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

(b)(6)

U.S. Citizenship and Immigration Services

[redacted]

DATE: JUN 2 6 2013 OFFICE: TEXAS SERVICE CENTER FILE: [redacted]

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:

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,

Ron Rosenberg
Acting Chief, Administrative Appeals Office

DISCUSSION: The Director, Texas Service Center (director), denied the employment-based immigrant visa petition. The petitioner appealed the decision to the Administrative Appeals Office (AAO).[1] The appeal will be dismissed.

The petitioner describes itself as a shoe repair business. It seeks to permanently employ the beneficiary in the United States as a shoe repairer. The petitioner requests classification of the beneficiary as a professional or skilled worker pursuant to section 203(b)(3)(A) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(3)(A).[2] The petition is accompanied by a Form ETA 750, Application for Alien Employment Certification, approved by the United States Department of Labor (DOL). The priority date of the petition, which is the date the DOL accepted the labor certification for processing, is November 9, 2004. *See* 8 C.F.R. § 204.5(d).

The director's decision denying the petition concludes that the petitioner and the beneficiary committed material misrepresentation on the Form ETA 750. Specifically, the director found that the petitioning business was a sole proprietorship owned by the beneficiary's spouse, which was subsequently bought by The director found that, while the business may have, on paper, been owned by individuals other than the beneficiary and his spouse, all documentation concerning the operation of the petitioning business indicated that the beneficiary was in-fact the true owner and operator of the petitioning business. The director also found that the qualifying experience letter was insufficient to establish that the beneficiary was qualified for the proffered position. The director made additional statements and findings about fraud and misrepresentation involving another Form I-140 petition filed on behalf of the beneficiary by which has no bearing on the instant case.[3]

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. The AAO conducts appellate review on a *de novo* basis. *See Soltane v. DOJ*, 381 F.3d 143, 145 (3d Cir. 2004).

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[1] It is noted that the director incorrectly rejected the appeal on January 20, 2011. The AAO has exclusive jurisdiction over appeals of immigrant visa petitions based on employment such as the instant appeal. Additionally, the governing regulations only permit the director to treat an appeal as a motion in the event the director will take favorable action. *See* 8 C.F.R. § 103.3(a)(2)(iii). However, the AAO finds that to have been harmless error as the matter has been reopened and is now before the AAO for consideration.

[2] Section 203(b)(3)(A)(i) of the Act, 8 U.S.C. § 1153(b)(3)(A)(i), grants preference classification to qualified immigrants who are capable of performing skilled labor (requiring at least two years training or experience), not of a temporary nature, for which qualified workers are not available in the United States. Section 203(b)(3)(A)(ii) of the Act, 8 U.S.C. § 1153(b)(3)(A)(ii), grants preference classification to qualified immigrants who hold baccalaureate degrees and are members of the professions.

[3] On appeal, the AAO will only address issues pertinent to the instant case.

The AAO considers all pertinent evidence in the record, including new evidence properly submitted upon appeal.[4] On appeal, counsel submitted a brief and copies of documentation already in the record.

The director issued a notice of intent to deny (NOID) on June 17, 2010, in which he noted that the beneficiary's spouse[5] was the sole proprietor of the petitioning business prior to filing the Form ETA 750 labor certification and that the only qualifying experience listed for the beneficiary was employment with the petitioner. The director noted that there was evidence in the record that the business had been sold to "successors-in-interest" , but that all documentation regarding operation of the business had been completed and handled by the beneficiary. In response to the NOID, counsel submitted a letter contending that the petitioner and beneficiary did not commit fraud or misrepresentation because there was no relationship to explain on the Form ETA 750 as the beneficiary's spouse had sold the business in 2004. Counsel contended that were legitimate successors-in-interest. In support of these contentions counsel submitted, *inter alia*: (1) Taxes for the beneficiary and his spouse from 1998 until 2004; (2) An affidavit from the beneficiary; (3) Tax returns for for 2004 through 2006 with original tax return transcript issued by the Internal Revenue Service (IRS) for 2006; (4) The petitioner's Business Licenses; (5) Tax returns for for 2007 through 2009 with original tax return transcripts issued by the IRS for 2007 through 2009; (6) Letters regarding the beneficiary's experience with the petitioning business; and (6) Copies of documentation already in the record.

After reviewing the response, the director concluded that the job offer was not *bona fide* because the petitioning business was in-fact owned and operated by the beneficiary and not the individuals identified in corporate documents. The director concluded that the petitioner had fraudulently or willfully misrepresented a material fact in that it failed to establish that a *bona fide* job opportunity was clearly open to U.S. workers and on that basis invalidated the labor certification. The AAO notes that, while such a relationship to the petitioner is not an automatic disqualification, if the beneficiary's true relationship to the petitioner is not apparent in the labor certification 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. The petitioner has the burden of establishing that a bona fide job opportunity exists when asked to show

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[4] The submission of additional evidence on appeal is allowed by the instructions to the Form I-290B, which are incorporated into the regulations by 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).

[5] . The record contains a Korean Family Register reflecting that the beneficiary married Ms. Lee on January 15, 1980; a Business Registration Application with the State of Utah Department of Commerce Division of Corporations and Commercial Code, filed May 19, 1998, indicating that bank statements, checks and federal tax returns reflecting that was the sole proprietor of the petitioner; and Internal Revenue Service (IRS) Forms W-2, Wage and Tax Statements, reflecting that was otherwise employed full-time by an entity other than the petitioner.

that the job opportunity is clearly open to U.S. workers. *See Matter of Amger Corp.*, 87-INA-545 (BALCA 1987); *see also* 8 U.S.C. § 1361.

The AAO concurs with the director. It is noted that section 212(a)(5)(A)(i) of the Act and the scope of the regulation at 20 C.F.R. § 656.1(a) describe the role of the DOL in the labor certification process as follows:

> In general.-Any alien who seeks to enter the United States for the purpose of performing skilled or unskilled labor is inadmissible, unless the Secretary of Labor has determined and certified to the Secretary of State and the Attorney General that-
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> > (I) there are not sufficient workers who are able, willing, qualified (or equally qualified in the case of an alien described in clause (ii)) and available at the time of application for a visa and admission to the United States and at the place where the alien is to perform such skilled or unskilled labor, and
> >
> > (II) the employment of such alien will not adversely affect the wages and working conditions of workers in the United States similarly employed.

It is left to United States Citizenship and Immigration Services (USCIS) to determine whether the proffered position and alien qualify for a specific immigrant classification or even the job offered. This fact has not gone unnoticed by Federal Circuit Courts:

> There is no doubt that the authority to make preference classification decisions rests with INS. The language of section 204 cannot be read otherwise. *See Castaneda-Gonzalez v. INS*, 564 F.2d 417, 429 (D.C. Cir. 1977). In turn, DOL has the authority to make the two determinations listed in section 212(a)(14).[6] Id. at 423. The necessary result of these two grants of authority is that section 212(a)(14) determinations are not subject to review by INS absent fraud or willful misrepresentation, but all matters relating to preference classification eligibility not expressly delegated to DOL remain within INS' authority.
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> Given the language of the Act, the totality of the legislative history, and the agencies' own interpretations of their duties under the Act, we must conclude that Congress did not intend DOL to have primary authority to make any determinations other than the two stated in section 212(a)(14). If DOL is to analyze alien qualifications, it is for the purpose of "matching" them with those of corresponding United States workers so that it will then be "in a position to meet the requirement of the law," namely the section 212(a)(14) determinations.

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[6] Based on revisions to the Act, the current citation is section 212(a)(5)(A) as set forth above.

Madany v. Smith, 696 F.2d 1008, 1012-1013 (D.C. Cir. 1983).[7] In this case, the petitioner has failed to demonstrate that the certified job opportunity was "clearly open to any qualified U.S. worker" as attested on Item 22-h of Part A of the Form ETA 750 because the beneficiary had a symbiotic, familial and business relationship to the petitioning business. The job offer was essentially a form of self-employment and the petitioner failed to establish that the beneficiary met the minimum qualifications required for the position.

In evaluating the labor certification to determine the required qualifications for the position, U.S. Citizenship and Immigration Services (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 Madany*, 696 F.2d at 1008; *K.R.K. Irvine, Inc.*, 699 F.2d at 1006; *Stewart Infra-Red Commissary of Massachusetts, Inc. v. Coomey*, 661 F.2d 1 (1st Cir. 1981).

Where the job requirements in a labor certification are not otherwise unambiguously prescribed, e.g., by regulation, USCIS must examine "the language of the labor certification job requirements" in order to determine what the petitioner must demonstrate about the beneficiary's qualifications. *Madany*, 696 F.2d at 1015. The only rational manner by which USCIS can be expected to interpret the meaning of terms used to describe the requirements of a job in a labor certification is to "examine the certified job offer *exactly* as it is completed by the prospective employer." *Rosedale Linden Park Company v. Smith*, 595 F. Supp. 829, 833 (D.D.C. 1984)(emphasis added). USCIS's interpretation of the job's requirements, as stated on the labor certification must involve "reading and applying *the plain language* of the [labor certification]." *Id.* at 834 (emphasis added). USCIS cannot and should not reasonably be expected to look beyond the plain language of the labor certification or otherwise attempt to divine the employer's intentions through some sort of reverse engineering of the labor certification.

In the instant case, the labor certification states that the offered position has the following minimum

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[7] The Ninth Circuit, citing *K.R.K. Irvine, Inc.,* 699 F.2d at 1006, has stated:

> The Department of Labor (DOL) must certify that insufficient domestic workers are available to perform the job and that the alien's performance of the job will not adversely affect the wages and working conditions of similarly employed domestic workers. *Id.* § 212(a)(14), 8 U.S.C. § 1182(a)(14). The INS then makes its own determination of the alien's entitlement to sixth preference status. *Id.* § 204(b), 8 U.S.C. § 1154(b). *See generally K.R.K. Irvine, Inc. v. Landon*, 699 F.2d 1006, 1008 9th Cir.1983).
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> The INS, [now USCIS] therefore, may make a de novo determination of whether the alien is in fact qualified to fill the certified job offer.

Tongatapu Woodcraft Hawaii, Ltd. v. Feldman, 736 F. 2d 1305, 1309 (9th Cir. 1984).

requirements:

EDUCATION
Grade School: 0 years
High School: 0 years
College: 0 years
College Degree Required: None
Major Field of Study: None
TRAINING: None
EXPERIENCE: Two (2) years in the job offered.
OTHER SPECIAL REQUIREMENTS: None.

The labor certification states that the beneficiary qualifies for the offered position based on experience as a shoe repairer for Utah, from January 1998 until February 2004; and as a shoe repairer with in from March 2004 until the date on which the Form ETA 750 was signed, November 6, 2004. There is no other experience listed on the labor certification. The beneficiary signed the labor certification under a declaration that the contents are true and correct under penalty of perjury.

To be eligible for approval, a beneficiary must have all the education, training, and experience specified on the labor certification as of the petition's priority date. *See* 8 C.F.R. § 103.2(b)(1), (12). *See also Matter of Wing's Tea House,* 16 I&N Dec. 158, 159 (Acting Reg. Comm. 1977); *Matter of Katigbak*, 14 I& N Dec. 45, 49 (Reg. Comm. 1971). Fundamentally, the job offer must be "clearly open to any qualified U.S. worker." It is noted that 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). The regulation at 20 C.F.R. § 656.3 states that employment means: "Permanent full-time work by an employee for an employer other than oneself." Therefore, if the petitioning business is owned by the beneficiary's spouse or she or the beneficiary have a substantial ownership interest in it, then it is the functional equivalent of self-employment and is not a job offer for someone other than oneself.

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). Where the petitioner is owned by the person applying for position, it is not a *bona fide* offer. *See Bulk Farms, Inc. v. Martin*, 963 F.2d 1286 (9th Cir. 1992) (denied labor certification application for president, sole shareholder and chief cheese maker even where no person qualified for position applied). The court noted:

> The regulatory scheme challenged by Bulk Farms is reasonable related to the achievement of the purpose outlined in section 212(a). As the district court correctly noted, "the DOL certification process is built around a central administrative mechanism: A private good faith search by the certification applicant for U.S.

> workers qualified to take the job at issue." *See* 20 C.F.R. § 656.21. This "good faith search" process operates successfully because all employers are subject to uniform certification requirements. The two independent safeguards challenged by Bulk Farms-the ban on alien self-employment and the bona fide job requirements–make the good faith search process self-enforcing. The prophylactic rules permit the Department of Labor to process more than 50,000 permanent labor certification requests each years. . .
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> The challenged regulations also represent a reasonable construction of section 212(a) insofar as they ensure the integrity of the information gathered by DOL. As a practical matter, where an employer is indistinguishable from the alien seeking the job in question, there is reason for the employer to abuse the process. . .
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> *Bulk Farms, Inc., v. Martin,* 963 F.2d 1286-1289 (1992).

The regulation at 20 C.F.R. § 656.30 (2001) provided in pertinent part:

> (d) After issuance labor certifications are subject to invalidation by the INS or by a Consul of the Department of State upon a determination, made in accordance with those agencies, procedures or by a Court, of fraud or willful misrepresentation of a material fact involving a labor certification. If evidence of such fraud or willful misrepresentation becomes known to a RA or to the Director, the RA or Director, as appropriate, shall notify in writing the INS or State Department, as appropriate. A copy of the notice shall be sent to the regional or national office, as appropriate, of the Department of Labor's Office of Inspector General.[8]

As outlined by the Board of Immigration Appeals (BIA), a material misrepresentation requires that the alien willfully make a material misstatement to a government official for the purpose of obtaining

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[8] The current regulation provides: provides in pertinent part:

> (d) *Invalidation of labor certifications.* After issuance, a labor certification may be revoked by ETA using the procedures described § 656.32. Additionally, after issuance, a labor certification is subject to invalidation by the DHS or by a Consul of the Department of State upon a determination, made in accordance with those agencies' procedures or by a court, of fraud or willful misrepresentation of a material fact involving the labor certification application. If evidence of such fraud or willful misrepresentation becomes known to the CO or to the Chief, Division of Foreign Labor Certification, the CO, or the Chief of the Division of Foreign Labor Certification, as appropriate shall notify in writing the DHS or Department of State, as appropriate. A copy of the notification must be sent to the regional or national office, as appropriate, of the Department of Labor's Office of Inspector General. 20 C.F.R. § 656.30 (2010).

an immigration benefit to which one is not entitled. *Matter of Kai Hing Hui,* 15 I&N Dec. 288, 289-90 (BIA 1975). "The intent to deceive is no longer required before the willful misrepresentation charge comes into play." *Id.* at p. 290.[9] The term "willfully" means knowing and intentionally, as distinguished from accidentally inadvertently, or in an honest belief that the facts are otherwise. *See Matter of Healy and Goodchild,* 17 I&N Dec. 22, 28 (BIA 1979). To be considered material, the misrepresentation must be one which "tends to shut off a line of inquiry which is relevant to the alien's eligibility, and which might well have resulted in a proper determination that he be excluded." *Matter of Ng,* 17 I&N Dec. 536, 537 (BIA 1980). Accordingly, for an immigration officer to find a willful and material misrepresentation in visa petition proceedings, he or she must determine: 1) that the petitioner or beneficiary made a false representation to an authorized official of the United States government: 2) that the misrepresentation was willfully made; and 3) that the fact misrepresented was material. *See Matter of M-,* 6 I&N Dec. 149 (BIA 1954); *Matter of L-L-,* 9 I&N Dec. 324 (BIA 1961); *Matter of Kai Hing Hui,* 15 I&N Dec. at 288.

An occupational preference petition may be filed on behalf of a prospective employee who is a shareholder in the corporation. The prospective employee's interest in the corporation, however, is a material fact to be considered in determining whether the job being offered was really open to all qualified applicants. A shareholder's concealment, in labor certification proceedings, of his or her interest in the petitioning corporation constitutes willful misrepresentation of a material fact and is a ground for invalidation of an approved labor certification under 20 C.F.R. § 656.30(d) (1986). *Matter of Silver Dragon Chinese Restaurant,* 19 I&N Dec. 401,406 (Comm. 1986).

The record contains the following documentation regarding the claimed transfer/sale of the petitioning entity, Ace Shoe Repair:

- A Business Registration Application with the State of Utah Department of Commerce Division of Corporations and Commercial Code, filed May 19, 1998, indicating that [10]
- A Certificate of Registration of DBA for dated June 23, 2005, issued to [11]
- A Business Name Registration/DBA Application, filed January 19, 2007, indicating that [12]
- A Sales Tax License, dated January 1, 2007, listed under
- A Federal Employer Identification Number (FEIN) letter from the IRS to dated February 14, 2007, indicating that

[9] In contrast, a finding of fraud requires a determination that the alien made a false representation of fact of a material fact with knowledge of its falsity and with the intent to deceive an immigration officer. Furthermore, the false representation must have been believed an acted upon by the officer. *See Matter of G-G-,* 7 I&N Dec. 161 (BIA 1956).

[10] The DBA registration expired on August 22, 2001.

[11] The DBA registration expired on July 31, 2008.

[12] The DBA registration expired on July 31, 2008.

- A "Closing Agreement", dated December 31, 2006, between for the purchase of
- A declaration from dated March 31, 2010, indicating that entered into a closing agreement with to purchase on December 31, 2006 and that he has assumed the employment of the beneficiary.
- A Business Name Registration/DBA Application, filed March 15, 2010, indicating that registered agent is [13]

The record also contains individual federal tax returns for and reflecting the claimed ownership of for 1998 through 2009 and certified tax transcripts for the years 2006 through 2009. However, the records also contains business bank statements, business checks, Employers Quarterly Federal Tax Returns for and payment vouchers, which reflect that, since the inception of the business in 1998, even though may have been owned on paper by the beneficiary's spouse, and the beneficiary has in-fact been the sole owner and operator of The checks executed on behalf of are completed and/or signed by the beneficiary, including payments on behalf of the business to the IRS.

Further, IRS Forms W-2, Wage and Tax Statements, issued to the beneficiary for 2007 through 2009 do not match the federal tax records for in that the Schedule C does not account for the wages indicated of the Forms W-2.[14] Those IRS Forms W-2, Wage and Tax Statements, issued to the beneficiary, which are hand-written, are in the beneficiary's hand and the typed FEIN listed on the 2007 Form W-2 is crossed out and FEIN is hand-written in. A check on behalf of to the IRS on October 31, 2008, was issued from the beneficiary and his spouse's bank account, which still lists dba . The federal tax returns and corporation documents reflect that the beneficiary has been the only employee of the petitioning business since 1998.[15]

Additionally, there is no evidence of the initial transfer/sale of the business from to It is incumbent upon the petitioner to resolve any inconsistencies in the record by independent objective evidence. Any attempt to explain or reconcile such inconsistencies will not suffice unless the petitioner submits competent objective evidence pointing to where the truth lies. *Matter of Ho*, 19 I&N Dec. 582, 591-92 (BIA 1988). The petitioner has failed to establish through independent, objective evidence that the proferred job is not instrinsically tied to the beneficiary, that the job offer was ever a *bona fide* job offer open to all U.S. workers, or that the beneficiary is not in-fact the true owner and operator of the petitioning business.

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[13] The DBA registration expired on April 24, 2013.

[14] The beneficiary's IRS Forms W-2 stated compensation of $22,860.00 in 2007; $22,860.00 in 2008; and $24,060.00 in 2009; however, the Schedule C filed by for those years reflects that no wages were paid to any employees.

[15] Publicly available information also lists the beneficiary as the owner of In any future filings, the petitioner must address this inconsistency. *Matter of Ho*, 19 I&N Dec. at 582.

In the circumstances set forth in this case, failure to disclose the beneficiary's relationship to the petitioning company amounts to the 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.") In the context of a visa petition, a misrepresented fact is material if the misrepresentation cuts off a line of inquiry which is relevant to the eligibility criteria and that inquiry might well have resulted in the denial of a visa petition. *See Matter of Ng,* 17 I&N Dec. at 537.

A misrepresentation is an assertion or manifestation that is not in accord with the true facts. A misrepresentation of a material fact may include but not be limited to such consequences as a denial of a visa petition, a decision rendering an alien inadmissible to the United States, and possible criminal prosecution. It is noted that section 212(a)(6)(C) of the Act, 8 U.S.C. § 1182 provides that any "alien who, by fraud or willfully misrepresenting a material fact, seeks to procure (or has sought to procure or has procured) a visa, other documentation, or admission into the United States or other benefit provided under this Act is inadmissible. An alien may be found inadmissible when he or she subsequently applies for admission into the United States or applies for adjustment of status to permanent resident status. *See* sections 212(a) and 245((a) of the Act, 8 U.S.C. §§ 1182(a) and 1255(a). The Attorney General has held that a misrepresentation made in connection with an application for a visa or other document, or with entry into the United States, is material if either: (1) the alien is excludable on the true facts, or (2) the misrepresentation tends to shut off a line of inquiry which is relevant to the alien's eligibility and which might well have resulted in a proper determination that he be excluded. *Matter of S & B-C,* 9 I&N Dec. 436, 447 (A.G. 1961). Accordingly, in determining admissibility, the materiality test has three parts. First, if the record shows the alien is inadmissible on the true facts, then the second and third questions must be addressed. The second question is whether the relevant line of inquiry has been shut off, then it must be determined whether the inquiry might have resulted in a proper determination that the foreign national should have been excluded. *Id.* at 449.

The petitioner's misrepresentation as to the beneficiary's relationship to the owners of the petitioning entity cut off potential lines of inquiry regarding the *bona fide* nature of the offer of employment. This is directly material as to whether the petitioner is an "employer" which "intends to employ" the beneficiary as required by section 204(a)(1)(F) of the Act, and is therefore material to whether the beneficiary is eligible for the benefit sought. *See Matter of S & B-C,* 9 I&N Dec. at 447. As set forth above, and pursuant to 20 C.F.R. § 656.31(d), the AAO finds that the petitioner failed to demonstrate that a *bona fide* job offer existed based on the undisclosed relationship between the beneficiary and the petitioner, which constituted willful misrepresentation of a material fact. The AAO concurs with the director who found the labor certification invalid based on the willful misrepresentation of a material fact and the labor certification remains invalidated based on willful misrepresentation of a material fact.

Additionally, the petitioner failed to establish that the beneficiary met the minimum qualifications for the proffered position. The regulation at 8 C.F.R. § 204.5(l)(3)(ii)(A) states:

> 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.

The record contains an experience letter, dated October 21, 2004, from , owner, on letterhead stating that the company employed the beneficiary as a shoe repairer from January 1998 until February 2004. However, the letter is inconsistent with the applicant's affidavit and information regarding his entry into the United States.[16] It is incumbent upon a petitioner to resolve the inconsistencies in the record concerning the beneficiary's experience by independent objective evidence and any attempt to explain or reconcile such inconsistencies will not suffice unless the petitioner submits competent objective evidence pointing to where the truth lies. *See Matter of Ho*, 19 I&N Dec. at 582. Moreover, as discussed above, the signatory, is married to the beneficiary and her statements are self-serving and do not provide independent, objective evidence of his prior work experience. *Id.* 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)).

While the record contains letters from various individuals attesting to the beneficiary's employment as a shoe repairer with since 1998, there are no IRS Forms W-2 to confirm the beneficiary's employment and the Schedule Cs for the business from 1998 through 2004 reflect that no wages were paid to any employees.

Moreover, when determining whether a beneficiary has the required minimum experience for a position, experience gained by the beneficiary with the petitioner in the offered position cannot be considered. *See* 20 C.F.R. § 656.21(b)(5) [2004]. This position is supported by the Board of Alien Labor Certification Appeals (BALCA). *See Delitizer Corp. of Newton,* 88-INA-482, May 9, 1990 (BALCA). *Delitizer* determined that 20 C.F.R. § 656.21(b)(6) does require that employers establish "the 'dissimilarity' of the position offered for certification from the position in which the alien gained the required experience." *Delitizer Corp. of Newton*, at 4. In its decision, BALCA stated that Certifying Officers should consider various factors to establish that the requirement of dissimilarity under 20 C.F.R. § 656.21(b)(6) has been met, and that, while Certifying Officers must state the factors considered as a basis for their decisions, the employer bears the burden of proof in establishing that the positions are dissimilar. *Delitizer Corp. of Newton*, at 5.

In the instant case, representations made on the certified Form ETA 750 clearly indicate that the actual minimum requirement for the offered position is two years of experience in the job offered and that experience in an alternate occupation is not acceptable. In the instant case, the beneficiary did not

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[16] The beneficiary's affidavit indicates that he entered the United States and began working for in March 1998. A Form I-94, Arrival/Departure Record for the beneficiary, reflects that he was admitted to the United States on March 19, 1998.

represent on Form ETA 750, Part B that he had been employed with the petitioner in any position other than the proffered position. As discussed above, in order to utilize the experience gained with the employer, the employer must demonstrate that the job in which the alien gained experience was not similar to the job offered for certification. *Delitizer Corp. of Newton,* 88-INA-482, May 9, 1990 (BALCA).

The petitioner failed to establish the dissimilarity between the position the beneficiary previously held with the employer and the permanent position offered. Therefore, the AAO cannot consider the beneficiary's experience gained with the petitioner as qualifying experience to meet the requirements of the labor certification by the priority date. As the evidence in the record does not establish that the beneficiary possessed the required experience set forth on the labor certification by the priority date, the petitioner has also failed to establish that the beneficiary is qualified for the offered position.

Beyond the decision of the director, the petitioner has failed to establish its ability to pay the proffered wage. 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, United States Citizenship and Immigration Services (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 beneficiary's IRS Forms W-2 stated compensation of:

- $18,050.00 in 2004.
- $21,660.00 in 2005.
- $22,860.00 in 2006.
- $22,860.00 in 2007.
- $22,860.00 in 2008.
- $24,060.00 in 2009.

However, the AAO cannot accept the Forms W-2 for years 2007 through 2009 as the business records do not reflect that these wages were paid to the beneficiary and the record does not contain

certified copies of the Forms W-2.[17] Therefore, for the years 2004 and 2007 through 2009, the petitioner has not established that it employed and paid the beneficiary the full proffered wage, but it did establish that it paid partial wages in 2004 and the full proffered wage in 2005 and 2006. As the proffered wage is $21,632.00 per year, the petitioner must establish that it can pay the difference between the wages actually paid to the beneficiary and the proffered wage in 2004, which is $3,582.00 and the full proffered wage in 2007 through 2009.

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 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).

The petitioner is 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'r 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. *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 petitioner 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, both sole proprietors, support a family of one (1). The proprietor's tax returns reflect the following information for the following years:

- In 2004, the proprietor's[18] adjusted gross income (Form 1040, line 36) was $41,483.00

[17] The beneficiary's IRS Forms W-2 stated compensation of $22,860.00 in 2007; $22,860.00 in 2008; and $24,060.00 in 2009; however, the Schedule C filed by for those years reflects that no wages were paid to any employees.

[18]

- In 2005, the proprietor's[19] adjusted gross income (Form 1040, line 37) was $59,424.00
- In 2006, the proprietor's[20] adjusted gross income (Form 1040, line 37) was $64,791.00
- In 2007, the proprietor's[21] adjusted gross income (Form 1040, line 37) was $22,174.00
- In 2008, the proprietor's[22] adjusted gross income (Form 1040, line 37) was $22,381.00.
- In 2009, the proprietor's[23] adjusted gross income (Form 1040, line 37) was $21,925.00.

The sole proprietor's adjusted gross income exceeds the proffered wage of $21,632.00 from 2004 through 2009; however, the proprietor's monthly household expenses must be considered in determining whether the proprietor has the ability to pay the proffered wage. failed to provide a list of his monthly household expenses in 2004 through 2006, and therefore the AAO cannot conclude that he had the ability to pay the proffered wage in those years. did submit a list of his monthly household expenses for 2007 through 2009 reflecting annualized household expenses. In considering monthly household expenses for 2007 through 2009, it would result in a deficit between the adjusted gross income, less expenses, less the proffered wage of $17,650.00 in 2007, $10,603.00 in 2008, and $10,633.00 in 2009.

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.

FURTHER ORDER: The appeal is dismissed with a finding that the petitioner and beneficiary willfully misrepresented a material fact.

FURTHER ORDER: The AAO finds that the petitioner's job offer was not *bona fide* based on the beneficiary's undisclosed relationship to the petitioner, which constituted willful misrepresentation of a material fact underlying eligibility for a benefit sought under the immigration laws of the United States.

FURTHER ORDER: The alien employment certification, Form ETA 750, ETA case number , is invalidated.