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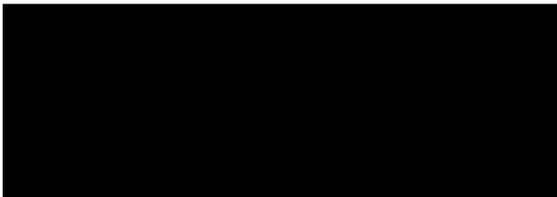
U.S. Department of Homeland Security
20 Mass. Ave., N.W., Rm. 3000
Washington, DC 20529



U.S. Citizenship
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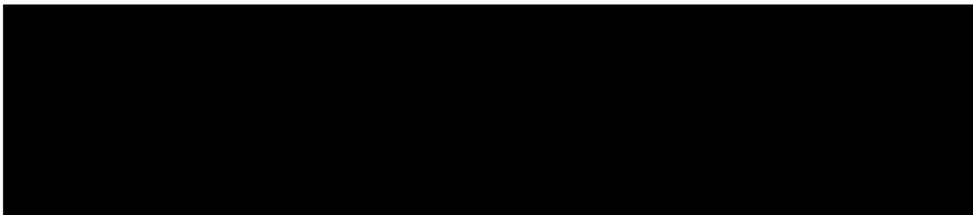
FILE: LIN 06 038 51948 Office: NEBRASKA SERVICE CENTER Date: AUG 17 2007

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:

This is the decision of the Administrative Appeals Office in your case. All documents have been returned to the office that originally decided your case. Any further inquiry must be made to that office.

Robert P. Wiemann, Chief
Administrative Appeals Office

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

The petitioner is a restaurant. It seeks to employ the beneficiary permanently in the United States as a foreign food specialty cook. As required by statute, a Form ETA 750, Application for Alien Employment Certification, approved by the Department of Labor (DOL) accompanied the petition. The acting 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 denied the petition accordingly.

On appeal counsel submitted a brief and additional evidence.

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 granting 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 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, the day the Form ETA 750 was accepted for processing by any office within the employment system of the DOL. *See* 8 C.F.R. § 204.5(d). Here, the Form ETA 750 was accepted for processing on April 30, 2001. The proffered wage as stated on the Form ETA 750 is \$11.82 per hour, which equals \$24,585.60 per year.

The Form I-140 petition in this matter was submitted on November 18, 2005. On the petition, the petitioner stated that it was established on June 30, 1997 and that it employs 40 workers. The petition states that the petitioner's gross annual income is \$2,297,308 and that its net annual income is also \$2,297,308. This office notes that the net annual income of a restaurant will not equal its gross annual income and believes the misstatement was the result of a typographical error.

On the Form ETA 750, Part B, signed by the beneficiary, the beneficiary did not claim to have worked for the petitioner. Both the petition and the Form ETA 750 indicate that the petitioner would employ the beneficiary in Seattle, Washington.

The AAO reviews *de novo* issues raised in decisions challenged on appeal. *See Dor v. INS*, 891 F.2d 997, 1002 n. 9 (2d Cir. 1989). The AAO considers all evidence properly in the record including evidence properly submitted on appeal.¹

In the instant case the record contains (1) the petitioner's 2001, 2002, 2003, 2004, and 2005 Form 1120S, U.S. Income Tax Returns for an S Corporation, (2) Monthly statements pertinent to the petitioner's bank account, (3) the petitioner's unaudited 2005 financial statements, (4) an undated letter from Punya Tipyasothi, a representative of the petitioner, (5) pay statements the petitioner issued to two of its owners, and (6) a letter dated March 18, 2006 from the petitioner's accountant. The record does not contain any other evidence relevant to the petitioner's continuing ability to pay the proffered wage beginning on the priority date.

The petitioner's tax returns show that the petitioner is a subchapter S-corporation, that it incorporated on June 30, 1997, and that it reports taxes pursuant to accrual accounting and the calendar year.

During 2001 the petitioner reported Schedule K, Line 23 Income² of \$32,135. At the end of that year the petitioner's current liabilities exceeded its current assets.

During 2002 the petitioner reported a loss of \$14,150 as its Schedule K, Line 23 Income. At the end of that year the petitioner's current liabilities exceeded its current assets.

During 2003 the petitioner reported Schedule K, Line 23 Income of \$46,072. At the end of that year the petitioner's current liabilities exceeded its current assets.

During 2004 the petitioner reported Schedule K, Line 23 Income of \$11,928. At the end of that year the petitioner's current liabilities exceeded its current assets.

During 2005 the petitioner reported Schedule K, Line 23 Income of 180,353. At the end of that year the petitioner had current assets of 151,597 and current liabilities of \$135,754, which yields net current assets of \$15,843.

The undated letter from the petitioner's manager and beneficiary's uncle states that the petitioner's gross receipts have grown continuously and the petitioner has been unable to locate sufficient qualified cooks throughout its operation. The letter further states, "We only have 9 real cooks left with us in the kitchen."

In his March 18, 2006 letter the petitioner's accountant stated that during 2002 and 2003 the petitioner had fewer chefs and the owners were required to fill in as needed. He stated that they each drew a wage of

¹ The submission of additional evidence on appeal is allowed by the instructions to the Form I-290B, which are incorporated into the regulations at 8 C.F.R. § 103.2(a)(1). The record in the instant case provides no reason to preclude consideration of any documents newly submitted on appeal. *See Matter of Soriano*, 19 I&N Dec. 764 (BIA 1988).

² An S-corporation's Schedule K, Line 23 income is the sum of its various types of income and is considered net income for the purpose of determining its ability to pay the proffered wage.

\$12,000 during those years. The accountant stated that the petitioner could have paid those wages to a new chef had one been available.

The accountant further stated that the petitioner's chefs are currently working many overtime hours at one and a half times regular pay. Counsel provided spreadsheets showing various figures pertinent to the petitioner's overtime expenses. The spreadsheet indicates that during 2005 the petitioner's 11 cooks worked overtime such that the difference between their pay and what the same hours would have cost the petitioner if paid for pursuant to straight time equaled \$24,160.

The pay statements issued to the petitioner's owners are dated December 20, 2005. Those statements show year-to-date gross wages of \$2,100 and \$7,200. They also show total tips of \$700 and \$4,780.

The acting director denied the petition on February 24, 2006. On appeal, counsel asserted, (1) that the difference between the amount paid to its cooks during each salient year and the amount the petitioner would have paid for the same number of hours of straight time represents a fund available to pay the proffered wage, because if the petitioner had been able to hire the beneficiary it could have paid that amount to her, (2) that the amounts paid to the petitioner's owners in officer compensation represent a fund available to pay the proffered wage because it was paid to them for acting as cooks and they would willingly have ceded those duties and the corresponding income to pay the proffered wage to the beneficiary, and (3) that the acting director should have considered the accountant's March 18, 2006 letter and the progressive increases in the petitioner's gross receipts pursuant to *Matter of Sonogawa*, 12 I&N Dec. 612 (Reg. Comm. 1967).³

Counsel's reliance on the bank statements in this case is misplaced. First, bank statements are not among the three types of evidence, enumerated in 8 C.F.R. § 204.5(g)(2), which are the requisite evidence of a petitioner's ability to pay a proffered wage. While this regulation allows additional material "in appropriate cases," the petitioner has not demonstrated that the evidence required by 8 C.F.R. § 204.5(g)(2) is inapplicable or that it paints an inaccurate financial picture of the petitioner. Second, bank statements show the amount in an account on a given date, and cannot show the sustainable ability to pay a proffered wage.⁴ Third, no evidence was submitted to demonstrate that the funds reported on the petitioner's bank statements somehow reflect additional available funds that were not reported on its tax returns.

³ Counsel appears to cite *Sonogawa, Id.*, for the proposition that, "CIS requires the petitioner to demonstrate financial resources sufficient to pay the first year of the beneficiary's wages . . ." This is not, strictly speaking, accurate. The governing regulations, and CIS, require the petitioner to show the continuing ability to pay the proffered wage beginning on the priority date.

⁴ A possible exception exists to the general rule that bank accounts are ineffective in showing a petitioner's continuing ability to pay the proffered wage beginning on the priority date. If the petitioner's account balance showed a monthly incremental increase greater than or equal to the monthly portion of the proffered wage, the petitioner might be found to have demonstrated the ability to pay the proffered wage with that incremental increase during that month. If that trend continued, with the monthly balance increasing during each month in an amount at least equal to the monthly amount of the proffered wage, then the petitioner might have shown the ability to pay the proffered wage during the entire salient period. That scenario is absent from the instant case, however, and this office does not purport to decide the outcome of that hypothetical case.

Counsel submitted the petitioner's financial statements for 2005. The regulation at 8 C.F.R. § 204.5(g)(2) makes clear that where a petitioner relies on financial statements to demonstrate its ability to pay the proffered wage, those financial statements must be audited. The accountant's report that accompanied those financial statements makes clear that they were produced pursuant to a compilation rather than an audit. As that report also makes clear, financial statements produced pursuant to a compilation are the representations of management compiled into standard form. The unsupported representations of management are not reliable evidence and are insufficient to demonstrate the ability to pay the proffered wage. The unaudited financial statements will not be considered.

The tax returns provided show Line 7 Compensation of officers of \$41,945 during 2002, \$36,000 during 2002, \$39,000 during 2004, and \$28,934 during 2005. Counsel and the accountant assert that some or all of the officer compensation paid to the petitioner's owners during various years was paid for their working as cooks. The record contains no other support for that assertion.

The assertions of counsel are not evidence. *Matter of Obaigbena*, 19 I&N Dec. 533, 534 (BIA 1988); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980). Unsupported assertions are insufficient to meet the burden of proof in these proceedings. *Matter of Soffici* 22 I&N Dec. 158, 165 (Comm. 1998) (citing to *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm. 1972)).

Further, although the accountant and counsel appear to imply that the petitioner's owners began the practice of filling in for their cooks during 2002 and 2003, when some of its cooks left their positions, the 2001 tax return also shows \$36,000 in compensation of officers. The tax returns lend no support for the proposition that the petitioner's owner's duties substantially changed during and after 2002.

Further still, the 2005 pay statements submitted show that two of the petitioner's owners received gross wages of \$2,100 and \$7,200 during that year. Submission of those documents in the instant context appears, to this office, to imply that counsel and the petitioner are asserting that they are relevant, that is, that the amounts shown were paid for performance of the duties of the proffered position.

If those amounts, or the amounts paid to the petitioner's owners during any of the salient years were shown, rather than alleged, to have been paid for performance of the duties of the proffered position, this office would be inclined to consider them a fund available to pay the wages of the proffered position. Those same two owners also received tips of \$700 and \$4,780 during 2005. Although restaurant cooks may occasionally receive tips, that a worker's tips for a given year were a third of his or her gross wages, or even exceeded half of his or her gross wages, does not suggest that the person was working as a cook.

Counsel provided insufficient evidence to support the assertion that the petitioner's officers were paid for performing the duties of the proffered position. The compensation that the petitioner paid to its officers has not, therefore, been shown to have been available to pay wages.

The accountant provided figures pertinent to overtime showing potential savings of \$24,160 during 2005, had the petitioner been able to employ the beneficiary. The record does not show the circumstances pursuant to which the figures upon which the accountant relied were provided to him. This office wonders whether the figures the accountant cited were provided to him in the ordinary course of business, or whether they were

provided to him so that he might rely upon them in producing an opinion to be submitted in the instant case. If the scope of the accountant's duties for the petitioner includes managing its payroll and drawing paychecks, then the accountant would certainly have reliable information about the hourly wage paid to each employee, the number of hours each employee worked, and what number of those hours were overtime. In that event, this office would accord credibility to the figures the accountant relied upon and to the conclusions the accountant drew from those figures. If, on the other hand, the petitioner provided those figures to the accountant to produce an opinion to be used in the instant case, then those figures would be the unsupported representations of management. In that event this office would find them less reliable and would find the accountant's opinion that was based on them less convincing.

For the sake of analysis in today's decision, this office will suppose that the accountant had those figures available in the scope of his employment and available for collation. This office will treat the \$24,160 as a fund available to pay additional wages to an additional cook during 2005. If the petitioner pursues the instant matter further, however, it should provide evidence pertinent to the scope of the accountant's responsibility and how he came to be in possession of the figures upon which he relied.

The petitioner must establish that its job offer to the beneficiary is realistic. Because filing 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. The petitioner's ability to pay the proffered wage is an essential element in evaluating whether a job offer is realistic. *See Matter of Great Wall*, 16 I&N Dec 142 (Acting Reg. Comm. 1977). *See also* 8 C.F.R. § 204.5(g)(2). In evaluating whether a job offer is realistic, Citizenship and Immigration Services (CIS) requires the petitioner to demonstrate financial resources sufficient to pay the beneficiary's proffered wages, although the totality of the circumstances affecting the petitioning business will be considered if the evidence warrants such consideration. *See Matter of Sonogawa*, 12 I&N Dec. 612 (Reg. Comm. 1967).

In determining the petitioner's ability to pay the proffered wage during a given period, CIS will examine whether the petitioner employed 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 did not establish that it employed and paid the beneficiary.

If the petitioner does not establish that it employed and paid the beneficiary an amount at least equal to the proffered wage during a given period, the AAO will, in addition, examine the net income figure reflected on the petitioner's federal income tax return, without consideration of depreciation or other expenses. CIS may rely on federal income tax returns to assess a petitioner's ability to pay a proffered wage. *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). *See also* 8 C.F.R. § 204.5(g)(2).

Showing that the petitioner's gross receipts exceeded the proffered wage, or greatly exceeded it, is insufficient. Similarly, showing that the petitioner paid total wages in excess of the proffered wage, or greatly in excess of the proffered wage, is insufficient. In *K.C.P. Food Co., Inc. v. Sava*, 623 F. Supp. at 1084, the court held that the Immigration and Naturalization Service, now CIS, had properly relied on the petitioner's net income figure, as stated on the petitioner's corporate income tax returns, rather than the petitioner's gross

income. The court specifically rejected the argument that CIS should have considered income before expenses were paid rather than net income. Finally, no precedent exists that would allow the petitioner to add back to net cash the depreciation expense charged for the year. *Chi-Feng Chang* at 537. See also *Elatos Restaurant*, 623 F. Supp. at 1054.

The petitioner's net income is not the only statistic that may be used to show the petitioner's ability to pay the proffered wage. If the petitioner's net income, if any, during a given period, added to the wages paid to the beneficiary during that period, if any, do not equal the amount of the proffered wage or more, the AAO will review the petitioner's assets as an alternative method of demonstrating the ability to pay the proffered wage.

The petitioner's total assets, however, are not available to pay the proffered wage. The petitioner's total assets include those assets the petitioner uses in its business, which will not, in the ordinary course of business, be converted to cash, and will not, therefore, become funds available to pay the proffered wage. Only the petitioner's current assets -- the petitioner's year-end cash and those assets expected to be consumed or converted into cash within a year -- may be considered. Further, the petitioner's current assets cannot be viewed as available to pay wages without reference to the petitioner's current liabilities, those liabilities projected to be paid within a year. CIS will consider the petitioner's net current assets, its current assets minus its current liabilities, in the determination of the petitioner's ability to pay the proffered wage.

Current assets include cash on hand, inventories, and receivables expected to be converted to cash or cash equivalent within one year. Current liabilities are liabilities due to be paid within a year. On a Schedule L the petitioner's current assets are typically found at lines 1(d) through 6(d). Year-end current liabilities are typically⁵ shown on lines 16(d) through 18(d). If a corporation's net current assets are equal to or greater than the proffered wage, the petitioner is expected to be able to pay the proffered wage out of those net current assets. The net current assets are expected to be converted to cash as the proffered wage becomes due.

The priority date is April 30, 2001. The wage proffered in the instant case is \$24,585.60.

Although it was not mentioned in the decision of denial, the petitioner has filed multiple petitions for alien workers. This office is aware of six cases,⁶ in addition to the instant case, that the petitioner filed at approximately the same time. In each of those cases the wage proffered is \$24,588.

The regulations require the petitioner to show the ability to pay the proffered wage. If CIS is aware of other pending petitions, CIS must, in order to determine the petitioner's ability to pay the instant beneficiary's wages, take into account any and all other wage obligations that could possibly result from the other pending petitions in order to determine whether the job offer is credible. As an example, a petitioner with \$25,000 in net profits cannot show the ability to pay, out of those profits, the wages of an infinite number of workers at \$25,000 each per annum nor, in fact, more than one. Thus the regulations require CIS to take notice of other pending petitions when evaluating the petitioner's ability to pay the proffered wage. The aggregated

⁵ The location of the taxpayer's current assets and current liabilities varies slightly from one version of the Schedule L to another.

⁶ LIN 05 039 51117, LIN 05 037 52374, LIN 05 037 51739, LIN 05 036 50851, LIN 05 037 52521, and LIN 05 037 52576

proffered wage of those cases and the instant case is \$172,113.60.⁷ In order to show the ability to pay the proffered wage in the instant case the petitioner must show the ability to pay that aggregated amount.

During 2001 the petitioner had net income of \$32,135. That amount is insufficient to pay the proffered wage. At the end of that year the petitioner had negative net current assets. The petitioner is unable, therefore, to show the ability to pay any portion of the proffered wage out of its net current assets. The petitioner submitted no reliable evidence of any other funds at its disposal with which it could have paid the proffered wage during 2001. The petitioner has not demonstrated the ability to pay the proffered wage during 2001.

During 2002 the petitioner reported a loss as its net income. The petitioner is unable, therefore, to demonstrate the ability to pay any portion of the proffered wage out of its profit during that year. At the end of that year the petitioner had negative net current assets. The petitioner is unable, therefore, to show the ability to pay any portion of the proffered wage out of its net current assets. The petitioner submitted no reliable evidence of any other funds at its disposal with which it could have paid the proffered wage during 2002. The petitioner has not demonstrated the ability to pay the proffered wage during 2002.

During 2003 the petitioner had net income of \$46,072. That amount is insufficient to pay the proffered wage. At the end of that year the petitioner had negative net current assets. The petitioner is unable, therefore, to show the ability to pay any portion of the proffered wage out of its net current assets. The petitioner submitted no reliable evidence of any other funds at its disposal with which it could have paid the proffered wage during 2003. The petitioner has not demonstrated the ability to pay the proffered wage during 2003.

During 2004 the petitioner had net income of \$11,928. That amount is insufficient to pay the proffered wage. At the end of that year the petitioner had negative net current assets. The petitioner is unable, therefore, to show the ability to pay any portion of the proffered wage out of its net current assets. The petitioner submitted no reliable evidence of any other funds at its disposal with which it could have paid the proffered wage during 2004. The petitioner has not demonstrated the ability to pay the proffered wage during 2004.

During 2005 the petitioner had net income of \$180,353. The petitioner also demonstrated, as was explained in detail above, that it would have saved \$24,150 in overtime expense had it been able to employ the beneficiary. Those two amounts both represent funds that were available to the petitioner during 2005 to pay additional wages. They total \$204,503. That amount is sufficient to pay the aggregated proffered wage. The petitioner has demonstrated the ability to pay the proffered wage during 2005.

The petition in this matter was submitted on November 18, 2005. On that date the petitioner's 2006 tax return was unavailable. On December 14, 2005 the service center issued a request for evidence in this matter, requesting additional evidence of the petitioner's continuing ability to pay the proffered wage beginning on the priority date. On that date the petitioner's 2006 tax return was still unavailable. For the purpose of today's decision, the petitioner is relieved of its burden to demonstrate its ability to pay the proffered wage during 2006 and later years.

⁷ [\$24,588 x 6] + \$24,585.60.

The petitioner's tax returns are insufficient, in themselves, to show the ability to pay the proffered wage during 2001, 2002, 2003, and 2004.

However, citing *Matter of Sonogawa, Id.*, counsel argues that notwithstanding that the tax returns, in themselves, do not sufficiently support that the petitioner was able to pay the proffered wage during each of the salient years, the increase in the petitioner's gross receipts and profits and its general financial vigor demonstrate that it will be able to pay the proffered wage.

This office notes that, for instance, the petitioner's gross receipts were \$1,864,452, \$1,832,552, \$1,906,563, \$2,297,308, and \$3,119,194 during 2001, 2002, 2003, 2004, and 2005, respectively. Its Schedule K Line 23 Income was \$32,135, <\$14,150>, \$46,072, \$11,928, and \$180,353 during those same years. The gross receipts demonstrate that the petitioner's volume is growing. Although the petitioner's net profits have not shown the same consistent, relentless growth, the figures for 2005, the most recent year for which data are available, appears to show an operation that has recently become successful.

This office concurs that, if the petitioner were only obliged to show the ability to pay the wage proffered in the instant case, then the petitioner's increased profitability during the salient years and its general fiscal health might be sufficient to show the continuing ability to pay the wage proffered in the instant case. In the instant case, however, the petitioner is also obliged to show the ability to pay the wages proffered to all seven of the alien workers for whom it petitioned. The figures cited by the accountant and counsel are insufficient to show the ability to absorb such a large increase in the petitioner's wage expense.

The petitioner failed to demonstrate that it had the ability to pay the proffered wage during 2001, 2002, 2003, and 2004. Therefore, the petitioner has not established that it had the continuing ability to pay the proffered wage beginning on the priority date.

The record suggests an additional issue that was not addressed in the decision of denial.

One of the petitioner's part owners, [REDACTED] admitted, in an undated letter, that he is the beneficiary's uncle. He admitted it again in an affidavit dated November 17, 2005. Counsel also admitted that relationship in his November 16, 2005 letter, although he referred to the uncle as the petitioner's secretary, rather than as an owner or officer of the company.⁸

The uncle signed the Form ETA 750 Labor Certification Application, the Form I-140 visa petition, and the Form G-28 Notice of Entry of Appearance, as the petitioner's representative and appears to be personally pursuing approval of the instant petition. Both counsel and the beneficiary's uncle disclaim that the beneficiary has any control over the petitioner.

A relationship invalidating a *bona fide* job offer may arise where the beneficiary is related to the petitioner by blood or the relationship may be financial, by marriage, or through friendship." See *Matter of Summart*, 374, 00-INA-93 (BALCA May 15, 2000). The blood relationship in the instant case casts suspicion on the

⁸ Schedules K-1 for each of the salient years indicate that [REDACTED] owned 30% of the petitioner during 2001, 2002, 2003, and 2004; and 33% during 2005.

assertion that the petitioner is hiring the beneficiary because it was unable to locate suitable U.S. workers for the proffered position. The record does not indicate that the petitioner revealed the family relationship to DOL when it filed the labor certification application.

This issue was properly before the acting director when he denied the instant visa petition. Because the decision of denial did not discuss this issue, the petitioner has not been accorded the opportunity to address it, and today's decision does not rely on that issue. If the petitioner further pursues this matter, however, it should address this issue.

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

ORDER: The appeal is dismissed.