



U.S. Citizenship  
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Services

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BK



FILE: [Redacted]  
WAC 02 062 50717

Office: CALIFORNIA SERVICE CENTER

SEP 11 2007  
Date:

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:



**PUBLIC COPY**

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, California Service Center, initially approved the employment based preference visa petition. Subsequently, the director issued a 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 nature of the petitioner's business is audio, video color printing and duplication. It seeks to employ the beneficiary permanently in the United States as a secretary. As required by statute, the petition is accompanied by a Form ETA 750, Application for Alien Employment Certification, approved by the U.S. Department of Labor (DOL). The director stated that the petitioner has the burden when asked to show that a *bona fide* job opportunity is available to U.S. workers. The director determined that the petitioner and the beneficiary had not disclosed that there was a relationship through friendship between the beneficiary and the petitioner's spouse and that the evidence in the record did not demonstrate that a job opportunity has been and "is clearly open to any qualified U.S. worker."

The record shows that the appeal is properly filed and 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 February 13, 2006, notice of revocation, the issues in this case are whether or not the petitioner and the beneficiary had disclosed to DOL during the alien labor certification application process that there was a relationship through friendship between the beneficiary and the petitioner's spouse and whether or not there is evidence in the record to demonstrate that a job opportunity for the position of secretary has been and "is clearly open to any qualified U.S. worker."

The director approved the petition on May 15, 2002. Citizenship and Immigration Services (CIS) regulations affirmatively require an alien to establish eligibility for an immigrant visa at the time an application for adjustment of status is filed. 8 C.F.R. § 245.1(a). If the beneficiary of an approved visa petition is no longer eligible for the classification sought, the director may seek to revoke his approval of the petition pursuant to section 205 of the Act, 8 U.S.C. § 1155, for "good and sufficient cause." A Notice of Intent to Revoke 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. *Matter of Estime*, 19 I&N Dec. 450 (BIA 1987).

In order to reflect the record of proceeding (and, for what evidence the following may provide to the issues of this case relating only to the I-140 petition, its approval and subsequent revocation), the director's request for evidence relating to the beneficiary's adjustment application, and the beneficiary's response, is included below. Since this communication took place in the context of the adjudication of the alien's application for adjustment of status, the proper venue for consideration of the evidence presented is with the CIS official with jurisdiction over the application for adjustment. The AAO has no jurisdictional authority to determine or review adjustment of status matters. Further, the beneficiary has no standing in the subject proceeding relating to the issues first set forth above relating to the petitioner and its I-140 petition.

In connection with the adjustment of status interview, on June 6, 2005, the beneficiary stated that she was informed that the proffered position of secretary was available through a friend, that the existing secretary in

that position "was let go," that she lived for three months when she first arrived in the United States<sup>1</sup> at ██████████ Sherman Oaks, California, that the residence at that address was owned by her very good friend from Israel, and that friend named ██████████ was the spouse of ██████████ which fact she acknowledged she knew when she lived at that address. The beneficiary stated in the interview that she commenced working for the petitioner (which is owned by ██████████) in approximately the month of January of 1998.<sup>34</sup>

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).

The I-140 petition was filed on December 10, 2001. Here, the Form ETA 750 was accepted on January 14, 1998.<sup>5</sup>

The AAO takes a *de novo* look at issues raised in the denial of this petition. *See Dor v. INS*, 891 F.2d 997, 1002 n. 9 (2d Cir. 1989)(noting that the AAO reviews appeals on a *de novo* basis). The AAO considers all pertinent evidence in the record, including new evidence properly submitted upon appeal<sup>6</sup>.

Relevant evidence submitted in the record includes the following: a Form ETA 750, Application for Alien Employment Certification, approved by the Department of Labor with collateral correspondence; a cover letter from counsel dated October 22, 2001; an English language translation of an statement on plain paper

<sup>1</sup> According to the I-140 petition, the beneficiary last arrived in the United States on July 23, 1997.

<sup>2</sup> According to the record of proceeding the beneficiary was married in Los Angeles, United States on December 14, 2001, to ██████████. On the marriage certificate the beneficiary stated her occupation as an office manager in the real estate industry.

<sup>3</sup> Counsel in a brief dated March 2, 2006, stated that the beneficiary worked with the petitioner on a permanent full-time basis since May 2003 and that the spouse of the petitioner's owner introduced the beneficiary to her husband in the United States in 1997.

<sup>4</sup> A statement in the form of a hand written transcript was prepared by the CIS immigration officer attending the beneficiary's adjustment interview and afterwards copies of the transcript were distributed to the beneficiary who was present at the interview.

<sup>5</sup> The petition's priority date. See 8 C.F.R. § 204.5(d). It has been approximately nine years since the Alien Employment Application has been accepted and the proffered wage established. According to the employer certification that is part of the application, ETA Form 750 Part A, Section 23 b., states "The wage offered equals or exceeds the prevailing wage and I [the employer] guarantee that, if a labor certification is granted, the wage paid to the alien when the alien begins work will equal or exceed the prevailing wage which is applicable at the time the alien begins work."

<sup>6</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). 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).

(not notarized or apostilled) purporting to be a release form from the Israeli Army stating that the beneficiary was in the armed service from January 16, 1994 to October 16, 1996; letters from the petitioner dated August 13, 2002 and May 26, 2005; the beneficiary's marriage certificate; a CIS Form G-325 signed by the beneficiary on October 14, 2000; a CIS prepared handwritten transcript of the beneficiary's adjustment interview dated June 6, 2005; and a legal brief dated September 26, 2005.

The director revoked the approval of the Immigrant Petition I-140 on February 13, 2006. Counsel filed an appeal on March 3, 2006.

As a preface to the following discussion, counsel refers to a decisions but does not provide their published citation. 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). Further, the AAO is not bound to follow the published decision of a United States district court, even in matters which arise in the same district. *See Matter of K-S-*, 20 I&N Dec. 715 (BIA 1993). Although the reasoning underlying a district judge's decision will be given due consideration when it is properly before the AAO, the analysis does not have to be followed as a matter of law. *Id.* at 719.

Counsel has submitted a legal brief in the matter dated March 2, 2006. On appeal counsel contends that the evidence in the record of proceeding does not present "good and sufficient cause" for the revocation of the approval of the Immigrant Petition I-140. In support of his contentions counsel cites *Prapavat v. INS*, 662 F.2d 561 (9<sup>th</sup> Cir. 1981), and *Matter of Estime*, 19 I&N 450 (BIA 1987), and *Urbania Osejo v. INS*, No. 9570648, and *Watkins v. INS*, No. 9170600, and *Salcido v. INS*, No. 9670683.

*Matter of Estime* is a case precedent also relied upon by CIS. Section 205 of the Act, 8 U.S.C. § 1155, provides that "[t]he Secretary 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."

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)). Finally, the realization by the director that the petition was approved in error may be good and sufficient cause for revoking the approval. *Id.*

Counsel asserts that CIS does not have jurisdiction to determine whether the petitioner complied with the "[applicable] DOL regulations." In support of his contentions counsel cites *Singh v. Attorney General*, 510 F. Supp. 351 (D.D.C. 1908), *aff'd*, 672 894 (D.C. Cir. 1981), *Madany v. Smith*, 696 F.2d 1008, U.S. App. D.C.

53 (1983). Counsel also references the cases of *Firstland International Inc. v. Ashcroft*, 377 F.3d 127 (2<sup>nd</sup> Cir. 2004)<sup>7</sup> and *Ana Intl. Inc. v. Way*, 242 F. Supp. 2d 906 (9<sup>th</sup> Cir. 2004).

In determining the respective jurisdictions of the Department of Labor and the CIS, one may turn to the entire body of recent court proceedings interpreting the interplay of the agencies and strictly confining the final determination made by the Department of Labor. See *Stewart Infra-Red Commissary, Etc. v. Coomey*, 661 F.2d 1 (1st Cir. 1981); *Denver Tofu Company v. District Director, Etc.*, 525 F. Supp. 254 (D. Colo. 1981); and, *Joseph v. Landon*, 679 F.2d 113 (7th Cir. 1982).

These cases recognize the labor certification process and the authority of the Department of Labor in this process stem from section 212(a)(5)(A) of the Act, 8 U.S.C. 1182(a) (5)(A). In labor certification proceedings, the Secretary of Labor's determination is limited to analysis of the relevant job market conditions and the effect, which the grant of a visa would have on the employment situation. CIS, through the statutorily imposed requirement found in section 204 of the Act, 8 U.S.C. 1154, must investigate the facts in each case and, after consultation with the Department of Labor, determine if the material facts in the petition including the certification are true and correct. The burden of proof in these proceedings rests solely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361.

Although the advisory opinions of other Government agencies are given considerable weight, CIS has authority to make the final decision about a beneficiary's eligibility for occupational preference classification. The Department of Labor is responsible for decisions about the availability of United States workers and the effect of a prospective employee's employment on wages and working conditions. The Department of Labor's decisions concerning these factors, however, do not limit the CIS's authority regarding eligibility for occupational

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<sup>7</sup> In his brief, counsel draws the AAO's attention to an opinion issued by the United States Court of Appeals for the Second Circuit, *Firstland Int'l, Inc. v. Ashcroft*, 377 F.3d 127 (2d Cir. 2004). In that opinion, the court in *Firstland* interpreted the third and fourth sentence of section 205 of the Act, 8 U.S.C. § 1155 (2003), to render the revocation of an approved immigrant petition ineffective where the beneficiary of the petition did not receive notice of the revocation before beginning his/her journey to the United States. *Firstland*, 377 F.3d at 130. Counsel asserts a general contention in citing this case, that CIS does not have jurisdiction to determine whether the petitioner complied with the applicable DOL regulations. For the sake of argument the reasoning of this opinion cannot be applied to the present matter since CIS approved the immigrant petition, then revoked the approval of the immigrant petition and the beneficiary did receive notice of the revocation when she was already in the United States (when the director issued the revocation).

On December 17, 2004, the President signed the Intelligence Reform and Terrorism Prevention Act of 2004 (S. 2845). See Pub. L. No. 108-458, 118 Stat. 3638 (2004). Specifically relating to this matter, section 5304(c) of Public Law 108-458 amends section 205 of the Act by striking "Attorney General" and inserting "Secretary of Homeland Security" and by striking the final two sentences. Section 205 of the Act now reads:

The Secretary 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 1154 of this title. Such revocation shall be effective as of the date of approval of any such petition.

Furthermore, section 5304(d) of Public Law 108-458 provides that the amendment made by section 5304(c) took effect on the date of enactment and that the amended version of section 205 applies to revocations under section 205 of the Act made before, on, or after such date. Accordingly, the amended statute specifically applies to the present matter and counsel's *Firstland* argument no longer has merit.

preference classification.<sup>8</sup> Therefore, the issuance of a labor certification does not necessarily mean a visa petition will be approved.

Counsel further contends that the petitioner did not violate any DOL rules or regulations when it decided to hire the beneficiary because the job was open to qualified U.S. workers. The evidence as submitted in the record does not support counsel's assertion. According to the beneficiary and counsel, the beneficiary arrived in the United States on July 23, 1997, and stayed with the wife of the owner of petitioner for three months. Since this pre-dated those residences stated in the CIS Form G325 listed (i.e. various stays at residences from October 14, 1997 to October 14, 2002), in that case the beneficiary stayed at [REDACTED] California, from July 23, 1997 to October 14, 1997.

According to the beneficiary she was informed of the offered position through a friend, undisclosed, and not through the regular recruitment process. Also, the beneficiary said in the adjustment interview she knew that [REDACTED] was the spouse of [REDACTED] when she lived at that Sherman Oaks address (in 1997). Further the beneficiary admitted, then later recanted her statement, that because of her fluency in Hebrew and English that she, among other attributes, was selected for the offered job of secretary.

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<sup>8</sup> Relying in part on *Madany v. Smith*, 696 F.2d 1008, 1012-1013 (D.C. Cir. 1983), the Ninth Circuit Court of Appeals in *K.R.K. Irvine, Inc. v. Landon*, 699 F.2d 1006, 1008 (9<sup>th</sup> Cir. 1983) stated in pertinent part:

[I]t appears that the DOL is responsible only for determining the availability of suitable American workers for a job and the impact of alien employment upon the domestic labor market. It does not appear that the DOL's role extends to determining if the alien is qualified for the job for which he seeks sixth preference status. That determination appears to be delegated to the INS under section 204(b), 8 U.S.C. § 1154(b), as one of the determinations incident to the INS's decision whether the alien is entitled to sixth preference status.

*Id.* at 1008. The court in that case relied on an amicus brief from DOL that stated the following:

The labor certification made by the Secretary of Labor ... pursuant to section 212(a)(14) of the ... [Act] ... is binding as to the findings of whether there are able, willing, qualified, and available United States workers for the job offered to the alien, and whether employment of the alien under the terms set by the employer would adversely affect the wages and working conditions of similarly employed United States workers. *The labor certification in no way indicates that the alien offered the certified job opportunity is qualified (or not qualified) to perform the duties of that job.*

(Emphasis added.) *Id.* at 1009. The Ninth Circuit, citing *K.R.K. Irvine, Inc.*, 699 F.2d at 1006, revisited this issue, stating:

The Department of Labor ("DOL") must certify that insufficient domestic workers are available to perform the job and that the alien's performance of the job will not adversely affect the wages and working conditions of similarly employed domestic workers. *Id.* § 212(a)(14), 8 U.S.C. § 1182(a)(14). The INS then makes its own determination of the alien's entitlement to sixth preference status. *Id.* § 204(b), 8 U.S.C. § 1154(b). See generally *K.R.K. Irvine, Inc. v. Landon*, 699 F.2d 1006, 1008 9th Cir.1983).

The INS, therefore, may make a de novo determination of whether the alien is in fact qualified to fill the certified job offer.

See *Tongatapu Woodcraft Hawaii, Ltd. v. Feldman*, 736 F. 2d 1305, 1309 (9<sup>th</sup> Cir. 1984).

In response to a NOIR and a specific assertion by the director that because the petitioner hired the friend of his wife, it was evident that the petitioner did not offer opportunities (i.e. the offered job of secretary) to qualified U.S. workers. The record is clear that it was only in the adjustment interview that the beneficiary disclosed her close friendship/relationship to the owner of petitioner's spouse. The petitioner did not disclose that fact to CIS when it initially filed the petition nor is it indicated that it made the appropriate disclosure to the Department of Labor (DOL) during the alien labor certification application process, since there is no such inclusion in the purportedly complete copy of the alien labor certification filing submitted to DOL that the petitioner submitted to CIS when it filed the petition and in response to the director's notice of intent to revoke.

According to DOL precedent and regulations, 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).

There is no statement in the record made by the petitioner's president in response to the director's notice of intent to revoke that the offer was valid and legitimate. The petitioner's failure to make critical disclosures to DOL and CIS initially, undermined that notion. The AAO cannot conclude that the petitioner is extending a *bona fide* job offer that was not already taken by the beneficiary. Further as the director pointed out there is no special requirement listed in the labor certification that an applicant must be fluent in the languages of both Hebrew and English. It appears that this was a hidden requirement of the position that was uniquely tailored to the beneficiary's qualifications. On the contrary, the petitioner should have considered U.S. worker applicants who met the minimum qualifications of the position without the language requirement.

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 is available to U.S. workers. An application or petition that fails to comply with the technical requirements of the law may be denied by the AAO even if the Director 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).

Counsel cited the case precedent of *Matter of Arias*, 19 I&N Dec. 568 (BIA 1988) for the proposition that when a notice of intent to revoke is based upon an unsupported statement or an unstated presumption, revocation of the visa is approved cannot be sustained. Counsel's logic in making this contention in light of the evidence submitted in this case is not apparent.

According to *Matter of Arias* the Board of Immigration Appeals held that a decision to revoke approval of a visa petition can only be grounded upon, and the petitioner is only obliged to respond to, the factual allegations specified in the notice of intention to revoke. The director issued a NOIR on September 1, 2005, and in that notice provided the factual allegations arising from the sworn testimony given by the beneficiary in the adjustment interview. The AAO notes that the beneficiary was accompanied by an attorney during that interview and that no where in the record is the CIS officer's statement of questions asked and the beneficiary's responses disputed (except in a later affidavit submitted by the beneficiary on appeal.)

Regarding that affidavit attested September 19, 2005, the beneficiary stated in contravention to her earlier sworn statements that she never intended to conceal the fact that she knew the owner of the petitioner (Mr. Begim) before he filed the Application for Alien Employment and the I-140 immigrant petition on her behalf and that she never "expressly stated or implied that the proffered job was offered to ...[her] because of my bilingual skills."

The AAO disagrees with these statements in light of a plain reading of the adjustment interview record that has never been disputed prior to the affidavit mentioned above.<sup>9</sup> There is no explanation given by the beneficiary for the affidavit, or evidence submitted in the affidavit is more accurate than the adjustment information submitted. There is no other substantiation provided by petitioner to help reconcile these disparate statements in the record of proceedings to show that in fact there was a bona fide job offered to willing U.S. workers that was not ready offered to and accepted (but for approval of the permanent residency status) by the beneficiary who was already working in that offered job..

The BIA also held in *Matter of Arias* that observations of the consular officer (which in this case would be the CIS officer with jurisdiction over the adjustment process) that are conclusory, speculative, equivocal, or irrelevant to the bona fides of the claimed relationship between the petitioner and the beneficiary do not provide "good and sufficient cause" for the issuance of a notice of intention to revoke approval of a visa petition and cannot serve as the basis for revocation, notwithstanding the petitioner's failure to timely respond to the notice of intention to revoke. Based upon the totality the evidence in the record of proceeding, the AAO's finds that the report of the CIS officer with jurisdiction over the adjustment process exceeded mere observations but that it was a detailed written report supported in particular by a statement from the beneficiary that recanted her earlier statements, as discussed above. The beneficiary's statements found in the affidavit are not credible.

The AAO thus affirms the director's decision that the preponderance of the evidence demonstrates that the petitioner and the beneficiary had not disclosed that there was a relationship through friendship between the beneficiary and the petitioner's spouse and that the evidence in the record did not demonstrate that a job opportunity has been and "is clearly open to any qualified U.S. worker."

Therefore the director had good and sufficient cause to revoke the petition's approval.

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 appeal is dismissed.

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<sup>9</sup> Counsel has made assertions involving the context of the statements but no one has disputed that the responses noted in the CIS interviewing officer's report were other than true and accurate.