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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
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FILE: [REDACTED] Office: NEBRASKA SERVICE CENTER Date: **MAR 02 2010**
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IN RE: Petitioner: [REDACTED]
Beneficiary: [REDACTED]

Petition: Immigrant Petition for Alien Worker as an Unskilled Worker Pursuant to Section 203(b)(3)
of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)(3)

IN 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 or reopen, as required by 8 C.F.R. § 103.5(a)(1)(i).

Perry Rhew, Chief
Chief, Administrative Appeals Office

DISCUSSION: The preference visa petition was improperly revoked by the district director. The petition was reopened and subsequently denied by the Director, Nebraska Service Center after issuance of a Notice of Intent to Deny on October 2, 2007. The director additionally invalidated the labor certification. The matter is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed and the labor certification will remain invalidated.

The petitioner is a kosher bakery. It seeks to employ the beneficiary permanently in the United States as a baker. 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 demonstrated its continuing financial ability to pay the proffered wage beginning as of the priority date. The director also determined that the petitioner had not established that the beneficiary had acquired the necessary qualifying training as of the priority date of the visa petition. The director additionally determined that petitioner had willfully misrepresented on the labor certification that a *bona fide* full-time permanent job offer existed and invalidated the labor certification.¹

On appeal, the petitioner, through counsel, submits additional evidence relating to the petitioner's ability to pay the proffered wage and asserts that the director erred in this determination and in determining that the job offer was not *bona fide*.

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).²

Section 203(b)(3)(A)(iii) of the Act, 8 U.S.C. § 1153(b)(3)(A)(iii), provides for the granting of preference classification to other qualified immigrants who are capable, at the time of petitioning for classification under this paragraph, of performing unskilled labor, not of a temporary or seasonal 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:

¹ It is noted that Section 212(a)(6)(C)(i) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1182(a)(6)(C)(i) provides that "[A]ny 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 chapter is inadmissible."

² 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.

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 regulation at 8 C.F.R. § 204.5(1)(3) further provides:

(ii) *Other documentation—*

- (A) *General.* Any requirements of training or experience for skilled workers, professionals, or other workers must be supported by letters from trainers or employers giving the name, address, and title of the trainer or employer, and a description of the training received or the experience of the alien.

Further, the regulation at 20 C.F.R. § 656.30 provides in pertinent part:

(d) *Invalidation of labor certifications.* After issuance, a labor certification may be revoked by ETA using the procedures described in §656.32. Additionally, after issuance, a labor certification is subject to invalidation by the DHS or by a Consul of the Department of State upon a determination, made in accordance with those agencies' procedures or by a court, of fraud or willful misrepresentation of a material fact involving the labor certification application. . . .

The petitioner must demonstrate that a beneficiary has the necessary education and experience specified on the labor certification as of the priority date. The petitioner must also demonstrate the continuing ability to pay the proffered wage beginning on the priority date, the day the Form ETA 750 was accepted for processing by any office within DOL's employment system. *See* 8 C.F.R. § 204.5(d); *Matter of Wing's Tea House*, 16 I&N 158 (Act. Reg. Comm. 1977). Here, the Form ETA 750 was accepted for processing on August 10, 1998. The proffered wage is set forth on the labor certification application as \$28,000 per year. The labor certification application was signed on August 5, 1998 by [REDACTED] as manager. On Part 14 of the labor certification "manager" is stated as the occupational title of the person who will be the alien's immediate supervisor.

Item 14 of the ETA 750A describes the education, training and experience that an applicant for the certified position must have. In this matter, item 14 states that the alien must one year of work experience in the job. The duties are described in item 13 of the ETA 750 as "baking kosher cakes and pastry products including breads, and challas. Coordinate special displays prepare cakes, set up and decorating."

The ETA 750B, signed by the beneficiary on August 5, 1998, lists three jobs that he has held. He states that he worked for ██████████ Tel Aviv, Israel as a full-time baker from September 1979 to October 1981. He also claims to have worked as a full-time baker for the Israel Defense Force from October 1971 to June 1974. Finally, the beneficiary states that he has worked for the petitioning business as a baker from January 1997 to the current time (date of signing).

As evidence that the beneficiary had obtained the requisite experience in the job offered and in response to the director's request for evidence issued on May 1, 2003, a letter typed on the letterhead of the petitioning business, dated July 3, 2003, signed by "██████████," states that the beneficiary obtained his experience as a baker in accordance with the information stated on the ETA 750. Another employment verification certificate was submitted in response to the director's notice of intent to deny issued on July 13, 2007. It is dated June 21, 1992 and is from ██████████. No address is given and it appears to be a translation of a letter in Hebrew. It states that ██████████ and [the beneficiary] worked as pastry cooks and bakers between 1982 and 1987 at our ██████████ which is a kosher bakery." The author is stated to be ██████████ who shares the same surname as the beneficiary. His title is stated as ██████████." Although this letter is not mentioned by the director in his decision to deny the petition, it is noted that the letter did not state whether the beneficiary worked full-time or part-time, did not properly identify ██████████ title, and the translation did not comply with the terms of 8 C.F.R. § 103.2(b)(3) which provides that a document in a foreign language must be accompanied by a full English language translation where the translator has certified that he or she is competent to translate from the foreign language into English and that the translation is certified to be complete and accurate. Additionally, it is noted that this employment was completely omitted from Part B of the ETA 750 and will not be considered as probative of the beneficiary's qualifying experience.³

With regard to the beneficiary's experience as a baker, the director observed in his decision to deny the petition that the petitioner's authorized representative was the beneficiary's wife. Further, as noted in the director's intent to deny, it appeared that his wife had intentionally failed to reveal this relationship by signing various documents with her maiden name. The director noted in his decision that counsel had represented that the beneficiary's wife had "changed her name to ██████████ on June 30, 2003, after her marriage to the Beneficiary." However, Cook County, Illinois records indicate that they were married on November 14, 2002, and that the employment verification letter of July 3, 2003 signed by the beneficiary's wife in her maiden name occurred well after the date that counsel asserts that her name was changed. The director additionally observes that "the beneficiary's wife signed the correspondence with her maiden name, ██████████, under the title of 'manager,'" and that she "completed and signed Form G-325A on March 14, 2005. On this form, ██████████ states she has not worked in the last five years. As this statement was made on March 14, 2005, it suggests ██████████ did not hold employment from March 14, 2000 through March 14, 2005."

³ See *Matter of Leung*, 16 I&N 12, Interim Dec. 2530 (BIA 1976)(decided on other grounds; Court noted that applicant testimony concerning employment omitted from the labor certification deemed not credible.)

On appeal, counsel merely states that the beneficiary's wife may continue to sign documents using her maiden name after marriage but does not address the issue of her employment. 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. *Matter of Ho*, 19 I&N Dec. 582, 591-592 (BIA 1988). The petitioner failed to establish that the beneficiary possessed the requisite employment experience as of the priority date of August 10, 1998.

A 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 this matter, relevant to the petitioner's continuing financial ability to pay the proffered wage, the director concluded that although the petitioner established through its tax returns and copies of Wage and Tax Statements (W-2s) provided to the beneficiary, that it had the ability to pay the proffered wage of \$28,000 per year to the beneficiary in 1999 and 2002, 2003, 2004, 2005, and 2006, it had not demonstrated the ability to pay the proffered wage in 1998, the year of filing, and in 2000 and 2001.

The AAO finds that the petitioner demonstrated the ability to pay the proffered wage in 2002, 2003 and 2004 through the W-2s issued to the beneficiary reflecting compensation paid in those years that demonstrated its ability to pay the proffered wage of \$28,000 per year, but failed to establish the ability to pay the proffered wage in the other years because it failed to submit complete tax returns either in the underlying record or on appeal. It is noted that in his notice of intent to deny the petition, the director had instructed the petitioner to provide evidence demonstrating its ability to pay the proffered wage starting in 1998 and continuing through the present. He stated that such evidence must include *complete* U.S. tax returns for this time frame. In response, the petitioner submitted only the first page of its Form 1120S, U.S. Income Tax Return for an S Corporation for 1998 through 2006. Although the director reviewed the ordinary business income as reported on line 21 of the first page of each tax return, this review was flawed because this figure only applies where an S Corporation's income is exclusively from a trade or business. However, U.S. Citizenship and Immigration Services (USCIS) reviews Schedule K where an S corporation has income, credits, deductions or other adjustments from sources other than a trade or business.⁴ In this matter, as complete tax returns were not provided as directed by the notice of intent to deny, which would have included Schedule K and all other pertinent information, the petitioner has not established its ability to pay the proffered wage.

⁴ *See* Instructions for Form 1120S, at <http://www.irs.gov/pub/irs-pdf/i1120s.pdf> (accessed March 22, 2007)(indicating that Schedule K is a summary schedule of all shareholder's shares of the corporation's income, deductions, credits, etc).

Further, although the petitioner provided copies of its tax returns' Schedule L, Balance Sheets per Books, for 1998 through 2006 on appeal, they will not be considered as probative of the petitioner's ability to pay the proffered wage.⁵ Because the petitioner was specifically notified that complete tax returns were required in the director's intent to deny, 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). As in the present matter, where a petitioner has been put on notice of a deficiency in the evidence and has been given an opportunity to respond to that deficiency, the AAO will not accept evidence offered for the first time on appeal. *See Matter of Soriano*, 19 I&N Dec. 764 (BIA 1988); *Matter of Obaigbena*, 19 I&N Dec. 533 (BIA 1988). If the petitioner had wanted the submitted evidence to be considered, it should have submitted the complete tax returns in response to the director's intent to deny. *Id.* Under the circumstances, the AAO need not, and does not, consider the sufficiency of this evidence submitted on appeal in support of the petitioner's ability to pay the proffered wage.

Evidence of compensation paid to the beneficiary was provided as shown by copies of W-2s. They contain the following information:

Year	Compensation
1998	\$19,960
1999	\$22,800
2000	\$25,375
2001	\$ 2,400
2002	\$27,900
2003	\$28,200
2004	\$28,500
2005	\$ 9,750

Wages in the amount of \$9,360 are also shown to have been paid to the beneficiary during the second quarter of 2007 as reflected by a copy of an Illinois employer's wage report.

⁵ If provided within complete tax returns, USCIS will also review a petitioner's net current assets for a given period if its net income is not adequate to demonstrate its ability to pay the proffered wage during a given period. Net current assets are the difference between the petitioner's current assets and current liabilities. It represents a measure of liquidity during a given period and a possible readily available resource out of which the proffered wage may be paid. A corporate petitioner's year-end current assets and current liabilities are shown on Schedule L of a corporate tax return or on its audited financial statement or annual report based on audited financial statements. Current assets are represented on line(s) 1 through 6 and current liabilities are shown on line(s) 16 through 18. If the petitioner's end-of-year net current assets are equal to or greater than the proffered wage, the petitioner is expected to be able to pay the proffered wage out of those net current assets.

In determining the petitioner's ability to pay the proffered wage during a given period, USCIS will first examine whether the petitioner may have employed and paid the beneficiary during the relevant period. If the petitioner establishes by documentary evidence that it employed the beneficiary at a salary equal to or greater than the proffered wage during a given period, the evidence will be considered *prima facie* proof of the petitioner's ability to pay the proffered wage. To the extent that the petitioner paid wages less than the proffered salary, those amounts will be considered in calculating the petitioner's ability to pay the proffered wage. If any shortfall between the actual wages paid by a petitioner to a beneficiary and the proffered wage can be covered by either a petitioner's net income or net current assets during the given period, the petitioner is deemed to have demonstrated its ability to pay the proffered salary for that period. Here, as noted above, the W-2s for 2002, 2003 and 2004 indicate that the petitioner demonstrated its ability to pay the proffered wage by compensating the beneficiary slightly under and slightly over the certified wage of \$28,000 in each of those years. For the reasons cited above, however, the AAO will not consider the partial corporate tax returns provided to the record as demonstrating the petitioner's continuing ability to pay the shortfalls resulting when comparing the actual wages paid to the proffered wage in the other relevant years. 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)).⁶ It may not be concluded that for 1998, 1999, 2000, 2001, 2005, or 2006 that the petitioner established its ability to pay the proffered wage.

⁶ If the petitioner does not establish that it employed and paid the beneficiary an amount at least equal to the proffered wage during a given period, USCIS will next examine the net income figure (or net current assets) as reflected on the petitioner's federal income tax returns without consideration of depreciation or other expenses. As set forth in the regulation at 8 C.F.R. § 204.5(g)(2), a petitioner may also provide either audited financial statements or annual reports as an alternative to federal tax returns, but they must show that a petitioner has sufficient net income or net current assets to pay the proffered wage. It is also noted that reliance on federal income tax returns as a basis for determining a petitioner's ability to pay the proffered wage is well supported by federal case law. . *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); *River Street Donuts, LLC v. Napolitano*, 558 F.3d 111 (1st Cir. 2009). 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. It is further noted that the petitioner filed for a second worker. In such a case the petitioner would need to demonstrate the continuing ability to pay the proffered wage as of the priority date for each sponsored worker.

It is noted on the notice of appeal, counsel states that the petitioner had the ability to pay the proffered wage but the director failed to consider all submitted documents related to this ability. Counsel did not identify the documents that the director failed to consider. Subsequent partial copies of the petitioner's 1998 through 2006 tax returns were submitted without further argument.⁷ Based on the foregoing, the AAO concludes that the petitioner has failed to demonstrate that it has had the continuing financial ability to pay the proffered wage pursuant to 8 C.F.R. 204.5(g)(2).

The regulation at 20 C.F.R. § 656.3 states that employment means: "Permanent full-time work by an employee for an employer other than oneself." The INA was intended to protect U.S. workers from foreign competition and to allow U.S. employers to hire foreign workers when qualified U.S. workers are not available, but the Act was not intended to protect the interests of foreign self-employed entrepreneurs. *See Bulk Farms, Inc. v. Martin*, 963 F.2d 1286 (9th Cir. 1992)(D.C. Cir 1989)(labor certification appropriately denied where sought for its president, sole shareholder and chief cheese maker); *Hall v. McLaughlin*, 864 F.2d 868, 875 (D.C.Cir. 1989)(certification denied where employing corporation is not a "sham," and is not separable from alien who was founder and corporate president). It is noted that pertinent state corporation online records indicate that the petitioning business was incorporated on August 10, 1995 and that the beneficiary is the president of the petitioning business.⁸ On appeal, and from the information derived from the district office

⁷ It is noted that in *Matter of Sonogawa*, 12 I&N Dec. 612 (Reg. Comm. 1967), the appeal was sustained where other circumstances were found to be applicable in supporting a petitioner's reasonable expectations of increasing business and increasing profits despite evidence of past small profits. That case, however, relates to petitions filed during uncharacteristically unprofitable or difficult years within a framework of profitable or successful years. During the year in which the petition was filed, the *Sonogawa* petitioner changed business locations, and paid rent on both the old and new locations for five months. There were large moving costs and a period of time when business could not be conducted. The Regional Commissioner determined that the prospects for a resumption of successful operations were well established. He noted that the petitioner was a well-known fashion designer who had been featured in *Time* and *Look*. Her clients included movie actresses, society matrons and Miss Universe. The petitioner had 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.

Although it is noted that the petitioner has provided copies of documents indicating that the petitioner has contributed to community activities and describing its establishment in Buffalo Grove, Illinois, we do not conclude that the petitioner has submitted sufficient evidence demonstrating that uncharacteristic losses, factors of outstanding reputation or other factual circumstances similar to *Sonogawa* are applicable. As noted above, it failed to submit complete tax returns despite the director's specific request. No persuasive argument that *Sonogawa* should be applied has been made. The AAO cannot conclude that the petitioner has demonstrated that such unusual circumstances have been shown to exist in this case, which parallel those in *Sonogawa*.

⁸ See <http://www.ilsos.gov/corporatellc/CorporateLicController>. (Accessed Jan. 14, 2010). The petitioner is shown to have been incorporated on August 10, 1995; the beneficiary is stated to be the

interview it is indicated that the beneficiary and his brother, [REDACTED] were co-owners of the bakery. The number of shareholders is shown as "2" on each of the tax returns from 1998 to 2005. Where Schedule K-1 was provided on appeal, the beneficiary is shown as a 50% shareholder on the tax returns for 1999, 2001, 2002, 2003, and 2004. In 2005, only one shareholder is listed on part G of the tax return but Schedule K-1 shows that the beneficiary held 47.376% of the stock. On the 2006 tax return, the beneficiary is listed as the only shareholder with 100% of the stock.

In his notice of intent to deny, issued in July 2007, the director had requested that the petitioner submit documentation that the beneficiary is not attempting to secure an employment-based visa for himself. The director noted that the record at that time suggested that the beneficiary was part-owner of the petitioning business with his brother and requested that the petitioner submit evidence establishing the ownership of the petitioning business and evidence that a *bona fide* job opportunity exists and was open to otherwise qualified U.S. workers. The director also requested that the petitioner provide evidence detailing the hours that the beneficiary spends as a baker and as an officer of the corporate petitioner, including a description of duties, as well as any and all notice of findings and other correspondence issued to the petitioner by DOL concerning its ETA 750 and the familial relationship between the petitioner and the beneficiary.

In response, the petitioner failed to provide evidence documenting the ownership of the petitioner and failed to provide evidence detailing the hours and duties of the beneficiary or any DOL correspondence. This omission has not been addressed by the petitioner. 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). As noted in the director's denial, however, the petitioner provided a copy of an employer's contribution and wage report for the second quarter of 2007, signed by the beneficiary as president of the petitioning business; a letter, dated July 25, 2007, from the Chicago Rabbinical Council indicating that for "the past ten years [the beneficiary], has had a bakery certified by the Chicago Rabbinical Council;" and a newspaper article, from the *Daily Herald*, dated May 3, 1998. It states that "three years ago, [the beneficiary left Chicago, to open [REDACTED] . ." and that the beneficiary spoke different languages as "he talks to his brother [REDACTED] who started the business with him." Additionally, pay statements in the record dated February 21, 2005 and February 28, 2005 state his earnings as, "Officer Salary Regular." As noted by the director, 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). The only argument advanced on appeal concerning this issue is counsel's assertion that the petitioner completed all efforts to hire a baker within the requirements set in the ETA 750 and that the director failed to consider the lack of any application for the job offered. Undocumented assertions of counsel do not constitute evidence. *Matter of Obaigbena*, 19 I&N Dec. 533, 534 (BIA 1988); *Matter of Ramirez-Sanchez*, 17 I&N Dec.

president and secretary and the beneficiary became the registered agent for the petitioner on July 14, 2006. The secretary of state's office confirmed telephonically on January 15, 2010 that the petitioner's officers on 1996, 1997, and 1998 are listed as the beneficiary's brother [REDACTED] as president and the beneficiary as secretary.

503, 506 (BIA 1980). As noted above, the petitioner failed to provide any DOL correspondence as requested and failed to address this omission.

It is noted that a relationship invalidating a *bona fide* job offer may arise where the beneficiary is related to the petitioner by "blood" or it may "be financial, by marriage, or through friendship." See *Matter of Summart 374*, 00-INA-93 (BALCA May 15, 2000). The AAO concurs with the director in that the beneficiary's ownership of the petitioning business and his sibling relationship with the other part-owner as well as the other evidence contained in the record indicate that the beneficiary functioned as far more than a baker in the petitioning business and that there was no valid *bona fide* job opportunity open to otherwise qualified U.S. workers.

Moreover the AAO finds that deliberate and willful misrepresentation has occurred as set forth on the labor certification. In *Matter of Silver Dragon Chinese Restaurant*, 19 I&N Dec. 401,406 (Comm. 1986). In that case, the labor certification was signed on behalf of the petitioner by an individual identified as [REDACTED]. After certification and in the course of examining the petitioner's tax returns, the former Immigration and Naturalization Service (now USCIS) observed that the 1981 tax return showed the beneficiary as the sole officer and a 50% shareholder in the company. The 1982 return reflected that the beneficiary and [REDACTED] were each 50 percent shareholders with officer compensation going to the beneficiary. In light of these facts, the Board of Immigration Appeals (BIA) observed that the beneficiary is not supervised by [REDACTED] who signed the petition as president. Second, the job was not actually open to qualified U.S. Citizen or resident workers. It was concluded that the misrepresentation was both "willful and material." While it was noted that ownership in a petitioning relationship does not automatically disqualify an alien, the DOL has denied labor certifications where it was determined that the prospective alien employee controlled the prospective corporate employer to the extent that the job offer could not be properly regarded as open to all qualified applicants. *Id.* at 3.

The BIA further noted that the labor application was signed by an individual other than the beneficiary, despite the fact that the petitioner's corporation income tax return shows that the beneficiary to have been the sole officer of the corporation during that period of time. In the instant matter, [REDACTED] signed the application for alien labor certification on August 10, 1998, despite the evidence indicating that the corporation had only two shareholders and [REDACTED]'s role in the petitioner company was never documented. The BIA additionally noted that the beneficiary was represented to be subject to the supervision of the president of the petitioning company on the labor certification when he was actually the president of the petitioning corporation. In this case, as noted above, the ETA 750 indicates that [REDACTED], signed the labor certification application. On Part 16 of the certification, the manager is the title of the person who will be the beneficiary's immediate supervisor. In view of the facts as set forth above, in that the beneficiary was one of the two founders and part-owner of the bakery, the AAO does not conclude that he would be supervised by the manager. In *Matter of Silver Dragon Chinese Restaurant*, the BIA determined that these were material misrepresentations that were willful because the officers and principals of the corporation were presumed to be aware and informed of the organization and staff of the enterprise. *Id.* at 4. In this case, the AAO finds that the beneficiary has a stated financial interest in the company, as well as a close relationship to the other owner which the petitioner has not

demonstrated that it revealed to DOL, or DOL was allowed an opportunity to examine. Further, the AAO finds it questionable that the beneficiary, as one of the founders and part-owners of the bakery, would be supervised by [REDACTED] as manager and is misrepresentation calculated to secure a benefit for which the petitioner was not eligible, and thus a misrepresentation which subjects the labor certification to invalidation.

Based upon a review of the underlying record and the evidence and argument submitted on appeal, the AAO finds that the petitioner has not established its continuing financial ability to pay the certified wage, has not established that the beneficiary acquired the necessary qualifying training as of the priority date of the visa petition, and has through willful misrepresentation failed to demonstrate that there was a *bona fide* job opportunity as represented by the application for labor certification. The AAO concurs with the director's finding that pursuant to 20 C.F.R. § 656.30(d), the labor certification remains invalidated.

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. The approved labor certification is invalidated.

FURTHER ORDER: The AAO finds that the petitioner willfully misrepresented a material fact to fraudulently obtain an immigration benefit.