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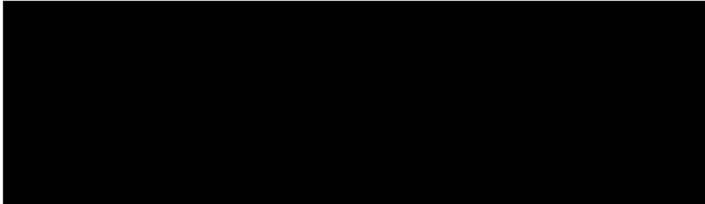
U.S. Department of Homeland Security
U. S. Citizenship and Immigration Services
Office of Administrative Appeals MS 2090
Washington, DC 20529-2090



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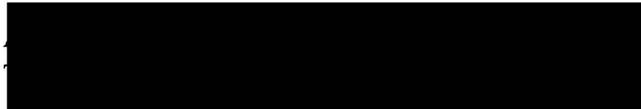
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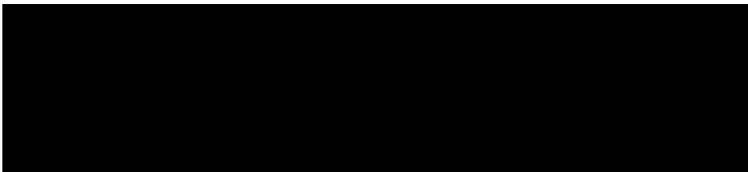
FILE: WAC 05 206 50847 Office: CALIFORNIA SERVICE CENTER Date: FEB 17 2010

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 preference visa petition was denied by the Director, California Service Center, and is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner is a commercial/industrial air conditioning and refrigeration business. It seeks to employ the beneficiary permanently in the United States as an air conditioning technician. As required by statute, the petition is accompanied by a labor certification application approved by the United States Department of Labor (DOL). The director determined that the petitioner had not established that the beneficiary is qualified to perform the duties of the proffered position with four years of qualifying employment experience. The director denied the petition accordingly.

The record shows that the appeal is properly filed and 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 February 11, 2006 denial, the primary issue in this case is whether or not the petitioner has demonstrated that the beneficiary is qualified to perform the duties of the proffered position.

Section 203(b)(3)(A)(i) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(3)(A)(i), provides for the granting of preference classification to qualified immigrants who are capable, at the time of petitioning for classification under this paragraph, of performing skilled labor (requiring at least two years training or experience), not of a temporary nature, for which qualified workers are not available in the United States.

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). Here, the labor certification application was accepted on May 31, 2002.

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). The AAO considers all pertinent evidence in the record, including new evidence properly submitted upon appeal.¹

¹ The submission of additional evidence on appeal is allowed by the instructions to the Form I-290B, which are incorporated into the regulations by the regulation at 8 C.F.R. § 103.2(a)(1). The record in the instant case provides no reason to preclude consideration of any of the documents newly submitted on appeal. *See Matter of Soriano*, 19 I&N Dec. 764 (BIA 1988).

On appeal, counsel asserts that the beneficiary worked as a general manager and as an air conditioning technician during his employment with AIRCO USA (AIRCO) and Airtech International (Airtech). He states that the employment verification letters submitted with the petition and in response to the director's request for evidence (RFE) support his assertion. He states that the beneficiary's violation of his L-1 nonimmigrant status is an "irrelevant matter and should not impact the adjudication of the immediate case." Counsel notes that it is unclear how United States Citizenship and Immigration Services (USCIS) determined that the beneficiary was ineligible for a L-1 nonimmigrant visa, based on a finding that the employer had not established that the alien was principally employed either as an executive or a manager, while it has determined in the instant matter that the beneficiary's experience as an air conditioning technician and general manager with the L-1 employer "could not be accounted for in consideration of the immediate petition."

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, Mandany v. Smith*, 696 F.2d 1008, (D.C. Cir. 1983); *K.R.K. Irvine, Inc. v. Landon*, 699 F.2d 1006 (9th Cir. 1983); *Stewart Infra-Red Commissary of Massachusetts, Inc. v. Coomey*, 661 F.2d 1 (1st Cir. 1981). According to the plain terms of the labor certification, the applicant must have completed grade school and high school, and must have four years of experience in the job offered or four years of experience as a general manager/air conditioning technician.

The beneficiary set forth his credentials on the labor certification and signed his 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, he represented that he worked full-time as a general manager-air conditioning technician for Airtech International in South Africa from July 1995 to February 2000; and that he worked full-time as [REDACTED] in Newport Beach, California from August 2000 to the date he signed the Form ETA 750B on May 24, 2002. He does not provide any additional information concerning his employment background on that form.

The beneficiary entered the United States on August 17, 2000, in L-1A nonimmigrant status. On the initial Form I-129 petition filed by AIRCO on behalf of the beneficiary on May 26, 2000, the beneficiary's duties with Airtech were described as follows: "General Manager managing subcontractors and technical staff providing air condition installation and maintenance service for light commercial and residential customers."² Regarding the beneficiary's proposed duties for AIRCO, the Form I-129 stated that the beneficiary will serve as "President and General Manager managing business

² The subsequent petitions to extend the beneficiary's L-1A nonimmigrant status contained a similar description of his duties with Airtech International.

operations including subcontractors, technical staff and other personnel providing air condition installation and maintenance service for industrial, commercial and residential customers.”³

In a cover letter accompanying the initial Form I-129 petition filed by AIRCO on behalf of the beneficiary,⁴ AIRCO stated that the beneficiary:

has been providing the managerial services responsible for the growth experienced since [Airtech’s] inception in 1995. The services he has been providing include both executive and managerial duties. He manages and oversees the activities of subcontractors and workers engaged in fabricating, installing, and repairing air-conditioning systems in residential and commercial buildings. He resolves problems to maintain production schedule by utilizing his managerial and technical background and experience. He has the discretionary right to hire, promote, recommend salary increases and fire employees and subcontractors managed by him.

Regarding the beneficiary’s proposed duties for AIRCO, the cover letter accompanying the initial Form I-129 petition filed by AIRCO on behalf of the beneficiary stated:⁵

The beneficiary will hold the position of President and general manager for [AIRCO]. The duties and responsibilities of the position beneficiary will hold are very similar to those performed in South Africa and will also include the following managerial functions: Oversee the complete business operation of the subsidiary company, including accounting, finance, operations, marketing, planning, development and distribution as well as the projected expansion of operations. He will have complete authority and responsibility to manage and direct the ongoing U.S. business operation. He will continue to establish the policies for the corporation and will be responsible for budgets and spending.

Further, in an organizational chart submitted with the initial Form I-129 petition filed by AIRCO on behalf of the beneficiary, the beneficiary is shown as a general manager of Airtech International, overseeing technical staff and subcontractors. He is also shown as the President and General Manager of AIRCO, overseeing the project manager, subcontractors and technical staff.⁶

³ The subsequent petitions to extend the beneficiary’s L-1A nonimmigrant status contained a similar description of his duties with AIRCO.

⁴ The subsequent petitions to extend the beneficiary’s L-1A nonimmigrant status contained cover letters with similar descriptions of his duties with Airtech.

⁵ The subsequent petitions to extend the beneficiary’s L-1A nonimmigrant status contained cover letters with similar descriptions of his duties with AIRCO.

⁶ Two subsequent petitions to extend the beneficiary’s L-1A nonimmigrant status contained a similar organizational chart.

On January 14, 2005, the director denied the third L-1A nonimmigrant extension request filed by AIRCO on behalf of the beneficiary, because AIRCO had not demonstrated that the beneficiary would be employed primarily in a qualifying managerial or executive capacity. The director denied a subsequent motion to reopen/reconsider filed by AIRCO. In a letter dated February 9, 2005, submitted with the motion, the beneficiary indicated that he enrolled in several classes in the United States during his L-1A tenure, including residential HVAC construction, HVAC mechanical and electrical, control systems, and mechanical compressors. He further stated that he is pursuing a bachelor's degree in mechanical engineering, that he is certified to work with low-pressure ammonia refrigeration systems, and that "[d]uring the past few years, I have worked as a sub-contractor for various established HVAC companies" to establish relationships with potential clients.

The regulation at 8 C.F.R. § 204.5(1)(3) provides:

(ii) *Other documentation*—

(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.

On appeal, counsel submits a letter dated March 5, 2006, from [REDACTED] of [REDACTED] in South Africa. The letter states that CPW acquired Airtech; that the beneficiary was the [REDACTED] for five years, and that the beneficiary worked full-time for Airtech from July 1995 to February 2000 as [REDACTED] as the company's primary air conditioning technician. The letter does not indicate how [REDACTED] acquired knowledge of the beneficiary's employment, as he was not the beneficiary's trainer or employer during the period from July 1995 to February 2000. *See* 8 C.F.R. § 204.5(1)(3).

Further, on appeal, counsel submits a letter dated February 24, 2006, from [REDACTED] of [REDACTED] in South Africa. The letter states that the beneficiary performed services to [REDACTED], and primary air conditioning technician from July 1995 to February 2000, for both commercial and industrial air-conditioning projects. The letter does not indicate the frequency with which the beneficiary performed such services. Based on the other letters submitted on appeal, the services do not appear to have been performed full-time.

Counsel also submits a letter dated March 1, 2006, from [REDACTED] stating that he was the branch manager of Fidelity Cash Management in South Africa from July 1995 to February 2000, and that the beneficiary served as lead air conditioning technician, owner and general manager of Airtech in connection with the provision of services to Fidelity Cash Management from July 1995 to February 2000. The letter does not indicate the frequency with which the beneficiary performed such services. Based on the other letters submitted on appeal, the services do not appear to have been performed full-time.

Counsel submits two letters on appeal from [REDACTED] on appeal. One letter, dated March 3, 2006, from [REDACTED] states that the beneficiary, in his capacity as owner, manager and lead technician of Airtech, provided air conditioning services to SBV from July 1995 to February 2000. A letter dated February 24, 2000, from [REDACTED], states that the beneficiary worked for SBV from July 1, 1995 to February 28, 2000.⁷ The letter does not indicate the frequency with which the beneficiary performed such services. Based on the other letters submitted on appeal, the services do not appear to have been performed full-time.

Counsel also submits a letter on appeal dated February 17, 2006, from [REDACTED] of [REDACTED] in South Africa, stating that the beneficiary, working for Airtech, installed, repaired, serviced and maintained the air-conditioning units for [REDACTED] from July 1995 to February 2000. The letter does not indicate the frequency with which the beneficiary performed such services. Based on the other letters submitted on appeal, the services do not appear to have been performed full-time.

In pursuit of his L-1 nonimmigrant visa, the beneficiary represented that his duties for Airtech were solely executive and managerial and nature. Now, in pursuit of his immigrant visa, the beneficiary claims that he, in fact, worked as an airconditioning technician, in addition to serving as general manager, during his tenure at Airtech. Further, in pursuit of his L-1 nonimmigrant visa, the beneficiary represented that he served as [REDACTED]. Now, in pursuit of his immigrant visa, the beneficiary claims that he, in fact, worked as an airconditioning technician, in addition to serving as [REDACTED] during his tenure at AIRCO. It is incumbent upon the petitioner to resolve any inconsistencies in the record by independent objective evidence. Any attempt to explain or reconcile such inconsistencies will not suffice unless the petitioner submits competent objective evidence pointing to where the truth lies. *Matter of Ho*, 19 I&N Dec. 582, 591-92 (BIA 1988). 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. *Id.* at 591. The petitioner has not resolved the inconsistencies between his L-1 nonimmigrant visa petitions and the instant petition. Furthermore, evidence that the petitioner creates after USCIS points out the deficiencies and inconsistencies in the petition will not be considered independent and objective evidence. Necessarily, independent and objective evidence

⁷ It is unclear how [REDACTED] could confirm the beneficiary's future employment, as the letter is dated February 24, 2000 and confirms the beneficiary's employment through February 28, 2000.

would be evidence that is contemporaneous with the event to be proven and existent at the time of the director's notice.

Counsel also submits in a supplemental submission to the AAO two additional letters in an attempt to verify the beneficiary's prior employment. The first letter, dated July 11, 2006, from [REDACTED] of Climatron Air Conditioning in South Africa, states that the beneficiary purchased air conditioning and refrigeration materials from Climatron Air Conditioning between July 1995 and February 2000. The second letter, dated July 13, 2006, from [REDACTED] of AutoAirCon in South Africa, states that the beneficiary purchased automotive air conditioning equipment and supplies from AutoAirCon between July 1995 and February 2000. Neither letter verifies the beneficiary's four years of experience in the proffered job or as a general manager/air conditioning technician as required by the labor certification application.

Thus, the AAO affirms the director's decision that the preponderance of the evidence does not demonstrate that the beneficiary acquired four years of experience in the job offered or four years of experience as a general manager/technician from the evidence submitted into this record of proceeding. The petitioner has not demonstrated that the beneficiary is qualified to perform the duties of the proffered position.

Beyond the decision of the director, the petitioner has not established that it has made a *bona fide* job offer to the beneficiary.⁸ The AAO issued a Notice of Derogatory Information (NDI) to the petitioner on July 28, 2008, stating, in part:

Documentation within the record of proceeding, as well as contained in the L-1 filings on behalf of the beneficiary, show that the beneficiary had a close relationship with the petitioner's management either through marriage, a long-standing business financial relationship, or through friendship.

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."

Further, *Matter of Silver Dragon Chinese Restaurant*, 19 I&N Dec. 401, 406 (Comm. 1986), provides:

⁸ An application or petition that fails to comply with the technical requirements of the law may be denied by the AAO even if the Service Center does not identify all of the grounds for denial in the initial decision. See *Spencer Enterprises, Inc. v. United States*, 229 F. Supp. 2d 1025, 1043 (E.D. Cal. 2001), *aff'd*, 345 F.3d 683 (9th Cir. 2003); see also *Dor v. INS*, 891 F.2d 997, 1002 n. 9 (2d Cir. 1989)(noting that the AAO reviews appeals on a *de novo* basis).

An occupational preference petition may be filed on behalf of a prospective employee who is a shareholder in the corporation. The prospective employee's interest in the corporation, however, is a material fact to be considered in determining whether the job being offered was really open to all qualified applicants. A shareholder's concealment, in labor certification proceedings, of his or her interest in the petitioning corporation constitutes willful misrepresentation of a material fact and is a ground for invalidation of an approved labor certification under 20 CFR 656.30(d)(1986).

If the petitioner did not reveal the relationship to Department of Labor ("DOL"), then the bona fides of the position may be in question.

The secretary of the beneficiary's L-1 employer shares the same surname, [REDACTED] as the president of the I-140 petitioning organization.¹⁰ Further, information contained in the record shows that the secretary's maiden name was [REDACTED] the same as the beneficiary's surname. Therefore, it appears that the beneficiary is related to the petitioner's owners through marriage. Further, the beneficiary provided a letter to document his experience in South Africa from an individual with the surname [REDACTED]

Additionally, the beneficiary's L-1 employer, of which he owned 49%, essentially operated in connection with the I-140 petitioning organization. The family relationship and close operation of the two companies suggest that the two companies were essentially the same entity. Contained within the beneficiary's L-1 filing (WAC-01-128-51084) are "Minutes of Directors' Meeting Between [REDACTED] & [REDACTED] dated March 12, 2001. At the meeting were [REDACTED] and [REDACTED] for [REDACTED] [REDACTED] the I-140 petitioner, and the beneficiary and [REDACTED] for [REDACTED] [REDACTED], the beneficiary's L-1 petitioner. The minutes provide that:

Whereas, an offer was put forth from [REDACTED], to [REDACTED] to amalgamate and the following would be adopted:

1. [REDACTED] is to run as a separate entity to A.R.S.
2. Airco would cede 30% of its profit to A.R.S.
3. A.R.S. would undertake all secretarial and administrative work.
4. Accounting books and financials etc., would be done independently.
5. Airco will undertake to manage the staff and work teams.
6. Airco undertakes to subcontract 80% of the work to A.R.S.

⁹ Records further reflect that the beneficiary's L-1 employer employed a second individual with the surname [REDACTED]

¹⁰ Information contained in the record shows that the I-140 petitioner employs several other individuals with the surname [REDACTED] so that it appears to be a small family-run business.

According to the L-1 petitioner's tax returns, the beneficiary was 49% owner of the L-1 petitioner. As part owner, his business "amalgamate[d]" with the I-140 petitioning organization to an extent that they operated as one organization. As one organization, it would raise an issue whether the beneficiary would therefore be considered a part owner of the I-140 petitioner, or whether A.R.S. undertook to sponsor the beneficiary as a matter of convenience to the beneficiary, or whether the two companies are substantially entwined and A.R.S. cannot function without the beneficiary. Therefore, the close relationship should have been revealed to DOL. *See Hall v. McLaughlin*, 864 F.2d 868 (D.C. Cir. 1989) (where labor certification found invalid where the husband beneficiary owned 50% of the petitioning organization).¹¹ Further, a company payroll printout "401(K) report," related to the petitioner's IRS defined tax-qualified deferred compensation plan, contained within the I-140 petition filing notes that A.R.S. Air Conditioning Services had the beneficiary listed on their report as an employee with a hire date of July 16, 2001. The beneficiary was authorized to work for Airco U.S.A. based on the L-1 Petition filed and approved for that time period. This documentation raises the issue of who the beneficiary's actual employer was, and whether he properly maintained his nonimmigrant status. *See* 8 C.F.R. § 245.1(b)(10) (requiring that the beneficiary must properly maintain his nonimmigrant status to later adjust to permanent residence).

Based on these close relationships, it is questionable whether the position was truly available to other qualified applicants during the labor certification's labor market test before DOL. While the present matter does not involve the beneficiary's direct ownership interest, the issue of whether the position was truly available to qualified workers is similar to the issue in *Matter of Silver Dragon Chinese Restaurant*, 19 I&N Dec. at 401. Had all the information been presented to DOL, it is not clear that the labor certification would have been approved.

The AAO's NDI also stated as follows:

Willful misrepresentation of a material fact in these proceedings may render the beneficiary inadmissible to the United States. *See* Section 212(a)(6)(c) of the Act, 8 U.S.C. 1182, regarding misrepresentation, "(i) in general – any alien, who by fraud or willfully misrepresenting a material fact, seeks (or has sought to procure, or who has procured) a visa, other documentation, or admission to the United States or other benefit provided under the Act is inadmissible."

¹¹ *Hall*, 864 F.2d at 877, further contemplated a two-part test used in another case. *See Matter of Lignomat USA, Ltd.*, 88-INA-276 (BALCA 1989), in which the Board of Alien Labor Certification Appeals ("BALCA") found where an applicant and his wife each owned 24.5% of the company's shares, it was not a bona fide job offer. BALCA applied a two-part analysis, that (1) whether in light of the alien's ownership interest the corporation was a sham and a scheme to obtain a labor certification; or (2) whether the corporation came to rely so heavily on the alien's skills and contacts so that if it were not for the alien, the corporation would probably not exist.

A material issue in this case is whether the position offered was truly available to U.S. workers. The failure to inform DOL of the substantial financial, and likely familial relationship between the beneficiary and the petitioner's owner would constitute "concealment," which would affect the decision on the labor certification. *See Kungys v. U.S.*, 485 U.S. 759 (1988), ("materiality is a legal question of whether "misrepresentation or concealment was predictably capable of affecting, *i.e.*, had a natural tendency to affect the official decision.") Furthermore, a finding of misrepresentation may lead to invalidation of the Form ETA 750. *See* 20 C.F.R. § 656.31(d) regarding labor certification applications involving fraud or willful misrepresentation:

Finding of fraud or willful misrepresentation. If as referenced in Sec. 656.30(d), a court, the DHS or the Department of State determines there was fraud or willful misrepresentation involving a labor certification application, the application will be considered to be invalidated, processing is terminated, a notice of the termination and the reason therefore is sent by the Certifying Officer to the employer, attorney/agent as appropriate.

Further, doubt cast on any aspect of the petitioner's evidence may lead to a reevaluation of the reliability and sufficiency of the remaining evidence offered in support of the visa 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, in fact, lies, will not suffice. *Matter of Ho*, 19 I&N Dec. 582, 591-592 (BIA 1988).

In response to the AAO's NDI, the petitioner stated in a letter dated August 22, 2008, that the Form ETA 750 did not include any provisions in which the petitioner could provide information regarding the relationship between the petitioner and the beneficiary. The petitioner states that it "has never directly employed [the beneficiary] nor did we intend to offer him employment until such time as he is granted permanent residence." The petitioner states that since neither the beneficiary nor his immediate family had an ownership interest in the petitioner's business, the instant case is distinguishable from *Matter of Silver Dragon Chinese Restaurant*.

The petitioner explained the relationship between the petitioner and the beneficiary as follows: [REDACTED] is the President and a shareholder of the petitioner; [REDACTED] and [REDACTED], the beneficiary's sister, are former in-laws, as [REDACTED] deceased husband, [REDACTED] was [REDACTED] brother. The petitioner claims that since [REDACTED] died in 2000, there is no longer a familial relationship between [REDACTED] and [REDACTED] and that there is no familial relationship between the petitioner and the beneficiary. The petitioner further states that [REDACTED] was the secretary of AIRCO and that the beneficiary purchased AIRCO's parent company from [REDACTED]

██████████ husband.¹² Despite these relationships, the petitioner asserts that “there has never been any substantial financial or familial relationship between [the petitioner] and [the beneficiary]” that would affect the job offer in the instant matter.

The petitioner also asserts in the letter dated August 22, 2008 that there was no amalgamation of AIRCO and the petitioner.¹³ The petitioner states that AIRCO was contracted to perform services for the petitioner. The petitioner states in the letter that “it cannot find any record that [the beneficiary] was in fact a paid employee of our company.”

In a subsequent submission to the AAO, the petitioner submits a letter dated September 21, 2009, stating that it wishes to retract its statement that the beneficiary was never employed by the petitioner, and that it has “since discovered” that its payroll service “accidentally made payroll check payments to [the beneficiary] for work that had been subcontracted to his company, Airco USA, Inc.” The letter further states that the petitioner “immediately stopped the issuance of payroll to [the beneficiary] when this error was discovered and had payments properly made payable to Airco USA, Inc. from that point forward.” The petitioner has contradicted itself in these statements, as it indicates that the mistake was discovered after the payments were made in 2001, and that the mistake was discovered sometime between August 2008 and September 2009, the dates of the petitioner’s two letters to the AAO.¹⁴ The petitioner’s statements regarding the beneficiary’s prior employment are not credible.

Counsel also asserts in the supplemental submission that there has never been a direct familial relationship between the petitioner’s shareholders and the beneficiary; that there was no amalgamation of interests between AIRCO and the petitioner; and that the beneficiary was only indirectly related to ██████████, an officer, director and shareholder of the petitioner. He asserts that this “distant and nebulous” relationship should not have been a concern to DOL.¹⁵ We

¹² The Minutes of the first meeting of the Board of Directors of the petitioner dated January 21, 1999, submitted with the petitioner’s response to the AAO’s NDI, indicate that ██████████ is also a director of the petitioner, and ██████████ is a director and the Secretary of the petitioner, and was a shareholder of the petitioner.

¹³ The record does not establish that the specific offer from the petitioner to AIRCO to “amalgamate” was accepted by AIRCO.

¹⁴ 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, 591 (BIA 1988).

¹⁵ Counsel asserts that the relationship does not meet the totality of the circumstances test set forth in *Matter of Modular Container Systems, Inc.*, 89 INA 228 (BALCA 1991). Based on the factors listed in *Matter of Modular Container Systems, Inc.*, the beneficiary may be in a position to control or influence hiring decisions regarding his position based on his relationship to the petitioner, the beneficiary is related to the petitioner, the beneficiary will be one of a small number of employees of the petitioner, and the petitioner claims that the beneficiary has specialized qualifications that are identical to those listed on the labor certification application. The totality of the circumstances test also includes a consideration of the employer’s level of compliance and good faith in the processing

disagree. The petitioner should have disclosed the relationship between the beneficiary and the petitioner to the DOL. *See Matter of Silver Dragon Chinese Restaurant*, 19 &N Dec. at 406.¹⁶ The petitioner failed to make this disclosure. The situation in the instant petition is analogous to the beneficiary in *Matter of Silver Dragon Chinese Restaurant* based on the family relationship between the petitioner's owner, officer and director and the beneficiary, and the lack of clarity as to the actual relationship of the beneficiary to the petitioner. The familial relationship would have caused the DOL to examine more carefully whether the job opportunity is clearly open to qualified U.S. workers, and whether U.S. workers applying for the job, if any, were rejected solely for lawful job-related reasons. *See id.* at 402. Thus, the petitioner has not established that it has made a *bona fide* job offer to the beneficiary.

The petition will be denied for the above stated reasons, with each considered as an independent and alternative basis for denial.¹⁷ 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.

of the claim. *Id.* The petitioner failed to disclose the relationship between the beneficiary and the petitioner to the DOL.

¹⁶ The burden rests on the employer to provide clear evidence that a bona fide job opportunity is available, and that the employer has, in good faith, sought to fill the position with a US worker. *Matter of Amger Corp.*, 87-INA-545 (BALCA 1987).

¹⁷ When the AAO denies a petition on multiple alternative grounds, a plaintiff can succeed on a challenge only if it is shown that the AAO abused its discretion with respect to all of the AAO's enumerated grounds. *See Spencer Enterprises, Inc. v. United States*, 229 F. Supp. 2d at 1043, *aff'd*. 345 F.3d 683.