(b)(6)

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

U.S. Citizenship and Immigration Services

[redacted]

DATE: NOV 2 7 2013 Office: NEBRASKA SERVICE CENTER FILE: [redacted]

IN RE: Petitioner: [redacted]
Beneficiary:

PETITION: Immigrant petition for Alien Worker as an Other, Unskilled Worker 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 (AAO) in your case.

This is a non-precedent decision. The AAO does not announce new constructions of law nor establish agency policy through non-precedent decisions. If you believe the AAO incorrectly applied current law or policy to your case or if you seek to present new facts for consideration, you may file a motion to reconsider or a motion to reopen, respectively. Any motion must be filed on a Notice of Appeal or Motion (Form I-290B) within 33 days of the date of this decision. **Please review the Form I-290B instructions at http://www.uscis.gov/forms for the latest information on fee, filing location, and other requirements.** *See also* 8 C.F.R. § 103.5. **Do not file a motion directly with the AAO.**

Thank you,

Elizabeth McCormack

Ron Rosenberg
Chief, Administrative Appeals Office

DISCUSSION: The employment-based immigrant visa petition was initially approved by the Director, Nebraska Service Center. On January 14, 2013, the director served the petitioner with notice of intent to revoke the approval of the petition (NOIR). In a Notice of Revocation (NOR), the director ultimately revoked the approval of the Form I-140, Immigrant Petition for Alien Worker. The matter is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

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 petitioner is a household. It seeks to employ the beneficiary permanently in the United States as a houseworker. As required by statute, the petition is accompanied by a Form ETA 750, Application for Alien Employment Certification, approved by the United States Department of Labor (DOL). The director determined that the petitioner had failed to demonstrate that the beneficiary possessed the requisite experience as indicated in the labor certification, or that the position offer was a *bona fide* job offer. The director revoked the approval of the petition accordingly.

On appeal, counsel for the petitioner asserts that the director has improperly revoked the approval of the petition. Counsel further asserts that the petitioner has submitted sufficient evidence to establish that the beneficiary has the requisite experience and that the position offer was a *bona fide* job offer.

As noted above, the Secretary of DHS has the authority to revoke the approval of any petition approved by him under section 204 for good and sufficient cause. *See* section 205 of the Act; 8 U.S.C. § 1155. This means that notice must be provided to the petitioner before a previously approved petition can be revoked. More specifically, the regulation at 8 C.F.R. § 205.2 reads:

> (a) *General.* Any United States Citizenship and Immigration Services [USCIS] officer authorized to approve a petition under section 204 of the Act may revoke the approval of that petition **upon notice to the petitioner** on any ground other than those specified in § 205.1 when the necessity for the revocation comes to the attention of this [USCIS]. (emphasis added).

Further, the regulation at 8 C.F.R. § 103.2(b)(16) states:

> (i) Derogatory information unknown to petitioner or applicant. If the decision will be adverse to the applicant or petitioner and is based on derogatory information considered by [USCIS] and of which the applicant or petitioner is unaware, he/she shall be advised of this fact and offered an opportunity to rebut the information and present information in his/her own behalf before the decision is rendered, except as provided in paragraphs (b)(16)(ii), (iii), and (iv) of this

> section. Any explanation, rebuttal, or information presented by or in behalf of the applicant or petitioner shall be included in the record of proceeding.

Moreover, *Matter of Arias*, 19 I&N Dec. 568 (BIA 1988); *Matter of Estime*, 19 I&N Dec. 450 (BIA 1987) provide that:

> A notice of intention to revoke the approval of a visa petition is properly issued for "good and sufficient cause" when the evidence of record at the time of issuance, if unexplained and unrebutted, would warrant a denial of the visa petition based upon the petitioner's failure to meet his burden of proof. However, where a notice of intention to revoke is based upon an unsupported statement, revocation of the visa petition cannot be sustained.

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 May 13, 2013 revocation, the primary issues in this case are whether the petitioner has established that the beneficiary has the requisite job experience as required by the labor certification, and that the job offer is *bona fide*.

Section 203(b)(3)(A)(iii) of the Act, 8 U.S.C. § 1153(b)(3)(A)(iii), provides for the granting of preference classification to other qualified immigrants who are capable, at the time of petitioning for classification under this paragraph, of performing unskilled labor, not of a temporary or seasonal nature, for which qualified workers are not available in the United States.

The first issue in this case is whether the petitioner has submitted sufficient evidence to demonstrate that the beneficiary had three months of experience as a houseworker as of the priority date in the instant matter, September 28, 2001. In determining whether the beneficiary is qualified to perform the duties of the proffered position, the petitioner must demonstrate that, on the priority date, the beneficiary had the qualifications stated on its labor certification application, as certified by the DOL and submitted with the instant petition. *Matter of Wing's Tea House*, 16 I&N Dec. 158 (Act. Reg. Comm. 1977).

To determine whether a beneficiary is eligible for an employment based immigrant visa, USCIS must examine whether the alien's credentials meet the requirements set forth in the labor certification. 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. 401, 406 (Comm. 1986). *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); and *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 three months of work experience as a houseworker. The petitioner must establish that the beneficiary possessed the qualified work experience as stated on the labor certification. The petitioner described the job duties as:

> Cleans furnishings, floors, windows, bedrooms, bathrooms and basement using vacuum cleaner, mops, brooms, cloths, cleaning solutions and other related cleaning items. Plans meals, purchases foodstuffs and various fruits and vegetables. Cooks food, refreshments and desserts. Washes dishes, changes linens, and makes beds. Washes and irons clothes. Maintains yard and pool.

The beneficiary set forth her credentials on the labor certification, and signed her name under a declaration that the contents of the form are true and correct under the penalty of perjury. On the section of the labor certification eliciting information of the beneficiary's work experience in the job offered, she represented that she was employed by India as a "houseworker, general" from August 1997 to the present, September 3, 2001, which is the date she signed the labor certification. She identified her job duties as follows:

> Carries out a wide array of housework including washing and ironing clothes, making beds, cleaning, purchasing food, making meals, washing dishes and insuring that the premises are properly maintained.

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 regulation states in part:

> ... Evidence relating to qualifying experience or training shall be in the form of letter(s) from current and former employer(s) or trainer(s) and shall include the name, address and title of the writer, and a specific description of the duties performed by the alien or of the training received. If such evidence is unavailable, other documentation relating to the alien's experience or training will be considered. ...

8 C.F.R. § 204.5(g)(1).

As evidence of the beneficiary's work experience, the petitioner initially submitted the following statements:

- A letter dated August 28, 2007 from who stated that the beneficiary was employed at his residence as a "Houseworker" from December 1997 to September 2002. He stated that during that time, her responsibilities included: "washing and ironing clothes, making beds, cleaning, washing dishes, purchasing food, and making sure the premises were properly maintained."

- Six letters dated June 25, 2011 from who stated that he was a business owner and that he employed the beneficiary at his place of residence as a "Houseworker" from December 1997 to September 2002. In each letter the declarant listed the yearly salary that the beneficiary received during her period of employment.

The letter dated August 28, 2007 did not state whether the beneficiary's employment was full-time. The letters dated June 25, 2011 did not describe the duties performed and did not state that the employment was full-time.

- A letter from India who stated that based upon her salary amounts, the beneficiary did not have to file income tax returns in 1997, 1998, 1999, 2000, 2001, and 2002.[1] He stated that the beneficiary's employment letters presented to him, which contained specific salary amounts received by the beneficiary while employed by were true and fair based on books which he had verified, and from documents and other relevant records produced.

The record of proceeding does not contain the other documents noted by the declarant.

In response to the director's Notice of Intent to Revoke (NOIR), dated January 14, 2013, the petitioner submitted the following letters:

- A letter dated February 8, 2013 from who states that the beneficiary worked at his residence as a houseworker from December 1997 to September 2002. The declarant reiterates the beneficiary's job duties as listed in his August 28, 2007 letter. The declarant further states that the beneficiary was employed full-time and that she was paid in cash. He also indicates that his son, was contacted telephonically by local investigators, and that his son verified the employment in all respects.

- A letter dated February 8, 2013 from wife of who stated that the beneficiary worked at their residence as a houseworker from December 1997 to September 2002. The declarant reiterates her husband's statements with regard to a description of the beneficiary's job duties, her full-time status, and that she was paid in cash.

- A letter dated February 8, 2013 from who stated that he is the son of and the beneficiary worked at his parent's residence as a houseworker from December 1997 to September 2002. The declarant

[1] The beneficiary indicated on the Form I-140 that she gave birth to a son on November 21, 1995 and a daughter on December 19, 1999, which is during the time period in question.

> reiterates his father's statements with regard to a description of the beneficiary's job duties, her full-time status, and that she was paid in cash, and that he told this information to an investigator who sought information on behalf of the United States Consulate in Mumbai.[2]

On appeal and in response to the AAO's Request for Evidence (RFE) dated August 30, 2013, counsel asserts that the documentation submitted by the petitioner is sufficient to establish that the beneficiary had gained the required three months of experience prior to the priority date of September 28, 2001. Counsel notes that the approved labor certification requires documentation of three months of general houseworker experience, and that such experience was satisfactorily provided and substantiated by the beneficiary's previous employer. Counsel states that the labor certification did not require experience in maintaining the yard and the pool.

As noted in the AAO NOID dated August 30, 2013 and in the director's NOIR, the consular official who interviewed the beneficiary indicated that the beneficiary stated during the interview that the employer on the Form I-140 filed the petition for reunification purposes. Because of the inconsistencies raised by the investigation in which many neighbors stated that the beneficiary did not work for the qualifying employer, but that she was a housewife and her husband is a businessman, the AAO requested independent objective evidence of her experience for the job. Doubt cast on any aspect of the petitioner's proof may lead to a reevaluation of the reliability and sufficiency of the remaining evidence offered in support of the petition. It is incumbent upon 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 lies, will not suffice. *Matter of Ho*, 19 I&N Dec. 582, 591-592 (BIA 1988). In response, the petitioner did not submit independent objective evidence of payment of wages to the beneficiary by the qualifying employer. Rather, the petitioner stated that the beneficiary was paid in cash and submitted new affidavits from the employer reiterating his prior statements of employment and from the employer's wife and son confirming the employment restated by Mr.

The AAO further requested the petitioner to submit evidence that the beneficiary had the skill set necessary to perform landscaping and pool maintenance. In response, the petitioner indicated that the requirement for three months job experience as a general houseworker implicitly includes yard and pool maintenance. The AAO disagrees. The O*NET (O*NET OnLine at http://www.onetonline.org) provides that the duties of a maid/housekeeper entail in part, carrying linens, towels, toilet items, and cleaning supplies, using wheeled carts, cleaning rooms, emptying wastebaskets, etc., dust and polish furniture, wash windows, and wax and polish furniture as necessary. The certified job is for (occupational code 37-201200, maids & housekeeping cleaners). Adversely, the O*NET provides that the duties of landscaping/groundskeeper entail in part, operating vehicles and powered equipment, such as mowers, tractors, twin-axle vehicles, snow blowers, chain saws, electric clippers, sod cutters, and pruning saws, mowing or edging

[2] Evidence in the record indicates that during the investigation, the declarant also stated that he was attending college during that time and seemed to remember the beneficiary doing some chores in the house.

lawns, using power mowers or edgers, caring for established lawns by mulching, aerating, weeding, grubbing, removing thatch, or trimming or edging around flower beds, walks, or walls, using hand tools, such as shovels, rakes, pruning saws, saws, hedge or brush trimmers, or axes, pruning or trimming trees, shrubs, or hedges, using shears, pruners, or chain saws, gathering and removing litter, and maintaining or repairing tools, equipment, or structures, such as buildings, greenhouses, fences, or benches, using hand or power tools (occupational code 37-3011.00, landscaping and grounds keeping workers). The landscaping and grounds keeping duties are extraneous to those of a houseworker. The petitioner has not established that the beneficiary has these skills or the skills necessary for pool maintenance. For this additional reason, the beneficiary is not qualified for the position.

The letters evidencing and verifying wages paid to the beneficiary during her claimed employment are not independent objective evidence demonstrating that she performed the duties as a houseworker during that period, as required by the labor certification. Furthermore, the petitioner has failed to provide contemporaneous evidence to substantiate the wages paid to the beneficiary during that time period. 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)).

On appeal, the petitioner has not submitted independent objective evidence of the beneficiary's qualifying employment as required when the evidence is inconsistent and contradictory. The petitioner has not submitted bank statements from the time nor any of the documentation relied upon by the chartered accountant in certifying the beneficiary's qualifying employment. The inconsistencies between the neighbor's statements and the statements from the family concerning whether the beneficiary was employed as a general housekeeper for almost five years have not been resolved by independent objective evidence. Thus, the AAO finds the beneficiary not qualified for the position as of the priority date.

The next issue in this case is whether the petition was based on a *bona fide* job offer and whether a pre-existing familial relationship likely affected the labor certification process.

The director issued a Notice of Intent to Revoke (NOIR) in which he noted that a review of service records showed that a familial relationship existed between the beneficiary and the petitioner. Hence, the director requested that the petitioner submit verifiable documentary evidence that a *bona fide* job opportunity exists and was open to qualified U.S. workers. The petitioner responded to the director's NOIR by submitting an affidavit in which he stated that "family reunification" was not the basis for the visa sponsorship but rather, that he had a *bona fide* offer of employment for a houseworker. The declarant also stated that the initial sponsorship of the beneficiary's husband's parents to the United States had been withdrawn and that therefore, the beneficiary was not coming to the United States for "family reunification."

The director determined that the petitioner had not established that the petition was based on a *bona fide* job offer but rather that a pre-existing familial relationship likely affected the labor

certification process. The director indicated that the beneficiary had admitted during an interview at the consulate's office in Mumbai to being sponsored to promote "family reunification." Consequently, the director revoked the approval of the petition.

Counsel asserts that the neither the petitioner nor the beneficiary misrepresented the beneficiary's relationship to the petitioner and that there is no proof of "fraud or willful misrepresentation" on any of the immigration documents submitted on her behalf, and that such a conclusion is without merit and contrary to law. In addition, counsel asserts that the Form ETA 750 does not contain a question relating to familial relationships, and that the beneficiary's husband's parents opted not to continue the sponsorship process, thereby eliminating the need to expedite the immigration process through filing Form ETA 750 and Form I-140 on behalf of the beneficiary. Counsel asserts that the immigration petition was based on an actual offer of employment to perform the job duties as described on the labor certification and that the petitioner performed an adequate test of the labor market. Counsel states that as the beneficiary has no power or authority over the day-to-day functionality of the petitioner there was no undue influence over the recruitment. Counsel asserts that the offer of employment was legitimate and necessary, and that the petitioner followed all the DOL and USCIS rules and regulations concerning the advertisement of the position. Contrary to counsel's claim, there is insufficient evidence in the record of proceeding to demonstrate how or that the position was advertised (employment ads, internet job site postings, recruitment reports, and other resumes). 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).

The AAO issued a Request for Evidence (RFE) dated August 30, 2013, requesting evidence to demonstrate that a *bona fide* job offer existed. In response to the RFE, counsel asserts that a valid job offer exists, and that neither the petitioner nor the beneficiary willfully misrepresented their relationship. Upon review, the petitioner has failed to demonstrate that a *bona fide* job opportunity was available to U.S. workers.

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 was 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). *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.

The record establishes that the beneficiary's husband is the nephew of the petitioner. Although counsel claims that the petitioner conducted its recruitment in accordance with the DOL's regulations and procedures, the petitioner has not submitted any evidence establishing that this was a *bona fide* job opportunity available to U.S. workers. 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)). Based upon the totality of the circumstances, it does not appear from the record that the petition was based on a *bona fide* job offer, in that a pre-existing familial relationship likely affected the labor certification process.[3] Given the close familial relationship between the parties, it is more likely than not that a *bona fide* job opportunity available to all qualified U.S. workers never existed.

The facts of this case suggest that the AAO should refer the case to the DOL, pursuant to our consultation authority at section 204(b) of the Immigration and Nationality Act (the Act), to determine whether the labor certification was improperly issued. Nevertheless, because the AAO finds that the beneficiary is not qualified for the position, it will dismiss the appeal on this ground alone at this time.

Accordingly, it has not been established that the beneficiary has the requisite three months of experience and is thus qualified to perform the duties of the proffered position. 8 C.F.R § 204.5(g)(1) and (l)(3)(ii)(A).

In visa petition proceedings, it is the petitioner's burden to establish eligibility for the immigration benefit sought. Section 291 of the Act, 8 U.S.C. § 1361; *Matter of Otiende*, 26 I&N Dec. 127, 128 (BIA 2013). The petitioner has not met that burden.

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[3] USCIS records indicate that the petitioner filed another Form I-140 on December 28, 2007, on behalf of [redacted] That petition is approved. USCIS records do not show that the beneficiary of the second petition has applied for an immigrant visa. USCIS records also indicate that the beneficiary of the instant petition shares the same address as two of the petitioner's family members in India. [redacted] the beneficiary of an approved Form I-130 family based petition filed by the petitioner, resides at [redacted] also the beneficiary of an approved Form I-130 petition filed by the petitioner [redacted], also resides at [redacted] The same [redacted] address was also listed as the beneficiary's address overseas in connection with the current Form I-140 petition. These facts demonstrate that the beneficiary shares close family ties to the petitioner that were not disclosed to DOL during the labor certification process.

ORDER: The appeal is dismissed. The director's prior decision dated May 13, 2013, revoking the petition's approval is affirmed. The petition's approval remains revoked.