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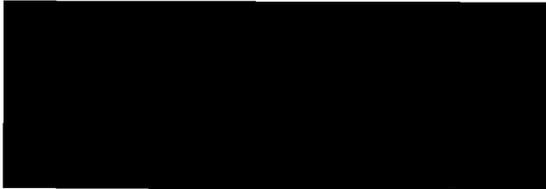
U.S. Department of Homeland Security  
U. S. Citizenship and Immigration Services  
Office of Administrative Appeals MS 2090  
Washington, DC 20529-2090



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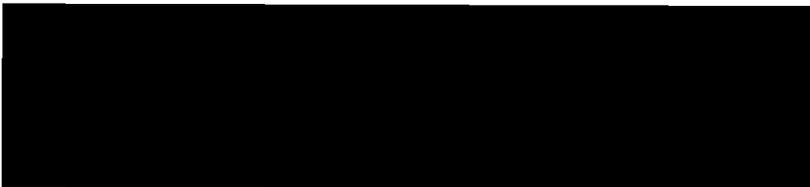
Office: TEXAS SERVICE CENTER

Date: FEB 01 2010

IN RE: Petitioner: [REDACTED]  
Beneficiary: [REDACTED]

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).

  
Perry Rhew  
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 with a separate finding of fraud. The labor certification application will also be invalidated based on the petitioner's fraudulent misrepresentation.

The petitioner is a restaurant.<sup>1</sup> It seeks to employ the beneficiary permanently in the United States as a cook.<sup>2</sup> 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 November 12, 2007 denial, the primary 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

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<sup>1</sup> The petitioner's federal income tax returns submitted to the record indicate that it is a retail business/gas station.

<sup>2</sup> The instant petition is for a substituted beneficiary. An I-140 petition for a substituted beneficiary filed prior to July 16, 2007 retains the same priority date as the original ETA 750. Memo. From Donald Neufeld, Acting Associate Director, Domestic Operations, United States Citizenship and Immigration Services (USCIS), to Regional Directors, *et al.*, *Interim Guidance Regarding the Impact of the [DOL's] final rule, Labor Certification for Permanent Employment of Aliens in the United States; Reducing the Incentives and Opportunities for Fraud and Abuse and Enhancing Program Integrity, on Determining Labor Certification Validity and the Prohibition of Labor Certification Substitution Requests*, <http://www.uscis.gov/files/pressrelease/DOLPermRule060107.pdf> (accessed October 5, 2009).

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 May 12, 2003. The proffered wage as stated on the Form ETA 750 is \$11.69 per hour (\$24,315.20 per year).

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>3</sup>

On appeal, counsel asserts that the director failed to consider its bank statements in the determination of its ability to pay the proffered wage; that the petitioner is a solvent, on-going business with substantial business revenues; that the director erred in requiring the petitioner to submit evidence of its ability to pay from 2003 onward; and that the director imposed an improper burden of proof on the petitioner.

The evidence in the record of proceeding shows that the petitioner is structured as an S corporation. On the petition, the petitioner claimed to have been established on October 19, 1999, and to currently employ five workers. According to the tax returns in the record, the petitioner's fiscal year is based on a calendar year. On the Form ETA 750B, signed by the substituted beneficiary on February 1, 2007, the beneficiary did not claim to have worked for the petitioner.

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, despite counsel's assertion on appeal, 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,

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<sup>3</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).

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, USCIS requires the petitioner to demonstrate financial resources sufficient to pay the beneficiary's proffered wages, although the totality of the circumstances affecting the petitioning business will be considered if the evidence warrants such consideration. *See Matter of Sonegawa*, 12 I&N Dec. 612 (Reg. 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 beneficiary's IRS Form 1099 for 2007 shows compensation received from the petitioner of \$26,000.00. Therefore, for the year 2007, the petitioner has established that it employed and paid the beneficiary the full proffered wage. The petitioner has not established that it employed the beneficiary in any other relevant year.

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 receipts and wage expense is misplaced. Showing that the petitioner's gross receipts 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 USCIS 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).

The petitioner’s tax returns demonstrate its net income for 2003, 2004, 2005, 2006 and 2008, as shown in the table below.

- In 2003, the Form 1120S stated net income<sup>4</sup> of \$17,717.00.<sup>5</sup>
- In 2004, the Form 1120S stated net income of \$5,498.00.
- In 2005, the Form 1120S stated net income of -\$21,685.00.

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<sup>4</sup> Where an S corporation’s income is exclusively from a trade or business, USCIS considers net income to be the figure for ordinary income, shown on line 21 of page one of the petitioner’s IRS Form 1120S. However, where an S corporation has income, credits, deductions or other adjustments from sources other than a trade or business, they are reported on Schedule K. If the Schedule K has relevant entries for additional income, credits, deductions or other adjustments, net income is found on line 23 (2003) line 17e (2004-2005) line 18 (2006-2008) of Schedule K. *See* Instructions for Form 1120S, 2006, at <http://www.irs.gov/pub/irs-pdf/i1120s.pdf> (accessed January 4, 2010) (indicating that Schedule K is a summary schedule of all shareholder’s shares of the corporation’s income, deductions, credits, etc.). Because the petitioner had additional deductions shown on its Schedule K for 2004, the petitioner’s net income is found on Schedule K of its tax return. The petitioner’s net income for 2003, 2005, 2006 and 2008 is found on line 21 of page one of the petitioner’s IRS Form 1120S.

<sup>5</sup> The director prorated the proffered wage for the portion of the year that occurred after the priority date. We will not, however, consider 12 months of income towards an ability to pay a lesser period of the proffered wage any more than we would consider 24 months of income towards paying the annual proffered wage. While we will prorate the proffered wage if the record contains evidence of net income or payment of the beneficiary’s wages specifically covering the portion of the year that occurred after the priority date (and only that period), such as monthly income statements or pay stubs, the petitioner has not submitted such evidence.

- In 2006, the Form 1120S stated net income of -\$28,736.00.
- In 2008, the Form 1120S stated net income of \$16,317.00.

Therefore, for the years 2003, 2004, 2005, 2006 and 2008, the petitioner did not have sufficient net income to pay the proffered wage.

As an alternate means of determining the petitioner's ability to pay the proffered wage, USCIS may review the petitioner's net current assets. Net current assets are the difference between the petitioner's current assets and current liabilities.<sup>6</sup> 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. The petitioner did not submit its Schedule L to its IRS Form 1120S for 2003 and, therefore, we are unable to calculate its net current assets for that year. Further, the petitioner's Schedule L to its IRS Form 1120S for 2006 was blank. The petitioner's tax returns demonstrate its end-of-year net current assets for 2004, 2005 and 2008, as shown in the table below.

- In 2004, the Form 1120S stated net current assets of \$6,830.00.
- In 2005, the Form 1120S stated net current assets of -\$14,855.00.
- In 2008, the Form 1120S stated net current assets of \$73,499.00.

Therefore, for the years 2003, 2004, 2005 and 2006, the petitioner did not establish that it had sufficient net current assets to pay the proffered wage. For 2008, the petitioner established that it had sufficient net current assets to pay the proffered wage.

Thus, from the date the Form ETA 750 was accepted for processing by the DOL, the petitioner had not established that it had the continuing ability to pay the beneficiary the proffered wage as of the priority date through an examination of wages paid to the beneficiary, or its net income or net current assets, except for 2007 and 2008.

On appeal, counsel asserts that the director failed to consider its bank statements in the determination of its ability to pay the proffered wage. However, as noted by the director in his decision, counsel's reliance on the balances in the petitioner's bank account is misplaced. First, bank statements are not among the three types of evidence, enumerated in 8 C.F.R. § 204.5(g)(2), required to illustrate a petitioner's ability to pay a proffered wage. While this regulation allows additional material "in appropriate cases," the petitioner in this case has not demonstrated why the documentation specified at

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<sup>6</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.

8 C.F.R. § 204.5(g)(2) is inapplicable or otherwise paints an inaccurate financial picture of the petitioner. Second, bank statements show the amount in an account on a given date, and cannot show the sustainable ability to pay a proffered wage. Third, no evidence was submitted to demonstrate that the funds reported on the petitioner's bank statements somehow reflect additional available funds that were not reflected on its tax returns, such as the petitioner's taxable income (income minus deductions) or the cash specified on Schedule L that was considered in determining the petitioner's net current assets.

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

In the instant case, counsel asserts on appeal that the petitioner is a solvent, on-going business with substantial business revenues. The petitioner was incorporated in 1999.<sup>7</sup> It had gross receipts of \$234,622, \$286,702, \$225,102, \$243,767, \$294,333, \$312,441 in 2003, 2004, 2005, 2006, 2007 and 2008, respectively. The petitioner paid minimal salaries and wages of \$34,111, \$28,655, \$27,851, \$21,091, \$13,287 and \$11,049 in 2003, 2004, 2005, 2006, 2007 and 2008, respectively. The petitioner did not establish the occurrence of any uncharacteristic business expenditures or losses, the petitioner's reputation within its industry, or whether the beneficiary is replacing a former

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<sup>7</sup> The State of Maryland Department of Assessments and Taxation's website indicates that the petitioner's corporate status was forfeited on October 7, 2005, and was not revived until May 28, 2009. *See* [REDACTED]

[REDACTED] (accessed January 4, 2010).

employee or an outsourced service.<sup>8</sup> 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.

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.

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 petitioner has not established that it has made a *bona fide* job offer to the beneficiary.<sup>9</sup> Under 20 C.F.R. § 656.20(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). The AAO issued a notice of derogatory information (NDI) to the petitioner on October 28, 2009. The NDI indicated that the petitioner's current sole shareholder, sole director, and President is [REDACTED].<sup>10</sup> The beneficiary's alias is [REDACTED]. Therefore, the NDI noted that the beneficiary and the petitioner appear to be related. The NDI asked the petitioner to provide evidence to establish that the petitioner has made a *bona fide* job offer to the beneficiary and that the relationship between the petitioner and the beneficiary was disclosed to the United States Department of Labor (DOL) during labor certification proceedings. See *Matter of Silver Dragon Chinese Restaurant*, 19 I&N Dec. 401 (Comm. 1986). Additionally, the AAO requested evidence that the petitioner conducted a labor market test conforming to the regulatory requirements.<sup>12</sup>

<sup>8</sup> The petitioner indicated that the proffered position is not a new position on the Form I-140 petition, and the beneficiary was employed as a cook by the petitioner until a medical emergency in 2008.

<sup>9</sup> An application or petition that fails to comply with the technical requirements of the law may be denied by the AAO even if the Service Center does not identify all of the grounds for denial in the initial decision. See *Spencer Enterprises, Inc. v. United States*, 229 F. Supp. 2d 1025, 1043 (E.D. Cal. 2001), *aff'd*, 345 F.3d 683 (9th Cir. 2003); see also *Dor v. INS*, 891 F.2d 997, 1002 n. 9 (2d Cir. 1989)(noting that the AAO reviews appeals on a *de novo* basis).

<sup>10</sup> See [REDACTED]

[REDACTED] (accessed October 5, 2009).

<sup>11</sup> For example, the beneficiary's IRS Form 1099-MISC, Miscellaneous Income, for 2007 was issued to [REDACTED]. He also filed his 2007 IRS Form 1040, U.S. Individual Income Tax Return, under the name [REDACTED].

<sup>12</sup> Under DOL's regulations, it is the responsibility of USCIS to ensure that the labor market test was *in fact* carried out in accordance with applicable law. See 20 C.F.R. § 656.30(d).

In response to the NDI, counsel indicated:

[REDACTED] is the shareholder, owner and manager of the petitioner [REDACTED]. The substituted beneficiary, [REDACTED], is the biological brother of [REDACTED]. The initial beneficiary, [REDACTED], is the brother-in-law of [REDACTED]. [REDACTED] is married to the sister of [REDACTED].

Despite the familial relationship between the original beneficiary, the substituted beneficiary and the petitioner, counsel asserts that the job offer was bona fide. He states that since neither beneficiary had an ownership interest in the petitioner's business, the instant case is distinguishable from *Matter of Silver Dragon Chinese Restaurant*. He notes that both the original and substituted beneficiaries were employed by the petitioner and, therefore, that the job offer was bona fide. We disagree.

The petitioner should have disclosed the relationship between the original beneficiary and the petitioner to the DOL and the relationship between the substituted beneficiary and the petitioner to USCIS when submitting the substituted beneficiary's Form ETA 750, Part B. *See Matter of Silver Dragon Chinese Restaurant*, 19 &N Dec. at 406.<sup>13</sup> The petitioner failed to make these disclosures. Further, it appears that the petitioner attempted to hide the familial relationship from DOL and USCIS by having [REDACTED] sign the Form ETA 750 and the Form I-140 as [REDACTED] instead of [REDACTED]. The situation in the instant petition is analogous to the beneficiary in *Matter of Silver Dragon Chinese Restaurant* based on the family relationship between the petitioner's owner, the original beneficiary and the substituted beneficiary, and the lack of clarity as to the actual relationship of the beneficiaries to the petitioner. The familial relationship would have caused the DOL and USCIS to examine more carefully whether the job opportunity is clearly open to qualified U.S. workers, and whether U.S. workers applying for the job, if any, were rejected solely for lawful job-related reasons. *See id.* at 402. The fact that both the original and substituted beneficiaries were employed by the petitioner does not establish that a *bona fide* job opportunity is available to U.S. workers. The petitioner has not established that it has made a *bona fide* job offer to the beneficiary.

Section 212(a)(6)(C) of the Act provides:

Misrepresentation. – (i) In general. – Any alien who, by fraud or willfully misrepresenting a material fact, seeks to procure (or has sought to procure or has procured) a visa, other documentation, or admission into the United States or other benefit provided under this Act is inadmissible.

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<sup>13</sup> The burden rests on the employer to provide clear evidence that a bona fide job opportunity is available, and that the employer has, in good faith, sought to fill the position with a US worker. *Matter of Amger Corp.*, 87-INA-545 (BALCA 1987).

Furthermore, a finding of fraud may lead to invalidation of the Form ETA 750 pursuant to 20 C.F.R. § 656.30(d). *See* 20 C.F.R. § 656.31(d) regarding labor certification applications involving fraud or willful misrepresentation:

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

By concealing the relationship between the petitioner, the original beneficiary and the substituted beneficiary on the labor certification application, the petitioner has sought to procure a benefit provided under the Act through fraud and willful misrepresentation of a material fact. We therefore make a finding of fraud. This finding of fraud shall be considered in any future proceeding where admissibility is an issue. We will invalidate the Form ETA 750 pursuant to 20 C.F.R. § 656.31(d) based on the petitioner's fraudulent misrepresentation.

The petition will be denied for the above stated reasons, with each considered as an independent and alternative basis for denial.<sup>14</sup> The burden of proof in these proceedings rests solely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. The petitioner has not met that burden.

**ORDER:** The appeal is dismissed with a finding of fraud.

**FURTHER ORDER:** The AAO finds that the petitioner fraudulently and willfully mislead DOL and USCIS on elements material to its eligibility for a benefit sought under the immigration laws of the United States. The labor certification application is invalidated pursuant to 20 C.F.R. § 656.31(d) based on the petitioner's fraudulent misrepresentation.

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<sup>14</sup> When the AAO denies a petition on multiple alternative grounds, a plaintiff can succeed on a challenge only if it is shown that the AAO abused its discretion with respect to all of the AAO's enumerated grounds. *See Spencer Enterprises, Inc. v. United States*, 229 F. Supp. 2d at 1043, *aff'd*. 345 F.3d 683.