(b)(6)

U.S. Department of Homeland Security
U.S. Citizenship and Immigration Services
Administrative Appeals Office (AAO)
20 Massachusetts Ave., N.W., MS 2090
Washington, DC 20529-2090

U.S. Citizenship and Immigration Services

DATE: JUN 25 2012 OFFICE: NEBRASKA SERVICE CENTER FILE:

IN RE: Petitioner:

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:

INSTRUCTIONS:

Enclosed please find the decision of the Administrative Appeals Office in your case. All of the documents related to this matter have been returned to the office that originally decided your case. Please be advised that any further inquiry that you might have concerning your case must be made to that office.

If you believe the AAO inappropriately applied the law in reaching its decision, or you have additional information that you wish to have considered, you may file a motion to reconsider or a motion to reopen in accordance with the instructions on Form I-290B, Notice of Appeal or Motion, with a fee of $630. The specific requirements for filing such a motion can be found at 8 C.F.R. § 103.5. **Do not file any motion directly with the AAO.** Please be aware that 8 C.F.R. § 103.5(a)(1)(i) requires any motion to be filed within 30 days of the decision that the motion seeks to reconsider or reopen.

Thank you,

Perry Rhew
Chief, Administrative Appeals Office

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

The petitioner is a medical clinic. It seeks to employ the beneficiary permanently in the United States as a clinic nurse. As required by statute, the petition is accompanied by a Form ETA 750, Application for Alien Employment Certification, approved by the United States Department of Labor (DOL). The director determined that the petitioner had not established that it had the continuing ability to pay the beneficiary the proffered wage beginning on the priority date of the visa petition. The director 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 the decision. Further elaboration of the procedural history will be made only as necessary.

As set forth in the director's March 10, 2009 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.

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.

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 DOL. *See* 8 C.F.R. § 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 DOL and submitted with the instant petition. *Matter of Wing's Tea House*, 16 I&N Dec. 158 (Acting Reg'l Comm'r 1977).

Here, the Form ETA 750 was accepted on April 30, 2001. The proffered wage is not stated clearly on the Form ETA 750. It appears as though at least two corrections have been certified by the DOL. Above Section 12 of Form ETA 750, there is a wage of $16.22 per hour ($33,737.60 per year) with a correction stamp from the DOL bearing an amendment date of April 10, 2007. In Section 16 of Form ETA 750, above the certification stamp, there is a wage of $28.89 per hour ($60,091.20 per year) with a new SOL code. This figure is accompanied by a signature next to the certification officer stamp and a date of March 7, 2002.. The Form ETA 750 states that the position requires four years of college, a Bachelor of Science degree in Nursing and two years of experience in the job offered.

The AAO conducts appellate review on a *de novo* basis. *See Soltane v. DOJ*, 381 F.3d 143, 145 (3d Cir. 2004). The AAO considers all pertinent evidence in the record, including new evidence properly submitted upon appeal.[1]

On appeal, counsel submits a brief; an undated opinion letter from , Assistant Professor at the ; a letter dated April 7, 2009 from President of the petitioning organization; pay statements issued by the petitioner to the beneficiary in 2009; a letter dated August 12, 2007 from Tax Accountant; bank account statements for for 2002, 2003, 2004, 2005; copies of statements for a line of credit issued to for 2004; a copy of the petitioner's U.S. Corporation Income Tax Return (Form 1120) for 2007; a report dated March 31, 2009 detailing the net worth of and duplicates of the documents which were submitted with the initial petition submission.

The evidence in the record of proceeding shows that the petitioner is structured as a personal services corporation. On the petition, the petitioner claimed to have been established in 1985, to have a gross annual income of $296,129, and currently to employ 4 workers. According to the tax returns in the record, the petitioner's fiscal year is a calendar year. On the Form ETA 750B, signed by the beneficiary on April 25, 2001, the beneficiary did not claim to have worked for the petitioner.

On appeal counsel asserts that the director erred in his analysis of the petitioner's ability to pay. Counsel further asserts that the director should have considered the personal assets of the petitioner's shareholders as they are able to infuse funds into the petitioning business when necessary and that this practice is common for small businesses and entrepreneurs. Further, counsel asserts that United States Citizenship and Immigration Services (USCIS) regulations do not prohibit the consideration of the shareholder's personal assets. Counsel also asserts that requiring the petitioner to supply audited financial documents is contrary to law is burdensome.

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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).

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'l Comm'r 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'l Comm'r 1967).

In determining the petitioner's ability to pay the proffered wage during a given period, USCIS 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 initially did not claim to have employed the beneficiary and provided no evidence of having paid the beneficiary any wages either before or after the priority date. However, on appeal, counsel submits copies of pay statements which the petitioner issued to the beneficiary in 2008 and 2009 as well as a copy of IRS Form W-2 which the petitioner issued to the beneficiary in 2008. The beneficiary's IRS Form W-2, Wage and Tax Statement, for 2008 shows compensation received from the petitioner, as shown in the table below.

- In 2008, the Form W-2 stated compensation of $9,240.00.

Additionally, the pay statements, which reflect payment to the beneficiary in January, February and March 2009, indicate that as of March 17, 2009, the beneficiary had received $7,920.00.

Therefore, the petitioner has not demonstrated that it employed and paid the beneficiary the full proffered wage from the priority date in 2001 through 2007. However, the petitioner has provided evidence of having paid the beneficiary a portion of the proffered wage in both 2008 and 2009 and, consequently, must demonstrate only the ability to pay the difference between wages already paid and the full proffered wage for those years.[2]

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, USCIS will next examine the net income figure reflected on the petitioner's federal income tax return, without consideration of depreciation or other

[2] The petitioner's tax federal income tax returns for 2008 and 2009 were not available either at the time the instant petition was filed or at the time the appeal was filed and no other regulatory-prescribed evidence of its ability to pay the proffered wage was submitted covering those years. Therefore, the petitioner could not demonstrate the ability to pay the difference between wages already paid and the full proffered wage for 2008 or 2009.

expenses. *River Street Donuts, LLC v. Napolitano*, 558 F.3d 111 (1st Cir. 2009); *Taco Especial v. Napolitano*, 696 F. Supp. 2d 873 (E.D. Mich. 2010), *aff'd*, No. 10-1517 (6th Cir. filed Nov. 10, 2011). 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 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. The court specifically rejected the argument that the Service should have considered income before expenses were paid rather than net income. *See Taco Especial v. Napolitano*, 696 F. Supp. 2d at 881 (gross profits overstate an employer's ability to pay because it ignores other necessary expenses).

With respect to depreciation, the court in *River Street Donuts* noted:

> The AAO recognized that a depreciation deduction is a systematic allocation of the cost of a tangible long-term asset and does not represent a specific cash expenditure during the year claimed. Furthermore, the AAO indicated that the allocation of the depreciation of a long-term asset could be spread out over the years or concentrated into a few depending on the petitioner's choice of accounting and depreciation methods. Nonetheless, the AAO explained that depreciation represents an actual cost of doing business, which could represent either the diminution in value of buildings and equipment or the accumulation of funds necessary to replace perishable equipment and buildings. Accordingly, the AAO stressed that even though amounts deducted for depreciation do not represent current use of cash, neither does it represent amounts available to pay wages.
>
> We find that the AAO has a rational explanation for its policy of not adding depreciation back to net income. Namely, that the amount spent on a long term tangible asset is a "real" expense.

River Street Donuts at 118. "[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." *Chi-Feng Chang* at 537 (emphasis added).

For a Personal Services Corporation, USCIS considers net income to be the figure shown on Line 28 of the Form 1120, U.S. Corporation Income Tax Return or Line 24 of the Form 1120-A, U.S. Corporation Short-Form Income Tax Return.[3] In this case, the director did not issue a request for evidence. Therefore, the record before the director closed on August 17, 2007 with the filing of the I-140 petition. As of that date, the petitioner's 2007 federal income tax return was not yet due. Therefore, the petitioner's income tax return for 2006 was the most recent return available at that time. However, on appeal, counsel submitted the petitioner's federal income tax return for 2007. The petitioner's tax returns demonstrate its net income for 2001, 2002, 2003, 2004, 2005, 2006 and 2007, as shown in the table below.

- In 2001, the Form 1120-A stated a net loss of $2,376.00.
- In 2002, the Form 1120-A stated a net loss of $1,533.00.
- In 2003, the Form 1120-A stated a net loss of $1,135.00.
- In 2004, the Form 1120-A stated net income of $7,003.00.[4]
- In 2005, the Form 1120-A stated a net loss of $3,673.00.
- In 2006, the Form 1120-A stated a net loss of $3,151.00.
- In 2007, the Form 1120 stated a net loss of $6,185.00.

Therefore, for the years 2001, 2002, 2003, 2004, 2005, 2006 and 2007, the petitioner did not have sufficient net income to pay the proffered wage.

If the net income the petitioner demonstrates it had available during that period, if any, added to the wages paid to the beneficiary during the period, if any, do not equal the amount of the proffered wage or more, USCIS will review the petitioner's net current assets. Net current assets are the difference between the petitioner's current assets and current liabilities.[5] A corporation's year-end current assets are shown on Schedule L, lines 1 through 6 and include cash-on-hand. Its year-end current liabilities are shown on lines 16 through 18. If the total of a corporation's end-of-year net current assets and the wages paid to the beneficiary (if any) are equal to or greater than the proffered wage, the petitioner is expected to be able to pay the proffered wage using those net current assets. The petitioner's tax returns demonstrate its end-of-year net current assets for 2001, 2002, 2003, 2004, 2005, 2006 and 2007, as shown in the table below.

- In 2001, the Form 1120-A stated net current liabilities of $12,676.00.
- In 2002, the Form 1120-A stated net current liabilities of $14,209.00.

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[3] Form 1120-A was only permitted for use prior to 2007, according to http://www.irs.gov/pub/irs-prior/f1120a--2006.pdf (accessed May 24, 2012).

[4] The director erroneously identified the petitioner's net income as $0 for 2004.

[5] 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.

- In 2003, the Form 1120-A stated net current liabilities of $15,345.00.
- In 2004, the Form 1120-A stated net current liabilities of $8,345.00.
- In 2005, the Form 1120-A stated net current assets of $220.00.
- In 2006, the Form 1120-A stated net current liabilities of $1,138.00.
- In 2007, the Form 1120 stated net current assets of $0.

Therefore, for the years 2001, 2002, 2003, 2004, 2005, 2006 and 2007, the petitioner did not have sufficient net current assets to pay the proffered wage.

Therefore, from the date the Form ETA 750 was accepted for processing by the DOL, the petitioner had not established that it had the continuing ability to pay the beneficiary the proffered wage as of the priority date through an examination of wages paid to the beneficiary, or its net income or net current assets whether that ability to pay is based upon the proffered wage of $33,737 or $60,091.

On appeal, counsel asserts that the director erred in his analysis of the petitioner's ability to pay the proffered wage. Counsel asserts that the director should have considered the shareholder's personal assets as available both to fund the petitioning entity and to pay the beneficiary the proffered wage because "it is very common for small business owners to fund the small businesses they own with their personal funds, when financing is required by the business." In support of his assertions, counsel provides an undated letter from Assistant Professor at the Additionally, counsel supplies a letter dated April 7, 2009 from president of the petitioning entity; bank statements; a copy of a statement for a line of credit held by the two shareholders of the petitioning entity as well as a statement which articulates the net worth of the same shareholders. The latter set of documents is supplied to substantiate the personal assets of the petitioning corporation's shareholders.

In his letter, discusses the nature of financing which is used by "small business ventures." In his discussion, distinguishes between "Entrepreneurial Finance" and "Corporate Finance," claiming that the former applies in the petitioner's situation so that it would be common for the investors in such enterprises to "inject cash to cover operating shortfalls." also claims that certain individual states, such as New York and Wisconsin are beginning to hold the shareholders of certain small, closely-held corporations personally liable for unpaid corporate debts owed to employees. On that basis, claims that USCIS should consider the personal assets of shareholders for purposes of determining the ability to pay.

In the instant situation, the petitioner is a corporation. Because a corporation is a separate and distinct legal entity from its owners and shareholders, the assets of its shareholders or of other enterprises or corporations cannot be considered in determining the petitioning corporation's ability to pay the proffered wage. *See Matter of Aphrodite Investments, Ltd.*, 17 I&N Dec. 530 (Comm'r 1980). In a similar case, the court in *Sitar v. Ashcroft*, 2003 WL 22203713 (D.Mass. Sept. 18, 2003) stated, "nothing in the governing regulation, 8 C.F.R. § 204.5, permits [USCIS] to consider the financial resources of individuals or entities who have no legal obligation to pay the wage."

The petitioner has provided no documentary evidence demonstrating that the petitioner represents some unique situation or entity in which the shareholders of the petitioning corporation are personally liable for the debts of the corporation.

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'r 1998) (citing *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg'l Comm'r 1972)).

On appeal, counsel asserts that the requirement of "'audited financial and other statements' is unduly burdensome, arbitrary and contrary to law and contrary to widely accepted business practices in the United States."

The regulation at 8 C.F.R. § 204.5(g)(2) requires that an offer of employment must be accompanied by evidence that the prospective United States employer has the ability to pay the proffered wage. The regulation permits the prospective United States employer to demonstrate such ability through the provision of one of three types of evidence: copies of annual reports, federal tax returns, or audited financial statements. In the instant circumstance, the petitioner supplied copies of federal income tax returns for each of the years under consideration. The director rendered his decision based upon the financial data reported on those federal income tax returns and did not render an adverse decision based upon the petitioner's failure to provide audited financial statements. The determination was based upon the petitioner's failure to demonstrate the ability to pay the beneficiary the proffered wage based up having paid the beneficiary the full proffered wage or having sufficient net income or net current assets to pay the proffered wage beginning on the priority date and continuing until the beneficiary obtains lawful permanent residence.

Counsel's assertions on appeal cannot be concluded to outweigh the evidence presented in the tax returns as submitted by the petitioner that demonstrates that the petitioner could not pay the proffered wage from the day the Form ETA 750 was accepted for processing by the DOL.

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

outside of a petitioner's net income and net current assets. USCIS may consider such factors as the number of years the petitioner has been doing business, the established historical growth of the petitioner's business, the overall number of employees, the occurrence of any uncharacteristic business expenditures or losses, the petitioner's reputation within its industry, whether the beneficiary is replacing a former employee or an outsourced service, or any other evidence that USCIS deems relevant to the petitioner's ability to pay the proffered wage.

In the present matter, the petitioner has identified itself on IRS Form 1120-A as a "personal service corporation." Pursuant to *Matter of Sonegawa*, *supra*, the AAO notes that the petitioner's personal service corporation status is a relevant factor to be considered in determining its ability to pay. A personal service corporation is a corporation where the "employee-owners" are engaged in the performance of personal services. The Internal Revenue Code (IRC) defines "personal services" as services performed in the fields of health, law, engineering, architecture, accounting, actuarial science, performing arts, and consulting. 26 U.S.C. § 448(d)(2). As a corporation, the personal service corporation files an IRS Form 1120 and pays tax on its profits as a corporate entity. However, under the IRC, a qualified personal service corporation is not allowed to use the graduated tax rates for other C-corporations. Instead, the flat tax rate is the highest marginal rate, which is currently 35 percent. 26 U.S.C. § 11(b)(2). Because of the high 35% flat tax on the corporation's taxable income, personal service corporations generally try to distribute all profits in the form of wages to the employee-shareholders. In turn, the employee-shareholders pay personal taxes on their wages and thereby avoid double taxation. This in effect can reduce the negative impact of the flat 35% tax rate. Upon consideration, because the tax code holds personal service corporations to the highest corporate tax rate to encourage the distribution of corporate income to the employee-owners and because the owners have the flexibility to adjust their income on an annual basis, the AAO will recognize the petitioner's personal service corporation status as a relevant factor to be considered in determining its ability to pay.

The documentation presented here indicates that and are the sole shareholders of the company's stock and both perform the personal services of the firm but the evidence does not indicate the proportion of stock which each owns. From 2001 until 2006, the petitioner filed its corporate income taxes on Form 1120-A, U.S. Corporation Short-Form Income Tax Return. This Short-Form Return does not contain Schedule E wherein the petitioner would identify shareholders and the specific amount of compensation paid to each. In 2007, the petitioner filed its corporate income taxes on Form 1120, U.S. Corporation Income Tax Return, a document which does contain Schedule E. However, on its tax return for 2007, the petitioner left Schedule E blank. The amount of compensation paid to the petitioner's officers was only identified on Line 12 of Form 1120-A and Line 12 of Form 1120. Without documentary evidence to the contrary, the AAO assumes that the compensation paid to the officers was divided evenly between and In 2001, the petitioner paid $36,000 to the two officers. In 2002, the petitioner paid $60,000 in officer compensation. In 2003, the petitioner paid $44,000 in officer compensation. In 2004 and 2005, the petitioner paid no officer compensation. In 2006, the petitioner paid $56,000 in officer compensation. In 2007, the petitioner paid $48,000 in officer compensation. We note here that the compensation received by the company's owners during these years was not a fixed salary. In the present case, USCIS would not be examining the personal assets of

but, rather, the financial flexibility that they as the two owners had in setting their salaries based on the profitability of their personal service corporation medical clinic. The petitioner provided no evidence demonstrating that or would be willing or able to forego the officer compensation paid to each in order to pay the proffered wage. Further, even if the petitioner provided evidence demonstrating that both and were able or willing to forgo their officer compensation, during 2004 and 2005, they were not compensated. Moreover, a review of the other factors discussed in *Matter of Sonegawa* fails to establish the petitioner's ability to pay the proffered wage.

Specifically, the petitioner provided tax documentation for seven years of operations. The gross receipts for all seven years remained modest and relatively consistent. Both payroll and officer compensation fluctuated during the seven years but were never more than modest. The petitioner has not demonstrated the historical growth of its business, the occurrence of any uncharacteristic expenditures or losses, the petitioner's reputation within its industry or whether the beneficiary is replacing a former employee or an outsourced service. Accordingly, after a review of the totality of the petitioner's financial situation and all other relevant evidence, it is concluded that the petitioner has not established that it had the continuing ability to pay the proffered wage.

The evidence submitted does not establish that the petitioner had the continuing ability to pay the proffered wage beginning on the priority date.

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*, 229 F. Supp. 2d 1025, 1043 (E.D. Cal. 2001), *aff'd*, 345 F.3d 683 (9th Cir. 2003); *see also Soltane v. DOJ*, 381 F.3d 143, 145 (3d Cir. 2004) (noting that the AAO conducts appellate review on a *de novo* basis).

Beyond the decision of the director, it is also concluded that the petition is not supported by a *bona fide* job offer. *See Matter of Silver Dragon Chinese Restaurant*, 19 I&N Dec. 401 (Comm'r 1986). Specifically, it appears from the evidence in the record, and from public records accessed through WestLaw, that the beneficiary is related to one of the two shareholders and the president of the petitioning entity. For example, the beneficiary's maiden name is the same surname as the president of the petitioning entity. Further, according to Form 1120-A for 2001, 2002, 2003, 2004 and 2005, the address listed for was Public records identify the 2548 as associated with , as a private address. Further, public records indicate that the beneficiary lived at beginning on January 1, 2001.

Under 20 C.F.R. § 626.20(c)(8) and §656.3, the petitioner must demonstrate that a valid employment relationship exists, that a *bona fide* job opportunity is available to U.S. workers. *See also* C.F.R. § 656.17(l); *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." *Matter of Sunmart 374*, 00-INA-93 (BALCA May 15, 2000); *see also Keyjoy Trading Co.*, 1987-INA-592 (BALCA Dec. 15, 1987) (en banc).

Based on the relationship described above, and considering the evidence in the record relating to the employer and the job opportunity, the petitioner has failed to establish that the instant petition is based a *bona fide* job opportunity available to U.S. workers. Accordingly, the petition must also be denied for this reason.

Therefore, if the petitioner pursues this matter further, it must address this issue and explain the relationship between the beneficiary and any owner, officer or incorporator of the company, and provide any evidence of this relationship that you may have provided to the DOL in accordance with 20 C.F.R. § 656.17. The petitioner should acknowledge what relationship the beneficiary has to the petitioner's shareholder and president, as well as any ownership interest in the petitioning entity. Further, the petitioner should provide certified copies of the petitioner's articles of incorporation, and certified copies of the corporation's stock ownership at the time of incorporation through the present to include any and all changes to the corporation's stock ownership.

Further, the failure to disclose the beneficiary's family relationship to any owner would constitute willful misrepresentation. Willful misrepresentation of a material fact in these proceedings may render the beneficiary inadmissible to the United States. *See* Section 212(a)(6)(C) of the Act, 8 U.S.C. § 1182(a)(6)(C), regarding misrepresentation, "(i) in general – any alien, who by fraud or willfully misrepresenting a material fact, seeks (or has sought to procure, or who has procured) a visa, other documentation, or admission to the United States or other benefit provided under the Act is inadmissible."

A material issue in this case is whether the petitioning entity disclosed any family relationship or close or financial relationship between the petitioning entity and the beneficiary. Failure to notify DOL amounts to a willful effort to procure a benefit ultimately leading to permanent residence under the Act. *See Kungys v. U.S.*, 485 U.S. 759 (1988), ("materiality is a legal question of whether "misrepresentation or concealment was predictably capable of affecting, *i.e.*, had a natural tendency to affect the official decision.") Here, the omission of the beneficiary's status as a relative in a small corporation, if any, would be willful misrepresentation that adversely impacted DOL's adjudication of the ETA Form 750.

Furthermore, a finding of misrepresentation may lead to invalidation of the Form ETA 750. *See* 20 C.F.R. § 656.31(d) regarding labor certification applications involving fraud or willful misrepresentation:

> Finding of fraud or willful misrepresentation. If as referenced in Sec. 656.30(d), a court, the DHS or the Department of State determines there was fraud or willful misrepresentation involving a labor certification application, the application will be considered to be invalidated, processing is terminated, a notice of the termination and the reason therefore is sent by the Certifying Officer to the employer, attorney/agent as appropriate.

By failing to identify any potential familial relationship, the beneficiary would seek to procure a benefit provided under the Act through fraud and willful misrepresentation of a material fact. Any

finding of fraud as a result shall be considered in any future proceeding where admissibility is an issue.

Doubt cast on any aspect of the petitioner's evidence may lead to a reevaluation of the reliability and sufficiency of the remaining evidence offered in support of the visa petition. It is incumbent upon the petitioner to resolve any inconsistencies in the record by independent objective evidence, and attempts to explain or reconcile such inconsistencies, absent competent objective evidence pointing to where the truth, in fact, lies, will not suffice. *Matter of Ho*, 19 I&N Dec. 582, 591-592 (BIA 1988).

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.