U.S. Department of Homeland Security
U.S. Citizenship and Immigration Services
Administrative Appeals Office (AAO)
20 Massachusetts Ave., N.W., MS 2090
Washington, DC 20529-2090

U.S. Citizenship and Immigration Services

PUBLIC COPY

[redacted]

B6

Date: JUN 04 2012 Office: TEXAS SERVICE CENTER [redacted]

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:

Enclosed please find the decision of the Administrative Appeals Office in your case. All of the documents related to this matter have been returned to the office that originally decided your case. Please be advised that any further inquiry that you might have concerning your case must be made to that office.

If you believe the AAO inappropriately applied the law in reaching its decision, or you have additional information that you wish to have considered, you may file a motion to reconsider or a motion to reopen with the field office or service center that originally decided your case by filing a Form I-290B, Notice of Appeal or Motion, with a fee of $630. The specific requirements for filing such a motion can be found at 8 C.F.R. § 103.5. **Do not file any motion directly with the AAO.** Please be aware that 8 C.F.R. § 103.5(a)(1)(i) requires any motion to be filed within 30 days of the decision that the motion seeks to reconsider or reopen.

Thank you,

Perry Rhew
Chief, Administrative Appeals Office

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

The petitioner is a hotel. It seeks to employ the beneficiary permanently in the United States as a supervisor, housekeeping and maintenance. As required by statute, the petition is accompanied by an ETA Form 9089, Application for Permanent Employment Certification, approved by the United States Department of Labor (DOL). The director determined that the petitioner sought to procure an immigration benefit on behalf of the beneficiary through material representation of a material fact by failing to disclose a familial relationship on the ETA Form 9089. The director denied the petition accordingly.

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 September 26, 2009 denial, the primary issue in this case is whether the petitioner sought to procure an immigration benefit on behalf of the beneficiary through material representation of a material fact by failing to disclose a familial relationship on the ETA Form 9089.

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 AAO conducts appellate review on a *de novo* basis. *See Soltane v. DOJ*, 381 F.3d 143, 145 (3d Cir. 2004). The AAO considers all pertinent evidence in the record, including new evidence properly submitted upon appeal.[1]

Failure to Disclose Familial Relationship on ETA Form 9089

On June 17, 2009, the director issued a request for evidence (RFE), advising the petitioner that "[t]here appears to be a familial relationship between the beneficiary and [redacted] shareholder of the company." The director requested that the petitioner submit "evidence that this relationship was disclosed to the Department of Labor prior to the issuance of the ETA-9089 labor certification."

Counsel responded that "no family relationship exists, however, in the interests of full disclosure, the Petitioner has opted to acknowledge the tenuous relationship that does exist." Counsel further states that "[t]his is an extremely distant cousin-relationship by blood."

[1] The submission of additional evidence on appeal is allowed by the instructions to the Form I-290B, which are incorporated into the regulations 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 regulation at 20 C.F.R. § 656.3 states in pertinent part:

> *Employer* means: (1) a person, association, firm, or a corporation which currently has a location within the United States to which U.S. workers may be referred for employment, and which proposes to employ a full-time worker at a place within the United States or the authorized representative of such a person, association, firm, or corporation.
>
> * * *
>
> *Employment* means: (1) permanent, full-time work by an employee for an employer other than oneself. For the purposes of this definition, an investor is not an employee.

Under 20 C.F.R. §§ 656.10(c)(8), 656.17(l), 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 October 15, 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). Where the petitioner is owned by the person applying for position, it is not a *bona fide* offer. *See Bulk Farms, Inc. v. Martin*, 963 F.2d 1286 (9th Cir. 1992) (labor certification application denied for president, sole shareholder and chief cheese maker even where no person qualified for position applied). The petitioner should have disclosed the relationship between the beneficiary and the petitioner to the DOL. *See Matter of Silver Dragon Chinese Restaurant*, 19 I&N Dec. 401, 406 (Comm. 1986). The burden rests on the employer to provide clear evidence that a *bona fide* job opportunity is available, and that the employer has, in good faith, sought to fill the position with a U.S. worker. *Matter of Amger Corp.*, 87-INA-545 (BALCA October 15, 1987).

The DOL applies a totality of circumstances test to ascertain a *bona fide* job offer with respect to the alien's inappropriate control over a job offer. The DOL considers multiple factors including whether the alien: (a) is in a position to control or influence hiring decisions regarding the job for which labor certification is sought; (b) is related to corporate directors, officers, or employees; (c) was an incorporator or founder of the company; (d) has an ownership interest in the company; (e) is involved in the management of the company; (f) is on the board of directors; (g) is one of a small number of employees; (h) has qualifications for the job that are identical to specialized or unusual job duties and requirements stated in the application; and (i) 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. *See Modular Container Systems, Inc.*, 89-INA-228 (BALCA July 16, 1991)(*en banc*).

The DOL adopted the holding in *Modular Container* through the regulation at 20 C.F.R. § 656.17(l), which states the following:

> Alien influence and control over job opportunity. If the employer is a closely held corporation or partnership in which the alien has an ownership interest, or if there is a familial relationship between the stockholders, corporate officers, incorporators, or partners, and the alien, or if the alien is one of a small number of employees, the employer in the event of an audit must be able to demonstrate the existence of a bona fide job opportunity, i.e. the job is available to all U.S. workers. . .[2]

A fairly recent DOL appellate decision applied *Modular Container's* holding and 20 C.F.R. § 656.17(l) and denied certification of a labor certification application where an alien was the 100% owner of the company. *See ATI Consultores*, 07-INA-64 (BALCA Feb. 11, 2008).

The DOL's regulatory criteria and interpretive case law are informative about the circumstances under which the DOL denies or revokes approval of labor certification applications based on familial, social, or financial relationships. Critically, however, the regulation at 20 C.F.R. § 656.30(d) provides in pertinent part that "[a]fter issuance, a labor certification is subject to invalidation by the [U.S. Citizenship and Immigration Services (USCIS)] or by a Consul of the Department of State upon a determination, made in accordance with those agencies' procedures or by a court, of fraud or willful misrepresentation of a material fact involving the labor certification application." Thus, USCIS properly examines the issue as well when documentation submitted for immigration benefits reveals familial, social, or financial relationships concealed before the DOL that may have impacted the *bona fide* nature of the job offer during the labor certification process.

---

[2] The DOL will automatically audit a petitioning business that ticks "yes" to Part C.9 of the ETA Form 9089 which specifically asks if the employer is a closely held corporation, partnership, or sole proprietorship in which the alien has an ownership interest, or if there is a familial relationship between the owners, stockholders, partners, corporate officers, incorporators, and the alien. As part of the audit, the DOL will request the following documentation from the petitioner:

(1) Articles of incorporation, partnership agreement, business license or similar documents that establish the business entity;
(2) A list of all corporate/company officers and shareholder/partners of the corporation/firm/business, their titles and positions in the business' structure, and a description of the relationships to each other and to the alien beneficiary;
(3) The financial history of the corporation/company/partnership, including the total investment in the business entity and the amount of investment of each officer, incorporator/partner and the alien beneficiary;
(4) The name of the business' official with primary responsibility for interviewing and hiring applicants for positions within the organization and the name(s) of the business' official(s) having control or influence over hiring decisions involving the position for which labor certification is sought.
(5) Documentation of any family relationship between the employees and the alien if the alien is one of 10 or fewer employees.

Part C.9 of the ETA Form 9089 accompanying the petition asks: "Is the employer a closely held corporation, partnership, or sole proprietorship in which the alien has an ownership interest, or is there a familial relationship between the owners, stockholders, partners, corporate officers, incorporators, and the alien?" The petitioner responded "no" to this question.

As a preliminary matter, the AAO will address whether the failure to disclose the beneficiary's position with and relationship to the petitioner rises to the level of a misrepresentation. A misrepresentation is an assertion or manifestation that is not in accord with the true facts.[3] A misrepresentation of material fact may lead to serious consequences, including but not limited to the denial of the visa petition, a finding of fact that may render an individual alien inadmissible to the United States, and criminal prosecution.

An immigration officer will deny a visa petition if the petitioner submits evidence which contains false information. In general, a few errors or minor discrepancies are not reason to question the credibility of an alien or an employer seeking immigration benefits. *See Spencer Enterprises Inc. v. United States*, 345 F.3d 683, 694 (9th Cir., 2003). If, however, a petition includes serious errors and discrepancies, and the petitioner fails to resolve those errors and discrepancies after an officer provides an opportunity to rebut or explain, then USCIS will conclude that the facts stated in the petition are not true. *See Matter of Ho*, 19 I&N Dec. 582, 591 (BIA 1988).

Although the petitioner indicated on the ETA Form 9089 that the beneficiary did not have a familial relationship with the petitioner's owner, counsel states, in response to the RFE, that there is a "cousin-relationship by blood." This constitutes a willful and material misrepresentation. Specifically, a material issue in this case is whether a *bona fide* job offer exists. The fact that the beneficiary was related the petitioner at the time the labor certification was filed is clearly material to whether a *bona fide* job offer existed. *Matter of Silver Dragon Chinese Restaurant*, 19 I&N Dec. 401. It is more likely than not that the alien had inappropriate influence and control over the job offer in violation of 20 C.F.R. § 656.17(l). The DOL had no opportunity to audit or investigate the issue since the petitioner and the beneficiary concealed the information from the DOL during the labor certification process.

Beyond the adjudication of the visa petition, a misrepresentation may lead USCIS to enter a finding that an individual alien sought to procure a visa or other documentation by willful misrepresentation of a material fact. This finding of fact may lead USCIS to determine, in a future proceeding, that the alien is inadmissible to the United States based on the past misrepresentation.

---

[3] The terms "fraud" and "misrepresentation" are not interchangeable. Unlike a finding of fraud, a finding of material misrepresentation does not require an intent to deceive or that the officer believes and acts upon the false representation. *See Matter of Kai Hing Hui*, 15 I&N Dec. 288 (BIA 1975). A finding of fraud requires a determination that the alien made a false representation of a material fact with knowledge of its falsity and with the intent to deceive an immigration officer. Furthermore, the false representation must have been believed and acted upon by the officer. *See Matter of G-G-*, 7 I&N Dec. 161 (BIA 1956).

Section 212(a)(6)(C) of the Act, 8 U.S.C. § 1182(a)(6)(C), provides:

> Misrepresentation. – (i) 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.

As outlined by the Board of Immigration Appeals, a material misrepresentation requires that the alien willfully make a material misstatement to a government official for the purpose of obtaining an immigration benefit to which one is not entitled. *Matter of Kai Hing Hui,* 15 I&N Dec. at 289-90. The term "willfully" means knowing and intentionally, as distinguished from accidentally, inadvertently, or in an honest belief that the facts are otherwise. *See Matter of Healy and Goodchild,* 17 I&N Dec. 22, 28 (BIA 1979). To be considered material, the misrepresentation must be one which "tends to shut off a line of inquiry which is relevant to the alien's eligibility, and which might well have resulted in a proper determination that he be excluded." *Matter of Ng*, 17 I&N Dec. 536, 537 (BIA 1980). Accordingly, for an immigration officer to find a willful and material misrepresentation in visa petition proceedings, he or she must determine: 1) that the petitioner or beneficiary made a false representation to an authorized official of the United States government; 2) that the misrepresentation was willfully made; and 3) that the fact misrepresented was material. *See Matter of M-*, 6 I&N Dec. 149 (BIA 1954); *Matter of L-L-*, 9 I&N Dec. 324 (BIA 1961); *Matter of Kai Hing Hui*, 15 I&N Dec. at 288.

The Attorney General has held that a misrepresentation made in connection with an application for a visa or other document, or with entry into the United States, is material if either:

> (1) the alien is excludable on the true facts, or (2) the misrepresentation tends to shut off a line of inquiry which is relevant to the alien's eligibility and which might well have resulted in a proper determination that he be excluded.

Matter of S & B-C-, 9 I&N Dec. 436, 447 (A.G. 1961). Accordingly, the materiality test has three parts. First, if the record shows that the alien is inadmissible on the true facts, then the misrepresentation is material. *Id.* at 448. If the foreign national would not be inadmissible on the true facts, then the second and third questions must be addressed. The second question is whether the misrepresentation shut off a line of inquiry relevant to the alien's admissibility. *Id.* Third, if the relevant line of inquiry has been shut off, then it must be determined whether the inquiry might have resulted in a proper determination that the foreign national should have been excluded. *Id.* at 449.

The ETA Form 9089 contains false information. A misrepresentation can be made to a government official in an oral interview, on the face of a written application or petition, or by submitting evidence containing false information. INS Genco Op. No. 91-39, 1991 WL 1185150 (April 30, 1991). Here, the submission of the Form ETA 9089 containing false information constitutes a false representation to a government official.

Further, the information contained in the ETA Form 9089 is material to the beneficiary's eligibility. To be considered material, a false statement must be shown to have been predictably capable of affecting the decision of the decision-making body. *Kungys v. U.S.*, 485 U.S. 759 (1988). In the context of a visa petition, a misrepresented fact is material if the misrepresentation shuts off a line of inquiry which is relevant to the eligibility criteria and that inquiry might well have resulted in the denial of the visa petition. *See Matter of Ng*, 17 I&N Dec. at 537.

The petitioner's misrepresentation shut off a potential line of inquiry regarding the *bona fide* nature of the offer of employment. This fact is directly material to whether the petitioner is an "employer" which "intends to employ" the beneficiary as required by section 204(a)(1)(F) of the Act, 8 U.S.C. § 1154(a)(1)(F), and is therefore material to whether the beneficiary is eligible for the benefit sought. *See Matter of S & B-C-*, 9 I&N Dec. at 447.

The AAO concludes that the director properly entered a finding that the petitioner sought to procure a visa or other documentation by willful misrepresentation of a material fact.

The regulation at 20 C.F.R. § 656.30(d) provides in pertinent part that "[a]fter issuance, a labor certification is subject to invalidation by the [USCIS] or by a Consul of the Department of State upon a determination, made in accordance with those agencies' procedures or by a court, of fraud or willful misrepresentation of a material fact involving the labor certification application."

As discussed above, the petitioner indicated on the ETA Form 9089 that the beneficiary did not have a familial relationship the petitioner's owner. The petitioner's response to the director's RFE, however, shows that the beneficiary, in fact, was the cousin of the petitioner's owner. Although counsel argues that this relationship is too distant to compel disclosure on the ETA Form 9089, the AAO disagrees. The relationship should have been disclosed and the DOL given an opportunity to consider this relationship. This constitutes a willful misrepresentation of a material fact. Therefore, the director properly invalidated the ETA Form 9089.

Beneficiary Qualifications

Beyond the decision of the director, the petitioner has also not established that the beneficiary is qualified for the offered position. The petitioner must establish that the beneficiary possessed all the education, training, and experience specified on the labor certification as of the priority date. 8 C.F.R. § 103.2(b)(l), (12). *See Matter of Wing's Tea House,* 16 I&N Dec. 158, 159 (Acting Reg. Comm. 1977); *see also Matter of Katigbak,* 14 I&N Dec. 45, 49 (Reg. Comm. 1971). In evaluating the beneficiary's qualifications, USCIS must look to the job offer portion of the labor certification to determine the required qualifications for the position. USCIS 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. at 406. *See also, Madany* 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).

In the instant case, the labor certification states that the offered position requires a high school diploma and 36 months of experience in the job offered or any suitable combination of experience, education, or training.

The beneficiary's claimed qualifying experience must be supported by letters from employers giving the name, address, and title of the employer, and a description of the beneficiary's experience. *See* 8 C.F.R. § 204.5(l)(3)(ii)(A).

The record contains a work experience letter from [redacted] The letter was signed by [redacted] on April 2, 2009. The letter states that the beneficiary worked as a housekeeping inspector from March 1991 to March 1994. However, this letter is insufficient to support the claimed work experience because the duties listed do not establish that the beneficiary possessed the required experience set forth on the labor certification by the priority date. The record also contains no evidence of the beneficiary's high school diploma. 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'r 1998) (citing *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg'l Comm'r 1972)). Therefore, the petitioner has also failed to establish that the beneficiary is qualified for the offered position.

ORDER: The appeal is dismissed.