

(b)(6)



U.S. Citizenship
and Immigration
Services

[Redacted]

DATE: Office: NEBRASKA SERVICE CENTER FILE: [Redacted]

APR 16 2013

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:

[Redacted]

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, denied the preference visa petition. The petitioner filed a motion to reopen the matter. The Director granted the motion to reopen and affirmed the previous decision. The matter is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner is an insurance agency. It seeks to employ the beneficiary permanently in the United States as an executive secretary / administrative assistant. 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 failed to establish that a *bona fide* job opportunity existed that was available to all U.S. workers based on the familial relationship that was undisclosed to the DOL during the labor certification process. In addition, the director found that the petitioner failed to demonstrate that the beneficiary had the experience required for the position as of the priority date. 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.

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

As set forth in the director's September 14, 2009 denial, the issues in this case are whether or not the petitioner made a willful misrepresentation of material fact when it stated that no familial relationship existed between the beneficiary and the owner, shareholder, partner, corporate officers, and/or incorporator and whether the beneficiary had the experience required by the terms of the labor certification as of the priority date.

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.

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:

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).

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.^[2] 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).³ 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).⁴ In this case, the petitioner has failed to demonstrate that the certified job opportunity was "clearly open to any qualified U.S.

² The Immigration and Nationality Service (INS) is the predecessor organization for USCIS.

³ Based on revisions to the Act, the current citation is section 212(a)(5)(A) as set forth above.

⁴ The Ninth Circuit, citing *K.R.K. Irvine, Inc.*, 699 F.2d at 1006, has stated:

worker” as attested on Item 22-h of Part A of the Form ETA 750 because the beneficiary is the brother-in-law of the petitioner’s sole shareholder.

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).

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 [REDACTED] 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 [REDACTED]—the ban on alien self-employment and the bona fide job requirements—make the good faith search

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).

process self-enforcing. The prophylactic rules permit the Department of Labor to process more than 50,000 permanent labor certification requests each years. . .

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.⁵

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.

⁵ 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).

As stated in the director's Notice of Intent to Deny (NOID), the record indicated that the petitioner's owner, [REDACTED] appeared to be the brother of the beneficiary's spouse. The NOID further requested evidence to establish that DOL was aware of the relationship during recruitment. In response, counsel admitted the relationship between the beneficiary and the petitioner's owner, but stated that the relationship by marriage did not bear upon the petitioner's recruitment procedure or whether the position was open to U.S. workers. The petitioner submitted all of its recruitment materials.

The director's decision noted the receipt of the petitioner's advertisements for the position, information about the sole U.S. applicant for the position, and two Notices of Finding from DOL concerning the proffered wage and the prevailing wage and the language requirement included on part 15. As stated by the director, the record contains no evidence that DOL was informed of or had knowledge of the relationship between the beneficiary and the petitioner's owner. The director also noted that the job advertisement placed by the petitioner did not seem to have run for three days and the job advertisement was placed five and a half years after the labor certification date. As a result, the director concluded that the record did not establish that a *bona fide* job offer for U.S. workers existed at the time the labor certification was filed.

Counsel states on appeal that recruitment was conducted including contacting a U.S. job applicant who declined the position. Counsel therefore concludes that the job offer was *bona fide*, however, 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. Without providing DOL the opportunity to determine whether the job offer was *bona fide* and open to all U.S. workers, the petition may not be approved.

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). 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 existed based on the undisclosed relationship interest of the beneficiary to the petitioner. In view of the foregoing, the AAO concludes that the director properly denied the petition on this basis.

In addition, the petitioner did not establish that it undertook good faith recruitment because the petitioner failed to submit its recruitment report and all applications for the position received following its advertisements as required by 20 C.F.R. § 656.21. The director stated in his decision that one application had been received and analyzed that application. The petitioner failed to submit all recruitment materials as specifically requested by the director's RFE and 20 C.F.R. § 656.21. The failure to submit requested evidence that precludes a material line of inquiry shall be grounds for denying the petition. *See* 8 C.F.R. § 103.2(b)(14). On appeal, counsel states that only one qualified applicant applied for the position, stating further that

multiple other applications were received. It is incumbent upon the petitioner to resolve any inconsistencies in the record by independent objective evidence. *Matter of Ho*, 19 I&N Dec. 582, 591-92 (BIA 1988).

Concerning the beneficiary's qualifications for the position, the beneficiary must meet all of the requirements of the offered position set forth on the labor certification by the priority date of the petition. 8 C.F.R. § 103.2(b)(1), (12). See *Matter of Wing's Tea House*, 16 I&N Dec. 158, 159 (Act. Reg. Comm. 1977); see also *Matter of Katigbak*, 14 I&N Dec. 45, 49 (Reg. Comm. 1971).

In evaluating 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 *Madany*, 696 F.2d at 1008; *K.R.K. Irvine, Inc.*, 699 F.2d at 1006; *Stewart Infra-Red Commissary of Massachusetts, Inc. v. Coomey*, 661 F.2d 1 (1st Cir. 1981).

Where the job requirements in a labor certification are not otherwise unambiguously prescribed, e.g., by regulation, USCIS must examine "the language of the labor certification job requirements" in order to determine what the petitioner must demonstrate about the beneficiary's qualifications. *Madany*, 696 F.2d at 1015. The only rational manner by which USCIS can be expected to interpret the meaning of terms used to describe the requirements of a job in a labor certification is to "examine the certified job offer *exactly* as it is completed by the prospective employer." *Rosedale Linden Park Company v. Smith*, 595 F. Supp. 829, 833 (D.D.C. 1984) (emphasis added). USCIS's interpretation of the job's requirements, as stated on the labor certification must involve "reading and applying *the plain language* of the [labor certification]." *Id.* at 834 (emphasis added). USCIS cannot and should not reasonably be expected to look beyond the plain language of the labor certification or otherwise attempt to divine the employer's intentions through some sort of reverse engineering of the labor certification.

In the instant case, the labor certification states that the offered position has the following minimum requirements:

EDUCATION

Grade School: 8 years

High School: 4 years

College: N/A

College Degree Required: N/A

Major Field of Study: N/A

TRAINING: None Required.

EXPERIENCE: Two (2) years in the job offered

OTHER SPECIAL REQUIREMENTS: Must speak, write and read Hindi and Gujarati.

The labor certification states that the beneficiary qualifies for the offered position based on experience as an administrative assistant with [REDACTED] from May 1993 until May 1995. No other experience is listed. The beneficiary signed the labor certification

under a declaration that the contents are true and correct under penalty of perjury.

The regulation at 8 C.F.R. § 204.5(l)(3)(ii)(A) states:

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.

The petitioner submitted a January 5, 1996 letter from [REDACTED] stating that the company employed the beneficiary as an administrative assistant from May 2, 1993 to May 17, 1995. Although the letter met the requirements of 8 C.F.R. § 204.5(g)(1) and (l)(3)(ii)(A) in that it contained the name, address, and title of the employer and a description of the job duties of the position, the *bona fide* nature of the letter is questionable due to the surname of the author. As noted by the director in the decision, the author's surname is identical to that of the beneficiary. Although [REDACTED] is a common name in India, because of the family relationship between the petitioner's stockholder and the beneficiary, a question is raised as to whether the beneficiary is related to the [REDACTED] as well. If the beneficiary were related to the [REDACTED] further evidence would be needed to demonstrate that the position the beneficiary supposedly held was, indeed, a full-time position as represented.

On appeal, counsel states that no further evidence of the beneficiary's experience is available because the beneficiary was paid in cash, as is customary with small businesses in India and [REDACTED] ceased operations in 2005. "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. at 591. The petitioner submitted no evidence to demonstrate that the beneficiary has the experience claimed nor that the situation with [REDACTED] is as claimed by counsel. 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)). The assertions of counsel do not constitute evidence. *Matter of Obaigbena*, 19 I&N Dec. 533, 534 (BIA 1988); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980). Because the petitioner did not submit independent, objective evidence to demonstrate that the beneficiary had the experience required for the position, the petition may not be approved on this ground either.

The AAO affirms the director's decision that the petitioner failed to establish that the beneficiary met the minimum requirements of the offered position set forth on the labor certification as of the priority date. Therefore, the beneficiary does not qualify for classification as a professional or skilled worker under section 203(b)(3)(A) of the Act.

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