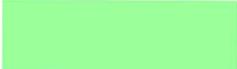


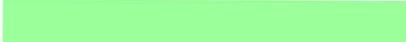
(b)(6)



U.S. Citizenship
and Immigration
Services



DATE: **SEP 30 2014** OFFICE: NEBRASKA SERVICE CENTER FILE: 

IN RE: Petitioner: 
Beneficiary: 

PETITION: Immigrant Petition for Alien Worker as a Skilled Worker 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,


Ron Rosenberg
Chief, Administrative Appeals Office

DISCUSSION: The employment-based immigrant visa petition was initially approved by the Director (director), Nebraska Service Center on May 27, 2003. Upon further review, the director issued a Notice of Intent to Revoke (NOIR) the approval of the petition on March 16, 2009. On May 19, 2009, the director revoked the approval of the petition, concluding that the job offer was not *bona fide*. The petitioner filed an appeal with the Administrative Appeals Office (AAO). We initiated consultation with the Department of Labor (DOL) requesting its opinion about the validity of the labor certification.¹ We also issued an abeyance notice to the petitioner informing it that we sought consultation with DOL. The DOL responded to our inquiry and we subsequently dismissed the appeal. The matter is currently before us on the petitioner's motion to reopen and motion to reconsider pursuant to 8 C.F.R. § 103.5.² The motion will be granted and our previous decision will be affirmed. The petition's approval will remain revoked.

The petitioner is a restaurant. It sought to employ the beneficiary permanently in the United States as a head cook/manager. As required by statute, a Form ETA 750, Application for Alien Employment Certification approved by the Department of Labor (DOL), accompanied the petition.

The director initially approved the petition, but upon further review issued a NOIR to the petitioner informing it that he intended to revoke the petition's approval.³ Upon review of the petitioner's response, the director revoked the petition's approval on May 19, 2009, finding that the job offer was not *bona fide*. The director noted the inconsistency of the beneficiary's representation that he was employed as a cook versus the characterization of [REDACTED] as Treasurer/Owner that the

¹ Section 204(b) of the Immigration and Nationality Act (the Act), which governs U.S. Citizenship and Immigration Services (USCIS) authority to approve immigrant visa petitions, states that "[a]fter an investigation of the facts in each case, and *after consultation with the Secretary of Labor* with respect to petitions to accord a status under section 203(b)(2) or 203(b)(3), [the Secretary of Homeland Security] shall, if he determines that the facts stated in the petition are true and that the alien in behalf of whom the petition is [filed is eligible] for preference under subsection (a) or (b) of section 203, approve the petition..." (All emphases added).

² The regulation at 8 C.F.R. § 103.5(a)(3) provides that a motion to reconsider must offer the reasons for reconsideration and be supported by pertinent legal authority showing that the decision was based on an incorrect application of law or USCIS policy. It must also demonstrate that the decision was incorrect based on the evidence contained in the record at the time of the initial decision. A motion to reopen must state the new facts to be submitted in the reopened proceeding and be supported by affidavits or other documentary evidence. 8 C.F.R. § 103.5(a)(2).

We also requested additional evidence from the petitioner on January 22, 2014. The petitioner's response satisfactorily addressed the issues raised relevant to the petitioner's operating status.

³ Section 205 of the Act, 8 U.S.C. § 1155 states:

The Secretary 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. Such revocation shall be effective as of the date of approval of any such petition.

The regulation at 8 C.F.R. § 205.2 states:

(a)*General.* Any Service [USCIS] officer authorized to approve a petition under section 204 of the Act may revoke the approval of that petition upon notice to the petitioner on any ground other than those specified in § 205.1 when the necessity for the revocation comes to the attention of this Service [USCIS].

beneficiary was employed as a head cook and manager. The director also found that the evidence indicated that the beneficiary was Mr. [REDACTED] brother-in-law, that the beneficiary was the President of the corporation, that the beneficiary owned 50% of the petitioning company, and that the beneficiary's pattern of compensation exceeded that of Mr. [REDACTED] and reflected compensation as a shareholder-officer rather than as an employee.⁴

The petitioner, through former counsel, filed an appeal.⁵ During the pendency of the appeal, we informed the petitioner that the proceedings would be held in abeyance while we sought consultation with DOL about the beneficiary's position within the petitioning business relevant to the *bona fides* of the labor certification. We also sent copies of documentation to DOL that the petitioner claims was originally submitted in the labor certification proceedings, and described the beneficiary's ownership of the petitioner as well as the beneficiary's position as the petitioner's President and familial relationship to the other owner. We additionally described the pattern of compensation as reflected on the corporate tax returns and requested DOL's opinion whether if, based on the information provided, it would have certified the labor certification.

We received a response from DOL on December 10, 2012, concurring that based on the information that we provided to DOL, as set forth above, it does not appear that the job offered was truly open to U.S. workers and that the employer and foreign worker engaged in a material misrepresentation involving the labor certification.⁶ It [DOL] indicates the following:

You also provided a copy of a letter from Mr. [REDACTED] to Mr. [REDACTED] a Department Regional Certifying Officer, wherein, as noted in your letter, he addressed the familial relationship but made no mention of the ownership interest or the foreign worker's position. . .

At issue is the undue influence and control the foreign worker may be afforded by virtue of his 50% ownership in the company. While Mr. [REDACTED] asserted that '[his] restaurant has always held **positions** [emphasis added] available to U.S. workers' to evidence that the job opening of head cook/manager was *bona fide* and

⁴ The procedural history of this case is documented in the record and is incorporated herein. Further references to the procedural history will only be made as necessary.

⁵ 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).

⁶ The regulation at 8 C.F.R. § 103.2(b)(16) which provides in relevant part:

- (i) *Derogatory information unknown to petitioner or applicant.* If the decision will be adverse to the applicant or petitioner and is based on derogatory information considered by [U.S. Citizenship and Immigration Services (USCIS)] and of which the applicant or petitioner is unaware, he/she shall be advised of this fact and offered an opportunity to rebut the information and present information in his/her own behalf before the decision is rendered, except as provided in paragraphs (b)(16)(ii), (iii), and (iv) of this section. Any explanation, rebuttal or information presented by or in behalf of the applicant or petitioner shall be included in the record of proceeding.

existed for U.S. workers, it does not appear that Mr. [REDACTED] would hire an applicant other than the foreign worker. In fact, Mr. [REDACTED] stated, '[l]astly, the applicant should be someone that I can entrust with the daily operation of the restaurant. The U.S. applicants that have previously worked for me or applied in the past do not meet that criteria.' It does not appear that the position of head cook/manager was truly open to all U.S. workers.

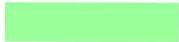
Upon the receipt of DOL's response, on June 10, 2013, we issued a Notice of Intent to Dismiss and Notice of Derogatory Information informing the petitioner:

As noted above, the record reflects:

1. The beneficiary is the 50% shareholder in the petitioning corporation. The other 50% shareholder is [REDACTED]. This is based on the corporate federal income tax returns for 1999, 2002, 2003, 2004, 2005, 2006, and 2007.
2. The beneficiary is shown as the President and/or President and Director of the petitioning corporation based on disclosures contained in the [REDACTED] Massachusetts Articles of Organization (beneficiary is listed as President and Director, [REDACTED] is listed as Treasurer, Clerk and Director); the 2001 state corporation annual report (beneficiary is listed as President and Director; [REDACTED] is listed as Treasurer, Clerk, and Director); the 2002 and 2003 state corporation annual report (beneficiary is listed as President; [REDACTED] is listed as Director, Treasurer and Clerk); the 2004, 2005, 2006 and 2007 state annual corporation report (beneficiary is listed as President; [REDACTED] is listed as Director, Secretary, and Treasurer).
3. As noted above, the record reveals that the beneficiary is the brother-in-law of [REDACTED] having married his sister in 1986.
4. The 2002, 2003, and 2004 corporate tax returns of the petitioner reflect that the beneficiary was paid officer compensation of \$46,670, \$46,624, and \$48,294, respectively, while Mr. [REDACTED] was paid officer compensation of \$39,000 in each year. It is also noted that the proffered wage of the certified position of "head cook/manager" is \$14.02 per hour or \$29,161.60 per year. The petitioner's tax returns reflect no other wages or costs of labor paid in 2002, 2005, 2006, or 2007.⁷

Through counsel, on appeal as well as in counsel's recent motion to reconsider, the petitioner claims that the familial relationship, as well as the beneficiary's position with the petitioning company was disclosed to DOL before the labor certification was

⁷ Wages paid in other years were minimal: 2003: \$1,260 in wages; and 2004; \$2,600 wages, so that it appears only that the beneficiary and his brother-in-law are employed with the petitioning entity. Form I-140 does not state, as required, that petitioner's number of employees, if any.



certified.⁸ It is noted that while the copy of Mr. [REDACTED] August 29, 2002, letter to DOL explicitly mentions the beneficiary's familial relationship to him, it does not specifically mention: (1) the beneficiary's investment interest in the petitioning company or; (2) the beneficiary's position within the company.

It is noted that a relationship invalidating a *bona fide* job offer may arise where the beneficiary is related to the petitioner by "blood" or it may be "financial, by marriage, or through friendship." See *Matter of Summart* 374, 00-INA-93 (BALCA May 15, 2000).

The regulation at 20 C.F.R. § 656.30 (2010) provides in pertinent part:

(d) *Invalidation of labor certifications.* After issuance, a labor certification may be revoked by ETA using the procedures described in §656.32. Additionally, after issuance, a labor certification is subject to invalidation by the DHS or by a Consul of the Department of State upon a determination, made in accordance with those agencies' procedures or by a court, of fraud or willful misrepresentation of a material fact involving the labor certification application. If evidence of such fraud or willful misrepresentation becomes known to the CO or to the Chief, Division of Foreign Labor Certification, the CO, or the Chief of the Division of Foreign Labor Certification, as appropriate, shall notify in writing the DHS or Department of State, as appropriate. A copy of the notification must be sent to the regional or national office, as appropriate, of the Department of Labor's Office of Inspector General.

As noted above, the regulation at 20 C.F.R. § 656.3 states that employment means: "Permanent full-time work by an employee for an employer other than oneself."

In *Matter of Silver Dragon Chinese Restaurant*, 19 I&N Dec. 401,406 (Comm. 1986), 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 is 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. It was concluded that the misrepresentation was both "willful and material." While it was noted that ownership in a petitioning relationship does not automatically disqualify an alien, the DOL has denied labor certifications where it was determined that the prospective alien employee

⁸ The petitioner's claimed submissions to DOL include a copy of the petitioner's 2001 state corporation annual report showing the beneficiary as the president and one of the two directors of the petitioner.

controlled the prospective corporate employer to the extent that the job offer could not be properly regarded as open to all qualified applicants. *Id.* at 3.

As noted above, it appears that the job offer of head cook/manager may not have been truly open to all qualified U.S. workers or have constituted a bona fide job opportunity for an employer other than oneself, who also happens to be a 50% investor in the petitioning company.

We subsequently dismissed the appeal on November 6, 2013. At that time, we concluded that there had not been deliberate misrepresentation but that the petition's approval did merit revocation.

Former counsel asserts on motion that after receiving the information requested concerning the beneficiary's familial relationship, the DOL approved the labor certification; and that therefore, USCIS's attempt to substitute its judgment for that of the DOL as to whether a bona fide job opportunity exists is outside USCIS authority. Counsel notes that the DOL has not, to date, sought to revoke the underlying labor certification. Counsel also asserts that neither the petitioner nor the beneficiary misrepresented the beneficiary's relationship to the DOL or to USCIS, and there is no basis for a finding of fraud or willful misrepresentation.

We note that neither we in the dismissal of the appeal, nor the director in his revocation of the approved petition, ever invalidated the underlying labor certification certified by the DOL. We further note that, even if invalidation were warranted, this authority is not given to the DOL in the instant case. The regulation at 20 C.F.R. § 656.30(d) (2001)⁹ provides:

(d) After issuance labor certifications are subject to invalidation by the INS or by a Consul of the Department of State upon a determination, made in accordance with those agencies, procedures or by a Court, of fraud or willful misrepresentation of a material fact involving the labor certification application. If evidence of such fraud or willful misrepresentation becomes known to a RA or to the Director, the RA or Director, as appropriate, shall notify in writing the INS or State Department, as appropriate. A copy of the notification shall be sent to the regional or national office, as appropriate, of the Department of Labor's Office of Inspector General.

As noted above, however, USCIS has the authority pursuant to section 205 of the Act to revoke the approval of petitions at any time for good and sufficient cause. It is not necessary for USCIS

⁹ New United States DOL regulations concerning labor certifications went into effect on March 28, 2005. The new regulations are referred to by the DOL by the acronym PERM. See 69 Fed. Reg. 77325, 77326 (Dec. 27, 2004). The PERM regulation was effective as of March 28, 2005, and applies to labor certification applications for the permanent employment of aliens filed on or after that date. However, the instant petition is governed by the prior regulations, in effect at the time it was filed on April 2, 2001.

to find fraud or willful misrepresentation to revoke an approved petition. In the instant case, the director determined that the beneficiary's ownership of the petitioner demonstrated that no *bona fide* job offer existed. Therefore, the director's revocation was based on good and sufficient cause. In our prior decision, we affirmed the director's revocation, concluding that no *bona fide* job offer existed, both as a result of the beneficiary's ownership of the petitioner and the beneficiary's role as president of the petitioner, the duties of which were not listed on the labor certification.

We have reconsidered and reviewed the evidence, including DOL's opinion that the beneficiary's ownership of the petitioner, of which it was unaware at the time of the labor certification proceedings, afforded the beneficiary undue influence and control over the recruitment process. An alien's ownership of the petitioning entity, if not disclosed, prevents the certifying officer from examining whether the job opportunity was clearly open to U.S. workers.¹⁰ Given that the beneficiary's ownership was not revealed by Mr. [REDACTED] in his letter to the DOL in the labor certification proceedings, as well as the other evidence in the record, we concur with DOL that the position of head cook/manager was not truly open to U.S. workers.

Further, given the beneficiary's role as president of the petitioner, we find that the petitioner intends to employ the beneficiary outside the terms of the Form ETA 750. *See Sunoco Energy Development Company*, 17 I&N Dec. 283 (Reg'l Comm'r 1979). A labor certification is only valid for the particular job opportunity stated on the application form. 20 C.F.R. § 656.30(c). On motion, the petitioner submits a verification of employment and experience letter in support of its intent to employ the beneficiary in the position of head cook/manager listed on the labor certification. However, this letter, dated November 26, 2013, signed by [REDACTED] discusses the beneficiary's preparation of "specialty foods such as Falafel, Hummus, Fatoush, Tabula, Kibbe, babaganoush, and Shis Taouk ... Greek pizzas and food such as Moussaka and Souvlaki, as well as Italian pasta and lasagna." However, the petitioner's menu does not include Falafel, Hummus, Fatoush, Tabula, Kibbe, babaganoush, and Shis Taouk, or Moussaka.¹¹ Doubt cast on any aspect of the petitioner's proof may, of course, lead to a reevaluation of the reliability and sufficiency of the remaining evidence offered in support of the visa petition. *See Matter of Ho*, 19 I&N Dec. 582, 591-592 (BIA 1988). As the petitioner's letter is inconsistent with its menu, we will not accept this evidence of the petitioner's intent to employ the beneficiary in the proffered position.

In our previous decision, we noted that the petitioner had not established that the beneficiary was qualified for the proffered position pursuant to the regulation at 8 C.F.R. § 204.5(l)(3)(ii). Specifically, the beneficiary failed to list any experience other than with the petitioner on the Form ETA 750 Part B. In *Matter of Leung*, 16 I&N Dec. 2530 (BIA 1976), the Board's dicta notes that the beneficiary's experience, without such fact certified by DOL on the beneficiary's Form ETA 750B, lessens the credibility of the evidence and facts asserted. On motion, the petitioner

¹⁰ Although the beneficiary's familial relationship to the petitioner was disclosed, the DOL confirmed, and the petitioner does not dispute, that the beneficiary's ownership interest was never disclosed to the DOL.

¹¹ [REDACTED] (accessed September 5, 2014).

submits a letter dated November 25, 2013 from [REDACTED] Owner, attesting to the beneficiary's experience as an Associate Cook/Chief Cook and Kitchen Manager with [REDACTED] from April 2, 1991 to June 30, 1993. As this experience was not listed on the Form ETA 750 Part B and was not certified by the DOL, pursuant to *Matter of Leung*, independent and objective evidence of this employment must be submitted. The record does not contain any independent, objective evidence verifying that the beneficiary possessed the required two years of experience in a related occupation as of the April 2, 2001 priority date.

On motion, counsel asserts that the DOL already sought clarification of the beneficiary's experience in a request for evidence. However, nothing in the record demonstrates that the DOL requested information concerning the beneficiary's experience or that such information was provided by the petitioner. The assertions of counsel do not constitute evidence. *Matter of Obaighbena*, 19 I&N Dec. 533, 534 (BIA 1988); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980). The beneficiary also submits on motion a revised Form ETA 750 Part B dated November 17, 2013. However, a petitioner may not make material changes to a petition in an effort to make a deficient petition conform to USCIS requirements. *See Matter of Izummi*, 22 I&N Dec. 169, 176 (Assoc. Comm'r 1988).

In view of the foregoing, we find 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, 590 (BIA 1988)(citing *Matter of Estime*, 19 I&N 450 (BIA 1987)). In this case, the evidence contained in the record at the time the decision was rendered, warranted such denial for good and sufficient cause.

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

ORDER: The motion to reconsider and motion to reopen is granted. The prior decision of the AAO, dated November 6, 2013, is affirmed. The petition's approval remains revoked.