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

U.S. Citizenship and Immigration Services

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NOV 19 2007

FILE: [redacted] Office: CALIFORNIA SERVICE CENTER Date:
WAC 05 096 53032

IN RE: Petitioner:
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:

[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 preference visa petition was denied by the Director, California Service Center, and is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner is an insurance agency. It seeks to employ the beneficiary permanently in the United States as an insurance underwriter. As required by statute, the petition is accompanied by a Form ETA 750, Application for Alien Employment Certification, approved by the Department of Labor (DOL).[1] The director determined that the petitioner had not established that it had conducted a bona fide, good faith recruitment effort to fill the proffered position with a U.S. worker, based on the beneficiary's familial relationships with all members of the petitioner's partnership. The director denied the petition accordingly. Furthermore on January 26, 2006, the director invalidated the Form ETA 750, stating that the petitioner willfully misrepresented a material fact during the labor certification process in not disclosing its familial relationship to the beneficiary to the Department of Labor Certifying Officer.

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.

As set forth in the director's January 24, 2006 denial, the primary issue in this case is whether or not the petitioner conducted a bona fide recruitment effort to fill the proffered position with a U.S. worker, and that the petitioner's true intent was to facilitate the immigration of a family member.

Section 203(b)(3) of the Immigration and Nationality Act (the "Act"), 8 U.S.C. § 1153(b)(3), 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 or unskilled labor, not of a temporary or seasonal nature, for which qualified workers are not available in the United States.

Pursuant to 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).

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.[2] On appeal, current counsel

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[1] The AAO notes that the petitioner has filed two prior I-140 petitions for the beneficiary, WAC 03 086 50154 and WAC 04 012 52013, utilizing the same Form ETA 750. The former petition was denied by the director on July 11, 2003 and subsequently dismissed by the AAO on appeal. The latter petition was denied on December 21, 2004. Both prior petitions examined the petitioner's ability to pay the proffered wage and determined that the petitioner did not have the ability to pay the proffered wage as of the 2001 priority date.

[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*

submits a brief. With the initial petition, former counsel[3] submitted further materials as to the petitioner's ability to pay the proffered wage in tax year 2001 to 2003, as well as copies of the petitioner's licensure, copies of the beneficiary's Form 1099 for tax years 2001 to 2004,[4] a letter of work experience for the beneficiary; a copy of the beneficiary's insurance license, and a copy of a deportation order issued for the beneficiary in September 16, 1999.

The record also reflects that based on the previous submission of two I-140 petitions[5] by the petitioner for the same beneficiary, on October 5, 2005, Citizenship and Immigration Services (CIS) requested further evidence from former counsel as to the petitioner's ability to pay the proffered wage, and as to the employment relationship between the beneficiary and the petitioner. With regard to the petitioner's ability to pay the proffered wage, the director requested the petitioner to provide its federal income tax return for tax year 2004 with all schedules and tables that accompanied the submitted tax return, as well as copies of the petitioner's Forms DE-6, Quarterly Wage Reports for all employees.

With regard to the beneficiary's relationship to the petitioner, the director requested that petitioner submit copies of the birth certificate, marriage certificate and divorce/death decree for [redacted] identified on the petitioner's 2001 Form 1065 as a partner, and as a 34 percent partner on the petitioner's 2003 tax return; for [redacted] identified on the petitioner's 2000 Schedule K-1, filed with the petitioner's state of California tax return as a 50 percent partner of the petitioner; for [redacted], identified in the petitioner's 2003 Form 1065 tax return as a partner; and for the beneficiary.

In response, current counsel submitted the petitioner's Form 1065 for tax year 2004 that indicated ordinary business income of $24,169, and net current assets of $41,535. Counsel also submitted the beneficiary's marriage certificate that indicates he is married to [redacted] and that his mother is [redacted] Counsel also provided a copy of the beneficiary's birth certificate that again identifies his mother as [redacted]; and a divorce decree dated June 28, 2005 for the dissolution of the marriage between [redacted] Current counsel stated that [redacted] was the beneficiary's stepfather, divorced from his mother and no longer with the petitioner; that [redacted] was the beneficiary's mother and that [redacted] was the beneficiary's sister. Counsel noted that even though the beneficiary is related to the petitioner by "blood," the offer of employment was open to any U.S. worker who was willing and qualified for the position, and that despite the petitioner's good faith bona fide recruitment efforts, the petitioner could not locate any such U.S. applicant.[6] Counsel stated that a valid employment relationship did exist between the beneficiary and the petitioner.

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of Soriano, 19 I&N Dec. 764 (BIA 1988).

[3] Former counsel is [redacted], Encino Law Center, [redacted], Encino, California. Although former counsel and current counsel share office space, the record indicates that they appear to be incorporated separately, with both operating out of an entity named the Encino Law Center

[4] The beneficiary's Form 1099 for tax year 2004 indicates the beneficiary received non-employee compensation of $52,699.80, from the petitioner, a figure higher than the proffered wage of $52,000.

[5] The AAO notes that on July 1, 2003, the director denied the petitioner's earlier petition, WAC 03 086 50154, because the petitioner had not established its ability to pay the proffered wage as of the 2001 priority year. On November 1, 2004, the AAO concurred with the director's decision, noting that while the petitioner had established its ability to pay the proffered wage in tax year 2002, it had not established its ability to pay the proffered wage as of the 2001 priority year. Therefore the issue of the petitioner's ability to pay the proffered wage will not be addressed further in these proceedings.

[6] Counsel also submitted a copy of a form letter correspondence from DOL dated July 5, 2001 entitled

In his decision to deny the instant petition, the director noted that [redacted] the beneficiary's wife, also worked for the petitioner. The director also stated that the fact the petitioner's partners sought to fill the proffered position with their stepson, son, and brother, respectively, casts serious doubt on counsel's assertion that the petitioner conducted a bona fide, good faith recruitment effort to fill the proffered position with a U.S. worker. The director also noted that while it is not an automatic disqualification of the beneficiary to have an interest in a petitioner, if the beneficiary's true relationship to the petitioner is not apparent in the labor certification proceedings, it caused the DOL certifying officer to fail to examine more carefully whether the position was clearly open to qualified U.S. workers and whether U.S. workers were rejected solely for lawful job-related reasons. The director then determined that CIS could find no documentary evidence demonstrating the DOL certifying officer was aware of the beneficiary's relationship to the petitioner, it appeared the petitioner's true intent was to facilitate the immigration of a family member.

On appeal, counsel states that the director's decision suggested that because of the petitioner's familial relationship with the beneficiary, the job opportunity was not open to qualified U.S. workers. Counsel asserts that the beneficiary does not own any interest in nor is employed by the petitioning company and therefore he has no hiring or firing capacity. Counsel also states that Department of Labor regulations do not require the petitioner to declare familial relationship at the time of filing a Form ETA 750. Counsel states that the petitioner's labor certification application was filed under the regular DOL processing that requires that the recruitment be supervised by the California Employment Development Department. Counsel states that this recruitment resulted in no applicants for the job.[7] Counsel then states that even though the DOL certifying officer might have been aware of the family relationship between the petitioner and the beneficiary, the fact that no applicant applied for the proffered position did not have any effect on the petitioner's fair and bona fide recruitment for the proffered position.

The AAO agrees with counsel that beneficiary does not appear to own any interest in the petitioner; however, the AAO does not concur with counsel's assertion that the beneficiary was not employed by the petitioner. The record reflects that the beneficiary received compensation from the petitioner of varying amounts from the 2001 priority year date through tax year 2004. The beneficiary, while not an employee, received compensation from the petitioner, based on services provided to the petitioner. Thus, counsel's assertion that the beneficiary was not employed by the petitioner is not persuasive to resolve the multiple relationship issues identified and addressed in the record.

Furthermore, the AAO notes that the beneficiary's relationship to the instant petitioner does not appear analogous to the beneficiary's circumstances in *Matter of Silver Dragon Chinese Restaurant*, 19 I&N Dec. 401, 406 (Comm. 1986). In this precedent decision, the beneficiary was the owner of 50 percent of the petitioner's issued shares, signer of the petitioner's tax returns, and at the time of filing the labor certification, the sole officer of the petitioning corporation. In the decision, the Bureau of Immigration Appeals (BIA) determined that while an occupational preference petition may be filed on behalf of a prospective employee who is a shareholder in a corporation, the prospective employee's interest in the corporation was a material fact to be considered in determining whether the job being offered was really open to all qualified applicants. The decision also stands

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"Final Documentation Notice." On the second page of the form letter, the number of total referrals is noted as 0 (zero).

[7] The assertions of counsel do not constitute evidence. *Matter of Obaigbena*, 19 I&N Dec. 533, 534 (BIA 1988); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980).

for the proposition that a shareholder's concealment in labor certification proceedings, of his or her interest in the petitioning corporation constituted willful misrepresentation of a material fact and was a ground of invalidation of an approved labor certification under 20 C.F.R. § 656.30(d)(1986). In fact, the petitioner's labor certification in *Silver Dragon Chinese Restaurant* was invalidated because the petitioner failed to disclose the beneficiary's relationship to the petitioner to DOL.

While the beneficiary is not an officer, incorporator of the petitioner, or on the board of directors, he is the stepson, son, and brother of former or current partners of the petitioner. On the I-140 petition and the petitioner's 2001 tax return, [redacted] the beneficiary's stepfather, was identified as a partner and owner of the petitioner. He is still listed as a partner on the petitioner's 2004 Form 1065. The beneficiary's mother and sister also appear as partners in the petitioner's tax returns. In addition, the beneficiary also appears to be one of a small number of employees or individuals who receive compensation from the petitioner.[8]

Furthermore the AAO, despite the assertions of counsel that DOL regulations do not require the disclosure of 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 partners. Counsel's explanation that the DOL regulations do not require the petitioner to acknowledge familial relationship between owners and beneficiaries is without merit.

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 son, stepson, and brother of the petitioner's former or current partners. 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 suggestion on appeal that because the recruitment process for the proffered position was supervised by DOL, the petitioner did not have to reveal its familial relationship with the beneficiary, to be without merit. The AAO also notes that the petitioner did not submit any further evidentiary documentation as to any of the petitioner's recruitment efforts with regard to the proffered position. Going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. *Matter of Soffici*, 22 I&N Dec. 158, 165 (Comm. 1998) (citing *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm. 1972)). The I-140 petition for this reason alone, can be denied.

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

> (d) Invalidation of labor certifications. After issuance, a labor certification may be revoked by ETA using the procedures described in Sec. 656.32. Additionally, after issuance, a labor certification is subject to invalidation by the DHS or by a Consul of the Department of State upon a determination, made in accordance with those agencies' procedures or by a court, of

[8] The I-140 petition indicates the petitioner has five employees as of the time the I-140 petition was filed.

> fraud or willful misrepresentation of a material fact involving the labor certification application.

The beneficiary's familial relationship with the petitioner's officers and shareholders is a material fact to be considered in determining whether the job being offered was open to all qualified workers. A prior knowledge of these relationships might have caused the DOL certifying officer to examine more carefully whether the job opportunity was clearly open to qualified U.S. workers, and whether U.S. workers applying for the job were rejected solely for lawful job-related reasons. The AAO considers the petitioner's failure to identify these relationships a willful misrepresentation of a material fact. The AAO further notes that should the beneficiary file a Form I-485, Application to Register Permanent Residence or Adjust Status, he should be considered inadmissible under Section 212(a)(6)(C)(i) of the Act which states:

> [Misrepresentation] IN GENERAL. – Any alien who, by fraud or willfully misrepresenting a material fact, seeks to procure (or has sought to procure or has procured) a visa, other documentation, or admission into the United States or other benefit provided under this Act is inadmissible

In the instant petition, the petitioner has not established that it had conducted a bona fide, good faith recruitment effort to fill the proffered position with a U.S. worker, and the beneficiary's familial relationships with all members of the petitioner's partnership call into question the realistic nature of the job offer. 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.