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U.S. Department of Homeland Security
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U.S. Citizenship
and Immigration
Services

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FILE: [Redacted]
SRC 02 031 56963

Office: TEXAS SERVICE CENTER

Date:

OCT 17 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 Director, Texas Service Center, initially approved the employment-based preference visa petition on May 28, 2002. In connection with the beneficiary's Application to Register Permanent Resident or Adjust Status (Form I-485) interview, Citizenship and Immigration Services (CIS) requested an onsite investigation as to the beneficiary's previous work experience and employers. On March 2, 2006, the director sent a notice of intent to revoke the approval of the petition (NOIR) to the petitioner's counsel. On March 22, 2006, counsel submitted a response to the director's NOIR. In a Notice of Revocation (NOR), on April 13, 2006, the director revoked the approval of the Immigrant Petition for Alien Worker (Form I-140). The petitioner then submitted an appeal to the Administrative Appeals Office. The appeal will be dismissed.

The petitioner is a convenience store and gas station. It seeks to employ the beneficiary permanently in the United States as a store general manager.

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 205 of the Act, 8 U.S.C. 1155, states 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).

Regarding the revocation on notice of an immigrant petition under section 205 of the Act, the Board of Immigration Appeals has stated:

In *Matter of Estime*, . . . this Board stated that a notice of intention to revoke a visa petition is properly issued for "good and sufficient cause" where the evidence of record at the time the notice is issued, if unexplained and un rebutted, would warrant a denial of the visa petition based upon the petitioner's failure to meet his burden of proof. The decision to revoke will be sustained where the evidence of record at the time the decision is rendered, including any evidence or explanation submitted by the petitioner in rebuttal to the notice of intention to revoke, would warrant such denial.

Matter of Ho, 19 I&N Dec. 582, 590 (BIA 1988)(citing *Matter of Estime*, 19 I&N 450 (BIA 1987)).

In order to properly revoke a petition on the basis of an investigative report, the report must have some material bearing on the grounds for eligibility for the visa classification. The investigative report must establish that the petitioner failed to meet the burden of proof on an essential element that would warrant the denial of the visa petition. Observations contained in an investigative report that are conclusory, speculative, equivocal, or irrelevant do not provide good and sufficient cause for the issuance of a notice of intent to

revoke the approval of a visa petition and cannot serve as the basis for revocation. *Matter of Arias*, 19 I&N Dec. 568 (BIA 1988).

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.¹ 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. In these proceedings, the AAO will review the procedural history of the revocation of the petition's approval.

On July 9, 2005, the director issued a Notice of Intent to Revoke (NOIR) to the petitioner stating that during the course of the beneficiary's 1-485 Adjustment of Status interview, he presented conflicting information with regard to the position he had held and the date he was employed in these positions. The director further stated that CIS was unable to find a telephone listing for the petitioner, [REDACTED] or to contact [REDACTED] the individual who signed the Form ETA-750, who claimed to be the petitioner's treasurer. The director also stated that CIS contacted [REDACTED] the petitioner's president, who is the beneficiary's brother-in-law, and who had also signed the beneficiary's letter of work experience, as the President of Friends Corner, Inc. The director also stated that the beneficiary was unable to explain why his salary for tax years 1999, 2000, and 2001 was not the equivalent of a manager's salary. The director also noted that the beneficiary's tax returns for 1999, 2000, and 2001 were signed by [REDACTED] the petitioner's alleged treasurer, and that these tax returns indicated the beneficiary occupation was that of clerk.

The director requested the petitioner to explain the relationship [REDACTED] and also asked the petitioner to submit copies of the beneficiary's Forms W-2 Wage and Tax Statements, for the years 1997 to 2005. The director also asked the petitioner to explain how the beneficiary began employment at Friends' Corner, Inc as a general manager when he did not claim any prior employment experience. The director also asked the petitioner to submit evidence that the brother-in-law relationship between [REDACTED] Department of Labor prior to the certification of the Form ETA 750.

Finally the director requested the petitioner to identify the beneficiary's current employment location, the ownership of the business, and whether the owners were related to the beneficiary by blood or marriage.

In response to the director's NOIR, counsel submitted the following evidence:

A copy of the Business Information printout for Navroz Inc, a domestic profit company from the online database for the state of Georgia Secretary of State Corporation Division. This document indicated the company identified as Navroz, Inc., incorporated on December 28, 1999, and that as of March 14, 2005; the date of the last annual registration, was active. The officers of the

¹ 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).

company were identified as [REDACTED] Fayetteville, Georgia;

Photographs of a convenience store/gas station identified as "Lovejoy Conoco";

City of Lovejoy Business License/Occupational Tax Certificate that indicates Lovejoy Conoco, located at [REDACTED] d, Lovejoy, Georgia had a valid business license as of February 16, 2006;

State of Georgia License to Sell Alcoholic Beverages, dated 2006. This document was addressed [REDACTED]

Copy of a February 2006 bank statement for a commercial checking account with the Heritage Bank, Jonesboro, Georgia, in the name [REDACTED] check register for checks written primarily in February and January 2006 on the Heritage bank account;

Copy of a bank statement dated January 2006 for a second Heritage Bank commercial checking account for [REDACTED] In Trust for Georgia Lottery;

Copy of a third Heritage Bank commercial checking account dated January 2006 for money orders in the name [REDACTED] d/b/a/ [REDACTED], based in Lovejoy, Georgia;

Copy of a Bell South Telephone bill for July 13, 2005 [REDACTED] D/B/A [REDACTED] along with other bills for items such as waste management, sewer and water, electricity, and oil shipments, and general merchandise. The dates on these bills range from March 2005 to February 2006 and are addressed to both [REDACTED] or [REDACTED]

A Form 1120S, for the tax year 2000 for Friend's Corner, Inc, Korner Food and Bottle Shops, [REDACTED], Jonesboro, Georgia. This tax return is an unsigned copy that indicates [REDACTED] is the president, and that [REDACTED] Jonesboro, Georgia, prepared the return;

Copies of the beneficiary's Forms W-2 Wage and Tax Statements for the years 1999 to 2005. These documents indicate that in tax year 1999 and 2000, the beneficiary worked for [REDACTED] [REDACTED], D/B/A [REDACTED] Stockbridge, Georgia, receiving wages of \$1,320, and \$5,880 in the respective years. In tax years 2001, 2002, and 2003, the documents indicate that the beneficiary worked for [REDACTED], [REDACTED] Thomaston, Georgia, and [REDACTED] [REDACTED], Stockbridge, Georgia, receiving wages of \$3,120, from [REDACTED], and \$11,520 from [REDACTED]. In tax year 2002, the W-2 Forms indicate that the beneficiary

² A more current Internet printout obtained by CIS from the Georgia Secretary of State website indicates that the address for [REDACTED] This is the same address listed by the beneficiary as his address on his W-2 Forms for tax years 2000 through 2005. See <http://www.state.ga.us/cgi-bin/ub/corp/corpsearch?corpId=0000259>. (available as of August 29, 2007.)

received wages from both [REDACTED] and from [REDACTED] in the amounts of \$13,260 and \$6,240 respectively. In tax year 2003 the beneficiary received wages of \$12,700 from [REDACTED] while in tax years 2004 and 2005, the beneficiary received wages from [REDACTED], Griffin, Georgia, and [REDACTED] Thomaston, Georgia. In tax year 2004, the beneficiary's wages were \$8,250 from [REDACTED] and \$5,000 from [REDACTED]. Finally, the documents indicated that in tax year 2005, the [REDACTED], Georgia, paid the beneficiary \$21,500; and

An attested letter of work experience written on Letterhead for [REDACTED] International Mens Wear, Hyderabad, India by an individual whose name is not clear, and whose title is not indicated. In this letter, the writer states that the beneficiary worked as a general manager for the company from 1995 until he left India in 1997. The writer indicated the company business was readymade men's clothing, and that the beneficiary's duties were to order goods from wholesalers, check the stock, maintain the books, and do the banking.

In his response to the NOIR dated March 22, 2006, counsel noted that CIS investigators had appeared twice, including a recent visit on March 8, 2006, at the petitioner's store, and that it was inconceivable why CIS now doubted the existence of the petitioner. Counsel also stated that the only connection between the Friend's Corner, Inc., the company where the beneficiary worked previously as a general manager, and the instant petitioner is that both companies were owned by [REDACTED] purchased the Friends Corner store in July 1997 and sold it in 2000. Counsel noted that the corporate income tax return for Friends Corner Store indicates it is the final return for the company. Counsel states that [REDACTED] then [REDACTED] Inc., d/b/a/ Lovejoy Conoco in December 1999.

With regard to the petitioner's owner being the brother-in-law of the beneficiary, counsel stated that nowhere on the Form ETA 750 is there any request for such information, nor did DOL request any additional evidence in this issue. Counsel stated that the petitioner did not mislead DOL, but rather the DOL never requested such information from the petitioner. With regard to [REDACTED] relationship with the petitioner, counsel stated that [REDACTED], who signed the Form ETA 705 certification application, is the petitioner's treasurer. Counsel described [REDACTED] as a partner of an accounting firm in Jonesboro, Georgia and noted that [REDACTED] is the accountant for all [REDACTED] companies while serving as the treasurer of the petitioner. As the petitioner's treasurer, [REDACTED] was acting as an agent of Navroz, Inc and is permitted to sign forms on the petitioner's behalf.

With regard to the beneficiary's low wages, counsel stated that although the beneficiary was acting as a manager for Friend's Corner, For Diamond Brothers and for Sarina-V, Inc., he was always paid a lower wage than a manager would make because the beneficiary was not authorized to work. With regard to the use of the word "clerk" on the beneficiary's tax returns, counsel states that the accountant³ used the terms clerk and manager interchangeably since the manager of a gas station and convenience stores is often called upon to perform the duties of a clerk. With regard to how the beneficiary could begin employment at Friend's Corner, Inc., as a general manager when he did not claim any prior employment experience, counsel stated that the beneficiary was employed as a manager of a retail store in India, and refers to the letter of work experience submitted by [REDACTED] International Mens Wear.

³ The beneficiary's Forms 1040 were submitted with his I-485 application. The forms indicate that Mr. [REDACTED] prepared the beneficiary's income tax returns, as well as the petitioner's tax forms.

Finally counsel stated that the beneficiary currently works at [REDACTED] Inc. d/b/a J.V.s Corner, Griffin, Georgia, and that this business was owned by the beneficiary's sister, [REDACTED]

In her revocation notice dated April 13, 2006, the director stated that the petitioner had established that it was conducting business operations. The director then noted that while a state of Georgia website indicated that [REDACTED] was the Chief Financial Officer; [REDACTED], whom counsel claimed was the petitioner's treasurer, was not listed as a company officer. The director determined that the petitioner had not established that [REDACTED] had the authority to sign the Form ETA 750 and the I-140 petition on behalf of the petitioner.

The director then noted that the initial letter of work experience submitted with the initial petition was signed by [REDACTED] the beneficiary's brother-in-law. The director stated that while [REDACTED] stated the beneficiary worked as a general manager, the beneficiary's tax returns indicate he worked as a clerk, and that the beneficiary's 1999 and 2000 W-2 Forms did not indicate that the beneficiary worked fulltime or that he made a salary commensurate with a manager position. The director determined that counsel's explanation of why the beneficiary was paid low wages when he worked at Friends Grocery did not overcome the fact that the beneficiary during his adjustment of status interview was unable to explain why his salary was so low. The director then determined that the information submitted to the record did not clearly establish that the beneficiary had the required two years of work experience as a general manager as stipulated in the ETA 750.

The director noted that with regard to the beneficiary's job duties being described as a "clerk," the beneficiary at his interview, indicated that he worked sometimes as a cashier and sometimes as a manager. The director stated that the information provided by the beneficiary contradicts the information provided on the Form ETA 750, signed by the beneficiary as true and accurate, that stated the beneficiary worked fulltime as a general manager.

The director then cited *Matter of Silver Dragon Chinese Restaurant*, 19 &N Dec. 401, 406 (Comm. 1986). The director stated that this decision stood for the proposition that an occupational preference petition may be filed on behalf of a prospective employee who is a shareholder in a corporation; however 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 director also stated that a shareholder's concealment in labor certification proceedings, of his or her interest in the petitioning corporation constitutes 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).

The director stated that the beneficiary's brother-in-law owns 50 percent of the petitioner, and this fact was not disclosed to DOL prior to the issuance of the Form ETA 750. The director noted that the Form ETA 750

⁴ The AAO notes that the record contains a printout from the state of Georgia Secretary of State's website that identifies the officers of [REDACTED] the beneficiary's sister, is identified as chief executive officer, and chief financial officer, while the beneficiary's wife, identified on the beneficiary's I-485 application, [REDACTED] is identified as secretary. See <http://www.sos.state.ga.us/cgi-bin/officers.asp?CtlNum=0426676>. (available as of April 4, 2006.)

was filed for a family member and not the petitioner's owner; however, the close family relationship called into question the true availability of the proffered position to other qualified applicants and whether the Form ETA 750 would have been approved if all the facts had been presented.

The director then stated that due to the concealment of the relationship between the petitioner's owner and the beneficiary and due to the contradiction regarding the beneficiary's duties, the Form ETA 750 was invalidated. The director also stated that based on the letter of experience submitted for the beneficiary initially that contradicts other evidence and that has not been substantiated with other evidentiary documentation, the petition was denied for fraud. The director further stated that pursuant to 8 C.F.R. § 103.1(f)(3)(iii)(B), there was no appeal to the director's decision, although the petitioner could file a motion to reopen or reconsider under 8.C.F.R. § 103.5.

On appeal, counsel states that the regulation cited by the director with regard to the appeal of the instant petition was obsolete, and that the regulation at 8 C.F.R. § 205.2(d) states that the petitioner may appeal the decision to revoke the approval within 15 days after the service of the notice of revocation. As stated previously, the petitioner's appeal is submitted timely.

On appeal, counsel states that [REDACTED] was the petitioner's acting treasurer and had the authority to both sign the Form ETA 750 and the I-140 petition. Counsel submits a notarized statement from [REDACTED]. In his statement, [REDACTED] states he had prepared tax returns and other related financial reports for [REDACTED] since 1997 and also prepared the beneficiary's taxes. [REDACTED] states that [REDACTED] asked him if he could fulfill the role of acting treasurer for his newly formed company, and [REDACTED] agreed to be the acting treasurer. In this capacity, [REDACTED] assisted [REDACTED] with the financial aspects of his newly created company. [REDACTED] states that although he is not an official officer of the petitioner, he was the acting treasurer from the inception of [REDACTED], and still continues to be intimately involved in the petitioner's financial matters, including its tax returns. With regard to the beneficiary, [REDACTED] states that when he began to prepare the beneficiary's taxes, he told him that he worked at a gas station, and [REDACTED] identified the beneficiary as a clerk on his tax returns and never changed the title in his computer system. [REDACTED] states that the beneficiary's title of clerk automatically prints out on his tax returns.

With regard to the beneficiary's claimed fulltime employment as a manager at Friend's Corner from December 1997 to October 2000, counsel submits a statement from [REDACTED] Newman, Georgia. [REDACTED] states that she and her husband leased the Friend's Corner property to [REDACTED] in 1997, and that she frequently visited the stores and had a good relationship with [REDACTED]. [REDACTED] states that she also knew the beneficiary very well and can attest to the fact that he worked as the manager for Friend's Corner Food Store from the time it opened in December 1997 to the end of 2000. [REDACTED] stated that she saw the beneficiary on a regular basis as her office is located next door to the Friend's Corner gas station and she was also a customer at the store.

Counsel states that the beneficiary was not authorized to work in the United States when he worked at Friend's Corner, Inc. and therefore was paid in cash and does not have W-2 Forms for 1997 and 1998. Counsel states that the petitioner also does not have any payroll records or work schedules with the beneficiary's name on them since the beneficiary was not authorized to work in the United States. Counsel

states that the petitioner is not hiding anything from CIS, but rather the petitioner does not have any official documents to show that the beneficiary worked for him at Friend's Corner, Inc.

Counsel also notes that the beneficiary did not receive compensation equal to that of a manager, as he was not authorized to work. Counsel also states that at a gas station/convenience store, the manager can manage the entire store and often perform the duties of a store clerk. Counsel submits a notarized statement from the beneficiary in which he states he performed all the duties of a general manager at Friend's Corner, Inc. and at his subsequent job at [REDACTED]. The beneficiary also states that as general manager, he was also called upon to perform the duties of the clerk/cashier as this is normal practice in a gas station. The beneficiary states that when [REDACTED] began preparing his taxes, he used the word clerk to describe the beneficiary's job title. The beneficiary states he never paid attention to this and signs his taxes year after year.

When regard to the adjustment of status interview, the beneficiary states the interviewing officer asked him what he was currently doing, and he told her he was a cashier for [REDACTED], where he is currently the manager, and told her that he worked as a manager for Friend's Corner, Inc., and as a manager for Diamond Brothers, Inc. The beneficiary states he never lied to the officer and did not withhold any information from her. The beneficiary also states that when the officer asked him why he didn't make a lot of money, he was too scared to tell her he was paid in cash and that was why it did not look like he was making enough money to be a manager.

Counsel states that based on her notes of the adjustment of status interview, the beneficiary stated that he was currently a cashier at [REDACTED] but had worked as a manager at Friend's Corner, Inc. and as a general manager at Diamond Brothers, Inc. Counsel states that when the officer stated that the beneficiary said he was a cashier and sometimes a manager, she was confusing his statement about his current position with this former job as a general manager at Friend's Corner. Counsel states that based on all the previous documents and information provided to CIS, the record is clear that the beneficiary worked as a general manager at Friend's Corner for almost three years, and thus is qualified to perform the duties of the proffered position, as stipulated on the Form ETA 750.

With regard to the director's reference to the BALCA precedent decision, *Silver Dragon Chinese Restaurant*, counsel states that in the instant petition, the beneficiary is not a shareholder in the petitioner, and has no financial or other ownership interest in the petitioner whatsoever. Counsel states that the petitioner did not intentionally conceal the fact that he is the beneficiary's brother-in-law, but rather he was never questioned about this issue during the labor certification process and was truthful with CIS when asked about any relationship. Counsel asserts that the petitioner never made a willful misrepresentation to DOL.

Counsel then cites *Modular Container Systems Inc.* 89 INA-228 (July 16, 1991) a BALCA decision for the proposition that being an investor or having some sort of relationship with the employer does not create a per se bar against establishing a bona fide job opportunity of U.S. employer. Counsel notes that the Board stated that it would look to the totality of the circumstances to determine whether the employer was providing a bona fide job opportunity. In reference to the findings in *Modular Container Systems, Inc.* counsel states that the beneficiary in the instant petition is not so inseparable from the sponsoring employer because of his or her

pervasive presence and personal attributes that the employer would be unlikely to continue in operation without the beneficiary. Counsel also states that the petitioner advertised the job opportunity of general manager in the local newspaper and did not receive any qualified applicants for the position. Counsel asserts that the petitioner met the requirements as mandated under the labor certification process and the Form ETA 750 should not now be invalidated based on the director's unfounded assumptions.

Upon review of the record, the AAO does not find the director's comments with regard to the beneficiary's job duties entailing those of a clerk or manager, or to the fact he was not paid a salary commensurate with a manager's salary to be dispositive in these proceedings. In fact, the record contains the notes of the adjudication officer who interviewed the beneficiary at his adjustment of status interview. These notes with regard to job titles closely track counsel's comments on her notes taken at the adjustment of status interview with regard to the beneficiary's job titles. According to the adjudicating officer, the beneficiary stated he worked for Yasmin Enterprises for one year as a cashier and for BP Food Shop as a cashier. The beneficiary stated he never worked as a supervisor and that he worked as a manager for Friends Corner, Inc for 12 months in 1997, and also worked at Stockbridge Enterprises as a supervisor and manager during 1999-2000. According to the officer's notes, the beneficiary was asked again how long he worked⁵ and he stated twelve months. The fact that the beneficiary appeared to twice assert that he worked at Friends Corner Inc for 12 months is much more dispositive than what his job title was.

With regard to the director's comments on the beneficiary receiving wages that were lower than those of a general manager, the petitioner does not have to pay the proffered wage until the beneficiary receives lawful permanent residency, although the petitioner does have to establish its ability to pay the proffered wage as of the priority date and continuing until the beneficiary obtains lawful permanent residency. Thus, while the instant petitioner has to establish its ability to pay the proffered wage of \$36,600 based on wages already paid to the beneficiary, or on its net income or net current assets, as of the 2001 priority date, the petitioner does not have to pay the proffered wage until the beneficiary obtains his lawful permanent residence.

Counsel and the director cite to *Matter of Silver Dragon Chinese Restaurant*, a Board of Alien Labor Certification Appeals decision, while counsel also cites to another BALCA decision, *Modular Container Systems, Inc.* 89 INA 228 (July 16, 1991). The AAO notes that neither counsel nor the director provides legal authority for the applicability of BALCA's precedent to these proceedings occurring under the Department of Homeland Security. Counsel also does not submit how CIS's regulatory authority to verify the beneficiary's qualifications for the proffered position is obviated by DOL. While 8 C.F.R. § 103.3(c) provides that precedent decisions of CIS are binding on all its employees in the administration of the Act, unpublished decisions are not similarly binding. Precedent decisions must be designated and published in bound volumes or as interim decisions. 8 C.F.R. § 103.9(a).

Furthermore, the BALCA precedent decisions cited by counsel do not appear dispositive in the present matter. In *Matter of Modular Container Systems, Inc.*, the court describes the totality of circumstances to be examined when determining whether a job is clearly open to U.S. workers in cases involving questions of the beneficiary's relationship to the petitioner. The circumstances include but are not limited to whether:

⁵ This question presumably was directed at the beneficiary's employment at Friend's Corner, Inc.

The alien is in the position to control or influence hiring decisions regarding the job for which the labor certification is sought;

Is related to the corporate director, officers, or employees;

Was an incorporator or founder of the company;

Has an ownership interest in the company; is involved in the management of the company; is on the board of directors; is one of a small number of employees;

Has qualification for the job that are identical to specialized or unusual job duties and requirements as stated in the application; and

Is so inseparable from the sponsoring employer because of his or her pervasive presence and personal attributes that the employer would be unlikely to continue in operation without the alien. In addition, the business cannot have been established for the sole purpose of obtaining certification for the beneficiary, and also that totality of the circumstances standard also includes a consideration of the employer's level of compliance and good faith in the processing of the claim.

In the instant petition, the AAO agrees with counsel that the beneficiary is not an officer, incorporator of the petitioner, on the board of directors. However, he is the brother-in-law of the petitioner's owner, and is one of a small number of employees. Furthermore the AAO, despite the assertions of counsel that DOL never asked any questions about familial relationships, would question the petitioner's level of compliance and good faith in the processing of the claim based on the relationship between the beneficiary and the petitioner's owner. In addition, the listing of the beneficiary's wife as a corporate officer for his present place of employment raises further questions as to whether the beneficiary or his wife have contributed financial assets to any of the family-related businesses. Counsel's explanation that the DOL never questioned the petitioner with regard to any relationship issues is without merit.

The beneficiary's relationship to the instant petitioner also does not appear analogous to the beneficiary's circumstances in *Silver Dragon Chinese Restaurant*. 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. Nevertheless, the AAO notes that 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). In the instant matter, the beneficiary is the brother-in-law of the petitioner's owner. Nevertheless, the petitioner provided no information as to this relationship at the time of filing the Form ETA 750, and initial I-140 petition. As previously stated, the AAO finds counsel's assertions on appeal that the petitioner did not reveal this fact because the DOL did not ask about it to be without merit. The I-140 petition's approval for this reason alone, can be revoked, as the record

does not reflect that a bona fide job offer exists based on the undisclosed relationship between the beneficiary and the petitioner's owner.

The director in her revocation decision also determined that the evidence submitted did not clearly demonstrate that the beneficiary had the requested work experience of two years as a store general manager. 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 6, 2001. The Form ETA 750 Part A stipulates that the beneficiary have two years of work experience as a store manager, general prior to the April 6, 2001 priority date.

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).

As stated previously, 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. 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 general store manager. In the instant case, item 14 indicates the proffered position requires two years of work experience in the job offered, namely store general manager.

With the initial petition, the petitioner submitted a letter of work experience signed by the instant petitioner's owner, [REDACTED] who is also the beneficiary's brother-in-law. In his letter, [REDACTED] identified himself on the letter as President, Friends Corner Inc., [REDACTED] and stated that the beneficiary worked for the company as a general manager from December 12, 1997 to October 30, 2000. The AAO notes that [REDACTED] in his letter did not indicate that the beneficiary worked for Friend's Corner, Inc. on a fulltime or part-time basis, although the Form ETA 750 indicates that the beneficiary worked for Friend's Corner, Inc. for 40 hours a week. The Form ETA 750 submitted to the record includes this employment as well as simultaneous employment of the beneficiary with [REDACTED] [REDACTED], Stockbridge, Georgia, from October 22, 1999 to April 2000. On the Form ETA 750, the beneficiary's employment at Diamond Brothers, Inc., is identified as 20 hours per week.

In response to the director's NOIR, the petitioner submitted the beneficiary's W-2 Forms for tax years 1999 to 2005.⁶ These forms reflect that the beneficiary was paid wages of \$ [REDACTED] Inc., in tax years 1999 and 2000 respectively.⁷ The evidence submitted to the record as to the beneficiary's employment with Diamond Brothers in tax years 1999 and 2000 does not establish the requisite two years of fulltime work experience stipulated by the ETA 750. Further while these returns establish that Diamond Brothers, Inc. paid the beneficiary some wages in tax years 1999 and 2000, they also raise the question of whether the petitioner also worked fulltime for his brother-in-law at Friend's Corner, Inc., during the period of time in question, namely December 1997 to October 30, 2000. Finally they do not establish that any of the beneficiary's claimed employment at two different companies from 1997 to 2000 would constitute the requisite two years of work experience as a general manager. The AAO notes that the letter submitted to the record by [REDACTED] on appeal, while it provides credible detail as to the beneficiary's employment at Friend's Corner, Inc., does not establish the beneficiary's fulltime employment there as a general store manager. Thus, while the record contains information, such as W-2 Forms for tax year 1999 and 2000, prior to the 2001 priority year, this evidence is not sufficient to establish the beneficiary's two years of work experience as a general store manager prior to the 2001 priority date year.

The petitioner in response to the director's NOIR, submitted a letter from a business identified as [REDACTED] Hyderabad, India, dated March 11, 2006 that claimed earlier employment as a general manager of a retail men's collection business. The AAO notes that this claimed employment is not included in the Form ETA 750, Part B, that the name of the person writing the letter is not clearly identified, and finally, that the contents of the letter do not establish that the beneficiary worked at [REDACTED]. A petitioner may not make material changes to a petition in an effort to make a deficient petition conform to CIS requirements. See *Matter of Izummi*, 22 I&N Dec. 169, 176 (Assoc. Comm. 1988). The AAO does not give this new evidence any weight in these proceedings. Further, the petitioner has provided no explanation for why any claimed employment as a manager in a men's retail business would be comparable to the requisite two years of work experience as a manager of a convenience store and gas station. In sum, based on the lack of sufficient evidence to establish the beneficiary's claimed previous employment as a general manager prior to the 2001 priority date, the petitioner has not established that the beneficiary has the requisite two years of work experience stipulated by the Form ETA 750.

Thus, the director does appear to have good and sufficient cause to revoke the instant petition's approval, pursuant to Section 205 of the Act, 8 U.S.C. 1155 and as discussed in *Matter of Estime*, 19 I&N 450 (BIA 1987)).

⁶ In submitting these W-2 Forms, the petitioner provides no explanation as to why the beneficiary was provided W-2 forms during his unauthorized employment with Diamond Brothers, Inc. while the beneficiary's brother-in-law could not provide similar documentation. Further, the Diamond Brothers business presents no letter of work verification as to the beneficiary's employment with them prior to the 2001 priority date.

⁷ Although the beneficiary in his affidavit submitted on appeal states that his employment with Diamond Brothers, Inc. d/b/a/ Korner Store was subsequent to his employment at Friend's Corner, the beneficiary's W-2 forms indicate this work was simultaneous with his claimed employment with Friend's Corner during tax years 1999 and 2000.

The director's decision to revoke the petition's approval, based on the petitioner's inability to establish the beneficiary's two years of requisite work experience, and the familial relationship between the beneficiary and the petitioner, shall stand, and the petition's approval will be revoked.

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.

ORDER: The director's decision of April 13, 2006 is affirmed. The petition's approval remains revoked.