U.S. Department of Homeland Security
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Washington, DC 20529

U.S. Citizenship and Immigration Services

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[redacted]

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FILE: [redacted] Office: VERMONT SERVICE CENTER Date: JUL 16 2007

EAC 03 196 51550

IN RE: Petitioner: [redacted]
Beneficiary:

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

ON BEHALF OF PETITIONER:

[redacted]

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, Vermont Service Center, initially approved the employment-based preference visa petition. Based on a Citizenship and Immigration Services (CIS) investigation undertaken with regard to the beneficiary's Application to Register Permanent Resident or Adjust Status (Form I-485), on November 29, 2005, the director served the petitioner with notice of intent to revoke the approval of the petition (NOIR). In a Notice of Revocation (NOR) dated February 13, 2006, 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 petition's approval will remain revoked.

The petitioner is a home improvement company involved in tiling.[1] It seeks to employ the beneficiary permanently in the United States as a tile setter. As required by statute, a Form ETA 750, Application for Alien Employment Certification approved by the Department of Labor, accompanied the petition. In her notice of intent to revoke the petition, the director stated that the CIS investigation had determined that the beneficiary, [redacted] was the 100 percent owner and director of the petitioning business for which he is seeking to claim the respective immigration benefit. In the NOR, the director determined that the petitioner had not established that the beneficiary was the petitioner's employee and a valid I-140 beneficiary or that the beneficiary performed the job duties outlined in the labor certification application. Thus, the director stated the record did not establish that the beneficiary was eligible for classification as the beneficiary of an I-140 employment based preference visa petition. *See* Section 203(b)(3)(A)(i) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(3)(A)(i).

Section 205 of the Act, 8 U.S.C. § 1155, provides that "[t]he Attorney General [now Secretary, Department of Homeland Security], may, at any time, for what he deems to be good and sufficient cause, revoke the approval of any petition approved by him under section 204." The realization by the director that the petition was approved in error may be good and sufficient cause for revoking the approval. *Matter of Ho,* 19 I&N Dec. 582, 590 (BIA 1988).

The 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. The AAO will only make further elaboration of the procedural history will be made, as necessary.

As set forth in the director's NOR, the revocation of the instant petition is based on the results of the CIS investigation undertaken when CIS reviewed the beneficiary's Form I-485, Application to Adjust Status. The investigation report is contained in the record and was provided to the petitioner, pursuant to the director's NOIR. 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).

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[1] The I-140 petition indicates the petitioner has two employees, and was established in January 1, 1996.

The AAO takes a *de novo* look at issues raised in the revocation 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[2]. On appeal, counsel submits twelve letters from construction businesses in the states of Connecticut and New York. Several letter writers describe the beneficiary as the lead tile setter for the petitioner, and/or link the petitioner and the beneficiary in the tiling work performed for the various letter writers. Counsel also submits a letter dated February 17, 2006 to the beneficiary from [redacted], Certified Public Accountant, Stamford, Connecticut. In his letter, [redacted] states that he confirms that the beneficiary is an employee of Quality Tiling, Inc. making a weekly gross salary of $1,846.16. Counsel also resubmits materials submitted to the record in response to the director's notice of intent to revoke the petition. Included in these materials are Forms 1099-MISC for tax years 2002 to 2004 that indicate compensation by the petitioner of ten subcontractors in 2004, of ten subcontractors in 2003, and of eight subcontractors in 2002. Counsel also resubmits copies of ten paychecks dated December 2005 for various individuals.

On appeal, counsel states that the director in his revocation notice first asserted that the petitioner and the beneficiary are one and the same person, and that consequently, the beneficiary is not a valid I-140 beneficiary. Counsel also states that the director appears to believe that because the beneficiary owns 100 percent of the petitioner and is the petitioner's president, the beneficiary cannot be an actual employee of the petitioner. Counsel states that the director's decision embodies a mistaken understanding of U.S. corporate law, and that based on the basis tenet of American corporate law that the corporation and its shareholders are distinct entities, the petitioner is separate and distinct from the beneficiary. Counsel states that the petitioner and the beneficiary are not, in fact, one and the same person, and this reasoning warrants a reversal of the director's revocation. Counsel states that the petitioner, not the beneficiary, employs ten independent contractors to perform tile-setting work for the petitioner. Counsel notes the petitioner's financial statement for the period ending December 31, 2004 that shows a gross profit of $194,252.57.

With regard to the second question raised by the director's decision to revoke the approval of the instant petition, namely, the beneficiary was not performing the duties of the position, counsel notes the twelve letters from contractors and clients of the petitioner. Counsel states that the letters all of which attest to the fact that the beneficiary performed tile-setting work, establish that the beneficiary performs tile-setting work for the petitioner, and are also evidence that the beneficiary is the petitioner's actual employee. Counsel finally notes that the director also failed to cite any legal authority for the proposition that the petitioner cannot petition for the beneficiary, or that the service center may revoke an I-140 petition that was previously approved following the approval by the United States Department of Labor (DOL) of a labor certification application.

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[2] 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).

The AAO notes that the director in her NOR only cited to *Matter of Estime*, 19 I&N 450 (BIA 1987) with regard to the underlying authority of CIS to revoke approved I-140 employment-based visa preference petitions. The AAO will comment more fully on this precedent decision. 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 unrebutted, 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 addition, under 20 C.F.R. §§ 626.20(c)(8) and 656.3, the petitioner has the burden when asked to show that a valid employment relationship exists, that a *bona fide* job opportunity is available to U.S. workers. *See Matter of Amger Corp.*, 87-INA-545 (BALCA 1987). A relationship invalidating a *bona fide* job offer may arise where the beneficiary is related to the petitioner by "blood" or it may "be financial, by marriage, or through friendship." *See Matter of Summart 374*, 00-INA-93 (BALCA May 15, 2000).

Where the petitioner is owned by the person applying for the position, it is not a *bona fide* offer. *See Bulk Farms, Inc. v. Martin*, 963 F.2d 1286 (9th Cir. 1992) (denied labor certification application for president, sole shareholder and chief cheese maker even where no person qualified for position applied).[3] In the instant petition, the investigation report contained in the record contains information from the website of the Secretary of the State of Connecticut , available at http://www.concord.sots.ct.gov. as of June 11, 2007. This information indicates the beneficiary is the president, director, and agent of the petitioner. While the record contains W-2 forms that indicate the beneficiary received wages from the petitioner, and the twelve letters submitted to the record indicate that the beneficiary does perform tile setting duties, the petitioner cannot

[3] The AAO notes that the petitioner did not submit its complete tax returns for tax years 2001 to 2004 when the director requested them in a request for further evidence dated May 13, 2004. The petitioner did submit facsimile one page IRS reports as to its net taxable income, as well as the beneficiary's W-2 forms for tax years 2001 to 2004. With the initial petition, the petitioner also submitted the first page of its 2004 IRS Form 1120 that indicated taxable income before net operating loss deduction and special deductions of $1,697. The director appears to have approved the petition based on the beneficiary's W-2 forms that all indicated wages greater than the proffered wage listed on the Form ETA 750. The petitioner did not submit its Schedules K-1 for the relevant years to the record that would have reflected the shareholder percentage held by the beneficiary. Thus the record does not establish whether the beneficiary is the sole shareholder of the petitioner, and 100 percent owner of the petitioner, as stated by counsel. However, the record does indicate the beneficiary is the sole director, president, and chief tile setter of the petitioner. These two initial titles would raise the question of whether the petitioner could establish the proffered position as a *bona fide* job offer.

establish that the position it is offering the beneficiary, who is the sole officer and director of the petitioner, is a *bona fide* position. Thus, the petition must be denied.

On appeal, counsel refers to the corporate relationship between corporations and the shareholders/owners of such corporations. Counsel is correct in his assertion; however in the instant petition, counsel's assertion is not persuasive. CIS routinely adjudicates petitions based on the elementary rule that a corporation is a separate and distinct legal entity from its owners and shareholders. *See Matter of M*, 8 I&N Dec. 24 (BIA 1958), *Matter of Aphrodite Investments, Ltd.*, 17 I&N Dec. 530 (Comm. 1980), and *Matter of Tessel*, 17 I&N Dec. 631 (Act. Assoc. Comm. 1980). Consequently, CIS may not "pierce the corporate veil" and look to the assets of the corporation's owner to satisfy the corporation's ability to pay the proffered wage, and the assets of its shareholders or of other enterprises or corporations cannot be considered in determining the petitioning corporation's ability to pay the proffered wage. In the instant petition, the director is not examining whether the petitioner has the ability to pay the proffered wage, but rather whether a *bona fide* job offer exists.

In sum, the director had good and sufficient cause to revoke the instant petition, 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)). As stated previously, 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). Furthermore, the report of the investigation conducted by CIS has significant material bearing on the grounds for eligibility for the visa classification, namely, whether the petitioner was offering the beneficiary a bona fide position. Finally the observations contained in the investigative report do not appear to be conclusory, speculative, equivocal, or irrelevant. *Matter of Arias.*

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. The petition's approval remains revoked.