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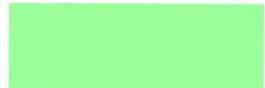
U.S. Citizenship  
and Immigration  
Services



DATE: AUG 11 2014

OFFICE: TEXAS SERVICE CENTER

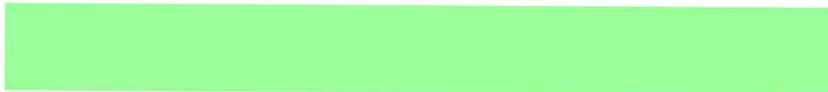
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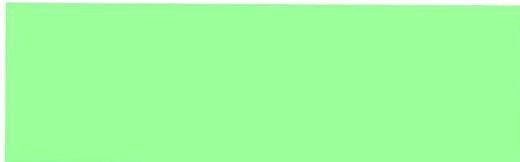
Petitioner:

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 (AAO) in your case. This is a non-precedent decision. The AAO does not announce new constructions of law nor establish agency policy through non-precedent decisions.

Thank you,

  
Ron Rosenberg  
Chief, Administrative Appeals Office

**DISCUSSION:** The employment-based preference visa petition was initially approved by the Director, Texas Service Center. Following the review of the beneficiary's Application to Register Permanent Resident or Adjust Status, Form I-485 and supporting documents, the director served the petitioner with notice of intent to revoke the approval of the petition (NOIR). In a Notice of Revocation (NOR), the director ultimately revoked the approval of the Form I-140, Immigrant Petition for Alien Worker. The matter is now before the Administrative Appeals Office (AAO) on appeal. The director's decision will be withdrawn. The appeal will be remanded to the director for further action, consideration, and the entry of a new decision in accordance with below.

### I. PROCEDURAL HISTORY

Section 205 of the Act, 8 U.S.C. § 1155, provides that "[t]he Attorney General [now Secretary, Department of Homeland Security], may, at any time, for what he deems to be good and sufficient cause, revoke the approval of any petition approved by him under section 204." The realization by the director that the petition was approved in error may be good and sufficient cause for revoking that approval. *Matter of Ho*, 19 I&N Dec. 582, 590 (BIA 1988). The decision to revoke will be sustained where the evidence of record at the time the decision is rendered, including any evidence or explanation submitted by the petitioner in rebuttal to the notice of intent to revoke, would warrant such denial. *Matter of Ho*, 19 I&N Dec. 582, 590 (BIA 1988) (citing *Matter of Estime*, 19 I&N Dec. 450 (BIA 1987)).

The petitioner describes itself as a "Retail Chain" business.<sup>1</sup> It seeks to employ the beneficiary permanently in the United States as an "Administrative Officer," pursuant to section 203(b)(3)(A)(i) of the Act, 8 U.S.C. § 1153(b)(3)(A)(i).<sup>2</sup> As required by statute, the petition was submitted with an approved ETA Form 9089, Application for Permanent Employment Certification (labor certification), from 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 July 6, 2007. *See* 8 C.F.R. § 204.5(d).

The director initially approved the petition on August 28, 2009; the director later revoked the approval of the petition and invalidated the labor certification on March 20, 2012. The director determined that the petitioner failed to disclose a familial relationship between the petitioner's sole owner and the beneficiary, the owner's sister-in-law. The director also questioned whether the petitioner conducted its recruitment for the job opportunity in good faith. Accordingly, the director revoked the approval of the petition under the authority of 8 C.F.R. § 205.2, and invalidated the labor certification pursuant to 20 C.F.R. § 656.30(d).

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<sup>1</sup> In response to the director's Request for Evidence, the petitioner acknowledged that it was not in fact a retail chain, but instead was a "holding company" for real estate and business investments.

<sup>2</sup> Section 203(b)(3)(A)(i) of the Act, 8 U.S.C. § 1153(b)(3)(A)(i), provides for the granting of preference classification to qualified immigrants who are capable, at the time of petitioning for classification, of performing skilled labor (requiring at least two years training or experience), not of a temporary nature, for which qualified workers are not available in the United States.

On appeal, former counsel<sup>3</sup> for the petitioner contends that the director has improperly revoked the approval of the petition. Counsel on appeal argues that the petitioner did comply with DOL recruitment requirements, and that the petitioner was not required to disclose the beneficiary's relationship to the petitioner's sole owner, as that relationship was by marriage and not by blood.

The record shows that the appeal is properly filed, timely and makes a specific allegation of error in law or fact. This office conducts appellate review on a *de novo* basis. *See Soltane v. DOJ*, 381 F.3d 143, 145 (3d Cir. 2004). We consider all pertinent evidence in the record, including new evidence properly submitted upon appeal.<sup>4</sup>

On May 14, 2013, we requested guidance from DOL on the issues presented on appeal, namely the relationship between the petitioner's owner and the beneficiary, and the nondisclosure of that relationship. In a brief, dated February 10, 2014, new counsel for the petitioner requested that DOL "affirm its initial determination to CIS." Our request to DOL remains pending, and this decision is made now in the interest of administrative expediency. DOL may later provide guidance or take its own action independent of this decision.

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.

## II. LAW AND ANALYSIS

Based on the following, we find that the NOIR was issued for good and sufficient cause; however, the director's decision and finding of fraud will be withdrawn and the matter will be remanded to the director for consideration and the entry of a new decision. The evidence in the record on appeal indicates that there are at a minimum two issues that must be addressed by the director in tandem. First, whether the petitioner's failure to disclose its owner's relationship to the beneficiary was a willful misrepresentation necessitating the invalidation of the labor certification and leading to the automatic revocation of the petition. Second, whether a *bona fide* job offer exists.

### A. The Director's NOIR was Issued for Good and Sufficient Cause

The threshold issue on appeal is whether the director adequately advised the petitioner of the basis for revocation of approval of the petition. The Secretary of Homeland Security has the authority to revoke the approval of any petition approved by her under section 204 for good and sufficient cause. *See* section 205 of the Act; 8 U.S.C. § 1155. This means that notice must be provided to the petitioner before a previously approved petition can be revoked. The NOIR was properly issued

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<sup>3</sup> The petitioner relied on one attorney for the labor certification, filing of the petition, and this appeal. A second attorney provided notice of entry of appearance as attorney on February 20, 2014.

<sup>4</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 the regulation at 8 C.F.R. § 103.2(a)(1). The record provides no reason to preclude consideration of any of the documents newly submitted on appeal or in response to our Notice of Abeyance. *See Matter of Soriano*, 19 I&N Dec. 764 (BIA 1988).

pursuant to *Matter of Arias*, 19 I&N Dec. 568 (BIA 1988) and *Matter of Estime*, 19 I&N Dec. 450 (BIA 1987). Both cases held that a notice of intent to revoke a visa petition is properly issued for “good and sufficient cause” when the evidence of record at the time of issuance, if unexplained and un rebutted, would warrant a denial of the visa petition based upon the petitioner’s failure to meet his burden of proof. The director’s NOIR sufficiently detailed the evidence of the record, including evidence of an undisclosed relationship between the beneficiary and the petitioner’s sole owner, possible misrepresentations of that relationship, and evidence that cast doubt on whether a *bona fide* job opportunity existed. The evidence of record at the time of the director’s NOIR would warrant denial, if unexplained and un rebutted; thus, the NOIR was issued for good and sufficient cause.

The remaining issues on appeal are: (1) whether the petitioner’s response of “No” to question C.9 on the labor certification, when the petitioner’s sole owner is the brother-in-law of the beneficiary, is a false representation; and (2) whether the evidence of record establishes that the job opportunity is *bona fide* and clearly open to all U.S. workers.

## **B. Fraud or Willful Misrepresentation**

The director’s decision revoking the approval of the petition concludes that the undisclosed relationship between the petitioner’s sole owner and his sister-in-law, the beneficiary, evidenced the lack of a *bona fide* job opportunity. The director indicated that evidence in the record, including the evidence received in response to the NOIR, documented significant loans made to the beneficiary by the petitioner, and discrepancies in the petitioner’s recruitment for the job opportunity, all of which cast doubt on whether a job opportunity was available to all U.S. workers. The director found fraud in the application, invalidated the labor certification, and revoked the approval of the petition.<sup>5</sup>

A finding of fraud or willful misrepresentation must be based on evidence that would permit a reasonable person to find that the person used fraud or that he or she willfully misrepresented a material fact in an attempt to obtain a visa, other documentation, admission into the United States, or any other immigration benefit. Section 212(a)(6)(C)(i) of the Act; *INS v. Elias-Zacarias*, 502 U.S. 478 (1992) (agency fact-finding must be accepted unless a reasonable fact-finder would necessarily conclude otherwise). The evidence must show that the person made the misrepresentation to an authorized official of the U.S. government. See *Matter of Y-G-*, 20 I&N Dec. 794 (BIA 1994).

### **1. Benefit Sought under the Act**

The petitioner seeks to employ the beneficiary permanently in the United States as an “Administrative Officer,” pursuant to section 203(b)(3)(A)(i) of the Act, 8 U.S.C. §1153(b)(3)(A)(i). The petitioner pursued this benefit by filing an application for labor certification with DOL, and a

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<sup>5</sup> The director’s decision analyzes negative factors suggesting the lack of a *bona fide* job opportunity. On remand, the director should evaluate all of the evidence, including any evidence provided by the petitioner on remand, to determine the totality of the circumstances affecting the job opportunity. See *Modular Container Systems, Inc.*, 1989-INA-228 (BALCA Jul. 16, 1991) (*en banc*).

Form I-140, Immigrant Petition for Alien Worker, with USCIS, on behalf of the beneficiary. Therefore, the benefit sought under the Act is an employment-based, third-preference immigrant visa.

## 2. False Representation

A false representation, or a misrepresentation, is an assertion or manifestation that is not in accordance with the true facts.<sup>6</sup> The director found that the petitioner's response to question C.9 on the labor certification represented falsified evidence resulting in a finding of fraud. However, the record does not reflect that the petitioner submitted intentionally falsified evidence. Rather, we must determine first whether the petitioner made an assertion on the labor certification that is not in accordance with the true facts by stating that the petitioner's owner had no family relationship to the beneficiary.

Eligibility for the employment-based preference classification requested requires that DOL must have granted a labor certification for the job opportunity. *See* Section 212(a)(5)(A)(i) (a foreign national seeking admission to perform skilled or unskilled labor is inadmissible without certification from the Secretary of Labor); Section 203(b)(3)(C) (immigrant visa may not be issued without certification by the Secretary of Labor); 8 C.F.R. § 204.5(l)(3)(i) (every petition for a professional or a skilled worker must be accompanied by an individual labor certification).

In order to grant an application for labor certification, DOL must make two determinations:

- (I) there are not sufficient workers who are able, willing, qualified (or equally qualified in the case of an alien described in clause (ii)) and available at the time of application for a visa and admission to the United States and at the place where the alien is to perform such skilled or unskilled labor, and
- (II) the employment of such alien will not adversely affect the wages and working conditions of workers in the United States similarly employed.

Section 212(a)(5)(A)(i); *see* 20 C.F.R. § 656.1(a) (defining the purpose and scope of part 656 as implementing section 212(a)(5)(A) of the Act.)

To execute the purpose of the first prong of that statute, DOL requests certain attestations be made by the employer, under penalty of perjury. This includes that the "job opportunity has been and is clearly open to any U.S. worker," pursuant to 20 C.F.R. § 656.10(c)(8).

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<sup>6</sup> Silence or omission can lead to a finding of fraud or willful misrepresentation if the evidence shows the conscious concealment of information. *See Fedorenko v. United States*, 449 U.S. 490 (1981).

Providing further context for whether a job opportunity is clearly open to any U.S. worker, the regulations at 20 C.F.R. § 656.17(l) discuss the issue of the *bona fide* job requirement within the context of the beneficiary's influence and control over the job opportunity:

(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 ...

Because the labor certification is an attestation-based system, DOL provides a question on ETA Form 9089 asking for information on whether the beneficiary may have any influence or control over the job opportunity. Part C.9 of the labor certification requests that the petitioner answer the following question in either the affirmative or negative:

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 purpose of this question is to apprise the Certifying Officer at DOL as to whether the beneficiary may have influence and control over the job opportunity. *See* 20 C.F.R. § 656.17(l) (stating that the employer, in the event of an audit, must be able to demonstrate the existence of a bona fide job opportunity). The response to this question informs the Certifying Officer whether additional information is needed on the issue of the beneficiary's influence and control over the job opportunity, which may lead to an audit of the petitioner's request for labor certification. The method of evaluating this issue is succinctly set out in the statements of basis and purpose of the final rule for the system of "Labor Certification for the Permanent Employment of Aliens in the United States," which states:

In determining whether the job is subject to the alien's influence and control, we will evaluate the totality of the employer's circumstances, using the *Modular Container Systems* criteria listed in the preamble to the proposed rule (see F67 FR at 30474). No single factor, such as a familial relationship between the alien and the employer or the size of the employer, shall be controlling.

69 Fed. Reg. 77326, 77356 (ETA) (Dec. 27, 2004).

The final rule cites the method of analysis used to evaluate the totality of the employer's circumstances. *See Modular Container Systems, Inc.*, 1989-INA-228 (BALCA Jul. 16, 1991) (*en banc*) (where the beneficiary for whom labor certification is sought has such a dominant role in, or close personal relationship with, the sponsoring employer's business that it would be unlikely that the alien would be replaced by a qualified U.S. applicant, the question arises, pursuant to 20 C.F.R. §

656.20(c)(8),<sup>7</sup> whether the employer has a *bona fide* job opportunity). As the final rule indicates, the five types of evidence needed to evaluate the totality of the circumstances are specifically enumerated by the regulation at 20 C.F.R. § 656.17(l), and include:

- (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.

Therefore, at the time of the petitioner's application for labor certification: a statute existed which required DOL to determine the availability of U.S. workers at the time and place of the petitioner's application; implementing regulations existed which identified that DOL would inquire as to whether a job opportunity is clearly open to any U.S. worker; implementing regulations existed which indicated the issues that may affect whether a job opportunity is clearly open to any U.S. worker; and a common law test had been incorporated into the regulations governing the application for and adjudication of said labor certification. Question C.9 on the labor certification requests information from the employer that will allow DOL to ascertain not whether the employer is ineligible to request a labor certification for a particular employee, but whether DOL will need additional information from the employer to determine its eligibility.

Prior counsel for the petitioner asserted on appeal that DOL has not defined the meaning of the term "familial relationship," as written on ETA Form 9089, which indicates the petitioner could not have made a false representation by failing to disclose the in-law relationship between the petitioner's owner and the beneficiary.

The petitioner's new counsel asserts: "the in-law relationship does not constitute a 'familial relationship,' as no definition in the statutes or regulations controlling either the DOL or the CIS include in-laws as relatives. For this reason, [the petitioner's owner] did not inform DOL of this relationship."

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<sup>7</sup> This requirement is currently located at 20 C.F.R. § 656.10(c)(8).

The petitioner has the burden of establishing that a *bona fide* job opportunity exists when asked to show that the job opportunity is clearly open to U.S. workers. *See Matter of Amger Corp.*, 87-INA-545 (BALCA 1987); *see also* 8 U.S.C. § 1361. The language on ETA Form 9089 at Part C.9 generically asks, “is there a familial relationship between the owners, stockholders, partners, corporate officers, incorporators, and the alien.” However, the regulations governing the labor certification application to DOL instruct the Certifying Officer to request documentation of “any family relationship” between the beneficiary and the petitioner’s employees if its company has 10 or fewer employees. 20 C.F.R. § 656.17(l)(5). The accuracy of the petitioner’s answers to these questions, attested to under penalty of perjury, determines whether DOL will be aware of the petitioner’s true number of employees and relationship to the beneficiary.

While counsel asserts there are no regulations specifically including a relationship by marriage in the definition of “familial relationship,” DOL has not limited the meaning of the term. The issue concerned here is whether “any family relationship” exists, as written in the regulation. The terms in these regulations must be viewed as giving purpose to the first prong of the statute they implement, which requires the Secretary of Labor to determine whether or not there are sufficient U.S. workers available at the time and place of the employer’s application. 20 C.F.R. § 656.1(a). There are no identified conflicts between the usage of the terms “any family relationship” and “familial relationship.” An agency’s construction of regulatory language is controlling unless it is “plainly erroneous or inconsistent with the regulation.” *Auer v. Robbins*, 519 U.S. 452, 461 (1997) (quoting *Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, 359 (1989) (quoting *Bowles v. Seminole Rock & Sand Co.*, 325 U.S. 410, 414 (1945)) (internal quotation marks omitted)). Counsel has not provided any evidence or legal authority to suggest that “familial relationship,” as used by DOL on ETA Form 9089, is less encompassing than the “any family relationship” used in the regulation.

An agency need not define every term utilized in a regulation, as words that are not terms of art or defined by statute or regulation are customarily given their ordinary meanings. *See e.g. FDIC v. Meyer*, 510 U.S. 471, 476 (1994) (in the absence of a statutory definition, “we construe a statutory term in accordance with its ordinary or natural meaning.”). Reliance on common terms can be upheld when the terms’ use “comfortably bears the meaning” commonly given to it. *See Auer v. Robbins*, 519 U.S. at 461 (relying on dictionary definitions of a term to demonstrate its use by DOL was proper). *Black’s Law Dictionary* defines family as a “group of persons connected by blood, by affinity, or by law, esp. within two or three generations. *Black’s Law Dictionary* (9th ed., WestLaw 2009). It further indicates that familial is the adjective form of the noun family. *Id.* It further provides a sub-definition for “immediate family,” to include “1. A person’s parents, spouse, children, and siblings” and “2. A person’s parents, spouse, children, and siblings, as well as those of the person’s spouse.” *Id.* Both the definition of family, and immediate family, are broadly defined to include those connected by affinity and law, in addition to blood relatives. The American Heritage Dictionary also broadly defines family to include “a group of persons related by descent or

marriage” in its first definition of the word. *American Heritage Dictionary* (5<sup>th</sup> ed., Houghton Mifflin Harcourt 2011).<sup>8</sup>

DOL’s own application of the term “family” or “familial relationships” has included relationships by marriage. The Board of Alien Labor Certification Appeals (BALCA) has held that a relationship by marriage is relevant to the *bona fide* job inquiry. See *Matter of Sunmart 374*, 00-INA-93 (BALCA May 15, 2000) (a relationship invalidating a *bona fide* job opportunity may arise where the beneficiary is related to the petitioner by “blood” or it may “be financial, by marriage, or through friendship”); *In the Matter of Caress Home Health Care*, 2011-PER-00153 (BALCA Feb. 14, 2012) (“If there was no relationship between any of the parties, the Employer should have stated such, or if a relationship existed (regardless of whether it arose from marriage), that should have been stated as well.”); *In the Matter of Marie Jean Fabroa*, 2010-PER-01071 (BALCA Nov. 3, 2011) (denial of labor certification proper where the Certifying Officer found the job opportunity was not clearly open to U.S. workers when the beneficiary was the sister-in-law of the employer, the employer had no other workers, the beneficiary resided with the employer, and the business was closely held with a small number of employees).

DOL considers a relationship by marriage to be relevant to the *bona fide* job inquiry. The petitioner made a representation to DOL that there was no family relationship between its owner and the beneficiary by answering “No” to question C.9 on the labor certification. Therefore, the petitioner made a false representation in its written application for labor certification when it represented to DOL that no family relationship existed between its sole owner and the beneficiary, his sister-in-law; this representation was not in accordance with the true facts because the petitioner’s owner was in fact related to the beneficiary by marriage.

### 3. Willfulness

The false representation also must be willfully made; the false representation must be made “knowingly” and not accidentally, inadvertently, or in a good faith belief that the factual claims are true. See *Matter of Healy and Goodchild*, 17 I&N Dec. 22 (BIA 1979). The relationship between the beneficiary and the petitioner’s owner is not disputed; counsel for the petitioner acknowledges that the beneficiary is the owner’s sister-in-law, and an affidavit from the beneficiary confirms the same. Further, counsel acknowledges that the petitioner was aware that a relationship by marriage may be “familial.” Counsel asserts that the petitioner “sought clarity on the definition of ‘familial relationship’ and found no law or regulation governing either [DOL or USCIS] which included in-laws as relatives or family.” Counsel indicates that the petitioner contends that “the in-law relationship does not constitute a ‘familial relationship,’ as no definition in the statutes or regulations controlling either the DOL or the CIS include in-laws as relatives.” Counsel states, “[f]or this reason, [the petitioner] did not inform DOL of this relationship.” While counsel’s assertion is

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<sup>8</sup> The first definition includes three parts: “a. A fundamental social group in society typically consisting of one or two parents and their children ... b. The children of one of these groups ... c. A group of persons related by descent or marriage.” *American Heritage Dictionary* (5<sup>th</sup> ed., Houghton Mifflin Harcourt 2011).

understood, the assertion does not remove the willfulness or falseness of the petitioner's representation. Counsel appears to suggest that the petitioner's response was made on a good faith belief over the petitioner's confusion as to what degree of familial relationship needed to be disclosed to DOL. However, the regulations the petitioner purportedly reviewed would have included the regulations that indicate DOL would inquire about "any family relationship" for employers with less than 10 employees. 20 C.F.R. § 656.17(1)(5). As discussed above, several cases do in fact exist which indicate that a relationship by marriage is relevant. *See Matter of Sunmart 374*, 00-INA-93 (BALCA May 15, 2000). Further, counsel has not asserted what specific authority, be it case law, statute, regulation, or form instructions that the petitioner relied on in making its decision. Going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. *Matter of Soffici*, 22 I&N Dec. 158, 165 (Comm'r 1998) (citing *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg'l Comm'r 1972)). The assertions of counsel 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). On remand, it is the petitioner's burden to establish that its false representation was not willful.<sup>9</sup>

#### 4. Materiality

A false representation must also be material; the false representation must be relevant to the immigration benefit sought. *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"); *Matter of S- and B-C-*, 9 I&N Dec. 436, 447 (BIA 1961) (a willful misrepresentation of a material fact is one which "tends to shut 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 be excluded").

When evaluating whether a job opportunity is *bona fide*, DOL considers several factors including the size of the employer, and the beneficiary's influence and control over the hiring for the opportunity. 20 C.F.R. § 656.17(1). The petitioner identified that it had only two (2) employees at the time it filed its application for labor certification. The petitioner answered question C.9 on the labor certification in the negative, stating that the beneficiary did not have an ownership interest in the closely-held petitioner, and that there was not a familial relationship between the beneficiary and the petitioner's owners, stockholders, partners, corporate officers, or incorporators. Here, while the petitioner

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<sup>9</sup> The director found fraud in the labor certification process. A finding of fraud includes the elements of a willful misrepresentation, as well as additional elements. Fraud requires that the willful misrepresentation have been made with the intent to deceive. *See Matter of Tijam*, 22 I&N Dec. 408, 424 (BIA 1998). While the record indicates the petitioner was aware of the need to disclose "familial" relationships to DOL, the record also includes assertions from counsel that the petitioner did not believe an in-law relationship was included in that category. The petitioner's false representation was willful; however, the record lacks evidence of the petitioner's intent to deceive a government official.

disclosed that it had only two employees, it did not disclose that any family relationship existed between the beneficiary and the petitioner's owner.

If the petitioner fails to indicate the correct answer in Part C.9 on ETA Form 9089, DOL would not be allowed an opportunity to audit and assess the nature of the familial relationship, if any, and the extent of the beneficiary's influence and control over job opportunity, if any. Thus, a negative answer to C.9 cuts off the DOL's ability to inquire further into whether a family relationship impacted the job opportunity, preventing it from assessing if a *bona fide* job opportunity exists. As noted above, this determination is relevant to the benefit sought, as an approved labor certification is required by statute for the employment-based immigrant visa classification sought.

Had this line of inquiry not been cut off, it may have resulted in the denial of the request for labor certification.<sup>10</sup> *Matter of S- and B-C-*, 9 I&N Dec. 436, 447 (BIA 1961) (a willful misrepresentation of a material fact is one which "tends to shut 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 be excluded"). BALCA has held that documenting a relationship that arises from marriage is a necessary step in the application process. "If there was no relationship between any of the parties, the Employer should have stated such, or if a relationship existed (regardless of whether it arose from marriage), that should have been stated as well." *In the Matter of Caress Home Health Care*, 2011-PER-00153 (BALCA Feb. 14, 2012). In this decision, BALCA indicated that when the employer provided its list of shareholders and officers during the audit process, and the employer made its own decision that an in-law relationship need not be disclosed, the Certifying Officer properly declined to accept the employer's later-provided explanation of the in-law relationship between the employer's owner and the beneficiary. *Id.* BALCA noted that that list must include their titles, positions, and a description of their relationship to the beneficiary, including an in-law relationship. *Id.*; see *Matter of Sunmart 374*, 00-INA-93 (BALCA May 15, 2000) (a relationship invalidating a *bona fide* job opportunity may arise where the beneficiary is related to the petitioner by "blood" or it may "be financial, by marriage, or through friendship").

This indicates that the disclosure of the relationship is critical to DOL being able to carry out its function during the labor certification process. Therefore, a material issue in the case is whether the petitioner failed to disclose a familial relationship between the petitioner's sole owner and the beneficiary.

This need for disclosure, in order for DOL to have adequate information to properly conduct its function in the processing of a labor certification, relates back to the requirement that the job opportunity must be clearly open to any U.S. worker, and the employer must attest to this upon submitting the labor certification. 20 C.F.R. § 656.10(c)(8); see *In the Matter of Marie Jean Fabroa*,

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<sup>10</sup> We note that the petitioner has the burden to establish that, had it disclosed this relationship and provided other evidence that may have been requested by DOL, it would not have resulted in the denial of the request for labor certification. See *Matter of Otiende*, 26 I&N Dec. 127, 128 (BIA 2013) (it is the petitioner's burden to establish eligibility for the immigration benefit sought).

2010-PER-01071 (BALCA Nov. 3, 2011) (denial of labor certification proper where the Certifying Officer found the job opportunity was not clearly open to U.S. workers when the beneficiary was the sister-in-law of the employer, the employer had no other workers, the beneficiary resided with the employer, and the business was closely held with a small number of employees). Similarly, in the instant matter the petitioner is closely held, in addition to its owner the beneficiary may be the petitioner's only employee, and the beneficiary is the owner's sister-in-law.

The omission of the beneficiary's relationship, through marriage to the sole owner in a small corporation, was predictably capable of cutting off a line of inquiry before DOL. Therefore, 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"). The assertion that there was no family relationship is a willful, material misrepresentation that adversely impacted DOL's adjudication of the ETA Form 9089.

### **5. False Representation Made to a U.S. Government Official**

The request for labor certification is signed under penalty of perjury, and submitted to DOL. Upon approval, the labor certification is submitted to USCIS along with a Form I-140, also signed under penalty of perjury. Any false representation was therefore made to government officials at DOL and USCIS. Therefore, it appears that the petitioner made a material, willful misrepresentation that may justify invalidating the labor certification, and denying the instant petition.<sup>11</sup>

However, the director's decision found fraud in the labor certification process. As noted above, there is insufficient evidence to find that the petitioner intended to deceive DOL and USCIS. The director's decision will be withdrawn. The matter will be remanded for the director to enter a new decision, which shall consider whether the petitioner made a material, willful misrepresentation to DOL and USCIS. On remand, the petitioner should address these factors. As noted above, it is the petitioner's burden to establish facts that rebut these findings. Section 291 of the Act, 8 U.S.C. § 1361; *Matter of Otiende*, 26 I&N Dec. 127, 128 (BIA 2013).

### **C. Bona Fide Job Opportunity**

The second substantive issue in this matter is whether a *bona fide* job opportunity exists. The job opportunity must be *bona fide*, or clearly open to any U.S. worker. 20 C.F.R. § 656.10(c)(8). The

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<sup>11</sup> While DOL may have approved a labor certification based on the information attested to by the petitioner, that approval is not made immutable simply by the act of certification. A finding of misrepresentation may lead to invalidation of the labor certification by USCIS. *See* 20 C.F.R. § 656.30(d) (after issuance a labor certification may be invalidated by USCIS upon a determination of fraud or willful misrepresentation of a material fact involving the labor certification application).

petitioner has the burden when asked to show that a valid employment relationship exists, and that a *bona fide* job opportunity is available to U.S. workers. See *Matter of Amger Corp.*, 87-INA-545 (BALCA 1987). Even if the petitioner had shown that its nondisclosure of the family relationship was not a material misrepresentation, the current appeal is unprovable because the petitioner failed to establish that the beneficiary did not possess influence or control over the job opportunity.

Several factors including the size of an employer, the beneficiary's relationship to the employer, and the nature of the job opportunity impact the determination of whether a job opportunity is clearly open to any U.S. worker. The totality of the circumstances are examined when determining whether a job is clearly open to U.S. workers. *Modular Container Systems, Inc.*, 89-INA-228 (BALCA 1991) (en banc). *Modular Container* sets out several factors to evaluate, which include, but are not limited to, whether the beneficiary:

- is in the position to control or influence hiring decisions regarding the job for which labor certification is sought;
- is related to the corporate directors, officers, or employees;
- was an incorporator or founder of the company;
- has an ownership interest in the company;
- is involved in the management of the company;
- is on the board of directors;
- is one of a small number of employees;
- has qualifications for the job that are identical to specialized or unusual job duties and requirements stated in the application; and
- is so inseparable from the sponsoring employer because of his or her pervasive presence and personal attributes that the employer would be unlikely to continue in operation without the beneficiary.

*Id.* at 8. In evaluating the totality of the circumstances standard, the consideration must also include the employer's level of compliance and good faith during the labor certification process. *Id.*

*Matter of Silver Dragon Chinese Restaurant*, 19 I&N Dec. 401 (Comm'r 1986) quoted an advisory opinion from the Chief of DOL's Division of Foreign Labor Certification as follows:

The regulations require a 'job opportunity' to be 'clearly open.' Requiring the job opportunity to be *bona fide* adds no substance to the regulations, but simply clarifies that the job must truly exist and not merely exist on paper. The administrative interpretation thus advances the purpose of regulation 656.20(c)(8). Likewise requiring the job opportunity to be *bona fide* clarifies that a true opening must exist, and not merely the functional equivalent of self-employment. Thus, the administrative construction advances the purpose of regulations 656.20.

*Id.* at 405.

The petitioner claims to offer the beneficiary full-time, permanent employment as an Administrative Officer. Its labor certification was filed with DOL on July 6, 2007, and granted on August 10, 2007. The position offered is described by the terms of the labor certification, and includes the following duties:

Organize office operations/procedures; maintain/update records; prepare office budgets and expense reports; devise employee compensation, recruitment, personnel policies, and regulatory compliance, and improve efficiency.

Part H.1 lists a worksite address of [REDACTED] no other work locations, relocation, or travel requirements are indicated. Part H.6 of the labor certification indicates that the employer requires a qualified applicant to possess 24 months of experience in the position offered. The compensation offered for the position is \$40,830.00 annually. The petitioner signed Part N of the labor, and attested under penalty of perjury that the “job opportunity has been and is clearly open to any U.S. worker.”

In the petitioner’s response to the director’s NOIR, former counsel provided information relating to the *Modular Container System* test and provided some of the information required by 20 C.F.R. § 656.17(l). Former counsel asserted that the beneficiary’s status as the petitioner’s sole owner does not, on its own, negate the validity of the job opportunity, and that “a ‘familial relationship’ does not exist in this case.” However, it is unclear from the record whether the director evaluated the totality of the circumstances in order to determine whether or not the job opportunity was *bona fide*.

Current counsel states that the beneficiary is “simply an employee ... and she does not manage the company, bear responsibility for hiring, or control or influence hiring decision.” Counsel admits that the beneficiary is “one of a small number of employees,” but “this has not provided [her] with any control over hiring for her position, and thus is not relevant to whether a *bona fide* job exists.” However, counsel does not provide any basis to support his contention that this analysis is limited to whether or not the beneficiary has “control over hiring.” Further, the petitioner has not provided any evidence to document the factors set out at 20 C.F.R. § 656.17(l). Going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. *Matter of Soffici*, 22 I&N Dec. 158, 165 (Comm’r 1998) (citing *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg’l Comm’r 1972)). The assertions of counsel 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). As discussed above, the issue is whether, given the totality of the circumstances, a job opportunity open to all U.S. workers truly existed, and was not merely something documented on paper. 20 C.F.R. §§ 656.3; 656.10(c)(8); *Matter of Silver Dragon Chinese Restaurant*, 19 I&N at 405.

The evidence in the record on appeal suggests that the job opportunity may not be *bona fide*. There are several factors to be analyzed by the director, as indicated by evidence in the record.

## 1. Beneficiary's Relationship to the Petitioner's Owner

As discussed at length above, the beneficiary is the sister-in-law of the petitioner's sole owner. A family relationship is not a *per se* bar to finding that a *bona fide* job opportunity exists. *Modular Container Systems, Inc.*, 89-INA-228 (BALCA 1991) (*en banc*); *Paris Bakery Corp.*, 88-INA-337 (BALCA 1990) (*en banc*) (labor certification granted for the brother of the employer's owner). However, 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 2000). A relationship between the beneficiary and the petitioner's owner should have been disclosed, regardless of whether it arose from marriage. *In the Matter of Caress Home Health Care*, 2011-PER-00153 (BALCA Feb. 14, 2012). BALCA has held that a job opportunity may not be clearly open to U.S. workers when the beneficiary is the sister-in-law of the employer. *In the Matter of Marie Jean Fabroa*, 2010-PER-01071 (BALCA Nov. 3, 2011) (BALCA considered multiple factors including that the employer had no other workers, the beneficiary resided with the employer, and the business was closely held with a small number of employees). Even a nephew's relationship to the petitioner's owners may be enough, given other factors, to prevent DOL from granting the request for labor certification. *Capelli Antiques Furniture Restoration*, 2003-INA-98 (BALCA 2004) (employer had three officers, all members of the same family, and no other employees).

Based on the evidence currently in the record, it appears that the petitioner is wholly owned by one individual, the beneficiary's brother-in-law; and that in the year of labor certification, the petitioner had only two employees, the beneficiary and the petitioner's owner.

Counsel asserts that the beneficiary being related to the petitioner's sole owner cannot impact the determination of whether a *bona fide* job opportunity exists. Counsel states:

This factor could only be disqualifying if [the beneficiary] were offered the position despite the existence of other qualified applicants. However, no alternative applicants were available for [redacted] to hire.

Counsel's assertion is misplaced. The lack of qualified applicants does not cure other factors that would otherwise, in the presence of qualified applicants, support a determination that a *bona fide* job opportunity did not exist. *See e.g. Bulk Farms, Inc. v. Martin*, 963 F.2d 1286 (9<sup>th</sup> Cir. 1992) (denial of labor certification application was proper for president, sole shareholder and chief cheese maker even where no person qualified for position applied). Rather, the lack of qualified applicants is only a prerequisite to filing an application for labor certification. If the employer conducts recruitment in good faith, and no qualified applicants are found, the employer may then submit its application for labor certification; the lack of qualified applicants does not overcome other deficiencies.

On remand, the director should analyze the impact of this relationship, among the other factors the director determines to be relevant, in the totality of the circumstances. *Modular Container Systems, Inc.*, 89-INA-228 (BALCA 1991) (*en banc*).

## 2. Loans to the Beneficiary by the Petitioner

DOL must determine that the employment of the beneficiary would not adversely affect the wages and working conditions of other workers. 20 C.F.R. § 656.2(c)(1)(ii). When the petitioner advertises for the job opportunity, it cannot advertise wages or terms and conditions of employment that are less favorable than those offered to the beneficiary. 20 C.F.R. § 656.17(f)(7).

The petitioner provided \$60,000, purportedly as loans, to the beneficiary during the year in which the recruitment and labor certification took place. These purported loans were made within the beneficiary's first eight (8) months of her employment. The record contains copies of checks issued to the beneficiary to document these loans. However, it is unclear exactly whether or when a loan actually existed. Former counsel for the petitioner asserts that there was "a \$60,000 loan from the Company in 2007." There is no statement from the petitioner in the record on this issue. The petitioner provided a letter, dated April 5, 2012, from its Certified Public Accountant (CPA), stating that in "August of 2007, [the petitioner] gave a loan to [the beneficiary] for \$60,000 as she was trying to get a house. This deal of [the beneficiary's] did not materialize and hence paid back the loan to [the petitioner] in 2008." The record contains a "Demand Promissory Note," dated October 7, 2007, signed only by the beneficiary, as the "borrower." The Promissory Note is for \$60,000, and indicates that it is "for value received." The Promissory Note does not indicate any security for the instrument, interest rate requirements, repayment terms, or date upon which the debt is due. Rather, the Promissory Note indicates that only the principal of \$60,000 will be due and payable "upon demand," and that default occurs seven days from demand at which point the note may be turned over for collection, with those costs being born by the beneficiary. We note that the Promissory Note is not witnessed or notarized.

Despite the CPA's statement, and the information provided on the Promissory Note, evidence in the record indicates that the beneficiary received multiple payments from the petitioner prior to October 7, 2007. The first documented payment in the record is dated August 15, 2007, five days after DOL approved the labor certification on August 10, 2007. The beneficiary received \$25,000.00 from the petitioner on August 15, 2007; \$10,000.00 from the petitioner on October 1, 2007; and \$15,000.00 from the petitioner on October 6, 2007.<sup>12</sup> All three payments are drawn on the petitioner's account, payable to the beneficiary personally; all three payment checks have a blank memo line, and do not indicate any purpose for their issuance. This evidence contradicts the CPA's assertion on the petitioner's behalf, which indicated that the loan was made in August (generically), rather than over

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<sup>12</sup> These payments to the beneficiary document only \$50,000 in payments. This casts doubt on the assertions and evidence provided. 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. *Matter of Ho*, 19 I&N Dec. 582, 591-592 (BIA 1988). 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. *Id.* On remand, the petitioner should address this inconsistency with independent, objective evidence documenting the purported loan.

a period of three or more months. We note that the Promissory Note was executed by the beneficiary on October 7, 2007, indicating that the petitioner did not obligate the beneficiary to repayment until that date, which suggests that the beneficiary had received \$60,000 from the petitioner from August 15, 2007, to October 6, 2007, without being obligated to repay those funds. This suggests that the petitioner gave the beneficiary an initial sum of \$25,000 two months before obligating the beneficiary to repay that "loan," and continued to make similar payments to the beneficiary without condition of repayment until sometime after the funds were purportedly loaned to the beneficiary.

Further, the petitioner's former counsel and the petitioner's CPA indicate the funds were paid back by the beneficiary because the purpose for the loan, a house, did not materialize. The promissory note does not indicate that these funds were obligated for a specific purpose; rather, the funds appear to have been given to the beneficiary over a period of three months without obligation for repayment. This casts doubt on the petitioner's assertions and evidence. 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).

We note that the record also contains an affidavit from the beneficiary. While the affidavit's contents have been reviewed, we note that the beneficiary's affidavit is self-serving and does not provide independent, objective evidence of the issues. See *Matter of Ho*, 19 I&N Dec. 582, 591-592 (BIA 1988) (states that the petitioner must resolve any inconsistencies in the record by independent, objective evidence). Going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. *Matter of Soffici*, 22 I&N Dec. 158, 165 (Comm'r 1998) (citing *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg'l Comm'r 1972)). The beneficiary's affidavit cannot be considered to be persuasive evidence. Further, the facts sworn to in the affidavit are not corroborated by the evidence in the record. The beneficiary states:

I had taken a loan from my Employer [the petitioner] a sum of Sixty Thousand Dollars (\$60,000.00) on 7<sup>th</sup> October 2007 to purchase a house. I did not purchase a house and therefore returned the loan of Sixty Thousand Dollars (\$60,000.00) back to my [REDACTED] on 14<sup>th</sup> April 2008.

However, as discussed above, the record indicates that the petitioner made payments to the beneficiary over a period of three months, for a total of \$50,000 and not the \$60,000 claimed. Further, the record contains the copy of a deposited check, dated April 14, 2008, in the amount of \$50,000 from the beneficiary to the petitioner. The record also includes two Customer Receipts from [REDACTED] dated August 21, 2008, and August 25, 2008, indicating deposits of \$5,000 each. These slips have hand-written notations that they are cash deposits from the beneficiary for "loan paid back" and "loan recd back." These dates of repayment conflict with those asserted by the

beneficiary. Further, while the repayment of the \$50,000 is documented as being made from the beneficiary's personal checking account, the cash deposits only bear undated, unsigned handwritten notations to indicate their source. This casts additional doubt on the petitioner's explanation for these large sums of money.

These loans suggest that the beneficiary may have influence and control over the petitioner such that it provided her large sums of unsecured funds, some of which were provided months prior to any purported obligation for repayment. On remand, the petitioner should establish that these types of loans are normal for its business. The petitioner may provide evidence that these terms of employment were extended to applicants for the job opportunity, that the petitioner regularly loans money to its employees for the purchase of homes, and other independent, objective evidence that would establish these loans as being part of the petitioner's normal operations.

### 3. Work Location

A labor certification for a specific job offer is valid only for the particular job opportunity, the beneficiary for whom the certification was granted, and for the area of intended employment stated on the ETA Form 9089. 20 C.F.R. § 656.30(c)(2). A job opportunity is a job opening for employment at a place in the United States to which U.S. workers can be referred. 20 C.F.R. § 656.3. An area of intended employment is the area within normal commuting distance of the place (address) of intended employment. *Id.* The job opportunity must be advertised with a description of the vacancy specific enough to apprise the U.S. workers of the job opportunity, and indicate the geographic area of employment with enough specificity to apprise applicants of any travel requirements and where applicants will likely have to perform the job opportunity. 20 C.F.R. §§ 656.17(f)(3), (4). When the petitioner advertises for the job opportunity, it cannot advertise wages or terms and conditions of employment that are less favorable than those offered to the beneficiary. 20 C.F.R. § 656.17(f)(7).

The labor certification lists the petitioner's address as [REDACTED]. The labor certification lists a single work location, [REDACTED]. This address appears to be residential. The same street address is listed for the employer's contact person in Part D of the labor certification. The address for the employer's contact person, who is the petitioner's sole owner, also includes an apartment number.<sup>14</sup>

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<sup>13</sup> This is the same location to which interested applicants for the job opportunity were referred for their interviews. Evidence in the record described this location as a commercial location, a gas station and convenience store owned by the petitioner.

<sup>14</sup> Evidence in the record indicates that both the owner of the petitioner and the beneficiary lived in separate apartments at this facility during the year 2007; the petitioner's owner in apartment 216, the employee in apartment 218. This suggests they lived in close proximity, and potentially in side-by-side units if the apartment complex utilized the common system of having even numbered units on the same side of a street or hallway.

The address listed on the labor certification does not appear to be that of a worksite within the meaning of “at a place in the United States to which U.S. workers can be referred.” 20 C.F.R. § 656.3. The address provided, [REDACTED], is the address of the leasing office of an apartment complex, [REDACTED] (accessed July 1, 2014). The record contains no information documenting the petitioner’s ownership, lease, right or ability to utilize the building at [REDACTED]

On appeal, prior counsel asserted, “[at] the time of recruitment and subsequently filing the I-140 preference petition, the job location was at [REDACTED]” That statement conflicts with the worksite listed on the labor certification, and attested to by the petitioner under penalty of perjury.

Prior counsel for the petitioner also stated on appeal that the employer sold the prior location in Houston and that the address “where the beneficiary will be working on a permanent basis” is [REDACTED]. This appears to be a commercial address.

Forms G-28 submitted with new counsel’s brief to DOL indicate that the petitioner’s mailing address changed at least one additional time, to [REDACTED]. This appears to be a residential address. It is unclear from the record whether this is the beneficiary’s current worksite address.

While undisclosed until the petitioner’s response to the director’s Request for Evidence (RFE) was received, it appears the petitioner is not a “retail chain” as claimed on Form I-140, but an investment company that buys and sells businesses and commercial real estate for investment. The commercial addresses used appear to be those locations it has purchased, with the intention of selling in the future, once the business is “turned around.” It is unclear if the employer maintains workspace for the employee at any of these locations. As noted above, at least two of these addresses appear to be residential, and at least one of these addresses may have been the petitioner’s home.

Prior counsel’s response to the RFE states that the employee “works directly with the President,” but it is unclear where the employer’s president actually works. Prior counsel’s response to the director’s NOIR states that certain documents listed the petitioner’s owner’s home address, and that “it is common practice to list one’s home address as a matter of convenience” in order to receive mail there. Prior counsel also stated that “[at] no time was any business operations conducted from [the petitioner’s owner’s] home.” Counsel indicates that a letter from the petitioner’s Certified

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<sup>15</sup> This location appears to be a [REDACTED] gas station. See [http://\[REDACTED\]for-motorists/station-locator.html](http://[REDACTED]for-motorists/station-locator.html) (accessed July 1, 2014).

<sup>16</sup> See [REDACTED] County Clerk’s Office, “Real Property Database,” located at [REDACTED] (accessed July 1, 2014). Those records indicate a property at that address was sold to the petitioner’s owner individually, and not the petitioner. It appears from this information that this is the petitioner’s personal residence and not a commercial address.

Public Accountant (CPA) corroborates this, and that “[in] the past, we have provided licenses and business documents to both DOL and USCIS in subsequent petitions evidencing a bona fide business location.”<sup>17</sup> Prior counsel also submitted licenses and leases to corroborate the petitioner’s business locations.

Prior counsel disclosed in response to the director’s RFE that the employer is in fact a holding company for real estate and business investments, and that the petitioner purchases and “sales” properties. Based on evidence in the record, it appears that the employer at times does not own investment locations that the beneficiary would be working “at” and the petitioner has not documented where, in fact, the beneficiary works during those periods of time.

The record contains a letter, dated January 13, 2011, from the petitioner’s CPA. This letter states that the petitioner does not carry on business at the owner’s personal residence, and that all the petitioner’s administrative work is conducted from a location at [REDACTED]. However, this letter suggests that the petitioner did not maintain a corporate location in 2007. The CPA states:

During 2007, [the petitioner] was in the process of looking for some businesses. He had put contracts out to purchase a convenience store business and a hotel also, but these contracts did not materialize ... In October of 2007, [REDACTED] bought a business called [REDACTED] ...

A “Company Agreement,” dated February 22, 2007, indicates that [REDACTED] was formed on that date. Prior counsel’s response to the director’s RFE, dated January 13, 2008, indicates the petitioner owned two tracts of undeveloped land, in addition to its investment in [REDACTED].

The record contains several business licenses and related documents indicating the petitioner’s or [REDACTED], operations at the [REDACTED] Texas, location and at a location in [REDACTED] Texas. None of these documents indicate that the petitioner operated a business or maintained offices at the worksite address in [REDACTED] Texas, in 2007. None of the records document that the petitioner owned or leased a worksite at the time the labor certification was filed in July 2007. The CPA’s letter and the corporate documents provided suggest that the [REDACTED] Texas, location was not operated by the petitioner or through its investment with [REDACTED] until October 2007.

Based on the nature of the petitioner’s business, it does appear that the work location is known to change; however, the labor certification does not specify multiple work locations, or that travel or relocation is required. The job requirements, including known travel or relocation, must be known

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<sup>17</sup> We note that modification of a labor certification is prohibited by regulation for any application submitted after July 16, 2007. 20 C.F.R. § 656.11(b). The instant labor certification was submitted on July 26, 2007.

to give U.S. workers an opportunity to compete for the actual position. 20 C.F.R. §§ 656.17(f)(3), (4); see *Latin American Enterprises, Inc. d/b/a Telelink Inc.*, 2008-INA-82 (BALCA 2008); *Siemens Water Technologies Corp.*, 2011-PER-00955 (BALCA 2013) (when the employer permitted the beneficiary to work from home, but did not list this option in its recruitment and instead listed a geographic location of [REDACTED] represented a condition of employment less favorable than that offered to the beneficiary).

It is unclear from the record whether the job opportunity involves either working at the petitioner's president's home, or the employee's home, or multiple temporary worksites. There must be a worksite location; the petitioner cannot create a location if no real work is performed at that location. 20 C.F.R. § 656.3 (definition of job opportunity); see *PR Consultants Inc.*, 2007-INA-66 (BALCA 2008) (there must be an actual place of work, a worksite must not exist merely for the purpose of obtaining a labor certification).

On remand, the petitioner must document that the worksite address listed on the labor certification, [REDACTED] was true and accurate at the time the labor certification was filed. Without independent, objective evidence that this location was an accurate description of the worksite, the job offer may not have been clearly open to all U.S. workers, and the labor certification may not be valid. 20 C.F.R. § 656.30(c)(2).

#### 4. Recruitment

The record also contains some of the recruitment conducted by the petitioner for the position offered. Prior counsel appears to assert that DOL had the recruitment before it to review; however, the labor certification timeline suggests otherwise, as the application was filed electronically on July 26, 2007, and certified a few days later on August 10, 2007.

The documents supporting the petitioner's recruitment report include copies of the interview offer letters sent to seven applicants, as well as copies of the Certified Mail Receipts to document their mailing and receipt. These documents indicate the petitioner sent the request for interviews within four days of the end of its advertising for the position, and provided the applicants with one week notice of the interview date.

The petitioner's recruitment report is in the form of a letter, dated January 11, 2011, which is more than three years after the labor certification was granted. Given the timeline provided, it is unclear why a letter to DOL from 2011 would exist.<sup>18</sup> The letter also states that the employer received seven applications for the position "since May 2010." The late-dated recruitment letter casts doubt on the validity and accuracy of the petitioner's recruitment file and its contents. *Matter of Ho*, 19 I&N Dec. 582, 591 (BIA 1988) (doubt cast on any aspect of the petitioner's proof may lead to a reevaluation of

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<sup>18</sup> The letter may have been generated in response to the director's NOIR, which was issued December 2010. However, the letter is addressed to DOL, and it specifically requests that agency approve its labor certification.

the reliability and sufficiency of the remaining evidence offered in support of the visa petition). It is incumbent on the petitioner to resolve any inconsistencies in the record by independent, objective evidence; attempts to explain or reconcile such inconsistencies, absent competent, objective evidence pointing to where the truth, in fact, lies, will not suffice. *Id.* at 591-592.

Counsel asserts that the petitioner conducted its recruitment in good faith. Counsel asserts that only seven U.S. workers applied; two of those declined an interview, three failed to show up for the offered interview time, and two declined the position, “one asking for \$52,000 and the other asking for \$60,000” when the proffered wage was \$40,830. The petitioner’s recruitment report suggests that these two applicants were offered the job offer, as it states that they “declined the job offer.” See *Unique Chemtek, Inc.*, 88-INA-552 (BALCA 1990) (employer must offer the job, and the U.S. worker must reject the offer at the salary proffered). The petitioner’s recruitment report, if shown to be credible, appears to provide a lawful reason for rejecting these two U.S. workers.

However, as noted above, it is unclear from the record if the petitioner offered the employment to these applicants on the same terms as the beneficiary. On remand, the petitioner must establish that it did not offer better terms to the beneficiary than it offered to U.S. workers.

##### **5. Beneficiary is One of a Small Number of Employees**

In providing his analysis of the beneficiary’s influence and control, counsel discusses whether the beneficiary’s being one of a small number of employees would impact the *bona fides* of the job opportunity. Counsel acknowledges that the beneficiary is one of a “fluctuating, but typically small, number of employees.”<sup>19</sup> While counsel does not state how many employees the petitioner employs, prior counsel has stated numbers as low as two, including the beneficiary, and as high as five, including the beneficiary.

Counsel asserts that the beneficiary’s status as possibly the petitioner’s only employee is not a factor to consider, because her status as one of only a small number of employees does not provide her with “any control over hiring for her position, and thus is not relevant to whether a *bona fide* job exists.” The assertions of counsel 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).

Contrary to counsel’s assertion, the beneficiary’s status as one of only a small number of employees is an important factor to be considered in the analysis of whether a *bona fide* job opportunity exists. As stated in *Modular Container*, there are many unlisted factors that may need to be considered; the

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<sup>19</sup> As discussed above, the beneficiary was the only person to receive salary or wages from the petitioner in 2007. Only the \$36,000 paid to the beneficiary was listed on the petitioner’s tax return for 2007, and the petitioner listed no “costs of labor” on that year’s tax returns. While counsel and the petitioner’s CPA have claimed the petitioner employs other individuals as contractors, the record lacks evidence, such as Internal Revenue Service Forms 1099 for tax year 2007, to document these claims.

beneficiary being one of a small number of employees was a listed factor, suggesting BALCA wanted to emphasize its importance.

This, and additional factors, suggest the job opportunity was not *bona fide*. As noted above, the beneficiary is related to the petitioner's sole owner and officer, and is either the only employee or one of a small number of employees. Her relationship to the petitioner, the size of the petitioner, and the petitioner's willingness to provide large sums of unsecured funds suggests the beneficiary may have influence or control over the position offered. It is unclear if there was an actual worksite, or if the working conditions offered to the beneficiary were also offered to U.S. workers. Further, the beneficiary appears to be involved in the management of the company. Her job duties include: organizing the petitioner's office procedures; preparation of the petitioner's budgets; developing its employee compensation system; developing recruitment methods; and developing personnel policies. These duties suggest the beneficiary, who held the job opportunity prior to the labor certification, was in a position of management with the petitioner at the time of labor certification. DOL assigned the occupational code of 11-3011.00, with accompanying job title Administrative Officer, to the proffered position. DOL's occupational codes are assigned based on normalized occupational standards, which were last updated in 2010. The updated job title for this classification is "Administrative Services Manager." According to DOL's public online database at <http://www.onetonline.org/link/summary/11-3011.00> (accessed July 1, 2014) and its description of the position and requirements for the position, the proffered position is managerial. *Id.* (an Administrative Services Manager plans, directs, or coordinates one or more administrative services of an organization). It is unclear that the petitioner would have removed the beneficiary, the owner's sister-in-law, from the proffered position in 2007 in order to hire a U.S. worker on the same terms and conditions. In the totality of the circumstances, the job opportunity does not appear to be clearly open to all U.S. workers. On remand, the petitioner must provide independent, objective evidence to establish that the job opportunity was open to all U.S. workers.

### III. CONCLUSION

The evidence in the record on appeal does not support a finding of fraud. The director's decision will be withdrawn, and the matter will be remanded to the director to consider whether the petitioner made willful misrepresentations in conjunction with its application for labor certification, and whether a *bona fide* job opportunity exists.

The matter will be remanded to the director. On remand, the petitioner should explain the relationship between the beneficiary and any owner, officer or incorporator of the company, and provide any evidence of this relationship that you may have provided to the DOL in accordance with 20 C.F.R. § 656.17. Further, if it is the petitioner's contention that disclosure was not required of this relationship, the petitioner should provide support for that assertion which would rebut the finding of willful misrepresentation. Further, the petitioner should provide certified copies of the documents required by 20 C.F.R. § 656.17(l),<sup>20</sup> including of the petitioner's articles of incorporation,

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<sup>20</sup> The regulations at 20 C.F.R. § 656.17(l) require the following documentation: (1) a copy of the

and certified copies of the corporation's stock ownership at the time of incorporation through the present to include any and all changes to the corporation's stock ownership. The petitioner must also document its continuing ability to pay the beneficiary's proffered wage, and that the beneficiary possessed the minimum requirements for the position offered as of the priority date.

In visa petition proceedings, it is the petitioner's burden to establish eligibility for the immigration benefit sought. Section 291 of the Act, 8 U.S.C. § 1361; *Matter of Otiende*, 26 I&N Dec. 127, 128 (BIA 2013). Here, that burden has not been met.

**ORDER:** The director's decision is withdrawn; however, the petition is currently unapprovable for the reasons discussed above, and therefore we may not approve the petition at this time. Because the petition is not approvable, the petition is remanded to the director for issuance of a new, detailed decision.

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