [REDACTED] as an officer, director, registered agent or any position. Only a person named [REDACTED] is the current registered agent and officer⁵. The petitioner's tax return for 2001 does not contain any information about owner(s) and ownership of the company. The record does not contain any other evidence to support [REDACTED] ownership of the company. The record contains inconsistent information regarding [REDACTED] title and position in the company. [REDACTED] signed the Form ETA 750 as Manager Human Resources, but signed the petitioner's tax return for 2001 as a CEO [Chief Executive Officer). The beneficiary's adjustment of status application contains a letter dated August 18, 2006 from Invitrogen verifying that [REDACTED] is a senior systems engineer of Invitrogen since November 16, 2002. The petitioner claimed to have 2 employees on the petition. However, the record does not contain any evidence of the two employees, such as a list of employees, payroll record of all employees, an organizational chart, Form 940 or Form 941. It is also not clear whether or not [REDACTED] and [REDACTED] are included within the two employees. The petitioner's 2001 tax return does not reflect any **compensation of officers on line 12**, or salaries and wages on line 13 of Form 1120. Therefore, it is not established that the petitioner had two employees at the time of filing the instant petition. Even if the two employees are proven, it is doubtful that a company with two employees actually needs and has a CEO and HR manager positions.

The record of proceeding raised suspicions concerning the issue of whether the job offer was realistic as of the priority date and remained realistic for each year thereafter, until the beneficiary obtains lawful permanent residence. In the instant case, the record shows that [REDACTED] who signed the labor certification application and immigrant petition on behalf of the petitioning corporation has the same last name with

⁵ See <https://www.scc.virginia.gov/division/clk/diracc.htm> (accessed on July 25, 2007).

the beneficiary's father⁶. [REDACTED] also jointly sponsored the beneficiary's another adjustment of status application based on his wife's approved alien relative petition. However, the record does not contain any documents explaining the relationship between the representative of the petitioner, [REDACTED] and the beneficiary. 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 petitioner is owned by the person applying for position, 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). The petitioner failed to explain the relationship between [REDACTED] and the beneficiary, and thus, failed to comply with the above requirements of regulations. DOL may not have had accurate information concerning the bona fides of the job offer or the alien's background during the labor certification process. The test of the U.S. labor market and other procedural and substantive aspects of the labor certification adjudication may not have been properly completed because of possible relationship between the petitioner and the beneficiary which may invalidate a *bona fide* job offer.

The record also shows that the beneficiary has been living in New York and self-employed since September 2001, more than two hundred miles away from the petitioner's business location. The record does not contain any evidence showing that the beneficiary and his family tried to perform the duties in the proffered position even after they obtained employment authorization documents, or showed that they were willing and able to relocate and take the position with the petitioner. Instead, CIS record shows that the beneficiary's wife adjusted her status to permanent residence and the beneficiary's adjustment of status application based on his wife's approved alien relative petition is pending⁷. The beneficiary did not provide information on what field he has been self-employed since 2001. The experience that qualifies him for the proffered position in the instant case is the one he obtained from July 1984 to June 1989 in Bangladesh. If he had been doing business in a field other than database administrator since 2001, it is unlikely that the beneficiary is still able to perform the duties described on Item 13 of the Form ETA 750A with his experience from 18 years ago in Bangladesh considering that computer technology developed so much in the past decade. Therefore, it is unlikely that the beneficiary is willing and able to work in the proffered position with the petitioner. It is doubtful that the job offer was a realistic and *bona fide* one from the priority date.

The petitioner must establish that its job offer to the beneficiary is a realistic one. Because the filing of an ETA 750 labor certification application establishes a priority date for any immigrant petition later based on the ETA 750, the petitioner must establish that the job offer was realistic as of the priority date and that the offer remained realistic for each year thereafter, until the beneficiary obtains lawful permanent residence. The petitioner's ability to pay the proffered wage is an essential element in evaluating whether a job offer is realistic. See *Matter of Great Wall*, 16 I&N Dec. 142 (Acting Reg. Comm. 1977). See also 8 C.F.R. §

⁶ The beneficiary's Form G-325A submitted with currently filed adjustment of status application shows that the name of the beneficiary's father is [REDACTED]

⁷ CIS receipt number: MSC-06-361-10552. [REDACTED]

204.5(g)(2). In evaluating whether a job offer is realistic, CIS requires the petitioner to demonstrate financial resources sufficient to pay the beneficiary's proffered wages, although the totality of the circumstances affecting the petitioning business will be considered if the evidence warrants such consideration. *See Matter of Sonogawa*, 12 I&N Dec. 612 (Reg. Comm. 1967).

The regulation 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.

The petitioner must demonstrate the continuing ability to pay the proffered wage beginning on the priority date, which is the date the Form ETA 750 Application for Alien Employment Certification, was accepted for processing by any office within the employment system of the U.S. Department of Labor. *See* 8 C.F.R. § 204.5(d). The petitioner must also demonstrate that, on the priority date, the beneficiary had the qualifications stated on its Form ETA 750 Application for Alien Employment Certification as certified by the U.S. Department of Labor and submitted with the instant petition. *Matter of Wing's Tea House*, 16 I&N Dec. 158 (Act. Reg. Comm. 1977).

Here, the Form ETA 750 was accepted on April 16, 2001. The proffered wage as stated on the Form ETA 750 is \$56,000 per year. On the Form ETA 750B, signed by the beneficiary on April 3, 2001, the beneficiary did not claim to have worked for the petitioner. The record does not contain any evidence that the beneficiary was employed and paid by the petitioner in the relevant years 2001 onwards.

The record contains copies of the petitioner's Form 1120, U.S. Corporation Income Tax Return, for 2001. The petitioner's 2001 tax return states a net income⁸ of \$68,122. Therefore, the petitioner had sufficient net income to pay the full proffered wage of \$56,000, and thus established its ability to pay in the year 2001.

The record before the director closed on May 14, 2004 with the receipt by the director of the petitioner's submissions in response to the request for evidence (RFE) dated March 17, 2004. As of that date the petitioner's federal tax returns for 2002 and 2003 should have been available. However, the petitioner did not submit its 2002 and 2003 tax returns. In visa petition proceedings, the burden is on the petitioner to establish eligibility for the benefit sought. *See Matter of Brantigan*, 11 I&N Dec. 493 (BIA 1966). The petitioner must prove by a preponderance of evidence that the beneficiary is fully qualified for the benefit sought. *Matter of Martinez*, 21 I&N Dec. 1035, 1036 (BIA 1997); *Matter of Patel*, 19 I&N Dec. 774 (BIA 1988); *Matter of Soo Hoo*, 11 I&N Dec. 151 (BIA 1965). The tax returns would have demonstrated the amount of taxable income the petitioner reported to the IRS and further reveal its continuing ability to

⁸ Taxable income before net operating loss deduction and special deductions as reported on Line 28 of the Form 1120.

pay the proffered wage. The petitioner failed to establish its ability to pay the proffered wage in 2002 and 2003 because it did not submit its tax return or other regulatory-prescribed evidence.

Therefore, the petitioner had not established that it had the continuing ability in 2002 and 2003 to pay the beneficiary the proffered wage as of the priority date through an examination of wages paid to the beneficiary, its net income or its net current assets, and thus also failed to establish that its job offer to the beneficiary is a realistic one.

Counsel's assertions on appeal cannot overcome grounds of the director's revocation. The AAO concurs with the director's decision and determines that the director had good and sufficient cause to revoke the petition's approval based on insufficient evidence failing to support factual assertions. The AAO also concurs with the director's invalidation of the labor certification. The regulation at 20 C.F.R. § 656.30(d) provides in pertinent part that: "After issuance labor certifications are subject to invalidation by [CIS] or by a Consul of the Department of State upon a determination, made in accordance with those agencies, procedures or by a Court, of fraud or willful misrepresentation of a material fact involving the labor certification application." A material fact to the immigrant petition's eligibility is the *bona fides* of the job offer. The test of the U.S. labor market and other procedural and substantive aspects of the labor certification adjudication could not have been properly completed without the *bona fides* of the job offer. In his NOIR the director requested evidence to demonstrate the *bona fides* of the job offer and stated that invalidation of the labor certification would occur if the director determined that the labor certification was not based on a *bona fide* job offer. The petitioner failed to demonstrate that its job offer to the beneficiary is a realistic and *bona fide* one. Therefore, the labor certification in the instant case should be invalidated.

In visa petition proceedings, the burden of proving eligibility for the benefit sought remains entirely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. Here, that burden has not been met.

ORDER: The appeal is dismissed. The director's decision on April 17, 2006 is affirmed. The labor certification is invalidated. The approval of the petition is revoked.