

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

(b)(6)

DATE: **MAY 14 2013** OFFICE: NEBRASKA SERVICE CENTER FILE: [REDACTED]

IN RE: Petitioner: [REDACTED]
Beneficiary: [REDACTED]

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 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 summarily dismissed as abandoned pursuant to 8 C.F.R. § 103.2(b)(13)(i), with a separate administrative finding of willful misrepresentation of a material fact against the petitioner. The labor certification will also be invalidated based on the petitioner's willful misrepresentation.

The petitioner describes itself as a restaurant. It seeks to permanently employ the beneficiary in the United States as an administrative assistant. 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.

The director's decision denying the petition concluded that the petitioner failed to submit all of the required initial evidence with the petition, including evidence of the petitioner's continuing ability to pay the proffered wage, evidence of the beneficiary's qualifications for the proffered position, and an ETA Form 9089 signed by the beneficiary.¹

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

On July 6, 2012, the AAO sent the petitioner a notice of intent to dismiss and notice of derogatory information (NOID), with a copy to counsel of record. The NOID stated, in part:

USCIS records indicate that the petitioner filed multiple Form I-129s, Petition for a Nonimmigrant Worker, on behalf of the beneficiary. The Form I-129 petitions as well as the supporting documentation with them indicate that the beneficiary, [REDACTED] owns 50% of the petitioner and is married to [REDACTED] owner of the other 50% of the petitioner. 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

¹ USCIS will not approve a petition unless it is supported by an original certified ETA Form 9089 that has been signed by the employer, beneficiary, attorney and/or agent. *See* 20 C.F.R. § 656.17(a)(1).

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).

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 is related to the beneficiary, the petitioner should have indicated, "yes" to this question. The ETA Form 9089 submitted with this petition indicated "no" in Section C.9.

The PERM regulation specifically addresses this issue at 20 C.F.R. § 656.17(l) that states in pertinent part:

(l) Alien influence and control over job opportunity. If the employer is a closely held corporation or partnership in which the alien has an ownership interest, or if there is a familial relationship between the stockholders, corporate officers, incorporators, or partners, and the alien, or if the alien is one of a small number of employees, the employer in the event of an audit must be able to demonstrate the existence of a *bona fide* job opportunity, i.e., the job is available to all U.S. workers, and must provide to the Certifying Officer, the following supporting documentation:

(1) A copy of the articles of incorporation, partnership agreement, business license or similar documents that establish the business entity;

(2) A list of all corporate/company officers and shareholders/partners of the corporation/firm/business, their titles and positions in the business' structure, and a description of the relationships to each other and to the alien beneficiary;

(3) The financial history of the corporation/company/partnership, including the total investment in the business entity and the amount of investment of each officer, incorporator/partner and the alien beneficiary; and

(4) The name of the business' official with primary responsibility for interviewing and hiring applicants for positions within the organization and the name(s) of the business' official(s) having control or influence over hiring decisions involving the position for which labor certification is sought.

(5) If the alien is one of 10 or fewer employees, the employer must document any family relationship between the employees and the alien.

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 a close familial relationship between the petitioner and the beneficiary.

Therefore, please explain the relationship between the beneficiary and any owner, manager or organizer of the company, and please provide any evidence of this relationship that you may have provided to the DOL in accordance with 20 C.F.R. § 656.17. The petitioner should acknowledge what relationship the beneficiary has to the petitioner's members, as well as any ownership interest in the petitioning entity. Further, the petitioner should provide certified copies of the petitioner's articles of organization, and documentation of the company's ownership at the time of organization through the present to include any and all changes to the company's ownership.

Further, the failure to disclose the beneficiary's ownership interest and family relationship to any owner 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 family 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 an owner and as a relative of an owner of a small company, if any, 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 failing to identify any potential familial relationship, the beneficiary would seek to procure a benefit provided under the Act through fraud and willful misrepresentation of a material fact. Any finding of fraud as a result shall be considered in any future proceeding where admissibility is an issue.

Doubt cast on any aspect of the petitioner's evidence may lead to a reevaluation of the reliability and sufficiency of the remaining evidence offered in support of the visa petition. It is incumbent upon the petitioner to resolve any inconsistencies in the record by independent objective evidence, and attempts to explain or reconcile such inconsistencies, absent competent objective evidence pointing to where the truth, in fact, lies, will not suffice. *Matter of Ho*, 19 I&N Dec. 582, 591-592 (BIA 1988).

Further, the AAO notes that the Form I-140 petition and ETA Form 9089 both describe the proposed employment as an administrative assistant. Specifically, the duties of the proffered position listed on the labor certification are as follows:

Assist President with correspondence. Arrange appointments. Liason [sic] between staff and President. Write up minutes of Board of Directors and shareholders meeting. Examine the ballots and announce election results. Handle all shareholder information requests.

The Form I-129 petitions filed by the petitioner on behalf of the beneficiary list the beneficiary's employment with the petitioner as owner and general manager, and the duties of the position are listed as overseeing and supervising. The description of the beneficiary's employment on the Form I-129s is inconsistent with the description of the beneficiary's employment on the Form I-140 as an administrative assistant. The inconsistencies have not been resolved. This casts doubt on the actual duties of the position and whether the administrative assistant job offer is bona fide.

Further, the petitioner is a Florida limited liability company (LLC). Its Articles of Organization on file with the Florida Secretary of State indicate that the beneficiary and his wife are the managing members of the petitioner. See [REDACTED] (accessed May 4, 2012). An LLC does not have shareholders or a Board of Directors.³ Also, the petitioner does not appear to have officers, as it is managed by its members. Therefore, the petitioner does not have a President, does not have a Board of Directors and does not have shareholders as detailed in the proffered position's job description. Thus, the job offer does not appear to be a valid one.

³ See the Florida Limited Liability Company Act, 36 Fla. Stat. Ch. 608.

The AAO allowed the petitioner 30 days in which to submit a response. The AAO informed the petitioner that failure to respond to the NOID would result in a dismissal of the appeal.

As of the date of this decision, the petitioner has not responded to the AAO's NOID. 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). Since the petitioner failed to respond to the NOID, the appeal will be summarily dismissed as abandoned pursuant to 8 C.F.R. § 103.2(b)(13)(i).

Further, the petitioner indicated on the ETA Form 9089 that the beneficiary did not have an ownership interest in the petitioner and that there was no familial relationship between the beneficiary and the owners, stockholders, partners, corporate officers, incorporators of the petitioner. However, the beneficiary is a managing member of the petitioner, he owns 50% of the petitioner, and he is married to [REDACTED] owner of the other 50% of the petitioner. This constitutes a willful misrepresentation of a material fact. Therefore, the ETA Form 9089 will be invalidated.

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 summarily dismissed as abandoned.

FURTHER ORDER: The AAO finds that the petitioner knowingly misrepresented a material fact on the ETA Form 9089 in an effort to procure a benefit under the Act and the implementing regulations. The alien employment certification, ETA Form 9089, ETA case number A-07067-17680, filed by the petitioner is invalidated.