(b)(6)

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

DATE: MAY 20 2013 Office: NEBRASKA SERVICE CENTER FILE:

IN RE: Petitioner:
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:

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 law was inappropriately applied by us in reaching our decision, or you have additional information that you wish to have considered, you may file a motion to reconsider or a motion to reopen. The specific requirements for filing such a request can be found at 8 C.F.R. § 103.5. **All motions must be submitted to the office that originally decided your case by filing a Form I-290B, Notice of Appeal or Motion, with a fee of $630.** Please be aware that 8 C.F.R. § 103.5(a)(1)(i) requires that any motion must be filed within 30 days of the decision that the motion seeks to reconsider or reopen.

Thank you,

Ron Rosenberg
Acting Chief, Administrative Appeals Office

DISCUSSION: The Director, Nebraska Service Center, denied the preference visa petition. The petitioner filed a motion to reopen the matter. The Director granted the motion to reopen and affirmed the previous decision. The matter is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner is a semiconductor and related equipment engineering business. It seeks to employ the beneficiary permanently in the United States as an engineer. 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 failed to disclose an existing familial relationship to the DOL during the labor certification process and made a willful misrepresentation of material fact involving the labor certification. The director denied the petition and invalidated the labor certification accordingly.[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.

As set forth in the director's June 29, 2009 and August 19, 2009 decisions, the single issue in this case is whether or not the petitioner made a willful misrepresentation of material fact involving the labor certification when it stated that no familial relationship existed between the beneficiary and its owner, shareholder, partner, corporate officers, and/or incorporator.

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.

It is noted that section 212(a)(5)(A)(i) of the Act and the scope of the regulation at 20 C.F.R. § 656.1(a) describe the role of the DOL in the labor certification process as follows:

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[1] The regulation at 20 C.F.R. § 656.30(d) provides:

> (d) After issuance labor certifications are subject to invalidation by the INS 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. If evidence of such fraud or willful misrepresentation becomes known to a RA or to the Director, the RA or Director, as appropriate, shall notify in writing the INS or State Department, as appropriate. A copy of the notification shall be sent to the regional or national office, as appropriate, of the Department of Labor's Office of Inspector General.

> In general.-Any alien who seeks to enter the United States for the purpose of performing skilled or unskilled labor is inadmissible, unless the Secretary of Labor has determined and certified to the Secretary of State and the Attorney General that-
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> > (I) there are not sufficient workers who are able, willing, qualified (or equally qualified in the case of an alien described in clause (ii)) and available at the time of application for a visa and admission to the United States and at the place where the alien is to perform such skilled or unskilled labor, and
> >
> > (II) the employment of such alien will not adversely affect the wages and working conditions of workers in the United States similarly employed.

It is left to United States Citizenship and Immigration Services (USCIS) to determine whether the proffered position and alien qualify for a specific immigrant classification or even the job offered. This fact has not gone unnoticed by Federal Circuit Courts:

> There is no doubt that the authority to make preference classification decisions rests with INS. The language of section 204 cannot be read otherwise. *See Castaneda-Gonzalez v. INS*, 564 F.2d 417, 429 (D.C. Cir. 1977). In turn, DOL has the authority to make the two determinations listed in section 212(a)(14).[2] Id. at 423. The necessary result of these two grants of authority is that section 212(a)(14) determinations are not subject to review by INS[3] absent fraud or willful misrepresentation, but all matters relating to preference classification eligibility not expressly delegated to DOL remain within INS' authority.
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> * * *
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> Given the language of the Act, the totality of the legislative history, and the agencies' own interpretations of their duties under the Act, we must conclude that Congress did not intend DOL to have primary authority to make any determinations other than the two stated in section 212(a)(14). If DOL is to analyze alien qualifications, it is for the purpose of "matching" them with those of corresponding United States workers so that it will then be "in a position to meet the requirement of the law," namely the section 212(a)(14) determinations.

Madany v. Smith, 696 F.2d 1008, 1012-1013 (D.C. Cir. 1983).[4] In this case, the petitioner has failed to demonstrate that the certified job opportunity was "clearly open to any qualified U.S.

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[2] Based on revisions to the Act, the current citation is section 212(a)(5)(A) as set forth above.

[3] The INS is the predecessor to USCIS.

[4] The Ninth Circuit, citing *K.R.K. Irvine, Inc.*, 699 F.2d at 1006, has stated:

worker" as attested in Question C.9 on the ETA Form 9089 because the beneficiary is the brother-in-law of the petitioner's sole owner.

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. *See* 8 C.F.R. § 103.2(b)(1), (12). *See also 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). Fundamentally, the job offer must be "clearly open to any qualified U.S. worker." It is noted that 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).

Matter of Silver Dragon Chinese Restaurant, 19 I&N Dec. 401 (Comm'r 1986), discussed a beneficiary's 50% ownership of the petitioning entity. The decision quoted an advisory opinion from the Chief of DOL's Division of Foreign Labor Certification as follows:

> The regulations require a 'job opportunity' to be 'clearly open.' Requiring the job opportunity to be bona fide adds no substance to the regulations, but simply clarifies that the job must truly exist and not merely exist on paper. The administrative interpretation thus advances the purpose of regulation 656.20(c)(8). Likewise requiring the job opportunity to be bona fide clarifies that a true opening must exist, and not merely the functional equivalent of self-employment. Thus, the administrative construction advances the purpose of regulations 656.20.

Id. at 405. Accordingly, where the beneficiary named in an alien labor certification application has an ownership interest in the petitioning entity, the petitioner must establish that the job is *bona fide*, or clearly open to U.S. workers. *See Keyjoy Trading Co.*, 1987-INA-592 (BALCA Dec. 15, 1987) (*en banc*). A relationship invalidating a *bona fide* job offer may also 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*, 2000-INA-93 (BALCA May 15, 2000).

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

Tongatapu Woodcraft Hawaii, Ltd. v. Feldman, 736 F. 2d 1305, 1309 (9th Cir. 1984).

The ETA Form 9089 specifically asks in Question C.9: "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 checked "no" to this question. Section N. of the labor certification requires the petitioner to attest that "The job opportunity has been and is clearly open to any U.S. worker." The petitioner signed the labor certification under penalty of perjury on October 23, 2008. In response to a Notice of Intent to Deny (NOID) issued May 5, 2009, the petitioner indicated that the beneficiary is the brother-in-law of its sole shareholder and president. In determining whether the job is subject to the alien's influence and control, the adjudicator will look to the totality of the circumstances. *See Modular Container Systems, Inc.*, 1989-INA-228 (BALCA Jul. 16, 1991) (*en banc*). The same standard has been incorporated into the PERM regulations. *See* 69 Fed. Reg. 77326, 77356 (ETA) (Dec. 27, 2004).

The PERM regulation specifically addresses this issue at 20 C.F.R. § 656.17(l) and states in pertinent part:

> (l) 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, and must provide to the Certifying Officer, the following supporting documentation:
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> (1) A copy of the articles of incorporation, partnership agreement, business license or similar documents that establish the business entity;
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> (2) A list of all corporate/company officers and shareholders/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;
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> (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; and
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> (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.
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> (5) If the alien is one of 10 or fewer employees, the employer must document any family relationship between the employees and the alien.

The petitioner has the burden of establishing that a *bona fide* job opportunity exists when asked to show that the job opportunity is clearly open to U.S. workers. *See Matter of Amger Corp.*, 87-INA-545 (BALCA 1987); *see also* 8 U.S.C. § 1361.

On appeal, counsel asserts that Form ETA 9089, Question C.9 asks whether a) the petitioner is a closely held corporation and b) whether a family relationship exists between the beneficiary and any officer, owner, shareholder, etc. of the petitioner. Counsel argues that in this case, the answer to both of these questions is "no."

the petitioner's sole shareholder, states in a May 29, 2009 letter that the petitioner is not a closely held corporation because it is not "designate[d] as a close corporation in the articles of incorporation." The petitioner submitted the Texas Transaction Guide defining "close corporation." The type of corporate formation chosen for the purposes of its Texas corporate charter does not define whether the petitioner is a "closely held corporation" as defined by the DOL with reference to the filing of a labor certification application. The DOL regulation at 20 C.F.R. § 656.3 defines a "closely held corporation" as "a corporation that typically has relatively few shareholders and whose shares are not generally traded in the securities market." The petitioner's 2007 Internal Revenue Service Form 1120S tax return states that owns 100% of the petitioner's stock. The petitioner is not generally traded in the securities market. Thus, under the applicable federal immigration regulation, the petitioner is defined as a closely held corporation.

The petitioner's corporate structure does not end the inquiry as it must also be determined whether "the alien has an ownership interest, or if there is a familial relationship between the stockholders, corporate officers, incorporators, or partners and the alien." The letter from dated May 29, 2009 states that the beneficiary is his brother-in-law, having married sister. Counsel argues that this relationship is not "familial" under immigration law. Specifically, counsel states that the immigration laws allow for family petitions to be filed on behalf of children, spouses, siblings, and parents and that a brother-in-law would not qualify as "family" under these parameters. *See* INA § 204(a)(1)(A).

The regulations do not restrict the relationship in this circumstance to only those family members eligible for sponsorship under a family based immigrant petition. Instead, 20 C.F.R. 656.17(l) makes clear that the intention behind the inquiry in Question C.9 of the Form ETA 9089 is to insure that the job opportunity is open to all workers.[5] As a result, any family relationship would

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[5] The regulation states:

> (l) 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, and must provide to the Certifying Officer, the following supporting documentation:

require the petitioner to answer "yes" to allow DOL the opportunity to determine whether that relationship influenced whether the job opportunity was open to all U.S. workers.

Counsel states that the court's holding in *Matter of Sunmart* is not applicable to the instant case because the term defined is "any relationship" and not "familial relationship" as is presented here. In the decision, the Board of Alien Labor Certification Appeals (BALCA) discussed whether the alien in that case was related in any way to the owner or shareholder of that petitioning entity. BALCA specifically stated that it undertook the inquiry to determine whether the position was *bona fide* and whether the position was truly open to all U.S. workers. In the discussion, BALCA stated that "any relationship between Alien and Employer" was important in determining whether a job offer is *bona fide,* not just a relationship "of the blood." Although *Sunmart* concerned a job offer under the ETA Form 750, the precursor to the Form ETA 9089, which did not contain the question found in Part C Question 9, the basic requirement that a job offer be *bona fide* and open to U.S. workers is found under both the previous ETA Form 750 and the current Form ETA 9089 and the supporting regulations governing each application. As a result, we find the *Sunmart* decision to be persuasive here.

Furthermore, in the circumstances set forth in this case, failure to disclose the beneficiary's relationship to the petitioning company amounts to the willful effort to procure a benefit ultimately leading to permanent residence under the Act. *See Kungys v. U.S.,* 485 U.S. 759 (1988) (materiality is a legal question of whether "misrepresentation or concealment was predictably capable of affecting, i.e., had a natural tendency to affect the official decision.") In the context of a visa petition, a misrepresented fact is material if the misrepresentation cuts off a line of inquiry which is relevant to the eligibility criteria and that inquiry might well have resulted in the denial of a visa petition. *See Matter of Ng,* 17 I&N Dec. 536, 537 (BIA 1980).

A misrepresentation is an assertion or manifestation that is not in accord with the true facts. A misrepresentation of a material fact may include but not be limited to such consequences as a denial of a visa petition, a decision rendering an alien inadmissible to the United States, and possible criminal prosecution. It is noted that section 212(a)(6)(C) of the Act, 8 U.S.C. § 1182 provides that 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. An alien may be found inadmissible when he or she subsequently applies for admission into the United States or applies for adjustment of status to permanent resident status. *See* sections 212(a) and 245((a) of the Act, 8 U.S.C. §§ 1182(a) and 1255(a). 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, in determining admissibility, the materiality test has three parts. First, if the record shows the alien is inadmissible on the true facts, then the second and third questions must be addressed. The

second question is whether 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 failure to disclose the fact that the beneficiary was related to the owner of the petitioning company at the time the labor certification was secured was a material misrepresentation that was willful because the officer, principal and owner of the company was presumed to be aware and informed of the organization and staff of the enterprise. *See Matter of Silver Dragon Chinese Restaurant*, 19 I&N Dec. 401 at 403. Counsel argues that the petitioner truthfully answered Part C. Question 9 on the ETA Form 9089 and thus cannot be found to have committed a material misrepresentation.

Counsel contends that the petitioner made no willful misrepresentation concerning the relationship between and the beneficiary, because the petitioner believed it was answering Part C Question 9 correctly and was forthcoming about the relationship between and the beneficiary when asked in the NOID. The AAO finds that the petitioner's explanation for failing to disclose the relationship is not persuasive. The petitioner's stated belief that it was answering the question correctly by checking "no" is not credible when viewed in the context of whether the petitioner intended for the job to be open to all United States workers. By checking the "no" box, the petitioner cut off a potential line of inquiry regarding the *bona fide* nature of the offer of employment. This is directly material as to whether the petitioner is an employer which intends to employ the beneficiary as required by section 204(a)(1)(F) of the Act, 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.

As set forth above, and pursuant to 20 C.F.R. § 656.31(d), the AAO finds that the petitioner failed to demonstrate that a *bona fide* job offer existed based on the undisclosed relationship of the beneficiary to the petitioner, which constituted willful misrepresentation of a material fact involving the labor certification. The AAO concurs with the director's decision to invalidate the labor certification invalid based on the willful misrepresentation of a material fact and affirms the invalidation of the ETA 9089.

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 labor certification application remains invalidated pursuant to 20 C.F.R. § 656.30(d) based on the petitioner's willful misrepresentation.