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



U.S. Citizenship
and Immigration
Services

PUBLIC COPY



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DATE: **MAY 03 2011** Office: NEBRASKA SERVICE CENTER FILE:

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:

Enclosed please find the decision of the Administrative Appeals Office in your case. All of the documents related to this matter have been returned to the office that originally decided your case. Please be advised that any further inquiry that you might have concerning your case must be made to that office.

If you believe the law was inappropriately applied by us in reaching our decision, or you have additional information that you wish to have considered, you may file a motion to reconsider or a motion to reopen. The specific requirements for filing such a request can be found at 8 C.F.R. § 103.5. 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 \$630. Please be aware that 8 C.F.R. § 103.5(a)(1)(i) requires that any motion must be filed within 30 days of the decision that the motion seeks to reconsider or reopen.

Thank you

Perry Rhew
Chief, Administrative Appeals Office

DISCUSSION: The employment-based visa petition was initially approved by the director, Vermont Service Center. Upon further review, the director of the Nebraska Service Center served an Intent to Revoke to the petitioner. The director subsequently revoked the approval of the Immigrant Petition for Alien Worker (Form I-140). The petitioner appealed the revocation and the matter is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.¹

The petitioner is an international trading company. It sought to employ the beneficiary permanently in the United States as an import/export (consultant) manager.² As required by statute, the petition was accompanied by an individual alien labor certification, Form ETA 750, approved by the Department of Labor.

The record indicates that the I-140 was initially filed on October 22, 2003. It was accompanied by an approved ETA 750 establishing a priority date of April 24, 2001.³ The preference petition was approved on July 13, 2004.

Upon reexamination of the petition's approval, the director determined that it had been approved in error and issued an Intent to Revoke on February 26, 2010. The intent to revoke noted that the 2001 federal income tax return filed by the beneficiary and her spouse⁴ indicated on Schedule C, Profit or Loss from Business, that the beneficiary was the sole proprietor of the petitioning business. Therefore, the director concluded that the job offer was not *bona fide*. The director noted that a 2005 divorce certificate had been submitted, but determined that this was not relevant to the fact that the beneficiary had an ownership interest in the petitioner when the ETA 750 was filed.

The petitioner was afforded thirty days to offer additional evidence or argument in opposition to the proposed revocation. Counsel submitted a response to the director's Intent to Revoke, which

¹ The procedural history of this case is documented in the record and is incorporated herein. Further references to the procedural history will only be made as necessary.

²Section 203(b)(3)(A)(ii) of the Act, 8 U.S.C. § 1153(b)(3)(A)(ii), also provides for the granting of preference classification to qualified immigrants who hold baccalaureate degrees and are members of the professions.

³ After March 28, 2005, the correct form to apply for labor certification is the ETA Form 9089. See 69 Fed. Reg. 77325, 77326 (Dec. 27, 2004). The priority date, the day the Form ETA 750 was accepted for processing by any office within DOL's employment system. See 8 C.F.R. § 204.5(d); *Matter of Wing's Tea House*, 16 I&N 158 (Act. Reg. Comm. 1977). If the petition is approved, the priority date is also used in conjunction with the Visa Bulletin issued by the Department of State to determine when a beneficiary can apply for adjustment of status or for an immigrant visa abroad. Thus, the importance of reviewing the *bona fides* of a job opportunity as of the priority date, including a prospective U.S. employer's ability to pay the proffered wage is clear.

⁴ Her spouse in this proceeding is her second husband, Alexander S. Nemets. The record indicates that they obtained a Russian divorce on July 5, 2005.

included: 1) A letter dated March 11, 2010, signed by [REDACTED] who stated that he incorporated the petitioning business in 1992 and managed it until December 31, 2002, when he ceded management and ownership to the beneficiary's second husband; 2) A copy of a stock purchase and sale agreement executed December 31, 2002; 3) A copy of a stock certificate in the name of [REDACTED]; 4) A copy of [REDACTED] petitioning business; and 5) An Internal Revenue Service (IRS) application for an Employer Identification [REDACTED]

The petitioner had already submitted copies of the petitioner's corporate federal income tax return for 2001 and 2002, as well as copies of the beneficiary's and Nemets' individual income 2001 and 2002 tax return(s) showing her as the petitioner's sole proprietor.

The director subsequently determined that the grounds for revocation of the petition had not been overcome and revoked the petition's approval on May 21, 2010, pursuant to section 205 of the Act, 8 U.S.C. § 1155.

The director noted the documentation submitted in response to the Intent to Revoke and observed that the 2001 corporate tax return filed by the petitioner states that the petitioner's sole officer was the beneficiary's then-husband. This evidence clearly conflicted with [REDACTED] assertion that he managed the business and owned all the stock until December 31, 2002. The director also concluded that the petitioner's response contained no credible explanation to explain the discrepancy between the beneficiary claiming to be the sole proprietor on the individual tax returns and her husband as listed as the sole officer on the corporate tax returns. The director concluded that the petitioner had fraudulently or willfully misrepresented a material fact in that it failed to establish that a *bona fide* job opportunity was clearly open to U.S. workers and on that basis invalidated the labor certification.

On appeal, counsel requests an additional 30 days to submit a brief to this office. He states that the director did not review the evidence provided in response to the Intent to Revoke and that the beneficiary did not have an ownership interest in the petitioner. As of this date, more than nine months later, nothing further has been received at this office. This decision will be rendered on the record as it stands.

The AAO concurs with the director. It is noted that section 212(a)(5)(A)(i) of the Act and the scope of the regulation at 20 C.F.R. § 656.1(a) describe the role of the DOL in the labor certification process as follows:

In general.-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.

It is left to United States Citizenship and Immigration Services (USCIS) to determine whether the proffered position and alien qualify for a specific immigrant classification or even the job offered. This fact has not gone unnoticed by Federal Circuit Courts:

There is no doubt that the authority to make preference classification decisions rests with INS. The language of section 204 cannot be read otherwise. *See Castaneda-Gonzalez v. INS*, 564 F.2d 417, 429 (D.C. Cir. 1977). In turn, DOL has the authority to make the two determinations listed in section 212(a)(14).⁵ *Id.* at 423. The necessary result of these two grants of authority is that section 212(a)(14) determinations are not subject to review by INS absent fraud or willful misrepresentation, but all matters relating to preference classification eligibility not expressly delegated to DOL remain within INS' authority.

* * *

Given the language of the Act, the totality of the legislative history, and the agencies' own interpretations of their duties under the Act, we must conclude that Congress did not intend DOL to have primary authority to make any determinations other than the two stated in section 212(a)(14). If DOL is to analyze alien qualifications, it is for the purpose of "matching" them with those of corresponding United States workers so that it will then be "in a position to meet the requirement of the law," namely the section 212(a)(14) determinations.

Madany v. Smith, 696 F.2d 1008, 1012-1013 (D.C. Cir. 1983).⁶ In this case, the petitioner has failed to demonstrate that the certified job opportunity was "clearly open to any qualified U.S.

⁵ Based on revisions to the Act, the current citation is section 212(a)(5)(A) as set forth above.

⁶ The Ninth Circuit, citing *K.R.K. Irvine, Inc.*, 699 F.2d at 1006, has stated:

The Department of Labor (DOL) must certify that insufficient domestic workers are available to perform the job and that the alien's performance of the job will not adversely affect the wages and working conditions of similarly employed domestic workers. *Id.* § 212(a)(14), 8 U.S.C. § 1182(a)(14). The INS then makes its own determination of the alien's entitlement to sixth preference status. *Id.* § 204(b), 8 U.S.C. § 1154(b). *See generally K.R.K. Irvine, Inc. v. Landon*, 699 F.2d 1006, 1008 9th Cir.1983).

worker” as attested on Item 22-h of Part A of the Form ETA 750 because the beneficiary had an ownership interest in the petitioning business or, at the least, even if it had been credibly explained, that her husband was the sole shareholder at the time of the priority date based on the 2001 tax return submitted. The job offer was essentially a form of self-employment.

To be eligible for approval, a beneficiary must have all the education, training, and experience specified on the labor certification as of the petition’s priority date. *See* 8 C.F.R. § 103.2(b)(1), (12). *See also Matter of Wing’s Tea House*, 16 I&N Dec. 158, 159 (Acting Reg. Comm. 1977); *Matter of Katigbak*, 14 I&N Dec. 45, 49 (Reg. Comm. 1971). Fundamentally, the job offer must be “clearly open to any qualified U.S. worker.” It is noted that a relationship invalidating a *bona fide* job offer may arise where the beneficiary is related to the petitioner by “blood” or it may be “financial, by marriage, or through friendship.” *See Matter of Sunmart* 374, 00-INA-93 (BALCA May 15, 2000). The regulation at 20 C.F.R. § 656.3 states that employment means: “Permanent full-time work by an employee for an employer other than oneself.” Therefore, if the petitioning business is owned by the beneficiary or she has a substantial ownership interest in it, then it is the functional equivalent of self-employment and is not a job offer for someone other than oneself.

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). Where the petitioner is owned by the person applying for position, it is not a *bona fide* offer. *See Bulk Farms, Inc. v. Martin*, 963 F.2d 1286 (9th Cir. 1992) (denied labor certification application for president, sole shareholder and chief cheese maker even where no person qualified for position applied). The court noted:

The regulatory scheme challenged by Bulk Farms is reasonable related to the achievement of the purpose outlined in section 212(a). As the district court correctly noted, “the DOL certification process is built around a central administrative mechanism: A private good faith search by the certification applicant for U.S. workers qualified to take the job at issue.” *See* 20 C.F.R. § 656.21. This “good faith search” process operates successfully because all employers are subject to uniform certification requirements. The two independent safeguards challenged by Bulk Farms—the ban on alien self-employment and the *bona fide* job requirements—make the good faith search process self-enforcing. The prophylactic rules permit the Department of Labor to process more than 50,000 permanent labor certification requests each years. . .

The INS, [now USCIS] therefore, may make a *de novo* determination of whether the alien is in fact qualified to fill the certified job offer.

Tongatapu Woodcraft Hawaii, Ltd. v. Feldman, 736 F. 2d 1305, 1309 (9th Cir. 1984).

The challenged regulations also represent a reasonable construction of section 212(a) insofar as they ensure the integrity of the information gathered by DOL. As a practical matter, where an employer is indistinguishable from the alien seeking the job in question, there is reason for the employer to abuse the process. . .

Bulk Farms, Inc., v. Martin, 963 F.2d 1286-1289 (1992).

The regulation at 20 C.F.R. § 656.30 (2001) provided in pertinent part:

(d) After issuance labor certifications are subject to invalidation by the INS or by a Consul of the Department of State upon a determination, made in accordance with those agencies, procedures or by a Court, of fraud or willful misrepresentation of a material fact involving a labor certification. If evidence of such fraud or willful misrepresentation becomes known to a RA or to the Director, the RA or Director, as appropriate, shall notify in writing the INS or State Department, as appropriate. A copy of the notice shall be sent to the regional or national office, as appropriate, of the Department of Labor's Office of Inspector General.⁷

As outlined by the Board of Immigration Appeals (BIA), a material misrepresentation requires that the alien willfully make a material misstatement to a government official for the purpose of obtaining an immigration benefit to which one is not entitled. *Matter of Kai Hing Hui*, 15 I&N Dec. 288, 289-90 (BIA 1975). "The intent to deceive is no longer required before the willful misrepresentation charge comes into play." *Id.* at p. 290.⁸ The term "willfully" means knowing

⁷ The current regulation provides: provides in pertinent part:

(d) *Invalidation of labor certifications.* After issuance, a labor certification may be revoked by ETA using the procedures described § 656.32. Additionally, after issuance, a labor certification is subject to invalidation by the DHS or by a Consul of the Department of State upon a determination, made in accordance with those agencies' procedures or by a court, of fraud or willful misrepresentation of a material fact involving the labor certification application. If evidence of such fraud or willful misrepresentation becomes known to the CO or to the Chief, Division of Foreign Labor Certification, the CO, or the Chief of the Division of Foreign Labor Certification, as appropriate shall notify in writing the DHS or Department of State, as appropriate. A copy of the notification must be sent to the regional or national office, as appropriate, of the Department of Labor's Office of Inspector General. 20 C.F.R. § 656.30 (2010).

⁸ In contrast, a finding of fraud requires a determination that the alien made a false representation of fact of a material fact with knowledge of its falsity and with the intent to deceive an immigration officer. Furthermore, the false representation must have been believed an acted upon by the officer. *See Matter of G-G-*, 7 I&N Dec. 161 (BIA 1956).

and intentionally, as distinguished from accidentally inadvertently, or in an honest belief that the facts are otherwise. *See Matter of Healy and Goodchild*, 17 I&N Dec. 22, 28 (BIA 1979). To be considered material, the misrepresentation must be one which "tends to shut off a line of inquiry which is relevant to the alien's eligibility, and which might well have resulted in a proper determination that he be excluded." *Matter of Ng*, 17 I&N Dec. 536, 537 (BIA 1980). Accordingly, for an immigration officer to find a willful and material misrepresentation in visa petition proceedings, he or she must determine: 1) that the petitioner or beneficiary made a false representation to an authorized official of the United States government; 2) that the misrepresentation was willfully made; and 3) that the fact misrepresented was material. *See Matter of M-*, 6 I&N Dec. 149 (BIA 1954); *Matter of L-L-*, 9 I&N Dec. 324 (BIA 1961); *Matter of Kai Hing Hui*, 15 I&N Dec. at 288.

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 C.F.R. § 656.30(d) (1986). *Matter of Silver Dragon Chinese Restaurant*, 19 I&N Dec. 401,406 (Comm. 1986).

In the circumstances set forth in this case, failure to disclose the beneficiary's relationship to the petitioning company amounts to the willful effort to procure a benefit ultimately leading to permanent residence under the Act. *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.") In the context of a visa petition, a misrepresented fact is material if the misrepresentation cuts off a line of inquiry which is relevant to the eligibility criteria and that inquiry might well have resulted in the denial of a visa petition. *See Matter of Ng*, 17 I&N Dec. at 537.

A misrepresentation is an assertion or manifestation that is not in accord with the true facts. A misrepresentation of a material fact may include but not be limited to such consequences as a denial of a visa petition, a decision rendering an alien inadmissible to the United States, and possible criminal prosecution. It is noted that section 212(a)(6)(C) of the Act, 8 U.S.C. § 1182 provides that any "alien who, by fraud or willfully misrepresenting a material fact, seeks to procure (or has sought to procure or has procured) a visa, other documentation, or admission into the United States or other benefit provided under this Act is inadmissible. An alien may be found inadmissible when he or she subsequently applies for admission into the United States or applies for adjustment of status to permanent resident status. *See* sections 212(a) and 245((a) of the Act, 8 U.S.C. §§ 1182(a) and 1255(a). The Attorney General has held that a misrepresentation made in connection with an application for a visa or other document, or with entry into the United States, is material if either: (1) the alien is excludable on the true facts, or (2) the misrepresentation tends to shut off a line of inquiry which is relevant to the alien's eligibility and which might well have resulted in a proper determination that he be excluded.

Matter of S & B-C, 9 I&N Dec. 436, 447 (A.G. 1961). Accordingly, in determining admissibility, the materiality test has three parts. First, if the record shows the alien is inadmissible on the true facts, then the second and third questions must be addressed. The second question is whether the relevant line of inquiry has been shut off, then it must be determined whether the inquiry might have resulted in a proper determination that the foreign national should have been excluded. *Id.* at 449.

The failure to disclose the fact that the beneficiary had an ownership interest in the petitioning company and/or was married to the sole shareholder at the time the labor certification was secured were material misrepresentations that were willful because the officer, principal and owner of the company was presumed to be aware and informed of the organization and staff of the enterprise. *See Matter of Silver Dragon Chinese Restaurant*, 19 I&N Dec. 401 at 403. The petitioner failed to offer any credible explanation why tax returns were being filed simultaneously as a corporation and as a sole proprietorship. Further, it is noted that although the incorporation year was stated to be 1992, the date incorporated given on the two corporate tax returns is February 28, 1998. No reasonable explanation has been offered. The petitioner has failed to address the discrepancy raised by the director in that the petitioner claimed that the petitioning business transferred in December 2002 and the corporate tax return shows the beneficiary's husband as the 100% shareholder in 2001.⁹ 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. *See Matter of Ho*, 19 I&N Dec. 582, 591-592 (BIA 1988).

The petitioner's misrepresentation as to the beneficiary's relationship to the company cut off a potential line of inquiry regarding the *bona fide* nature of the offer of employment. This is directly material as to whether the petitioner is an "employer" which "intends to employ" the beneficiary as required by section 204(a)(1)(F) of the Act, and is therefore material to whether the beneficiary is eligible for the benefit sought. *See Matter of S & B-C*, 9 I&N Dec. at 447.

⁹ The Massachusetts [REDACTED] and referring to the end of the last fiscal year on December 31, 2001, identifies [REDACTED] of the petitioner. Counsel asserts that the beneficiary got divorced from the owner in July 2005 and is therefore no longer related to the owner. The [REDACTED] show that the beneficiary was named as [REDACTED] as of the end of the fiscal year on December 31, 2004, upon her husband's removal from these same positions. The beneficiary remained in these positions through the end of December 31, 2006, when she additionally became [REDACTED]. Therefore, the petitioner cannot claim that the beneficiary's interest in the petitioning company ended. *See* <http://corp.sec.state.ma.us/corp/corptest/CorpSearchFormList.asp?SearchType=E> (Accessed April 15, 2011).

The petitioner must establish the elements for the approval of the petition at the time of filing. *Matter of Katigbak*, 14 I&N Dec. 45, 49 (Comm. 1971). 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).

As set forth above, and pursuant to 20 C.F.R. § 656.31(d), the AAO finds that the petitioner failed to demonstrate that a *bona fide* job offer existed¹⁰ based on the undisclosed relationship interest of the beneficiary to the petitioner, which constituted willful misrepresentation of a material fact. The AAO concurs with the director who found the labor certification invalid based on the willful misrepresentation of a material fact and the labor certification remains invalidated based on willful misrepresentation of a material fact. In view of the foregoing, the AAO concludes that the director properly revoked the approval of the petition on this basis.

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 450 (BIA 1987)). Here, the director has revoked the petition's approval for good and sufficient cause.¹¹

¹⁰ It is noted that the state online corporate records indicate that the petitioner's last annual report was filed on March 31, 2008 for the fiscal year ending December 31, 2008. See <http://corp.sec.state.ma.us/corp/corptest/CorpSearchFormList.asp?SearchType=E>. It is unclear if the petitioner is still conducting business. It is noted that even if the appeal could be otherwise sustained, the petition's approval would be subject to automatic revocation pursuant to 8 C.F.R. § 205.1(a)(iii)(D) which sets forth that an approval is subject to automatic revocation without notice upon termination of the employer's business in an employment-based preference case.

¹¹ It is additionally noted that the 1997 employment verification letter from a Russian export firm that appears to be "RTS" does not contain a legible signature and fails to identify the author or the author's job title. Thus, the petition would not have been approvable because it fails to

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 with a finding that the petitioner and beneficiary willfully misrepresented a material fact.

FURTHER ORDER: The AAO finds that the petitioner's job offer was not *bona fide* based on the beneficiary's undisclosed relationship interest to the petitioner, which constituted willful misrepresentation of a material fact underlying eligibility for a benefit sought under the immigration laws of the United States. The labor certification application is invalidated pursuant to 20 C.F.R. § 656.30(d) based on the petitioner's willful misrepresentation.

demonstrate that the beneficiary had the requisite ten months of work experience as of the priority date of April 24, 2001. *See* 8 C.F.R. § 204.5(l)(3)(ii).