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U.S. Citizenship
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FILE:



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Date:

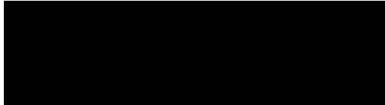
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LIN-03-131-52218

IN RE:

Petitioner:

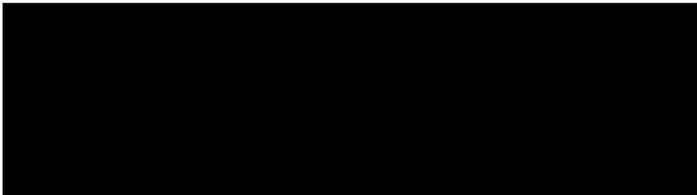
Beneficiary:



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, Nebraska Service Center. Upon further review of the immigrant visa proceeding, the director consequently served the petitioner with notice of intent to revoke the approval of the petition (NOIR). In a Notice of Revocation (NOR), the director ultimately revoked the approval of the Immigrant Petition for Alien Worker (Form I-140). The matter is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner is a wholesaler of industrial controls. It seeks to employ the beneficiary permanently in the United States as a sales manager (industrial controls marketing manager). As required by statute, a Form ETA 750, Application for Alien Employment Certification approved by the Department of Labor (DOL), accompanied the petition. The director determined that the petitioner's misrepresentation of the beneficiary's experience in Part B of the Form ETA 750 constituted willful misrepresentation of a material fact and invalidated the labor certification. The director revoked the approval of the petition accordingly.

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 December 21, 2005 NOR, the single issue in this case is whether or not the petitioner willfully misrepresented a material fact to DOL in the labor certification process, and therefore, the labor certification was properly invalidated.

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. Section 203(b)(3)(A)(ii) also provides for the granting of preference classification to qualified immigrants who hold baccalaureate degrees and are members of the professions.

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. To determine whether a beneficiary is eligible for an employment based immigrant visa, Citizenship and Immigration Services (CIS) must look to the job offer portion of the labor certification to determine the required qualifications for the position. CIS may not ignore a term of the labor certification, nor may it impose additional requirements. *See Matter of Silver Dragon Chinese Restaurant*, 19 I&N Dec. 401, 406 (Comm. 1986). *See also, Mandany v. Smith*, 696 F.2d 1008, (D.C. Cir. 1983); *K.R.K. Irvine, Inc. v. Landon*, 699 F.2d 1006 (9th Cir. 1983); *Stewart Infra-Red Commissary of Massachusetts, Inc. v. Coomey*, 661 F.2d 1 (1st Cir. 1981).

In the instant case, the Application for Alien Employment Certification, Form ETA-750A, was filed on April 30, 2001 and the job offered was "Marketing Manager, Industrial Controls." On the Form ETA 750B, the beneficiary claimed that he had been working for the petitioner in the proffered position since February 2001.

The director determined that the labor certification application concealed the fact that the beneficiary held a corporate position with the petitioner prior to the priority date, and therefore, the petitioner misrepresented a material fact during the labor certification proceeding by failing to disclose the beneficiary's prior positions with the petitioner. The director determined the Form ETA 750 was not approvable at the time of filing and invalidated it pursuant to 20 C.F.R. § 656.30 as of December 21, 2005.

On appeal counsel argues that the beneficiary held a corporate position with the petitioner before filing the Form ETA 750, that the beneficiary did disclose his prior position with the petitioner to DOL, and that there was no willful misrepresentation in the labor certification proceeding.

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 finds that the director had good and sufficient cause to revoke the approval of this petition. The petitioner's evidentiary submissions and counsel's assertions are also non-responsive to whether or not the petitioner's job offer was realistic and *bona fide*.

Section 212(a)(6)(C)(i) of the Act provides that “[a]ny 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 AAO finds that the petitioner made a fraudulent or willful misrepresentation of a material fact involving the labor certification application, and therefore the director correctly invalidated the labor certification. First of all, the labor certification was filed by the petitioner and accepted by DOL on April 30, 2001. Counsel asserts that the beneficiary held a corporate position before filing the labor certification application. However, the record contains evidence showing that the beneficiary was the president of the petitioner on or after filing the labor certification. The record contains an approval notice issued by the Nebraska Service Center on January 9, 2001 granting the beneficiary L-1A status from January 15, 2001 to January 14, 2002 in the position of the president of the petitioner.¹ The beneficiary entered the United States under L-1A status on February 21, 2001 and started his employment with the petitioner as the president. On October 22, 2001, the petitioner filed an I-129 petition for extension of the beneficiary's L-1A status with the Nebraska Service Center.² On the Form I-129 and supporting documents, the petitioner claimed that the beneficiary had been working for the petitioner as the president since February 21, 2001 and would continue to serve in that position for another three years. The record also contains the petitioner's Form 941s signed by the beneficiary as the president on April 11, 2001, July 15, 2001 and October 26, 2001 respectively, the petitioner's stock certificate signed by the beneficiary as

¹ CIS receipt number: LIN-01-061-51310.

² CIS receipt number: LIN-02-017-55288.

the president on December 14, 2001 and the petitioner's organizational chart showing that the beneficiary is the president. Therefore, counsel's assertion that the beneficiary held a corporate position before the filing of the labor certification application is misplaced.

Secondly, on the Form ETA 750B signed by the beneficiary on April 30, 2001 under a declaration that the contents of the form are true and correct under the penalty of perjury, the beneficiary represented that he worked 40 hours per week as a "Marketing Manager, Industrial Controls" for the petitioner from February 2001 to the present. He did not provide any additional information concerning his employment with the petitioner in the United States. Item 15 of the Form ETA 750B requires the beneficiary to "[l]ist *all* jobs held during the last three (3) years." (emphasis added). The form requires listing all jobs including all the related or non-related, part-time or full-time, previous or current, as long as they were held within three years. However, the beneficiary did not list his employment with the petitioner as the president regardless of whether the position was held before the filing or currently held, and whether the position was held as a full-time job or part-time. The beneficiary willfully concealed his employment as the president of the petitioner.

On appeal counsel asserts that the beneficiary disclosed his position with the petitioner as a marketing manager because he actually performed those duties as well as initially transferred from Autonics Korea to do so. Counsel does not submit any evidence to support his assertions. The assertions of counsel do not constitute evidence. *Matter of Obaigbena*, 19 I&N Dec. 533, 534 (BIA 1988); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980). The record does not contain any evidence that the beneficiary was initially transferred and continued to work for the petitioner as a marketing manager. Instead, evidence in the record shows that the beneficiary was transferred to the petitioner as the president and had been working as the president of the petitioner since he arrived in the United States in February 2001. The I-129 extension petition included Minutes of Organizational Meeting for Autonics USA, Inc. which shows that in the meeting held on October 31, 2000 the beneficiary was appointed as one of the initial board directors and the president. With the I-129 petition, the beneficiary as the president submitted a letter dated October 11, 2001 on behalf of the petitioner.

In addition, 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 the 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). In the instant case, the record shows that the parent company Autonics Korea owns 100% shares of stock of the petitioner and does not contain any evidence showing that the beneficiary owns any part of the petitioner. However, the record shows that the parent company is owned and controlled by the beneficiary's brother,³ and that the beneficiary was transferred to the petitioner as the president based on his employment with the parent company as a manager. In the instant immigrant petition, however, the

³ The petitioner claimed on L Classification Supplement to Form I-129 that "Autonics Corp. – Korea privately owned and controlled by Alien's brother."

petitioner claimed that the beneficiary worked as a marketing manager instead of the president. *Matter of Ho*, 19 I&N Dec. 582, 591-592 (BIA 1988) states: “Doubt cast on any aspect of the petitioner’s proof may, of course, lead to a reevaluation of the reliability and sufficiency of the remaining evidence offered in support of the visa petition.” “It is incumbent on the petitioner to resolve any inconsistencies in the record by independent objective evidence, and attempts to explain or reconcile such inconsistencies, absent competent objective evidence pointing to where the truth, in fact, lies, will not suffice.” *Matter of Ho*, 19 I&N Dec. at 591-592. The petitioner did not submit sufficient independent objective evidence to resolve doubts and inconsistencies in the record, and thus failed to establish that the job opportunity offered by the petitioner to the beneficiary was a bona fide job offer at the time of filing the labor certification application.

The regulation at 20 C.F.R. § 656.30(d) provides in pertinent part that: “After issuance labor certifications are subject to invalidation by the [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 beneficiary’s qualifications and the bona fides of the job offer. By willful misrepresentation and concealment of the beneficiary’s role and employment history at the petitioner’s business, DOL did not have 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 could not have been properly completed because of that willful misrepresentation and concealment of the beneficiary’s role and employment history at the petitioner’s business.

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.

Additionally, 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 DOL’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. Accordingly the director’s decision to invalidate the labor certification is affirmed.

Therefore, we affirm the director’s decision to revoke approval of the petition and invalidate the underlying labor certification application.

Beyond the director’s decision and counsel’s assertions on appeal, the AAO has identified additional ground of ineligibility and will discuss whether or not the petitioner has demonstrated with regulatory-prescribed evidence that the beneficiary possessed the requisite qualifications prior to the priority date. An application or petition that fails to comply with the technical requirements of the law may be denied by the AAO even if the Service Center does not identify all of the grounds for denial in the initial

decision. See *Spencer Enterprises, Inc. v. United States*, 299 F. Supp. 2d 1025, 1043 (E.D. Cal. 2001), *aff'd*, 345 F.3d 683 (9th Cir. 2003); see also *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 petitioner must 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 30, 2001.

To determine whether a beneficiary is eligible for an employment based immigrant visa, CIS must examine whether the alien's credentials meet the requirements set forth in the labor certification. In evaluating the beneficiary's qualifications, CIS must look to the job offer portion of the labor certification to determine the required qualifications for the position. CIS may not ignore a term of the labor certification, nor may it impose additional requirements. See *Matter of Silver Dragon Chinese Restaurant*, 19 I&N Dec. 401, 406 (Comm. 1986). See also, *Mandany v. Smith*, 696 F.2d 1008, (D.C. Cir. 1983); *K.R.K. Irvine, Inc. v. Landon*, 699 F.2d 1006 (9th Cir. 1983); *Stewart Infra-Red Commissary of Massachusetts, Inc. v. Coomey*, 661 F.2d 1 (1st Cir. 1981).

In the instant case, the Application for Alien Employment Certification, Form ETA-750A, items 14 and 15, set forth the minimum education, training, and experience that an applicant must have for the position of industrial controls marketing manager. Item 14 describes the requirements of the proffered position as follows:

- | | | |
|-----|-------------------------|-------------|
| 14. | Education | |
| | Grade School | 8 |
| | High School | 4 |
| | College | 4 |
| | College Degree Required | Bachelor |
| | Major Field of Study | Bus. Admin. |

The applicant must also have one year of experience in the job offered (the duties of which are delineated at Item 13 of the Form ETA 750A and since this is a public record, will not be recited in this decision) or in the related occupation of export or import manager, wholesale automotive parts. Item 15 of Form ETA 750A does not reflect any other special requirements.

Although the petitioner checked the box e in Part 2 of the Form I-140 to classify the beneficiary as a skilled worker or professional, it is properly considered as a professional under the third preference since the requirements include a bachelor degree and one year experience. The regulation at 8 C.F.R. § 204.5(l)(3)(ii)(C) states the following:

If the petition is for a professional, the petition must be accompanied by evidence that the alien holds a United States baccalaureate degree or a foreign equivalent degree and by evidence that the alien is a member of the professions. Evidence of a baccalaureate degree shall be in the form of an official college or university record showing the date the baccalaureate degree was awarded and the area of concentration of study. To show that

the alien is a member of the professions, the petitioner must submit evidence that the minimum of a baccalaureate degree is required for entry into the occupation.

The beneficiary set forth his credentials on Form ETA-750B. On Part 11, eliciting information of the names and addresses of schools, college and universities attended (including trade or vocational training facilities), he indicated that he attended Pusan Sanup University in Pusan, Korea in the field of "Business Admin." from March 1981 to February 1985, culminating in the receipt of a "Bachelor" degree. He provides no further information concerning his educational background on this form, which is signed by the beneficiary under a declaration under penalty of perjury that the information was true and correct. In corroboration of the Form ETA-750B, the petitioner provided the beneficiary's "Diploma of University" issued by Pusan Industrial University on February 25, 1985 with its English translation, that shows that the beneficiary completed all courses of business administration and acquired a bachelor degree of business administration on February 25, 1985.

A credential evaluation drafted by [REDACTED], Director of Education International Inc. on December 2, 2003 was also submitted and stated the following in pertinent part:

The credentials of [the beneficiary] indicate that, in the judgment of the undersigned, he/she has achieved the equivalent of a Bachelor's degree in Business Administration at an accredited institution in the United States. This is based on the following:

-- studies in South Korea at Pusan Sanub University (now Kyung Sung University) resulting in the award of the degree of Bachelor of Business Administration in 1985.

CIS may, in its discretion, use as advisory opinions statements submitted as expert testimony. *Matter of Caron International*, 19 I&N Dec. 791 (Comm. 1988). The petitioner has demonstrated that the beneficiary possessed a bachelor's degree or foreign equivalent degree in business administration prior to the priority date, and thus met the educational requirements for the proffered position.

The certified Form ETA 750 in the instant case also indicates that the position requires one (1) year of experience in the job offered or in the related occupation of export or import manager of industrial controls. The beneficiary set forth his credentials on Form ETA-750B. On Part 15, eliciting information of the beneficiary's work experience, he represented that he has been working as a full time industrial controls marketing manager for the petitioner since February 2001. Prior to that, he represented that Autonics Corp. in Yangsan-shi, Korea employed him as a full time industrial controls export or import manager from March 1985 to February 2001. He does not provide any additional information concerning his employment background on that form.

The regulation at 8 C.F.R. § 204.5(g)(1) states in pertinent part:

Evidence relating to qualifying experience or training shall be in the form of letter(s) from current or former employer(s) or trainer(s) and shall include the name, address, and title of the writer, and a specific description of the duties performed by the alien or of the

training received. If such evidence is unavailable, other documentation relating to the alien's experience or training will be considered.

The record of proceeding contains a copy of "Certificate of Being in Autonics" from [REDACTED] President of Autonics Corporation dated December 6, 2000. This certificate states in pertinent part that:

Employee: [REDACTED]
Title: Assistant Director
Dept: Oversea Marketing dept.
Job: Manager – Industrial control products, Develop distributors for company products worldwide, Train distributors in applications.

This[sic] brief statement that [REDACTED] [sic] been a employee from 1985 January 1st to up to now, his job is stipulated in this Certificate and his salary has been US\$35,000 in 1999 year and USD40,000 in 2000 year.

The experience letter certifies the beneficiary had more than one year of experience as a manager prior to the priority date, however, it indicates the beneficiary's title as assistant director, therefore, it is not clear whether or not the beneficiary's experience with Autonics Corporation as an Assistant Director meets the one year of experience in the job offered, i.e. as a marketing manager, or export or import manager. In addition the duties performed by the beneficiary with Autonics Corporation are described as "[d]evelop distributors for company products worldwide, [t]rain distributors in applications" while Item 13 of the Form ETA 750A describes the duties of the proffered position as follows: "Supervise performance of marketing analysis to determine available markets. Devise and implement marketing campaigns, to maintain or increase market share. Set sales, pricing and credit policies. Recruit, train and supervise marketing representatives. Liaison with operations section to insure customer post-sale satisfaction." It is not clear that the beneficiary possessed the requisite experience to perform the duties described in Part 13 of the Form ETA 750. Therefore, the petitioner failed to demonstrate that the beneficiary qualified for the proffered position with the experience letter from Autonics Corporation.

In addition, the experience letter provides inconsistent information about the beneficiary's employment with Autonics Corporation. The letter certifies that the beneficiary worked from January 1, 1985 while on the Form ETA 750B the beneficiary claimed to have worked for the company from March 1985. The beneficiary also represented on that form that he attended Pusan Sanup University until February 1985. The record does not contain any explanation how the beneficiary managed both full-time studies at Pusan and a full-time assistant director job in Yangsan-shi at the same time during January and February 1985. The record does not contain any independent objective evidence to resolve the inconsistency. Doubt cast on any aspect of the petitioner's proof may, of course, lead to a reevaluation of the reliability and sufficiency of the remaining evidence offered in support of the visa petition. *Matter of Ho*, 19 I&N Dec. 582, 591. It is incumbent on the petitioner to resolve any inconsistencies in the record by independent objective evidence, and attempts to explain or reconcile such inconsistencies, absent competent objective evidence pointing to where the truth, in fact, lies, will not suffice. *Id.* If CIS fails to believe that a fact stated in the petition is true, CIS may reject that fact. Section 204(b) of the Act, 8 U.S.C. § 1154(b); see also *Anetekhai v. I.N.S.*, 876 F.2d 1218, 1220 (5th Cir.1989); *Lu-Ann Bakery Shop, Inc. v. Nelson*, 705 F.

Supp. 7, 10 (D.D.C.1988); *Systronics Corp. v. INS*, 153 F. Supp. 2d 7, 15 (D.D.C. 2001). The experience letter that the petitioner submitted is insufficient evidence to demonstrate that the beneficiary possessed the requisite experience to perform the duties described in the part 13 of the Form ETA 750A prior to the priority date of April 30, 2001.

The petition will be denied for the above stated reasons, with each considered as an independent and alternative basis for denial. 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 December 21, 2005 is affirmed. The approval of the petition is revoked.