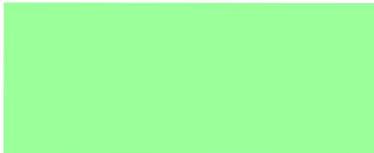


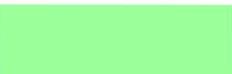


U.S. Citizenship  
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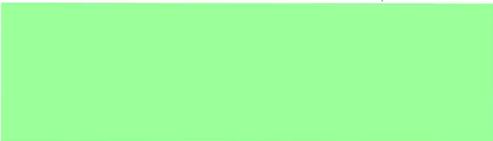


DATE: **MAR 07 2013** OFFICE: VERMONT SERVICE CENTER FILE: 

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,

  
Ron Rosenberg  
Acting Chief, Administrative Appeals Office

**DISCUSSION:** The employment-based immigrant visa petition was denied by the Director, Vermont Service Center, and is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner describes itself as a building maintenance and cleaning service, and seeks to employ the beneficiary as a janitorial supervisor. The petitioner seeks to classify the beneficiary pursuant to section 203(b)(3) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(3) as a professional or skilled worker. The director determined that the petitioner failed to demonstrate that a bona fide job offer existed, and that the petitioner failed to comply with a Request for Evidence (RFE) to demonstrate it possessed the continued ability to pay the proffered wage from the priority date onward. The petition was denied accordingly.

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.

The AAO conducts appellate review on a *de novo* basis. The AAO's *de novo* authority is well recognized by the federal courts.<sup>1</sup>

On appeal, counsel cited the same controlling case mentioned by the director, and asserted that the totality of the circumstances establishes that the job offer was bona fide. Counsel misconstrued the remaining portion of the director's decision which dealt with the petitioner's failure to provide "original U.S. Internal Revenue Service issued transcripts of your company's 2004, 2005, and 2006 U.S. Federal Income tax returns" and "original U.S. Internal Revenue Service issued transcripts of the beneficiary's W-2 Forms for 2001, 2002, 2003, 2004, 2005, and 2006." Instead of addressing the underlying failure to provide **original** documents, counsel focused on the petitioner's ability to pay the proffered wage.<sup>2</sup>

The record in this case lacks conclusive evidence as to whether the petition is based on a bona fide job offer or whether a pre-existing family, business, or personal relationship may have influenced the labor certification. In the instant case, USCIS records indicate that the petitioner is owned by two persons: the beneficiary and his wife. The beneficiary's wife signed all documents for the petitioner, as well as the beneficiary's experience verification letters. We note that the beneficiary also submitted a Form I-485, Application to Register Permanent Residence or Adjust Status, which was supported by the instant immigrant visa application. On the Form I-485 the beneficiary lists his wife as a derivative beneficiary for lawful permanent resident status. From the record, the petitioner has

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<sup>1</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>2</sup> The petitioner's original counsel, who filed the petition, was found guilty of committing immigration fraud. Because doubt was cast on the petitioner's proof, original documents from the IRS were deemed necessary.

not established that the beneficiary or his wife are in a lawful immigration status. It is clear, however, that neither the beneficiary nor his wife (the petitioner's owners) are lawful permanent residents or United States citizens. Although not explicitly noted by the director,<sup>3</sup> the instant petition is not submitted by a United States employer as required by 8 C.F.R. § 204(c).

The petitioner did not establish that a bona fide job offer exists.

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 (9<sup>th</sup> 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.

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 a part owner and husband of the other owner of the petitioner, the facts of the instant case show that this is the functional equivalent of self-employment. The petitioner failed to establish that the Department of Labor was aware of this information at the time the petitioner filed the application for labor certification. In his brief, counsel "postulates that the service has disregarded [petitioner's] corporate structure in making its determination that a bona fide

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<sup>3</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).

job opportunity does not exist.” Counsel goes on to state that “the fact that the petitioner only has one employee is not determinative of whether or not the corporation offered a bona fide job.” We disagree. The evidence in the case demonstrates that the petitioner’s owners and officers are the beneficiary and his wife (whose application for lawful permanent residence rest on the outcome of the beneficiary’s status). In this instant case, the petitioner has not shown how these conflicting interests were countermanded, or that the job was actually held open to United States workers.

Furthermore, the petitioner has not established that the job offer described on the application for labor certification remains valid. When the petition was filed, it sought to employ the beneficiary as a janitorial supervisor. The petitioner listed on the petition that it employed four people. At present, the record shows that the beneficiary is the sole employee. The petitioner has not shown how the original job as a supervisor remains valid when there are no employees to supervise.

The petitioner did not submit necessary evidence.

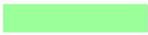
As noted above, the petitioner employed the service of counsel who was later found to be involved in immigration fraud. The record contains the beneficiary’s and his spouse’s joint Forms 1040, the petitioner’s Form 1120S, and Forms W-2 showing the petitioner employed and paid the beneficiary. However, there are inconsistencies in these records. Taking tax year 2001, the petitioner’s Form 1120S states that there were two owners (the beneficiary and his spouse), the petitioner had a gross profit of \$95,736, and \$24,000 was paid in officer compensation. A 2001 Form W-2 purporting to pay the beneficiary \$24,000 in 2001 is also in the record. However, the beneficiary’s 2001 Form 1040 claims wages in the amount of \$51,650, and income from an S Corp of \$33,177. These numbers are inconsistent. The director had significant questions about the probity of the petitioner’s evidence, and consequently requested original documents provided by the IRS. 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). Furthermore, 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).

Here, the petitioner has not explained or reconciled the inconsistencies in the record, and failed to provide evidence necessary for the adjudication of the petition.<sup>4</sup> The director therefore properly denied the petition.

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.

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<sup>4</sup> Counsel states in her brief that the IRS tax transcripts had not been received from the IRS in time for a response to the director’s RFE. Although counsel states that the transcripts for 2004, 2005, and 2006 are attached to the brief submitted on appeal, no such evidence was actually attached or submitted at any later date.



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Page 5

**ORDER:** The appeal is dismissed.