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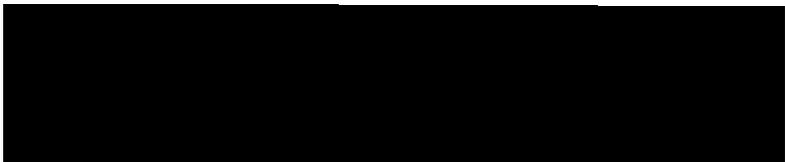
U.S. Department of Homeland Security
U.S. Citizenship and Immigration Services
Office of Administrative Appeals, MS 2090
Washington, DC 20529-2090



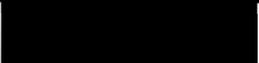
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FILE:



Office: VERMONT SERVICE CENTER

Date:

NOV 09 2009

EAC 03 177 53987

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:

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.

If you believe the law was inappropriately applied or you have additional information that you wish to have considered, you may file a motion to reconsider or a motion to reopen. Please refer to 8 C.F.R. § 103.5 for the specific requirements. 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 \$585. Any motion must be filed within 30 days of the decision that the motion seeks to reconsider or reopen, as required by 8 C.F.R. § 103.5(a)(1)(i).

Perry Rhew
Chief, Administrative Appeals Office

DISCUSSION: The employment-based Immigrant Petition for Alien Worker (Form I-140) was initially approved by the Director, Vermont Service Center. Following a district office interview and a review of the record, the director subsequently served the petitioner with Notice of Intent to Revoke (NOIR) the approval of the petition. In the Notice of Revocation (NOR), the director revoked the approval of the Immigrant Petition for Alien Worker (Form I-140). The petitioner filed motion to reconsider the revocation. The director determined that the grounds to revoke the petition's approval had not been overcome and reaffirmed the previous decision. The matter is now before the Administrative Appeals Office (AAO) on appeal. The director's decision to revoke the petition's approval will be affirmed.

The I-140 petitioner, [REDACTED] federal employer identification number (FEIN) [REDACTED] provides computer consulting services. It sought to employ the beneficiary permanently in the United States as a fine art instructor. As required by statute, the petition was accompanied by an ETA 750, Application for Alien Labor Certification approved by the Department of Labor. The name of the employer identified on Item 4 of the ETA 750 is [REDACTED]. For the reasons explained below, the AAO concludes that the petitioner failed to establish that Lancaster Software & Service has been a *bona fide* employer either as a sole proprietorship or a corporation.¹

The AAO maintains plenary power to review each appeal on a *de novo* basis. 5 U.S.C. § 557(b) ("On appeal from or review of the initial decision, the agency has all the powers which it would have in making the initial decision except as it may limit the issues on notice or by rule."); *see also, Janka v. U.S. Dept. of Transp., NTSB*, 925 F.2d 1147, 1149 (9th Cir. 1991). The AAO's *de novo* authority has been long recognized by the federal courts. *See, e.g. Dor v. INS*, 891 F.2d 997, 1002 n. 9 (2d Cir. 1989).

Section 204(a)(1)(F) of the Act, 8 U.S.C. § 1154(a)(1)(F), provides that "[a]ny employer desiring and intending to employ within the United States an alien entitled to classification under section . . . 203(b)(1)(B) . . . of this title may file a petition with the Attorney General [now Secretary of Homeland Security] for such classification." (Emphasis added.)

¹ It is well settled that a corporation is a distinct legal entity from its owners or individual shareholders. *See* 18 Am. Jur. 2d *Corporations* § 44 (1985). *See also, Matter of Tessel*, 17 I&N Dec. 631 (Act. Assoc. Comm. 1980); *Matter of Aphrodite Investments Limited*, 17 I&N Dec. 530 (Comm. 1980). Unlike a corporation, a sole proprietorship is not considered a distinct legal entity apart from the individual owner. *See Matter of United Investment Group*, 19 I&N Dec. 248, 250 (Comm. 1984). If an individual operates a business as a sole proprietorship, the Internal Revenue Service (IRS) requires that a separate Schedule C "Profit or Loss from Business" summarizing the income and expenses of the business be filed with the annual individual income tax return.

Section 212(a)(5)(A)(i) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1182(a)(5)(i) provides that 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-

- (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.

The petitioner must establish that its job offer to the beneficiary is a realistic one and that the opportunity is a *bona fide* job offer. Because the filing of an ETA 750 labor certification application establishes a priority date for any immigrant petition later based on the ETA 750, the petitioner must establish that the job offer was realistic as of the priority date and that the offer remained realistic for each year thereafter, until the beneficiary obtains lawful permanent residence. The filing date or priority date of the petition is the initial receipt in the DOL's employment service system. *See* 8 C.F.R. § 204.5(d); *Matter of Wing's Tea House*, 16 I&N 158 (Act. Reg. Comm. 1977). Here, the Form ETA 750 was accepted for processing on April 19, 2001.²

The record indicates that the I-140 was initially filed on May 19, 2003. It was approved on July 22, 2004. Based on the concurrently filed Application to Register Permanent Residence or Adjust Status (Form I-485), the beneficiary sought employment authorization and was first approved for such employment on June 26, 2003.

On January 25, 2006, the director concluded that the I-140 was approved in error and issued a notice of intent to revoke the petition noting that based on the adjustment interview held at the district office on September 9, 2005, the petitioning entity may not qualify as a *bona fide* petitioner. The director enclosed a memorandum from the Miami district office which observed that the interview established that the I-140 petitioner, [REDACTED], was the beneficiary's brother-in-law. He had been employed as a computer programmer since 2000 and

²The *bona fides* of the job offer including such elements as the petitioner's ability to pay the proffered wage and the beneficiary's qualifications for the position are essential elements in evaluating whether a job offer is realistic. *See Matter of Great Wall*, 16 I&N Dec. 142 (Acting Reg. Comm. 1977); *see also* 8 C.F.R. § 204.5(g)(2). It is noted that the employment verification letter submitted on behalf of the beneficiary's two years of experience in the certified job as required by the ETA 750 was not submitted with a certified English translation in compliance with 8 C.F.R. § 103.2(b)(3) so it is not clear if the beneficiary's experience met the terms of the ETA 750. It is noted that employment must be offered as permanent, full-time work. 20 C.F.R. § 656.3(1).

received a substantial income which was reported on Wage and Tax Statements (W-2s) and reported as wages on Form 1040. His individual tax returns also reflected self-employment income on Schedule C for computer consulting in the range of \$3,000 per year. The memorandum states that the applicant had been requested to provide evidence of the company's viability, referring to [REDACTED] which consisted of such documents as articles of incorporation, licenses, sales receipts, accounts receivables, etc. Applicant's counsel responded that such items did not exist because the petitioner is not a company. The memorandum states that the 2003 and 2004 income tax returns for [REDACTED] reflected no gross receipts, sales, income or transactions to support that there is business being conducted. In this respect, the AAO notes that the record contains a Form 1120, U.S. Corporation Income Tax Return filed by [REDACTED] [REDACTED] indicating that it was incorporated on October 29, 1999, and uses the federal employer identification number (FEIN) of [REDACTED]. It reflects no gross sales, \$606 in taxes and licenses, \$358 in other deductions and -\$964 in net income. Schedule L net current assets are partially legible as \$220.³ A 2003 Massachusetts state Form 355, Business or Manufacturing Corporation Excise Return indicates that [REDACTED] reported no gross receipts or sales, \$350 in other deductions, and net income of -\$931. Net current assets in the form of cash are reflected as \$1,507.⁴ These are the only two income tax returns submitted for the corporation of [REDACTED].

³ Based on this federal tax return, [REDACTED] is a C corporation. On a Form 1120, the petitioner's net income is found on line 28 (taxable income before net operating loss deduction and special deductions). USCIS uses a corporate petitioner's taxable income before the net operating loss deduction as a basis to evaluate its ability to pay the proffered wage in the year of filing the tax return because it represents the net total after consideration of both the petitioner's total income (including gross profit and gross receipts or sales), as well as the expenses and other deductions taken on line(s) 12 through 27 of page 1 of the corporate tax return. Because corporate petitioners may claim a loss in a year other than the year in which it was incurred as a net operating loss, USCIS examines a petitioner's taxable income before the net operating loss deduction in order to determine whether the petitioner had sufficient taxable income in the year of filing the tax return to pay the proffered wage.

Net current assets are the difference between a firm's current assets and current liabilities. Besides net income and as an alternative method of reviewing a petitioner's ability to pay a proposed wage, USCIS will examine a petitioner's net current assets. It represents a measure of liquidity during a given period and a possible resource out of which the proffered wage may be paid for that period. Year-end current assets and current liabilities are shown on Schedule L of the Form 1120. Here, current assets are shown on line(s) 1 through 6 and current liabilities are shown on line(s) 16 through 18. If a corporation's end-of-year net current assets are equal to or greater than the proffered wage, the ability to pay the proffered wage may be shown using these net current assets.

⁴ This figure is taken from page 2, Schedule A, line(s) 16 and 17 of the state return.

⁵The name [REDACTED] also was identified as [REDACTED].

The memorandum continues to state that payroll records were submitted indicating that [REDACTED] employed the beneficiary since February 4, 2005. The beneficiary had been requested to present evidence of her work while employed by [REDACTED] and submitted a copy of a computer generated document called “[REDACTED]” No other evidence related to the sale, advertisement, marketing or incurred expenses were provided that related to this production or other projects.

The memorandum also determined that the beneficiary and her husband were well established in Florida, owning their home and rental property with the beneficiary’s husband employed in the hotel and real estate industry. According to the memorandum, the beneficiary claimed to have been unemployed until February 2005. Given these facts, and the fact that the beneficiary had possessed employment authorization since June 2003, it failed to demonstrate the beneficiary’s intent to work in her field of expertise, or for the sponsoring petitioner.

Counsel responded to the NOIR on February 23, 2006, by asserting that there is no prohibition for employers to sponsor their relatives on I-140 petitions. He also claims that an Affidavit of Support, (Form I-864) must be executed if a family member is sponsored, but family members do not include sisters-in-law. Relative to the petitioner’s occupation, counsel submits copies of contracts under which counsel states that the petitioner [REDACTED] operates as both an independent contractor or as an employee. Counsel also states that the Miami District Office is correct in stating that the beneficiary does not desire to work in Massachusetts and will work for the petitioner in Florida as a consultant. Counsel asserts that the beneficiary ported her I-485 application in 2005 under the provisions of the “American Competitiveness in the Twenty-First Century Act” (AC21) (Public Law 106-313), so the job opportunity is in Florida not Massachusetts.⁶ Counsel also states that the

[REDACTED]. Both use the same FEIN. The consulting services that the petitioner’s owner performed and listed on his individual Form 1040, Schedule C, is not referenced by a FEIN. It is noted that the regulation at 20 C.F.R. § 656.3(1) defines an employer as a person, association, firm, or a corporation that has a current location in the United States to which U.S. workers may be referred for employment. Each employer must possess a valid FEIN. It is additionally noted that a corporation is a separate and distinct legal entity from its owners and shareholders, *See Matter of Aphrodite Investments, Ltd.*, 17 I&N Dec. 530, 531 (Comm. 1980).

⁶ It is noted that the record contains only a notice from the beneficiary relating to AC21 dated February 20, 2006 not 2005. This assertion was not pursued on motion or on appeal and will not be further addressed. It is noted that the pertinent section of AC 21, Section 106(c)(1), amended section 204 of the Act, codified at section 204(j) of the Act, 8 U.S.C. § 1154(j) provides:

Job Flexibility For Long Delayed Applicants For Adjustment Of Status To Permanent Residence. - A petition under subsection (a)(1)(D) [since redesignated section 204(a)(1)(F)] for an individual whose application for adjustment of status pursuant to section 245 has been filed and remained adjudicated for 180 days or more shall remain valid with respect to a

job was advertised in Florida and intended to be in Florida, however the ETA 750 does not list work sites other than in Massachusetts. It is incumbent on 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, in fact, lies, will not suffice. *Matter of Ho*, 19 I&N Dec. 582, 591-592 (BIA 1988). Counsel responds to the memorandum's observation that the beneficiary did not work for the petitioner until February 2005 by arguing that there is no requirement to work for the employer until permanent residency is granted.

Finally, as to the petitioner's status as a corporation, counsel states that the petitioner is not a corporation because in 2001, he changed the way he was doing business from a corporation to a "doing business as." Counsel states that [REDACTED] is "still registered with the petitioner, as it is still a company of which he is a sole proprietor; it is no longer a corporation. Thus the suffix 'Inc.' has been removed from all of the company's letterhead, as well as any of the documents pertaining to the petitioner." Counsel further asserts that as the petitioner's services are conducted through contracts with companies who market the petitioner's services to third parties, he does not maintain receipts, accounts receivables, advertisements, or credit card slips. Counsel addresses the district office's observation that [REDACTED] reported only \$3,000 in self-employment by maintaining

new job if the individual changes jobs or employers if the new job is in the same or a similar occupational classification as the job for which the petition was filed.

Section 212(a)(5)(A)(iv) of the Act, 8 U.S.C. § 1182(a)(5)(A)(iv), states further:

Long Delayed Adjustment Applicants- A certification made under clause (i) with respect to an individual whose petition is covered by section 204(j) shall remain valid with respect to a new job accepted by the individual after the individual changes jobs or employers if the new job is in the same or a similar occupational classification as the job for which the certification was issued.

Adjustment of status may only be granted "by virtue of a valid visa petition approved in [the alien's] behalf." 8 C.F.R. § 245.1(g)(2). Filing for benefits under AC21 does not make the portability provision relevant to the adjudication of the underlying visa petition. Rather, the statute and regulations prescribe that aliens seeking employment-based preference classification must have an immigrant visa petition approved on their behalf before they are even eligible for adjustment of status. Section 245(a) of the Act, 8 U.S.C. § 1255(a); 8 C.F.R. § 245.1(g)(1), (2). If the director properly revokes the petition, there is no basis of the beneficiary to seek benefits pursuant to AC21.

that sole proprietors can use income and assets from any source to prove the ability to pay the certified wage.

On April 27, 2006, the director revoked the I-140's approval pursuant to section 205 of the Act, 8 U.S.C. § 1155. The director found that counsel's arguments raised in the response to the NOIR were insufficient to overcome the inconsistencies presented in the record and by the Miami district office. The director found that the evidence did not support the conclusion that the petitioner was a *bona fide* U.S. employer based on the 2003 and 2004 corporate tax returns, which failed to indicate that the company had generated any gross receipts or transactions showing that any business was conducted. The director reiterated the observation that the beneficiary was the sister-in-law of the petitioner and although payment of funds to the beneficiary was suggested in 2005 by the payroll records submitted, it failed to demonstrate the beneficiary's *bona fide* intent to commence permanent employment with the petitioner.

Counsel filed a motion to reconsider the revocation of the petition asserting the director's "egregious negligence" and abuse of discretion and generally reiterates the assertions stated in his response to the notice of intent to revoke. Counsel maintains that the petitioner is not a company but a sole proprietor and reiterates that the sole proprietor's 2003 and 2004 tax returns were submitted and that the petitioner chose to abandon the corporate mode of doing business in favor of the sole proprietor structure.

On September 5, 2006, the director responded to counsel's motion to reconsider the revocation of the petition's approval by affirming the previous decision to revoke the petition's approval. Counsel subsequently appealed this decision asserting that the director's conclusions were erroneous, adopting his arguments previously submitted in response to the director's NOIR and on motion.

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).

At the outset, it is noted that the I-140 petitioner, "[REDACTED]" as a sole proprietorship, has not clearly established its status as an employer. It is not supported by a valid labor certification identifying "[REDACTED]" as the employer. Rather, the ETA 750 identifies only "[REDACTED]" as the employer in Item 4 of the ETA 750 with the work to be performed at "[REDACTED]" in Lancaster, Massachusetts, 01523. Documentation contained in the record indicates that "[REDACTED]" has been registered as a corporation in Massachusetts since 2000, contrary to counsel's assertions that this business structure was abandoned in 2001. The following inconsistencies are revealed by the record:

A. Part 1 of the I-140 states that the IRS tax number belonging to [REDACTED] is [REDACTED]. This FEIN number cannot be verified in the relevant state electronic database.⁷ Further, this number does not appear on any of the Schedule C, Profit or Loss From Business (Sole Proprietorship) included in [REDACTED] individual income tax returns submitted to the record for 2002, 2003, or 2004. Additionally, the business name of [REDACTED] does not appear on any of the Schedule(s) C describing the sole proprietorship operated by [REDACTED] that was provided to the record. Also, the statement that the I-140 petitioner, [REDACTED] changed [REDACTED] in 2001 from a corporation to a sole proprietorship and abandoned the corporate mode is contradicted by the state public database, which reflects that annual reports have been filed for [REDACTED] throughout the years with the most recent filing occurring March 15, 2009 for the year 2008. [REDACTED] is shown as the president, treasurer, and secretary during this period. Public records also reveal that on March 16, 2000, the name was changed from [REDACTED]. The old FEIN number for [REDACTED] was [REDACTED].

B. The abandonment of corporate status for [REDACTED] is also not supported by copies of contracts provided with counsel's response to the director's NOIR. They were summarized by [REDACTED] in an e-mail contained in the record as either representing a W-2 income as an employee or a "corporation-to-corporation" arrangement. Of the thirteen listings by [REDACTED] in the e-mail, he claims that four represent the corporation-to-corporation arrangement whereby [REDACTED] engages in a contract with the clients." Only two of the four copies of corporation-to-corporation contracts were provided. As shown by these documents, the first self-described corporation-to-corporation agreement referred to by [REDACTED] is one executed on August 1, 1998 between [REDACTED] and [REDACTED] and one executed on February 1, 2004 between [REDACTED] and [REDACTED]. Although the 1998 contract pre-dates the incorporation date of [REDACTED] the 2004 contract clearly establishes that [REDACTED] did not abandon corporate status of [REDACTED]. It is observed that the 2004 Form 1120 corporate tax return provided to the record does not reflect any specified gross or net income to [REDACTED] from [REDACTED].

It is additionally determined that documentation reflecting that the corporate mode was not abandoned in 2001 is indicated by the submission of copies of [REDACTED] [REDACTED] 2004 federal tax return, its Massachusetts 2003 Form 355 and a copy of its Form 941, Employer's Quarterly Federal Tax Return for 2005. This is also part of another unexplained discrepancy. The payroll records suggest that the payor of \$4,000 in

⁷ See <http://corp.sec.state.ma.us/corp/corptest/CorpSearchSummary.asp?ReadFromDB+True...> (Accessed 9/29/09).

⁸ See <http://corp.sec.state.ma.us/corp/corptest/CorpSearchSummary.asp?ReadFromDB+True...> (Accessed 9/29/09).

wages to the beneficiary in the first quarter of 2005 was the I-140 petitioner. However, also submitted is the corresponding copy of [REDACTED]'s federal Form 941, Employer's Quarterly Federal Tax Return with a state tax return attachment that identifies the beneficiary as the recipient of \$4,000 in wages from [REDACTED] for the first quarter of 2005. The corporate entity, [REDACTED] is shown as the payor, not [REDACTED].

- C. It is further noted that [REDACTED] as an individual doing business under a fictitious business name ("doing business as"), namely [REDACTED] a sole proprietorship as claimed by counsel, according to local Lancaster, Massachusetts records,⁹ failed to comply with state law relating to registering his sole proprietorship business of [REDACTED] during any of the relevant years. As an individual who is doing business under a name other than his or her own name, he must file a business certificate in the city or town hall where the business is to be located, or by incorporating with the secretary of the Commonwealth. *See* Massachusetts General Law Chapter 110, Section 5 (<http://www.sec.state.Ma.us/cis/ciscig/a/a18a19.htm>). As indicated above, he filed yearly reports with the Secretary of the Commonwealth for the corporation of [REDACTED] but failed to register Lancaster [REDACTED] as a fictitious business name.

It is incumbent on 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, in fact, lies, will not suffice. Doubt cast on any aspect of the petitioner's proof may, of course, lead to a reevaluation of the reliability and sufficiency of the remaining evidence offered in support of the visa petition. *Matter of Ho*, 19 I&N Dec. 582 at 591-592. Given the above, we do not conclude that the ETA 750 was originally sought by [REDACTED] but as [REDACTED], a corporation. A corporation for which no tax returns were submitted for 2001 and 2002 and in which the federal tax corporate tax return for 2004 and the state tax return for 2003 reflected minimal net current assets, miscellaneous other minimal deductions, and no gross revenue at all. Although still actively registered as a corporation with Massachusetts, the lack of declared business revenue fails to support the conclusion that this corporation may be considered a *bona fide* employer pursuant to Section 204(a)(1)(F) of the Act, beginning as of the priority date set forth on the ETA 750. Counsel's unsupported assertions relating to the abandonment of corporate status by [REDACTED] do not constitute evidence and are not supported by the record of proceedings or available public records. *See Matter of Obaigbena*, 19 I&N Dec. 533, 534 (BIA 1988); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980).

Further, although counsel is correct in stating that a sole proprietor may utilize a variety of sources to demonstrate his ability to pay the proffered wage, the director's revocation of the petition's

⁹(Accessed by telephone on 9/29/09).

approval was not based on ability to pay the proffered wage, but on the lack of *bona fides* of the intended U.S. employer. We note that ability to pay has not been established even if [REDACTED] was considered to be a sole proprietorship. As noted above, the operation of the sole proprietorship was described on Schedule C of Profit and Loss from Business (Sole Proprietorship) that was included on his respective individual tax returns for 2002, 2003, and 2004. His respective gross receipts never exceeded \$3,325, [REDACTED] was not identified as his business name and as stated above, the FEIN stated on the I-140 does not appear on any of the Schedule Cs for 2002-2004. It is noted that even if [REDACTED] was considered to be the same business as the sponsoring employer of the beneficiary on the ETA 750, no sole proprietorship business income was reported on the 2001 individual tax return and no Schedule C was included with the 2001 return. This demonstrates that even if considered as a sole proprietorship, [REDACTED] failed to demonstrate that it conducted any business transactions in 2001. It fails to establish that [REDACTED] identified on the I-140, could be considered as a viable *bona fide* employer as of the priority date of April 19, 2001. It is finally noted that, until 2005, when payroll records were submitted suggesting that the beneficiary was paid wages by [REDACTED] there is no evidence in the record that [REDACTED] employed and paid wages to any other employee or that it would need a full-time fine arts instructor.¹⁰

Counsel also misconstrues the use of the Affidavit of Support (Form I-864). The Affidavit of Support is utilized at the time a beneficiary adjusts or consular processes an approved immigrant visa to provide evidence to USCIS that the beneficiary is not inadmissible pursuant to section 212(a)(4) of the INA as a public charge. The beneficiary in this matter has not advanced to a consular processing or adjustment of status phase of the proceeding. The fact that the beneficiary is the sister-in-law of [REDACTED] is certainly relevant to this adjudication and is not restricted to the definitions set forth in 8 C.F.R. § 213a.1. 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). 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*, 2000-INA-93 (BALCA May 15, 2000).

It is noted that when evaluating employment-based preference petitions, USCIS will look to the intent of the alien to take the job offered and the intent of the employer to hold the position open for the alien. *See Jang Man Cho v. INS*, 669 F.2. 936 (4th Cir. 1982). It is further noted that the phrase “ ‘for the purpose of performing,’ ” in section 212(a)(5)(A)(i) of the Act (formerly section 212(a)(14) of the Act), clearly indicates that an immigrant alien within the contemplation

¹⁰ The job duties as listed in the ETA 750 include preparing courses in art instruction, including lesson plans in achieving course goals; selecting methods to present art appreciation and skills; describing world class museums for step-by-step analysis of specific art movements; and using inter-active media to communicate with students.

of section 212(a)(14) must establish a *bona fide* intent to engage in the certified position as set forth on the ETA 750 A. See *Matter of Semerjian*, 11 I&N Dec. 751 (Reg. Comm. 1966); *Matter of Izdebska*, 12 I&N 54 (Reg. Comm. 1966).

In this case, the director noted that the beneficiary was well-established in Florida with her husband and had no intent to work in Massachusetts where the job was originally certified to be located. It was also noted that the beneficiary remained unemployed until February 2005,¹¹ when she was allegedly employed by [REDACTED] in Florida. Payroll records and a copy of a federal quarterly tax return for 2005 were submitted in support of her employment. Additionally, as noted above, a copy of her Brazilian Folklore document was provided as an example of her work performed for [REDACTED]. However, the record does not contain any record of an invoice or existence of a client who had ordered such work from [REDACTED].¹² As the record currently stands, we cannot conclude that the beneficiary lacked the intent to accept full-time employment from the petitioner, however, as explained above, we concur with the director's conclusion that the petitioner has not established that it has been a *bona fide* employer. For this reason, the job offer cannot be considered as a *bona fide* job offer.

In view of the foregoing, the AAO concludes that the director properly revoked the approval of the petition. 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 at 590 (citing *Matter of Estime*, 19 I&N 450 (BIA 1987)). In this case, the evidence contained in the record at the time the decision was rendered, warranted such denial.

¹¹ Contrasting to counsel's assertion that portability under AC21 was invoked in 2005, the only notice of portability under AC21 that is contained in the record is dated February 20, 2006, subsequent to the NOIR issued on January 25, 2006.

¹² Several of the contracts submitted to show the petitioner's ongoing work state that the services will be performed only by the signer ([REDACTED]) unless otherwise agreed. Further, it is not clear that the petitioner's contracts required any services for a fine arts instructor. It is also not clear the petitioner would need a fine arts instructor on a full-time basis. See 20 C.F.R. § 656.3.

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.