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U.S. Citizenship and Immigration Services

PUBLIC COPY

[redacted]

AUG 12 2008

FILE: LIN 06 157 51845 Office: NEBRASKA SERVICE CENTER Date:

IN RE: Petitioner: [redacted]
Beneficiary:

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.

for

Robert P. Wiemann, Chief
Administrative Appeals Office

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

The petitioner is an insurance agency. It seeks to employ the beneficiary permanently in the United States as an administrative coordinator. As required by statute, the petition is accompanied by a Form ETA 750, Application for Alien Employment Certification, approved by the Department of Labor (DOL). The director determined that the petitioner did not have sufficient net income to pay the proffered wage as of the 2001 priority date and continuing.[1] The director also determined that a question of whether the proffered position was a bona fide job offer was raised due to the beneficiary's possible familial relationship with the petitioner's owner. The director denied the petition accordingly.

The record shows that the appeal is properly filed and 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 April 23, 2007 decision, the two issues in this case are whether or not the petitioner has the ability to pay the proffered wage as of the priority date and to the present, and whether a familial relationship between the beneficiary and the petitioner's owner would negate the proffered position being a bona fide job offer.

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 Immigration and Nationality Act (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 either 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 AAO notes that the director appears to have identified the petitioner as a corporation in tax year 2001 and 2002. The record indicates the petitioner was a sole proprietor as of the April 30, 2001 priority date and continuing through tax years 2002,2003, 2004 and the first months of tax year 2005. As a sole proprietor the petitioner has to establish it has sufficient adjusted gross income to pay the proffered wage and its household monthly or yearly expenses. The AAO will address this issue more fully further in these proceedings.

§ 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 30, 2001. The proffered wage as stated on the Form ETA 750 is $21.07 an hour, or $43,825.60 per year. The Form ETA 750 states that the position requires a four-year bachelor's degree and two years of work experience in the proffered position. Under section 15 on the Form ETA 750, it states a bachelor degree or two years of progressively responsible full time administrative or technical experience, as well as experience in Microsoft Excel, Microsoft WORD and Microsoft Access to process policies and provide correspondence with the customers.

The AAO maintains plenary power to review each appeal on a de novo basis. 5 U.S.C. § 557(b) ("On appeal from or review of the initial decision, the agency has all the powers which it would have in making the initial decision except as it may limit the issues on notice or by rule."); *see also, Janka v. U.S. Dept. of Transp.*, NTSB, 925 F.2d 1147, 1149 (9th Cir. 1991). The AAO's de novo authority has been long recognized by the federal courts. *See, e.g. Dor v. INS*, 891 F.2d 997, 1002 n. 9 (2d Cir. 1989).

The AAO considers all pertinent evidence in the record, including new evidence properly submitted upon appeal.[2] On appeal counsel submits a brief and the following evidence:

> A copy of the beneficiary's IRS Form 1099-MISC, for tax year 2001. This document indicates the petitioner paid the beneficiary $7,562 in tax year 2001;
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> A copy of an account statement for a seven month Classic CD with CALFED, a California savings bank, in the name of the petitioner's owner. This document indicates that on February 20 2001, the certificate of deposit was worth $17,209.54;
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> A copy of a document from the Internal Revenue Service dated May 2, 2007, requesting a Wage and Income transcript for the beneficiary[3] for December 2001. This document states that there is no record of a return filed;
>
> A copy of an IRS-generated report for the beneficiary entitled Wage and Income Transcript, which notes the beneficiary's social security number and the tax period request as December 2002. This document indicates that based on a Form 1099-MISC, the petitioner paid the beneficiary $37,500 in non-employee compensation in tax year 2002;
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> Correspondence between the petitioner and the state of California Employment Development Department (EDD) with regard to the EDD's determination on the prevailing wage; and

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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] The AAO notes that the document identifies the beneficiary by means of his Social Security number.

> A copy of the petitioner's Reduction in Recruitment petition for the proffered position, the petitioner's notice of filing, the petitioner's description of where he advertised the position, and the results of the search. Correspondence also includes the responses from five individuals with their qualifications for the positions and the reasons why none of the five individuals were selected for the administrative coordinator position.

With the initial petition, counsel submitted the petitioner's 1120-A, U.S. Corporation Short Form Income Tax Return, for tax year 2005. This document indicated the petitioner had net income of $13,468 in 2005. Counsel also submitted the sole proprietor's Forms 1040, for tax years 2002 through 2004, while the petitioner was structured as a sole proprietorship. Counsel also submitted the beneficiary's pay stub dated April 8, 2006 that indicated he earned $2,200 for an unspecified period of time, and the beneficiary's Forms 1040 for tax years 2002, 2003, and 2004. The record also contains a letter written by the petitioner's owner/manager dated March 31, 2006 that states the beneficiary had worked for the petitioner for a period of two and a half years as a supervisor of sales and marketing starting in 2003. [redacted] noted that the beneficiary's main duties were directing the sales and marketing, and being responsible for network installation and troubleshooting in a LAN environment.

In response to the director's request for further evidence (RFE) dated November 16, 2006, counsel submitted the petitioner's 2001 tax return, and resubmitted the petitioner's tax returns for tax years 2002 through 2005. Counsel also submits the beneficiary's Form 1099-MISC for tax years 2003, 2004, and 2005 that indicate the petitioner paid the beneficiary non-employee compensation of $42,500 in tax year 2003, $44,600 in tax year 2004, and $21,500 in tax year 2005. Counsel also submits a copy of the beneficiary's Forms 1040 for tax year 2001, and resubmits the beneficiary's tax returns for tax years 2002 to 2005. Counsel stated that the beneficiary was unable to find his Forms 1099-MISC for tax years 2001 and 2002, but they could be furnished at a later date if Citizenship and Immigration Services (CIS) needed the documents. The record does not contain any other evidence relevant to the petitioner's ability to pay the wage.

The evidence in the record of proceeding shows that the petitioner was structured as a sole proprietorship in tax years 2001 through 2004, and that as of March 2005, the petitioner is structured as a corporation.[4] On the petition, the petitioner claimed to have been established in 1997, to have a gross annual income of $314,000, a net annual income of $85,000 and to currently employ four workers. On the Form ETA 750B, signed by the beneficiary on June 4, 2004, the beneficiary claimed to have worked for the petitioner from November 2003 to June 2004.[5]

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

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[4] It is noted that in his RFE dated November 16, 2006, the director did not identify the petitioner as a sole proprietor in tax years 2001 to 2004 and, thus, did not request information on the sole proprietor's household expenses.

[5] The petitioner, in its letter of work experience, also stated that the beneficiary began working for it in 2003, but indicated that the beneficiary continued to work for it past the June date indicated by the beneficiary. Since the petitioner also submitted the beneficiary's Forms 1099-MISC for the tax years following 2003, the AAO accepts that the beneficiary worked for the petitioner past the June 2004 date noted on the ETA 750, Part B.

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 the instant case, the petitioner submitted the beneficiary's Forms 1099-MISC for tax years 2001, 2003 2004, and 2005, and an IRS-generated report on the beneficiary's Form 1099-MISC for tax year 2002. These documents establish that the petitioner compensated the beneficiary the following amounts: $7,562 in 2001; $37,500 in 2002; $42,500 in 2003; $44,600 in 2004; and $21,500 in 2005. In tax year 2004, the petitioner provided compensation greater than the proffered wage of $43,825.60 and, thus, established its ability to pay the proffered wage in 2004. With regard to the year in which the priority date was established, 2001, and tax years 2002, 2003, and 2005, the petitioner has not established that it employed and paid the beneficiary the full proffered wage from the priority date in 2001 onwards.[6]

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 supported by federal case law. *See 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).

Due to the change in the petitioner's business structure in 2005, the AAO will first examine the petitioner's ability to pay the proffered wage as of the 2001 priority date through tax year 2004, while structured as a sole proprietorship, and then will examine the petitioner's ability to pay the proffered wage in tax year 2005 after restructuring as a corporation.

During tax years 2001 through 2004, the petitioner was a sole proprietorship, a business in which one person operates the business in his or her personal capacity. Black's Law Dictionary 1398 (7th Ed. 1999). Unlike a corporation, a sole proprietorship does not exist as an entity apart from the individual owner. *See Matter of United Investment Group*, 19 I&N Dec. 248, 250 (Comm. 1984). Therefore the sole proprietor's adjusted gross income, assets and personal liabilities are also considered as part of the petitioner's ability to pay. Sole proprietors report income and expenses from their businesses on their individual (Form 1040) federal tax return each year. The business-related income and expenses are reported on Schedule C and are carried forward to the first page of the tax return. Sole proprietors must show that they can cover their existing

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[6] The AAO, while using the submitted Forms 1099-MISC to establish the beneficiary's compensation, also notes that the beneficiary's Forms 1040, Schedule C, indicate that his compensation was based on insurance sales, which appear to be reported under the petitioner's commissions and fees expenses, listed on the sole proprietor's Schedules C for tax years 2001 through 2004. These figures, while not the exact figures reported on the Forms 1109-MISC, also corroborate that the beneficiary received compensation from the petitioner.

business expenses as well as pay the proffered wage out of their adjusted gross income or other available funds. In addition, sole proprietors must show that they can sustain themselves and their dependents. *See Ubeda v. Palmer*, 539 F. Supp. 647 (N.D. Ill. 1982), *aff'd*, 703 F.2d 571 (7th Cir. 1983).

In *Ubeda*, 539 F. Supp. at 650, the court concluded that it was highly unlikely that a petitioning entity structured as a sole proprietorship could support himself, his spouse and five dependents on a gross income of slightly more than $20,000 where the beneficiary's proposed salary was $6,000 or approximately thirty percent (30%) of the petitioner's gross income.

In the instant case, the sole proprietor in tax years 2001 to 2004 supports a family of five individuals. The tax returns reflect the following information for the following years:

	2001	2002	2003
Proprietor's adjusted gross income (Form 1040)	$ 31,318	$ 35,797	$ 33,869
Petitioner's gross receipts or sales (Schedule C)	$ 116,505	$ 174,059	$ 201,263
Petitioner's wages paid (Schedule C)	$ 0	$ 0	$ 0
Commissions and Fees Paid	$ 32,812	$ 82,133	$ 89,859
Beneficiary's Compensation (Form 1099-MISC)	7,562	$ 37,500	$ 42,500
Petitioner's net profit from business (Schedule C)	$ 34,031	$ 40,778	$ 40,291

	2004
Proprietor's adjusted gross income (Form 1040)	$ 64,769
Petitioner's gross receipts or sales (Schedule C)	$ 235,635
Petitioner's wages paid (Schedule C)	$ 0
Commissions and Fees Paid	$ 96,366
Beneficiary's Compensation (Form 1099-MISC)	$ 44,600
Petitioner's net profit from business (Schedule C)	$ 73,610

In the priority year 2001, the sole proprietorship's adjusted gross income was not sufficient to cover $36,263, the difference between the beneficiary's compensation of $7,562 and the proffered wage of $43,825.60. In 2002 and 2003, the sole proprietor's adjusted gross income was sufficient to cover the difference between the beneficiary's compensation of $37,500 in 2002 and $42,500 in 2003, and the proffered wage of $43,825.60. As stated previously, the beneficiary's compensation in tax year 2004 was greater than the proffered wage. However, the sole proprietor also has to establish that he can both pay the difference between the beneficiary's compensation and the proffered wage in all years from the 2001 priority date through 2003, and pay his respective yearly household expenses in those years.

As stated previously, the director in his RFE did not request nor did the petitioner provide an itemized list of its monthly household expenses that covered automobile payments, food, utility bills, schooling, clothing, any mortgage or property tax, expenses, among other items. The AAO further notes that none of the sole proprietor's federal tax returns include Schedules A, Itemized Deductions, and the petitioner's tax returns do not list any deductions, such as home mortgage interest payments, although these payments are considered a household expense. Thus, the record contains no further information with regard to the sole proprietor's household expenses.[7]

[7] Since the petitioner was restructured as a corporation in tax year 2005, the petitioner does not have to

Therefore, from the date the Form ETA 750 was accepted by the Department of Labor through tax year 2004, while the petitioner was structured as a sole proprietorship, the petitioner has not established that the sole proprietor had the continuing ability to pay the beneficiary the difference between actual wages and the proffered wage and pay his monthly household expenses, out of his adjusted gross income. As the petitioner is unable to demonstrate the ability to pay the proffered wage in 2001 through the sole proprietor's adjusted gross income (or in 2005 for the reasons discussed below), we need not remand the matter for a request for the sole proprietor's monthly household expenses.

The AAO notes that on appeal counsel submits a 2001 statement for the sole proprietor's Seven Month CD with CALFED. While certificates of deposit are considered assets that are readily available (although with financial penalties for early withdrawal) to pay the proffered wage, the $17,209.54 balance in the CD combined with the beneficiary's reported compensation of $7,562 in 2001, would only cover $24,771.54 of the proffered wage of $43,825.60. The sole proprietor would have to apply $19,054.06 of its 2001 adjusted gross income of $34,031 to establish its ability to pay the proffered wage. It does not appear reasonable that the sole proprietor could support a family of five individuals on its remaining adjusted gross income of $14,976.94. Thus, the petitioner did not establish its ability to pay the beneficiary's proffered wage and its monthly household expenses as of the 2001 priority date year based on the sole proprietor's additional financial resources. Further, the petitioner provided no further information with regard to additional financial resources that could be utilized to establish further the sole proprietor's ability to pay the difference between the beneficiary's actual wages and the proffered wage, and his household expenses in tax years 2002 and 2003.

With regard to tax year 2005, the petitioner restructured itself as a corporation. As previously stated, 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 supported by federal case law. *See Elatos Restaurant Corp. v. Sava*, 632 F. Supp. at 1054 (citing *Tongatapu Woodcraft Hawaii, Ltd. v. Feldman*, 736 F.2d at 1305); *see also Chi-Feng Chang v. Thornburgh*, 719 F. Supp. at 532; *K.C.P. Food Co., Inc. v. Sava*, 623 F. Supp. at 1080; *Ubeda v. Palmer*, 539 F. Supp. at 647, *aff'd*, 703 F.2d at 571.

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.

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establish its ability to pay the proffered wage and the owner's household expenses in tax year 2005.

(Emphasis in original.) *Chi-Feng,* 719 F. Supp. at 537.

The corporate tax return demonstrates the following financial information concerning the petitioner's ability to pay the proffered wage of $43,825.60 in 2005:

- Form 1120 stated a net income[8] of $13,468.

Thus, the petitioner does not have sufficient net income in tax year 2005 to pay the difference between the beneficiary's actual compensation of $21,500 and the proffered wage of $43,825.60, namely, $22,325.60.

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.[9] On Form 1120A, a corporation's year-end current assets are shown on Part III, Balance Sheet Per Books, lines 1(b) through 6(b). Its year-end current liabilities are shown on lines 13(b) through 14(b). If a corporation's end-of-year net current assets are equal to or greater than the proffered wage, the petitioner is expected to be able to pay the proffered wage out of those net current assets. The petitioner's Form 1120-A for tax year 2005, Part III, does not reflect any information with regard to the petitioner's current assets or liabilities. Therefore the AAO cannot examine the petitioner's ability to pay the proffered wage based on its net current assets for tax year 2005.

Therefore, from the date the Form ETA 750 was accepted for processing by the U. S. Department of Labor, the petitioner had not established that it had the continuing ability to pay the proffered wage as of the 2001 priority date through an examination of wages paid to the beneficiary, or its net income or net current assets, except for tax year 2004.

The AAO will now address the director's second issue, with regard to the beneficiary's relationship to the petitioner's owner, and whether the petitioner has a bona fide job opportunity.

The director in his decision stated that the record did not indicate that the Department of Labor (DOL) inquired during the labor certification process about the beneficiary's possible familial relationship to the petitioner's owner, who has the same last name. The director did not identify any purported or actual relationship between the beneficiary and the petitioner's owner.

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

[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 as accounts payable, short-term notes payable, and accrued expenses (such as taxes and salaries). *Id.* at 118.

On appeal, counsel states that the director cited *Matter of Treasure Craft of California,* 14 I&N Dec. 190, 194 (Reg. Comm. 1972) in his denial. Counsel examines the circumstances of the instant beneficiary and the beneficiary in the *Treasure Craft* decision. While the decision does state that a petitioner's statement regarding whether the beneficiary will displace U.S. workers must be given "due consideration," that issue is now under the jurisdiction of the Department of Labor.

Counsel states that unlike the beneficiary in *Treasure Craft,* the beneficiary's position with the petitioner did not provide him with further day by day on the job repetitious experience thus giving him a higher degree of proficiency. Counsel states that the beneficiary possessed sufficient education and experience before he had even started working for the petitioner based on his bachelor's degree in science from California State University in 1998. Counsel also notes that all the prospective applicants who applied for the proffered position lacked the basic skills for adequate performance in the job.

With regard to the DOL's awareness of the beneficiary's relationship to the petitioner's owner, counsel states that it was highly unlikely that DOL would have missed the evidence showing a familial relationship and if the certifying officer had felt that the familial relationship has tainted the process of labor certification, he would have raised such concerns before issuing the labor certification. Counsel enumerates the documents or correspondence signed by the petitioner's owner. Counsel states that it would have been impossible for the certifying officer not to notice that the last name of the sole proprietor was the same as the beneficiary.

Counsel then notes that the beneficiary performed a lawful, fair, free of bias and impartial recruitment to satisfy the requirements of the instant petition. Counsel asserts that every applicant who applied for the proffered position was contacted and either interviewed or notified by certified return receipt mail of possible interview times. Counsel refers to the copy of the labor certification petition and the recruitment report that was submitted to DOL.

As stated previously, the director did not identify any specific relationship between the beneficiary and the petitioner's owner in his decision. Counsel also does not identify any particular relationship between the beneficiary and the petitioner's owner. The record reflects that the beneficiary and the petitioner's owner share the same surname.

The DOL certified the Form ETA 750. CIS does have the authority to invalidate the certification where there is evidence of fraud or willful misrepresentation of a material fact involving the labor certification application. 20 C.F.R. § 656.30(d). At issue, then, is whether the record contains any evidence of fraud or willful misrepresentation by the employer or the beneficiary in proceedings before the DOL.

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 Sunmart 374*, 00-INA-93 (BALCA May 15, 2000). Under 20 C.F.R. §§ 626.20(c)(8) and 656.3, however, 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). As acknowledged by the director, the record lacks evidence that DOL inquired as to any family relationship. Unlike the situation in *Matter of Silver Dragon Chinese Restaurant,* 19 I&N Dec. 401 (Comm. 1986), the beneficiary has no known ownership interest in the petitioner such that the petitioner's assertion that the beneficiary will report to the "manager" can be considered a misrepresentation.

Beyond the issue of similar last names, the exact relationship between the beneficiary and the petitioner's owner is not established in the record. The record does not provide sufficient evidence to support a finding of misrepresentation before DOL that could support the invalidation of the labor certification application by CIS. Thus the AAO withdraws this part of the director's decision. Nevertheless, the petitioner did not establish its ability to pay the proffered wage as of the 2001 priority date to the present. For this reason, the petition is denied.

The burden of proof in these proceedings rests solely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. The petitioner has not met that burden.

ORDER: The appeal is dismissed.