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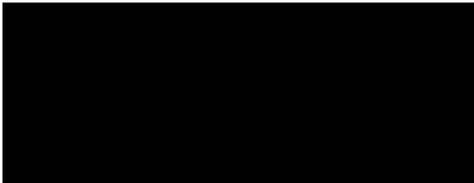
U.S. Department of Homeland Security
20 Mass. Ave., N.W., Rm. 3000
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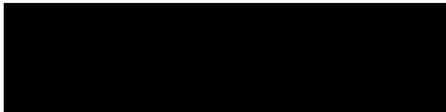


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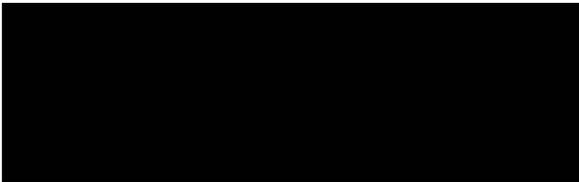
Date: **AUG 11 2008**

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 employment-based preference visa petition was initially approved by the Director, Vermont Service Center. In connection with the beneficiary's Form I-130, Petition for Alien Relative, and based on reports of investigation conducted by the U.S. Embassy in Cairo and Citizenship and Immigration Services (CIS), the director consequently served the petitioner with notices of intent to revoke the approval of the petition (NOIR). In a Notice of Revocation (NOR), the director ultimately revoked the approval of the Immigrant Petition for Alien Worker (Form I-140). The matter is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed. The petition will remain revoked.

The petitioner is a restaurant. It seeks to employ the beneficiary permanently in the United States as a restaurant manager (manager). As required by statute, a Form ETA 750, Application for Alien Employment Certification approved by the Department of Labor (DOL), accompanied the petition. The director determined that the petitioner had not established the beneficiary's requisite five years of experience as a restaurant manager prior to the priority date, and that the petitioner had not established its continuing ability to pay the proffered wage beginning on the priority date to the present. The director also determined that as the marriage between the beneficiary and a U.S. citizen was fraudulent, and because there is no evidence of a bona fide marriage, the provisions of 204(c) of the Immigration and Nationality Act (the Act) prohibit the beneficiary from benefiting from an immigrant visa petition. The director revoked the approval of 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.

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

Section 205 of the Act, 8 U.S.C. § 1155, provides that "[t]he Attorney General [now Secretary, Department of Homeland Security], may, at any time, for what he deems to be good and sufficient cause, revoke the approval of any petition approved by him under section 204." The realization by the director that the petition was approved in error may be good and sufficient cause for revoking the approval. *Matter of Ho*, 19 I&N Dec. 582, 590 (BIA 1988).

On appeal, counsel asserts that the director had no "good and sufficient cause" to revoke the approval of the petition because the petitioner submitted substantial evidence of the beneficiary's experience as a restaurant manager and of the petitioner's ability to pay the proffered wage, and because the director jumped to conclusions without basis that the beneficiary's previous marriage to a United States citizen was a sham marriage to obtain immigration benefits.

The first issue to be discussed in this case is whether or not the petitioner established the beneficiary's qualifications for the proffered position. To be eligible for approval, a beneficiary must have the education and experience specified on the labor certification as of the petition's filing date, which is April 23, 2001 in the instant case. *See Matter of Wing's Tea House*, 16 I&N Dec. 158 (Act. Reg. Comm. 1977).

To determine whether a beneficiary is eligible for an employment based immigrant visa, CIS must examine whether the alien's credentials meet the requirements set forth in the labor certification. In evaluating the beneficiary's qualifications, CIS must look to the job offer portion of the labor certification to determine the required qualifications for the position. CIS may not ignore a term of the labor certification, nor may it impose additional requirements. *See Matter of Silver Dragon Chinese Restaurant*, 19 I&N Dec. 401, 406 (Comm. 1986). *See also, Mandany v. Smith*, 696 F.2d 1008, (D.C. Cir. 1983); *K.R.K. Irvine, Inc. v. Landon*, 699 F.2d 1006 (9th Cir. 1983); *Stewart Infra-Red Commissary of Massachusetts, Inc. v. Coomey*, 661 F.2d 1 (1st Cir. 1981).

In the instant case, the Application for Alien Employment Certification, Form ETA-750A, items 14 and 15, set forth the minimum education, training, and experience that an applicant must have for the position of restaurant manager. In the instant case, item 14 describes the requirement of the proffered position is five (5) years of experience in the job offered.

The beneficiary set forth his credentials on Form ETA-750B. On Part 15, eliciting information of the beneficiary's work experience, he indicated that he was in practical training as a lawyer in real estate law from 1990 to 1992 and in administrating import/export business in Dubai, U.A.E. from 1992 to 1993. He did not provide any further information regarding his employment history on the form, but signed his name on February 19, 2001 under a declaration that the contents of the form are true and correct under the penalty of perjury.

The regulation at 8 C.F.R. § 204.5(g)(1) states in pertinent part:

Evidence relating to qualifying experience or training shall be in the form of letter(s) from current or former employer(s) or trainer(s) and shall include the name, address, and title of the writer, and a specific description of the duties performed by the alien or of the training received. If such evidence is unavailable, other documentation relating to the alien's experience or training will be considered.

With the initial petition, the petitioner submitted an experience certificate from Ali Baba Restaurant and Cafeteria (Ali Baba) in Arabic with its English translation. This letter states in pertinent parts that:

Ali Baba Restaurant and Cafeteria certifies that [the beneficiary] has worked at our place from February 1988 till February 1993 as restaurant and cafeteria manager. During this period he was responsible for managing the restaurant and cafeteria. He was also responsible for operation purchases together with all required goods and all necessary day-to-day operations. He was also responsible for bookkeeping, dealing with banks, withdrawal and deposit of restaurant and cafeteria's funds. He was also responsible for training old and new workers. His experience in producing all kinds of foods and drinks was

very well recognized. We certify that he was experienced in dealing with work and customers.

The Ali Baba letter was signed by [REDACTED] as the manager of Ali Baba, and thus it appears to be an experience letter from a former employer. The letter includes a specific description of the duties performed by the beneficiary during his employment which appear to qualify him to perform the duties set forth by item 13 of the Form ETA 750A for the proffered position. This letter also verifies that the beneficiary worked as a restaurant and cafeteria manager for exactly five years from February 1988 to February 1993, however, it does not verify the beneficiary's full-time employment. In response to the director's March 29, 2007 NOIR, counsel submitted an undated letter from [REDACTED] as Executive Manager of Ali Baba (Ali Baba's second letter) with the business address and telephone number stating that they "are willing to answer any question or to explain any matter" as evidence of the previous employer's existence and providing contact information. In response to the director's October 26, 2007 NOIR, counsel also submitted a certificate dated November 18, 2007 from [REDACTED] as Executive Manager¹ of Ali Baba (Ali Baba's third letter). This Ali Baba letter states in pertinent part that "[w]e are also certify [sic] that [the beneficiary] has worked for us and we have given him a previous letter certifying that was working for us. We are willing to answer any questions by calling the phone number listed above." However, neither of the two subsequent letters from Ali Baba verifies the beneficiary's full-time employment with Ali Baba for the five years from February 1988 to February 1993.

In addition, although the translator swore and subscribed the certification of translation on July 8, 2002, the English translation of Ali Baba's first letter does not include the date of the letter, the address for the employer or the writer as required by the regulation. Ali Baba's second letter was also undated. Therefore, it is unlikely to properly determine whether these two letters would be given full evidentiary weight in these proceedings since it is not clear when they were issued. Both Ali Baba's second and third letters included its business address and telephone number and Ali Baba's third letter even provides its new location and the old location and confirms its previous letter certifying the beneficiary's employment. However, neither of these two letters provides any information about the date of moving from the old location to new location, and specifically verifies the beneficiary's employment at the old location and new location. Moreover, none of these letters verifies the beneficiary's full-time employment during the alleged five-year period. Because of these defects, the Ali Baba letters do not fully comply with the regulation at 8 C.F.R. § 204.5(g)(1).

Of more concern, the letter provides information about the beneficiary's employment that is inconsistent with the beneficiary's statements on the Form ETA 750B and the Form G-325A Biographic Information.² While the first Ali Baba letter verifies that the beneficiary worked for the restaurant and cafeteria from

¹ It is noted that the beneficiary's former employer provided its letters by its representative in different names and titles. While the Ali Baba letter was from [REDACTED] as a manager, the second Ali Baba letter and the third Ali Baba letter were from [REDACTED] respectively but both as an executive manager. Although all the three letters contain K [REDACTED] as partial or full name, it is not clear whether these three different names identify one same person.

² The record contains the beneficiary's two G-325A forms submitted with adjustment of status applications based on a Form I-130 Petition for Alien Relative filed by a U.S. citizen on May 10, 2001 and based on the instant Form I-140 immigrant petition for alien worker respectively.

February 1988 to February 1993, the beneficiary stated on the Form ETA 750B that he attended the University of Zaqaziq from September 1986 to December 1990 and that he did his legal practical training from 1990 to 1992 and worked in Dubai, U.A.E. from 1992 to 1993. On the Form G-325A signed by the beneficiary on April 13, 2001, he represented that he had been unemployed since June 1995 to the present, i.e. the date of signing the form on April 13, 2001; and that he was self-employed in Cairo, Egypt as an attorney from January 1990 to June 1995. However, on the Form G-325A signed on September 3, 2002, the beneficiary listed his employment for the same or similar period as follows: My Cousin ██████████ Manager, from April 1999 to October 2001; ██████████ Steak ██████████ from November 1997 to February 1999; ██████████ Restaurant, ██████████ Cashier, from September 1995 to October 1997; and Energy Import/Export, ██████████ U.A.E., Executive Secretary, from March 1993 to June 1995.

The record does not contain any explanation or evidence how the beneficiary managed both his studies at the university and manager position at Ali Baba at the same time period, from February 1988 to December 1990, how he managed his jobs in restaurant management and legal practical training during the years of 1990 through 1992, and most significantly how he managed both jobs in Egypt and U.A.E. at the same time, during the year of 1992 and the first two months of 1993. The information provided on the ETA 750B and G-325A forms do not support the beneficiary's five years of employment with Ali Baba as a restaurant manager alleged in the Ali Baba letter. The inconsistent information raises a doubt regarding the authenticity of the employment the letter claimed. Counsel did not submit any independent objective evidence to resolve these inconsistencies in the record. "It is incumbent on 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." "Doubt cast on any aspect of the petitioner's proof may, of course, lead to a reevaluation of the reliability and sufficiency of the remaining evidence offered in support of the visa petition." *Matter of Ho*, 19 I&N Dec. 582, 591-592 (BIA 1988). Counsel asserts that there are no significant inconsistencies because the beneficiary worked as an unpaid apprentice from 1988 to 1993 in Egypt while at the same time supporting himself with his employment for Ali Baba. However, the assertions of counsel do not constitute evidence. *Matter of Obaighena*, 19 I&N Dec. 533, 534 (BIA 1988); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980). Therefore, the petitioner failed to demonstrate that the beneficiary possessed the requisite five years of experience as a restaurant manager prior to the priority date with independent objective evidence, such as Ali Baba's personnel records and payroll records, the beneficiary's paystubs or income reports or the employment agreement between Ali Baba and the beneficiary.

In addition, the beneficiary's employment for Ali Baba is further called into question by an overseas investigation dated October 23, 2007 from the U.S. Embassy Cairo Fraud Prevention Unit (Embassy investigation report) in the record. The record shows that an investigation was conducted by the U.S. Embassy Cairo Fraud Prevention Unit upon the director's request after Ali Baba's address was provided in Ali Baba's second letter. The Embassy investigation report states that a vice consul from the Embassy Fraud Prevention Unit visited the business alleged to be the beneficiary's former employer and talked to the owner and employees of the business, a toy shop owner nearby who knew the beneficiary, the beneficiary's brother and an elderly man at a stationery shop who has been in the neighborhood for a long time, and none of them,

including the owner of Ali Baba, verified that the beneficiary did work as a restaurant manager at Ali Baba from February 1988 to February 1993. Both nearby business owners stated that the café was not built until 1990. Based on the Embassy investigation report, the director concluded that the experience letters submitted by Ali Baba could not be given any weight as evidence. On appeal, counsel asserted that the Embassy investigation report was “based on evidence that was conclusory[sic] and speculative, most of which was obtained from unnamed and unidentifiable sources.” Counsel submitted Ali Baba’s third letter, a statement from the beneficiary’s brother, [REDACTED] (Statement from [REDACTED] and a certificate dated November 27, 2007 from the Egyptian Bar Association (Egyptian Bar November 27, 2007 letter) as evidence to support his assertions in response to the director’s October 26, 2007 NOIR.

Ali Baba’s third letter does not reference the Embassy investigation. It does not indicate whether any of its legal representatives were interviewed by phone, but just mentions that the employer was willing to answer any questions by phone. Therefore, Ali Baba’s third letter does not provide any support to counsel’s assertions on appeal, and it does not in fact further verify the beneficiary’s alleged five years of employment with it.

The statement of [REDACTED] was not dated or notarized. The declaration that was provided in response to the director’s NOIR is not an affidavit as it was not sworn to or affirmed by the declarant before an officer authorized to administer oaths or affirmations who has, having confirmed the declarant's identity, administered the requisite oath or affirmation. *See Black's Law Dictionary* 58 (7th Ed., West 1999). Nor, in lieu of having been signed before an officer authorized to administer oaths or affirmations, does it contain the requisite statement, permitted by Federal law, that the signer, in signing the statement, certifies the truth of the statement, under penalty of perjury. 28 U.S.C. § 1746. Such an unsworn statement made in support of an appeal is not evidence and thus, as is the case with the arguments of counsel, is entitled to only minimal evidentiary weight. *See INS v. Phinpathya*, 464 U.S. 183, 188-89 n.6 (1984); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503 (BIA 1980). Further, counsel submitted a photocopy of the statement in Arabic language with its English translation. There is no evidence that the original statement of [REDACTED] was originally written by him in Egypt and sent to the United States via mail or fax. That raises a doubt regarding the authenticity of the statement. Furthermore, the statement of [REDACTED] contains three questions from the consul and his answers to these questions. All three questions are not directly relevant to the main purpose of the Embassy investigation, that is “to verify the work experience letter.” However, [REDACTED] does not testify that these three questions and answers were all the contents of his interview with the consul. More important, the statement of [REDACTED] cannot and does not verify that his brother, the beneficiary, worked as a restaurant manager at Ali Baba from February 1988 to February 1993, and therefore, the statement of [REDACTED] does not establish that the Embassy investigation report was conclusory and speculative as counsel alleged.

The Egyptian Bar November 27, 2007 letter states in pertinent part that:

The Kaluobia Branch of the Egyptian Bar Association certifies that [the beneficiary], who was registered as a lawyer in the general directory with No. [REDACTED] on December 31, 1991 was listed at the general schedule level (meaning a lawyer under training) and this was during the period from December 31, 1991 to February 15, 1995. It’s prohibited by law that

a lawyer under training can file law suits or legal cases with his/her name. A lawyer under training is not allowed to practice the profession using his name neither using seals that carry his/her name or title.

The Egyptian Bar November 27, 2007 letter verifies that the beneficiary was registered as a lawyer under training during the period from December 31, 1991 to February 15, 1995 and that Egyptian law prohibits a lawyer under training from practicing under his name. However, the verification that the beneficiary was registered as a lawyer under training during the period from December 31, 1991 to February 15, 1995 does not verify that the beneficiary worked as a restaurant manager for Ali Baba for five years from February 1988 to February 1993. In fact, the Egyptian Bar November 27, 2007 letter indirectly supports the beneficiary's statements on the Form ETA 750B and the statement from the beneficiary's brother quoted by the consul in the Embassy investigation report that the beneficiary conducted practical training as a lawyer after he graduated from the university and that the beneficiary worked with their brother Ashraf as a lawyer because Ashraf is a lawyer too. The Egyptian Bar November 27, 2007 establishes neither that the beneficiary worked as a restaurant manager at Ali Baba for five years from February 1988 to February 1993, nor that the Embassy investigation report was conclusory and speculative.

In visa petition proceedings, the burden is on the petitioner to establish eligibility for the benefit sought. *See Matter of Brantigan*, 11 I&N Dec. 493 (BIA 1966). The petitioner must prove by a preponderance of evidence that the beneficiary is fully qualified for the benefit sought. *Matter of Martinez*, 21 I&N Dec. 1035, 1036 (BIA 1997); *Matter of Patel*, 19 I&N Dec. 774 (BIA 1988); *Matter of Soo Hoo*, 11 I&N Dec. 151 (BIA 1965). Generally, when something is to be established by a preponderance of evidence, it is sufficient that the proof establish that it is probably true. *Matter of E-M-*, 20 I&N Dec. 77 (Comm. 1989). The evidence in each case is judged by its probative value and credibility.

Given the deficits in the employment letters, the inconsistencies between these letters and the beneficiary's own claims regarding his employment and the investigation in the aggregate, we are satisfied that the petition was approved in error because the petitioner failed to demonstrate with regulatory-prescribed evidence that the beneficiary possessed the requisite five years of experience as a restaurant manager. The AAO finds that the director had good and sufficient cause to revoke the approval of this petition. The petitioner's evidentiary submissions and counsel's assertions are non-responsive to the critical issue and material fact of this case: the beneficiary's experience for the proffered position. Although requested by the director, the petitioner failed to present additional independent, probative, and relevant corroborative evidence to rebut this ground of intent to revoke the approval of the instant petition as indicated in the director's NOIR. Accordingly, the director's revocation on this ground is affirmed.

Matter of Ho, 19 I&N Dec. at 591-592 states: "It is incumbent on 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." In the instant case, the petitioner failed to submit independent objective evidence to overcome the inconsistencies regarding the beneficiary's employment. "Doubt cast on any aspect of the petitioner's proof may, of course, lead to a reevaluation of the reliability and sufficiency of the remaining evidence

offered in support of the visa petition.” *Id.* Since the employment documentation is not credible, the remaining evidence has significantly reduced evidentiary value.

The second issue to be discussed in this case is whether the petitioner established that it has the ability to pay the proffered wage as of the priority date and continuing until the beneficiary obtains lawful permanent residence.

The regulation 8 C.F.R. § 204.5(g)(2) states in pertinent part:

Ability of prospective employer to pay wage. Any petition filed by or for an employment-based immigrant which requires an offer of employment must be accompanied by evidence that the prospective United States employer has the ability to pay the proffered wage. The petitioner must demonstrate this ability at the time the priority date is established and continuing until the beneficiary obtains lawful permanent residence. Evidence of this ability shall be either in the form of copies of annual reports, federal tax returns, or audited financial statements.

The petitioner must demonstrate the continuing ability to pay the proffered wage beginning on the priority date, which is the date the Form ETA 750 Application for Alien Employment Certification, was accepted for processing by any office within the employment system of the DOL. *See* 8 C.F.R. § 204.5(d). 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. *Matter of Sonogawa*, 12 I&N Dec. 612 (BIA 1967).

Here, the Form ETA 750 was accepted on April 23, 2001. The proffered wage as stated on the Form ETA 750 is \$51,000 per year. On the Form ETA 750B signed on February 19, 2001, the beneficiary did not claim to have worked for the petitioner. In response to the director’s NOIR, the petitioner claimed that the beneficiary has been employed in the proffered position since July 1, 2002. On the petition, the petitioner claimed to be established in 1999, to have a gross annual income of \$197,170 and to currently employ four workers.

In determining the petitioner’s ability to pay the proffered wage during a given period, CIS will first examine whether the petitioner employed and paid the beneficiary during that period. If the petitioner establishes by documentary evidence that it employed the beneficiary at a salary equal to or greater than the proffered wage, the evidence will be considered *prima facie* proof of the petitioner’s ability to pay the proffered wage. In the instant case, the petitioner submitted the beneficiary’s W-2 forms for 2002 through 2006, the paystubs for four weeks in 2007, and the petitioner’s Form 941 Employer’s Quarterly Federal Tax Return for the first quarter of 2001 through the third quarter of 2007. In his October 26, 2007 NOR, the director determined that the W-2 forms could not be given much weight as evidence because it appears that the W-2 forms were manufactured for the purposes of responding to the director’s March 29, 2007 NOIR and it seems unlikely that the petitioner paid the beneficiary exactly \$51,012 four years in a row. However, it is noted that the amounts reflected on W-2 forms are supported by the petitioner’s Form 941 and the beneficiary’s individual income tax returns which were filed with IRS

before the director's March 29, 2007 NOIR. In addition, the AAO also notes that the petitioner paid the beneficiary \$34,710 for his half year service (\$69,420 per year) which was much more than the beneficiary's wage of \$51,012 paid for later years. However, the fact that the petitioner paid more compensation to the beneficiary in 2002 than later years and paid exactly \$51,012 four years in a row for some other purposes than compensating its employee's services may raise a doubt on whether the job offer is a realistic and bona fide one, but does not automatically establish that the W-2 forms in the record are fraudulent. The AAO has not found any evidence in the record of proceedings showing that those W-2 forms are fraudulent. Therefore, we will consider these W-2 forms in determining the petitioner's ability to pay the proffered wage. The evidence in the record shows that the petitioner paid the beneficiary \$34,710 in 2002, \$51,012 annually in 2003 through 2006 and \$13,734 as of April 6, 2007 at the rate of \$981 weekly (\$51,012 per year) in 2007. Therefore, the petitioner demonstrated that it paid the full proffered wage in 2003 through 2007. However, the petitioner is still obligated to demonstrate that it could pay the beneficiary the full proffered wage of \$51,000 in 2001 and the difference of \$16,290 in 2002 between wages actually paid to the beneficiary and the proffered wage with its net income or its net current assets.

If the petitioner does not establish that it employed and paid the beneficiary an amount at least equal to the proffered wage during that period, CIS will next examine the net income figure reflected on the petitioner's federal income tax return, without consideration of depreciation or other expenses. Reliance on federal income tax returns as a basis for determining a petitioner's ability to pay the proffered wage is supported by judicial decisions. *See Elatos Restaurant Corp. v. Sava*, 632 F. Supp. 1049, 1054 (S.D.N.Y. 1986) (citing *Tongatapu Woodcraft Hawaii, Ltd. v. Feldman*, 736 F.2d 1305 (9th Cir. 1984)); *see also Chi-Feng Chang v. Thornburgh*, 719 F. Supp. 532 (N.D. Texas 1989); *K.C.P. Food Co., Inc. v. Sava*, 623 F. Supp. 1080 (S.D.N.Y. 1985); *Ubeda v. Palmer*, 539 F. Supp. 647 (N.D. Ill. 1982), *aff'd*, 703 F.2d 571 (7th Cir. 1983). Reliance on the petitioner's gross income and gross profit is misplaced. Showing that the petitioner's total income 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 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. Counsel's reliance on the petitioner's depreciation in determining its ability to pay the proffered wage is misplaced. The court in *K.C.P. Food Co., Inc. v. Sava* specifically rejected the argument that the Service should have considered income before expenses were paid rather than net income. The court in *Chi-Feng Chang* further noted:

Plaintiffs also contend the depreciation amounts on the 1985 and 1986 returns are non-cash deductions. Plaintiffs thus request that the court *sua sponte* add back to net cash the depreciation expense charged for the year. Plaintiffs cite no legal authority for this proposition. This argument has likewise been presented before and rejected. *See Elatos*, 632 F. Supp. at 1054. [CIS] and judicial precedent support the use of tax returns and the *net income figures* in determining petitioner's ability to pay. Plaintiffs' argument that

these figures should be revised by the court by adding back depreciation is without support.

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

The petitioner submitted Internal Revenue Service (IRS) account transcripts for its tax returns for 2001 through 2005 and Form 1120S U.S. Income Tax Return for an S Corporation for 2006 as evidence of the petitioner's ability to pay the proffered wage. According to the tax returns in the record, the petitioner is structured as an S corporation, and its fiscal year is based on a calendar year. Since the petitioner established its ability to pay the proffered wage for 2003 through the present through examination of wages actually paid to the beneficiary, this office will examine the petitioner's tax return documents for 2001 and 2002 only to determine whether the petitioner had the ability to pay the proffered wage for these two years. The petitioner's 2001 and 2002 tax returns demonstrate the following financial information concerning the petitioner's ability to pay the proffered wage of \$51,000 per year from the priority date:

- In 2001, the petitioner had net taxable income of \$22,629.
- In 2002, the petitioner had net taxable income of \$35,299.

Where an S corporation's income is exclusively from a trade or business, CIS considers net income to be the figure for ordinary income, shown on line 21 of page one of the petitioner's Form 1120S. The instructions on the Form 1120S U.S. Income Tax Return for an S Corporation state on page one, "Caution: Include only trade or business income and expenses on lines 1a through 21." Where an S corporation has income from sources other than from a trade or business, net income is found on Schedule K. The Schedule K form related to the Form 1120S states that an S corporation's total income from its various sources are to be shown not on page one of the Form 1120S, but on line 23 or line 17e of the Schedule K, Shareholders' Shares of Income, Credits, Deductions, etc.³ In the instant case, the petitioner submitted one page of IRS account transcripts for its tax returns. The submitted IRS account transcripts do not include the schedule K and do not indicate whether the petitioner's income is exclusively from a trade or business, or from sources other than from a trade or business, and whether the net taxable income is the figure for ordinary income, shown on line 21 of page one of the petitioner's Form 1120S or on line 23 or line 17e of the Schedule K, Shareholders' Shares of Income, Credits, Deductions, etc. It is not clear that the net taxable income shown on the IRS transcript is the net income CIS will consider as the petitioner's net income in determining the petitioner's ability to pay the proffered wage. Without the correct net income information, the AAO cannot determine whether the petitioner had sufficient net income to pay the proffered wage in 2001 and 2002. The petitioner failed to establish its ability to pay the proffered wage for 2001 and 2002 with its net income because it failed to submit a complete tax return for 2001 and 2002. This office also notes that even if the figures reflected on the IRS transcripts as net taxable income were the net income CIS usually uses to determine the petitioner's ability to pay the proffered wage, the petitioner would still fail to demonstrate that its net income, \$22,629, was sufficient to pay the proffered wage of \$51,000 in 2001, the year of the priority date.

³ See Internal Revenue Service, Instructions for Form 1120S (2003), available at <http://www.irs.gov/pub/irs-prior/i1120s--2003.pdf>; Instructions for Form 1120S (2002), available at <http://www.irs.gov/pub/irs-prior/i1120s--2002.pdf>.

If the net income the petitioner demonstrates it had available during that period, if any, added to the wages paid to the beneficiary during the period, if any, do not equal the amount of the proffered wage or more, CIS will review the petitioner's assets. The petitioner's total assets include depreciable assets that the petitioner uses in its business. Those depreciable assets will not be converted to cash during the ordinary course of business and will not, therefore, become funds available to pay the proffered wage. Further, the petitioner's total assets must be balanced by the petitioner's liabilities. Otherwise, they cannot properly be considered in the determination of the petitioner's ability to pay the proffered wage. Rather, CIS will consider net current assets as an alternative method of demonstrating the ability to pay the proffered wage. Counsel urges that the petitioner's cash on hand should be added to its net profits in calculating the funds available to the petitioner to pay the proffered wage. That calculation would be inappropriate. Some portion of the petitioner's revenue during a given year is paid in expenses and the balance is the petitioner's net income. Of its net income, some is retained as cash. Adding the petitioner's Schedule L Cash to its net income would likely be duplicative, at least in part. The petitioner's Schedule L Cash is included in the calculation of the petitioner's net current assets, which are considered separately from its net income.

Net current assets are the difference between the petitioner's current assets and current liabilities.⁴ A corporation's year-end current assets are shown on Schedule L, lines 1 through 6. 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.

However, as previously discussed, the petitioner submitted incomplete IRS transcripts for its tax returns. The submitted one page IRS transcripts do not include Schedule L's. Therefore, the AAO cannot determine whether the petitioner had sufficient net current assets in 2001 and 2002 to pay the proffered wage or the difference between wages actually paid to the beneficiary and the proffered wage respectively. The petitioner failed to demonstrate that it had sufficient net current assets to pay the proffered wage or the difference between wages actually paid to the beneficiary and the proffered wage in 2001 and 2002 because it failed to submit complete regulatory-prescribed evidence for its net current assets in 2001 and 2002.

Therefore, from the date the Form ETA 750 was accepted for processing by the DOL, the petitioner had not established that it had continuing ability to pay the beneficiary the proffered wage as of the priority date in 2001 to 2002 through an examination of wages paid to the beneficiary, its net income or net current assets. The AAO finds that the director approved the instant petition in error because the petitioner failed to establish its ability to pay the proffered wage as of the priority date, and therefore, this ground of the director's revocation is affirmed.

⁴According to *Barron's Dictionary of Accounting Terms* 117 (3rd ed. 2000), "current assets" consist of items having (in most cases) a life of one year or less, such as cash, marketable securities, inventory and prepaid expenses. "Current liabilities" are obligations payable (in most cases) within one year, such as accounts payable, short-term notes payable, and accrued expenses (such as taxes and salaries). *Id.* at 118.

The third issue to be discussed in this case is whether or not approval of the instant petition is precluded under section 204(c) of the Act due to the beneficiary's previous marriage.

Section 204(c) of the Act), 8 U.S.C. § 1154(c), states in pertinent part:

Notwithstanding the provisions of subsection (b) of this section no petition shall be approved if (1) the alien has previously been accorded, or has sought to be accorded, an immediate relative or preference status as the spouse of a citizen of the United States or the spouse of an alien lawfully admitted for permanent residence, by reason of a marriage determined by the Attorney General to have been entered into for the purpose of evading immigration laws or (2) the Attorney General has determined that the alien has attempted or conspired to enter into a marriage for the purpose of evading immigration laws.

The regulation at 8 C.F.R. § 204.2(a)(1)(ii) states:

Fraudulent marriage prohibition. Section 204(c) of the Act prohibits the approval of a visa petition filed on behalf of an alien who has attempted or conspired to enter into a marriage for the purpose of evading the immigration laws. The director will deny a petition for an immigrant visa classification filed on behalf of an alien for whom there is substantial and probative evidence of such an attempt or conspiracy. Although it is not necessary that the alien have been convicted of, or even prosecuted for, the attempt or conspiracy, the evidence of the attempt or conspiracy must be contained in the alien's file.

The record of proceedings contains a Form I-130 petition for alien relative filed by a United States citizen, [REDACTED] on behalf of the beneficiary as a United States citizen's spouse with Immigration and Naturalization Services (now CIS), New York District Office on May 10, 2001. On May 9, 2005, the director of the CIS Philadelphia District Office (district director) served [REDACTED] a notice of intent to deny (NOID) at her address of record, [REDACTED] indicating CIS' intention to deny the petition with a finding that the sole purpose of the marriage was to confer upon the beneficiary an immigration benefit. The director noted that public record searches revealed that [REDACTED] was residing separately from the beneficiary. The record does not contain any response to the district director's May 9, 2005 NOID. Therefore, on March 21, 2007, the district director denied the Form I-130 petition due to the petitioner's failure to meet the burden of proof in establishing that the parties did not enter into marriage for the sole purpose of obtaining immigration benefits. It is also noted that the district director properly informed the petitioner and her counsel of appeal or motion to reopen or reconsider opportunities in the decision of denial. However, the record does not show that any appeal or motion to reopen or reconsider has ever been filed.

Upon a second review of the instant petition, the director realized that the petition may have been approved in error because the petition may not be approved under section 204(c) of the Act due to the

⁵ The U.S. citizen's name is being withheld to protect her identity.

beneficiary's previous marriage. The director informed the instant petitioner of this ground in his March 29, 2007 NOIR. In response to the NOIR, counsel submitted an affidavit dated April 23, 2007 from the beneficiary (the beneficiary's April 23, 2007 affidavit). The record shows that subsequently on October 1, 2007, a CIS officer interviewed [REDACTED] at her home. The director attached this interview report to his October 26, 2007 NOIR. In response, counsel submitted a copy of State of New York Department of Health Affidavit, License and Certificate of Marriage for [REDACTED] and the beneficiary issued by [REDACTED] Town or City Clerk at [REDACTED] March 23, 2001, a copy of State of New York Department of Health Certificate of Marriage Registration for [REDACTED] and the beneficiary issued by the town or city clerk on March 29, 2001, and a copy of Judgment of Divorce entered by the New York Supreme Court at the Courthouse, New York County on June 3, 2003 granting the beneficiary's divorce complaint. Counsel asserted that the beneficiary's April 23, 2007 affidavit and these official records directly contradict [REDACTED] statement that she never married the beneficiary, and records from the former INS directly contradict her statement that she never filed a Form I-130 petition on his behalf.

In the interview, [REDACTED] states that she did not know, marry or file a Form I-130 petition for the beneficiary; that she married someone other than the beneficiary on August 5, 2000 in Deltona, Florida and has been living together with that spouse for 24 years; that she has never heard of or been to Port Chester, New York where the beneficiary claimed to marry [REDACTED] on March 24, 2001. However, the officer did not obtain any objective evidence to verify [REDACTED] statements in the interview, such as her signatures on the Form I-130, G-325A, G-28 and the Certificate of Marriage Registration, her personal information on the petition and relevant forms, her birth certificate and other documents submitted to support the petition, and her resident addresses and time frames during the period from March 2001 until she moved to the current residence. Therefore, it appears that the interview report from the CIS officer alone is not sufficient to determine that the Form I-130 petition on behalf of the beneficiary and the relevant marriage between [REDACTED] and the beneficiary involve fraudulent documentation or evading immigration laws. However, the officer identified [REDACTED] and had her sworn in before him, she signed the interview report. It is noted that all [REDACTED]'s signatures on relevant Forms G-28, I-130, G-325A and the certificate of marriage registration were signed with a different spelling for the first name and they are visibly different from her signature on the interview report. That raises a doubt whether the Form I-130 petition and relevant documents were signed by [REDACTED] herself.

The record does not show that the director conducted any fraud investigation on the authenticity of the Affidavit, License and Certificate of Marriage, Certificate of Marriage Registration and the Judgment of Divorce by the New York Supreme Court, and the record does not contain any evidence showing that these documents are fraudulent. However, while the marriage license and certificate, and the Form I-130 reflect a marriage date of March 24, 2001, [REDACTED] listed March 29, 2001 as the marriage date on her Form G-325A. The AAO suggests the director start an investigation to determine whether this case involves a document forge or fraud.

In his April 23, 2007 affidavit, the beneficiary asserted that he married [REDACTED] on March 24, 2001; that on advice of their previous lawyer, they filed a petition and application before the end of April 2001; that after a few months living together in New York, he got a job offer in Philadelphia and wanted to move

there, but [REDACTED] did not want to do so, and therefore, they started to have problems and eventually separated. Finally he asserted that he did not marry [REDACTED] to obtain immigration benefits. As of when the beneficiary moved from New York to Philadelphia to take a new job, the petitioner and the beneficiary provided inconsistent information. The record contains a letter dated April 12, 2007 from [REDACTED] stating that the beneficiary began working for the petitioner July 1, 2002. On the Form [REDACTED] signed on September 3, 2002 submitted with his adjustment of status application based on the instant Form I-140 petition, the beneficiary indicates that he moved from [REDACTED] in October 2001 and also started to work for the petitioner as a manager in October 2001. However, the certified Form ETA 750 in the instant case clearly shows that although the labor certification was officially accepted by the DOL on April 23, 2001 as the priority date, both the petitioner and the beneficiary signed the Form ETA 750A and 750B respectively on February 19, 2001 and used [REDACTED] as the beneficiary's present address. Therefore, the record does not support the beneficiary's statements in his affidavit that he lived with Ms. [REDACTED] together for a few months at [REDACTED] after their marriage on March 24, 2001 until a few months later when he got a job offer from Philadelphia. In fact, the Form ETA 750 shows that the petitioner and the beneficiary started the labor certification processing more than one month before the marriage based on the job offer from the petitioner and the job acceptance by the beneficiary. According to the Form ETA 750, the beneficiary did not live in New York at the time of marriage, nor did he live with [REDACTED] together for a few months thereafter at that address. In addition, the record shows that the beneficiary obtained his employment authorization document (EAD) for the period from August 28, 2001 to August 27, 2002 based on the marriage-based Form I-130 petition and the concurrent adjustment of status application.

As previously discussed, the record contains inconsistencies between the experience letters and the beneficiary's own claims regarding his employment and the investigation in the aggregate, and the petitioner did not submit any independent objective evidence to resolve the inconsistencies. Therefore, the employment documentation is not credible. *Matter of Ho*, 19 I&N Dec. at 591 states: "Doubt cast on any aspect of the petitioner's proof may, of course, lead to a reevaluation of the reliability and sufficiency of the remaining evidence offered in support of the visa petition." Because of the unresolved inconsistencies with the employment evidence, the beneficiary's credibility is seriously reduced. The beneficiary sought to obtain the immigrant benefits from the alleged short-term marriage to a United States citizen. For all the reasons above, the AAO concurs with the director's findings that the beneficiary's April 23, 2007 affidavit cannot be considered as evidence to establish the bona fides of the alleged marriage and thus, failed to demonstrate that they were living together in New York as husband and wife.

The beneficiary also asserted that he filed for divorce in 2002 and in 2003 the court entered a final divorce judgment. The petitioner submitted a copy of the Judgment of Divorce entered by the New York Supreme Court at the Courthouse, New York County on June 3, 2003 to support the beneficiary's assertions. According to the judgment of divorce, the instant beneficiary filed a complaint for divorce as plaintiff and the court granted a judgment dissolving the marriage between the beneficiary and [REDACTED]. In the judgment of divorce, the beneficiary's address is [REDACTED]. However, all the records show that the beneficiary was no longer living at this address in June 2003. It is

noted that the attorney who represented the plaintiff against ██████ in that divorce case was the same attorney who was currently representing ██████ in the Form I-130 petition while the petition was still pending with CIS at that time when the judgment of divorce was entered.⁶ The record does not contain any conflict of interest resolution documents from the attorney. It is also noted that ██████'s address was listed as ██████ in the judgment of divorce and the divorce judgment was entered without ██████ appearance. The above address for ██████ was listed on her G-█████ form accompanied with the Form I-130 petition as her residence for the period from January 1996 to March 2001. The record does not contain any evidence showing that the counsel had ever updated Ms. ██████ address in connection with the Form I-130 petition since the petition was filed on May 10, 2001. Counsel did not submit any divorce complaint he filed for the instant beneficiary in the divorce case. It is not clear whether ██████ was served a copy of the complaint, was informed of the divorce and did not appear in court due to not-having been served or informed. It is also not clear whether counsel had the right source for ██████'s updated address. In addition, the fact that the beneficiary was granted divorce by the court does not establish that the alleged marriage between the beneficiary and ██████ was a bona fide one, and that they began a new family by living together as husband and wife. Therefore, the AAO finds that the submitted judgment of divorce cannot establish that the sole purpose of the alleged marriage between the beneficiary and ██████ was not to confer upon the beneficiary an immigration benefit.

In conclusion, the record shows that the beneficiary has previously been accorded, or has sought to be accorded, an immediate relative or preference status as the spouse of a citizen of the United States. The petition was denied because the district director determined that the marriage was entered into or the beneficiary has attempted or conspired to enter into a marriage for the purpose of evading immigration laws, and that the petitioner or the beneficiary in the instant case failed to establish that the alleged marriage was not entered for the sole purpose to confer the beneficiary the immigration benefits. The ServiceCenter director independently reached the same conclusion and we uphold that conclusion. The AAO finds that the Form I-140 petition was not approvable under section 204(c) of the Act, that the director approved the petition in error, and that the director has good and sufficient cause to revoke the approval of the instant petition under section 205 of the Act. Thus, this ground of the director's revocation is affirmed.

Therefore, counsel's assertions on appeal cannot overcome grounds of the director's revocation. The AAO concurs with the director's findings that the petitioner had not established the beneficiary's requisite five years of experience as a restaurant manger prior to the priority date, that the petitioner had not established its continuing ability to pay the proffered wage beginning on the priority date to the present, and that the marriage between the beneficiary and ██████ was not established with evidence that this was a bona fide marriage, and therefore, the petition was not approvable under section 204(c) of the Act. The AAO finds that the director has good and sufficient causes to revoke the approval of the petition, and accordingly the director's revocation is affirmed.

⁶ The record shows that counsel ██████ was representing ██████ when she filed a Form I-130 petition. The petition was denied on March 21, 2007. The record does not contain any evidence that counsel terminated his representation of ██████ at any stages of the processing. In fact, the record shows that the district director sent counsel as attorney of record of a copy of the May 9, 2005 NOID and March 21, 2007 NOD.

Even if we did not uphold the director's grounds of revocation, the petition is not approvable and would have to be remanded for a new NOIR. Specifically, under 20 C.F.R. §§ 626.20(c)(8) and 656.3, the petitioner has the burden when asked to show that a valid employment relationship exists, that a *bona fide* job opportunity is available to U.S. workers. See *Matter of Amger Corp.*, 87-INA-545 (BALCA 1987). A relationship invalidating a *bona fide* job offer may arise where the beneficiary is related to the petitioner by "blood" or it may "be financial, by marriage, or through friendship." See *Matter of Sunmart* 374, 00-INA-93 (BALCA May 15, 2000). The record of proceedings shows that [REDACTED] is the owner of the petitioner. CIS records show that [REDACTED] is the brother of the beneficiary and filed a Form I-130 petition on behalf of the beneficiary as a United States citizen's brother on May 14, 2001 and the Form I-130 petition is still pending with CIS.⁷

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 petitioner's tax return for 2006 submitted in the record shows that [REDACTED] owns 95% of the company stock of the petitioner and the beneficiary is the 5% of the company stock owner. Therefore, considering the fact that the beneficiary is the brother of the petitioner's owner together, the director may wish to consider whether invalidating the labor certification is appropriate. In light of the above, the petition was never approvable. The director approved the petition in error on this ground.

The petition must 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. The director's revocation on December 15, 2007 is affirmed. The approval of the petition remains revoked.

⁷ EAC-01-176-52317.