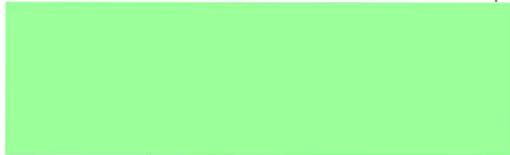




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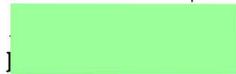


DATE:

MAR 26 2013

OFFICE: TEXAS SERVICE CENTER

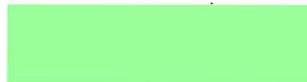
FILE:



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:

SELF-REPRESENTED

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 Director, Texas Service Center (director), denied the employment-based immigrant visa petition. The petitioner appealed the decision to the Administrative Appeals Office (AAO). The appeal will be dismissed.

The petitioner describes itself as a liquor store. It seeks to permanently employ the beneficiary in the United States as a bookkeeper. 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).

The director's decision denying the petition concluded that the petitioner had not established its ability to pay the beneficiary the proffered wage from the priority date onward.

The record shows that the appeal is properly filed 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. 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

The threshold issue on appeal is whether the petitioner has a successor-in-interest. The record shows that the ETA Form 9089 and Form I-140 were both filed by [REDACTED], with Federal Employer Identification Number (FEIN) [REDACTED] (the petitioner). It appears from the record that the petitioner was organized as a general partnership from its establishment in 2004 until it was incorporated in the state of California on September 5, 2007. Upon incorporation, the business became [REDACTED]. (appellant) has filed the instant appeal. There is nothing in the record to indicate that the petitioner consented to the appeal.

A labor certification is only valid for the particular job opportunity stated on the application form. 20 C.F.R. § 656.30(c). If the appellant is a different entity than the petitioner/labor certification employer, 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).

An appellant may establish a valid successor relationship 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

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 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).

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.

Evidence of transfer of ownership must show that the successor not only purchased assets from the predecessor, but also the essential rights and obligations of the predecessor necessary to carry on the business. To ensure that the job opportunity remains the same as originally certified, the successor must continue to operate the same type of business as the predecessor, in the same metropolitan statistical area and the essential business functions must remain substantially the same as before the ownership transfer. *See Matter of Dial Auto*, 19 I&N Dec. at 482.

On January 31, 2013, the AAO sent the petitioner a notice of derogatory information and request for evidence (NDI/RFE). The NDI/RFE afforded the appellant the opportunity to establish that it was a petitioning successor by documenting the transaction transferring ownership of the predecessor, demonstrating that it intended to employ the beneficiary in the proffered position in the same geographical location and providing evidence that the appellant and petitioner had the ability to pay the beneficiary the proffered wage during the relevant time period. The NDI/RFE allowed 30 days in which to submit a response. As of the date of this decision, the appellant has not responded to the AAO's NDI/RFE. Further, as noted above, there is nothing in the record to indicate that the petitioner consented to the appeal; nor has the petitioner submitted documentary evidence that the appellant is its successor-in-interest. Therefore, the appellant is not recognized as a petitioning successor and does not have standing in these proceedings.

In the NDI/RFE, the AAO noted that failure to respond to each line of inquiry would result in the appeal being dismissed and with the referral or invalidation of the labor certification. 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). For this reason, we affirm the director's decision denying the petition.

Additionally, it is not clear that a *bona fide* job offer exists in the instant case. In a search of public records, the beneficiary is identified as the owner of the petitioning business and on the submitted Form I-290B, the petitioner's address listed is the beneficiary's home address. 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 alien?” If the petitioner’s owner or corporate officer is related to, or in fact is the beneficiary, the petitioner should have indicated, “yes” to this question.

If the petitioner failed to check the appropriate box on ETA Form 9089, DOL would not be allowed an opportunity to audit and assess the nature of the familial relationship and the extent of the alien’s influence and control over job opportunity. Therefore, a material issue in the case is whether the petitioner failed to disclose the fact that the beneficiary appears to own the petitioning entity.

The NDI/RFE indicated that the failure to disclose the beneficiary’s familial relationship to any owner or officer, or his being an owner or officer, would constitute willful misrepresentation. Willful misrepresentation of a material fact in these proceedings may render the beneficiary inadmissible to the United States. See Section 212(a)(6)(C) of the Act, 8 U.S.C. § 1182(a)(6)(C), regarding misrepresentation, “(i) in general – any alien, who by fraud or willfully misrepresenting a material fact, seeks (or has sought to procure, or who has procured) a visa, other documentation, or admission to the United States or other benefit provided under the Act is inadmissible.”

A material issue in this case is whether the petitioning entity disclosed any familial relationship or close or financial relationship between the petitioning entity and the beneficiary. Failure to notify DOL amounts to a willful effort to procure a benefit ultimately leading to permanent residence under the Act. See *Kungys v. U.S.*, 485 U.S. 759 (1988), (“materiality is a legal question of whether “misrepresentation or concealment was predictably capable of affecting, *i.e.*, had a natural tendency to affect the official decision.”) Here, the omission of the beneficiary’s status as the owner of the petitioner, if true, is a willful misrepresentation that adversely impacted DOL’s adjudication of the ETA Form 9089.

Furthermore, a finding of misrepresentation may lead to invalidation of the ETA Form 9089. See 20 C.F.R. § 656.31(d) regarding labor certification applications involving fraud or willful misrepresentation:

Finding of fraud or willful misrepresentation. If as referenced in Sec. 656.30(d), a court, the DHS or the Department of State determines there was fraud or willful misrepresentation involving a labor certification application, the application will be considered to be invalidated, processing is terminated, a notice of the termination and the reason therefore is sent by the Certifying Officer to the employer, attorney/agent as appropriate.

By misrepresenting the beneficiary’s ownership of the petitioning business, the petitioner and the beneficiary sought to procure a benefit provided under the Act through willful misrepresentation of a material fact. See also *Matter of Ho*, 19 I&N Dec. at 591-592. It is proper for the United States Citizenship and Immigration Service (USCIS) to make a finding of fraud pursuant to section

212(a)(6)(c) of the Act, 8 U.S.C. § 1182. For these reasons, the AAO finds that the labor certification has been obtained through willful and material misrepresentation.

USCIS, pursuant to 20 C.F.R. § 656.31(d) (2004), may invalidate the labor certification based on fraud or willful misrepresentation. On March 28, 2005, pursuant to 20 C.F.R. § 656.17, the Application for Permanent Employment Certification, Form ETA 9089, replaced the Application for Alien Employment Certification, Form ETA 750. The new Form ETA 9089 was introduced in connection with the re-engineered permanent foreign labor certification program (PERM), which was published in the Federal Register on December 27, 2004, with an effective date of March 28, 2005. See 69 Fed. Reg. 77326 (Dec. 27, 2004). The regulation cited at 20 C.F.R. § 656.31(d) is the pre-PERM regulation applicable to the instant case. The regulation stated:

If a Court, the INS² or the Department of State determines that there was fraud or willful misrepresentation involving a labor certification application, the application shall be deemed invalidated, processing shall be terminated, a notice of the termination and the reason therefor shall be sent by the Certifying Officer to the employer, and a copy of the notification shall be sent by the Certifying Officer to the alien, and to the Department of Labor's Office of Inspector General.

As there was fraud or willful misrepresentation involving the labor certification, the ETA 9089 labor certification is hereby invalidated.

The petitioner has also failed to establish its ability to pay the proffered wage as of the priority date and continuing until the beneficiary obtains lawful permanent residence. See 8 C.F.R. § 204.5(g)(2). In determining the petitioner's ability to pay the proffered wage, USCIS first examines whether the petitioner has paid the beneficiary the full proffered wage each year from the priority date. If the petitioner has not paid the beneficiary the full proffered wage each year, USCIS will next examine whether the petitioner had sufficient net income or net current assets to pay the difference between the wage paid, if any, and the proffered wage.³ If the petitioner's net income or net current assets is not sufficient to demonstrate the petitioner's ability to pay the proffered wage, USCIS may also consider the overall magnitude of the petitioner's business activities. See *Matter of Sonogawa*, 12 I&N Dec. 612 (Reg'l Comm'r 1967).

In the instant case, the petitioner claims to have employed and paid the beneficiary since January 1, 2004. However, upon review of the information submitted, the director found discrepancies between

² INS is the predecessor agency to USCIS.

³ See *River Street Donuts, LLC v. Napolitano*, 558 F.3d 111 (1st Cir. 2009); *Elatos Restaurant Corp. v. Sava*, 632 F. Supp. 1049, 1054 (S.D.N.Y. 1986); *Tongatapu Woodcraft Hawaii, Ltd. v. Feldman*, 736 F.2d 1305 (9th Cir. 1984)); *Chi-Feng Chang v. Thornburgh*, 719 F. Supp. 532 (N.D. Texas 1989); *K.C.P. Food Co. v. Sava*, 623 F. Supp. 1080 (S.D.N.Y. 1985); *Ubeda v. Palmer*, 539 F. Supp. 647 (N.D. Ill. 1982), *aff'd*, 703 F.2d 571 (7th Cir. 1983); and *Taco Especial v. Napolitano*, 696 F. Supp. 2d 873 (E.D. Mich. 2010), *aff'd*, No. 10-1517 (6th Cir. filed Nov. 10, 2011).

the information reported on the tax returns and the information reflected in the instant petition. Specifically:

- The beneficiary claims to have been employed by the petitioner since January 1, 2004. However, the tax returns submitted state that the petitioner was not established until December 1, 2004;
- The beneficiary claims to have worked for the petitioner in 2006; however, no Internal Revenue Service (IRS) Form W-2 has been submitted for the beneficiary. Furthermore, the IRS Form 1065 filed by the petitioner in 2006 does not list any salaries or wages paid or cost of labor; and
- In 2007, the petitioner reported wages paid in the amount of \$5,200, the exact amount reported on the beneficiary's IRS Form W-2. This would indicate that the petitioning business was staffed solely by the beneficiary who is employed as a bookkeeper.

Therefore, the director issued two requests for evidence (RFE) dated March 19, 2010 and May 4, 2010 asking the petitioner to submit IRS tax transcripts for both the beneficiary's personal tax filings and the petitioner corporate tax filings for 2006 to 2009. *See* 8 C.F.R. § 204.5(g)(2). The petitioner failed to submit the requested information which precluded a material line of inquiry and the director concluded that the petitioner had failed to establish the ability to pay from the priority date onward.

The AAO's NDI/RFE noted that the record still contains a number of inconsistencies regarding the submitted financial information which call into question the reliability of the documents submitted. We indicated that the wages paid, as reported on the petitioner's tax returns, do not align with the number of employees it claims to have and that the date the petitioner was established does not support the beneficiary's claims of prior employment with the petitioner. It 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. *See Matter of Ho*, 19 I&N Dec. at 591-592. The discrepancies in the information and documentation in the record raise doubt about the veracity of the documents submitted. Doubt cast on any aspect of the petitioner's proof may, of course, lead to a reevaluation of the reliability and sufficiency of the remaining evidence offered in support of the visa petition. *Id.* Accordingly, after considering the totality of the circumstances, the petitioner has also failed to establish its continuing ability to pay the proffered wage to the beneficiary since the priority date onwards.

The petitioner must also establish that the beneficiary possessed all the education, training, and experience specified on the labor certification as of the priority date. 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). 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).

In the instant case, the labor certification states that the offered position requires 24 months of experience as a bookkeeper. On the ETA 9089, the beneficiary claims to qualify for the offered position based on experience as a full-time bookkeeper with [REDACTED] in Homs, Syria from January 15, 1989 to March 1, 2001. No other employment is listed. The beneficiary signed the labor certification under a declaration that the contents are true and correct under penalty of perjury.

The beneficiary's claimed qualifying experience must be supported by letters from employers giving the name, address, and title of the employer, and a description of the beneficiary's experience. See 8 C.F.R. § 204.5(1)(3)(ii)(A). The record contains an experience letter and translation from Dr. [REDACTED], general manager, on [REDACTED] letterhead, stating that the beneficiary was employed in the financial department, working 20 hours per week from January 5, 1989 to March 1, 2001. As noted in the NDI/RFE, the information submitted in the experience letter is inconsistent with the information listed on the ETA Form 9089; specifically the beginning date of employment and the number of hours worked per week are different. The record also contains an employment experience letter from Eng. [REDACTED], General Manager of the [REDACTED] in Homs, Syria. The letter, dated August 23, 2006, states that the beneficiary worked for the company in the financial department for 20 hours per week from January 5, 1989 to March 1, 2001. This experience was not listed on the ETA Form 9089. In *Matter of Leung*, 16 I&N Dec. 2530 (BIA 1976), the Board's dicta notes that the beneficiary's experience, without such fact certified by DOL on the beneficiary's Form ETA 750B, lessens the credibility of the evidence and facts asserted.

Furthermore, while the petitioner has not responded to the NDI/RFE, the beneficiary did submit a response. The beneficiary is not an affected party in these proceedings. The term "affected party" means the person or entity with legal standing in a proceeding. It does not include the beneficiary of a visa petition. 8 C.F.R. § 103.3(a)(1)(iii)(B). The party affected in visa petition cases is the petitioner, and the beneficiary does not have standing. *Matter of Dabaase*, 16 I&N Dec. 720 (BIA 1979). However, as the AAO finds that the beneficiary has engaged in willful misrepresentation in order to obtain an immigration benefit for which he is not eligible; the beneficiary's response will be incorporated into the record as evidence that the beneficiary was given notice of the AAO's findings.

By failing to identify any potential familial relationship or failing to disclose ownership of the petitioning entity, the beneficiary sought to procure a benefit provided under the Act through fraud and willful misrepresentation of a material fact. Upon receiving notice, the beneficiary did not respond to or rebut the AAO's finding that he had misrepresented his relationship with or ownership of the petitioning business. This finding of fraud shall be considered in any future proceeding where admissibility is an issue.

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.



(b)(6)

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ORDER: The appeal is dismissed. The director's denial shall remain undisturbed.

FURTHER ORDER: The AAO finds that the beneficiary knowingly misrepresented a material fact in an effort to procure a benefit under the Act and the implementing regulations.

FURTHER ORDER: The application for permanent employment certification, ETA Form 9089, ETA case number C-06172-31121, is invalidated.