U.S. Department of Homeland Security
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U.S. Citizenship and Immigration Services

PUBLIC COPY

[redacted]

BLA

FILE: [redacted] Office: TEXAS SERVICE CENTER Date: DEC 05 2006

SRC 03 161 50535

IN RE: Petitioner:
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: SELF-REPRESENTED

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 preference visa petition was denied by the Director, Texas Service Center, and is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner is a flower import and export business. It seeks to employ the beneficiary permanently in the United States as a wholesaler II. As required by statute, the petition is accompanied by the Form ETA 750, Application for Alien Employment Certification, approved by the U.S. Department of Labor (DOL). The director 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. The director also determined that the petitioner had not clearly established that the beneficiary had the requisite work experience as defined by the Form ETA 750. Finally, the director informed the petitioner that [redacted] the individual who had submitted certain documents on the petitioner's behalf, had been convicted of immigration fraud. The director determined that the petitioner had not overcome the presumption of fraud raised by [redacted]'s involvement in this case. For these reasons, the director denied the petition.

This office notes that the record does not contain a Form G-28, Notice of Entry of Appearance as Attorney or Representative, executed by the petitioner that recognizes [redacted] as its representative. It is also noted that on December 7, 2004, [redacted] was expelled from the practice of law before the Board of Immigration Appeals, the Immigration Courts and the Department of Homeland Security. *See www.usdoj.gov/eoir/profcond/chart.htm.* For both of these reasons, this office will not recognize [redacted] as the petitioner's representative. [redacted] also provided some of the submissions in this case. In the record there are two Forms G-28, one executed by the beneficiary and another executed by the beneficiary's husband, which both recognize [redacted] as their representative. However, the record does not contain a Form G-28 executed by the petitioner which recognizes [redacted] as its representative. Consequently, this office will not recognize [redacted] as the petitioner's representative[1]. All representations in the record will be considered, but the decision in this matter will be provided only to the petitioner.

The record shows that the appeal is properly filed, timely and makes a specific allegation of error in law or fact. The procedural history in this case is documented by the record and incorporated into the decision. Further elaboration of the procedural history will be made only as necessary.

According to the director's October 29, 2004 denial, the issues in this case include whether the petitioner has the ability to pay the proffered wage from the priority date onwards and whether the beneficiary had the qualifying experience as of the priority date.

The director also indicated in her denial that this petition should be denied based on a finding of fraud because of [redacted] involvement in the case. This point in the director's decision is withdrawn. Each immigrant petition is a separate proceeding with a separate record. *See* 8 C.F.R. § 103.8(d). In making a determination of statutory eligibility, Citizenship and Immigration Services (CIS) is limited to the information contained in the record of proceeding. *See* 8 C.F.R. § 103.2(b)(16)(ii). The record of proceeding in this instance consists of the material in the A-file. *See* 8 C.F.R. § 103.8(d). Further, if the decision will be adverse to the petitioner and is based on derogatory information considered by CIS of which the petitioner is unaware, the petitioner shall be advised of this and offered an opportunity to rebut the information and present evidence in its own behalf before the decision is rendered. *See* 8 C.F.R. § 103.2(b)(16)(i). Aside from

[1] Citizenship and Immigration Services' (CIS) regulations specifically prohibit a beneficiary of a visa petition, or a representative acting on a beneficiary's behalf, from filing an appeal. 8 C.F.R. § 103.3(a)(1)(iii)(B).

notifying the petitioner of a general presumption of fraud because of [redacted] involvement in the case, the A-file does not contain any specific finding or adverse information that directly relates to the specific petition now before CIS. *See* 8 C.F.R. § 103.3(a)(1)(i).

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.

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, which is the date the Form ETA 750 is accepted for processing by any office within the employment system of the DOL. *See* 8 CFR § 204.5(d). The petitioner must also demonstrate that, on the priority date, the beneficiary had the qualifications stated on the Form ETA 750 as certified by the DOL and submitted with the petition. *See Matter of Wing's Tea House*, 16 I&N Dec. 158 (Act. Reg. Comm. 1977).

Here, the DOL accepted the Form ETA 750 for processing on April 30, 2001. The proffered wage as stated on the Form ETA 750 is $12.50 per hour or $26,000 annually, based on a 40-hour work week. The Form ETA 750 states that the position requires two years of experience in the proffered position and the completion of six years of grade school and five years of high school. The position also requires oral and written fluency in the Spanish language.

The AAO takes a *de novo* look at issues raised in the denial of the petition. *See 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 AAO considers all pertinent evidence in the record, including new evidence properly submitted on appeal.[2]

The petitioner submitted the following evidence in support of its claim that it has the ability to pay the beneficiary the proffered wage: the petitioner's Form 1120, U.S. Corporation Income Tax Return, for 2001, 2002 and 2003. The record does not contain any other evidence directly relevant to the petitioner's ability to pay the wage.

The record shows that the petitioner is structured as a C corporation. On the petition, the petitioner claimed to have been established in 1997, to employ three workers and to have a gross annual income of $1,202,790.[3]

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[2] The submission of additional evidence on appeal is allowed by the instructions to the Form I-290B, which are incorporated into the regulations by the regulation at 8 C.F.R. § 103.2(a)(1). The record in this 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).

According to the tax returns in the record, the petitioner's fiscal year begins on January 31 and ends on December 31.[4] On the Form ETA 750B, signed by the beneficiary on April 1, 2002, the beneficiary did not claim to have worked for the petitioner.[5] The Form ETA 750 indicates that the petitioner would employ the beneficiary in Weston, Florida. The Form I-140 indicates that the petitioner would employ the beneficiary in Miami, Florida.[6]

On appeal, the petitioner indicates that it does have the ability to pay the proffered wage and that the beneficiary has the qualifying experience as stated on the Form ETA 750. The petitioner also indicates that its business is a legitimate, operating company with a legitimate vacancy for which the beneficiary's services are needed, in contrast to certain other petitioners' filings in which [redacted] was involved. Finally, the petitioner indicates that it did submit the various additional documents requested by the director in the NOID dated September 13, 2004, or approximations thereof. However, it did not submit them until October 29, 2004, rather than within thirty days as requested by the director in the NOID. The petitioner asks that these submissions be considered on appeal.[7]

The petitioner must establish that its job offer to the beneficiary is a realistic one. Because the filing of a Form ETA 750 establishes a priority date for any immigrant petition later based on that Form ETA 750, the petitioner must establish that the job offer was realistic as of the priority date and that the offer remained realistic for each year thereafter, until the beneficiary obtains lawful permanent residence. The petitioner's ability to pay the proffered wage is an essential element in evaluating whether a job offer is realistic. *See Matter of Great Wall*, 16 I&N Dec. 142 (Acting Reg. Comm. 1977). *See also* 8 C.F.R. § 204.5(g)(2). In evaluating whether a job offer is realistic, CIS requires the petitioner to demonstrate financial resources sufficient to pay the beneficiary's proffered wages, although the totality of the circumstances affecting the petitioning business will be considered if the evidence warrants such consideration. *See Matter of Sonegawa*, 12 I&N Dec. 612 (Reg. Comm. 1967).

In determining the petitioner's ability to pay the proffered wage during a given period, 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 this

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[3] Initially, the petitioner filed the petition leaving some of this information blank. The director requested in her Notice of Intent to Deny (NOID) dated September 13, 2004 that the petitioner submit a fully completed Form I-140, Immigrant Petition for Alien Worker. In response the petitioner did provide a Form I-140 complete with the information referred to above.

[4] Because the petitioner's fiscal year corresponds closely to the calendar year, this office will consider the petitioner's tax returns for 2001, 2002 and 2003 in determining the petitioner's ability to pay the proffered wage during each respective calendar year.

[5] It is unclear that the Form ETA 750B submitted with the petition is the original form submitted to the DOL and certified during 2001. The Form ETA 750B was signed approximately one year after the entire labor certification application was submitted to the DOL and this part of the form was not stamped as received by the DOL. However, the date it was signed precedes DOL's final certification date. This office notes that the petitioner is obliged to submit the entire, *original* Form ETA 750 with the petition. *See* § 203(b)(3)(c) of the Act.

[6] It is noted that Weston is located in Broward County, whereas Miami is located in Miami-Dade County.

[7] The Director requested over twenty additional documents from the petitioner in the NOID, including certain documents from the beneficiary's native country of Colombia as well as copies of certain academic records issued approximately thirty years prior to the NOID. Taking this into account, this office will exercise its discretion and consider all documents submitted on October 29, 2004 in response to the NOID, as well as all other representations submitted into the record.

case, the record does not contain any evidence to establish that the petitioner employed and paid the beneficiary the full proffered wage, or any portion thereof, from the priority date onwards.

If the petitioner does not establish that it employed and paid the beneficiary an amount at least equal to the proffered wage during the relevant 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 sales, profits and wage expense is misplaced. Showing that the petitioner's gross sales and profits exceeded the proffered wage is insufficient. Similarly, documenting that the wages which the petitioner paid overall were more than the proffered wage is not sufficient.

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 tax returns in the record provide the following information concerning the petitioner's ability to pay the proffered annual wage from the priority date:

- The Form 1120 for 2001 states a net income[8] of $15,401.
- The Form 1120 for 2002 states a net income of $20,359.
- The Form 1120 for 2003 states a net income of $19,713.

Therefore, for the years 2001 through 2003, the petitioner did not have sufficient net income to pay the beneficiary the proffered wage of $26,000.

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 may not, therefore, be viewed as funds available to pay the proffered wage, contrary to counsel's

[8] Taxable income before net operating loss deduction and special deductions as reported on Line 28 of the Form 1120.

assertions. 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. As such, 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.[9] A corporation's year-end current assets are shown on the Form 1120, Schedule L, lines 1 through 6. Its year-end current liabilities are shown on lines 16 through 18 of Schedule L. 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 petitioner's net current assets during 2001 were $0.
- The petitioner's net current assets during 2002 were $18,415.
- The petitioner's net current assets during 2003 were $35,727.

Thus, for the years 2001 and 2002, the petitioner did not have sufficient net current assets to pay the proffered wage. The petitioner did have sufficient net current assets to pay the proffered wage during 2003.

In sum, the petitioner has not established that it had the continuing ability to pay the beneficiary the proffered wage from the priority date onwards through an examination of wages paid to the beneficiary, or an examination of its net income or net current assets, except for 2003.

Finally, CIS may consider the overall magnitude of the petitioner's business activities in its determination of the petitioner's ability to pay the proffered wage. *See Matter of Sonegawa,* 12 I&N Dec. 612 (BIA 1967). The petitioning entity in *Sonegawa* had been in business for over 11 years and routinely earned a gross annual income of about $100,000. During the year in which the petition was filed in that case, the petitioner changed business locations and paid rent on both the old and new locations for five months. There were large moving costs and also a period of time when the petitioner was unable to do regular business. The Regional Commissioner determined that the petitioner's prospects for a resumption of successful business operations were well established. The petitioner was a fashion designer whose work had been featured in *Time* and *Look* magazines. Her clients included Miss Universe, movie actresses, and society matrons. The petitioner's clients had been included in the lists of the best-dressed California women. The petitioner lectured on fashion design at design and fashion shows throughout the United States and at colleges and universities in California. The Regional Commissioner's determination in *Sonegawa* was based in part on the petitioner's sound business reputation and outstanding reputation as a couturiere.

Accordingly, CIS may, in its discretion, consider evidence relevant to a petitioner's financial ability that falls outside of its net income and net current assets. CIS may consider such factors as the number of years that the petitioner has been doing business, the established historical growth of the petitioner's business, the overall number of employees, the occurrence of any uncharacteristic business expenditures or losses, the petitioner's reputation within its industry, whether the beneficiary is replacing a former employee or an outsourced service, or any other evidence that CIS deems relevant to the petitioner's ability to pay the proffered wage. In this case, however, the only forms of evidence provided by the petitioner which are relevant to its ability to pay the beneficiary are its tax returns for 2001 through 2003. Such evidence is not sufficient to establish that

[9]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.

the petitioner has met all of its obligations in the past or to establish its historical growth. In addition, such evidence is not sufficient to establish whether unusual circumstances exist in this case to parallel those in *Sonegawa*, nor to establish whether 2001 and 2002 were uncharacteristically, unprofitable years for the petitioner.

The evidence submitted does not establish that the petitioner had the continuing ability to pay the proffered wage from the priority date onwards.[10]

In the denial dated October 29, 2004 the director also indicated that the petitioner had not submitted evidence sufficient to substantiate that the beneficiary had the requisite qualifying experience. However, the director failed to identify any inconsistencies or omissions in the employment letter from *Lavisa Bealls Roses de Colombia, Ltda.*, Bogota, Colombia, submitted into the record for the purpose of verifying the beneficiary's previous experience. In this case, the petitioner submitted with the petition an original letter on company letterhead dated March 20, 2003 and signed by the company's administrative and human resources manager. The letter specifies the duties performed by the beneficiary while employed by that company from 1996 through 1999. The stated duties appear to coincide with the duties of the proffered position. A second employment verification letter in the record dated October 19, 2004 was submitted in response to the NOID. It is also an original document on company letterhead signed by the company's human resources administrator. This letter specifies additional information as requested by the director in the NOID such as that the beneficiary worked for the company from *May* 1996 through *March* 1999. This letter also provides further detail regarding the beneficiary's duties at the company. In addition, regarding the educational requirements set out by the Form ETA 750, the petitioner submitted an abstract of the beneficiary's transcript from Mound Westonka High School in Mound, Minnesota, also as requested by the director in the NOID.[11] It appears that L. Laube, an administrator in this school system, faxed this transcript to [redacted][12] on October 25, 2004. This document indicates that the beneficiary graduated from this high school on June 5, 1975. The beneficiary apparently attended this school during the 1974/1975 school year.

To determine whether a beneficiary is eligible for an employment based immigrant visa, CIS must examine whether the alien's credentials meet the requirements set forth in the labor certification. In evaluating the beneficiary's qualifications, CIS must look to the job offer portion of the labor certification to determine the required qualifications for the position. 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*,

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[10] This office notes that in the denial dated October 29, 2004, the director indicated that the petitioner demonstrated that it had the ability to pay the proffered wage during 2002. This point in the director's denial is withdrawn. The petitioner demonstrated the ability to pay the wage only one year in the relevant period of analysis, the year 2003.

[11] It is noted that the beneficiary indicated on the Form 750B that she graduated high school in Colombia. However, she provided a notarized affidavit in response to the NOID in which she explains that she attended high school in Colombia only through June 1974 and that she later graduated from Mound Westonka High School as an exchange student during June 1975. This office accepts that explanation given that the petitioner provided independent, objective evidence in its support in the form of a transcript. It is also noted that, as stated on the transcript, the relevant school is Mound Westonka High School in Mound, Minnesota. *See* http://www.westonka.k12.mn.us/mwhs/. However, in the beneficiary's affidavit dated October 13, 2004 "Mound" is misspelled as "Mount". This office draws no negative inference from that misspelling.

[12] As noted earlier [redacted] submitted various documents in support of this petition. However, in the record there is no Form G-28 executed by the petitioner which acknowledges that [redacted] has its authorization to serve as representative.

699 F.2d 1006 (9th Cir. 1983); *Stewart Infra-Red Commissary of Massachusetts, Inc. v. Coomey*, 661 F.2d 1 (1st Cir. 1981).

To be eligible for approval, a beneficiary must have the education and experience specified on the labor certification as of its filing date, which as noted above, is April 30, 2001. *See Matter of Wing's Tea House*, 16 I&N Dec. 158 (Act. Reg. Comm. 1977).

The Form ETA 750A, items 14 and 15 set forth the minimum education, training, and experience that an applicant must have for the position of wholesaler II. Item 14 indicates that the educational requirements for the proffered position are six years of grade school and five years of high school, and that the applicant must have two years of experience in the proffered position. The duties of the proffered position are delineated at Item 13 of the Form ETA 750A as follows:

> Import and export of flowers. Arrange for transportation, shipping and receiving. Discuss prices, sales, regulations and freight conditions in Spanish.

Item 15 of Form ETA 750A also lists oral and written fluency in the Spanish language as a special requirement for the proffered position.

The beneficiary set forth her credentials on the Form ETA 750B and signed her name under a declaration that the contents of the form are true and correct under the penalty of perjury. At Item 11, eliciting information regarding her education, she indicated that she attended the elementary school *Colegio Andino,* Bogota, Colombia from the age of five until the age of twelve and that she attended *Colegio Santa Francisca Romana*, Bogota, Colombia, subsequent to this. She referred to *Colegio Santa Francisca Romana* as a "high school" on the Form ETA 750. However, as she entered this institution after only six years of schooling, it appears that this school is the equivalent of a U.S. middle school and high school combined. She indicated further that she attended *Colegio Santa Francisca Romana* until June 1975.[13] The beneficiary did not provide any additional information concerning her educational background on that form. At Item 15, eliciting information of the beneficiary's work experience, she represented that she performed all the duties listed at Item 13 of the Form ETA 750A on a full-time basis while employed by *Lavisa Bealls Roses de Colombia, Ltda.*, Bogota, Colombia from May 1996 through March 1999. She does not provide any additional information concerning her employment background on that form.

The regulation at 8 C.F.R. § 204.5(l)(3) provides:

> (ii) *Other documentation—*
>
> > (A) ***General.*** Any requirements of training or experience for skilled workers, professionals, or other workers must be supported by letters from trainers or employers giving the name, address, and title of the trainer or employer, and a description of the training received or the experience of the alien.
> >
> > (B) ***Skilled workers.*** If the petition is for a skilled worker, the petition must be accompanied by evidence that the alien meets the educational, training or experience,

[13] Again, the beneficiary offered a correction to this and stated that she actually left *Colegio Santa Francisca Romana* in June 1974 and that, during the 1974/1975 school year, she attended Mound Westonka High School in Minnesota as an exchange student. She provided a transcript and a notarized affidavit in support of this correction.

> and any other requirements of the individual labor certification, meets the requirements for Schedule A designation, or meets the requirements for the Labor Market Information Pilot Program occupation designation. The minimum requirements for this classification are at least two years of training or experience.

This office finds that the preponderance of the evidence does demonstrate that, as of the priority date, the beneficiary had acquired two years of experience in the proffered position with duties as set forth on the Form ETA 750A. Also, after being raised in Colombia and after completing more than ten years of study in that country, this office does not dispute that the beneficiary has met the requirement that she be proficient in oral and written Spanish.

The record indicates that the beneficiary attended six years of elementary school followed by six additional years of study, culminating in a high school diploma. Specifically, it appears that after completing elementary school, the beneficiary completed the equivalent of two years of middle school. After this, she completed three years of study at the high school level in Colombia, followed by one year of high school in the United States, after which she received a high school diploma. In sum, a preponderance of the evidence indicates that the beneficiary did not complete five years of study at the high school level as required by the Form ETA 750. As such, the petitioner has not demonstrated that, as of the priority date, the beneficiary was qualified in terms of her educational background to perform the duties of the proffered position. The director did not specifically base the denial on the petitioner's failure to demonstrate that the beneficiary had the educational requirements set forth on the Form ETA 750[14]. As such, the petitioner has not been accorded an opportunity to respond to such a finding. Thus, this office's decision to dismiss the instant appeal is not based, even in part, on this finding. However, if the petitioner attempts to overcome this decision on motion, it should address this issue.

The record suggests an additional issue that was not developed in the decision of denial[15].

Pursuant to 20 C.F.R. § 656.20(c)(8)(2004)[16] the petitioner has the burden when asked to show that a valid employment relationship exists and that a *bona fide* job opportunity is available to U.S. workers. *See Matter of Amger Corp.*, 87-INA-545 (October 15, 1987). A relationship invalidating a *bona fide* job offer may arise where the beneficiary is related to the petitioner by "blood" or the relationship may "be financial, by marriage, or through friendship." *See Matter of Sunmart 374*, 2000-INA-93 (May 15, 2000).

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[14] However, 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).

[15] *See* note 14, *supra.*

[16] The regulatory scheme governing the alien labor certification process contains certain safeguards to assure that petitioning employers do not treat alien workers more favorably than U.S. workers. The current Department of Labor regulations concerning labor certifications went into effect on March 28, 2005. The new regulations are referred to by the Department of Labor by the acronym PERM. *See* 69 Fed. Reg. 77325, 77326 (Dec. 27, 2004). The PERM regulation was effective as of March 28, 2005, and applies to labor certification applications for the permanent employment of aliens filed on or after that date. However, the instant labor certification application was filed prior to March 28, 2005 and is governed by the prior regulations. This citation is to the Department of Labor regulations as in effect prior to the PERM amendments.

In this case, the petitioner's chief executive officer and director, Santiago Uribe, and the beneficiary, Maria Clara Uribe, are siblings according to a sworn affidavit in the record of proceeding from Santiago Uribe. CIS must scrutinize whether this familial relationship had an impact on the petitioner's recruitment efforts before the petition may be approved.

That the petitioner's officer/director and the beneficiary are siblings raises the question of whether the petitioner is attempting to employ its relative in preference to a U.S. worker. The familial relationship also raises the following questions: whether the petitioner actually needs to fill the proffered position; whether the petitioner attempted in good faith to locate a suitable U.S. worker; and whether U.S. workers were rejected merely out of preference for the family member. While those issues are typically under the DOL's jurisdiction, they also relate to the *bona fides* of the proffered position and whether or not a realistic job offer is being made in this case. *See Matter of Great Wall*, 16 I&N Dec. 142 (Acting Reg. Comm. 1977).

Under these circumstances, any evidence that the job offer may not be *bona fide*, that the employer may not truly have attempted to locate a U.S. worker for the position, that evidence may have been falisfied, or that the beneficiary may not actually be qualified pursuant to the terms of the approved labor certification, when considered with the familial relationship, may be sufficient to deny the petition. This is particularly likely to lead to a denial where the DOL was not made aware of the familial relationship when ruling on the labor certification application.

In this case, the petitioner does not appear to have revealed the familial relationship between the beneficiary and the petitioner's officer/director to the DOL. This office notes, however, that the record contains no evidence that the petitioner denied the familial relationship or withheld it in response to a question put forth by the DOL or CIS.

Another problem with this petition is that the petitioner required *five* years of schooling at the high school level on the Form ETA 750. Given that U.S. students graduate high school after completing only four years of high school study, it seems that it would be virtually impossible for a person who had attended school in the United States to fulfill the requirement of five years of high school study as set out on the Form ETA 750. Viewing this in conjunction with the familial relationship described above, this office finds that the requirement that any applicant for the proffered position have five years of schooling at the high school level appears to be the petitioner's attempt to preclude U.S. workers from being able to qualify for the proffered position.[17] Again, while this is under the DOL's jurisdiction, it also relates to the *bona fides* and realistic nature of the job offer. We do note, however, that the advertisement issued in this case only stated "HS educ" and did not specify 5 years of attendance at high school.

The decision of denial did not develop this issue. As such, the petitioner has not been accorded an opportunity to respond to such a finding. Thus, the instant decision to dismiss is not based, even in part, on this issue. However, if the petitioner attempts to overcome this decision on motion, it should address this finding.

Finally, the Form ETA 750 labor certification was issued for employment in Weston, Broward County, Florida and is not valid for employment outside of Broward County. The city, state, and county of the *employment location* must be known in order for the DOL to properly identify the prevailing wage rate for the proffered position. Yet, the petitioner now apparently seeks to employ the beneficiary in Miami-Dade

[17] This remains the case even though in this instance the record indicates that even beneficiary does not meet this education requirement. In its supporting documents, the petitioner presented claims that the beneficiary did have five years of schooling at the high school level.

County, Florida. However, while these counties neighbor each other, there is no evidence in the record of proceeding that they fall within the standard metropolitan statistical area or commuting area[18]. If they do not, this would constitute a material change to the job offer and represents additional sufficient grounds to deny the petition. However, the decision of denial did not develop this issue. As such, the petitioner has not been accorded an opportunity to respond to such a finding. Thus, the instant decision is not based, even in part, on this issue. However, if the petitioner attempts to overcome this decision on motion, it should address this finding.

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 appeal is dismissed.

[18] *See* DOL's Technical Assistance Guide, No. 656, p. 104, A-11. *See also Matter of Seibel & Stern*, Case No. 90-INA-116 through 90-INA-129 and 90-INA-144 through 90-INA-168 (BALCA 1990)(defining standard metropolitan statistical area as "a county or group of counties which contain at least one central city of at least 50,000 inhabitants or a central urbanized area of at least 100,000.")