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

U.S. Citizenship and Immigration Services

PUBLIC COPY

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[redacted]

FILE: [redacted] Office: VERMONT SERVICE CENTER Date: JUL 26 2007

EAC 03 170 51373

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:

[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, Chief
Administrative Appeals Office

DISCUSSION: The preference visa petition was denied by the Director, Vermont Service Center. The AAO improperly rejected the appeal as filed untimely.[1] The AAO sua sponte under 8 C.F.R. § 103.5(a)(5)(ii) reopened the matter to adjudicate the appeal. The matter is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner is a restaurant. It seeks to employ the beneficiary permanently in the United States as a restaurant manager. As required by statute, the petition is accompanied by a Form ETA 750, Application for Alien Employment Certification, approved by the Department of Labor. 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 noted that the petitioner had not responded to the director's second request for further evidence asking for clarification of discrepancies on the petitioner's tax returns in a timely manner.

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.

As set forth in the director's June 2, 2004 denial, the single issue in this case is whether or not the petitioner has the ability to pay the proffered wage as of the priority date and continuing until the beneficiary obtains lawful permanent residence.

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. Section 203(b)(3)(A)(ii) of the Act, 8 U.S.C. § 1153(b)(3)(A)(ii), provides for the granting of preference classification to qualified immigrants who hold baccalaureate degrees and are members of the professions.

The regulation 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 Application for Alien Employment Certification, was accepted for processing by any office within the employment system of the U.S. Department of Labor. *See* 8 C.F.R.

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[1] The petitioner had previously appealed the director's decision and the AAO on November 22, 2005 determined that the appeal was untimely. After the petitioner noted that the required final date of receipt was a holiday, and thus, the appeal was still within the 33 days allowed for mailed in appeal submissions, the director reopened the matter and resubmitted the appeal to the AAO.

§ 204.5(d). The petitioner must also demonstrate that, on the priority date, the beneficiary had the qualifications stated on its Form ETA 750 Application for Alien Employment Certification as certified by the U.S. Department of Labor and submitted with the instant petition. *Matter of Wing's Tea House*, 16 I&N Dec. 158 (Act. Reg. Comm. 1977).

Here, the Form ETA 750 was accepted on April 27, 2001. The proffered wage as stated on the Form ETA 750 is $80,000 per year. The Form ETA 750 states that the position requires college with no specific number of years identified, a bachelor of science degree in business administration, and two years of work experience in the job offered.

The AAO takes a *de novo* look at issues raised in the denial of this 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 upon appeal.[2] On appeal, counsel submits a brief dated August 4, 2004 and additional correspondence dated April 12, 2004 with accompanying evidence.[3] The April 2004 correspondence addressed the director's second request for further evidence, and contained an affidavit from [redacted] This affidavit addressed the discrepancy in the number of the petitioner's workers on the I-140 petition and the number of the petitioner's workers identified on the IRS 941 forms submitted to the record.

Counsel also states that any corrections to clarify the error in number of employees cannot be completed by the petitioner's new accountant until after the tax season is over, and that the corresponding tax documents cannot be rectified until after April 19, 2004. Counsel also encloses a letter from the petitioner's former accountant, [redacted]. Counsel also submits a copy of the director's second request for further evidence dated January 20, 2004 that addressed discrepancies between the petitioner's number of employees noted on the I-140 petition and the petitioner's From 941; the discrepancy between the beneficiary's W-2 form for 2001 and the From 941, Employer's Quarterly Federal Tax return; the lack of agreement between the figures for Additional Paid in capital and Retained Earnings; and a discrepancy between the balance on Schedule M-2 at the end of 2001 and the beginning balance on Schedule M-2 in 2002. The director also requested certified copies of the petitioner's tax returns for 2001 and 2002, and a copy of the beneficiary's income tax return for 2001, also certified by IRS.

In the affidavit submitted on appeal, [redacted] states that with regard to the number of employees, the petitioner only had two fulltime cooks and the manager on the payroll, and did not have nine part time wait staff on the payroll. The letter writer states that the petitioner was misinformed about putting the part time wait staff on the payroll and it was the petitioner's understanding was that if there were less than ten wait staff they did not have to be paid on the payroll. [redacted] then noted that the petitioner has since found out that it is their tips that do not have to be reported on the payroll, not their salaries. Thus, the

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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 the instant case provides no reason to preclude consideration of any of the documents newly submitted on appeal. *See Matter of Soriano*, 19 I&N Dec. 764 (BIA 1988).

[3] This correspondence is the response to the director's second request for further evidence dated January 20, 2004.

[4] The record does not clearly identify position with the petitioner, although he has signed the I-140 petition, a G-28 Form, the petitioner's tax returns, and the employer's part of the Form ETA 750. On Form ETA 750A, he indicates that he is the petitioner's owner.

Form 941 report for the first quarter of 2004 shows twelve employees with their wages, consisting of two fulltime cooks, one manager, four part time kitchen staff, four wait staff and one hostess. Mr. Chinchotikul submits a copy of the first quarter 2004 Form 941.

states that the petitioner has a new accountant to amend all the old Form 941 quarterly reports; however the first appointment with the new accountant is after April 19, 2004. [redacted] states that the petitioner will submit the amended Forms 941 and an amended tax return to the director as soon as the accountant finishes these forms and notes that the wait staff salaries were reflected in the cost of goods sold on the petitioner's yearly tax returns prior to the forthcoming amendments. The letter writer states that the petitioner was misinformed about the correct way to reflect wages of the part time wait staff.

With regard to the discrepancy between the beneficiary's wages on his W-2 form and the wages noted on the Form 941 quarterly reports for the beneficiary, [redacted] states that the W-2 forms reflect the actual checks and bonuses paid to the beneficiary for the 2001 tax year; however, the Forms 941 only reflected the beneficiary's wages.

[redacted] stated that he had made every diligent effort to comply with the requests for certified copies of tax returns, but due to the death of counsel's mother in early February 2004 and also the delay in getting the certified copies of the corporate returns, all evidence has not been obtained. The petitioner's owner asked for a further extension of time to both amend its 941 reports, its previous tax returns and to obtain certified copies of the same.

Counsel also submits a letter from [redacted], Certified Public Accountant, Attorney at Law, Wakefield, Massachusetts to the beneficiary, dated March 4, 2004. [redacted] notes in his letter that the petitioner's 2001 amended corporate tax return and the 2002 corporate tax return balance sheet, specifically lines 23 and 24 reflect a variance of $10,894. [redacted] states that the variance is due to a payroll adjustment of $10,894 reflected in the 2001 amended corporate income tax return. [redacted] states that this adjustment was initiated by Paychex on March 13, 2003. [redacted] states that he will enter a $10,894 adjusting journal entry in the petitioner's 2004 corporate tax return balance sheet that will correct the beginning and ending balance sheet items and will not affect the income statement for any prior or future years.

[redacted] then states that the director in her request for further evidence is incorrect in stating the petitioner's 2001 ending balance sheet line item 23 is $375,805, and that the director inadvertently referenced the petitioner's 2001 beginning balance sheet line item 23 , rather than the ending balance of $339,955. Mr. [redacted] states that if he were to deduct the 2001 ending balance of $339,955 from the 2002 beginning balance of $329,061, the variance is $10,894. [redacted] notes a similar error in the director's calculations with regard to the petitioner's retained earnings in tax year 2001 and 2002. [redacted] stated that if he deducted the petitioner's 2001 ending balance of -$98,243 from the petitioner's 2002 beginning balance of $87,349, the variance is $10,894. [redacted] submits a letter from [redacted] PAYCHECK, Woburn, Massachusetts. In his letter [redacted] apologizes for "incorrect errors," and notes 2001 and 2002 adjustments to bonus net, gross wages, and employer and employee FICA tax items.

The record also contains the petitioner's Forms 941 for all four quarters of tax year 2001 and a W-3 Transmittal of Wage and Tax Statements for tax year 2001. This latter document indicates the petitioner paid wages, tips and other compensation of $133,200 in tax year 2001. The IRS Forms 941 indicate the petitioner paid $43,400, $35,200, $29,400, and $25,200 for the four respective quarters for three employees, including the beneficiary. These forms also indicate that the beneficiary received quarterly wages of $28,000, $22,000, $14,000, and $12,000, or total wages of $76 ,000 in tax year 2001.

On appeal, counsel also submits copies of Forms 941c, Supporting Statement to Correct Information, for tax years 2001, 2002, and 2003 submitted to the IRS with an IRS datestamp receipt of May 11, 2004. The Forms 941C indicated the petitioner amended its total wages for 2001 from $133,200 to $137,795.29, from $114,010,23 to $119,861.97 in 2002 and from $164,635.24 to $168,846 in tax year 2003. The Forms 941C are accompanied by an amended first quarter wage report for the respective years. In addition, the petitioner submitted a copy of the original Form 941 for the first quarter of 2003 that indicates five employees, and an amended Form 941 for the first quarter of 2003 that indicates twelve employees.

Counsel in response to the director's first request for further evidence dated August 5, 2003, also submitted amended W-2 Forms for the beneficiary. Counsel stated that the amended forms reflected the addition of a bonus given to the beneficiary. The amended W-2 records reflect that rather than the $76,000 noted on the Forms 941, the beneficiary received wages, tips and other compensation of $86,423.95 in tax year 2001. The amended W-2 reflected previously reported wages, tips and other compensation of $54,000 and amended wages, tips and other compensation of $86,385.39 in 2002. The record also contains a copy of the petitioner's 2001 and 2002 Forms 1120.

The evidence in the record of proceeding shows that the petitioner is structured as a C corporation. On the petition, the petitioner claimed to have been established in 1997, to have a gross annual income of $742,317, and to currently have twelve employees. On the Form ETA 750B, signed by the beneficiary on April 22, 2001, the beneficiary claimed to have worked for the petitioner since March 1998.

On appeal, counsel asserts that the petitioner did submit further evidence within the allotted twelve weeks, as the petitioner submitted a response to the Vermont Service Center on April 13, 2004. Counsel further asserts that the questions raised in the director's request for further evidence were answered in the petitioner's response and the only thing missing from the record was the confirmation that the amendments on the IRS 941 Forms were confirmed by IRS. Counsel states the petitioner requested further time beyond the twelve weeks only if the district director needed these documents; however the discrepancy between the number of employees on Form I-140 and the original Form 941 forms was addressed by the petitioner. Counsel states that the evidence establishes that the beneficiary was paid the proffered swage for the entire relevant time in question. Counsel states that the amendments to the W-2 Forms and the petitioner's tax returns establish that the proffered wage was paid to the beneficiary the entire time in question. Counsel states that the petitioner's accountant made some errors; however he explained these errors in the submission of evidence in the director's second request for additional evidence.

The petitioner must establish that its job offer to the beneficiary is a realistic one. Because the filing of an ETA 750 labor certification application establishes a priority date for any immigrant petition later based on the 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, Citizenship and Immigration Services (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).

The AAO notes that the director's reference to the petitioner's additional paid-in capital, on line 23 and the petitioner's retained earnings, unappropriated, on line 25 of Schedule L on its 2001 and 2002 tax returns are

irrelevant to any examination of the petitioner's net income or net current assets. Neither item, both of which are considered assets held for longer than one year, is considered when calculating the petitioner's net current assets as will be discussed further in these proceedings. The AAO also notes that [redacted]'s references to a payroll adjustment of $10,864 on the petitioner's amended 1120 Tax Return for 2001 to address the variances on the petitioner's tax returns in these two items is considered irrelevant. [redacted] comments with regard to a payroll adjustment of $10,894 being calculated for the petitioner's 2004 tax return, and the PAYCHEX correspondence that refers to adjustments to gross wages to the extent they refer to the petitioner's retained earnings and additional paid in capital are also considered irrelevant and will not be discussed further in these proceedings.

With regard to the amended Forms 941 submitted to the record on appeal, the AAO notes that the petitioner appears to have attempted to amend the forms based on the director's prior comments on the contents of the tax return. The AAO also notes that these documents only indicate that the IRS received the forms, and not that the IRS certified that the amendments were accepted. Furthermore [redacted] in his letter refers to the petitioner's amended 2001 corporate tax return, although it is not clear from this correspondence in 2004 whether the amended tax return is a prospective return, or actually exists. A petitioner may not make material changes to a petition in an effort to make a deficient petition conform to CIS requirements. *See Matter of Izummi*, 22 I&N Dec. 169, 176 (Assoc. Comm. 1988). Therefore the AAO will only examine the petitioner's original Forms 1120 submitted to the record, as well as the original Forms 941 submitted to the record. With regard to the amended W-2 Forms, the record is not clear if these documents were sent to the IRS, accepted or certified by the IRS, and when these actions took place. If the forms were amended following the submission of the I-140 petition to CIS, the AAO would consider the W-2 amendments to also be material changes. Thus, the AAO will not give any evidentiary weight to the amended Forms 941 and limited evidentiary weight to the amended W-2 forms.

The AAO notes that in his second request for further evidence dated January 20, 2004, the director requested certified copies of the petitioner's Forms 1120 for tax years 2001 and 2002; however the record does not contain the petitioner's certified tax returns. CIS requires certified copies to corroborate that the tax returns were actually processed by the IRS. The regulation at 8 C.F.R. § 204.5(g)(2) states that the director may request additional evidence in appropriate cases. Although specifically and clearly requested by the director, the petitioner declined to provide certified copies of its tax returns for 2001 ad 2002. The petitioner's failure to submit these documents cannot be excused. The failure to submit requested evidence that precludes a material line of inquiry shall be grounds for denying the petition. *See* 8 C.F.R. § 103.2(b)(14).

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 the instant case, the petitioner has established that it employed and paid the beneficiary during the relevant period of time. Based on the petitioner's original 2001 Forms 941 submitted to the record, the petitioner appears to have paid the beneficiary $76,000, which is $4,000 less than the proffered wage.[5] With regard to tax year 2002, in response to the director's first request for further evidence, the petitioner submitted amended W-2 forms for both 2001 and 2002. Neither the beneficiary's original W-2 form nor the petitioner's Forms 941 for tax year 2002 are found in the record. The beneficiary's amended 2002 W-2 form submitted in response to the director' request for further evidence indicates the beneficiary's previously reported wages, tips and other

[5] The amended W-2 forms submitted to the record also suggest that the beneficiary was paid $76,000 in tax year 2001.

compensation of $54,000 in tax year 2002. As stated previously, the AAO gives only limited evidentiary weight to the amended W-2 documents. Therefore for purposes of these proceedings, the petitioner has not provided sufficient evidentiary documentation of any wages paid to the beneficiary in tax year 2002. Therefore the petitioner therefore did not establish that it paid the beneficiary the proffered wage as of the 2001 priority date and to the present time. Thus the petitioner has to establish its ability to pay the difference between the beneficiary's actual wages and the proffered wage in tax year 2001, namely, $4,000 and has to establish its ability to pay the entire proffered wage of $80,000 in tax year 2002.

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 sales and profits and wage expense is misplaced. Showing that the petitioner's gross sales and profits 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 tax returns demonstrate the following financial information concerning the petitioner's ability to pay the proffered wage of $80,000 per year from the priority date:

- In 2001, the Form 1120 stated a net income[6] of $12,131.
- In 2002, the Form 1120 stated a net income of $46,802.

Therefore, for the years 2001 and 2002, the petitioner did have sufficient net income to pay the difference between the beneficiary's actual wages and the proffered wage in 2001; however, it did not have sufficient net income to pay the entire proffered wage of $80,000 in tax year 2002.

[6]The petitioner's net income is its taxable income before NOL deduction and special deductions, as reported on Line 28 of the Form 1120.

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.[7] 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.[8] 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 2002 were $53,086.

Therefore, for the year 2002, the petitioner did not have sufficient net current assets to pay the proffered wage of $80,000. Therefore the petitioner has not established its ability to pay the proffered wage both as of the 2001 priority date and until the beneficiary obtains lawful permanent residence, based on the beneficiary's salary, the petitioner's net income or the petitioner's net current assets.

Beyond the decision of the director, the petitioner does not appear to be providing a bona fide position to the beneficiary. 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).

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). In the instant petition, the record does not identify the petitioner's owners; however, the petitioner's tax returns, Schedules

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[7] 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.

[8] Thus, as previously stated, the petitioner' retained earnings (line 25 of Schedule L) and additional paid-in capital (line 23 of Schedule L) would not be considered when calculating the petitioner's current liabilities.

E, indicate that the beneficiary is the sole officer of the petitioner devoting 100 percent of his time to the business, and having a 33 percent ownership in the petitioner. The record contains no further information as to the petitioner's other owner(s). The AAO does not view the proffered position to be a *bona fide* job offer for the beneficiary. Therefore the petitioner has not established that it has a *bona fide* job offer for the beneficiary. Thus, for this additional reason, the petition is denied.

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.