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U.S. Department of Homeland Security
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U.S. Citizenship
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Services

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FILE:



Office: TEXAS SERVICE CENTER Date: OCT 01 2007

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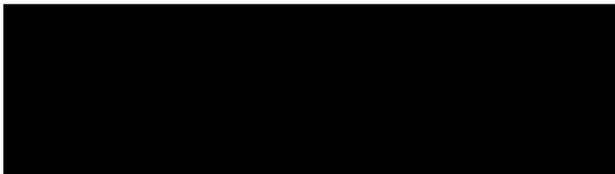
Petitioner:

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:

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 Director, Texas Service Center, initially approved the preference visa petition. Subsequently, the director issued a 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 Immigrant Petition for Alien Worker (Form I-140). 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, states, in pertinent part, that the Secretary 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."

Regarding the revocation on notice of an immigrant petition under section 205 of the Act, the Board of Immigration Appeals has stated:

In Matter of Estime, . . . this Board stated that a notice of intention to revoke a visa petition is properly issued for "good and sufficient cause" where the evidence of record at the time the notice is issued, if unexplained and un rebutted, would warrant a denial of the visa petition based upon the petitioner's failure to meet his burden of proof. The decision to revoke will be sustained where the evidence of record at the time the decision is rendered, including any evidence or explanation submitted by the petitioner in rebuttal to the notice of intention to revoke, would warrant such denial.

Matter of Ho, 19 I&N Dec. 582, 590 (BIA 1988)(citing *Matter of Estime*, 19 I&N Dec. 450 (BIA 1987)). Finally, the realization by the director that the petition was approved in error may be good and sufficient cause for revoking the approval. *Id.*

The petitioner is a custom-designed swimwear manufacturer. It seeks to employ the beneficiary permanently in the United States as a garment-manufacturing supervisor. As required by statute, a Form ETA 750 Application for Alien Employment Certification approved by the Department of Labor accompanied the petition. The director determined that the petitioner had not established that the beneficiary has the requisite experience as stated on the labor certification petition. The director also determined, based on the relationship of the petitioner's owner and the beneficiary, that no *bona fide* job offer exists in this case. The director revoked approval of the petition accordingly.

The record shows that the appeal was properly and timely filed and makes a specific allegation of error in law or fact and is accompanied by new evidence. On July 25, 2007, however, this office issued a notice of derogatory information elaborating on the issues raised by the director. This office afforded 30 days in which to respond. As of this date, approximately two months later, we have received nothing further. The procedural history of this case is documented in 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 decision of revocation the sole issues in this case are whether or not the petitioner has demonstrated a *bona fide* job offer and whether the beneficiary has the necessary qualifications for the job.

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 or seasonal nature, for which qualified workers are unavailable in the United States.

The regulation at 8 C.F.R. § 204.5(1)(3)(ii) states, in pertinent part:

(A) *General*. Any requirements of training or experience for skilled workers, professionals, or other workers must be supported by letters from trainers or employers giving the name, address, and title of the trainer or employer, and a description of the training received or the experience of the alien.

(B) *Skilled workers*. If the petition is for a skilled worker, the petition must be accompanied by evidence that the alien meets the educational, training or experience, and any other requirements of the individual labor certification, meets the requirements for Schedule A designation, or meets the requirements for the Labor Market Information Pilot Program occupation designation. The minimum requirements for this classification are at least two years of training or experience.

Eligibility in this matter hinges on the petitioner demonstrating that, on the priority date, the beneficiary had the qualifications stated on its Form ETA 750 Application for Alien Employment Certification as certified by the U.S. Department of Labor and submitted with the instant petition. *Matter of Wing's Tea House*, 16 I&N Dec. 158 (Act. Reg. Comm. 1977). The priority date of the petition is the date the request for labor certification was accepted for processing by any office within the employment system of the Department of Labor. 8 C.F.R. § 204.5(d). Here, the request for labor certification was accepted for processing on April 27, 2001. The labor certification states that the position requires two years of experience in the job offered. Larry Quick signed that labor certification application for the petitioner as an "authorized representative." Larry Quick also signed the instant visa petition.

In evaluating the beneficiary's qualifications, CIS must look to the appropriate portion of the labor certification. CIS may not ignore a term of the labor certification, Form ETA 750 at part 14, 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. Cal. 1983); *Stewart Infra-Red Commissary of Massachusetts, Inc. v. Coomey*, 661 F.2d 1 (1st Cir. 1981).

On the Form ETA 750, Part B the beneficiary, who signed that form on April 24, 2001, stated that she had worked 40 hours per week for Memories, a custom swimwear designer in Penticton, British Columbia, Canada, from January 1986 to January 1991 as owner/manager; and 50 hours per week for Peachwear, another custom swimwear manufacturer also of Penticton, British Columbia, as a designer/supervisor, from October 1988 to August 1995.¹ The beneficiary did not claim to have worked for the petitioner. The beneficiary declared under the penalty of perjury that the information she provided on that form was correct.

In the instant case the record contains a letter from Memories, dated April 12, 2002, stating that it employed the beneficiary as a manager from January 1986 through January 1991. The record also contains a letter dated September 8, 1995 from Peachwear, on its letterhead, stating that it employed the beneficiary as a designer/supervisor from February 1991 to August 1995. Both of those letters are signed by individuals whose job titles at the companies for which they are verifying employment is unstated as required by 8 C.F.R.

¹ This office notes that, because those two periods of employment overlap, the beneficiary was claiming to have worked 90 hours per week from October 1988 to January 1991.

§ 204.5(l)(3)(ii)(A). The basis of their asserted knowledge, whether from memory or company records or some other source, is also unstated.²

In connection with a collateral matter, a Form I-485 Application to Register Permanent Residence or Adjust of Status contained in the record, receipt number SRC 03 099 50651, the beneficiary submitted a G-325A Biographic Information form. That form notes that severe penalties are provided by law for knowingly and willfully falsifying or concealing a material fact. On that form, which the beneficiary signed on December 26, 2002, the beneficiary stated that she had been unemployed since March of 1993. This office notes that this admission contradicts her assertion, made on the Form ETA 750B, that she worked for Peachwear from February 1991 to August 1995. A Florida Marriage Record submitted with that petition shows that the beneficiary, then [REDACTED] married [REDACTED] on September 14, 1995.

The record does not contain any other evidence relevant to the beneficiary's claim of qualifying employment experience. The petition was approved on December 5, 2002.

The Director, Texas Service Center, issued a NOIR in this matter on August 25, 2006. The director noted that the service center had received a memorandum from the Miami District Office that stated:

The [beneficiary] has never been working in any line of work as indicated in the I-140 application in 2002. The owner of [the petitioner] who petitioned for [the beneficiary] in this I-140 as her employer, is actually her husband. [Citizenship and Immigration Services (CIS)] finds that the petitioner filed an ETA-750 and suggested the position was offered to the public when if [sic] fact all along the position was for the petitioner's [owner's] wife. [CIS] has to assume the I-140 application was filed with the intent to circumvent [immigration laws] to obtain immigration benefits.³

The director also requested that the petitioner provide telephone numbers for the employers for whom the beneficiary claimed to have worked.

In a letter dated October 24, 2006, submitted in response to the August 25, 2006 NOIR issued in this matter, counsel noted, correctly, that the notice misstated that the petitioner is the beneficiary's husband, rather than

² The record also contains a letter, dated April 15, 2006, from Singer Island Health and Fitness of Singer Island, Florida. That letter purports to offer the beneficiary employment as a sewing supervisor of the company's production of "workout/streetwear apparel." This appears to be an attempt to use the previously approved visa petition in this case for employment by another employer pursuant to the American Competitiveness in the Twenty-First Century Act of 2000, Pub. L. No. 106-313, 114 Stat. 1251 (AC21). The terms of AC21, however, do not restrict the ability of CIS to deny or revoke a visa petition in general. Moreover, by providing for situations in which the petition shall "remain valid" section 204(j) of the Act is only relevant in matters where the petition was initially valid.

³ In fact, although the director purports to be quoting the memorandum he is paraphrasing it. The actual language of the memorandum is as follows:

[The beneficiary] is the spouse of the owner of [the petitioner.] She stated she had never been working. The [petitioner's owner], who petitioned for her in the I-140, is her dependent . . . in their applications for adjustment. Clearly, they are committing fraud in their efforts to obtain immigration benefits.

that the petitioner's owner is the beneficiary's husband. Counsel further noted that a corporation is a legal entity, separate and distinct from its owners and stockholders.

Counsel cited non-precedent decisions of this office for the proposition that the petition in the instant case may be approved even though the petitioner's owner is the beneficiary's spouse. Counsel stated that, "The fact that the Beneficiary's husband [owns the petitioner] is irrelevant," and that ". . . the labor certification recruitment [was] conducted at arms length in full compliance with Department of Labor regulations."

Counsel further noted that many companies petition for their owners or part-owners and that, since the petitioner in such an arrangement is a United States employer within the meaning of 8 C.F.R. § 214.2(h)(4)(ii), the petitioner in the instant case should also qualify.

Counsel cited Board of Alien Labor Certification Appeals (BALCA) cases for the propositions that a close family relationship between the employer and the alien does not preclude approval of a petition, but that it invites a higher level of scrutiny.

Counsel acknowledged the request for telephone numbers with which the service center might contact the beneficiary's previous employers, but did not provide any such numbers. Instead, counsel provided an affidavit from the beneficiary, dated October 13 2006, that counsel stated "sufficiently explain[ed] her previous experience," and asserted that no reason exists to question the veracity of the beneficiary's experience or assume that it is fraudulent.

The October 13, 2006 affidavit attested to the following: (1) from approximately January 1986 to January 1991 the beneficiary worked as co-owner/manager of Memories, a custom swimwear store, along with her mother who is now deceased; (2) Memories is now out of business and the employment verification letter was executed by a former employee of the store whose current location is unknown to the beneficiary; (3) From approximately February 1991 to August 1995 the beneficiary worked as designer/supervisor at Peachwear, a custom swimwear store; (4) "Upon information and belief, Peachwear is out of business and no longer operating" and the employment verification letter was executed by a former manager of the business whose current location is unknown to the beneficiary; and (5) The beneficiary is unable to provide any further contact information pertinent to her alleged previous employment.

The director revoked approval of the petition on November 20, 2006, stating that the petitioner failed to provide contact information for the beneficiary's prior employers to permit CIS to verify the beneficiary's claims of qualifying employment, and that based on the beneficiary's marriage to the petitioner's owner it appeared that the petition was filed to circumvent U.S. immigration laws.

On appeal, counsel asserted: (1) that the Notice of Intent to Revoke issued in this matter was unclear; (2) that the petitioner's owner, rather than the petitioner, is the beneficiary's spouse; (3) that approval of the instant visa petition need not have been revoked based on the finding that the beneficiary's husband is the petitioner's owner; (4) that approval should not have been revoked based on the failure to include contact information for verification of the information on the beneficiary's employment verification letters,⁴ and (5) that CIS did not have the authority to invalidate the approved labor certification.

⁴ This office notes that approval of the petition was not revoked for failure to provide the contact information, though that might have been a legitimate basis in view of 8 C.F.R. § 204.5(1)(3)(ii)(A), but because the documentation supporting the beneficiary's employment claims were found to be unpersuasive.

On July 25, 2007 this office issued a Notice of Derogatory Evidence to the petitioner and counsel. That notice stated:

The record in the instant case contains an investigative report dated April 21, 2006 stating that the beneficiary is the petitioner's owner's spouse. A notice of intent to revoke dated August 25, 2006 informed you of that finding. The record further shows that in a contemporaneously filed Form I-485 Application to Adjust Status to Lawful Permanent Resident, the beneficiary of the instant petition is filing derivative status for her husband, the owner of the petitioner in the instant petition. Those facts, taken together, raise the suspicion that the instant immigrant visa petition, ostensibly a petition by a U.S. employer to fill a legitimate shortage occupation with an alien worker, may actually be an attempt to circumvent U.S. immigration law.

Further, the record indicates that, prior to the issuance of the notice of intent to revoke, [REDACTED] signed all of the petitioner's correspondence with DOL and CIS. That previous correspondence includes an affidavit attested to on April 4, 2001; the Form ETA 750, signed on April 24, 2001; the Form I-140, signed on May 1, 2002; a letter signed on May 17, 2002, a Form G-28, Notice of Entry of Appearance, signed on May 22, 2002, a letter dated January 27, 2003, and a letter dated October 1, 2005. This suggests that the petitioner may have concealed the family relationship of the petitioner's owner and the beneficiary in order to avoid the increased scrutiny that would have resulted from its disclosure to DOL during the labor certification process.

The petitioner was also instructed as follows:

Please submit any evidence or argument that mitigates the suspicion raised by the circumstances described. Especially, please submit any evidence that the relationship of the petitioner's owner and the beneficiary was revealed to DOL during the labor certification application process. Failure to do so will result in invalidation of the labor certification underlying the instant petition.

Neither the petitioner nor counsel responded to that notice.

As to the clarity of the Notice of Intent to Revoke, this office observes that the Notice of Intent to Revoke indicated (1) that the beneficiary's claim of qualifying employment experience had come into question, and (2) that the petitioner, actually, as counsel notes, the petitioner's owner, is the beneficiary's spouse, a fact that had apparently never been previously revealed either to DOL or CIS. This office finds that the Notice of Intent to Revoke was sufficiently clear to inform counsel and the petitioner of the nature of the basis for the pending revocation pursuant to the requirements enunciated in *Matter of Estime*, 19 I&N 450 (BIA 1987). Further, the notice issued by this office on July 25, 2007 elaborated on the adverse evidence in the record.

Counsel's citation of unpublished, non-precedent decisions is without precedential effect. Although 8 C.F.R. § 103.3(c) provides that CIS precedent decisions are binding on all CIS employees in the administration of the Act, unpublished decisions are not similarly binding. Counsel is permitted to note the reasoning of a non-precedent decision, to argue that it is compelling, and to urge its extension. Absent such an argument, however, counsel's citation of a non-precedent decision is of no effect.

Counsel's assertion that the fact that the petitioner's owner is the beneficiary's spouse is irrelevant does not convince this office. *Matter of Paris Bakery Corporation*, 88-INC-337 (BALCA 1990) (en banc), relied upon

by counsel, stated that such a family relationship is a factor to be considered in determining whether a *bona fide* job opportunity exists for U.S. workers. The weight to be accorded to that factor is a matter to be decided by the finder-of-fact.

In the realm of finances, a strict distinction exists between the petitioner and the petitioner's owner. The owner or owners of a corporation or other limited liability entity are not responsible for the debts and obligations of the company. Various cases cited by counsel correctly observe that distinction in the context of financial matters, including a petitioner's continuing ability to pay the proffered wage beginning on the priority date.

One of the bases for denial of the instant petition, however, is the finding that the job offer was not open to the public. This conclusion is based upon, among other facts, that the petitioner's owner decided to hire his own spouse to fill the proffered position.

The issue in the instant case is not whether the petitioner's owner is responsible for the petitioner's debts and obligations, but whether he was responsible for the decision to hire his spouse. No reason exists, in this context, for a distinction between a limited liability entity and any other type of company.

Pursuant to 20 C.F.R. §656.20(c)(8) the petitioner has the burden when asked to show that a valid employment relationship exists and 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, by marriage, through friendship, or where the two have a financial relationship. See *Matter of Sunmart*, 374, 2000-INA-93 (May 15, 2000).

The investigative report in the record is dated April 21, 2006 and the notice of intent to revoke was issued on August 25, 2006. Submissions from the petitioner prior to those dates,⁵ were signed by [REDACTED] and [REDACTED].

The petitioner's Form G-28 Notice of Entry of Appearance was signed after those dates, on December 6, 2006, by the petitioner's owner, [REDACTED], after the petitioner had been informed that CIS was aware of his relationship to the beneficiary. This fact suggests that the petitioner may have wished to avoid the heightened scrutiny that would have followed if the relationship between the petitioner's owner and the beneficiary had been revealed to DOL during the labor certification process. These facts are consistent with the allegation of fraud in the acquisition of the labor certification.

The issue in this matter is not whether the petitioner qualifies as a U.S. employer, as counsel framed it, but whether the petitioner has shown that the proffered position was opened to U.S. workers, rather than being created for, or reserved for, the petitioner's owner's spouse. Based on the evidence, this office finds that the job offer was not open to U.S. workers, that the labor certification was, therefore, obtained by fraud. Counsel's assertion that CIS is without authority to invalidate an approved labor certification is incorrect. 20 C.F.R. 656.30(d). Authority to invalidate labor certifications is delegated to CIS by DHS Delegation Number 0150.1(X), (effective March 1, 2003) and the labor certification in the instant case will be invalidated.

An additional issue is whether the beneficiary has the experience requisite to the proffered position. The beneficiary's September 8, 1995 employment verification letter, which states that she worked for Peachwear

⁵ As was noted above, the prior submissions signed by [REDACTED] include the Form ETA 750, signed on April 24, 2001; the Form I-140, signed on May 1, 2002; a letter signed on May 17, 2002, a Form G-28, Notice of Entry of Appearance, signed on May 22, 2002, and a letter dated October 1, 2005.

from February 1991 to August 1995, contradicted her initial statement on the Form ETA 750B that she worked for Peachwear from October 1988 to August 1995.

Further, the beneficiary's claim of employment for Peachwear from February 1991 or from October 1988 to August 1995 is contradicted by the beneficiary's statement, on the collateral Form G-325A, that she had been unemployed from March of 1993 to December 26, 2002, the date she signed that form.

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 visa petition. Further, the petitioner must resolve any inconsistencies in the record by independent objective evidence. Attempts to explain or reconcile such inconsistencies, absent competent objective evidence sufficient to demonstrate where the truth, in fact, lies, will not suffice. *Matter of Ho*, 19 I&N Dec. 582 (Comm. 1988).

In response to the service center's request for independent objective evidence, however, the beneficiary stated that both of her former employers are out of business and she is unable to locate any of the former employees. Although the beneficiary's statement may be plausible, it certainly does not qualify as independent objective evidence to overcome the evidence adverse to her claim of qualifying employment. The evidence submitted does not resolve the above inconsistencies.

This office finds that each of the bases set out above is good and sufficient cause, by itself, to revoke approval of the instant visa petition pursuant to Section 205 of the Act, 8 U.S.C. § 1155, which is set out above. The appeal will be therefore dismissed and approval of the petition will remain revoked for the above stated reasons, with each considered as an independent and alternative basis for revocation. In visa petition proceedings, the burden of proving eligibility for the benefit sought remains entirely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. Here, that burden has not been met.

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.

FURTHER ORDER: The AAO finds that the petitioner willfully concealed a material fact in an effort to mislead the DOL and thereby committed fraud in obtaining the instant labor certification, which labor certification is hereby invalidated.