(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: MAR 2 8 2013 OFFICE: NEBRASKA SERVICE CENTER FILE:

IN RE: Petitioner:
Beneficiary:

PETITION: Immigrant Petition for Alien Worker as a Professional Pursuant to Section 203(b)(3)(ii) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)(3)(ii)

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, Nebraska 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 manufacturer of nonwoven sorbents. It seeks to permanently employ the beneficiary in the United States as chief executive officer. 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).[1]

The petition is accompanied by an ETA Form 9089, Application for Permanent Employment Certification (labor certification), certified by the U.S. Department of Labor (DOL). The priority date of the petition, which is the date the DOL accepted the labor certification for processing, is March 3, 2010. *See* 8 C.F.R. § 204.5(d).

The director's decision denying the petition concludes that, due to the beneficiary being a general partner and member of the petitioner holding substantial financial interests, it does not appear that there was a bona fide job offer from the petitioner to the beneficiary which was open to all qualified U.S. workers.

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.[2]

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).

Where the petitioner is owned by the person applying for a position, 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

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[1] Section 203(b)(3)(A)(ii) of the Act, 8 U.S.C. § 1153(b)(3)(A)(ii), grants preference classification to qualified immigrants who hold baccalaureate degrees and are members of the professions.

[2] 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).

president, sole shareholder and chief cheese maker even where no person qualified for position applied).

In the director's August 22, 2011 denial, the director stated that the petitioner submitted a certificate of membership indicating the beneficiary possessed a 45.67% interest in the petitioner. Additionally, the petitioner submitted a 2009 Form 1065, Schedule K-1 indicating the beneficiary was a 32.696% general partner in the petitioner. The director concluded that a valid employment relationship did not exist in that a bona fide job opportunity was not available to U.S. workers.

The director also concluded that the petitioner willfully misrepresented interest of the beneficiary in the petitioner on the labor certification. In part C, section 9 of the Form 9089, the petitioner was asked, "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?" The petitioner marked the box labeled, "No."

On appeal, the petitioner asserts that it was an oversight of the company official and there was no intent to willfully misrepresent information on the Form 9089.

On appeal, petitioner submits the following:

1) A timeline for the petition application process. The timeline reflects that the petitioner formed) in January 31, 2010. The petitioner also submitted an ownership interest chart, reflecting that the beneficiary held a 45.67% ownership interest in this company. On March 3, 2010, the petitioner filed the labor certification with DOL. On March 31, 2010, a new partnership was formed as a successor-in-interest to . The new partnership had the same name but a different EIN number (On June 11, 2010, the Form 9089 was certified and the petitioner filed the Form I-140 on December 6, 2010. The ownership chart reflects that the beneficiary held a 27.40% ownership interest in the new partnership.
2) A copy of financial statements for the new partnership, dated March 31, 2010 through December 31, 2010.
3) A copy of a previously submitted Limited Liability Company Agreement for the petitioner.
4) A copy of the petitioner's 2009 Schedule K-1 (Form 1065), which reflects the beneficiary was a partner and had an ending profit of 32.696%.
5) A copy of an Agreement and Plan of Merger of and et al.

With the appeal, the petitioner also submits a letter asserting that 1) the beneficiary reports to a Board of Managers and may be removed by the board with or without cause; and 2) there was no intent to willfully misrepresent information on the Form 9089, as a proper advertising campaign was conducted and the fact that the beneficiary is in H1B non-immigrant status establishes an employer-employee relationship.

The supporting documents submitted by the petitioner to demonstrate that the petitioner's corporate structure allows for the removal of the beneficiary by a Board of Managers fail to address the bona fides of the job offer set forth in the labor certification. These supporting documents, which detail the petitioner's corporate structure and changes since the filing of the labor certification, do not establish that the offered position was open and available to all qualified U.S. workers. Rather, these documents only demonstrate that the offered position must answer to a Board of Managers and that the petitioner changed its corporate structure after the labor certification was filed.

The supporting documents submitted by the petitioner to demonstrate that it did not willfully misrepresent information on the Form 9089 also fail to address the bona fides of the job offer set forth in the labor certification. The supporting documents, which detail the beneficiary's ownership interest at the time the labor certification and petition were filed, as well as the beneficiary's H1B non-immigrant status, do not establish that the offered position was open and available to all qualified U.S. workers. Although the petitioner states that two responses from applicants were received and that both were disqualified for lawful reasons, no evidence of these responses was submitted. The petitioner's assertions 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).

Based on the evidence in the record, the AAO agrees that the beneficiary holds substantial financial interest in the petitioner. The Department of Labor did not have knowledge of the beneficiary's ownership interest in the petitioning entity and, therefore, did not conduct an inquiry into whether the position offered to the beneficiary was clearly open to all qualified U.S. workers and whether U.S. workers were rejected solely for lawful job-related reasons.

The petitioner has failed to establish that there was a bona fide job offer from the petitioner to the beneficiary which was open to all qualified U.S. workers.

Beyond the decision of the director,[3] 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

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[3] 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).

the wage paid, if any, and the proffered wage.[4] 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 Sonegawa,* 12 I&N Dec. 612 (Reg'l Comm'r 1967).

In the instant case, the wages paid to the beneficiary by the petitioner were not equal to or greater than the proffered wage for 2010. The record fails to contain the petitioner's 2010 federal tax returns for a proper analysis of the petitioner's net income or net current assets. Although the record contains a portion of the petitioner's audited financial statements from March 31, 2010 through December 31, 2010, no financial data is included.

Accordingly, after considering the evidence in the record, the petitioner has also failed to establish its continuing ability to pay the proffered wage to the beneficiary since the priority date in 2010.

Also beyond the decision of the director, the petitioner has not established that the beneficiary is qualified for the offered position. The petitioner must 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)(l), (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 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.

In the instant case, the labor certification states that the offered position requires 120 months in the job offered as a Chief Executive Officer.

Part K of the labor certification states that the beneficiary qualifies for the offered position based on experience as a Chief Executive Officer with [redacted] from March 27, 2007 to March 1, 2010; as a President with [redacted] from October 1, 2004 to March 26, 2007; as a General Manager with [redacted] from December 1, 1999 to December 31, 2002; and as a President/CEO with [redacted] from June 1, 1995 to December 31, 1999. No other experience is listed.

The regulation at 8 C.F.R. § 204.5(l)(3) provides:

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[4] *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).

(ii) *Other documentation* –

(A) *General.* 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.

The record contains an experience letter from , a member of , stating that the company employed the beneficiary as President from October 1, 2004 to March 26, 2007, a total of approximately two years and five months.

The record contains an experience letter from stating that the company employed the beneficiary as a General Manager starting in January 2000. No employment end date was provided. Therefore, the beneficiary's period of employment at this company is unclear and cannot be confirmed.

The record contains an experience letter from a shareholder in stating that the company employed the beneficiary as President/CEO from June 1, 1995 to December 31, 1999, a total of four and a half years. However, the letter is not on company letterhead and does not include the company's address.

Based on the above, the evidence in the record is not sufficient to establish that the beneficiary possessed the 120 months of experience in the job offered as a Chief Executive Officer by the priority date as required by the terms of the labor certification.

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.

ORDER: The appeal is dismissed.