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[REDACTED]

FILE: [REDACTED] Office: VERMONT SERVICE CENTER Date: **JAN 28 2008**  
EAC 05 129 51697

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

PETITION: Immigrant Petition for Alien Worker as a Member of the Professions Holding an Advanced Degree or an Alien of Exceptional Ability Pursuant to Section 203(b)(2) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)(2)

ON BEHALF OF PETITIONER:  
[REDACTED]

**INSTRUCTIONS:**

This is the decision of the Administrative Appeals Office in your case. All documents have been returned to the office that originally decided your case. Any further inquiry must be made to that office.

*Robert P. Wiemann*  
Robert P. Wiemann, Chief  
Administrative Appeals Office

**DISCUSSION:** The Director, Vermont Service Center, denied the employment-based immigrant visa petition and reaffirmed that decision on motion. The matter is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed and the labor certification invalidated. We also make a finding of fraud.

The petitioner is an international trade company. According to the application for Alien Employment Certification, Form ETA 750A<sup>1</sup> and the instant petition, the petitioner seeks to employ the beneficiary permanently in the United States as an “import/export manager” pursuant to section 203(b)(2) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(2). In pertinent part, section 203(b)(2) of the Act provides immigrant classification to members of the professions holding advanced degrees or their equivalent and whose services are sought by an employer in the United States. As required by statute, the petition was accompanied by certification from the Department of Labor. The director ultimately determined that the petitioner had not established that it had the continuing ability to pay the beneficiary the proffered wage beginning on the priority date of the visa petition and denied the petition accordingly.

On appeal, counsel submitted a brief and additional evidence, most of which was already submitted. For the reasons discussed below, we uphold the director’s basis of denial. Specifically, we concur with the director that the petitioner cannot rely on the assets of its alleged parent company without evidence of the company’s legal obligation to pay the proffered wage. In addition, on October 25, 2006, this office advised the petitioner of our intent to dismiss the appeal, invalidate the labor certification and enter a finding of fraud. The petitioner’s November 21, 2006 response has been incorporated into the record. In addition, the petitioner’s subsequent submission, dated March 23, 2007, has also been incorporated into the record. For the reasons discussed below, while the petitioner has adequately addressed our concerns regarding the beneficiary’s employment prior to May 2001 and the petitioner’s various addresses, the petitioner has not overcome our conclusions that the petitioner misrepresented the beneficiary’s position with the petitioner on the Form ETA 750A, which the beneficiary signed, and that the individual who signed the petition was not an authorized representative of the petitioner as defined within the definition of “employer” at 20 C.F.R. § 656.3.

### **Ability to Pay**

The regulation at 8 C.F.R. § 204.5(g)(2) states, in pertinent part:

*Ability of prospective employer to pay wage.* Any petition filed by or for an employment-based immigrant which requires an offer of employment must be accompanied by evidence that the prospective United States employer has the ability to pay the proffered wage. The petitioner must demonstrate this ability at the time the priority date is established and continuing until the beneficiary obtains lawful

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<sup>1</sup> After March 28, 2005, the correct form to apply for labor certification is the Form ETA 9089. 69 Fed. Reg. 77386 (Dec. 27, 2004). All references in this decision to Department of Labor regulations are to those regulations in effect as of the priority date in this matter, February 27, 2002.

permanent residence. Evidence of this ability shall be in the form of copies of annual reports, federal tax returns, or audited financial statements.

The petitioner must demonstrate the continuing ability to pay the proffered wage beginning on the priority date, the day the Form ETA 750 was accepted for processing by any office within the employment system of the Department of Labor. *See* 8 C.F.R. § 204.5(d). Here, the Form ETA 750 was accepted for processing on February 27, 2002. The proffered wage as stated on the Form ETA 750 is \$103,000 annually. On the Form ETA 750B, signed by the beneficiary, the beneficiary claimed to have worked for the petitioner as of May 2001.

On the petition, the petitioner claimed to have an establishment date in February 1997, a gross annual income of \$1,400,000, a "private" net annual income and two employees. In support of the petition, the petitioner submitted bank statements with balances ranging from \$4,865 to \$115,965 in 2004, \$5,307 to \$36,811.66 in 2003 and \$3,127.66 to \$29,541.78 in 2002, unaudited financial statements and tax returns for 2002 and 2003, the beneficiary's 2004 Form W-2 reflecting \$40,000 in wages and the financial statements for [REDACTED] in China.

On May 26, 2005, the director advised the petitioner that the evidence submitted did not demonstrate the petitioner's ability to pay the proffered wage through its net income, net current assets or wages paid to the beneficiary. The director requested additional evidence relating to this issue.

In response, the petitioner submitted a letter from [REDACTED], Director of the Finance Department at [REDACTED] asserting the following:

This is to certify that [REDACTED] Industrial [REDACTED] is the sole owner of [the petitioner]. As the parent company of [the petitioner], we are able and willing to provided financial support to [the petitioner] in its business operations, including payment o the prevailing wage of \$103,000.00 per year to [the beneficiary] as the Import/Export Manager, once the immigrant petition is approved.

The petitioner also submitted the beneficiary's Forms W-2 for 2002 and 2003 reflecting wages of \$40,000 each year and the petitioner's 2004 tax return.

The tax returns reflect the following information for the following years:

	2002	2003	2004
Net income	\$536	\$4,516	\$10,840
Current Assets	\$2,806	\$19,957	\$189,868
Current Liabilities	\$1,461	\$11,470	\$83,940
Net current assets	\$1,345	\$8,487	\$105,928

The director determined that the evidence submitted did not establish that the petitioner had the continuing ability to pay the proffered wage beginning on the priority date, and, on October 7, 2005, denied the petition. Specifically, the director determined that the record lacked evidence of [REDACTED] ability to pay the proffered wage in 2002.

In the first appeal,<sup>2</sup> counsel asserted that the petitioner provided financial statements for [REDACTED] for 2001 through 2004. On February 10, 2006, the director reopened the matter and issued a new denial. The regulation at 8 C.F.R. § 103.3(a)(2)(iii) allows the director to treat an appeal as a motion only in order to make a favorable decision. Moreover, the director did not comply with the regulation at 8 C.F.R. § 103.5(a)(5)(ii) which requires the director to serve notice of his own motion to reopen and allow 30 days in which to respond if the final decision may be unfavorable. Nevertheless, the most appropriate remedy for this procedural failure would be to consider all of the evidence on appeal, which we will do below.

In the new denial, the director concluded that the petitioner could not rely on the assets of another entity, as a corporation is a separate legal entity from its shareholders. On appeal, counsel asserts that the cases cited by the director are factually dissimilar from this matter and relies on *Full Gospel Portland Church v. Thornburgh*, 730 F. Supp. 441 (D.D.C. 1988).

Where the petitioner has submitted the requisite initial documentation required in the regulation at 8 C.F.R. § 204.5(g)(2), Citizenship and Immigration Services (CIS) will first examine whether the petitioner employed and paid the beneficiary during the relevant period. If the petitioner establishes by documentary evidence that it employed the beneficiary at a salary equal to or greater than the proffered wage, the evidence will be considered *prima facie* proof of the petitioner's ability to pay the proffered wage. In the instant case, the petitioner did not establish that it employed and paid the beneficiary the full proffered wage in 2002, 2003 or 2004.

If the petitioner does not establish that it employed and paid the beneficiary an amount at least equal to the proffered wage during that period, CIS will next examine the net income figure reflected on the petitioner's federal income tax return, without consideration of depreciation or other expenses. Reliance on federal income tax returns as a basis for determining a petitioner's ability to pay the proffered wage is well established by judicial precedent. *Elatos Restaurant Corp. v. Sava*, 632 F. Supp. 1049, 1054 (S.D.N.Y. 1986) (citing *Tongatapu Woodcraft Hawaii, Ltd. v. Feldman*, 736 F.2d 1305 (9th Cir. 1984)); see also *Chi-Feng Chang v. Thornburgh*, 719 F. Supp. 532 (N.D. Texas 1989); *K.C.P. Food Co., Inc. v. Sava*, 623 F. Supp. 1080 (S.D.N.Y. 1985); *Ubeda v. Palmer*, 539 F. Supp. 647 (N.D. Ill. 1982), *aff'd*, 703 F.2d 571 (7th Cir. 1983). Showing that the petitioner's gross receipts exceeded the proffered wage is insufficient. Similarly, showing that the petitioner paid wages in excess of the proffered wage is insufficient. In *K.C.P. Food Co., Inc. v. Sava*, 623 F. Supp. at 1084, the court held that the Immigration and Naturalization Service, now CIS, had properly relied on the petitioner's net income figure, as stated on the petitioner's corporate income tax returns,

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<sup>2</sup> The initial Form I-290B Notice of Appeal was filed as a "motion to reconsider, motion to reopen, or notice of appeal."

rather than the petitioner's gross income. The court specifically rejected the argument that the Service should have considered income before expenses were paid rather than net income.

Nevertheless, the petitioner's net income is not the only statistic that can be used to demonstrate a petitioner's ability to pay a proffered wage. If the net income the petitioner demonstrates it had available during that period, if any, added to the wages paid to the beneficiary during the period, if any, do not equal the amount of the proffered wage or more, CIS will review the petitioner's assets. We reject, however, any argument that the petitioner's total assets should have been considered in the determination of the ability to pay the proffered wage. The petitioner's total assets include depreciable assets that the petitioner uses in its business. Those depreciable assets will not be converted to cash during the ordinary course of business and will not, therefore, become funds available to pay the proffered wage. Further, the petitioner's total assets must be balanced by the petitioner's liabilities. Otherwise, they cannot properly be considered in the determination of the petitioner's ability to pay the proffered wage. Rather, CIS will consider *net current assets* as an alternative method of demonstrating the ability to pay the proffered wage.

Net current assets are the difference between the petitioner's current assets and current liabilities.<sup>3</sup> A corporation's year-end current assets are shown on Schedule L, lines 1(d) through 6(d). Its year-end current liabilities are shown on lines 16(d) through 18(d). If a corporation's end-of-year net current assets are equal to or greater than the proffered wage, the petitioner is expected to be able to pay the proffered wage out of those net current assets.

The petitioner paid the beneficiary \$40,000, or \$63,000 less than the proffered wage, in 2002, 2003 and 2004. In 2004, the petitioner shows net current assets of \$105,928, sufficient to cover the difference between the proffered wage and wages paid in 2004. In 2002 and 2003, however, the petitioner shows net income and net current assets well below the difference between the wage paid and the proffered wage. Thus, the petitioner cannot rely on its net income or net current assets to demonstrate its ability to pay the proffered wage in 2002 or 2003.

The unaudited financial statements that counsel submitted with the petition are not persuasive evidence. According to the plain language of 8 C.F.R. § 204.5(g)(2), where the petitioner relies on financial statements as evidence of a petitioner's financial condition and ability to pay the proffered wage, those statements must be audited. Unaudited statements are the unsupported representations of management. The unsupported representations of management are not persuasive evidence of a petitioner's ability to pay the proffered wage.

Any reliance on the balances in the petitioner's bank account is misplaced. First, bank statements are not among the three types of evidence, enumerated in 8 C.F.R. § 204.5(g)(2), required to illustrate a petitioner's ability to pay a proffered wage. While this regulation allows additional material "in

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<sup>3</sup> According to *Barron's Dictionary of Accounting Terms* 117 (3<sup>rd</sup> ed. 2000), "current assets" consist of items having (in most cases) a life of one year or less, such as cash, marketable securities, inventory and prepaid expenses. "Current liabilities" are obligations payable (in most cases) within one year, such accounts payable, short-term notes payable, and accrued expenses (such as taxes and salaries). *Id.* at 118.

appropriate cases,” the petitioner in this case has not demonstrated why the documentation specified at 8 C.F.R. § 204.5(g)(2) is inapplicable or otherwise paints an inaccurate financial picture of the petitioner. Second, bank statements show the amount in an account on a given date, and cannot show the sustainable ability to pay a proffered wage. Third, no evidence was submitted to demonstrate that the funds reported on the petitioner’s bank statements somehow reflect additional available funds that were not reflected on its tax return, such as the cash specified on Schedule L that was considered above in determining the petitioner’s net current assets.

The petitioner’s reliance on the assets of SLIPBT is not persuasive. As stated by the director, a corporation is a separate and distinct legal entity from its owners or stockholders. *See Matter of Tessel*, 17 I&N Dec. 631 (Act. Assoc. Comm. 1980); *Matter of Aphrodite Investments Limited*, 17 I&N Dec. 530 (Comm. 1980); *Matter of M-*, 8 I&N Dec. 24 (BIA 1958; A.G. 1958). CIS will not consider the financial resources of individuals or entities who have no legal obligation to pay the wage.

The decision cited by counsel, *Full Gospel Portland Church*, 730 F. Supp. at 441, is not binding here. Although the AAO may consider the reasoning of the decision, the AAO is not bound to follow the published decision of a United States district court in cases arising within the same district. *See Matter of K-S-*, 20 I&N Dec. 715 (BIA 1993). Further, the decision in *Full Gospel* is distinguishable from the instant case. The court in *Full Gospel* ruled that CIS should consider the pledges of parishioners in determining a church’s ability to pay the proffered wage. Here, counsel is asserting that CIS should consider the assets of the petitioner’s alleged foreign parent company based on a “pledge.”

More directly on point is the decision in *Sitar Restaurant v. Ashcroft*, 2003 WL 22203713 \*2, (D. Mass. Sept. 18, 2003). The court noted that the petitioner in that case had not rebutted the contention that nothing in the governing regulation, 8 C.F.R. § 204.5, permits legacy Immigration and Naturalization Service (INS, now CIS) to consider the financial resources of individuals or entities who have no legal obligation to pay the wage. The court continued:

**Absent a legal obligation by [REDACTED], the INS had no need to determine whether his income was sufficient to pay [REDACTED]’s salary. Interestingly enough, Petitioner makes no real attempt to address an agency decision directly on point, *In re: Petitioner*, 1998 WL 34030184 (INS Dec. 22, 1998), which holds that assets of “stockholders or of other[s] ... cannot be considered in determining the petitioning corporation’s ability to pay the proffered wage.” Petitioner also fails to affirmatively offer any case law in support of its position or provide any authority that requires the INS to credit a director’s affidavit promising to pay the proffered wage. Instead, Petitioner merely attempts to distinguish certain cases cited by the INS.**

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At bottom, Petitioner has not submitted evidence of its own ability to pay the proffered wage. Accordingly, the court cannot say that INS’s decision to restrict itself to an examination of assets under Petitioner’s legal control was “arbitrary, capricious,

an abuse of discretion, or otherwise not in accordance with law.”

*Sitar Restaurant v. Ashcroft*, 2003 WL 22203713, \*3, \*4 (D. Mass. Sept. 18, 2003).

Thus, at issue is whether SLIPBT has a legal obligation to pay the proffered wage. The petitioner relies on what counsel characterizes as a “pledge” by the foreign company. The “pledge” is actually a letter attesting to the company’s ability and willingness to provide financial support, including paying the proffered wage. The petitioner has not established that this letter legally binds SLIPBT.

In a different context, legacy INS noted the difficulty in relying on the assets of foreign companies. Specifically, where an alien entrepreneur seeks to demonstrate that a promissory note constitutes a qualifying investment, he must demonstrate that any foreign assets securing the note are fully amenable to seizure under the foreign nation’s laws. *Matter of Hsiung*, 22 I&N Dec. 201, 204 (Comm. 1998). If the letter from SLIPBT does not create any legal obligation under Chinese law, the letter is meaningless as evidence of the petitioner’s ability to pay the proffered wage.

Regardless, of more concern is the lack of evidence that SLIPBT is, in fact, the parent company as claimed. As stated in our October 25, 2006 notice, the petitioner’s tax returns are not consistent with a foreign parent company. Specifically, on Schedule K, line 7, the petitioner responded “no” to the question: “At any time during the tax year, did one foreign person own, directly or indirectly, at least 25% of (a) the total voting power of all classes of stock of the corporation entitled to vote or (b) the total value of all classes of stock of the corporation.” While the petitioner also responded “no” to the question on line 5 of Schedule K inquiring as to whether one individual, partnership, corporation, estate or trust own 50 percent or more of the corporation’s voting stock, the petitioner also indicated on Schedule E that the beneficiary owns 100 percent of the petitioner’s common stock.

In response, the petitioner submitted a letter from CPA [REDACTED], Managing Partner of the accounting firm that prepared the tax returns, stating:

When we prepared the Company’s corporation income tax return, Form 1120, we mistakenly indicated that the officer of the Company, [the beneficiary] owns 100% of corporation stock on Schedule E, Column (d).

This firm is in the process to file amended Form 1120 to Internal Revenue Service. We apologize for any inconvenience that this typo may have caused. Please update your records accordingly.

The petitioner also submitted “amended” tax returns for 2003 and 2004, signed on November 15, 2006, and the company’s 2005 tax returns. On March 23, 2007, the petitioner submitted an “amended” tax return for 2002, signed January 31, 2007. All of the “amended” tax returns list no officers on Schedule E and include Form 5472 reporting [REDACTED] as a foreign shareholder. H- Y-<sup>4</sup> signed the returns as “acting president.” None of these documents are stamped as filed with the

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<sup>4</sup> The identity of this individual is protected under the Privacy Act, 5 U.S.C. § 522a (1974).

Internal Revenue Service (IRS). Moreover, they are not filed on Form 1120X, Amended U.S. Corporation Income Tax Return. Rather, they are newly completed Form 1120 tax returns with the phrase "Amended Return" handwritten on the top. The instructions for Form 1120X, a publicly available form, state that it must be filed "within 3 years after the date the corporation filed its original return or within 2 years after the date the corporation paid the tax (if filing a claim for a refund), whichever is later." Like a delayed birth certificate, the amended tax returns several years after the claimed transaction raise serious questions regarding the truth of the facts asserted. *Cf. Matter of Bueno*, 21 I&N Dec. 1029, 1033 (BIA 1997); *Matter of Ma*, 20 I&N Dec. 394 (BIA 1991)(discussing the evidentiary weight accorded to delayed birth certificates in immigrant visa proceedings).

It is incumbent upon the petitioner to resolve any inconsistencies in the record by independent objective evidence. Any attempt to explain or reconcile such inconsistencies will not suffice unless the petitioner submits competent objective evidence pointing to where the truth lies. *Matter of Ho*, 19 I&N Dec. 582, 591-92 (BIA 1988). Explicitly listing the beneficiary as an officer and the sole shareholder on multiple tax returns if, in fact, she was not, can not be credibly characterized as a "typo." It remains that the petitioner has provided two very different sets of facts to two different government agencies, the IRS and CIS. Amended tax returns that have not even been filed with the IRS is not the type of competent objective evidence that could reconcile these two contradictory sets of facts.

In light of the above, the petitioner has not demonstrated that any other funds were available to pay the proffered wage beyond its net income and net current assets. The petitioner has not, therefore, shown the ability to pay the proffered wage during 2002 and 2003. Therefore, the petitioner has not established that it had the continuing ability to pay the proffered wage beginning on the priority date.

#### **Disclosures on ETA-750A**

Beyond the decision of the director, the record contains evidence suggesting the petitioner did not provide complete and accurate information before CIS and the Department of Labor. The AAO maintains plenary power to review each appeal on a *de novo* basis. 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). The AAO's *de novo* authority has been long recognized by the federal courts. *See, e.g. Dor v. INS*, 891 F.2d 997, 1002 n. 9 (2d Cir. 1989). *See also Spencer Enterprises, Inc. v. United States*, 229 F. Supp. 2d 1025, 1043 (E.D. Cal. 2001), *aff'd*. 345 F.3d 683 (9th Cir. 2003); *see also Dor v. INS*, 891 F.2d 997, 1002 n. 9 (2d Cir. 1989)(noting that the AAO reviews appeals on a *de novo* basis).

On October 25, 2006, this office advised the petitioner of our intent to invalidate the alien employment certification based on the following information.

On the Form ETA-750A, the petitioner indicated that the beneficiary would work as an import/export manager and would report to the general manager. According to *Matter of Silver Dragon Chinese Restaurant*, 19 I&N Dec. 401, the title of the alien's supervisor in cases where the beneficiary has an interest in the petitioning company is a material fact for consideration by the Department of Labor. Specifically, the beneficiary's ownership in the company may suggest that the job offer was never bona fide.

We note that the instant petition is an employment-based visa petition filed by an allegedly existing employer.<sup>5</sup> The regulation at 20 C.F.R. § 656.3 provides the definition of employment as "permanent full-time work by an employee for an employer *other than oneself*. For purposes of this definition *an investor is not an employee.*" (Emphasis added.)

As discussed above, all of the petitioner's tax returns, schedule E, reflect that the beneficiary is the sole officer of the petitioner and owns 100 percent of all common stock. The petitioner has the burden, when asked, to show that a valid employment relationship exists, that a bona fide job opportunity is available to U.S. workers. *Matter of Amger Corp.*, 87-INA-545 (BALCA 1987). "Employment" is defined at 20 C.F.R. § 656.3 and the regulation at 20 C.F.R. § 656.20(c)(8) requires that the employer demonstrate that the job opportunity has been and is clearly open to any qualified U.S. worker. 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). Where the petitioner is owned by the person applying for the position, it is not a bona fide offer. See *Bulk Farms, Inc. v. Martin*, 963 F.2d 1286 (9<sup>th</sup> Cir. 1992) (denied labor certification application for president, sole shareholder and chief cheese maker even where no person qualified for position applied).

In *Hall v. McLaughlin*, 864 F.2d 868 (D.C. Cir. 1989), the court affirmed the district court's dismissal of the alien's appeal from the Secretary of Labor's denial of his labor certification application. The court found that where the alien was the founder and corporate president of the petitioning corporation, absent a genuine employment relationship, the alien's ownership in the corporation was the functional equivalent of self-employment.

As stated in our October 25, 2006 notice, the beneficiary indicated on the Form ETA-750B, signed under penalty of perjury, that she worked for [REDACTED] as a "Vice Manager" from March 1995 through June 2001 and the petitioner as an import/export manager after that date. The petitioner, however, obtained a nonimmigrant visa in behalf of the beneficiary in 1997, classifying her as an intracompany transferee. In 2000, the beneficiary obtained status as an H-1B nonimmigrant. In listing the petitioner's experience for the H-1B nonimmigrant petitions filed in her behalf, receipt numbers EAC-03-257-51565 and EAC-00-283-53968, the petitioner indicated that she was the president from September 1997 through June 2000, after which time she returned to her position with [REDACTED]. Significantly, the petitioner also petitioned for nonimmigrant status for the individual

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<sup>5</sup> A separate visa category set forth in section 203(b)(5) of the Act exists for investors and requires an investment of \$500,000 at a minimum and the creation of 10 jobs. This petition does not seek benefits under that provision.

who signed the ETA-750A and the petition before us, H- Y-. The beneficiary signed the December 1997 petition, receipt number EAC-98-058-52860, as the petitioner's president.

In response to our notice, counsel explains that while the beneficiary did enter the United States pursuant to a nonimmigrant visa as an intracompany transferee, the business did not do as well as expected and the beneficiary did not remain in the United States very long. Her subsequent brief entries were pursuant to a B-1 nonimmigrant visa. The petitioner submitted the beneficiary's passport corroborating counsel's claims. While the petitioner has now established that she did not spend much time in the United States prior to May 2001, it remains that the petitioner indicated on the H-1B visa petitions that the beneficiary had served as the petitioner's president and that the beneficiary signed the nonimmigrant visa petition in behalf of H- Y- as the petitioner's president. Curiously, it now appears that the beneficiary was not in the United States when the petition in behalf of H- Y- was filed, signed by the beneficiary as the petitioner's president. Moreover, the beneficiary's tenure as president was not disclosed to the Department of Labor and diminishes the credibility of the claim that the petitioner now seeks to hire the beneficiary only as an import/export manager reporting to H- Y- as claimed on the Form ETA 750A.

More significantly, the AAO also raised the concern that H- Y-, on her Form N-400 Naturalization Application, listed employment only with other entities since January 2000. Thus, the AAO questioned whether H- Y-, who signed the instant petition, was even authorized to file the Form ETA-750A or, for that matter, the instant petition. In response, counsel notes that H- Y- has signed various documents on behalf of the petitioner as "Acting" President and stipulates that H- Y- "was not an employee of the Petitioner then and she was only entrusted with the authority by the management of SLIPBT."

The regulation at 20 C.F.R. § 656.21(a) provides:

Except as otherwise provided by §§ 656.21a and 656.22, *an employer* who desires to apply for a labor certification on behalf of an alien *shall file, signed by hand* and in duplicate, a Department of Labor Application for Alien Employment Certification form and any attachments required by this part with the local Employment Service office serving the area where the alien proposes to be employed.

(Emphasis added.) The regulation at 20 C.F.R. § 656.3 provides:

"Employer" means a person, association, firm, or a corporation which currently has a location within the United States to which U.S. workers may be referred for employment, and which proposes to employ a full-time worker at a place within the United States or the authorized representative of such a person, association, firm, or corporation. For purposes of this definition an "authorized representative" means an *employee* of the employer whose position or legal status authorizes the employee to act for the employer in labor certification matters.

(Emphasis added.) Counsel has stipulated that H- Y-, the individual who signed the petition, is *not* an employee of the petitioner. Rather, counsel implies she was an agent of the petitioner. The regulation at 20 C.F.R. § 656.20(b)(1) provides:

Aliens and employers may have agents represent them throughout the labor certification process. If an alien and/or an employer intends to be represented by an agent, the alien and/or *the employer shall sign the statement set forth on the Application for Alien Employment Certification form: That the agent is representing the alien and/or employer and that the alien and/or employer takes full responsibility for the accuracy of any representations made by the agent.*

(Emphasis added.) H- Y- signed the ETA Form 750A as the manager of the employer, not on the line reserved for agent, which was signed by counsel. The “authorization of agent of employer” line is unsigned.

The Form ETA-750A was not signed by an “authorized representative” of the petitioner as defined in Department of Labor regulations. Both H- Y- and the beneficiary have misrepresented their positions with the petitioner to the Department of Labor. The regulation at 20 C.F.R. § 656.30(d) provides:

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.

In *Matter of Silver Dragon Chinese Restaurant*, 19 I&N Dec. at 405, the Commissioner invalidated an alien employment certification at the appellate stage. Thus, the precedent exists for such action. The misrepresentation discussed above cannot be dismissed by the petitioner or prudently regarded by us as an innocent, non-willful omission of material facts that would not subject the labor certification before us to invalidation. Rather, the petitioner’s statement that the beneficiary would be supervised by its general manager, when the beneficiary, at the time the statement was made, was in fact the only officer and possibly the only employee<sup>6</sup> of the petitioning corporation can only be held to be a misrepresentation calculated to secure a benefit for which the petitioner was not eligible, and thus a misrepresentation which properly subjects the alien employment certification to invalidation under the regulation at 20 C.F.R. § 656.30(d). Moreover, as stipulated by counsel, H-

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<sup>6</sup> As stated above, the petitioner indicated it had two employees on Part 5 of the petition. The petitioner appears to be including H- Y-, as she signed the petition as the petitioner’s manager. As counsel now stipulates that H- Y- was *not* an employee of the petitioning company, it appears the beneficiary may be the petitioner’s only employee who, therefore, cannot report to anyone.

Y- was not an employee of the petitioning company when she signed the Form ETA-750A and, thus, could not be an authorized representative. She did not sign the ETA 750B as an agent; thus she misrepresented her own relationship to the petitioner. This additional misrepresentation also subjects the alien employment certification to invalidation under the regulation at 20 C.F.R. § 656.30(d).

Section 212(a)(6)(C) of the Act provides:

*Misrepresentation.* – (i) In general. – Any alien who, by fraud or willfully misrepresenting a material fact, seeks to procure (or has sought to procure or has procured) a visa, other documentation, or admission into the United States or other benefit provided under this Act is inadmissible.

By signing the Form ETA-750B listing her position as an import/export manager, the beneficiary has willfully misrepresented a material fact. Moreover, as an officer of the petitioning company, the beneficiary bears the responsibility for the documentation submitted in support of the petition. Because the petitioner has failed to provide independent and objective evidence to overcome, fully and persuasively, our finding that the information provided by the petitioner and the beneficiary was false, we affirm our finding of fraud. This finding of fraud shall be considered in any future proceeding where admissibility is an issue.

For the above stated reasons, considered both in sum and as separate grounds for denial, the petition may not be approved. 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 with a finding of fraud and willful misrepresentation of a material fact.

**FURTHER ORDER:** The AAO finds that the beneficiary knowingly misrepresented her past employment and, as an officer of the petitioning employer, submitted documents containing false statements in an effort to mislead the Department of Labor, CIS and the AAO on elements material to her eligibility for a benefit sought under the immigration laws of the United States.