



U.S. Citizenship
and Immigration
Services

(b)(6)

DATE: AUG 18 2014 OFFICE: NEBRASKA SERVICE CENTER

FILE: [REDACTED]

IN RE:

PETITIONER:

BENEFICIARY:

PETITION: Immigrant Petition for Alien Worker as a Member of the Professions Holding an Advanced Degree or an Alien of Exceptional Ability Pursuant to Section 203(b)(2) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)(2)

ON BEHALF OF PETITIONER:

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,


Ron Rosenberg
Chief, Administrative Appeals Office

DISCUSSION: The Director, Nebraska Service Center, (director) denied the employment-based immigrant visa petition and a subsequent motion to reopen and reconsider. The matter is now before the Administrative Appeals Office (AAO) on appeal. The matter will be remanded to the director.

The petitioner seeks to permanently employ the beneficiary in the United States as a managing director. The petitioner requests classification of the beneficiary as an advanced degree professional pursuant to section 203(b)(2) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(2).¹

The Director, Nebraska Service Center denied the petition on October 15, 2013. The director found that the petitioner failed to disclose the beneficiary's partial ownership interest in the company that applied for the labor certification and that this prevented the Department of Labor (DOL) from investigating whether there is a *bona fide* job offer that was open to U. S. workers. The director invalidated the labor certification.

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).

The ETA Form 9089 specifically asks in Section 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?” If the beneficiary has an ownership interest in the petitioning entity, the petitioner should have indicated, “yes” to this question.

At the outset, we note that the entity that filed the labor certification was [REDACTED]. The instant petition was filed by [REDACTED], the successor-in-interest to the labor certification employer.

In response to the director's August 20, 2013, Notice of Intent to Deny counsel stressed that the company that applied for the labor certification was a Limited Liability Company (LLC), not a partnership, and therefore was not required to disclose the beneficiary's partial ownership share of the company. An LLC is an entity formed under state law by filing articles of organization. An LLC may be classified for federal income tax purposes as if it were a sole proprietorship, a partnership or a corporation. If the LLC has only one owner, it will automatically be treated as a sole proprietorship by the Internal Revenue Service (IRS) unless an election is made to be treated as a corporation. If the LLC has two or more owners, it will automatically be considered to be a partnership by the IRS unless an election is made to be treated as a corporation. If the LLC does not elect its classification, a default classification of partnership (multi-member LLC) or disregarded entity (taxed as if it were a sole proprietorship) will apply. *See* 26 C.F.R. § 301.7701-3. The

¹ Section 203(b)(2) of the Act provides immigrant classification to members of the professions holding advanced degrees, whose services are sought by an employer in the United States.

election referred to is made using IRS Form 8832, Entity Classification Election. In the instant case, the record demonstrates that [REDACTED] was an LLC formed under Delaware law, filed its federal income taxes on Form 1065, U.S. Return of Partnership Income and was considered to be a partnership for federal tax purposes.

The PERM regulation specifically addresses the issue of a beneficiary's ownership interests at 20 C.F.R. § 656.17(l) that 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:

- (1) A copy of the articles of incorporation, partnership agreement, business license or similar documents that establish the business entity;
- (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;
- (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
- (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) If the alien is one of 10 or fewer employees, the employer must document any family relationship between the employees and the alien.

If the petitioner failed to check the appropriate box on ETA Form 9089, DOL would not be allowed an opportunity to audit and assess the nature of the ownership and the extent of the alien's influence and control over job opportunity. Therefore, a material issue in the case is whether the petitioner failed to disclose a controlling ownership interest in the petitioning entity by the beneficiary.

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).

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)

The petitioner has provided a copy of the Limited Liability Agreement for [REDACTED] as required in 20 C.F.R. § 656.17(l)(1). This document describes the different types of ownership, "'Voting Income Units', the 'Non-Voting Capital Units', and the 'Profits Interest Units.'" A letter from [REDACTED], Vice President of the petitioning company, indicates that the beneficiary's shares consisted of "Non-Voting Capital Units" and that these shares were "extremely small and did not give him any right or opportunity to affect the labor certification process." As required in 20 C.F.R. § 656.17(l)(2) and (3), the company's 2012 income tax return lists the company's owners and confirms that the beneficiary's shares constituted 2.23% ownership of the company at the beginning of the year and 0.1428482% at the end of the year.

The record does not document the name of the business official with primary responsibility for interviewing and hiring applicants as required in 20 C.F.R. § 656.17(l)(4). While, the size of the petitioning company, the size of the beneficiary's ownership share, and the description of the beneficiary's duties for the petitioner all suggest that the beneficiary did not exert influence over the labor certification process, the petition will be remanded to the director for evaluation of the totality of the circumstances concerning a *bona fide* job offer.

In view of the foregoing, the previous decision of the director will be withdrawn. The petition is remanded to the director for reconsideration. The director may request any additional evidence considered pertinent. Similarly, the petitioner may provide additional evidence within a reasonable period of time to be determined by the director. Upon receipt of all the evidence, the director will review the entire record and enter a new decision.

ORDER: The director's decision is withdrawn. The petition is remanded to the director for issuance of a new decision.