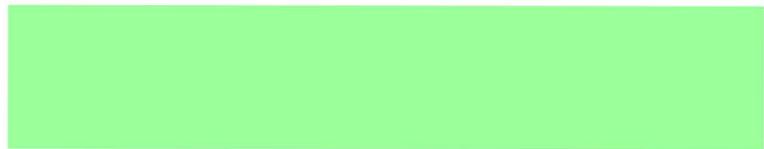


(b)(6)

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: FEB 12 2013 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:  
[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.

Thank you,

A handwritten signature in black ink, appearing to read "Ron Rosenberg".

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 The decision of the director will be withdrawn, and the matter will be remanded to the director for further consideration and a new decision.

The petitioner is a restaurant. It seeks to employ the substituted beneficiary<sup>1</sup> permanently in the United States as a sous chef. As required by statute, the petition is accompanied by ETA Form 9089, Application for Permanent Employment Certification, approved by the DOL. The director determined that the petition is not supported by a bona fide job offer based on the existence of a familial relationship between the substituted beneficiary and the shareholders of the petitioning company.

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 6, 2009 denial, the primary issue in this case is whether or not a bona fide job offer exists.

The labor certification was originally filed on behalf of [REDACTED]. The instant petition was filed requesting substitution of the original labor certification beneficiary, [REDACTED] with [REDACTED]. The petitioner indicates that there is no relationship based on marriage, blood or finance between [REDACTED] and the petitioner. The petitioner indicates that the substituted beneficiary, [REDACTED] is the nephew of [REDACTED] the President and 50% shareholder of the petitioner, and his wife, [REDACTED] a 50% shareholder of the petitioner.

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).

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

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<sup>1</sup> This petition involves the substitution of the labor certification beneficiary. The substitution of beneficiaries was formerly permitted by the United States Department of Labor (DOL). On May 17, 2007, the DOL issued a final rule prohibiting the substitution of beneficiaries on labor certifications effective July 16, 2007. *See* 72 Fed. Reg. 27904 (codified at 20 C.F.R. § 656). As the filing of the instant petition predates the final rule, and since another beneficiary has not been issued lawful permanent residence based on the labor certification, the requested substitution will be permitted.

alien?" The petitioner identified that it was an entity with eight employees, 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*).<sup>2</sup> 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

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<sup>2</sup> The Board of Alien Labor Certification Appeals (BALCA) in *Matter of Modular Container Systems, Inc.* determined that a *bona fide* job opportunity was dependent on whether U.S. workers could legitimately compete for the job opening and whether a genuine need for alien labor existed. If the certified job opportunity is tantamount to self-employment, then there is a *per se* bar to labor certification. Whether the job is clearly open to U.S. workers is measured by such factors as 1) whether the alien was in a position to influence or control hiring decisions regarding the job for which certification is sought; 2) whether the alien was related to the corporate directors, officers, or employees; 3) whether the alien was the incorporator or founder of the employer; 4) whether the alien had an ownership interest in the company; 5) whether the alien was involved in the management of the company; 6) whether he was one of a small number of employees; 7) whether the alien has qualifications for the job that are identical to specialized or unusual job duties and requirements as stated in the application; and 8) whether the alien is so inseparable from the petitioning employer because of a pervasive presence and personal attributes that the employer would be unlikely to continue in operation without him.

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.

The director stated in his decision that:

[i]t appears that the [DOL] could not conduct an inquiry into whether the position offered to the petitioner's family member was clearly open to qualified U.S. workers and whether U.S. workers were rejected solely for lawful job-related reasons.

Thus, the director determined that it did not appear that there was a bona fide job offer from the petitioner to the beneficiary which was open to all qualified U.S. citizens.

On appeal, counsel for the petitioner indicates that the answer on the ETA Form 9089 in Section C.9 was correct as it relates to the original labor certification beneficiary, [REDACTED]. Counsel notes that in response to the director's request for evidence (RFE) dated January 20, 2009, the petitioner advised the director that the substituted beneficiary is the nephew of the petitioner's President.

The AAO issued a Notice of Intent to Dismiss and Request for Evidence (NOID) on May 24, 2012, requesting evidence to establish that a *bona fide* job opportunity existed and that it was available to all U.S. workers.<sup>3</sup>

In response to the NOID, the petitioner provided sufficient documentation to establish that a *bona fide* job opportunity existed and that it was available to all U.S. workers. Specifically, the documentation established that the beneficiary was not in a position to control or influence hiring decisions involving the position for which certification is sought; that the beneficiary was not the incorporator or founder of the employer;<sup>4</sup> that the beneficiary did not have an ownership interest in the petitioner;

<sup>3</sup> The AAO specifically requested that the petitioner:

provide copies of all published advertisements for the offered position ... together with copies of the prevailing wage determination, all online, print and additional recruitment conducted for the position, the job order, the posted notice of the filing of the labor certification, and all resumes received in response to the recruitment efforts.

The AAO also requested evidence of the petitioner's ability to pay the proffered wage.

<sup>4</sup> The Certificate of Incorporation for the petitioner shows that [REDACTED] was the Incorporator of the petitioner and that [REDACTED] was the petitioner's initial director and registered agent. The Minutes of the Organization Meeting of the Shareholders and Directors of the petitioner dated September 29, 2001 show that [REDACTED] was the initial President, Secretary and Treasurer of the petitioner and that he was the initial sole shareholder and director of the petitioner. In July 2004, the petitioner became an S corporation jointly owned in equal shares by [REDACTED] and his wife, [REDACTED].

that the beneficiary was not involved in the management of the petitioner as an officer or director; and that the beneficiary was not so inseparable from the petitioning employer because of a pervasive presence and personal attributes that the employer would be unlikely to continue in operation without him.<sup>5</sup> Further, the petitioner established that its recruitment resulted in no applicants for the proffered job.<sup>6</sup>

Therefore, pursuant to 20 C.F.R. § 656.17(l), the petitioner has established that the instant petition is based on a *bona fide* job opportunity available to all U.S. workers. The petitioner has overcome the director's basis of denial.

However, beyond the decision of the director, [REDACTED] failed to establish that it is a successor-in-interest to the entity that filed the labor certification, petition and appeal in the instant matter.<sup>7</sup> In response to the AAO's NOID, the petitioner indicated that [REDACTED] absorbed a substantial portion of [REDACTED] in 2010, taking on its assets, liabilities, and employees, including all immigration obligations associated with the sponsorship of the [b]eneficiary." However, the petitioner failed to submit sufficient evidence to establish a successor-in-interest relationship between the petitioner, [REDACTED]. The record does not contain

The petitioner submitted its IRS Forms W-2 and Forms W-3 for 2005 through 2010, and a brief that lists the names of all of the petitioner's employees in 2010. The list includes [REDACTED]. Evidence contained in the beneficiary's Form I-485, Application to Register Permanent Residence or Adjust Status, as well as review of the Form I-140 filed by the petitioner on behalf of [REDACTED] for the position of Korean Specialty Cook, indicates that [REDACTED] is the substituted beneficiary's mother. While this factor alone does not establish that the instant job offer was mala fide, the AAO notes that the Form I-140 filed by the petitioner on behalf of [REDACTED] does not contain any evidence to indicate that the petitioner notified DOL or USCIS of the relationship between [REDACTED] or her husband, [REDACTED] and the petitioner. The approved Form I-140 filed by the petitioner on behalf of [REDACTED] indicates that the labor certification in that matter was originally filed on behalf of [REDACTED] the husband of [REDACTED] and the beneficiary's father. Further, the approved petition filed by the petitioner on behalf of [REDACTED] does not indicate on page three the name of her spouse or children.

<sup>6</sup> The petitioner provided copies of its job order, newspaper advertisements, notice of posting and prevailing wage determination for the proffered position.

<sup>7</sup> An application or petition that fails to comply with the technical requirements of the law may be denied by the AAO even if the Service Center does not identify all of the grounds for denial in the initial decision. *See Spencer Enterprises, Inc. v. United States*, 229 F. Supp. 2d 1025, 1043 (E.D. Cal. 2001), *aff'd*, 345 F.3d 683 (9<sup>th</sup> Cir. 2003); *see also Soltane v. DOJ*, 381 F.3d 143, 145 (3d Cir. 2004) (noting that the AAO conducts appellate review on a *de novo* basis).

<sup>8</sup> In response to the AAO's NOID, the petitioner states that it was established in September 2001 by [REDACTED]. The petitioner further states that in August 2006, [REDACTED] established another restaurant, [REDACTED] changed its corporate name to [REDACTED] in August 2006, changed its corporate name to [REDACTED] in January 2008, and changed its corporate

evidence to document the transfer. While the 2010 IRS Form 1120S<sup>9</sup> for the petitioner shows that the petitioner had no assets at the end of 2010, the tax return does not establish that the “assets, liabilities, and employees” were transferred to [REDACTED]

A labor certification is only valid for the particular job opportunity stated on the application form. 20 C.F.R. § 656.30(c). As [REDACTED] is a different entity than the petitioner/labor certification employer and appellant, it must establish that it is a successor-in-interest to that entity. *See Matter of Dial Auto Repair Shop, Inc.*, 19 I&N Dec. 481 (Comm’r 1986).

A valid successor relationship may be established for immigration purposes if it satisfies three conditions. First, the successor must fully describe and document the transaction transferring ownership of all, or a relevant part of, the predecessor. Second, the successor must demonstrate that the job opportunity is the same as originally offered on the labor certification. Third, the successor must prove by a preponderance of the evidence that it is eligible for the immigrant visa in all respects.

The evidence in the record does not satisfy all three conditions described above because it does not fully describe and document the transaction transferring ownership of the predecessor, it does not demonstrate that the job opportunity will be the same as originally offered and it does not demonstrate that the claimed successor is eligible for the immigrant visa in all respects, including whether it and the predecessor possessed the ability to pay the proffered wage for the relevant periods.<sup>10</sup> Accordingly,

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name to [REDACTED] in August 2010.

<sup>9</sup> The 2010 tax return is not marked as the petitioner’s final return.

<sup>10</sup> According to USCIS records, the petitioner has filed two I-140 petitions on behalf of other beneficiaries. Accordingly, the petitioner must establish that it has had the continuing ability to pay the combined proffered wages to each beneficiary from the priority date of the instant petition. *See Matter of Great Wall*, 16 I&N Dec. 142, 144-145 (Acting Reg’l Comm’r 1977). The petitioner has not established its continuing ability to pay the instant beneficiary and the beneficiaries of its other petitions for the relevant periods based on a review of wages paid, net income and net current assets. The AAO notes that there are inconsistencies in Schedules L to the petitioner’s IRS Forms 1120S for 2009 and 2010. The Schedule L for 2009 lists loans to shareholders of \$98,395 as non-current assets (line 7) at the beginning of the year, but the shareholder loans were listed on the petitioner’s Schedule L as current assets (line 6) at the end of 2008. Also, the Schedule L for 2009 lists \$98,395 in loans to shareholders (line 7) at the end of 2009, but the 2010 Schedule L does not list any loans to shareholders at the beginning of the year. *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.

The petitioner must resolve the inconsistencies in its tax returns with independent, objective evidence.

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[REDACTED] has failed to establish that it is a successor-in-interest to the petitioner/labor certification employer and appellant.

In view of the foregoing, the previous decision of the director will be withdrawn. The petition is remanded to the director for consideration of the issue stated above. The director may request any additional evidence considered pertinent. Similarly, the petitioner may provide additional evidence within a reasonable period of time to be determined by the director. Upon receipt of all the evidence, the director will review the entire record and enter a new decision.

**ORDER:** The director's decision is withdrawn; however, the petition is currently unapprovable for the reasons discussed above, and therefore the AAO may not approve the petition at this time. Because the petition is not approvable, the petition is remanded to the director for issuance of a new, detailed decision which, if adverse to the petitioner, is to be certified to the Administrative Appeals Office for review.