

(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

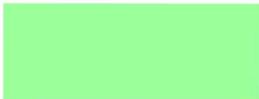


U.S. Citizenship
and Immigration
Services

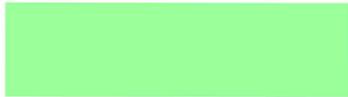


DATE: JUN 03 2013

OFFICE: TEXAS SERVICE CENTER

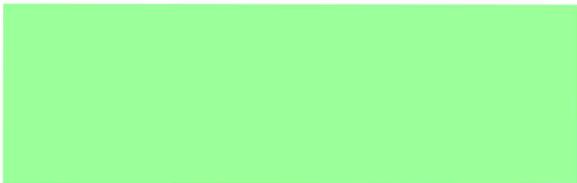
FILE: 

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:



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,

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

Ron Rosenberg
Acting Chief, Administrative Appeals Office

DISCUSSION: The employment-based preference visa petition was initially approved by the director of the Texas Service Center (director). The director served the petitioner with notice of intent to revoke the approval of the petition (NOIR). In a Notice of Revocation (NOR), the director revoked the approval of the Immigrant Petition for Alien Worker (Form I-140). The matter was appealed to the Administrative Appeals Office (AAO). The appeal will be dismissed.

The petitioner describes itself as a gas station/convenience store. It seeks to permanently employ the beneficiary in the United States as a manager, retail store. 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). The petition is accompanied by a labor certification approved by the U.S. Department of Labor (DOL).¹

Section 205 of the Act, 8 U.S.C. § 1155, provides that “[t]he Attorney General [now Secretary, Department of Homeland Security], may, at any time, for what he deems to be good and sufficient cause, revoke the approval of any petition approved by him under section 204.” The realization by the director that the petition was approved in error may be good and sufficient cause for revoking the approval. *Matter of Ho*, 19 I&N Dec. 582, 590 (BIA 1988).

The NOIR was properly issued pursuant to *Matter of Arias*, 19 I&N Dec. 568 (BIA 1988) and *Matter of Estime*, 19 I&N Dec. 450 (BIA 1987). Both cases held that a notice of intent to revoke a visa petition is properly issued for “good and sufficient cause” when the evidence of record at the time of issuance, if unexplained and un rebutted, would warrant a denial of the visa petition based upon the petitioner’s failure to meet his burden of proof. The director’s NOIR sufficiently detailed that during the beneficiary’s immigrant visa interview, the beneficiary stated that he had no experience or training as required for the proffered position.² The beneficiary’s lack of qualifications for the proffered job would warrant a denial if unexplained and un rebutted. Thus, the NOIR was properly issued for good and sufficient cause. The petitioner did not respond to the NOIR.

As set forth in the June 15, 2009 NOR, the director concluded that based on the beneficiary’s interview with the consular officer, the beneficiary does not meet the experience requirement set forth on the labor certification. The director revoked the petition’s approval accordingly.

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.³

¹ 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.

² The proffered position requires two years of experience as a retail store manager.

³ The submission of additional evidence on appeal is allowed by the instructions to the Form I-290B,

On appeal, the petitioner's counsel asserts that the beneficiary "was not asked about the prior experience letter. He was under the assumption that the interviewer asked him if he had worked for this employer in the US." However, 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).

Beneficiary's Qualifications

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 (Acting Reg'l Comm'r 1977); *see also Matter of Katigbak*, 14 I&N Dec. 45, 49 (Reg'l Comm'r 1971).

The regulation at 8 C.F.R. § 204.5(1)(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.

On December 4, 2012, the AAO sent the petitioner a Notice of Intent to Dismiss, Request for Evidence and Notice of Derogatory Information (NOID). The NOID stated, in part:

On Form ETA 750B signed by the substituted beneficiary on March 8, 2004, the beneficiary claims to have worked as a manager at the [REDACTED] in Mandi Gobindgarh, India from August 1996 through December 2001. The record contains a January 1, 2002 letter from an unnamed "manager" of [REDACTED] that states that the beneficiary worked "...on my petrol Pump as manager" from August 16, 1996 to December 31, 2001. Please submit independent, objective evidence of the beneficiary's work experience.⁴ Such evidence may include payroll records, tax records and/or paychecks issued by [REDACTED] to the beneficiary. Please also explain the beneficiary's conflicting statement to the consular officer that he had no such experience.

In response to the NOID, the petitioner's counsel asserts that in India, "paychecks are not generally given to employees, as they work on a cash basis." However, the non-existence or other unavailability

which are incorporated into the regulations by 8 C.F.R. § 103.2(a)(1).

⁴ It is incumbent upon the petitioner to resolve any inconsistencies in the record by independent objective evidence. Any attempt to explain or reconcile such inconsistencies will not suffice unless the petitioner submits competent objective evidence pointing to where the truth lies. *Matter of Ho*, 19 I&N Dec. 582, 591-92 (BIA 1988).

of required evidence creates a presumption of ineligibility. 8 C.F.R. § 103.2(b)(2)(i). The petitioner also submits affidavits from the beneficiary, the beneficiary's former employer and a customer indicating that the beneficiary worked as a manager for [REDACTED] from August 1996 through December 2001.

The beneficiary's affidavit dated December 28, 2012 is self-serving and does not provide independent, objective evidence of his prior work experience as a retail store manager. See *Matter of Ho*, 19 I&N Dec. at 591-592. 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 affidavit from [REDACTED] dated December 28, 2012 states that he is the owner of [REDACTED] that he has been running the station since 1979 and that the beneficiary worked there as a manager from August 16, 1996 to December 31, 2001. The signature on the affidavit does not match the signature on the January 1, 2002 letter from [REDACTED] provided with the petition. If [REDACTED] has "been running the station since 1979," it is unclear why he did not write the original letter submitted with the petition. Doubt cast on any aspect of the petitioner's proof may 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 affidavit does not provide independent, objective evidence of the beneficiary's prior work experience as a retail store manager. See *Matter of Ho*, 19 I&N Dec. at 591-592.

In response to the NOID, the petitioner submits an affidavit dated December 28, 2012 from [REDACTED] who asserts that he is the owner of a transport company that used to buy diesel and petrol from [REDACTED]. He states that the beneficiary worked as a manager at [REDACTED] but does not indicate when this employment occurred. The affidavit does not provide independent, objective evidence of the beneficiary's prior work experience as a retail store manager. See *id.*

Thus, 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. The director properly revoked the approval of the petition on this basis.

Bona Fide Job Offer

In its NOID, the AAO stated, in part:

Beyond the decision of the director, the record in this case also lacks conclusive evidence as to whether the petition is based on a bona fide job offer. 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 (9th 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). In the instant case, the above-referenced report from the consular officer in New Delhi states that the substituted beneficiary is your brother-in-law. If you contest this finding, please submit copies of the beneficiary and his wife's birth certificates and marriage certificate, as well as your birth certificate.

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 Summart 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'r 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 DOL advisory opinion in invalidating the labor certification. The regulation at 20 C.F.R. § 656.30(d) provides that United States Citizenship and Immigration Services (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.

In *Hall v. McLaughlin*, 864 F.2d 868 (D.C. Cir. 1989), the court affirmed the district court's dismissal of the alien's appeal from the Secretary of Labor's denial of his labor certification application. The court found that where the alien was the founder and corporate president of the petitioning corporation, absent a genuine employment relationship, the alien's ownership in the corporation was the functional equivalent of self-employment.

Given that the substituted beneficiary is the brother-in-law of the owner of the petitioner, the facts of the instant case suggest that this may too be the functional equivalent of self-employment. The observations noted above suggest that further investigation, including consultation with the DOL may be warranted under our consultation authority at 204(b) of the Act, in order to determine whether any family,

business, or personal relationship between the petitioner and the beneficiary represents an impediment to the approval of any employment-based visa petition filed by this petitioner on behalf of this beneficiary.

Please submit evidence to establish that the petitioner made a bona fide job offer to the substituted beneficiary, and that the relationship between the substituted beneficiary and the petitioner, if any, was disclosed to DOL or USCIS when the substitution request was made.

In response to the AAO's NOID, the petitioner's counsel states that although the beneficiary is the brother-in-law of the petitioner's shareholder, "neither of them tried to conceal this fact." Counsel further states that the "recruiting and petitions filed were all conducted with the sincere intention of hiring someone to fill an important position." However, 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). Counsel also notes that the labor certification did not have a space to alert DOL about the relationship between the beneficiary and the petitioner and that the original beneficiary was not related to the petitioner.

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.

In this case, the petitioner has failed to demonstrate that the certified job opportunity was clearly open to any qualified U.S. worker.⁵ Item 14 of Part A of the Form ETA 750 describes the minimum

⁵ Although not binding on the USCIS, the Board of Alien Labor Certification Appeals (BALCA) in *Matter of Modular Container Systems, Inc.*, 89 INA 228 (July 16, 1991), 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

education, training and experience that an applicant for the certified position must have. In this matter, item 14 requires two years of work experience in the job offered as a retail store manager. Item 17 states that the beneficiary will supervise four employees. The job duties are described in item 13 of the Form ETA 750. They state:

Supervising personnel, including hiring/firing decisions. Also, recordkeeping of personnel, accounts and sales receipts. Will manage purchasing and inventory and ensure store will comply with regulations.

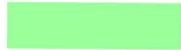
It is noted that the petitioner filed the instant Form I-140 with a labor certification for a prior beneficiary. Pursuant to existent procedures at the time the Form I-140 was filed, the petitioner requested to offer a substitution for the original beneficiary. The substituted beneficiary is the brother-in-law of the petitioner's shareholder and President.⁶ 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). The petitioner submitted no evidence to establish that a *bona fide* job opportunity was available to U.S. workers. The AAO finds that the petitioner failed to demonstrate that a *bona fide* job offer existed based on the undisclosed relationship of the substituted beneficiary to the petitioner.⁷

The director's decision revoking the approval of the petition will be sustained, and the appeal will be dismissed.

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. Based on these factors, it is not clear whether the job was open to U.S. workers, as the petitioner did not submit evidence to establish that it made a *bona fide* job offer. 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)).

⁶ The substitution of beneficiaries was formerly permitted by the DOL. Due to concerns regarding fraud and abuse, 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).

⁷ The AAO's NOID also requested evidence of the petitioner's continuing ability to pay the proffered wage. The petitioner submitted the requested evidence.



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.