



U.S. Citizenship
and Immigration
Services

(b)(6)

DATE: JUN 27 2013 Office: TEXAS SERVICE CENTER

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,

Elizabeth McCormack

Ron Rosenberg
Acting Chief, Administrative Appeals Office

DISCUSSION: The preference visa petition was denied by the Director, Texas Service Center. The matter is now before the Administrative Appeals Office (AAO) on appeal. The AAO will withdraw the director's finding of willful material misrepresentation against the petitioner. The appeal will be dismissed.

The petitioner is a garment importer and distributor. It seeks to employ the beneficiary permanently in the United States as a purchasing agent pursuant to section 203(b)(3) of the Immigration and Nationality Act (the Act), 8 U.S.C. §1153(b)(3). As required by statute, a Form ETA 750, Application for Alien Employment Certification approved by the United States Department of Labor (DOL) accompanied the petition. The director determined that the petitioner sought to procure an immigration benefit through fraud and willfull misrepresentation of a material fact by not disclosing that the beneficiary is the original member and is now a managing member of the LLC petitioner. Therefore, the director denied the petition with a finding of fraud.

As set forth in the director's March 23, 2012 denial, the primary issue in this case is whether or not the job offer in this case is bona fide; also at issue is whether the petitioner willfully misrepresented a material fact by not disclosing a familial relationship with the beneficiary.

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

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.

The petitioner must establish that its job offer to the beneficiary is a realistic one. Because the filing of an ETA 750 labor certification application establishes a priority date for any immigrant petition later based on the ETA 750, the petitioner must establish that the job offer was realistic as of the priority date and that the offer remained realistic for each year thereafter, until the beneficiary obtains lawful permanent residence. The petitioner's ability to pay the proffered wage is an essential element in evaluating whether a job offer is realistic. *See Matter of Great Wall*, 16 I&N Dec. 142 (Acting Reg'l Comm'r 1977); *see also* 8 C.F.R. § 204.5(g)(2). In evaluating whether a job offer is realistic, United States Citizenship and Immigration Services (USCIS) requires the petitioner to demonstrate financial resources sufficient to pay the beneficiary's proffered wages, although the totality of the circumstances affecting the petitioning business will be considered if the evidence warrants such consideration. *See Matter of Sonogawa*, 12 I&N Dec. 612 (Reg'l Comm'r 1967).

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).

The director determined that the petition was not based on a based on a *bona fide* job offer, and that the record in this case warrants a finding of fraud and willful misrepresentation because the petitioner, a Limited Liability Company (LLC) failed to disclose that the beneficiary is an original founding member and is one of its managing members. The director noted that on February 1, 2012, USCIS issued a notice of intent to deny (NOID) informing the petitioner of the derogatory information and giving the petitioner an opportunity to rebut the derogatory information. Specifically, the director notified the petitioner that a corporate records search, conducted on January 23, 2012, revealed that the beneficiary is the original founding member and one of the managing members of the LLC company; and, that the petitioner's federal tax returns for 2003 through 2006, and 2010, indicate that the beneficiary is the general partner designated as the tax matters partner for each of these years.

The director noted the petitioner's response to the NOID contending that the application was not a PERM labor certification application, but an old Form ETA-750 labor certification application. The director noted that while the Form ETA-750 did not have a box to check to indicate the beneficiary's ownership or relationship to the petitioning company, under the regulation at 8 C.F.R. § 626.2(c)(8), the petitioner was required to show that the job opportunity was clearly open to any U.S. worker. Therefore, even though there was not a box on the form ETA 750 to check, the petitioner was required to disclose the beneficiary's ownership in the company. The director further noted that the petitioner asserted in response to the NOID, that it did not willfully mislead the DOL, because on the Form ETA 750-B the beneficiary disclosed that he was the president of [REDACTED] Canada from 1998-2001, and that he was working for the petitioner in L-1 status; that, as an employee in L-1 status he would have worked in an executive or managerial capacity for a parent, subsidiary, or affiliate company abroad, prior to working for the petitioner in the United States; therefore, because of these disclosures on the Form ETA 750, the DOL knew or should have known of the possible ownership relationship between the beneficiary and the petitioner.

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.

A material issue in this case is whether the petitioner deliberately misrepresented its relationship to 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 this case, the record lacks sufficient evidence showing that either the petitioner or the beneficiary deliberately concealed and willfully misrepresented the facts about the relationship between the petitioner and the beneficiary. As noted above, on the ETA 750-B the beneficiary disclosed that he was the president of [REDACTED] from 1998-2001, and that he was working for the petitioner in L-1 status. We note that the record does not indicate the DOL was aware of the relationship between the petitioner and the beneficiary, and that while the relationship might have been discerned, the alien beneficiary's true relationship to the petitioning business was not affirmatively disclosed and is not immediately apparent in the labor certification proceedings. However, we cannot conclude that the petitioner sought to procure an immigration benefit by fraud or willful misrepresentation of a material fact.

For these reasons, we determine that the petitioner did not deliberately misrepresent its relationship to the beneficiary on the Form ETA 750. Accordingly, we withdraw the director's finding of fraud and/or willful misrepresentation involving the labor certification process.

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, and that a *bona fide* job opportunity is available to United States workers. As determined by the director, however, the record in this case does not reflect that the petition is based on a *bona fide* job offer, as the record establishes the beneficiary is an owner and managing member of the petitioner, and its managing and tax partner.

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 beneficiary is an owner of the petitioner, and a managing member, the beneficiary may be said to be functionally self-employed. The established business, ownership, and managerial 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.

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It is clear from the record of proceeding that a relationship between the beneficiary and the petitioner exists and that the petitioner did not affirmatively disclose the relationship to the DOL. It is also not clear from the objective evidence that DOL was cognizant of that relationship when it certified the instant labor certification, and that the job offer was open to all United States workers. Accordingly, the petition must be denied as it not based on the existence of a *bona fide* job offer.

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 AAO withdraws the director's finding of fraud and willful misrepresentation of a material fact against the petitioner. The appeal is dismissed.