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



U.S. Citizenship  
and Immigration  
Services

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FILE:

SRC 07 271 53075

Office: TEXAS SERVICE CENTER

Date:

**AUG 03 2009**

IN RE:

Petitioner:

Beneficiary:

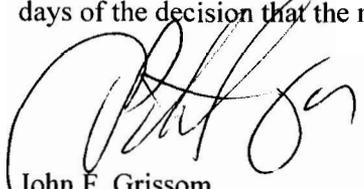
PETITION: Immigrant Petition for Alien Worker as a Skilled Worker or Professional pursuant to Section 203(b)(3) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)(3)

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.

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

  
John F. Grissom

Acting Chief, Administrative Appeals Office

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

The petitioner is an auto repair shop. It seeks to employ the beneficiary permanently in the United States as an auto mechanic. As required by statute, the petition is accompanied by a Form ETA 750, Application for Alien Employment Certification, approved by the United States Department of Labor (DOL). The director determined that the petitioner had not established that it had the continuing ability to pay the beneficiary the proffered wage beginning on the priority date of the visa petition. The director denied the petition accordingly.

The record shows that the appeal is properly filed, timely and makes a specific allegation of error in law or fact. The procedural history in this case is documented by the record and incorporated into the decision. Further elaboration of the procedural history will be made only as necessary.

As set forth in the director's April 10, 2008 denial, the single issue in this case is whether or not the petitioner has the ability to pay the proffered wage as of the priority date and continuing until the beneficiary obtains lawful permanent residence.

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

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

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

The petitioner must demonstrate the continuing ability to pay the proffered wage beginning on the priority date, which is the date the Form ETA 750, Application for Alien Employment Certification, was accepted for processing by any office within the employment system of the DOL. See 8 C.F.R. § 204.5(d). The petitioner must also demonstrate that, on the priority date, the beneficiary had the qualifications stated on its Form ETA 750, Application for Alien Employment Certification, as certified by the DOL and submitted with the instant petition. *Matter of Wing's Tea House*, 16 I&N Dec. 158 (Act. Reg. Comm. 1977).

Here, the Form ETA 750 was accepted on April 30, 2001. The proffered wage as stated on the Form ETA 750 is \$15 per hour (\$31,200 per year). The Form ETA 750 states that the position requires two years of experience in the job offered as an auto mechanic.

The AAO maintains plenary power to review each appeal on a *de novo* basis. 5 U.S.C. § 557(b) ("On appeal from or review of the initial decision, the agency has all the powers which it would have in making the initial decision except as it may limit the issues on notice or by rule."); *see also*, *Janka v. U.S. Dept. of Transp., NTSB*, 925 F.2d 1147, 1149 (9th Cir. 1991). The AAO's *de novo* authority has been long recognized by the federal courts. *See, e.g. Dor v. INS*, 891 F.2d 997, 1002 n. 9 (2d Cir. 1989). The AAO considers all pertinent evidence in the record, including new evidence properly submitted upon appeal.<sup>1</sup>

Relevant evidence in the record includes counsel's brief; copies of the petitioner's 2000,<sup>2</sup> 2001, and 2007 Forms 1120, U.S. Corporation Income Tax Returns; copies of the petitioner's 2002 through 2006 Forms 1120-A, U.S. Corporation Short-Form Income Tax Returns; a letter from [REDACTED] with a summary of financial information for 2001, 2003, 2004, 2005, and 2006; handwritten copies of the petitioner's 2001, 2003, 2004, 2005, and 2006 Forms 1096, Annual Summary and Transmittal of U.S. Information Returns; handwritten copies of the 2001, 2003, 2004, 2005, and 2006 Forms 1099-MISC, Miscellaneous Income, issued by the petitioner on behalf of the beneficiary; and copies of the beneficiary's 2001, 2003, 2004, 2005, and 2006 Forms 1040, U.S. Individual Income Tax Returns, including Schedule C, Profit or Loss from Business, for 2001, 2003, and 2006. The record does not contain any other evidence relevant to the petitioner's ability to pay the wage.

The evidence in the record of proceeding shows that the petitioner is structured as a C corporation. On the petition, the petitioner claimed to have been established in February 1993, to have a gross annual income of \$113,485, and to currently employ three workers. According to the tax returns in the record, the petitioner's fiscal year is from February 1 through January 31. On the Form ETA 750B, signed by the beneficiary on April 20, 2001, the beneficiary did not list any dates that he worked for the petitioner (although the petitioner is listed as a place of employment).

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

<sup>2</sup> It is noted that the petitioner's 2000 income tax return is for the fiscal year prior to the priority date of April 30, 2001; and, therefore, has limited probative value when determining the petitioner's continuing ability to pay the proffered wage of \$31,200 from the priority date. Therefore, the AAO will not consider the petitioner's 2000 tax return when determining the petitioner's ability to pay the proffered except when considering the totality of the circumstances affecting the petitioning business if the evidence warrants such consideration.

On appeal, counsel asserts that the petitioner has established its ability to pay the proffered wage of \$31,200 based on the consulting fees paid to the beneficiary and on the petitioner's liquid and non-liquid assets.

The petitioner must establish that its job offer to the beneficiary is a realistic one. Because the filing of an ETA 750 labor certification application establishes a priority date for any immigrant petition later based on the ETA 750, the petitioner must establish that the job offer was realistic as of the priority date and that the offer remained realistic for each year thereafter, until the beneficiary obtains lawful permanent residence. The petitioner's ability to pay the proffered wage is an essential element in evaluating whether a job offer is realistic. *See Matter of Great Wall*, 16 I&N Dec. 142 (Acting Reg. Comm. 1977); *see also* 8 C.F.R. § 204.5(g)(2). In evaluating whether a job offer is realistic, 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 Sonogawa*, 12 I&N Dec. 612 (Reg. Comm. 1967).

In determining the petitioner's ability to pay the proffered wage during a given period, USCIS will first examine whether the petitioner employed and paid the beneficiary during that period. If the petitioner establishes by documentary evidence that it employed the beneficiary at a salary equal to or greater than the proffered wage, the evidence will be considered *prima facie* proof of the petitioner's ability to pay the proffered wage. In the instant case, the petitioner has not established that it employed and paid the beneficiary the full proffered wage from the priority date of April 30, 2001.

The AAO notes that on appeal, the petitioner has submitted the 2001, 2003, 2004, 2005, and 2006 Forms 1099-MISC, issued by the petitioner on behalf of the beneficiary. However, all of the Forms 1099-MISC are handwritten, and none of the petitioner's tax returns list the amounts given as payment to the beneficiary as consulting fees. In addition, the Forms 1096 are not completed correctly (i.e., the form does not give the number of forms attached, the employer identification number (EIN), the total amount reported with the form, there is no evidence that the forms were actually filed with the Internal Revenue Service (IRS), etc.). Furthermore, only on appeal has the petitioner indicated that it employed the beneficiary during any of the pertinent years, 2001 through 2007. In fact, one letter, dated February 2, 2007, from [REDACTED] signed as President of Roy's II Auto Center, Inc. at the same address as the petitioner, states that the beneficiary "has been with us part time since January 3, 2000." And, while counsel states that the consulting fees paid to the beneficiary were not reflected in the petitioner's tax returns as the beneficiary did not have a valid social security number, all of the Forms 1099-MISC do show a social security number for the beneficiary. Therefore, without evidence that shows that the Forms 1096, Forms 1099-MISC, and the beneficiary's Forms 1040 were filed with the IRS, the AAO will not accept these forms as proof of the petitioner's ability to pay the proffered wage of \$31,200. *Matter of Ho*, 19 I&N Dec. 582, 591-592 (BIA 1988) 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.

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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.

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 (1<sup>st</sup> Cir. 2009). Reliance on federal income tax returns as a basis for determining a petitioner's ability to pay the proffered wage is well established by judicial precedent. *Elatos Restaurant Corp. v. Sava*, 632 F. Supp. 1049, 1054 (S.D.N.Y. 1986) (citing *Tongatapu Woodcraft Hawaii, Ltd. v. Feldman*, 736 F.2d 1305 (9th Cir. 1984)); see also *Chi-Feng Chang v. Thornburgh*, 719 F. Supp. 532 (N.D. Texas 1989); *K.C.P. Food Co., Inc. v. Sava*, 623 F. Supp. 1080 (S.D.N.Y. 1985); *Ubeda v. Palmer*, 539 F. Supp. 647 (N.D. Ill. 1982), *aff'd*, 703 F.2d 571 (7th Cir. 1983). Reliance on the petitioner's gross sales and profits and wage expense is misplaced. Showing that the petitioner's gross sales and profits exceeded the proffered wage is insufficient. Similarly, showing that the petitioner paid wages in excess of the proffered wage is insufficient.

In *K.C.P. Food Co., Inc. v. Sava*, 623 F. Supp. at 1084, the court held that the Immigration and Naturalization Service, now USCIS, had properly relied on the petitioner's net income figure, as stated on the petitioner's corporate income tax returns, rather than the petitioner's gross income. The court specifically rejected the argument that the Service should have considered income before expenses were paid rather than net income.

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

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

We find that the AAO has a rational explanation for its policy of not adding depreciation back to net income. Namely, that the amount spent on a long term tangible asset is a "real" expense.

*River Street Donuts* at 116. “[USCIS] and judicial precedent support the use of tax returns and the net income figures in determining petitioner’s ability to pay. Plaintiffs’ argument that these figures should be revised by the court by adding back depreciation is without support.” *Chi-Feng Chang* at 537 (emphasis added).

For a C corporation, USCIS considers net income to be the figure shown on Line 28 of the Form 1120, U.S. Corporation Income Tax Return. The record before the director closed on March 28, 2008 with the receipt by the director of the petitioner’s submissions in response to the director’s notice of intent to deny (NOID). As of that date, the petitioner’s 2008 federal income tax return was not yet due. Therefore, the petitioner’s income tax return for 2007 is the most recent return available. The petitioner’s tax returns demonstrate its net income for 2001 through 2007, as shown in the table below.

- In 2001, the Form 1120 stated net income of -\$2,481.
- In 2002, the Form 1120-A stated net income of \$47,336.
- In 2003, the Form 1120-A stated net income of -\$18.
- In 2004, the Form 1120-A stated net income of \$4,136.
- In 2005, the Form 1120-A stated net income of \$3,715.
- In 2006, the Form 1120-A stated net income of \$6,074.
- In 2007, the Form 1120 stated net income of \$41,284.

Therefore, for the years 2001, 2003, 2004, 2005, and 2006, the petitioner did not have sufficient net income to pay the proffered wage. The petitioner has shown that it had sufficient net income to pay the proffered wage in 2002 and 2007.<sup>3</sup>

If the net income the petitioner demonstrates it had available during that period, if any, added to the wages paid to the beneficiary during the period, if any, do not equal the amount of the proffered wage or more, USCIS will review the petitioner’s 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

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<sup>3</sup> As stated above, the AAO will not accept the Forms 1099-MISC, issued by the petitioner on behalf of the beneficiary, as proof of the petitioner’s ability to pay the proffered wage of \$31,200 as there is no evidence in the record of proceeding that establishes that the forms were actually filed with the IRS.

petitioner's ability to pay the proffered wage. Rather, USCIS will consider net current assets as an alternative method of demonstrating the ability to pay the proffered wage.

Net current assets are the difference between the petitioner's current assets and current liabilities.<sup>4</sup> A corporation's year-end current assets are shown on Schedule L, lines 1 through 6 and include cash-on-hand. **Its year-end current liabilities are shown on lines 16 through 18.** If the total of a corporation's end-of-year net current assets and the wages paid to the beneficiary (if any) are equal to or greater than the proffered wage, the petitioner is expected to be able to pay the proffered wage using those net current assets. The petitioner's tax returns demonstrate its end-of-year net current assets for 2001 through 2007, as shown in the table below.

- In 2001, the Form 1120 stated net current assets of \$4,231.
- In 2002, the Form 1120-A stated net current assets of \$113.
- In 2003, the Form 1120-A stated net current assets of -\$3,193.
- In 2004, the Form 1120-A stated net current assets of \$2,053.
- In 2005, the Form 1120-A stated net current assets of \$864.
- In 2006, the Form 1120-A stated net current assets of \$11,356.
- In 2007, the Form 1120 stated net current assets of \$16,342.

Therefore, for the years 2001, 2003, 2004, 2005, and 2006, the petitioner did not have sufficient net current assets to pay the proffered wage. The petitioner has already shown that it had sufficient net income to pay the proffered wage in 2002 and 2007.

Therefore, from the date the Form ETA 750 was accepted for processing by the DOL, the petitioner had not established that it had the continuing ability to pay the beneficiary the proffered wage as of the priority date through an examination of wages paid to the beneficiary,<sup>5</sup> or its net income or net current assets except for 2002 and 2007.

Counsel asserts in his brief accompanying the appeal that the petitioner has established its ability to pay the proffered wage of \$31,200 based on the consulting fees paid to the beneficiary and on the petitioner's liquid and non-liquid assets.

Counsel is mistaken. With regard to the wages paid to the beneficiary, please see footnote 3.

With regard to the petitioner's liquid assets, the petitioner's C.P.A. points to the cash on hand at the end of the year under Schedule L. While counsel urges that the petitioner's Schedule L Cash should

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

<sup>5</sup> See footnote 3.

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. Furthermore, this approach is unacceptable because net income and net current assets are not, in the view of the AAO, cumulative. The AAO views net income and net current assets as two different ways of methods of demonstrating the petitioner's ability to pay the wage--one retrospective and one prospective. Net income is retrospective in nature because it represents the sum of income remaining after all expenses were paid over the course of the previous tax year. Conversely, the net current assets figure is a prospective "snapshot" of the net total of petitioner's assets that will become cash within a relatively short period of time minus those expenses that will come due within that same period of time. Thus, the petitioner is expected to receive roughly one-twelfth of its net current assets during each month of the coming year. Given that net income is retrospective and net current assets are prospective in nature, the AAO does not agree with counsel that the two figures can be combined in a meaningful way to illustrate the petitioner's ability to pay the proffered wage during a single tax year. Moreover, combining the net income and net current assets could double-count certain figures, such as cash on hand and, in the case of a taxpayer who reports taxes pursuant to accrual convention, accounts receivable. Therefore, USCIS will not add the petitioner's Schedule L cash to the petitioner's net profits when calculating the funds available to the petitioner to pay the proffered wage of \$31,200.

With regard to the petitioner's non-liquid assets, those assets are considered to be a long-term assets (having a life longer than one year), and their value is not considered to be readily available to pay the proffered wage to the beneficiary as they are not easily converted into cash. Therefore, the AAO will not consider the petitioner's non-liquid assets when determining the petitioner's ability to pay the proffered wage of \$31,200.

In addition, it is unclear why counsel or the C.P.A believes loans to shareholders could be evidence of the ability to pay, but, it is clear that shareholder proceeds, or liabilities for that matter, cannot be evidence of the ability to pay by their very nature. Because a corporation is a separate and distinct legal entity from its owners and shareholders, the assets of its shareholders or of other enterprises or corporations cannot be considered in determining the petitioning corporation's ability to pay the proffered wage. *See Matter of Aphrodite Investments, Ltd.*, 17 I&N Dec. 530 (Comm. 1980). In a similar case, the court in *Sitar v. Ashcroft*, 2003 WL 22203713 (D.Mass. Sept. 18, 2003) stated, "nothing in the governing regulation, 8 C.F.R. § 204.5, permits USCIS to consider the financial resources of individuals or entities who have no legal obligation to pay the wage." Furthermore, loans from shareholders are also considered a long-term liability and cannot be considered in determining the petitioner's ability to pay the proffered wage.

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

USCIS may consider the overall magnitude of the petitioner's business activities in its determination of the petitioner's ability to pay the proffered wage. *See Matter of Sonogawa*, 12 I&N Dec. 612 (BIA 1967). The petitioning entity in *Sonogawa* had been in business for over 11 years and routinely earned a gross annual income of about \$100,000. During the year in which the petition was filed in that case, the petitioner changed business locations and paid rent on both the old and new locations for five months. There were large moving costs and also a period of time when the petitioner was unable to do regular business. The Regional Commissioner determined that the petitioner's prospects for a resumption of successful business operations were well established. The petitioner was a fashion designer whose work had been featured in *Time* and *Look* magazines. Her clients included Miss Universe, movie actresses, and society matrons. The petitioner's clients had been included in the lists of the best-dressed California women. The petitioner lectured on fashion design at design and fashion shows throughout the United States and at colleges and universities in California. The Regional Commissioner's determination in *Sonogawa* was based in part on the petitioner's sound business reputation and outstanding reputation as a couturiere. As in *Sonogawa*, USCIS may, at its discretion, consider evidence relevant to the petitioner's financial ability that falls outside of a petitioner's net income and net current assets. USCIS may consider such factors as the number of years the petitioner has been doing business, the established historical growth of the petitioner's business, the overall number of employees, the occurrence of any uncharacteristic business expenditures or losses, the petitioner's reputation within its industry, whether the beneficiary is replacing a former employee or an outsourced service, or any other evidence that USCIS deems relevant to the petitioner's ability to pay the proffered wage.

In the instant case, the petitioner's tax returns indicate it was incorporated in 1992. The petitioner has provided tax returns for the years 2000 through 2007. However, only the 2002 and 2007 tax returns establish the petitioner's ability to pay the proffered wage of \$31,200. There also is not enough evidence to establish that the business has met all of its obligations in the past or to establish its historical growth. In addition, there is no evidence of the petitioner's reputation throughout the industry. Furthermore, with regard to the events of September 11, 2001, the record of proceeding contains no evidence specifically connecting the petitioner's business decline to the events of September 11, 2001, not even a statement from the petitioner showing a loss or claiming difficulty in doing business specifically because of that event. A mere broad statement by the petitioner's C.P.A. that, because of the nature of the petitioner's industry, its business was impacted adversely by the events of September 11, 2001, cannot by itself, demonstrate the petitioner's continuing ability to pay the proffered wage beginning on the priority date. Rather, such a general statement merely suggests, without supporting evidence, that the petitioner's financial status might have appeared stronger had it not been for the events of September 11, 2001. In fact, the petitioner's tax returns did not show a significant decline in business until 2003 where it reported only one-quarter of the prior year's gross receipts. Subsequent gross receipts varied significantly year-to-year. Additionally, some of the tax returns reflect no wages paid, or low wages paid. Thus, assessing the totality of the circumstances in this individual case, it is concluded that the petitioner has not established that it had the continuing ability to pay the proffered wage.

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

Beyond the decision of the director, the record in this case also lacks conclusive evidence as to whether the petition is based on a bona fide job offer or whether the pre-existing family, business, or personal relationship may have influenced the labor certification. An application or petition that fails to comply with the technical requirements of the law may be denied by the AAO even if the Service Center does not identify all of the grounds for denial in the initial decision. *See Spencer Enterprises, Inc. v. United States*, 299 F. Supp. 2d 1025, 1043 (E.D. Cal. 2001), *aff'd*, 345 F.3d 683 (9th Cir. 2003); *see also Dor v. INS*, 891 F.2d 997, 1002 n. 9 (2d Cir. 1989) (noting that the AAO reviews appeals on a de novo basis). It appears that the beneficiary may be part owner of the petitioner.

On August 4, 2008, the AAO issued a notice of derogatory information (NDI) informing the petitioner that evidence in the file raised questions whether a valid employment relationship existed and whether a bona fide job opportunity was available to U.S. workers at the time of filing of the labor certification, April 30, 2001.

The AAO specifically informed the petitioner of the following:

On the ETA 750, the petitioner indicated that the proffered position was an auto mechanic and that the beneficiary would report to the petitioner's Manager. Although not noted by the director or part of the director's denial, a review of the petitioner's tax returns,<sup>6</sup> 2000 through 2007, reveals that for the question "At the end of the year, did any individual, partnership, corporation, estate or trust own, directly or indirectly, 50% or more of the corporation's voting stock?", the answer is "yes" in all instances. In 2000, the tax return stated that 100% of the corporation's voting stock was owned, but no name was provided that establishes who owned the 100% voting stock. In 2001 and 2004, the tax returns indicate that the beneficiary owned 100% of the corporation's voting stock. In 2002 and 2007, the name of the owner was not provided. In 2003, 2005, and 2006, the owner was listed as [REDACTED]

According to *Matter of Silver Dragon Chinese Restaurant*, 19 I&N Dec. at 405, the title of the alien's supervisor in cases where the beneficiary has an interest in the petitioning company is a material fact for consideration by the Department of Labor. Specifically, the beneficiary's ownership in the company may suggest that the job offer was never bona fide. By stating that the beneficiary, the owner of the petitioner at the time the ETA 750 was filed, would report to the Manager, the petitioner willfully misrepresented the title of the beneficiary's supervisor. The regulation at 20 C.F.R. § 656.30(d)(2002) provides:

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<sup>6</sup> It should be noted that none of the petitioner's tax returns are complete tax returns.

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 the labor certification application. If evidence of such fraud or willful misrepresentation becomes known to a RA [Regional Administrator, Employment and Training Administration] 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 notification shall be sent to the regional or national office, as appropriate, of the Department of Labor's Office of Inspector General.

The petitioner was allotted thirty days from the date of the NDI to respond to the notice with proof that a valid employment relationship exists and that a bona fide job opportunity was available to U.S. workers at the time of filing of the labor certification, April 30, 2001.

In response, counsel submits a brief, a copy of a share certificate, dated December 1992, with the name [REDACTED] as owner, a copy of a share certificate, dated March 17, 1995, with the name [REDACTED] as owner, a copy of a minutes of organization meeting of (no name), dated March 17, 1995, and signed by [REDACTED], a copy of a letter, dated August 22, 2008, from [REDACTED], of Roy's Automotive Center, Inc.,<sup>7</sup> a copy of a letter, dated August 22, 2008, from [REDACTED], and copies of job announcements from various websites advertising jobs for an auto mechanic at Auto Care East, Punjab Mobil, Superior Auto Sales, etc.<sup>8</sup> Counsel did not address the issue with the beneficiary or his father appearing as an owner on the petitioner's income tax returns.<sup>9</sup>

The letter, dated August 22, 2008 from [REDACTED], states:

My name is [REDACTED] and I purchased Roy's Complete Automotive approximately in 1995 from [the beneficiary's] father, [REDACTED]. His father did name the shop after his son. I chose to keep the name since it had a reputation for good work, honesty, and reasonable prices. At the time, [the beneficiary] was already

<sup>7</sup> It is noted that the petitioner's proclaimed owner has several different spellings of his last name (i.e., [REDACTED] etc.). It is further noted that the August 22, 2008 letter is on letterhead for Roy's Automotive Center, Inc., not Roy's Complete Automotive Service Center, Inc. No business entities were found with this name, according to the website at [http://appsext8.dos.state.ny.us/corp\\_public/CORPSEARCH.SELECT\\_ENTITY](http://appsext8.dos.state.ny.us/corp_public/CORPSEARCH.SELECT_ENTITY) (accessed on July 8, 2009).

<sup>8</sup> None were for the petitioner and all were dated in 2008.

<sup>9</sup> The purpose of the request for evidence is to elicit further information that clarifies whether eligibility for the benefit sought has been established, as of the time the petition is filed. See 8 C.F.R. §§ 103.2(b)(8) and (12). The failure to submit requested evidence that precludes a material line of inquiry shall be grounds for denying the petition. 8 C.F.R. § 103.2(b)(14).

excelling [as an] automotive technician and showed promise in many areas. I actively tried to recruit [the beneficiary] to my team, enticing him with many items, good pay, benefits, a company car, and yearly bonuses. [The beneficiary] was reluctant and preferred to work independently.

Finally, in 1999, I made [the beneficiary] an offer he could not refuse. I offered to sponsor him for Alien resident (Green Card). It still took [the beneficiary] a while to accept my offer, and in April of 2001, the Labor Authorization, Form ETA 750 was filed on his behalf.

\* \* \*

While responding to the Labor Department's requests, we published an ad in the NY Daily News. All responses were to go to the Labor Department who were to forward to us any inquiries for further investigation. The Department of Labor received zero (0) inquiries to our publications. We also posted a posting at the location advertising the position available. We still do. From time to time we get someone who applies but is not qualified or is qualified but has no good references to provide. On many occasions, I have put people to work. They last for several months and leave. Some I caught stealing, some were always late, and some love to leave early.

I am not saying that another qualified person is not out there. I am saying I have not been able to find and keep them. I don't offer medical or 401k or any benefits other than a salary so not many people are attracted to this position.

Let me make it very clear. I own Roy's Complete Automotive Service Center, Inc. I have known [the beneficiary] for a long time prior to the sponsorship. This job offer is available and will remain available to qualified applicants. [The beneficiary] does not have any administrative capabilities within my company other than those that have to do with the day to day operations. I am the only one who can invest, hire, fire, purchase equipment, etc.

The letter, dated August 22, 2008, from [REDACTED] states:

**It has been my responsibility to deal with the president of the corporation, currently, [REDACTED]. Mr. [REDACTED] has taken over the administrative and ownership duties of Roy's Complete Automotive Service Center, Inc. since March of 1995.**

Counsel states:

Petitioner, Roy's Complete Automotive Service Center, Inc., a closely held **corporation**, is owned and operated by [REDACTED] (Exhibits A and B). Mr. [REDACTED] purchased Roy's Complete Automotive Service Center, Inc. in March of 1995 from [REDACTED], the beneficiary's father (Exhibits A and B). Mr.

purchased all two hundred (200) shares (Exhibit A) and to this day remains the holder of all shares in the corporation. The business was incorporated on December 30, 1992 by [REDACTED] (Exhibits A, B, and C). When the business was incorporated in 1992, [REDACTED] named the shop after his son, [the beneficiary] in this matter (Exhibit B). When [REDACTED] purchased Roy's Complete Automotive Service Center, Inc., he kept the business's name intact as the shop had built up good will and had a reputation of providing good and honest service at reasonable prices (Exhibit B).

As owner and operator of Roy's Complete Automotive Service Center, Inc., Mr. [REDACTED] is responsible for the administrative and ownership duties (Exhibit B and C). Mr. [REDACTED] is the only individual with the authority to make business decisions, including, but not limited to, whether to invest in improvements, purchase equipments, retain professional services, etc. (Exhibits B and C). Most importantly, [REDACTED] is the only person authorized to making decision regarding the hiring and terminating of employees. Neither the [beneficiary] nor members of his family has say over the operations of Roy's Complete Automotive Service Center, Inc. While [the beneficiary] is currently working for Roy's Complete Automotive Service Center Inc., he does in the capacity of an auto mechanic (Exhibit B). He has no authority to make business decisions except those related to his position's duties (i.e., determining what parts need to be ordered in order to complete repairs on a customer's car).

In addition, Roy's Complete Automotive Service Center, Inc. has been in business for nearly sixteen (16) years (Exhibit C). While [the beneficiary] was working as an automotive technician at the time [REDACTED] purchased Roy's Complete Automotive Service Center, Inc., he did not work with company or was in any other way affiliated with said business (Exhibit B). It was not until 2001 that [the beneficiary] began to work for Roy's Complete Automotive Service Center, Inc. as an auto mechanic and is under the supervision of [REDACTED]. Though Roy's Complete Automotive Service Center, Inc. has had difficulty filling the position he currently holds, this by no means makes [the beneficiary] so integral to the business that it would cease to operate without him; especially, since the business operated for nearly ten (10) years without him.

Since [the beneficiary] is neither an investor nor holder of any other interest in Roy's Complete Automotive Service Center, Inc., a valid employment relationship exists between Petitioner and [the beneficiary]. [The beneficiary] is employed by Roy's Complete Automotive Service, Inc. as a mechanic and fulfills duties as a mechanic only. He is not involved with the business-making decisions of Roy's Complete Automotive Service, Inc. as those are within the sole authority of [REDACTED] as sole owner. This existence of a valid employment relationship is bolstered by the fact that the business has existed many years without [the beneficiary's] employment. As

a valid employment relationship exists between Petitioner and Beneficiary, the denial of the I-140 Immigrant Petition for Alien Worker should be overturned.

The AAO is not convinced by counsel's argument. Counsel did not address, in response to the AAO's NDI, why the petitioner's tax returns show that the beneficiary is the petitioner's owner on its 2001 and 2004 tax returns or why the beneficiary's father is the petitioner's owner on its 2003, 2005, and 2006 tax returns. In addition, it is noted that the petitioner's purported owner, Mr. [REDACTED] name does not appear on the tax returns in any location, including the signature of the officer or Schedule E, Compensation of Officers, of its 2000 tax return that shows that the officer received \$6,800 in compensation. Furthermore, the share certificates and the minutes of organization meeting of (no name) is not probative evidence of [REDACTED] ownership of Roy's Complete Automotive Service Center, Inc. The record does not contain an asset purchase agreement, bill of sale or any other documentation evidencing that Roy's Complete Automotive Service Center, Inc. was purchased by [REDACTED] or the date of any alleged sale. The fact that the petitioner is doing business at the same location as the predecessor or even using the same name is not evidence of the purchase of the entity by [REDACTED]. **Going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings.** *Matter of Soffici*, 22 I&N Dec. 158, 165 (Comm. 1998) (citing *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm. 1972)).

Finally, the website, [http://appsext8.dos.state.ny.us/corp\\_public/CORPSEARCH.SELECT\\_ENTITY](http://appsext8.dos.state.ny.us/corp_public/CORPSEARCH.SELECT_ENTITY) (accessed on July 7, 2009) reveals that there are two active corporations at the location given by the petitioner, Roy's Complete Automotive Service Center, Inc. with [REDACTED] as Chairman and Chief Executive Officer and Roy's II Auto Center, Inc. with [REDACTED] as Chairman and Chief Executive Officer and the beneficiary as Principal Executive Office. Further, another website accessed on July 8, 2009, <https://risk.nexis.com/InvestigativePortal/Default.aspx?> shows both businesses with [REDACTED] as owner, chairman, and president.<sup>10</sup> The report does not show [REDACTED] in any capacity regarding either entity. *Matter of Ho*, 19 I&N Dec. at 591-592 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.

\* \* \*

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.

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<sup>10</sup> See also the website at [http://appsext8.dos.state.ny.us/corp\\_public/CORPSEARCH.ENTITY](http://appsext8.dos.state.ny.us/corp_public/CORPSEARCH.ENTITY) (accessed on July 28, 2008), which lists [REDACTED] as Chairman of Roy's Complete Automotive Service Center, Inc.

In the instant case, the petitioner has not satisfactorily shown that [REDACTED] is its sole owner or that the beneficiary and his father are not part owners of the entity. Therefore, the petition may not be approved.

Under 20 C.F.R. §§ 626.20(c)(8) and 656.3, the petitioner has the burden when asked to show that a valid employment relationship exists, that a *bona fide* job opportunity is available to U.S. workers. See *Matter of Amger Corp.*, 87-INA-545 (BALCA 1987). A relationship invalidating a *bona fide* job offer may arise where the beneficiary is related to the petitioner by “blood” or it may “be financial, by marriage, or through friendship.” See *Matter of Summart 374*, 00-INA-93 (BALCA May 15, 2000). Where the person applying for a position owns the petitioner, it is not a *bona fide* offer. See *Bulk Farms, Inc. v. Martin*, 963 F.2d 1286 (9<sup>th</sup> Cir. 1992) (denied labor certification application for president, sole shareholder and chief cheese maker even where no person qualified for position applied). In *Matter of Silver Dragon Chinese Restaurant*, 19 I&N Dec. 401 (Comm. 1986), the commissioner noted that while it is not an automatic disqualification for an alien beneficiary to have an interest in a petitioning business, if the alien beneficiary’s true relationship to the petitioning business is not apparent in the labor certification proceedings, it causes the certifying officer to fail to examine more carefully whether the position was clearly open to qualified U.S. workers and whether U.S. workers were rejected solely for lawful job-related reasons. That case relied upon a Department of Labor advisory opinion in invalidating the labor certification. The regulation at 20 C.F.R. § 656.30(d) provides that [USCIS], the Department of State or a court may invalidate a labor certification upon a determination of fraud or willful misrepresentation of a material fact involving the application for labor certification.

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

Form I-140 lists that the petitioner only has three employees, two of whom appear to be the beneficiary and his father.

Given that the beneficiary appears to be part-owner of the petitioner, the facts of the instant case suggest that this may too be the functional equivalent of self-employment. The observations noted above suggest that further investigation, including consultation with the Department of Labor may be warranted, in order to determine whether any family, business, or personal relationship between the petitioner and the beneficiary represents an impediment to the approval of any employment-based visa petition filed by this petitioner on behalf of this beneficiary.

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.