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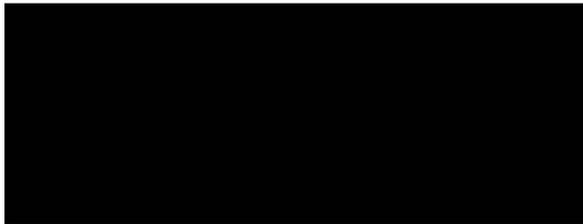
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FILE: [REDACTED] Office: CALIFORNIA SERVICE CENTER Date: **NOV 19 2007**  
WAC 03 152 51467

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 director denied the employment-based preference visa petition. The petitioner subsequently submitted a motion to reopen/reconsider. On February 22, 2006, the director granted the motion to reconsider, identified an additional ground for denial and subsequently denied the petition. The matter is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner is an Indian restaurant. It seeks to employ the beneficiary permanently in the United States as an Indian specialty cook. As required by statute, a Form ETA 750, Application for Alien Employment Certification approved by the Department of Labor, accompanied the petition. The director in his initial denial determined that the petitioner had not established that the beneficiary had the requisite two years of work experience as an Indian cook. The director stated that the petitioner had only established the beneficiary had seven months and eighteen days of experience as a cook prior to the January 19, 1996 priority date.

In his decision to reopen the petition, following the submission of counsel's motion to reopen, the director then stated that the beneficiary might be ineligible for the employment-based visa benefit sought based on the beneficiary's financial relationship to the petitioner and issued a Notice of Intent to Deny (NOID) the petition. On August 23, 2006, following the submission of further documentation by counsel, the director determined that the petitioner had not established that the beneficiary was eligible for the visa classification sought, and accordingly denied the petition, and invalidated the labor certification.

The record shows that the appeal is properly filed and timely and makes a specific allegation of error in law or fact. The AAO will provide further elaboration of the procedural history in these proceedings.

As set forth in the director's denial dated August 23, 2006, the single issue in this case is whether or not the petitioner has demonstrated that the beneficiary<sup>1</sup> was eligible for the visa classification sought based on his

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<sup>1</sup> The AAO notes that the I-140 petition's cover letter dated January 10, 2003 stated that the petitioner was replacing [REDACTED] the individual identified on the certified Form ETA 750, with [REDACTED]. The petitioner stated that the substituted beneficiary had the same qualifications for the position. The petitioner did not indicate that it was submitting Part B of the Form ETA 750 for [REDACTED] the substituted beneficiary, nor does the record reflect any accompanying Part B. The only Part B found in the record is for the original beneficiary, filed with the original Form ETA 750. Under the Citizenship and Immigration Services (CIS) procedures, a petitioner must initiate the process by filing a new I-140 petition on behalf of the beneficiary to be substituted. The substituted beneficiary must have met all of the minimum education, training, and/or experience requirements, as stated in Part A of Form ETA 750 filed by the petitioner, at the time the original labor certification application was submitted to the state employment office. The petitioner must submit documentation that the substituted beneficiary meets the requirements set forth in the original labor certification, along with Part B of Form ETA 750, signed by the substituted alien. In addition, the petitioner must attach a photocopy of the original Form ETA 750, Parts A and B, a photocopy of the DOL certification, and a copy of a notice of approval (if there is one) of a previous I-140 petition to the new I-140 petition filed on behalf of the substituted alien. The petitioner must also submit a written notice of withdrawal of the initial I-140 petition, which was based on the labor certification.

financial relationship to the petitioner. The director in his initial denial also raised the issue of the beneficiary's qualifications; however, the director's final decision is solely based on the beneficiary's relationship to the petitioner.

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 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 January 1, 1996.

The AAO maintains plenary power to review each appeal on a de novo basis. 5 U.S.C. § 557(b) ("On appeal from or review of the initial decision, the agency has all the powers which it would have in making the initial decision except as it may limit the issues on notice or by rule."); *see also, Janka v. U.S. Dept. of Transp., NTSB*, 925 F.2d 1147, 1149 (9th Cir. 1991). The AAO's de novo authority has been long recognized by the federal courts. *See, e.g. Dor v. INS*, 891 F.2d 997, 1002 n. 9 (2d Cir. 1989). The AAO considers all pertinent evidence in the record, including new evidence properly submitted upon appeal.<sup>2</sup>

As stated previously, the AAO will review the procedural history of the instant matter in these proceedings.

On March 31, 2005, the director notified the petitioner that the director had sent the petitioner a request for further evidence, and that the petitioner had failed to respond to the request within the allotted period, and therefore the petitioner was considered abandoned. The director also denied the beneficiary's I-485 petition. On April 11, 2005, counsel for the petitioner submitted a motion for reconsideration to the director stating that neither the petitioner nor counsel had received the previous request for further evidence, even though counsel had made enquiries with regard to the petition to Citizenship and Immigration Services (CIS). The director reopened the matter and resubmitted the request for further evidence to the petitioner. In the RFE, the director requested evidence with regard to a more detailed description of the beneficiary's previous experience in the proffered job; evidence with regard to the petitioner's ability to pay the proffered wage as of the 1996 priority date, 1997, 1998, 2002 and 2003;<sup>3</sup> DE-6 Quarterly Wage reports for all employees for the last four quarters accepted by the state of California, with names, social security numbers and number of weeks worked for all employees, as well as job titles and duties. Finally the director requested copies of all W-2 Wage and Tax Statements issued to the beneficiary from 1996 to the present, if the beneficiary was the petitioner's current employee.

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<sup>2</sup> 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).

<sup>3</sup> The petitioner had submitted its Forms 1120, U.S. Corporation Income Tax Return, for the years 1999, 2000, and 2001, with the initial petition.

On June 20, 2005, counsel submitted an additional letter of employment<sup>4</sup> from the Royal Taj Restaurant, located at several locations in Arizona. In this letter, [REDACTED] identified as the owner, stated that the beneficiary was a cook at his restaurant, and the beneficiary worked for him for three years, from June 1995 to April 1998, and that he worked 45 hours a week. Counsel also submitted the petitioner's Form 1120 for tax years 1996, 1997, 1998, 2002, and 2003; the petitioner's balance sheet and income statement as of December 31, 2004; and Forms 941 for all four quarters of tax year 2004. Counsel also submitted W-2 Wage and Tax Statements for tax years 1998 and 2004. Finally counsel submitted copies of Form 4852, Substitute for Form W-2, Wage and Tax Statement, or Form 1099-W, Distribution from Pensions, Annuities, Retirement or Profit-Sharing Plans, IRAs, Insurance Contracts, Etc., for tax years 2000, 2001, 2002 and 2003.<sup>5</sup>

On October 27, 2005, the director denied the petition. The director noted that the Form ETA 750 submitted with the original I-140 petition and also used in the instant petition with the substituted beneficiary required two years of experience in the proffered position or a related occupation. The director further noted that the letter of work experience from Cuisine of India [REDACTED] Restaurant in Arizona stated that the beneficiary was employed by this business as a cook from June 1995 to April 1998 and that the letter failed to state whether the beneficiary was employed full-time.<sup>6</sup> The director thus determined that the petitioner had not established that the beneficiary was qualified to perform the duties of the proffered position.

On November 21, 2005, counsel submitted a motion for reconsideration and provided additional evidence as to the beneficiary's previous employment from December 1988 to February 1991. Counsel submitted a letter from Surinder [REDACTED] owner, and manager of [REDACTED] 1422 N. Palm Canyon Drive, Palm Springs, California. In his letter, [REDACTED] stated that the beneficiary was a cook in his restaurant and worked there from December 1988 to February 1991 as a fulltime employee.

On February 22, 2006, the director granted the motion to reconsider, and in a notice of intent to deny the petition determined that the beneficiary might be ineligible for the visa classification benefit sought by the petitioner. The director noted that, pursuant to 20 C.F.R. §§ 626.20 (c)(8) and 656.3, the petitioner has the burden of proof when asked to show that a valid employment relationship exists, and that a bona fide job opportunity is clearly open to any qualified U.S. worker. The director stated that 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." The director stated that if the alien beneficiary's true relationship to the petitioning business is not apparent in the labor certification proceedings, it caused the

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<sup>4</sup> The petitioner had submitted an initial letter of work experience verification from [REDACTED] that lacked information with regard to hours worked and job duties.

<sup>5</sup> The Forms 4852 submitted to the record do not indicate the location of the beneficiary's claimed employers, the employer's identification number, and they are not signed. The documents do reflect that the wages for which the beneficiary wished to receive a substitute W-2 Form were for employment at various gas stations in the years 2000, 2001, 2002, and 2003.

<sup>6</sup> The AAO notes that the director appeared to be referring to the initial undated letter of work experience submitted to the record with the I-140 petition. The second letter of work experience, submitted apparently with the petitioner's response to the director's RFE and also undated, indicated that the beneficiary worked at least 45 hours a week. The claimed time period of employment, namely June 1995 to April 1998 is identical in both letters.

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. The director also stated that the Arizona Corporation Commission State of Arizona Public Access System indicated that the beneficiary was one of the petitioner's four shareholders and had held the office of secretary since December 6, 1989.

The director noted that the petitioner on motion submitted a letter from [REDACTED] Cuisine of India, Palm Spring, California, that stated the beneficiary was employed there as a full-time cook from December 1988 to February 1991. The director then noted that the Form G-325A<sup>7</sup> signed by the beneficiary on January 3, 2003 reflected that the beneficiary had resided in Phoenix, Arizona, since June 1990. The director noted that the petitioner signed the I-140 petition, and thus, assumed legal responsibility for the truth and accuracy of all information submitted in support of the I-140 petition. The director stated that the petitioner had violated its legal responsibility by submitting falsified evidence and that CIS was under no obligation to presume that the letter of work verification from Delhi Cuisine of India was the only false document in the record. The director also noted that, having proven that the petitioner submitted false documents in support of a material fact, CIS was not obligated to verify, document by document, the entire record of proceeding, and that the burden of proof lay with the petitioner. The director gave the petitioner thirty days from the date of the director's decision to submit evidence and/or a written statement in response to the director's notice.

On March 21, 2006, counsel responded to the director's NOID. Counsel stated that the original labor certification was filed on behalf of [REDACTED]. Counsel noted that this labor certification had been approved and that [REDACTED] had never held any ownership or management interest in the petitioner's business. Counsel then noted that the petitioner substituted [REDACTED] on the labor certification and filed a new I-140 petition. Counsel noted that [REDACTED] and [REDACTED] are married and that the instant beneficiary has a twenty-one percent ownership interest in the petitioner. Counsel noted that the original labor certification application was filed for a person who had no such ownership interest and that there was a fair test of the labor market prior to the approval of the labor certification. Counsel noted that he did not see why substituting an equally qualified individual at a later date tainted the original recruiting process even though the substituted beneficiary had an interest in the petitioner.

Counsel submitted to the record an unsworn affidavit from the beneficiary in which the beneficiary stated that his prior declaration to having lived in Phoenix, Arizona since 1990 was incorrect, and that he attributed the error on his Form G-385 to a faulty memory and to the fact that thirteen years had passed since the dates of the claimed residence. [REDACTED] then described his employment and residence from 1988 to 1998, either in Palm Springs, California and Phoenix or Tempe, Arizona. Counsel also submitted a letter from [REDACTED] owner of 1381 N. Indian Canyon, Palm Springs, California. [REDACTED] stated that his property was leased from him by the beneficiary from January 1989 to March 1991. Counsel also submitted a letter from [REDACTED] of India, Anaheim, California. In his letter, [REDACTED] stated that he lived with the beneficiary at 1381 Indian Canyon Drive, Palm Springs, California, from December 1988 to February 1991, and that he also worked with the beneficiary while the beneficiary was working as a cook at [REDACTED] Cuisine of India in Palm Springs. A third letter submitted to the record is written by [REDACTED]

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<sup>7</sup> Submitted with the beneficiary's I-485 Application to Adjust Status or Apply for Permanent Residency,

Buena Park, California. In his letter, [REDACTED] stated that he had visited the beneficiary, whom he described as a friend, at 1381 N. Indian Canyon Drive, Palm Springs, California in April 1990. Finally counsel submitted a copy of a document entitled "Escrow No. 91400391 Amendment" that refers to a property at 4592 E. Whitton, Phoenix, Arizona. This document is dated September 28, 1991, and signed by [REDACTED]

On August 23, 2006, the director denied the petition. In his decision, the director reiterated his comments with regard to the beneficiary being an officer of the petitioner and having a 21 percent ownership interest in the business, and pointing out the discrepancy between the beneficiary's claimed residence in Arizona and later clarification of his residence in Palm Springs, California. The director stated that public records such as Choice Point indicated that the beneficiary was a businessman, and not a cook. The director noted that 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.<sup>8</sup> The director also noted that it was incumbent upon the petitioner to resolve any inconsistencies in the record by independent objective evidence, and any attempt to explain or reconcile such inconsistencies, absent competent objective evidence pointing to whether the truth, in fact, lies, will not suffice.<sup>9</sup> With regard to counsel's statement that the original beneficiary had no financial or management interest in the petitioner, the director noted that the original beneficiary and the instant beneficiary are married and that a relationship invalidating a bona fide job offer may arise where the beneficiary is related to the petitioner by blood, or it may be "be financial, by marriage, or through friendship."<sup>10</sup>

The director determined that 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. The director stated that the petitioner failed to advise the Department of Labor certifying officer of the fact that the beneficiary of the original labor certificate<sup>11</sup> was related to the petitioner by marriage, through friendship and possibly financially. The director then stated the Form ETA 750 would be invalidated. The record contains another determination by the director dated August 23, 2006 that invalidated the Form ETA 750 for willful misrepresentation of a material fact involving the labor certification application.

Upon review of the record, although the director initially denied the petition based on the lack of detail with regard to the letters of work verification submitted by the petitioner, he finally determined that the petitioner had not established that a realistic, bona fide job existed, based on the beneficiary's financial relationship to the petitioner. The AAO will discuss both issues in these proceedings.

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<sup>8</sup> See *Matter of Ho*, 19 I&N Dec. 582, 591 (BIA 1988).

<sup>9</sup> Again, see *Matter of Ho*, 19 I&N Dec. 582, 591 (BIA 1988).

<sup>10</sup> 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 Sunmart* 374, 00-INA-93 (BALCA May 15, 2000).

<sup>11</sup> Sukhbir Kaur, the current beneficiary's wife.

With regard to the bona fide nature of the proffered position, 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 Sunmart 374*, 00-INA-93 (BALCA May 15, 2000).

Furthermore, the AAO notes that the beneficiary’s relationship to the instant petitioner is analogous to the beneficiary’s circumstances in *Matter of Silver Dragon Chinese Restaurant*, 19 I&N Dec. 401, 406 (Comm. 1986). In this precedent decision, the beneficiary was the owner of 50 percent of the petitioner’s issued shares, signer of the petitioner’s tax returns, and at the time of filing the labor certification, the sole officer of the petitioning corporation. In the decision, the Bureau of Immigration Appeals (BIA) determined that while an occupational preference petition may be filed on behalf of a prospective employee who is a shareholder in a corporation, the prospective employee’s interest in the corporation was a material fact to be considered in determining whether the job being offered was really open to all qualified applicants.

The decision also stands for the proposition that a shareholder’s concealment in labor certification proceedings, of his or her interest in the petitioning corporation constituted willful misrepresentation of a material fact and is a ground of invalidation of an approved labor certification under 20 C.F.R. § 656.30(d)(1986). In fact, the petitioner’s labor certification in *Silver Dragon Chinese Restaurant* was invalidated because the petitioner failed to disclose the beneficiary’s relationship to the petitioner to the Department of Labor. In the instant matter, while the beneficiary is not the sole officer, he holds a twenty-one per cent interest in the petitioner, has apparently been on the petitioner’s board of directors as of December 6, 1989, and is married to the original beneficiary.<sup>12</sup>

The AAO thus concurs with the director’s invalidation of the petitioner’s ETA Form 750 based on willful misrepresentation of a material fact. *See* 20 C.F.R. § 656.30(d). This regulation, in pertinent part, states the following:

(d) Invalidation of labor certifications. After issuance, a labor certification may be revoked by ETA using the procedures described in Sec. 656.32. Additionally, after issuance, a labor certification is subject to invalidation by the DHS 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.

The beneficiary’s financial relationship with the petitioner is a material fact to be considered in determining whether the job being offered was open to all qualified workers. Counsel’s assertion that the original beneficiary, the current beneficiary’s wife, has no financial connection to the petitioner at the time the Form ETA 750 was filed is without merit. A prior knowledge of the relationship of the original beneficiary to the current beneficiary, regardless of her financial connection to the petitioner might have caused the DOL certifying officer to examine more carefully whether the job opportunity was clearly open to qualified U.S.

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<sup>12</sup> The I-140 petition indicates the petitioner has six employees as of the time the I-140 petition was filed.

workers, and whether U.S. workers applying for the job were rejected solely for lawful job-related reasons. The AAO considers the petitioner's failure to identify either the original beneficiary's or the current beneficiary's relationship to the petitioner to be a willful misrepresentation of a material fact.

With regard to the ground initially stated by the director in denying the petition, namely whether the beneficiary had the requisite two years of work experience as an Indian cook, the AAO first notes that the petitioner did not submit Part B of the labor certification for the substituted beneficiary, which could have been grounds for denying the petition initially. In Part B, the beneficiary set forth his credentials on Form ETA-750B and signs his name under a declaration that the contents of the form are true and correct under the penalty of perjury. If the petitioner does not provide Part B, neither the director nor the AAO can evaluate whether the beneficiary has the requisite work experience, or whether submitted letters of work experience corroborate the beneficiary's statements contained on the ETA 750, Part B. Second, the AAO notes that the record, with regard to the beneficiary's claimed employment as a cook of Indian specialty food prior to the 1996 priority date is confused. As correctly noted by the director, the beneficiary provided conflicting testimony with regard to his geographic location from 1988 to 1991, based on Form G325, submitted with his I-485 application, and also based on the letters of work experience submitted either with the initial petition or in response to the director's NOID. *Matter of Ho*, 19 I&N Dec. 582, 591-592 (BIA 1988) states: "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." Further, the AAO does not give any significant weight to the beneficiary's unsworn statement with regard to his faulty memory and his relocation from California to Arizona, or to the other affidavits submitted to the record on appeal. Thus, the petitioner has not established that the beneficiary is qualified to perform the duties of the proffered position.

In the instant petition, the petitioner has not established that the current beneficiary has the requisite two years of work experience as an Indian cook. But more importantly, the petitioner has not established that it had conducted a bona fide, good faith recruitment effort to fill the proffered position with a U.S. worker, but rather substituted an officer and shareholder of the petitioner for the original beneficiary. The burden of proof in these proceedings rests solely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. The petitioner has not met that burden. The appeal is dismissed.

**ORDER:** The appeal is dismissed.