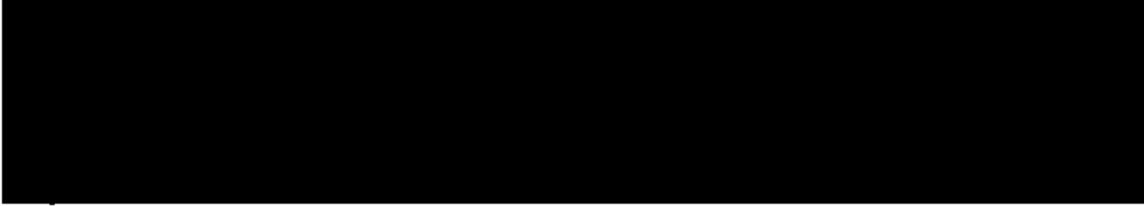


U.S. Department of Homeland Security
U.S. Citizenship and Immigration Services
Administrative Appeals Office (AAO)
20 Massachusetts Ave., N.W., MS 2090
Washington, DC 20529-2090



U.S. Citizenship
and Immigration
Services

B6



DATE: DEC 07 2012 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:

SELF REPRESENTED

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 Director, Nebraska Service Center (director), denied the Form I-140, Immigrant petition for Alien Worker, rendered on July 31, 2012. The matter is now before the Administrative Appeals Office (AAO) on certification. The director's decision will be affirmed.¹

The petitioner describes itself as a dialysis center. It seeks to permanently employ the beneficiary in the United States as a registered nurse. The petitioner requests classification of the beneficiary as a professional or skilled worker pursuant to section 203(b)(3)(A) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(3)(A).²

¹ Certifications by field office or service center directors may be made to the AAO "when a case involves an unusually complex or novel issue of law or fact." 8 C.F.R. § 103.4(a)(1).

The regulation at 8 C.F.R. § 103.4(a)(4) states as follows: "*Initial decision.* A case within the appellate jurisdiction of the Associate Commissioner, Examinations, or for which there is no appeal procedure may be certified only after an initial decision." The following subsection of that same regulation states as follows: "*Certification to [AAO].* A case described in paragraph (a)(4) of this section may be certified to the [AAO]." 8 C.F.R. § 103.4(a)(5).

The AAO's jurisdiction is limited to the authority specifically granted to it by the Secretary of the United States Department of Homeland Security. See DHS Delegation No. 0150.1 (effective March 1, 2003); see also 8 C.F.R. § 2.1 (2005 ed.). Pursuant to that delegation, the AAO's jurisdiction is limited to those matters described at 8 C.F.R. § 103.1(f)(3)(iii) (as in effect on February 28, 2003). See DHS Delegation Number 0150.1(U) *supra*; 8 C.F.R. § 103.3(a)(iv) (2005 ed.).

The regulation at 8 C.F.R. § 103.1(f)(3)(iii) (as in effect on February 28, 2003) states in pertinent part:

(iii) Appellate Authorities. In addition, the Associate Commissioner for Examinations exercises appellate jurisdiction over decisions on;

...

(B) Petitions for immigrant visa classification based on employment or as a special immigrant or entrepreneur under Secs. 204.5 and 204.6 of this chapter except when the denial of the petition is based upon lack of a certification by the Secretary of Labor under section 212(a)(5)(A) of the Act;

Pursuant to the delegation cited above, the AAO exercises the appellate jurisdiction formerly exercised by the Associate Commissioner for Examinations.

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

The director granted the motion, affirmed his denial, and certified the decision to the AAO. The petitioner had willfully misrepresented itself by answering “no” to part C. question 9 on the ETA Form 9089, Application for Permanent Employment Certification.

Procedural History

In the instant matter, the Form I-140 and ETA Form 9089 were filed on July 3, 2007. The director denied the Form I-140 on May 5, 2009. On June 8, 2009 the petitioner appealed the decision of the director, and that appeal was dismissed by the AAO on October 15, 2010. The petitioner then filed a motion to reopen and reconsider to the AAO on November 16, 2010. The AAO accepted the motion and withdrew its decision on appeal and the director’s decision on the Form I-140. On May 11, 2011, the petition was remanded to the director for issuance of a new decision. The director then denied the petition once again on September 19, 2011. The petition then filed a motion to reopen and reconsider. The director affirmed his decision and simultaneously certified it to the AAO on July 31, 2012.

Law

The petition is for a Schedule A occupation. A Schedule A occupation is an occupation codified at 20 § C.F.R. 656.5(a) for which the U.S. Department of Labor (DOL) has determined that there are not sufficient U.S. workers who are able, willing, qualified and available and that the wages and working conditions of similarly employed U.S. workers will not be adversely affected by the employment of aliens in such occupations. The current list of Schedule A occupations includes professional nurses and physical therapists. *Id.*

Petitions for Schedule A occupations do not require the petitioner to test the labor market and obtain a certified ETA Form 9089 from the DOL prior to filing the petition with U.S. Citizenship and Immigration Services (USCIS). Instead, the petition is filed directly with USCIS with a duplicate uncertified ETA Form 9089. *See* 8 C.F.R. §§ 204.5(a)(2) and (1)(3)(i); *see also* 20 C.F.R. § 656.15.

If the Schedule A occupation is a professional nurse, the petitioner must establish that the beneficiary has a Certificate from the Commission on Graduates of Foreign Nursing Schools (CGFNS); a permanent, full and unrestricted license to practice professional nursing in the state of intended employment; or passed the National Council Licensure Examination for Registered Nurses (NCLEX-RN). *See* 20 C.F.R. § 656.15(c)(2).

Petitions for Schedule A occupations must also contain evidence establishing that the employer provided its U.S. workers with notice of the filing of an ETA Form 9089 (Notice) as prescribed by 20 C.F.R. § 656.10(d), and a valid prevailing wage determination (PWD) obtained in accordance with 20 C.F.R. § 656.40 and 20 C.F.R. § 656.41. *See* 20 C.F.R. § 656.15(b)(2).

For the Notice requirement, the employer must provide notice of the filing of an ETA Form 9089 to

any bargaining representative for the occupation, or, if there is no bargaining representative, by posted notice to its employees at the location of the intended employment. *See* 20 C.F.R. § 656.10(d)(1).

The regulation at 20 C.F.R. § 656.10(d)(3) states that the Notice shall:

- (i) State that the notice is being provided as a result of the filing of an application for permanent alien labor certification for the relevant job opportunity;
- (ii) State any person may provide documentary evidence bearing on the application to the Certifying Officer of the Department of Labor;
- (iii) Provide the address of the appropriate Certifying Officer; and
- (iv) Be provided between 30 and 180 days before filing the application.

Notices for Schedule A occupations must also contain a description of the job offered and the rate of pay. *See* 20 C.F.R. § 656.10(d)(6).

In cases where there is no bargaining representative, the Notice must be posted for at least 10 consecutive business days, and it must be clearly visible and unobstructed while posted. 20 C.F.R. § 656.10(d)(1)(ii). The Notice must be posted in a conspicuous place where the employer's U.S. workers can readily read it on their way to or from their place of employment. *Id.* In addition, the Notice must be published "in any and all in-house media, whether electronic or printed, in accordance with the normal procedures used for the recruitment of similar positions in the employer's organization." *Id.* The satisfaction of the Notice requirement may be documented by "providing a copy of the posted notice and stating where it was posted, and by providing copies of all the in-house media" used to distribute the Notice. *Id.*

See section 212(a)(6)(C) of the Act, 8 U.S.C. § 1182(a)(6)(C), 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."

As outlined by the Board of Immigration Appeals, 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, (BIA 1975). The term "willfully" means knowing 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 (BrA 1954); *Matter of L-L-*, 9 I&N Dec. 324 (BrA 1961); *Matter of Kai Hing Hui*, 15 I&N Dec. at 288.

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, the materiality test has three parts. First, if the record shows that the alien is inadmissible on the true facts, then the misrepresentation is material. *Id.* at 448. If the foreign national would not be inadmissible on the true facts, then the second and third questions must be addressed. The second question is whether the misrepresentation shut off a line of inquiry relevant to the alien's admissibility. *Id.* Third, if the relevant line of inquiry has been cut 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.

See also 20 C.F.R. § 656.31(d) regarding labor certification applications involving fraud or willful misrepresentation:

- (d) 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.

Matter of Silver Dragon Chinese Restaurant, 19 I&N Dec. 401 (Comm'r 1986), discussed a beneficiary's 50% ownership of the petitioning entity. The decision quoted an advisory opinion from the Chief of the DOL's Division of Foreign Labor Certification as follows:

- The regulations require a 'job opportunity' to be 'clearly open.' Requiring the job opportunity to be bona fide adds no substance to the regulations, but simply clarifies that the job must truly exist and not merely exist on paper. The administrative interpretation thus advances the purpose of regulation 656.20(c)(8). Likewise requiring the job opportunity to be bona fide clarifies that a true opening must exist, and not merely the functional equivalent of self-employment. Thus, the administrative construction advances the purpose of regulations 656.20.

Id. at 405. Accordingly, where the beneficiary named in an alien labor certification application has an ownership interest in the petitioning entity, the petitioner must establish that the job is *bona fide*, or clearly open to U.S. workers. *See Keyjoy Trading Co.*, 1987-INA-592 (BALCA Dec. 15, 1987) (*en banc*). A relationship invalidating a *bona fide* job offer may also 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).

The ETA Form 9089 specifically asks in Section C.9: “Is the employer a closely held corporation, partnership, or sole proprietorship in which the alien has an ownership interest, or is there a familial relationship between the owners, stockholders, partners, corporate officers, incorporators, and the alien?” The petitioner identified that it was an entity and checked “no” to the question of whether the beneficiary was related to the owner. In determining whether the job is subject to the alien’s influence and control, the adjudicator will look to the totality of the circumstances. See *Modular Container Systems, Inc.*, 1989-INA-228 (BALCA Jul. 16, 1991) (*en banc*). The same standard has been incorporated into the PERM regulations. See 69 Fed. Reg. 77326, 77356 (ETA) (Dec. 27, 2004).

The PERM regulation specifically addresses this issue at 20 C.F.R. § 656.17(l) and states in pertinent part:

(l) Alien influence and control over job opportunity. If the employer is a closely held corporation or partnership in which the alien has an ownership interest, or if there is a familial relationship between the stockholders, corporate officers, incorporators, or partners, and the alien, or if the alien is one of a small number of employees, the employer in the event of an audit must be able to demonstrate the existence of a bona fide job opportunity, i.e., the job is available to all U.S. workers, and must provide to the Certifying Officer, the following supporting documentation:

- (1) A copy of the articles of incorporation, partnership agreement, business license or similar documents that establish the business entity;
- (2) A list of all corporate/company officers and shareholders/partners of the corporation/firm/business, their titles and positions in the business' structure, and a description of the relationships to each other and to the alien beneficiary;
- (3) The financial history of the corporation/company/partnership, including the total investment in the business entity and the amount of investment of each officer, incorporator/partner and the alien beneficiary; and
- (4) The name of the business' official with primary responsibility for interviewing and hiring applicants for positions within the organization and the name(s) of the business' official(s) having control or influence over hiring decisions involving the position for which labor certification is sought.
- (5) If the alien is one of 10 or fewer employees, the employer must document any family relationship between the employees and the alien.

Matter of Ho, 19 I&N Dec. 582, 591-592 (BIA 1988), states:

[i]t is incumbent upon the petitioner to resolve the inconsistencies by independent objective evidence. Attempts to explain or reconcile the conflicting accounts, 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.

Legal Analysis

On certification, over thirty days has elapsed since the date of the notice of certification on July 31, 2012. We have not received a brief or statement of waiver from the petitioner. The director found it more likely than not that the petitioner is hiring family members for its business, and has committed willful misrepresentation in order to secure those benefits. Specifically, the petitioner's one-hundred percent shareholder, the owner, has sought an immigration benefit for his sister as an immigrant worker. We will discuss the arguments submitted by the petitioner's counsel dated July 18, 2011. Counsel asserts the petitioner did not commit willful misrepresentation, and the job position is *bona fide*.

A. Misrepresentation

a. Materiality

Counsel argues that there was no material misrepresentation; any alleged misrepresentation was inconsequential since the job offer is and was *bona fide* and no line of inquiry was cut off; and the petitioner did not willfully misrepresent itself. Counsel cites to *Kungys v. U.S.*, 485 U.S. 759 (1988), and claims that the misrepresentation is not material to the adjudication of the benefit. Counsel's argument is not persuasive. As the regulations require the petitioner to submit an uncertified ETA Form 9089 with a Schedule A petition, it can be presumed that the petitioner's complete and accurate completion of that form is considered material to the Form I-140 filing. See 8 C.F.R. § 656.15(b). Likewise, as USCIS, in its adjudication of the Form I-140, must consider whether the petitioner is a U.S. employer desiring and intending to employ the beneficiary in the Schedule A position, the fact of whether a familial relationship exists between the beneficiary and the petitioner's owner is certainly material. 8 C.F.R. § 204.5(c); 20 C.F.R. § 656.3. As an employer's owner is more likely to invent a fictitious job for a sibling in order to circumvent the immigration laws rather than for a stranger, the existence of a familial relationship is material to this analysis. Therefore, the petitioner's answer of "no" to part C. Question 9 was a material misrepresentation of the true relationship between the beneficiary and petitioner. We also found that this discrepancy casts doubts on the efficacy of all of the evidence submitted in support of the petition. See *Matter of Ho*.

b. Line of Inquiry

Counsel asserts that even though the owner of the petitioner and beneficiary are brother and sister, there was still a *bona fide* position available and a rigorous recruitment process occurred. Further, the AAO cannot use the familial relationship as material misrepresentation because the company was sufficiently independent of the beneficiary.³ However, we disagree; first, Counsel does not state how the Board of Alien Labor Certification Appeals (BALCA) precedent is binding on the AAO. While 8 C.F.R. § 103.3(c) provides that precedent decisions of USCIS are binding on all its employees in the administration of the Act, BALCA decisions are not similarly binding. Precedent decisions must be designated and published in bound volumes or as interim decisions. Next, counsel cited a BALCA decision which affirmed a DOL decision to deny a labor certification because the beneficiary was not sufficiently independent. In the instant case, evidence in the record provides that the owner of the petitioner is the 100% shareholder; therefore we find that the petitioner was not sufficiently independent of the beneficiary and not incidental to the *bona fide* job offer. Moreover, USCIS records indicate the petitioner has applied for other relatives of the owner on previous occasions, which have been denied, but establishes the petitioner's past practice in attempting to petition for relatives. Thus, the petitioner's failure to indicate that the beneficiary was related to the owner is material and cut off a line of inquiry during the normal adjudicative process. By cutting off this line of inquiry, USCIS was prevented from further inquiry into whether the petitioner truly intended and desired to employ the beneficiary in the schedule A position.

c. Willful

Counsel asserts that the misrepresentation was not willful, because the petitioner made an innocent mistake which stemmed more out of negligence or ignorance than any willfulness.⁴ We do not agree, and the misrepresentation was willful. *In Parlak v. Holder*, the court found that the defendant's answers on the application forms were unambiguous and his answers provided some evidence that the falsity was deliberate and voluntary. Moreover, we agree with counsel in that intent to deceive is unnecessary and that knowledge of the falsity suffices. Therefore, the petitioner's answer on part C. question 9, coupled with the fact that the beneficiary admits she is related to the owner, and the existence of previous filings for relatives, it is most likely that the petitioner was willful in marking "no" to part C. question 9. A failure to apprise oneself of the contents of the ETA Form 9089 before signing it is not a defense to misrepresentation. *See, e.g., Hanna v. Gonzalez*, 128 Fed Appx. 498, 480

³ Counsel cites *In Matter of M. Safra & Co., INC.*, 2008-INA-00074, 2008 WL 4761315, (BALCA).

⁴ Counsel cites *Parlak v. Holder*, 578 F.3d 457, 464-65 (6th Cir. 2009); *Witter v. I.N.S.*, 113 F.3d 549, 554 (5th Cir.1997); *Forbes v. INS*, 48 F.3d 439, 442 (9th Cir.1995); *Espinoza-Espinoza v. INS*, 554 F.2d 921, 925 (9th Cir.1977); *Emokah v. Mukasey*, 523F.3d 110, 117 (2d Cir. 2008); *Beltran-Resendez v. INS*, 207 F.3d 284 (5th Cir. 2000); *Matter of L-D-E*, 8 I&N Dec. 3999 (BIA 1959)

(6th Cir. 2005)(unpublished)(citing *Bautista v. Star Cruises*, 396 F.3d 1289, 1301 (11th Cir.2005) and *United States v. Puente*, 982 F.2d 156, 159 (5th Cir, 1993)).

B. Job Position is Bona Fide

a. Family Relationship

Counsel asserts the petitioner owner is the brother of the beneficiary and that the owner has the primary responsibility of hiring/firing.⁵ Further counsel argues that the submitted evidence demonstrates that the petitioner has fully complied with 20 C.F.R. § 656.10(d). We agree with counsel that the petitioner owner is the brother of the beneficiary and that the owner has the primary responsibility of hiring/firing. However, the evidence provided is self-serving and does not provide independent, objective evidence of complying with 20 C.F.R. § 656.10(d). See *Matter of Ho*. Further, going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. *Matter of Soffici*, 22 I&N Dec. 158, 165 (Comm'r 1998) (citing *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg'l Comm'r 1972)).

b. Bona Fide Labor Certification Application

Counsel requests that the AAO consider the totality of the circumstances outlined by *Matter of Modular Container Systems, Inc*. Counsel asserts the following, in pertinent part:

1. The alien beneficiary is not clearly in a position of control or influences any hiring decisions.
2. The alien beneficiary is not an incorporator or founder of the company.
3. The alien beneficiary is not on the Board of Directors and has no ownership, investment, or controlling interests in the company.
4. The alien beneficiary possesses qualifications for the offered position.
5. The alien beneficiary is one of a small number of employees but has no "blood or spousal relationship" with any of the other company's officers and employees.

⁵ Counsel cites to *Matter of Paris Bakery* (88-INA-337, January 4, 1990); *Matter of Japanese Motors International, Inc.* (89-INA-246, January 30, 1991); *Modular Container Systems, Inc.*, 1989-INA-228 (BALCA Jul. 16, 1991)

6. The alien beneficiary is not so indispensable to the sponsoring employer that it would be unable to continue operations without her services.

We have reviewed the totality of the circumstances and find that counsel's assertions only reinforces the fact that the petitioner has willfully misrepresented itself and sought to obtain an immigration benefit solely for the owner's sister in order to circumvent the legal immigration system. This is evidenced not only by the record at hand, but the brief submitted by counsel. For example, in the July 18, 2011 response to USCIS Notice of Intent to Deny (NOID); the petitioner through counsel admitted that the owner was the sole shareholder, has the primary responsibility of hiring/firing, and is the brother of the beneficiary. However, in the same response counsel later asserted; the alien beneficiary is not clearly in a position of control or influences any hiring decisions; the alien beneficiary is not an incorporator or founder of the company; the alien beneficiary is not on the Board of Directors and has no ownership, investment, or controlling interests in the company. Further, the petition was filed under a Schedule A occupation codified at 20 § C.F.R. 656.5(a) for which the DOL has determined that there are not sufficient U.S. workers who are able, willing, qualified and available and that the wages and working conditions of similarly employed U.S. workers will not be adversely affected by the employment of aliens in such occupations. The current list of Schedule A occupations includes professional nurses and physical therapists. However, the petitioner asserts through counsel that, the alien beneficiary is not so indispensable to the sponsoring employer they would be unable to continue operations without her services. Based on the record at hand and upon a review of the assertions submitted to us, we find that there was no *bona fide* job opportunity and that the petitioner was seeking an immigration benefit for the petitioner's owner's sister. The petitioner deliberately misrepresented the familial relationship between the owner and the beneficiary to prevent scrutiny of whether the petitioner truly intended and desired to employ the beneficiary in the Schedule A position. Based on this misrepresentation, it appears most likely that the petitioner did not intend or desire to employ the beneficiary in the offered position. Rather, the petitioner's owner used his business as a vehicle to seek an immigration benefit for his sister while intentionally hiding this relationship from USCIS.

The petition will remain denied for the above stated reasons. In visa petition proceedings, the burden of proving eligibility for the benefit sought remains entirely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. Here, that burden has not been met.

ORDER: The director's decision is affirmed. The application remains denied.