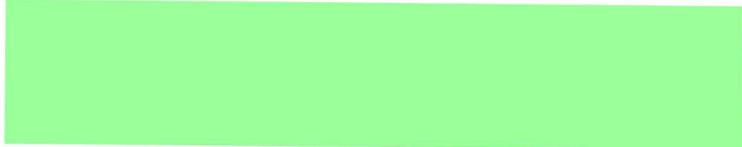


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U.S. Citizenship
and Immigration
Services



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OFFICE: TEXAS SERVICE CENTER

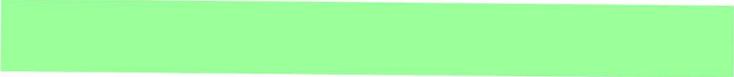
FILE:



OCT 31 2014

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 (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. If you believe the AAO incorrectly applied current law or policy to your case or if you seek to present new facts for consideration, you may file a motion to reconsider or a motion to reopen, respectively. Any motion must be filed on a Notice of Appeal or Motion (Form I-290B) within 33 days of the date of this decision. **Please review the Form I-290B instructions at <http://www.uscis.gov/forms> for the latest information on fee, filing location, and other requirements. See also 8 C.F.R. § 103.5. Do not file a motion directly with the AAO.**

Thank you,

A handwritten signature in black ink, appearing to read "Ron Rosenberg".

Ron Rosenberg

Chief, Administrative Appeals Office

DISCUSSION: The employment-based Immigrant Petition for Alien Worker (Form I-140) was initially approved by the Director, Texas Service Center. Upon determining that the petition had been approved in error, the director served the petitioner with a notice of Intent to Revoke (NOIR) the approval of the petition. In the Notice of Revocation (NOR), the director revoked the approval of the preference petition. The matter is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner describes itself as a convenience store. It sought to employ the beneficiary permanently in the United States as a store manager.¹ As required by statute, the petition was accompanied by an ETA Form 9089, Application for Permanent Employment Labor Certification² approved by the Department of Labor.

For the reasons explained below, we concur with the director's decision to revoke approval of the petition and conclude that the petitioner failed to credibly establish that it has made a *bona fide* job offer.

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 the approval. *Matter of Ho*, 19 I&N Dec. 582, 590 (BIA 1988).

We conduct appellate review on a *de novo* basis. Our *de novo* authority is well recognized by the federal courts. *See Soltane v. DOJ*, 381 F.3d 143, 145 (3d Cir. 2004). The procedural history in this case is documented by the record and incorporated. Further elaboration of the procedural history will be made only as necessary.³

Section 204(a)(1)(F) of the Act, 8 U.S.C. § 1154(a)(1)(F), provides that “[a]ny employer desiring and intending to employ within the United States an alien entitled to classification under section . . . 203(b)(1)(B) . . . of this title may file a petition with the Attorney General [now Secretary of Homeland Security] for such classification.” (Emphasis added.)

¹Section 203(b)(3)(A)(i) of the Immigration and Nationality Act (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 under this paragraph, 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.

²The filing date or priority date of the petition is the initial receipt in the DOL's employment service system. It is determined by the date that DOL accepted the filing of the ETA Form 9089 and is used in conjunction with the Visa Bulletin issued by the Department of State to determine when a beneficiary can apply for adjustment of status or for an immigrant visa abroad. *See* 8 C.F.R. § 204.5(d); *Matter of Wing's Tea House*, 16 I&N 158 (Act. Reg. Comm. 1977). Here, the ETA Form 9089 indicates that it was accepted for processing on February 7, 2007, which establishes the priority date.

³The 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 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).

Section 212(a)(5)(A)(i) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1182(a)(5)(i) provides that any alien who seeks to enter the United States for the purpose of performing skilled or unskilled labor is inadmissible, unless the Secretary of Labor has determined and certified to the Secretary of State and the Attorney General that-

- (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.

It is left to United States Citizenship and Immigration Services (USCIS) to determine whether the proffered position and alien qualify for a specific immigrant classification or even the job offered.

The record indicates that the I-140 was initially filed on June 20, 2007. On Part 5 of the Form I-140, Immigrant Petition for Alien Worker, the petitioner indicates that it was established on March 14, 2002 and employs three workers. It was signed by [REDACTED] as President. The ETA Form 9089 indicates the same information and was also signed by [REDACTED] as President.⁴ The record also contains a copy of the petitioner's 2006 federal tax return showing that [REDACTED] was the 100% shareholder. After an independent review of the state of Texas records, the director determined that these records also reflect that [REDACTED] was designated as the petitioner's director on the petitioner's Articles of Incorporation filed on March 14, 2002; that he was the petitioner's registered agent according to the petitioner's "Assumed Name Certificate" filed on October 28, 2002; that on September 5, 2007 (after the February 7, 2007 priority date) the petitioner's Articles of Incorporation were amended to reflect that [REDACTED] was the 51% shareholder, the only director and listed as the "President/Secretary;" the 49% shareholder was given as [REDACTED] and the petitioner's incorporator is listed as [REDACTED] CPA.

The Form I-140 was initially approved on June 25, 2007. However, subsequent to the approval information came to light that the beneficiary, [REDACTED] is the brother-in-law of [REDACTED] wife. Given that [REDACTED] had disclaimed any

⁴The ETA Form 9089 stated that the job of store manager required 24 months of work experience in the job offered. As verification of this experience, pursuant to 8 C.F.R. § 204.5(1)(3)(ii), the petitioner provided a letter, dated June 15, 2007, signed by [REDACTED] as President of [REDACTED] which stated that the beneficiary worked as a store manager from June 1, 2004 to present. It then listed some of the beneficiary's duties. Given that the beneficiary shares the same last name as this individual and that relevant state records reflect that the beneficiary is listed as the incorporator, director and registered agent of the corporation that owns this business, as well as the vice-president, in further filings, if any, additional documentation should be provided that establishes 24 months of full-time experience as a store manager and that distinguishes the portion of time spent in store managerial duties rather than duties as a director and/or vice-president and owner.

familial relationship in response to question 9 of Part C of the ETA Form 9089, the director determined that the *bona fides* of the job offer were in question. He subsequently concluded that the I-140 was approved in error and issued a notice of intent to revoke (NOIR) on March 22, 2013.

The petitioner was afforded thirty (30) days to overcome the reasons given for the issuance of the NOIR. Finding that the petitioner's response to the NOIR did not overcome the grounds for revocation, on September 19, 2013, the director revoked the petition's approval, pursuant to section 205 of the Act, 8 U.S.C. § 1155, concluding that the petitioner had misrepresented a material fact on the ETA Form 9089, specifically the beneficiary's familial relationship to the majority owner of the petitioner.

The petitioner, through counsel, appealed this decision, asserting that the in-law relationship is not a "familial" relationship and that question 9 of Part C of the ETA Form 9089 is ambiguous. Counsel also asserts that the *bona fides* of the job offer was established despite the relationship and cites *Matter of Modular Container Systems, Inc.*, 1989-INA-228 (BALCA July 16, 1991)(en banc). Counsel submits a copy of an affidavit from [REDACTED] in which he states that he misunderstood the question on the ETA Form 9089 and thought that it did not apply to relatives by marriage.

The petitioner must establish that its job offer to the beneficiary is a realistic one and that the opportunity is a *bona fide* job offer. With respect to the *bona fides* of the job offer, it is noted that a relationship relevant to the *bona fides* of a 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, 2000-INA-93 (BALCA May 15, 2000). The labor certification program administered by DOL is an attestation-based program. The employer bears the burden of proof to establish eligibility for labor certification. 8 U.S.C. § 1361; 20 C.F.R. §656.2(b). The employer must demonstrate that the job offer has been and is clearly open to any U.S. workers. 20 C.F.R. § 656.10(c)(8). *Matter of Intervid, Inc.*, 2009-PER-00278 (Sept. 9, 2010).

The employer must demonstrate to DOL, in the event of an audit, the existence of a *bona fide* job opportunity by providing documentation to the Certifying Officer including; a description of the entity's business structure, officers, shareholders, partners, their titles and positions, a description of their relationships to each other and to the alien beneficiary; a financial history and record of investments of each officer, incorporator/partner and the alien; identification of the entity's official(s) with responsibility for hiring; and documentation of any family relationship of the alien to the entity's employees if the entity has 10 or fewer employees. See 20 C.F.R. § 656.17(l).

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

(l) *Alien influence and control over job opportunity.* If the employer is a closely held corporation or partnership in which the alien has an ownership interest, or if there is a familial relationship between the stockholders, corporate officers, incorporators, or partners, and the alien, or if the alien is one of a small number of employees, the employer in the event of an audit must be able to demonstrate the existence of a *bona*

fide job opportunity, i.e., the job is available to all U.S. workers, and must provide to the Certifying Officer, the following supporting documentation:

- (1) A copy of the articles of incorporation, partnership agreement, business license or similar documents that establish the business entity;
- (2) A list of all corporate/company officers and shareholders/partners of the corporation/firm/business, their titles and positions in the business' structure, and a description of the relationships to each other and to the alien beneficiary;
- (3) The financial history of the corporation/company/partnership, including the total investment in the business entity and the amount of investment of each officer, incorporator/partner and the alien beneficiary; and
- (4) The name of the business' official with primary responsibility for interviewing and hiring applicants for positions within the organization and the name(s) of the business' official(s) having control or influence over hiring decisions involving the position for which labor certification is sought.
- (5) If the alien is one of 10 or fewer employees, the employer must document any family relationship between the employees and the alien.

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. Given that the petitioner failed to reveal his relationship to the beneficiary on the ETA Form 9089, the DOL Certifying Officer had no reason to make further inquiries. There is no evidence in this record that the petitioner ever provided the documentation specified in 20 C.F.R. § 656.17(l).

The regulation at 20 C.F.R. § 656.17(l) was based upon the approach taken by the Board of Labor Certification Appeals (BALCA) at *Modular Container Sys., Inc.*, 89-INA-228 (BALCA July 16, 1991) (*en banc*), a case based on the fact that the investor status of the alien beneficiary was disclosed to the certifying officer in the labor certification proceeding. The Board considered a totality of circumstances including such factors as 1) whether the alien was in a position to influence or control hiring decisions regarding the job for which certification is sought; 2) whether the alien was related to the corporate directors, officers, or employees; 3) whether the alien was the incorporator or founder of the employer; 4) whether the alien had an ownership interest in the company; 5) whether the alien was involved in the management of the company; 6) whether he was one of a small number of employees; 7) whether the alien has qualifications for the job that are identical to specialized or unusual job duties and requirements as stated in the application; and 8) whether the alien is so inseparable from the petitioning employer because of a pervasive presence and personal attributes that the employer would be unlikely to continue in operation without him. If the certified job opportunity was determined not to be clearly open to any U.S. worker and tantamount to self-employment, then there is a per se bar to labor certification.

Question 9 at Part C of the ETA Form 9089 embodies the fundamental query of 20 C.F.R. §656.17(l) and asks the employer to answer "yes" or "no" to:

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?

In the instant case, the petitioner's owner answered "no" to this question on the ETA Form 9089, and has now claimed that he misunderstood the question. The petitioner's failure to disclose the beneficiary's relationship to its owner precluded the DOL from further inquiring as to the beneficiary's influence and control over the job opportunity. The petitioner has submitted no evidence that the DOL was cognizant of the relationship between the owner and the alien when it certified the instant labor certification for the instant beneficiary so that factors mentioned by counsel on appeal, and as expressed in *Matter of Modular Container Systems, Inc.*, could be applied by DOL.

If the relationship between the petitioner's owner and the beneficiary had been disclosed, as noted by counsel for the petitioner, the DOL would have applied 20 C.F.R. § 656.17(l) and the factors listed in *Matter of Modular Container Systems, Inc.* In determining whether the instant beneficiary had influence and control over the job opportunity, we look to the same factors applied by the DOL. In the instant case, the petitioner's owner claimed only three employees at the time the labor certification and Form I-140 were filed. He is the brother-in-law of the beneficiary. It is not unexpected that an employer would have a vested interest in the employment and resulting procurement of immigrant status for the spouse of a sibling by sponsoring him for employment or that this would influence the hiring decision. It is noted that the record also indicates that the beneficiary's wife and the beneficiary had financial dealings with [REDACTED] in another business called [REDACTED] for which the beneficiary claimed employment as an assistant manager from August 2003 to January 2004. The record lacks other documentation required by 20 C.F.R. § 656.17(l), including 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; 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; 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. We note that the beneficiary has not claimed direct employment for the petitioner and was not listed as an incorporator, but he is closely related to the petitioner's owner and apparently has been engaged in the same business on his own and as an assistant manager for the petitioner's former business. In such a case, where multiple family members appear to have done business with and for each other, sponsoring each other for employment and endorsing work experience, we do not find that the beneficiary was removed from influence of the hiring decision. While no factor is controlling, where the alien is related to the owner of the employer, and where the employer is such a small enterprise, the employer must bear the burden to overcome the presumption that there is not a *bona fide* job opportunity. See *i.e.*, *Matter of: Young Building Services, Inc.*, 2011-PER-02710 (April 4, 2014). Even if *Modular Container Systems, Inc.* were applied, the record does not establish that the petitioner has met its burden of proof.

In *Matter of Silver Dragon Chinese Restaurant*, 19 I&N Dec. 401 (Comm. 1986), the beneficiary was a principal of the petitioning corporation and the labor certification was signed on behalf of the petitioner by an individual identified as [REDACTED]. After certification and in the course of examining the petitioner's tax returns, the former Immigration and Naturalization Service (now USCIS) observed that the 1981 tax return showed the beneficiary as the sole officer and a 50% shareholder in the company. The 1982 return reflected that the beneficiary and Mr. [REDACTED] were each 50 percent shareholders with officer compensation going to the beneficiary. In light of these facts, the Board of Immigration Appeals (BIA) observed that the beneficiary was not supervised by Mr. [REDACTED] who signed the petition as president. Second, the job was not actually open to qualified U.S. Citizen or resident workers. The BIA found that where the beneficiary's association with the petitioning corporation is concealed in labor certification proceedings, it prevents DOL from discharging its function of examining whether the job opportunity was clearly open to U.S. workers. It was concluded that the misrepresentation was both willful and material. The DOL advisory opinion submitted in that case noted that, while it is not an absolute ground for denial of an application for certification, the alien's ownership of the corporate employer should cause the certifying officer to examine more closely whether the job opportunity was clearly open to qualified U.S. workers. The alien's ownership of his employer would be one ground for denial since it would not constitute work for an employer other than oneself as required by regulation. *Id.* at 403.

Therefore, the petitioner has not established that a *bona fide* job offer existed in this case.

In view of the foregoing, we conclude that the director properly revoked the approval of the petition. Regarding the revocation on notice of an immigrant petition under section 205 of the Act, the Board of Immigration Appeals has stated:

In *Matter of Estime*, . . . this Board stated that a notice of intention to revoke a visa petition is properly issued for "good and sufficient cause" where the evidence of record at the time the notice is issued, 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 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 intention to revoke, would warrant such denial.

Matter of Ho, 19 I&N Dec. 582 at 590 (citing *Matter of Estime*, 19 I&N 450 (BIA 1987)). In this case, the evidence contained in the record, which raised numerous inconsistencies in the evidence as set forth above at the time the decision was rendered, warranted such denial.

The burden of proof in these proceedings rests solely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. The petitioner has not met that burden.

ORDER: The appeal is dismissed.