U.S. Department of Homeland Security
U.S. Citizenship and Immigration Services
Office of Administrative Appeals MS 2090
Washington, DC 20529-2090

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U.S. Citizenship and Immigration Services

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[redacted]

FILE: [redacted] Office: NEBRASKA SERVICE CENTER Date: APR 23 2009

LIN 07 154 52895

IN RE: Petitioner: [redacted]
Beneficiary:

PETITION: Immigrant Petition for Other Worker Pursuant to § 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.

If you believe the law was inappropriately applied or you have additional information that you wish to have considered, you may file a motion to reconsider or a motion to reopen. Please refer to 8 C.F.R. § 103.5 for the specific requirements. All motions must be submitted to the office that originally decided your case by filing a Form I-290B, Notice of Appeal or Motion, with a fee of $585. Any motion must be filed within 30 days of the decision that the motion seeks to reconsider or reopen, as required by 8 C.F.R. § 103.5(a)(1)(i).

John F. Grissom
Acting 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 a residential care home for the elderly. It seeks to employ the beneficiary permanently in the United States as a personal and home care aide. As required by statute, a Form ETA 750, Application for Alien Employment Certification approved by the Department of Labor, accompanied the petition. 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 and that the beneficiary met the requirements of the labor certification. The director denied the petition accordingly.

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 this decision. Further elaboration of the procedural history will be made only as necessary.

As set forth in the director's original August 7, 2007, decision, the issues in this case are 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 and whether or not the beneficiary met the requirements of the labor certification.

Section 203(b)(3)(A)(iii) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(3)(A)(iii), 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 unskilled labor, not of a temporary or seasonal 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 either in the form of copies of annual reports, federal tax returns, or audited financial statements. In a case where the prospective United States employer employs 100 or more workers, the director may accept a statement from a financial officer of the organization which establishes the prospective employer's ability to pay the proffered wage. In appropriate cases, additional evidence, such as profit/loss statements, bank account records, or personnel records, may be submitted by the petitioner or requested by [U.S. Citizenship and Immigration Services (USCIS)].

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 was accepted for processing by any office within the employment system of the Department of Labor. *See* 8 C.F.R. § 204.5(d). The priority date in the instant petition is November 16, 2001. The proffered wage as stated on the Form ETA 750 is $7.76 per hour or $16,140.80 annually.

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.[1]

Relevant evidence submitted on appeal includes a request for appointment of agent and mail forwarding, an authorization for assistance/self representation,[2] a financial analysis from the petitioner's

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[1] 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).

[2] On appeal, the petitioner requests the following:

> This is to request [USCIS] to kindly allow us to appoint an agent [redacted] to receive correspondence from the USCIS at:
>
> [redacted]
>
> Forwarding your correspondence to [redacted] office will achieve the following:
>
> 1) Avoid misdelivery of important USCIS mail which result in delay;
> 2) Avoid complete loss of mail;
> 3) Prevent denial or abandonment of the petition which are the consequences of untimely response to your correspondence;
> 4) Maintain the confidentiality of our petition.
>
> Please grant our request [sic] your kind consideration.

The regulation at 8 C.F.R. § 292.1 provides general representation provisions in immigration matters and lists following six categories of representatives who may represent a person entitled to representation: (1) Attorneys in the United States, (2) Law students and law graduates not yet admitted to the bar, (3) Reputable individuals, (4) Accredited representatives, (5) Accredited officials, and (6) attorneys outside the United States. However, the regulation governing representation in filing

certified public accountant (CPA) with a listing of the sole proprietor's personal assets, and a letter, dated August 28, 2007, from the petitioner explaining the labor certification requirement that the beneficiary have the legal right to work. Other relevant evidence includes copies of the sole proprietor's 2001 through 2006 Forms 1040, U.S. Individual Income Tax Returns, including Schedule C, Profit or Loss from Business, a copy of the sole proprietor's bank statement, dated June 27, 2007, and copies of the 2002 through 2006 Forms W-2, Wage and Tax Statements, issued by the petitioner on behalf of the beneficiary. The record does not contain any other evidence relevant to the petitioner's ability to pay the proffered wage or to the beneficiary's legal right to work.

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immigration petitions and/or applications with USCIS is the regulation at 8 C.F.R. § 103.2(a)(3), which provides in pertinent part that:

> (3) *Representation.* An applicant or petitioner may be represented by an attorney in the United States, as defined in § 1.1(f) of this chapter, by an attorney outside the United States as defined in § 292.1(a)(6) of this chapter, or by an accredited representative as defined in § 292.1(a)(4) of this chapter.

Therefore, it is clear that the regulation at 8 C.F.R. § 103.2(a)(3) limits the three categories of representatives, that is, attorneys in the United States, attorneys outside the United States and accredited representatives only in representing applicants or petitioners in filing immigration applications or petitions before USCIS with properly executed Form G-28, while the regulation at 8 C.F.R. § 292.1 allows all six groups of representatives to assist applicants or petitioners with non-filing immigration matters. In the instant case, [redacted] is not an attorney in or outside the United States, nor an accredited representative as defined in § 292.1(a)(4). Therefore, Ms. [redacted] is not authorized by any regulations to represent a petitioner in filing an I-140 immigrant petition and/or an appeal from the denial of an I-140 petition.

The other categories listed in 8 C.F.R. § 292.1 (law students, law grads, reputable individuals) may ONLY appear in person with an applicant or petitioner at an interview literally before, as in the presence of, a Department of Home Security (DHS) official who must make a discretionary decision to permit them to appear after conducting an inquiry as to the requirements in section 292.1. The regulation at 8 C.F.R. § specifically requires that a reputable individual must get a permission for his appearance from the official before whom he wished to appear. In the instant case, the AAO cannot permit [redacted] appearance as a reputable individual to represent the petitioner or receive direct information from the AAO on this appeal. The regulation set forth the following terms and conditions for reputable individuals' representation: he/she is appearing on an individual case basis, at the request of the person entitled to representation; he/she is appearing without direct or indirect remuneration and filed a written declaration to that effect; and he/she has a pre-existing relationship or connection with the person entitled to representation. The record shows that Ms. [redacted] has represented many petitioners and applicants in filing petitions and applications. It is unlikely that [redacted] met all the regulatory-preset terms and conditions in each of her numerous representations despite her assertions and documentation in the instant case.

The sole proprietor's 2001 through 2006 Forms 1040 reflect adjusted gross incomes of $39,351, $6,197, -$20,343, $22,206, -$30,125, and -$29,989, respectively. The 2002 through 2006 Forms W-2, issued by the petitioner on behalf of the beneficiary, reflect wages paid to the beneficiary of $13,580, $14,700, $14,400, $14,000, and $14,400, respectively.

The sole proprietor's bank statement reflects a balance of $2,502.47 in her Classic Private Reserve 50+ and a balance of $38,369.95 in her certificate of deposit as of June 27, 2007.

The letter, date August 28, 2007, from the sole proprietor states:

> In the Notice of Decision dated August 7, 2007, the Service is requesting evidence that the beneficiary has a legal right to work at the time the application was filed as stated in the special requirement. The beneficiary at that time was not in legal status. The requirement of having the legal right to work is intended for U.S. worker who will apply for the job.

The sole proprietor's personal assets include cash (certificate of deposit) of $37,000 and $10,000 (money market); pension income of $2,500 monthly (Bank of America) and $317 monthly (U.S. Postal Pension); IRA of $70,000; the petitioner's building and land of $950,000; and the sole proprietor's personal residence of $450,000.

The petitioner's assets include cash (savings) of $6,000 and $2,000 (checking) and monthly income of $12,500.

On appeal, the petitioner's financial analysis, as submitted by the sole proprietor's CPA, attempts to explain the petitioner's ability to pay the proffered wage of $16,140.80 through the wages paid to the beneficiary, its depreciation, and additional incomes.

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, USCIS 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, USCIS will first examine whether the petitioner employed the beneficiary at the time the priority date was established. If the petitioner establishes by documentary evidence that it employed the beneficiary at a salary equal to or greater than the proffered wage, this evidence will be considered *prima facie* proof of the petitioner's ability

to pay the proffered wage. In the instant case, on the Form ETA 750, signed by the beneficiary on November 5, 2001, the beneficiary does not claim the petitioner as a past or present employer. However, the petitioner has submitted the 2002 through 2006 Forms W-2, issued by the petitioner on behalf of the beneficiary, to show that the petitioner employed the beneficiary in those years. Therefore, the petitioner has established that it employed the beneficiary in 2002 through 2006.

Since the petitioner did not employ the beneficiary in 2001, it is obligated to show that it had sufficient funds to pay the entire proffered wage of $16,140.80. In addition, it is obligated to show that it had sufficient funds to pay the difference between the proffered wage of $16,140.80 and the actual wages paid to the beneficiary in 2002 through 2006 of $13,580, $14,700, $14,400, $14,400, and $14,400, respectively. Those differences are $2,560.80, $1,440.80, $1,740.80, $1,740.80, and $1,740.80, respectively.

As an alternative means of determining the petitioner's ability to pay the proffered wage, USCIS will next examine the petitioner's net income figure as 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 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. Tex. 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). In *K.C.P. Food Co., Inc.,* the court held that USCIS 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. 623 F.Supp at 1084. The court specifically rejected the argument that USCIS should have considered income before expenses were paid rather than net income. Finally, there is no precedent that would allow the petitioner to add back to net cash the depreciation expense charged for the year. *See Elatos Restaurant Corp.*, 632 F. Supp. at 1054. 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. [USCIS] 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 Chang,* 719 F. Supp. at 537.

The petitioner is organized as a sole proprietorship. A sole proprietorship is 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 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. *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 unlikely that a petitioning entity structured as a sole proprietorship could support himself, his spouse and five dependents on a gross income of approximately $20,000 where the beneficiary's proposed salary was $6,000 (or approximately thirty percent of the petitioner's gross income).

In the instant case, the sole proprietor supported a family of two in 2001 through 2006. The sole proprietor's adjusted gross incomes in 2001 through 2006 were $39,351, $6,197, -$20,343, $22,206, -$30,125, and -$29,989, respectively. Although it appears that the sole proprietor may have had sufficient funds to pay the difference of $2,560.80 in 2002 and the difference of $1,740.80 in 2004 between the proffered wage of $16,140.80 and the actual wages paid to the beneficiary of $13,580 in 2002 and $14,400 in 2004 and the entire proffered wage of $16,140.80 in 2001 from her adjusted gross income, the petitioner failed to provide a list of the sole proprietor's monthly personal recurring expenses.[3] Therefore, the AAO is unable to determine if the sole proprietor had sufficient funds to pay the proffered wage of $16,140.80 and support a family of two in 2001, 2002, and 2004. In addition, the petitioner could not have paid the difference of $1,440.80 in 2003, $1,740.80 in 2005 or $1,740.80 in 2006 between the proffered wage of $16,140.80 and the actual wages paid to the beneficiary of $14,700 in 2003, $14,400 in 2005, and $14,400 in 2006 from her adjusted gross income and support a family of two in 2003, 2005, and 2006. Thus, the petitioner has not established its ability to pay the proffered wage from the priority date and continuing to the present.

On appeal, the sole proprietor claims that the petitioner has established its ability to pay the proffered wage of $16,140.80 based on the wages paid to the beneficiary, depreciation, and its additional income.

The sole proprietor is mistaken. The sole proprietor's argument that the petitioner's depreciation deduction should be included in the calculation of its ability to pay the proffered wage is unconvincing.

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[3] It is noted that the director failed to request the sole proprietor's monthly personal recurring expenses in his request for evidence (RFE). However, the director did explain in his decision that the sole proprietor's monthly expenses were not submitted and "since the record does not include evidence of the sole proprietor's personal expenses, assets or liabilities, the record does not establish the petitioner's ability to pay."

A depreciation deduction does not require or represent a specific cash expenditure during the year claimed. It is a systematic allocation of the cost of a tangible long-term asset. It may be taken to represent the diminution in value of buildings and equipment, or to represent the accumulation of funds necessary to replace perishable equipment and buildings. But the cost of equipment and buildings and the value lost as they deteriorate is an actual expense of doing business, whether it is spread over more years or concentrated into fewer.

While the expense does not require or represent the current use of cash, neither is it available to pay wages. No precedent exists that would allow the petitioner to add its depreciation deduction to the amount available to pay the proffered wage. *Chi-Feng Chang v. Thornburgh*, 719 F.Supp. 532 (N.D. Texas 1989). *See also Elatos Restaurant Corp. v. Sava*, 632 F.Supp. 1049 (S.D.N.Y. 1985). The petitioner's election of accounting and depreciation methods accords a specific amount of depreciation expense to each given year. The petitioner may not now shift that expense to some other year as convenient to its present purpose, nor treat it as a fund available to pay the proffered wage. Further, amounts spent on long-term tangible assets are a real expense, however allocated. Therefore, the AAO will not consider the petitioner's depreciation when determining the petitioner's ability to pay the proffered wage.

On appeal, the sole proprietor's CPA claims that the petitioner's additional income should be considered when determining its ability to pay the proffered wage of $16,140.80. However, the additional income the CPA refers to is included in the calculation of the sole proprietor's adjusted gross income and may not be added again to the adjusted gross income in order to pay the proffered wage.

The CPA did provide a statement of the sole proprietor's personal assets. The statement lists that the sole proprietor had a certificate of deposit of $37,000, a money market fund of $10,000, pension income from Bank of America of $2,500, a pension income from the U.S. Postal Pension of $317, an IRA of $70,000, the petitioner's building and land valued at $950,000, and the sole proprietor's personal residence valued at $450,000. However, the sole proprietor's statement did not attach any documents to evidence the claims, or valuations of assets. Further, the sole proprietor did not provide any estimate of her family's regular and ongoing expenses to determine the amount she would need to support herself and her family. Going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. *Matter of Soffici*, 22 I&N Dec. 158, 165 (Comm. 1998) (citing *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm. 1972)). In addition, in most cases, the real property at the petitioner's premises are considered to be long-term assets (having a life longer than one year) and are not considered to be readily available to pay the proffered wage to the beneficiary as they are not easily converted into cash. Therefore, the AAO will not usually consider the real property of the petitioner's premises or the sole proprietor's personal residence when determining the petitioner's ability to pay the proffered wage of $16,140.80.

After a review of the record, it is concluded that the petitioner has not established its ability to pay the salary offered as of the priority date of the petition and continuing until the beneficiary obtains lawful permanent residence.

The second issue in this case is whether or not the beneficiary meets the requirements of the labor certification.

The regulation at 8 C.F.R. § 204.5(l)(3) states, in pertinent part:

> (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.
>
> *(D) Other workers.* If the petition is for an unskilled (other) worker, it must be accompanied by evidence that the alien meets any educational, training and experience, and other requirements of the labor certification.

To be eligible for approval, a beneficiary must have the education and experience specified on the labor certification as of the petition's filing date. The filing date of the petition is the initial receipt in the Department of Labor's employment service system. *Matter of Wing's Tea House,* 16 I&N 158 (Act. Reg. Comm. 1977). In this case, that date is November 16, 2001.

USCIS must look to the job offer portion of the labor certification to determine the required qualifications for the position. USCIS may not ignore a term of the labor certification, nor may it impose additional requirements. *See Matter of Silver Dragon Chinese Restaurant,* 19 I&N Dec. 401, 406 (Comm. 1986). *See also, Mandany v. Smith,* 696 F.2d 1008, (D.C. Cir. 1983); *K.R.K. Irvine, Inc. v. Landon,* 699 F.2d 1006 (9th Cir. 1983); *Stewart Infra-Red Commissary of Massachusetts, Inc. v. Coomey,* 661 F.2d 1 (1st Cir. 1981).

The approved alien labor certification, "Offer of Employment," (Form ETA-750 Part A) describes the terms and conditions of the job offered. Block 14 and Block 15, which should be read as a whole, set forth the educational, training, and experience requirements for applicants. In this case, Block 14 requires that the beneficiary must possess four years of high school. Block 15 states:

> Employer will provide on the job training. If hired must speak, read and write English; must know food nutrition, food preparation, food storage, menu planning; must obtain first aid, Health Screening Report issued by the State Health and Welfare Agency; must be willing to be fingerprinted to be submitted to the Department of Justice; must have legal right to work; live on premises; must be available on call 24 hours per day, overtime will be paid. Employer will pay in accordance with State Rules and Regulations.

Based on certified Block 15 "Other Special Requirements" set forth above, the applicant for the petitioner's position of personal and home care aide must have four years of high school; must speak, read, and write English; must know food nutrition, food preparation, food storage, menu planning; and must have the legal right to work.

In the instant case, the petitioner did not submit any evidence that the beneficiary met any of the requirements of Block 15 at the time of the priority date.

In his decision, the director noted that "the beneficiary entered the United States on October 24, 2001 as a visitor for pleasure. When the application for labor certification was filed on November 16, 2001, the beneficiary was still in that valid nonimmigrant status, but had no legal authorization for employment. Therefore, she did not meet the requirement of the labor certification that she have a legal right to work at the time the application was filed."

On appeal, the petitioner states that "the beneficiary at that time was not in legal status. The requirement of having the legal right to work is intended for U.S. worker who will apply for the job."[4]

[4] The AAO notes that the petitioner's owner and the beneficiary are related. 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 person applying for a position owns the petitioner, 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 *Matter of Silver Dragon Chinese Restaurant,* 19 I&N Dec. 401 (Comm. 1986), the commissioner noted that while it is not an automatic disqualification for an alien beneficiary to have an interest in a petitioning business, if the alien beneficiary's true relationship to the petitioning business is not apparent in the labor certification proceedings, it causes the certifying officer to fail to examine more carefully whether the position was clearly open to qualified U.S. workers and whether U.S. workers were rejected solely for lawful job-related reasons. That case relied upon a Department of Labor advisory opinion in invalidating the labor certification. The regulation at 20 C.F.R. § 656.30(d) provides that [USCIS], the Department of State or a court may invalidate a labor certification upon a determination of fraud or willful misrepresentation of a material fact involving the application for labor certification.

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

Given that the beneficiary appears to be related to the owner of the petitioner, the facts of the instant case suggest that this may too be the functional equivalent of self-employment. The observations noted above suggest that further investigation, including consultation with the Department of Labor may be warranted, in order to determine whether any family, business, or personal relationship

Simply asserting that the reported legal right to work requirement was intended for U.S. workers does not qualify as independent and objective evidence. Going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. *Matter of Soffici*, 22 I&N Dec. 158, 165 (Comm. 1998).[5] The petitioner's actual minimum requirements could have been clarified or changed before the Form ETA 750 was certified by the Department of Labor, but was not done so in this case. A petitioner must establish the beneficiary's eligibility for the visa classification at the time of filing; a petition cannot be approved at a future date after eligibility is established under a new set of facts. *Matter of Katigbak,* 14 I&N Dec. 45, 49 (Comm. 1971). As the petitioner listed the applicant must have the right to work, the beneficiary would need to show this at the time of the priority date. The petitioner must show that the job offer is realistic from the time of the priority date. Again, USCIS may not ignore a term of the labor certification, nor may it impose additional requirements. *See Matter of Silver Dragon Chinese Restaurant*, 19 I&N Dec. 401, 406 (Comm. 1986). *See also*, *Mandany v. Smith*, 696 F.2d 1008, (D.C. Cir. 1983); *K.R.K. Irvine, Inc. v. Landon*, 699 F.2d 1006 (9th Cir. 1983); *Stewart Infra-Red Commissary of Massachusetts, Inc. v. Coomey*, 661 F.2d 1 (1st Cir. 1981).

The 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.

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between the petitioner and the beneficiary represents an impediment to the approval of any employment-based visa petition filed by this petitioner on behalf of this beneficiary. If the petitioner failed to disclose the relationship to DOL, then the bona fides of the petition may be in question. Because this ground was not included as a basis of the decision of denial, however, this decision will not be based, even in part, on this ground. If the petitioner seeks to overcome this decision on motion, however, it should completely address this issue.

[5] Further, we note that a U.S. worker would have the right to work so that the petitioner's argument is not clear.