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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

DATE: **DEC 08 2012**

OFFICE: NEBRASKA SERVICE CENTER

FILE: [REDACTED]

IN RE:

Petitioner: [REDACTED]

Beneficiary: [REDACTED]

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 AAO inappropriately applied the law in reaching its decision, or you have additional information that you wish to have considered, you may file a motion to reconsider or a motion to reopen in accordance with the instructions on Form I-290B, Notice of Appeal or Motion, with a fee of \$630. The specific requirements for filing such a motion can be found at 8 C.F.R. § 103.5. **Do not file any motion directly with the AAO.** Please be aware that 8 C.F.R. § 103.5(a)(1)(i) requires any motion to be filed within 30 days of the decision that the motion seeks to reconsider or reopen.

Thank you,


Ron Rosenberg
Acting Chief, Administrative Appeals Office

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

The petitioner is a real estate development company. It seeks to employ the beneficiary permanently in the United States as a construction manager. As required by statute, the petition is accompanied by a Form ETA 750, Application for Alien Employment Certification, approved by the United States Department of Labor (DOL). The director determined that the petitioner had not established that a *bona fide* job offer was available to U.S. workers. The director denied the petition accordingly.

The record shows that the appeal is properly filed, 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 April 15, 2009 denial, the issue in this case is whether or not a *bona fide* job opportunity was available to U.S. workers.

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.

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, 00-INA-93 (BALCA May 15, 2000).

Where the petitioner is owned by the person applying for a 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 petitioner must demonstrate that a valid employment relationship exists and that a *bona fide* job opportunity was available to U.S. workers. Here, the Form ETA 750 was accepted on April 30, 2001. The proffered wage as stated on the Form ETA 750 is \$62,500 per year. The Form ETA 750 states that the position requires a high school diploma and two years of experience in the job offered as a construction manager.

The AAO conducts appellate review on a *de novo* basis. See *Soltane v. DOJ*, 381 F.3d 143, 145 (3d Cir. 2004). The AAO considers all pertinent evidence in the record, including new evidence properly submitted upon appeal.¹

The record indicates the petitioner is structured as a limited liability company and filed its tax returns on IRS Form 1065.² On the petition, the petitioner claimed to have been established in January 2000 and to currently employ two workers. According to the tax returns in the record, the petitioner's fiscal year is based on a calendar year. On the Form ETA 750, signed by the beneficiary on April 28, 2001,³ the beneficiary claimed to have worked for the petitioner as a construction manager beginning in December 1999 and continuing at least until the form was signed, on April 28, 2001.⁴

The record includes the petitioner's tax returns for 2001 to 2008. The tax returns for 2001 and 2002 show that the beneficiary and [REDACTED] each held a 50% interest in [REDACTED] the petitioning entity, for those years. In 2003, [REDACTED] and the beneficiary began with a 50% interest and ended with 80% and 0% of the company's interest, respectively. [REDACTED] held a 20% interest in the company by the end of the year.

The record also includes a letter from [REDACTED] Managing/Principal/General Partner, dated March 24, 2009. The letter includes the following information:

- [REDACTED]
 - Title: Managing/Principal/General Partner/Member
 - Investment: \$135,000
 - Duties: Responsible for all business decisions made for company. Responsibilities include the supervision, management hiring and firing of employees

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).

² A limited liability company (LLC) is an entity formed under state law by filing articles of organization. An LLC may be classified for federal income tax purposes as if it were a sole proprietorship, a partnership or a corporation. If the LLC has only one owner, it will automatically be treated as a sole proprietorship unless an election is made to be treated as a corporation. If the LLC has two or more owners, it will automatically be considered to be a partnership unless an election is made to be treated as a corporation. If the LLC does not elect its classification, a default classification of partnership (multi-member LLC) or disregarded entity (taxed as if it were a sole proprietorship) will apply. See 26 C.F.R. § 301.7701-3. The election referred to is made using IRS Form 8832, Entity Classification Election. In the instant case, the petitioner is considered to be a partnership for federal tax purposes.

³ The beneficiary signed and dated the Form ETA 750 again on December 8, 2006.

⁴ The beneficiary initialed and dated the "Name of Job," "No. of Hours," and "Kind of Business" fields on December 8, 2006. However, it is unclear if the beneficiary continued to work for the petitioner through December 8, 2006.

- Relation: Not related to [REDACTED] (beneficiary) or [REDACTED]
- [REDACTED]
 - Title: Limited Partner
 - Investment: \$55,000
 - Duties: Limited role within the company. Does not have authority to supervise, manage, hire or fire employees
 - Relation: [REDACTED] father
- [REDACTED]
 - Investment: \$0

The petitioner also submitted the following evidence:

- A recruitment report listing 14 individuals who responded to the job announcement. Five candidates were rejected due to the lack of experience as a construction manager, nine candidates were rejected due to failing to respond to interview requests via Federal Express mail.
- A letter from [REDACTED] President, dated July 16, 2007 listing two candidates who were rejected due to the experience requirements.
- Copies of the rejection letters to the candidates
- Copies of the interview request letters to the candidates
- Copies of the petitioner's request for certified mail receipts

Copies of the candidates' resumes were not submitted.

On appeal, counsel states:

... ownership in a corporation does not amount to self-employment and a familial relationship between a petitioner and beneficiary does not negate the bona fide job offer per se... If there is an ownership interest or familial relationship the Service should defer to BALCA precedent to determine whether a bona fide job offer exists... an employer must demonstrate that a bona fide opportunity exists for U.S. applicants under a "totality of the circumstances" test. Some of these factors are: whether the alien controls or influences the hiring decision regarding the job opportunity; whether the alien is related to corporate directors, officers, or employees; whether the alien founded the company, has an ownership interest therein and/or is involved in its management or is a member of its board of directors; whether the alien is one of a small number of employees; whether the alien has qualifications that are identical to specialized or unusual [sic] job duties or requirements; whether the alien is so inseparable from the sponsoring employer because of his pervasive presence and personal attributes that it would be unlikely for the employer to continue in operation without him/her; and whether the employer demonstrated good faith in processing the application.

According to the petition, the petitioner was established on January 21, 2000 and employs two workers. Based on the evidence in the record, at the time the labor certification was filed on April 30, 2001, the beneficiary had a business relationship with the petitioning entity, holding a substantial 50% interest in the company in 2001, 2002 and a portion of 2003. The Form ETA 750 shows that the beneficiary began working for the petitioner as a construction manager beginning in December 1999 and was still employed as such at the time the labor certification was filed. In 2003, after the beneficiary no longer held interest in the company, he continued to have a close familial relationship with the petitioning entity, with his father holding 50% interest for the years 2004 through 2008 and investing \$55,000. No documentation was submitted to establish that the DOL was notified of either the beneficiary's business relationship or familial ties to the petitioning entity. The petitioner should have disclosed the relationship between the beneficiary and the petitioner to the DOL when submitting the beneficiary's Form ETA 750, Part B. *See Matter of Silver Dragon Chinese Restaurant*, 19 &N Dec. at 406.⁵ The petitioner failed to make these disclosures. The business and familial relationships would have caused the DOL and USCIS 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. Although the petitioner provided a recruitment report describing the reasons that it rejected 14 candidates, the resumes of these candidates were not provided to substantiate the petitioner's claim that five of the candidates failed to meet the experience requirement listed on the labor certification. The petitioner has not established that it has made a *bona fide* job offer to the beneficiary.

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:

⁵ 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).

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).⁶ *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).⁷ In this case, the petitioner has failed to demonstrate that the certified job opportunity was "clearly open to any qualified U.S. worker" as attested on Item 22-h of Part A of the Form ETA 750 because the beneficiary had an ownership and familial interest in the petitioning business.

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*,

⁶ Based on revisions to the Act, the current citation is section 212(a)(5)(A) as set forth above.

⁷ 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).

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).

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 he 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.

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. The petitioner’s failure to disclose the beneficiary’s relationship to the company cut off a potential line of inquiry regarding the *bona fide* nature of the offer of employment.

The evidence submitted does not establish that a *bona fide* job opportunity was available to U.S. workers based on the beneficiary’s undisclosed relationship interest to the petitioner.

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.