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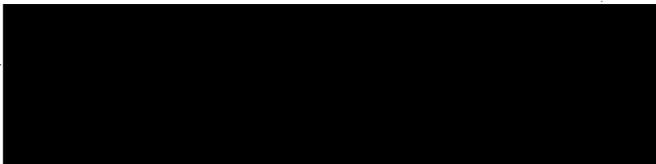
U.S. Department of Homeland Security
20 Mass. Ave., N.W., Rm. 3000
Washington, DC 20529



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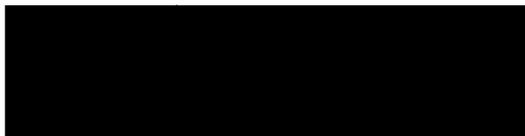


FILE: WAC 02 289 54483 Office: CALIFORNIA SERVICE CENTER Date: DEC 26 2006

IN RE: Petitioner: [Redacted]
Beneficiary: [Redacted]

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:

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, Chief
Administrative Appeals Office

DISCUSSION: The director denied the employment-based preference visa petition, and the AAO subsequently issued a summary dismissal because the petitioner had not submitted additional documentation on appeal that specifically identified any erroneous conclusion of law or statement of fact. Counsel for the petitioner subsequently established that a brief with accompanying documentation had been timely submitted for transmittal to the Administrative Appeals Office (AAO). The director sua sponte reopened the matter and transferred the appeal materials to the AAO. The appeal will be dismissed.

The petitioner is a dog training and boarding business. It seeks to employ the beneficiary permanently in the United States as an instructor/trainer and animal behaviorist. 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 denied the petition because the petitioner failed to provide sufficient evidence that the beneficiary possessed the requisite two years of work experience, and was qualified for the proffered position. The director concluded that the petitioner had not established that the beneficiary was eligible for the visa classification sought.

On appeal, the petitioner's counsel contends that the documentation submitted to the record establishes that the beneficiary has been trained in and worked in the dog training field for more than twenty-three years. Counsel resubmits letters of work verification previously submitted to the record.

Section 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.

With regard to evidentiary guidance for skilled workers, the regulation at 8 C.F.R. § 204.5(l)(3)(ii)(B) provides:

If the petitioner is for a skilled worker, the petition must be accompanied by evidence that the alien meets the educational, training or experience, and any other requirements of the individual labor certification The minimum requirements for this classification are at least the two years of training or experience.

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To be eligible for approval, a beneficiary must also have the education and experience specified on the labor certification as of the petition's filing date. See *Matter of Wing's Tea House*, 16 I&N Dec. 158 (Act. Reg. Comm. 1977). The filing date of the petition is the initial receipt in the Department of Labor's employment service system. 8 C.F.R. § 204.5(d). In this case, that date is January 13, 1998. The annual wage as indicated on the ETA 750 was an hourly wage of \$14, which amounts to a yearly wage of \$29,120.

To determine whether a beneficiary is eligible for an employment based immigrant visa as set forth above, Citizenship and Immigration Services (CIS) must examine whether the alien's credentials meet the requirements set forth in the labor certification. CIS may not ignore a term of the labor certification, nor may it impose additional requirements. *See Matter of Silver Dragon Chinese Restaurant*, 19 I&N Dec. 401, 406 (Comm. 1986). *See also, Mandany v. Smith*, 696 F.2d 1008, (D.C. Cir. 1983); *K.R.K. Irvine, Inc. v. Landon*, 699 F.2d 1006 (9th Cir. 1983); *Stewart Infra-Red Commissary of Massachusetts, Inc. v. Coomey*, 661 F.2d 1 (1st Cir. 1981). The Application for Alien Employment Certification, Form ETA-750A, items 14 and 15, set forth the minimum education, training, and experience that an applicant must have for the position of animal trainer. In the instant case, item 14 describes the requirements of the proffered position as follows:

14.	Education	
	Grade School	6
	High School	6
	College	(blank)
	College Degree Required	(blank)
	Major Field of Study	(blank)

The petitioner also specified that any applicants have two years of work experience in the job offered. Under Item 15, the petitioner set forth no additional special requirements. The job offered lists the following duties on Item 13:

Train dogs (including puppies of all ages and vicious dogs) to obey commands, compete in shows, perform tricks, evaluate to determine temperament & ability; rehearse and conduct shows; observe to detect illness and refer to vet if needed. Instruct and train owners of dogs in handling them, especially vicious dogs. Demonstrate handling techniques with dogs on and off leash; conduct practice sessions, among other usual duties.

The beneficiary set forth his credentials on Form ETA-750B. On Part 11, eliciting information of the names and addresses of schools, college and universities attended (including trade or vocational training facilities), he indicated that he attended King David School, Johannesburg, South Africa for primary and secondary studies from 1968 to 1980 and graduated from these studies. He also indicated he studied secondary studies at Eden College, Johannesburg, South Africa, from 1980 to 1981, completing 12th grade. Finally the beneficiary indicated he had attended Wits Technikon, Johannesburg, South Africa, from 1984 to 1989, and had received a diploma in civil engineering. He provides no further information concerning his educational background on this form, which is signed by the beneficiary under a declaration under penalty of perjury that the information was true and correct.

On Part 15, eliciting information concerning the beneficiary's past employment experience, the beneficiary indicated that he worked in two positions for past employers as follows in reverse chronology:

1. The petitioner, All Breed Dog Training/K 9 City, Inc, Camino Capistrano, California, Instructor/Trainer and Animal Behaviorist, August 1997 to the date of filing the ETA 750;

2. Self-Employed, July 1990 to July 1997;¹
3. Police Dog Trainer, South African Police, Muldersdrif, South Africa, January 1986-December 1989.

The record also contains three letters from individuals in South Africa, as well numerous certificates for the beneficiary's participation in continuing education workshops which focused on various breeds of dogs. These workshops appear to be one-day workshops with multiple certificates given on the same day, many of them dated 1992 or 1993. One letter is written by Captain [REDACTED], dated April 17, 1996. Captain [REDACTED] stated that the beneficiary did a dog-training course while working in conjunction with the South African Police Dog Training Unit for a period of three years from 1986 to 1989. Captain [REDACTED] continued that the beneficiary was instrumental in training not only the dogs in scent tracking and protection work, but also in instructing and training dog handlers in the same areas. A letter from Mr. [REDACTED] Muller dated May 3, 1996 was apparently submitted with the I-140 and Form ETA 750. In his letter [REDACTED] on letterhead from the Meridian Rottweiler League, Sandton, South Africa stated the beneficiary started his training in basic canine obedience under Mr. [REDACTED] in 1979, and that the beneficiary had been a professional trainer for two years before he left South Africa for the United States. A third letter in the record is from Dr. [REDACTED] Northclif Veterinary Hospital, Roosevelt Park, South Africa. In his letter, Dr. [REDACTED] states that the beneficiary was one of his more regular clients before he left for the United States, and that Dr. [REDACTED] knew him on a professional and personal basis. Dr. [REDACTED] described the beneficiary's expertise in the field of training Rottweiler and Doberman pincher dogs. The record also contains an excerpt from the *Los Angeles Times*, Orange Country edition dated November 8, 1993, that states the beneficiary teaches three daily classes in dog training. Another excerpt from *The Orange County Business Reports* indicates that the beneficiary was owner of the petitioner, as All Breed Dog Training, in 1995.

Because the director deemed the evidence submitted insufficient to demonstrate the petitioner's continuing ability to pay the proffered wage beginning on the priority date or the beneficiary's qualifications, on January 27, 2003, the director requested additional evidence pertinent to these two concerns. The director specifically requested that the petitioner provide evidence that the beneficiary possessed the requisite two years of work experience in the proffered position. The director states that evidence should be submitted in letterform on the previous employer's letterhead showing the name and title of the person verifying the information; should state the beneficiary's title, duties, and dates of employment/experience and number of hours worked per week; submit IRS W-2 forms or pay stubs if employed in the United States; or if the work experience was outside the United States, that verifiable evidence should be submitted to establish that the beneficiary met the labor certification requirements. The director states that such evidence could include a work identification, pay stubs or tax returns.

With regard to the petitioner's ability to pay, the director requested the beneficiary's W-2 forms or pay stubs. Furthermore the director requested copies of the petitioner's state of California Employment Development Department (EDD) Form DE-6, Employer's Quarter Wage Reports for all employees for the last four quarters that were accepted by the state of California. The director indicated that the petitioner needed to submit evidence of its ability to pay the proffered wage as of the priority date to the present. The director stated that such evidence

¹ In an amendment to this handwritten insertion on the ETA 750, dated November 10, 1999, the beneficiary stated that from January 1990 to July 1997, he worked as a self-employed dog trainer at [REDACTED] Laguna Hills, California.

should be either in the form of copies of annual reports, signed federal tax return or audited financial statements. The director finally stated that the petitioner should provide all schedules and tables for federal income tax returns submitted from January 13, 1998 to the present.

In response, counsel resubmitted the letter from Captain [REDACTED], dated April 17, 1996, and the letter from the Meridian Rottweiler League, dated May 3, 1996. Counsel submitted an undated letter from the Metropolitan Security Services, with five locations in South Africa noted on the letterhead, with two unidentified signatures. The letter writers stated that the beneficiary was "our instructor in the art of dog obedience training" and that he also was in charge of instructing and training all dog trainers and dog handlers. A third letter is from a firm identified as "The Protector", South Hills, Johannesburg, South Africa. The unidentified letter writer states that he wishes to place on the record that the beneficiary was a lecturer and instructor for all the company's dog handler and trainers. A second letter from [REDACTED] Chairman, Meridian Rottweiler League, Sandton, South Africa was also submitted. This letter is dated November 30, 1993, and states that the beneficiary had been involved with the Rottweiler Club since 1982, when he joined to train his own dog.

Counsel also resubmitted copies of various certificates of training or workshops in dog training from [REDACTED]s in South Africa, and a series of workshop certificates for continuing education in various breeds of dogs. These certificates were dated from 1985 to 1993.

Counsel stated that the letter from the South African police would document the beneficiary's work experience even from the end of 1986 to the beginning of 1989, as two years and one month. Counsel stated that the second letter from the Meridian Rottweiler League indicated that the beneficiary was qualified to train dog trainers, just as a teacher would teach other teachers.

Counsel also submitted the petitioner's Forms 1120, U.S. Corporation Tax Return, for tax years 1998 to 2002. These documents indicated the petitioner's net income was \$41,681 in 1998, -\$890 in 1999, -\$1,650 in 2000, \$214 in 2001, and \$844 in 2002. Counsel also stated that all the beneficiary's payroll information and W-2 forms since he became an employee of the company were submitted to the record. The documents submitted by counsel included the beneficiary's W-2 forms for the tax years 2000, 2001, and 2002. These documents indicated the beneficiary earned \$57,000 in tax year 2000, \$75,000 in tax year 2001, and \$54,000 in tax year 2002. Counsel also submitted a DE-6 printout for the third quarter of 2001 that indicated quarterly wages for five employees, along with an Interpay Quarter Wage summary for the same period that indicated seven employees. Similar documentation for the first quarter of 2002 was submitted that indicated quarterly wages paid to the beneficiary and his wife of \$28,700. Final documentation of quarterly wage paid by the petitioner for the third quarter of 2002 indicated quarterly wages paid to five employees of \$25,642.88. The five employees include the beneficiary and his wife, paid \$18,000 and \$6,600 respectively and three other employees paid \$567, \$27, and \$448 respectively.

On May 28, 2003, the director denied the petition. In his decision, the director stated that the initial evidence submitted with the I-140 petition did not specifically prove that the beneficiary possessed the full two years of work experience stipulated in the Form ETA 750. The director stated that in response to the request for further evidence, the petitioner submitted the same letters and certificates previously submitted. The director stated that the additional letters from Security Services and The Protector, not dated, did not provide information to substantiate the beneficiary's work experience. Therefore the director determined that the petitioner failed to provide sufficient

evidence to establish that the beneficiary possessed the requisite two years of work experience, and denied the petition.

On appeal, counsel reiterates that the letter from the South African Police stated the beneficiary completed a dog-training course in conjunction with working with the South African Police Dog Training Unit for a period of three years. Counsel states that the beneficiary unable to obtain a more complete letter because the government of South Africa has changed and the beneficiary was unable to reach anyone who could help him obtain the requested identification and tax documents requested by the director. Counsel further states that the individual with whom the beneficiary worked in other clubs and societies are no longer in South Africa and the beneficiary is unable to locate them. Counsel states that it is clear from the documentation on the record that the beneficiary has been trained in and worked in the dog-training field, training dogs as well as dog trainers, for more than twenty-three years.

Upon review of the record, the petitioner has clearly established that the beneficiary has significant experience in the field of dog training. However, the Form ETA 750 clearly stipulates that the proffered position requires two years of work experience, rather than volunteer experience, prior to the priority date of January 13, 1998. To date, the petitioner has presented no evidentiary documentation as to any wages paid to the beneficiary as a dog trainer prior to the January 13, 1998 priority date. As correctly noted by the director, the petitioner has presented no evidentiary documentation as to any wages paid to the beneficiary by the South African Police, or the other non-government security services who provided letters of recommendation to the beneficiary. Therefore the director's decision shall stand.

Beyond the decision of the director, another reason remains for which the petition must be denied. An application or petition that fails to comply with the technical requirements of the law may be denied by the AAO even if the Service Center does not identify all of the grounds for denial in the initial decision. *See Spencer Enterprises, Inc. v. United States*, 299 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). The petitioner did not establish that it has the ability to pay the proffered wage as of the 1998 priority date and to the present.

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 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, as previously stated, the Form ETA 750 was accepted for processing on January 13, 1998. The proffered wage as stated on the Form ETA 750 is \$14 per hour, which amounts to \$29,100 annually.

As previously stated, the petitioner, in response to the director's request for further evidence, submitted its corporate income tax returns for the years 1998 to 2002. These documents indicated the petitioner's net income was \$41,681 in 1998, -\$890 in 1999, -\$1,650 in 2000, \$214 in 2001, and \$844 in 2002.

In determining the petitioner's ability to pay the proffered wage during a given period, Citizenship and Immigration Services (CIS) will first examine whether the petitioner employed and paid the beneficiary during that 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 Form ETA 750, the beneficiary indicated that he had worked for the petitioner since August 1997. The petitioner also submitted the beneficiary's W-2 forms for the years 2000 to 2002. The petitioner paid the beneficiary \$57,000 in 2000, \$75,000 in 2001 and \$54,000 in 2002. Thus, in tax years 2000, 2001 and 2002, the petitioner paid the beneficiary more than the proffered wage of \$29,100. However, a petitioner must establish the elements for the approval of the petition at the time of filing. A petition may not be approved if the beneficiary was not qualified at the priority date, but expects to become eligible at a subsequent time. *Matter of Katigbak*, 14 I&N Dec. 45, 49 (Comm. 1971). The petitioner has to establish that it has the ability to pay the proffered wage as of the January 13, 1998, through tax year 1999. Thus the petitioner has not established its ability to pay the proffered wage based on payment of wages to the beneficiary. Since the petitioner provided no evidentiary documentation as to any wages paid to the beneficiary in tax years 1998 or 1999, the petitioner has the obligation to establish it has the ability to pay the entire proffered wage in these years.

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). Reliance on the petitioner's gross receipts and wage expense is misplaced. 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, 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. The court in *Chi-Feng Chang* further noted:

Plaintiffs also contend the depreciation amounts on the 1985 and 1986 returns are non-cash deductions. Plaintiffs thus request that the court *sua sponte* add back to net cash the depreciation expense charged for the year. Plaintiffs cite no legal authority for this proposition. This argument has likewise been presented before and rejected. See *Elatos*, 632 F. Supp. at 1054. [CIS] and judicial

precedent support the use of tax returns and the *net income figures* in determining petitioner's ability to pay. Plaintiffs' argument that these figures should be revised by the court by adding back depreciation is without support.

(Emphasis in original.) *Chi-Feng* at 537.

The petitioner as of the 1998 priority date is structured as a corporation. The petitioner's net income is the taxable income shown on line 28, taxable income before NOL deduction and special deductions on its IRS Form 1120. In the tax years 1998 and 1999, the petitioner's net income is \$41,681 and -\$890. Thus, the petitioner has sufficient net income in tax year 1998 to pay the proffered wage of \$29,100. However, the petitioner's net income in tax year 1999 is not sufficient to pay the 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. 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.² A corporation's year-end current assets are shown on Schedule L, lines 1 through 6. Its year-end current liabilities are shown on lines 16 through 18. If the total of a corporation's end-of-year net current assets and the wages paid to the beneficiary (if any) are equal to or greater than the proffered wage, the petitioner is expected to be able to pay the proffered wage using those net current assets. The tax returns reflect the following information for the tax year 1999:

	1999
Taxable income ³	\$ -890
Current Assets	\$ 4,803
Current Liabilities	\$ 0
Net current assets	\$ 4,803

The petitioner has not demonstrated that it paid any wages to the beneficiary during 1999. In 1999, as previously illustrated, the petitioner shows a taxable income of -\$890, and net current assets of \$4,803, and has not, therefore, demonstrated the ability to pay the proffered wage of \$29,100. Thus, although the petitioner

² According to *Barron's Dictionary of Accounting Terms* 117 (3rd 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.

³ As previously stated, taxable income is the sum shown on line 28, taxable income before NOL deduction and special deductions, IRS Form 1120, U.S. Corporation Income Tax Return.

established its ability to pay the proffered wage as of the 1998 priority date and in tax years 2000, 2001, and 2002, the petitioner must establish the elements for the approval of the petition at the time of filing. Thus, the petitioner has not established its ability to pay the proffered wage as of the 1998 priority date and to the present. Thus, for this additional reason, the petition shall be denied.

Finally, the question remains of whether the beneficiary is actually the petitioner. Although the business structure of a corporation has been set in place, the petitioner, based on the level of wages paid to the beneficiary and his spouse, appears to remain in spirit a sole proprietor. The majority of wages, as established by the petitioner's 2001 Payroll summary, goes to the beneficiary and his wife. As previously stated, the prevailing wage and stipulated wage for the proffered position appears to be \$29,100. The DOL approved the previously identified wage level. Nevertheless the record shows the beneficiary earning over three times that wage. While high wages are to be commended on the part of a petitioner, the wages provided to the remaining staff appear subject to whether the U.S. workers on the petitioner's payroll are adversely affected by the wages provided to the beneficiary and his spouse. The record also contains a May 2002 response to the DOL from Mr. [REDACTED] identified as the petitioner's president, that states the petitioner's tax returns show that the petitioner has seven employees and the position are those of a professional trainer, assistant trainers, and kennel helpers. However, the level of wages paid to other employees in 2002, as documented by the petitioner's DE-6 form contained in the record, raises the question as to whether the beneficiary is still nominally the petitioner, regardless of new business structure as a corporation, with another person serving as manager, president or director. Mr. [REDACTED] claimed that he was the person providing the investment while the beneficiary provided the expertise; however, the petitioner's tax documentation does not establish any financial advantages or any initial or ongoing investments, other than signing incorporation documents.

Under 20 C.F.R. § 626.20(c)(8) and 656.3, 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. See *Matter of Amger Corp.*, 87-INA-545 (BALCA 1987). 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 position, it is not a *bona fide* offer. See *Bulk Farms, Inc. v. Martin*, 963 F.2d 1286 (9th Cir. 1992) (denied labor certification application for president, sole shareholder and chief cheese maker even where no person qualified for position applied).

The record contains another amendment to the ETA 750 dated March 1, 1999, submitted by [REDACTED] identified as the petitioner's manager, that stated the beneficiary would not be supervising any employees. Another amendment dated March 1, 1999 and signed by the beneficiary corrected information items on Item 15a, b and 16, as to hours worked, and whether the beneficiary would supervise employees. This letter was submitted by the beneficiary. The record also contains earlier amendments to the ETA 750 submitted by either Mr. [REDACTED] or the beneficiary earlier in September 1998. The record also contains an initial decision by the Department of Labor to deny the application for alien employment certification, as the beneficiary appeared to be petitioning on his own behalf as the petitioner. The DOL drew attention to a 1995 excerpt from the *South Orange County Business Report* that reported the beneficiary was the owner of All Breed Dog Training. The record shows subsequent correspondence from counsel and from Mr. [REDACTED] along with additional documentation that the present petitioner was incorporated by the State of California in 1998, with Mr. [REDACTED] identified as signing officer or agency and the beneficiary and

Mr. [REDACTED] both identified as directors.⁴ Another document submitted by Mr. [REDACTED] is a registration form for commercial employers filed with the Educational Development Department of the State of California. This document states that the person to contact for the business is the beneficiary and that the document is to register a change in business form, from a sole proprietor to a corporation.

The record also contains a May 2002 response to the DOL from Mr. [REDACTED] identified as the petitioner's president that states the petitioner's tax returns shows that the petitioner has seven employees and the position are those of a professional trainer, assistant trainers, and kennel helpers. Mr. [REDACTED] states that prior to 1997, he was not the petitioner's president and had no need for employees. Mr. [REDACTED] stated that the excerpt in the *South Orange County Business Report* was placed before the petitioner's corporate structure was established and Mr. [REDACTED] became president. Mr. [REDACTED] stated that prior to 1997, the beneficiary did own the petitioner and the insert in the *Business Report* has never been updated. Mr. [REDACTED] also stated that there was a bona fide job opening and in fact there is another position open besides the one now held by the beneficiary; however, no qualified U.S. workers came forth despite the petitioner's advertising efforts.

Counsel also responded to the DOL notice to deny the application on May 2002. Counsel cites to several BALCA (Board of Alien Labor Certification Applications) cases with regard to the relationship between the beneficiary and the petitioner. Counsel states that *Human Performance Measurement, Inc.* 89 INA 269 (Oct.25, 1991) (en Banc), held that even though the beneficiary had a "collegial and professional relationship with the sponsoring employer," and was a stock holder, member of the Board of Directors, Treasurer and Vice President for Finance and Marketing, the labor certification should be granted where it appeared that a genuine job opportunity existed. Counsel also cited *Matter of Data Ray Corporation, Employer on behalf of Toshihiko Furukawa*, Alien 91 INS 330, 1992 WL 382142 (1992). Counsel finally cites to *Matter of Kika Inc. Employer on behalf of Chun-Fu-Chen*, Alien 88 INA 169, 1988 WL 235822 (1988) and states that this decision stated that certification may be granted and that a legitimate employer/employee relationship may exist under circumstances where the alien has or had a relationship with employer so long as the employer provides clear evidence that a bona fide job opportunity is available to U.S. workers, and that the employer has sought, in good faith, to fill the position with a U.S. workers. Counsel states that the record show that good faith efforts had been made through the State Employment office to recruit United States workers. Counsel submitted the articles of incorporation for the petitioner, a share certificate, a Quarterly Wage summary showing other employees of the petition, a statement by the domestic stock corporation, a registration form for commercial employers and a statement by the president of the corporation.

The InterPay electronic Quarterly Wage Summary for tax year 2001 is among the documents submitted by counsel. It identified seven employees, of which two are the beneficiary and his wife. Mr. [REDACTED] is not identified as an employee. None of the employee's job duties are identified. It is noted that the beneficiary was paid \$75,000 in 2001 while his wife was paid \$28,600. The remaining five employees were paid a combined gross wage of \$6,533.71 for the year.

Counsel states that the Department of Labor's (DOL) Bureau of Alien Labor Certification Appeals (BALCA) cases are applicable to the instant petition before the Department of Homeland Security's AAO. Counsel does not state how DOL precedent is binding in these proceedings. While 8 C.F.R. § 103.3(c) provides that precedent

⁴ Mr. [REDACTED] is also identified separately as one of the petitioner's three officers.

decisions of CIS are binding on all its employees in the administration of the Act, BALCA decisions are not similarly binding. Precedent decisions must be designated and published in bound volumes or as interim decisions. 8 C.F.R. § 103.9(a). Furthermore, the BALCA decisions cited by counsel concern petitioners that are large companies and/or subsidiaries of other companies, in which the beneficiaries held positions on the petitioner's board of directors, among other positions. The instant petitioner is a very small company that is not analogous to the petitioners in the decisions cited by counsel.

The AAO looks to the totality of circumstances in examining the relationship between the beneficiary and the petitioner. Another BALCA decision, *Modular Container Systems, Inc.* 89 INA 228(1991) examined whether the relationship between the beneficiary and the petitioner would establish whether a bona fide job opportunity exists.

Modular Container Systems examines factors to determine whether the job is clearly open to a U.S. worker may include, but are not limited to, whether the beneficiary is in the position to control or influence hiring decisions regarding the job for which labor certification is sought; is related to the corporate directors, officers, or employees; is an incorporator or founder of the company; has an ownership interest in the company; is involved in the management of the company; is on the board of directors; is one of a small number of employees; has qualifications for the job that are identical to specialized or unusual job duties and requirements stated in the application; and is so inseparable from the sponsoring employer because of his or her pervasive presence and personal attributes that the employer would be unlikely to continue in operation without the alien.

Modular Container Systems also states:

The totality of the circumstances standard also includes a consideration of the employer's level of compliance and good faith in the processing of the claim. See, e.g., Malone & Associates, 90-INA-360 (July 15, 1991) (en banc) (companion case to today's decision). Moreover, the business cannot have been established for the sole purpose of obtaining certification for the alien, i.e., a sham. Hall, 864 F.2d at 874.

In the instant petition, the beneficiary was the owner of the petitioner prior to its incorporation, is listed as a director of the present corporation, is one of a very small number of employees, has qualifications for the job that are identical to specialized or unusual job duties and requirements stated in the application, namely the training of vicious dogs, and based on the news clippings submitted to the record has been and continues to be inseparable from the petitioner because of his pervasive presence and personal attributes that without the beneficiary, the petitioner would be unlikely to continue in operation. Thus, the AAO finds that the petitioner has not established that its relationship with the beneficiary does not violate the terms of the employer/employee relationship, inherent in the ETA 750 or I-140 petition eligibility, and adversely impact the bona fides of the proffered position.

The petition will be denied for the above stated reasons, with each considered as an independent and alternative basis for denial. In visa petition proceedings, the burden of proving eligibility for the benefit sought remains entirely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. Here, that burden has not been met.

ORDER: The petition is denied. The appeal is dismissed.