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U.S. Department of Homeland Security
U.S. Citizenship and Immigration Services
Administrative Appeals Office (AAO)
20 Massachusetts Ave., N.W., MS 2090
Washington, DC 20529-2090



U.S. Citizenship
and Immigration
Services

[Redacted]

DATE: FEB 26 2015

OFFICE: TEXAS SERVICE CENTER FILE:

[Redacted]

IN RE:

Petitioner:

[Redacted]

Beneficiary:

PETITION:

Immigrant Petition for Alien Worker as a Skilled Worker Pursuant to Section 203(b)(3)(A)(i) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)(3)(A)(i)

ON BEHALF OF PETITIONER:

[Redacted]

INSTRUCTIONS:

Enclosed please find the decision of the Administrative Appeals Office 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 Director, Texas Service Center (the director) denied the employment-based immigrant visa petition and the petitioner appealed the director's decision to the Administrative Appeals Office (AAO).

The appeal, timely filed, makes a specific allegation of error in law or fact. We conduct appellate review on a *de novo* basis.¹ We consider all pertinent evidence in the record, including new evidence properly submitted on appeal.² The appeal will be sustained.

I. PROCEDURAL HISTORY

The petitioner filed Form I-140, Immigrant Petition for Alien Worker, with United States Citizenship and Immigration Services (USCIS). The petitioner describes itself as a trucking business, and seeks to employ the beneficiary permanently in the United States as a truck mechanic pursuant to section 203(b)(3)(A)(i) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(3)(A)(i).³ ETA Form 9089, Application for Permanent Employment Certification (labor certification), approved by the U.S. Department of Labor (DOL), accompanied the petition. DOL accepted the labor certification on January 13, 2010, establishing the petition's priority date. 8 C.F.R. § 204.5(d).

In a Notice of Intent to Deny (NOID), the director informed the petitioner that a USCIS investigation indicated that the petitioner's president and the beneficiary were involved in several business ventures together, raising doubts as to whether the offered position was a *bona fide* job opportunity open to all qualified U.S. workers. The director requested independent, objective evidence establishing that its president and the beneficiary did not have a financial relationship or a friendship, and that a *bona fide* job offer existed. He informed the petitioner that, absent such evidence, he intended to deny the petition with a finding of fraud or willful misrepresentation, and to invalidate the labor certification pursuant to 20 C.F.R. § 656.30(d).

The petitioner did not respond to the director's NOID.⁴ The director denied the visa petition, concluding that the undisclosed partnerships between the petitioner's owner and the beneficiary in several business enterprises prevented the petitioner from establishing the offered position as a *bona fide* job opportunity open to all qualified U.S. workers. He further found the petitioner's concealment of this relationship during the labor certification process represented fraud and/or the

¹ The Administrative Procedures Act provides agencies with *de novo* review of appeals of their initial decisions. See 5 U.S.C. § 557(b) ("On appeal from or review of the initial decision, the agency has all the powers which it would have in making the initial decision except as it may limit the issues on notice or by rule."); see also *Janka v. U.S. Dept. of Transp., NTSB*, 925 F.2d 1147, 1149 (9th Cir. 1991); *Soltane v. DOJ*, 381 F.3d 143, 145 (3d Cir. 2004).

² The submission of additional evidence on appeal is allowed by the instructions to the Form I-290B, Notice of Appeal or Motion, which are incorporated into the regulations by 8 C.F.R. § 103.2(a)(1).

³ Section 203(b)(A)(i) of the Act provides for preference classification to qualified immigrants who are capable at the time of petitioning 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.

⁴ On appeal, counsel for the petitioner states that counsel did not receive a copy of the NOID; counsel does not indicate whether the petitioner received the NOID. The record indicates that the NOID was addressed to the petitioner and a courtesy copy was sent to counsel; the record does not contain evidence of returned mail from either address.

willful misrepresentation of a material fact. Accordingly, he denied the visa petition with a finding of fraud and invalidated the underlying labor certification. 20 C.F.R. § 656.30(d). As the visa petition was no longer supported by a valid labor certification, the director denied it for this reason as well. 8 C.F.R. § 204.5(1)(3)(i).

The petitioner appealed the director's decision. Counsel asserts that disclosure of its president's friendship with the beneficiary or any unrelated business activity involving them was not required by the labor certification. Counsel states that the petitioner's failure to provide this information to DOL does not constitute fraud and should not result in the invalidation of the labor certification. Counsel also states that the recruitment for the offered position was "conducted in a proper, arms[-]length fashion, and the applicants who submitted resumes were properly interviewed."⁵

We notified the petitioner on August 29, 2013, that it appeared that DOL lacked the opportunity to assess the extent of the beneficiary's influence and control over the job opportunity prior to approving the labor certification application. Accordingly, we informed the petitioner that we would refer the labor certification to DOL to seek its advice regarding the labor certification's validity, pursuant to our consultation authority under section 204(b) of the Act, 8 U.S.C. § 1154(b). Our notice informed the petitioner that its appeal would be held in abeyance pending DOL's response.

On September 5, 2014, DOL responded to our request for its opinion regarding the validity of the labor certification. In its letter, DOL indicated that the beneficiary's and petitioner's president's shared ownership in companies other than the petitioning employer did not offer sufficient reason to revoke the labor certification. The letter states that shared ownership interest in a company, which is not the employer, is insufficient to revoke the labor certification because the form does not seek any information about other shared financial interests between the foreign worker and employer.

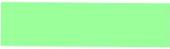
The letter further indicated that while revocation by DOL was not warranted in this matter, that finding does not preclude invalidation of the labor certification by USCIS. The letter states, "if [USCIS] finds the certification was not justified based on information obtained during its processing, USCIS may invalidate the labor certification in accordance with 20 CFR § 656.32(a)."

II. LAW AND ANALYSIS

The director denied the visa petition with a finding of fraud, and invalidated the underlying labor certification pursuant to 20 C.F.R. §§ 656.32(a), 656.30(d), based his finding that the petitioner's failure to disclose the business relationships between its president and the beneficiary during the labor certification process represented the willful misrepresentation of a material fact or fraud.

On review, we will sustain the appeal, and withdraw the director's invalidation of the labor certification and his denial of the visa petition. The ETA Form 9089 requests information on the beneficiary's ownership interests in the petitioning employer, but does not request information on

⁵ Counsel's assertion is inconsistent with the petitioner's recruitment report for the offered position, which indicates that no responses were received as a result of its recruitment efforts.

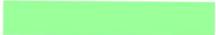


any other shared financial interests between the beneficiary and petitioner.⁶ The petitioner supplemented the record on appeal, documenting that while the beneficiary has shared financial interests with the petitioner's president, the beneficiary does not have a direct financial interest in the petitioner. As the petitioner's answer to question C.9 on the labor certification was accurate based on the plain language of the ETA Form 9089, there is insufficient evidence to support a finding of willful misrepresentation in this case.⁷

Upon review of the entire record, including evidence submitted on appeal and in response to requests for evidence issued by our office, we conclude that the petitioner established that it is more likely than not that the beneficiary had all the education, training, and experience specified on the labor certification. Accordingly, the petition is approved under section 203(b)(3)(A)(i) or the Act, 8 U.S.C. § 1153(b)(3)(A)(i).

The burden of proof in these proceedings rests solely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361; *Matter of Otiende*, 26 I&N Dec. 127, 128 (BIA 2013). The petitioner met that burden.

ORDER: The appeal is sustained, and the petition is approved.

FURTHER ORDER: The director's invalidation of the labor certification,  is withdrawn; the approval of the labor certification is reinstated.

⁶ See 20 C.F.R. §§ 656.10(c)(3) (stating that an investor is not an employee, in the definition of "employment"); 656.10(c)(10) (the "job opportunity is for full-time, permanent employment for an employer other than the alien"); 656.17(l) (discussing the beneficiary's influence and control in certain circumstances, including if the beneficiary has an ownership interest in the petitioner or is one of a small number of employees). *Cf. Matter of Sunmart 374, 00-INA-93* (BALCA May 15, 2000) (a relationship invalidating a *bona fide* job offer may arise where the beneficiary is related to the petitioner by blood, marriage, financially or through friendship).

⁷ At the time of the director's decision, the petitioner failed to respond to the director's NOID; the failure to submit requested evidence that precludes a material line of inquiry constitutes grounds for denying the petition. 8 C.F.R. § 103.2(b)(14). The director could have summarily denied the petition as abandoned at that time. *Id.* at § 103.2(b)(13) (stating that "the benefit request may be summarily denied as abandoned, denied based on the record, or denied for both reasons" if the petitioner fails to respond to a NOID). Because the director's decision was based on the record, the petitioner retained the right to appeal. *Cf.* 8 C.F.R. § 103.2(15) (denial due to abandonment may not be appealed).