



U.S. Citizenship
and Immigration
Services

(b)(6)



DATE: **JUN 30 2015**

FILE #: [REDACTED]

PETITION RECEIPT #: [REDACTED]

IN RE: Petitioner: [REDACTED]
Beneficiary: [REDACTED]

PETITION: Immigrant Petition for Alien Worker as an Other, Unskilled Worker Pursuant to § 203(b)(3) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)(3)

ON BEHALF OF PETITIONER:

NO REPRESENTATIVE OF RECORD

Enclosed is the non-precedent decision of the Administrative Appeals Office (AAO) for your case.

If you believe we incorrectly decided your case, you may file a motion requesting us to reconsider our decision and/or reopen the proceeding. The requirements for motions are located at 8 C.F.R. § 103.5. Motions must be filed on a Notice of Appeal or Motion (Form I-290B) **within 33 days of the date of this decision**. The Form I-290B web page (www.uscis.gov/i-290b) contains the latest information on fee, filing location, and other requirements. **Please do not mail any motions directly to the AAO.**

Thank you,


Ron Rosenberg
Chief, Administrative Appeals Office

DISCUSSION: The Director, Texas Service Center, denied the immigrant visa petition on May 24, 2011 for failing to respond to the director's Request for Evidence (RFE). The petitioner filed a motion to reopen and reconsider, and on December 12, 2011, the director denied the motion. The petitioner appealed the matter to the Administrative Appeals Office (AAO). The appeal will be summarily dismissed as abandoned pursuant to 8 C.F.R. § 103.2(b)(13)(i) with a separate finding of misrepresentation by the petitioner and an invalidation of the ETA Form 9089, Application for Permanent Employment Certification (labor certification) (ETA Case Number: [REDACTED]).

The petitioner describes itself as a Nail and Massage Salon. It seeks to permanently employ the beneficiary in the United States as a Massage and Nail Worker. Section 203(b)(3)(A)(iii) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(3)(A)(iii), provides for the granting of preference classification to other qualified immigrants who are capable, at the time of petitioning for classification under this paragraph, of performing unskilled labor, not of a temporary or seasonal nature, for which qualified workers are not available in the United States. The petition is accompanied by a labor certification approved by the U.S. Department of Labor.

We conduct 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.¹

Abandonment of the Appeal

The director denied the petition for abandonment because the petitioner had not responded to his RFE. On June 14, 2011, the petitioner filed a motion to reopen and reconsider that decision and asserted that neither the petitioner nor his attorney received notice of the RFE. On December 12, 2011, the director denied the motion to reopen and reconsider, concluding that the filing did not meet the requirements for a motion and the record did not demonstrate that the RFE was returned as undeliverable.

On November 29, 2012, we sent a letter to the U.S. Department of Labor (DOL), Employment and Training Administration, seeking clarification regarding the fact that the beneficiary is registered as the petitioner's "Chairman or Chief Executive Officer" with the NYS Department of State Division of Corporations, which was not disclosed on Part C.9 of the labor certification. We notified the petitioner that the matter would be held in abeyance until this issue was resolved with the DOL. After the matter had been considered by the DOL, on May 22, 2015 we issued the petitioner a Notice of Intent to Dismiss and Notice of Derogatory Information (NOID/NDI). In the NOID/NDI, we identified the following discrepancies and/or issues:

¹ The submission of additional evidence on appeal is allowed by the instructions to the Form I-290B, which are incorporated into the regulations by 8 C.F.R. § 103.2(a)(1). The record in the instant case provides no reason to preclude consideration of any of the documents newly submitted on appeal. See *Matter of Soriano*, 19 I&N Dec. 764 (BIA 1988).

- That the record did not contain a copy of the beneficiary's licenses or other documentation to practice "nail specialty" and massage therapy from the priority date onward.
- That the petitioner had not established its ability to pay the beneficiary's proffered wage.
- That the petitioner had not disclosed in Part C.9 of the labor certification that the beneficiary was an officer in its organization and it is unclear whether the beneficiary is related to the petitioner's owner or officer.
- That the petitioner had not established that the instant position constituted a *bona fide* job offer that was open to U.S. workers.
- That the record contained conflicting information regarding the worksite of the position offered.

The NOID allowed the petitioner 30 days in which to submit a response. We informed the petitioner that failure to respond to the NOID would result in a dismissal of the appeal.

As of the date of this decision, the petitioner has not responded to our NOID/NDI. The failure to submit requested evidence that precludes a material line of inquiry shall be grounds for denying the petition. *See* 8 C.F.R. § 103.2(b)(14). Since the petitioner did not respond to the NOID, the appeal will be summarily dismissed as abandoned pursuant to 8 C.F.R. § 103.2(b)(13)(i).

Willful Misrepresentation of a Material Fact

In addition, we conclude that the instant petition involves a willful misrepresentation of a material fact rendering the instant labor certification invalidated. 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." *Matter of S- and B-C-*, 9 I&N Dec. 436, 447 (BIA 1961). In this case, public records from the NYS Department of State Division of Corporations indicate that the beneficiary was the petitioner's "Chairman or Chief Executive Officer" as of February 12, 2008, prior to the instant priority date of January 21, 2009. The petitioner did not disclose this information as required in Part C.9 of the labor certification which shut off a line of inquiry to determine whether the position offered constituted a *bona fide* job offer.

The ETA Form 9089 specifically asks in Section C.9: "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 petitioner checked "no" to this question. In determining whether the job is subject to the alien's influence and control, the adjudicator will look to the totality of the circumstances. *See Modular Container Systems, Inc.*, 1989-INA-228 (BALCA Jul. 16, 1991) (*en banc*). The same standard has been incorporated into the PERM regulations. *See* 69 Fed. Reg. 77326, 77356 (ETA) (Dec. 27, 2004). The PERM regulation specifically addresses this issue at 20 C.F.R. § 656.17(l) and states in pertinent part:

(1) 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. In this case, the petitioner's response in Part C.9 misrepresented that the beneficiary was not employed in an executive position within its business despite the fact that he did hold such a position. The fact that the petitioner's business was formed in February 12, 2008 and that the instant case has a priority date of January 21, 2009 tends to indicate that the petitioner's business was likely incorporated for the purpose of petitioning for the beneficiary. In the totality of the circumstances, we find that the petitioner's response in Part C.9 of the labor certification constitutes a willful misrepresentation of a material fact.

The regulation at 20 C.F.R. § 656.30(d), states the following regarding labor certification applications involving fraud or willful misrepresentation:

(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.

Therefore, we hereby invalidate the instant labor certification, ETA Case Number [REDACTED] with a finding of willful misrepresentation against the petitioner.

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 appeal is dismissed.

FURTHER ORDER: The labor certification application, ETA Case Number [REDACTED], is invalidated pursuant to 20 C.F.R. § 656.30(d).