

(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: **MAY 24 2013** OFFICE: NEBRASKA 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 Director, Nebraska Service Center 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 construction business. It seeks to employ the beneficiary permanently in the United States as a bilingual accountant. 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 required initial evidence with the petition regarding its ability to pay the beneficiary the proffered wage from the priority date onwards, and regarding whether the beneficiary met the educational, training, and experience requirements of the labor certification as of the priority date.

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.<sup>1</sup>

On April 27, 2012, the AAO issued a Notice of Intent to Dismiss (NOID) to the petitioner and to counsel of record, stating that, during the adjudication of the appeal, the AAO found no evidence demonstrating that the petitioning business in this matter, [REDACTED] with the Federal Employer's Identification Number (FEIN) of [REDACTED] is an operating business enterprise. The AAO noted that the petitioner provided copies of the petitioner's U.S. Corporation Income Tax Returns (Forms 1120) for 2002 and 2003. However, no other evidence was provided for this company. Further, the AAO noted that there is no record of this company continuing to operate after 2003. The NOID included print-outs from the official website of the California Secretary of State, which had no record of the petitioning entity. The AAO stated that, according to the website of the California Secretary of State, there is one organization which bears the name [REDACTED]. However, this organization uses an address and agent that are not identified with the petitioner anywhere in the record of proceeding. Further, the website indicates that [REDACTED] is suspended.

---

<sup>1</sup> 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).

The AAO notified the petitioner that, if the petitioning business is no longer an active business, the petition and its appeal to this office have become moot.<sup>2</sup> In which case, the appeal shall be dismissed as moot.

Moreover, any such concealment of the true status of the organization by the petitioner seriously compromises the credibility of the remaining evidence in the record. *See Matter of Ho*, 19 I&N Dec. 582, 586 (BIA 1988)(stating that doubt cast on any aspect of the petitioner's proof 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. *See Id.* The AAO provided the petitioner with 30 days in which to respond.

On May 29, 2012, counsel submitted a letter to the AAO. The petitioner also submitted documents indicating that [REDACTED] was a corporation formed on August 21, 2003 under the laws of the state of Nevada, was in good standing as of January 14, 2009, and possessed a business license in Nevada from September 19, 2011 through August 31, 2012.

The AAO finds that the petitioner has failed to demonstrate that its business, [REDACTED] located in [REDACTED] California, is the same entity as [REDACTED] located in Nevada. The AAO notes that the petitioner listed on the petition that its business was established on December 4, 2007, rather than on August 21, 2003. Further, the AAO did not find [REDACTED] listed on the Nevada Secretary of State's business entity search website.<sup>3</sup>

Accordingly, the AAO finds that the petitioner has failed to demonstrate that its business is in existence. The instant appeal is therefore moot.

Beyond the decision of the director,<sup>4</sup> it is also concluded that the petition is not supported by a *bona fide* job offer. *See Matter of Silver Dragon Chinese Restaurant*, 19 I&N Dec. 401 (Comm'r 1986).

---

<sup>2</sup> Where there is no active business, no *bona fide* job offer exists, and the request that a foreign worker be allowed to fill the position listed in the petition has become moot. Additionally, even if the appeal could be otherwise sustained, the petition's approval would be subject to automatic revocation pursuant to 8 C.F.R. § 205.1(a)(iii)(D) which sets forth that an approval is subject to automatic revocation without notice upon termination of the employer's business in an employment-based preference case.

<sup>3</sup> *See* [REDACTED] (accessed March 12, 2013).

<sup>4</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).

Specifically, it appears from the evidence in the record that there was never a *bona fide* job offer in May 2002 when the labor certification was filed, as the petitioner's business did not exist until August 2003 or December 2007. The petitioner has failed to establish that the instant petition is based a *bona fide* job opportunity available to U.S. workers. Accordingly, the petition must also be denied for this reason.

Also beyond the decision of the director, the AAO notified the petitioner in its April 27, 2012 NOID that the record in this case lacks conclusive evidence regarding whether the petition is based on a bona fide job offer or whether a pre-existing family, business, or personal relationship might have influenced the labor certification.

In the instant case, USCIS records indicate that the beneficiary is related to the petitioner. USCIS records show that [REDACTED] is the mother of both [REDACTED] (the beneficiary's mother) and [REDACTED] the individual who signed the instant petition and the labor certification. All three of these individuals appear as owners of businesses associated with the petitioner's business, with the address initially attributed to the petitioner, or with businesses that have used variations of the petitioner's name. In addition, the petitioner provided copies of tax returns for other companies that [REDACTED] owns. Both [REDACTED] names and social security numbers have appeared on the tax returns submitted as evidence, indicating that they are also owners of said companies. USCIS records show that [REDACTED] filed Form I-130, Petition for an Alien Relative, for the beneficiary.

Additionally, in a search of public records, USCIS found information through Experian that indicates that the beneficiary of the instant petition has used at least three aliases, one of which is [REDACTED]. Further, the beneficiary has shared an address with [REDACTED] that address being: [REDACTED]

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 related to the owner of the petitioner's business, [REDACTED] through a relationship with the petitioner's owner's sister and co-owns/represents other businesses with [REDACTED] and the petitioner's sister, [REDACTED] the facts of the instant case suggest that this might also be the functional equivalent of self-employment and that the job offer might not be *bona fide*. The observations noted above suggest that further investigation, including consultation with the DOL, may be warranted under the AAO's consultation authority at 204(b) of the Act, in order to determine whether any family, business, or personal 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.

Therefore, this office requested verifiable evidence of the relationship between the beneficiary and [REDACTED] who signed the Form I-140 and the labor certification, and [REDACTED] with whom the beneficiary co-owns/represents properties along with [REDACTED] the petitioner's owner. The AAO also requested verifiable evidence that DOL was cognizant of these relationships when it certified the instant labor certification for the instant beneficiary. The AAO noted that, if the petitioner did not submit verifiable evidence of the relationship between the beneficiary and [REDACTED] as well as the petitioner's owner, [REDACTED] and verifiable evidence that DOL was cognizant of that relationship when it certified the instant labor certification, the AAO could invalidate the labor certification, based on fraud or willful misrepresentation. The regulation at 20 C.F.R. § 656.30(d) provides that: "after issuance, a labor certification is subject to invalidation by the DHS or by a Consul of the Department of State upon a determination, made in accordance with those agencies' procedures or by a court, of fraud or willful misrepresentation of a material fact involving the labor certification application." The law of materiality will control the agency's determination that the application should be invalidated. Under *Matter of S & B-C-*, 9 I&N Dec. 436 (A.G. 1961), a misrepresentation is material where it shuts off a line of inquiry which is relevant to the alien's eligibility and which might well have resulted in a proper determination that he or she is inadmissible. An alien's misrepresentation of his or her relationship to a company's owner during the labor certification process would close off a line of relevant inquiry which would have revealed that the labor certification should actually have been denied. Accordingly, USCIS may invalidate the labor certification based on the alien's misrepresentations. The AAO notified the petitioner that, while it may withdraw the appeal, withdrawal will not prevent a finding that it has engaged in fraud and the willful misrepresentation of material facts.

In counsel's letter included with the petitioner's May 29, 2012 response to the AAO's NOID, counsel states that neither the beneficiary nor the petitioner's owner's mother or sister ever owned any shareholding interest in the petitioner's company, which is solely owned by [REDACTED]. Counsel concedes that [REDACTED] have been elected on multiple occasions as director or officer of the petitioner's business, but that they have never held any ownership interest. Counsel claims that, if their names appear on corporate tax returns, then it was because of their remuneration and not because of any shareholding interest. Counsel states that these two individuals have long ceased to be the officer or director of the petitioner's corporation.

Counsel confirms that the beneficiary lives with his mother, [REDACTED] but categorizes this fact as being trivial. Counsel claims that this family relationship between a mother and her son should not invalidate an otherwise approvable petition. Counsel asserts that the position was clearly open to all qualified U.S. workers and that, as evidenced by all of the documents submitted to the DOL (but not submitted in response to the AAO's NOID), the petitioner strictly adhered to all recruitment steps, such as job posting, advertising, etc. Counsel references *Hall vs. McLaughlin*, 864 F. 2d 868 (D.C. Cir. 1989), claiming that the beneficiary was never the founder or president of the petitioner's company as in that case. Counsel states that the petitioner promptly disclosed all identifying information to the DOL, withheld no information, and provided no inaccurate data.

The AAO requested verifiable evidence of the relationship between the beneficiary and [REDACTED] who signed the Form I-140 and the labor certification application, and [REDACTED] with whom the beneficiary co-owns/represents properties along with [REDACTED] the petitioner's owner. The AAO also requested verifiable evidence that DOL was cognizant of these relationships when it certified the instant labor certification for the instant beneficiary. Other than the letter from counsel, the petitioner failed to provide any additional evidence with regard to these issues. The assertions of counsel do not constitute evidence. *Matter of Obaigbena*, 19 I&N Dec. 533, 534 (BIA 1988); *Matter of Laureano*, 19 I&N Dec. 1 (BIA 1983); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980). Accordingly, the AAO finds that the petitioner has failed to demonstrate that the petition is based on a bona fide job offer and that a pre-existing family, business, or personal relationship did not influence the labor certification.

The AAO notified the petitioner in its April 27, 2012 NOID that the evidence in the record does not establish that the beneficiary possesses the required experience for the offered position. The petitioner must demonstrate that the beneficiary possessed all of the requirements stated on the labor certification as of the May 13, 2002 priority date. *See Matter of Wing's Tea House*, 16 I&N Dec. 158 (Act. Reg. Comm. 1977).

The labor certification states that the offered position requires two years of experience in the job offered of bilingual accountant, performing the following duties:

- Prepare and keep financial statements, profit and loss accounts, bank reconciliations, balance books and compile records of cash receipts and expenditures, accounts

payable and receivable. Consults with clients in Farsi regarding billing and other bookkeeping matters.

Section 15 of Form ETA 750B of the labor certification states that the beneficiary qualifies for the offered position based on experience as a bilingual accountant with [REDACTED] California from April 1997 to May 1999. The petitioner also included experience that the beneficiary gained in the proffered position while working for the petitioning business since May 1999. Apart from these positions, no other experience is listed.

The regulation at 8 C.F.R. § 204.5(1)(3) provides:

(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.

(B) *Skilled workers.* If the petition is for a skilled worker, the petition must be accompanied by evidence that the alien meets the educational, training or experience, and any other requirements of the individual labor certification, meets the requirements for Schedule A designation, or meets the requirements for the Labor Market Information Pilot Program occupation designation. The minimum requirements for this classification are at least two years of training or experience.

The record contains an experience letter from [REDACTED] on [REDACTED] letterhead, stating that the company employed the beneficiary from April 12, 1997 until May 29, 1999, the date on which the letter was drafted.

However, the individual who wrote the letter does not identify his title or role with the company. The letter does not identify the position which the beneficiary held while working for the organization. Further, the letter fails to identify the duties that the beneficiary performed. Moreover, the letter does not indicate whether the position was full-time or not. It should also be noted that, while the letter was drafted on [REDACTED] letterhead, the address that appears at the bottom of the letter is the same address that the petitioner originally identified on Form ETA 750 as its own. The same address is also used by the petitioner, [REDACTED] for a number of his other business enterprises. For these reasons, the employment letter lacks credibility.

*Matter of Ho*, 19 I&N Dec. 582, 591-592 (BIA 1988), states:

It is incumbent on 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.

The evidence in the record was not sufficient to establish that the beneficiary possessed the two years of experience in the job offered by the priority date as required by the terms of the labor certification. Therefore, the AAO, in its April 27, 2012 NOID, asked the petitioner to submit experience letters that satisfy the regulatory requirements set forth above to establish that the beneficiary possessed the required experience to perform the duties of the offered position.

On May 29, 2012, the petitioner submitted a letter dated May 18, 2012 from [REDACTED] Vice President, on [REDACTED] letterhead. The letter states that the beneficiary worked there from April 12, 1997 to May 30, 1999 as a bilingual accountant. Although the petitioner has failed to reconcile the fact that [REDACTED] was located at the same address as the petitioner's business or to explicitly state whether the employment was full-time or not, the AAO finds that the petitioner has sufficiently demonstrated that the beneficiary possessed the requisite experience for the position as of the priority date.

The AAO notified the petitioner in its April 27, 2012 NOID that the petitioner, [REDACTED] with the FEIN [REDACTED] must also demonstrate that it has been able to pay the proffered wage from the priority date until the beneficiary obtains lawful permanent residence. See 8 C.F.R. § 204.5(g)(2). In order to establish ability to pay, the AAO stated that the petitioner must submit its annual reports, federal tax returns, or audited financial statements for each year from the priority date. *Id.* The AAO noted that the beneficiary has not yet obtained lawful permanent residence. The AAO stated that the record of proceeding contained the petitioner's federal tax returns for 2002 and 2003. Accordingly, the AAO asked the petitioner to submit annual reports, federal tax returns, or audited financial statements for 2004, 2005, 2006, 2007, 2008, 2009, 2010, and 2011. The AAO also asked the petitioner to submit any Forms W-2 or 1099 issued to the beneficiary by its organization for 2002 through 2011.

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.<sup>5</sup> 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

---

<sup>5</sup> See *River Street Donuts, LLC v. Napolitano*, 558 F.3d 111 (1<sup>st</sup> 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).

I&N Dec. 612 (Reg'l Comm'r 1967).

In the instant case, the petitioner failed to provide evidence of wages paid to the beneficiary even though the labor certification states that the beneficiary began working for the petitioner's business in May of 1999. In response to the AAO's April 27, 2012 NOID, the petitioner submitted copies of [REDACTED] personal tax returns for 2005 through 2009 and applications for an extension to file his personal tax returns for 2010 through 2011. Nothing in the record of proceeding indicates that the petitioner is a sole proprietorship. The petitioner's 2002 and 2003 federal tax returns submitted on appeal indicate that the petitioner was a C Corporation and filed its tax returns on Form 1120. No evidence of the petitioner's ability to pay the proffered wage in 2004 was submitted. Schedule C of [REDACTED] 2005 through 2009 Forms 1040 list [REDACTED] business name as "Licensed Contractor." Schedule C lists no business address or Employer Identification Number (EIN), and nothing in the Forms 1040 demonstrates that these are the petitioner's tax returns.

Because a corporation is a separate and distinct legal entity from its owners and shareholders, the assets of its shareholders or of other enterprises or corporations cannot be considered in determining the petitioning corporation's ability to pay the proffered wage. See *Matter of Aphrodite Investments, Ltd.*, 17 I&N Dec. 530 (Comm'r 1980). In a similar case, the court in *Sitar v. Ashcroft*, 2003 WL 22203713 (D.Mass. Sept. 18, 2003) stated, "nothing in the governing regulation, 8 C.F.R. § 204.5, permits [USCIS] to consider the financial resources of individuals or entities who have no legal obligation to pay the wage."

The petitioner did not demonstrate that it possessed sufficient net income or net current assets to pay the beneficiary the proffered wage of \$38,168.00 from 2003 onwards. The petitioner submitted no regulatory prescribed evidence of its ability to pay the proffered wage in 2004. Further, the petitioner failed to establish that factors similar to *Sonegawa* existed in the instant case, which would permit a conclusion that the petitioner had the ability to pay the proffered wage despite its shortfalls in wages paid to the beneficiary, net income, and net current assets.

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.

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 as moot.