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20 Mass. Ave., N.W., Rm. 3000
Washington, DC 20529

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U.S. Citizenship and Immigration Services

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[redacted]

File: [redacted] Office: VERMONT SERVICE CENTER Date: JUN 04 2007
EAC-03-174-50401

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 ("director"), denied the immigrant visa petition. The petitioner filed a Motion to Reopen. The director reopened the petition, and found that the petitioner overcame the basis for denial related to the petitioner's ability to pay, but affirmed the prior decision to deny the petition based on the petitioner's failure to document that the beneficiary met the qualifications of the certified Form ETA 750. The petitioner then appealed the denial to the Administrative Appeals Office ("AAO"). The appeal will be dismissed.

The petitioner operates a combination convenience store, gas station, and laundromat. The petitioner seeks to employ the beneficiary permanently in the United States as manager, retail store ("Manager"). As required by statute, the petition filed was submitted with Form ETA 750, Application for Alien Employment Certification, approved by the Department of Labor (DOL). As set forth in the director's April 6, 2005 denial, the case was denied, as the petitioner did not establish that the beneficiary met the qualifications listed on the certified ETA 750.

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.[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. Further elaboration of the procedural history will be made only as necessary.

The petitioner has filed to obtain permanent residence and classify the beneficiary as a skilled worker. 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 establish that its ETA 750 job offer to the beneficiary is a realistic one. A petitioner's filing of an ETA 750 labor certification application establishes a priority date for any immigrant petition later filed based on the approved ETA 750. The priority date is the date that Form ETA 750 Application for Alien Employment Certification was accepted for processing by any office within the employment service system of the Department of Labor. *See* 8 CFR § 204.5(d). Therefore, the petitioner must establish that the job offer was realistic as of the priority date, and that the offer remained realistic for each year thereafter, until the beneficiary obtains lawful permanent residence. The petitioner's ability to pay the proffered wage is an essential element in evaluating whether a job offer is realistic. *See Matter of Great Wall*, 16 I&N Dec. 142 (Acting Reg. Comm. 1977). *See also* 8 C.F.R. § 204.5(g)(2).

The regulation 8 C.F.R. § 204.5(g)(2) states in pertinent part:

> *Ability of prospective employer to pay wage.* Any petition filed by or for an employment-based immigrant which requires an offer of employment must be accompanied by evidence that the prospective United States employer has the ability to pay the proffered wage. 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).

> petitioner must demonstrate this ability at the time the priority date is established and continuing until the beneficiary obtains lawful permanent residence. Evidence of this ability shall be in the form of copies of annual reports, federal tax returns, or audited financial statements.

Here, the Form ETA 750 was accepted for processing by the relevant office within the DOL employment system on April 30, 2001. The proffered wage as stated on the Form ETA 750 is $12.00 per hour, for an annual salary of $24,960.00 based on a 40 hour work week. The Form ETA 750 was certified on March 3, 2003, and the petitioner filed the I-140 petition on the beneficiary's behalf on September 16, 2004. The petitioner listed the following information on the I-140 Petition: date established: 2001; gross annual income: $1,743,936; net annual income: $26,671; and current number of employees: 4.

The director initially denied the petition on January 31, 2005, on the basis that the petitioner failed to establish that the beneficiary had the required two years of experience as a manager, and that the petitioner failed to establish its ability to pay the proffered wage. As evidence to document the beneficiary's experience, the petitioner submitted a letter from Presidential Investment Corporation confirming his experience. Based on a prior filing, evidence demonstrated the beneficiary was the sole shareholder of Presidential Investment Corporation and the letter provided was, therefore, "self-serving" and would not establish that the beneficiary had the required experience. Further, the director noted that the petitioner and Presidential Investment Corporation appeared to have common interests and employees. The director concluded this from a list of businesses owned by the beneficiary, including a company, "IRA, Inc.," located at 2000 E. Hundred Road in Chester, Virginia, which was the same address as was listed for the petitioner. Further, the petitioner incorporated on March 19, 2001, and filed the labor certification in the present matter on April 30, 2001.

On March 2, 2005, the petitioner filed a Motion to Reopen. The petitioner submitted additional documentation related to the petitioner's ability to pay, including its 2002 and 2003 federal tax returns. The petitioner also additionally submitted documentation related to the beneficiary's qualifications, including W-2 statements and individual Forms 1040 to further document the beneficiary's employment with Presidential Investment Corporation, as well as affidavits from the beneficiary, and from [redacted], the petitioner's President and Director.

The director issued a decision on April 6, 2005, and determined that the filing met the requirements of a Motion to Reopen, and reopened the petition. The director further determined that the petitioner was able to demonstrate its ability to pay the beneficiary the proffered wage, and had overcome that basis for the petition's denial. The director determined that the petitioner did not, however, overcome the issue related to the beneficiary's experience as the W-2 Forms provided were issued by a corporation that the beneficiary owned. Further, the director again concluded that since the beneficiary owned Presidential Investment Corporation, a letter from the company to document the required experience was insufficient and self-serving. Despite the affidavit from [redacted] which attested that he served as the President and Director of Presidential Investment Corporation between 1998 through 2001, and that the beneficiary was the manager between 1998 and 2001, the record did not establish that [redacted] and not the beneficiary, owned Presidential Investment Corporation between 1998 and 2001. The director concluded that the beneficiary owned Presidential Investment Corporation for the entire time period. The petitioner appealed and the matter is now before the AAO.

We will examine the evidence submitted to document the beneficiary's qualifications, and then examine the evidence submitted on appeal. In evaluating the beneficiary's qualifications, Citizenship and Immigration Services ("CIS") must look to the job offer portion of the alien 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). A labor certification is an integral part of this petition, but the issuance of a Form ETA 750 does not mandate the approval of the relating petition. To be eligible for approval, a beneficiary must have all the education, training, and experience specified on the labor certification as of the petition's priority date. 8 C.F.R. § 103.2(b)(1), (12). *See Matter of Wing's Tea House,* 16 I&N Dec. 158, 159 (Acting Reg. Comm. 1977); *Matter of Katigbak*, 14 I. & N. Dec. 45, 49 (Reg. Comm. 1971). The priority date is the date the Form ETA 750 was accepted for processing by any office within the employment system of the Department of Labor. *See* 8 C.F.R. § 204.5(d).

The beneficiary must demonstrate that he had the required skills by the priority date. On the Form ETA 750A, the "job offer" states that the position requires two years of experience in the job offered, as a manager, **with job duties including: "Overall operation of the convenience store/gas station/Laundromat. Duties** include sales, purchase, inventory, personnel, and marketing. *Work Schedule: F/T rotating 7 day shifts between 6:00 a.m. and midnight." The petitioner listed no educational requirements in Section 14, and listed no other special requirements for the position in Section 15.

On the Form ETA 750B, signed by the beneficiary on April 26, 2001, the beneficiary listed his prior experience as: Presidential Investment Corporation, Petersburg, Virginia, August 1991 to April 2001, Manager.

To document a beneficiary's qualifications, the petitioner must provide evidence in accordance with 8 C.F.R. § 204.5(l)(3):

> (ii) *Other documentation—*
>
> > (A) *General.* Any requirements of training or experience for skilled workers, professionals, or other workers must be supported by letters from trainers or employers giving the name, address, and title of the trainer or employer, and a description of the training received or the experience of the alien.
> >
> > (B) *Skilled workers.* If the petition is for a skilled worker, the petition must be accompanied by evidence that the alien meets the educational, training or experience, and any other requirements of the individual labor certification, meets the requirements for Schedule A designation, or meets the requirements for the Labor Market Information Pilot Program occupation designation. The minimum requirements for this classification are at least two years of training or experience.

As evidence to document the beneficiary's qualifications, the petitioner initially submitted the following letter:

1. Letter from "President" [no name listed], Presidential Investment Corporation, Petersburg, VA, dated April 18, 2001;
   Dates of employment: August 1, 1991 to April 1, 2001;
   Title: "Manager of our Convenience Store/Gas Station;"

Job Duties: not listed, the letter further provided: "his devoted work ethics were some of the main reasons for this Company's significant growth over the last decade. It was pleasure to have known him and we wish him all the best."

The director then issued the decision, which outlined deficiencies based on the beneficiary's ownership of the company, and potential common interests between the company that the beneficiary owned and the petitioner. In response, the petitioner submitted the following affidavits:

2. Notarized Affidavit from [redacted] President/Director of the petitioner [submitted on the petitioner's letterhead], dated February 23, 2005;
He provides that he also served as the President/Director of Presidential Investment Corporation from 1998 to 2001, and in that capacity issued the experience letter for the beneficiary. The affidavit further provides:

> In March of 2001, I formed a new business entity, [redacted]. and, on the basis of [the beneficiary's] previous employment history and work skills, I offered him a future position with the company. Furthermore, as a corporate officer I also signed and attested 2001 tax returns for [the petitioner].

3. Notarized Affidavit from the beneficiary, dated February 23, 2005;
The affidavit provides that the beneficiary owned Presidential Investment Corporation from 1991 through 1998;[2] that he served as the President and Corporate Officer from 1991 to 1998; that [redacted] took over as the President and Corporate Officer from 1998 to 2001; that he worked as a manager of a convenience store/gas station owned by Presidential Investment Corporation from August 1991 through April 2001, which he asserts is "clearly documented in my annual federal income tax returns filed with the Internal Revenue Service and also in W-2 forms issued to me by the Corporation." Further, the beneficiary provided that [redacted] signed the experience letter attesting to the beneficiary's employment,[3] and that: "to the best of my knowledge and belief, in March of 2001 [redacted] formed a new business entity, [redacted] and on the basis of my previous employment history, offered me a future position with the company."

The director's decision again concluded that since the beneficiary owned Presidential Investment Corporation, a letter from the company to document the required experience was insufficient and self-serving. Further, the director believed that the beneficiary continued to own Presidential Investment Corporation from 1998 to 2001, the dates of employment that the letter confirmed.

On appeal, the petitioner did not submit any new documentation, but instead contends that CIS erred in its determination that the determination that the beneficiary did not have the required two years of managerial experience. Further, the petitioner contends that CIS was in error in denying the petition, and should have

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[2] We note that information from a prior filing indicates that the beneficiary reorganized the individual companies that he owned by an agreement dated August 1, 1998. The reorganization included Presidential Investment Corporation, the company that verified the beneficiary's work experience. As a result of the agreement, one of the companies, IRA Investment Corporation, acquired all of the stock of the seven other companies, which became subsidiaries to IRA Investment Corporation. In turn, the beneficiary obtained all the stock of IRA Investment Corporation. The beneficiary, therefore, continued ownership interest in the ultimate parent of Presidential Investment Corporation.

[3] The decision noted that it was unclear who signed the letter documenting the beneficiary's experience.

issued a Request for Evidence ("RFE"), or a Notice of Intent to Deny ("NOID").[4] Counsel contends that the beneficiary did have documented experience, and CIS erred in determining that experience gained as the owner of his own business could not be used. We note that counsel does not provide a citation for this assertion.

Counsel provides that the letter submitted documents that the beneficiary had evidenced the required experience from 1991 to 2001 with Presidential Investment Corporation, and that the W-2 forms and individual Forms 1040 verify his experience with the company. Further, counsel contends that the individual Forms 1040 were signed under penalty of perjury and the beneficiary lists his occupation on these documents as a "manager" and "general manager." Counsel contends that the statements together with the W-2 Forms, and Forms 1040, demonstrate that the beneficiary had the required management experience, and cites to *Lu-Ann Bakery Shop v. Nelson*, 705 F. Supp. 7 (D.D.C. 1988) in support. Counsel asserts that the experience was not given proper weight, and does demonstrate that the beneficiary has the required experience gained with an employer separate from the petitioner.

We note that documents from a prior filing indicate that the beneficiary was the President and CEO of Presidential Investment Corporation, and not the "manager" or "general manager" as he attests to on his tax returns.[5] Further, nothing submitted on appeal addresses the director's concern that the company that the beneficiary owned, Presidential Investment Corporation, and the petitioning company have common interests. The petitioner did not submit any documentation related to incorporation, federal tax identification, or other corporate documentation that might demonstrate the independent nature of the two companies.

Further, we note that the individual who verified the beneficiary's experience, and who is the petitioner's President, is also likely the beneficiary's brother.[6] We note 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 also Bulk Farms, Inc. v. Martin*, 963 F.2d 1286 (9th Cir. 1992), where the petitioner is owned by the person applying for position, it is not a *bona fide* offer (denied labor certification application for president, sole shareholder and chief cheese maker even where no person qualified for position applied). If there is a relationship and the petitioner failed to disclose this to DOL during the labor certification process, then the bona fides of the job offer may be in question.

A labor certification may be cancelled when the totality of the circumstances indicates that the employer was involved in fraud or material misrepresentation. This may include cases in which it appears that no bona fide job opportunity for U.S. workers exists because the applicant will be self-employed or self-petitioned. Thus,

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[4] *See* 8 C.F.R. § 103.2(b)(8) which provides that, "if there is evidence of ineligibility in the record, an application or petition shall be denied on that basis notwithstanding any lack of required initial evidence."

[5] Doubt cast on any aspect of the petitioner's proof may, of course, lead to a reevaluation of the reliability and sufficiency of the remaining evidence offered in support of the visa petition. *Matter of Ho*, 19 I&N Dec. 582, 591 (BIA 1988). Further, it is incumbent on the petitioner to resolve any inconsistencies in the record by independent objective evidence, and attempts to explain or reconcile such inconsistencies, absent competent objective evidence pointing to where the truth, in fact, lies, will not suffice. *Id.* at 591-592. Additionally, CIS may reject a fact stated in the petition if it does not believe that fact to be true. Section 204(b) of the Act, 8 U.S.C. § 1154(b); *see also Anetekhai v. I.N.S.*, 876 F.2d 1218, 1220 (5th Cir. 1989); *Lu-Ann Bakery Shop, Inc. v. Nelson,* 705 F. Supp. 7, 10 (D.D.C. 1988); *Systronics Corp. v. INS,* 153 F. Supp. 2d 7, 15 (D.D.C. 2001).

[6] A prior filing contained in the record identifies Riaz R. Kapadia as the beneficiary's brother.

there would be no bona fide job opportunity available. The Board of Alien Labor Certification Appeals ("BALCA") enumerated a number of factors for consideration related to closely held corporations, or entities were there is a family relationship:

1. Whether the applicant is in a position of control or influence hiring decisions regarding the job for which the labor certification is sought;
2. Whether the alien is related to corporate directors, officers or employees;
3. Whether the alien was an incorporator or founder of the company;
4. Whether the alien is involved in the management of the company;
5. Whether the alien is one of a small number of employees;
6. Whether the alien has qualifications for the job that are identical to specialized or unusual job duties and requirements stated on the application;
7. Whether the alien 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 operation without the alien; or
8. Whether the business was established for the sole purpose of obtaining labor certification for the alien.

See Matter of Modular Container Systems, Inc., 89-INA-288 (BALCA 1991). In the case at hand, factors number two, and five appear to apply. Further, factors three, four, seven, and eight might apply.

Additionally, we note that a search of Virginia corporate records indicates that the petitioner no longer holds corporate status, but instead has been "terminated" based on fee delinquency as of April 1, 2002.[7,8] *See* http://s0302.vita.virginia.gov/servlet/resqportal/resqportal, accessed as of May 17, 2007. Accordingly, it is not clear that a valid job offer still exists. *See also* 20 C.F.R. § 656.30, a labor certification may be revoked if the petitioner is no longer in business.

In visa petition proceedings, the burden is on the petitioner to establish eligibility for the benefit sought. *See Matter of Brantigan*, 11 I&N Dec. 493 (BIA 1966). The petitioner has failed to address the director's concerns related to the common interests of the company, which the beneficiary owned, and provided an experience letter, and the petitioning entity, apparently owned by the beneficiary's brother. The beneficiary's work experience is therefore in question. On appeal, the petitioner provided no further documentation to demonstrate the independent nature of Presidential Investment Corporation. It is incumbent on the petitioner to resolve any inconsistencies in the record by independent objective evidence, and attempts to explain or reconcile such inconsistencies, absent competent objective evidence pointing to where the truth, in fact, lies, will not suffice. *Matter of Ho*, 19 I&N Dec. 582, 591-592 (BIA 1988). The petitioner has failed to resolve

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[7] The records confirm that the petitioner incorporated on March 19, 2001. Additionally, we note a second entry under the name [redacted]. with a different corporate identification number, but information related to that company has been purged. *See* ht tp://s0302.vita.virginia.gov/servlet/resqportal/resqportal, accessed as of May 17, 2007.

[8] The petitioner has not asserted that another valid enterprise is the successor-in-interest to [redacted] To show that a new entity qualifies as a successor-in-interest to the original petitioner requires documentary evidence that the new entity has assumed all of the rights, duties, and obligations of the predecessor company, and has the ability to pay from the date of the acquisition. *See Matter of Dial Auto Repair Shop, Inc.*, 19 I&N Dec. 481 (Comm. 1986).

the inconsistencies in the record, and, therefore, failed to establish that the beneficiary is qualified for the position.

Based on the foregoing, the petitioner has failed to establish that the beneficiary meets the qualifications as set forth in the certified ETA 750. In visa petition proceedings, the burden of proving eligibility for the benefit sought remains entirely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. Here, that burden has not been met.

ORDER: The appeal is dismissed.