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



U.S. Citizenship  
and Immigration  
Services



Date:

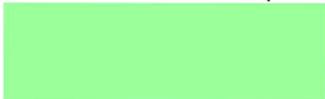
Office: NEBRASKA SERVICE CENTER FILE:



**FEB 01 2013**

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 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:** On September 24, 2007, the visa petition was initially approved by the Director, United States Citizenship and Immigration Services (USCIS) Nebraska Service Center. However, on November 19, 2012, the Director, Texas Service Center (the director), revoked the approval of the petition, invalidated the labor certification, and certified the decision to the Administrative Appeals Office (AAO) for review pursuant to 8 C.F.R. § 103.4(a). The matter is now before the AAO on certification. Upon review, the AAO will withdraw the director's 2012 revocation decision, because the petition had previously been withdrawn by the petitioner. The petition will be automatically revoked based on the withdrawal by the petitioner.

The petitioner is a landscaping company. It seeks to permanently employ the beneficiary in the United States as a stone cutter/carver<sup>1</sup> pursuant to section 203(b)(3)(A)(i) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(3)(A)(i).<sup>2</sup> As required by statute, the petition is submitted along with an approved ETA Form 9089, Application for Permanent Employment Certification. The petition was initially approved in 2007, but as indicated above, the approval was later revoked and the labor certification invalidated in 2012. The director found that the petitioner materially and/or willfully misrepresented its familial relationship with the beneficiary on the ETA Form 9089, and accordingly, invalidated the labor certification. The director also determined that the petitioner failed to establish the continuing ability to pay the proffered wage from the priority date, and continuing until the beneficiary obtains lawful permanent residence.

On certification, counsel contends that the director's action to revoke the approval of the petition and to invalidate the labor certification is moot, since the petitioner has previously requested that the petition be withdrawn before the director issued the Notice of Revocation (NOR) on November 9, 2012. In the alternative, counsel requests the AAO to withdraw the petition and undo the director's finding of fraud and/or willful misrepresentation involving the labor certification process.

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<sup>1</sup> We note that the petitioner listed the job title as stonemason on the Form I-140. To determine whether a beneficiary is eligible for an employment based immigrant visa, USCIS must examine whether the alien's credentials meet the requirements set forth in the labor certification. In evaluating the beneficiary's qualifications, USCIS must look to the job offer portion of the labor certification to determine the required qualifications for the position. USCIS may not ignore a term of the labor certification, nor may it impose additional requirements. *See Matter of Silver Dragon Chinese Restaurant*, 19 I&N Dec. 401, 406 (Comm'r 1986). *See also, Madany v. Smith*, 696 F.2d 1008 (D.C. Cir. 1983); *K.R.K. Irvine, Inc. v. Landon*, 699 F.2d 1006 (9th Cir. 1983); *Stewart Infra-Red Commissary of Massachusetts, Inc. v. Coomey*, 661 F.2d 1 (1st Cir. 1981).

<sup>2</sup> Section 203(b)(3)(A)(i) of 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.

We will address both issues – whether the director’s finding of fraud and/or willful misrepresentation involving the labor certification process is supported by evidence of record, and whether the request of withdrawal moot the director’s NOR.

The AAO conducts appellate review on a *de novo* basis. See *Soltane v. DOJ*, 381 F.3d 143, 145 (3d Cir. 2004).

In reviewing the record, we find that the director’s finding of fraud or willful misrepresentation involving the *bona fide* of the job offered and the labor certification process is not supported by the evidence of record, and thus, the director’s decision to invalidate the labor certification will be withdrawn. A relationship invalidating a *bona fide* job offer may arise where the beneficiary is related to the petitioner by blood or the relationship may be financial, by marriage, or through friendship. See *Matter of Sunmart* 374, 00-INA-93 (BALCA May 15, 2000). Where the person applying for a position owns the petitioner, 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). In *Matter of Silver Dragon Chinese Restaurant*, 19 I&N Dec. 401 (Comm. 1986), the commissioner noted that while it is not an automatic disqualification for an alien beneficiary to have an interest in a petitioning business, if the alien beneficiary’s true relationship to the petitioning business is not apparent in the labor certification proceedings, it causes the certifying officer to fail to examine more carefully whether the position was clearly open to qualified U.S. workers and whether U.S. workers were rejected solely for lawful job-related reasons. That case relied upon a Department of Labor (DOL) advisory opinion in invalidating the labor certification. The regulation at 20 C.F.R. § 656.30(d) provides that [USCIS], the Department of State or a court may invalidate a labor certification upon a determination of fraud or willful misrepresentation of a material fact involving the application for labor certification.

Here, the petitioner answered “No” to question 9 of part C of the ETA Form 9089, which reads, in pertinent part: “Is there a familial relationship between the owners, stockholders and the alien?” The record reflects, however, that the beneficiary is indeed related to the petitioner by marriage (the beneficiary is the brother-in-law of the owners of the petitioner).

A material issue in this case is whether the petitioner deliberately misrepresented its relationship by marriage with the beneficiary and whether the job offer was open and available to all qualified U.S. workers – whether the job offer was *bona fide*. A misrepresentation is material where the application involving the misrepresentation should be denied on the true facts, or where the misrepresentation tends to shut off a line of inquiry which is relevant to the applicant’s eligibility and which might well have resulted in a proper determination that the application be denied. See *Matter of S-- and B--C--*, 9 I&N Dec. 436, 447 (AG 1961). We note that the term “willfully” in the statute has been interpreted to mean “knowingly 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) (“knowledge of the falsity of the representation” is sufficient); *Forbes v. INS*, 48 F.3d 439, 442 (9th Cir. 1995) (interpreting “willfully” to mean “deliberate and voluntary”). Materiality is determined based on the

substantive law under which the purported misrepresentation is made. *See Matter of Belmares-Carrillo*, 13 I&N Dec. 195 (BIA 1969); *see also Matter of Healy and Goodchild*, 17 I&N Dec. 22, 28 (BIA 1979).

In addition, the fact that the beneficiary is related to the petitioner by marriage in and of itself is not sufficient to automatically disqualify the beneficiary to have a legitimate interest in the job offered and to conclude that the job offer was not *bona fide*. *See Matter of Silver Dragon Chinese Restaurant, id.* Nor should the labor certification be invalidated simply because the beneficiary is related to the petitioner by marriage.

In this case, we find ample evidence in the record showing that neither the petitioner nor the beneficiary deliberately concealed and willfully misrepresented the facts about their familial relationship. The record contains various affidavits and statements from the petitioner and the beneficiary stating that the petitioner disclosed its familial relationship with the beneficiary to [REDACTED] the attorney who filed the labor certification and the petition.<sup>3</sup> The record also includes documentation showing that [REDACTED] was aware of the filing of the Form I-130 Immigration Petition for Alien Relative that one of the owners of the petitioner filed on behalf of the beneficiary's wife. We also find that the e-mail message dated March 30, 2011 from Mr. [REDACTED] affirms the conclusion that neither the petitioner nor the beneficiary deliberately concealed and willfully misrepresented any facts concerning their relationship by marriage. The e-mail message indicated that [REDACTED] "is not sure that a brother-in-law is considered familial relationship." For these reasons, we determine that the misrepresentation on the ETA Form 9089 is not deliberate and willful by the petitioner. Accordingly, we withdraw the director's finding of fraud and/or willful misrepresentation involving the labor certification process as well as his decision to invalidate the labor certification.

Further, we find that the director's decision to revoke the approval of the petition was incorrect because it ignored the petitioner's prior request to "withdraw" the approved petition. The regulation at 8 C.F.R. § 103.2(b)(6) provides as follows with respect to the withdrawal of a petition:

An applicant or petitioner may withdraw an application or petition at any time until a decision is issued by USCIS or, in the case of an approved petition, until the person is admitted or granted adjustment or change of status, based on the petition. However, a withdrawal may not be retracted.

Moreover, the regulation at 8 C.F.R. § 205.1(a)(3)(iii)(C), in pertinent part, states:

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<sup>3</sup> [REDACTED] was under USCIS investigation at the time the Notice of Intent to Revoke (NOIR) was sent. USCIS suspected that [REDACTED] submitted fraudulent Form ETA 750 labor certification applications and Form I-140 immigrant worker petitions. [REDACTED] has since been suspended from practice before the United States Department of Homeland Security for three years from March 1, 2012.

The approval of a petition is [automatically] revoked as of the date of approval upon written notice of withdrawal filed by the petitioner, in employment-based preference cases, with any officer of the Service who is authorized to grant or deny petitions.

The director may not deny a petition after it has been withdrawn. *See Matter of Cintron*, 16 I&N Dec. 9 (BIA 1967). In this case, the Form I-140 petition was approved on September 24, 2007. On April 7, 2011 the petitioner submitted a request to withdraw the petition, and USCIS received the withdrawal request on April 11, 2011. The director then revoked the approval of the petition on November 19, 2012.

Based on the regulatory language above and the pertinent precedent decision, the petition's approval was automatically revoked when it was received by USCIS on April 11, 2011 regardless of whether USCIS acted upon it.<sup>4</sup> The director should have recognized the automatic revocation of the petition upon the petitioner's request to withdraw the petition and not adjudicated the petition further. Notwithstanding the director's failure, the approval of the petition was, as a matter of law, automatically revoked when the petitioner's written notice of withdrawal was filed and received by the director on April 11, 2011. For this reason, the petition was no longer valid at the time the director issued the Notice of Certification on November 9, 2012. All other issues that were initiated by the director during the revocation proceeding, i.e. the *bona fide* of the job offer and the petitioner's ability to pay, are moot.

**ORDER:** The petition is automatically revoked based on its withdrawal by the petitioner.

**FURTHER ORDER:** The director's finding of fraud or willful misrepresentation involving the labor certification process and decision to invalidate the alien employment certification, Form ETA 750, ETA Case Number [REDACTED] are withdrawn.

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<sup>4</sup> While 8 C.F.R. § 205.1(b) states that USCIS shall send a notice of automatic revocation to the petitioner, this notice is not required to perfect the automatic revocation. The automatic revocation occurs by operation of law upon the receipt by USCIS of the petitioner's request to withdraw.