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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

[redacted]

B6

FILE: [redacted] Office: TEXAS SERVICE CENTER Date:
EAC-05-172-53892 MAY 1 0 2010

IN RE: Petitioner:
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:

[redacted]

INSTRUCTIONS:

Enclosed please find 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 concerning your case 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, Administrative Appeals Office

DISCUSSION: The preference visa petition[1] filed by the petitioner in this case was denied by the Director, Texas Service Center, and is now before the Administrative Appeals Office (AAO) on appeal. The decision of the director will be upheld and the appeal will be dismissed.

The petitioner is a restaurant. It seeks to employ the beneficiary permanently in the United States as a foreign food specialty cook (Middle Eastern specialty cook) pursuant to section 203(b)(3)(A)(i) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(3)(A)(i). As required by statute, the petition is accompanied by a Form ETA 750, Application for Alien Employment Certification (Form ETA 750 or labor certification), approved by the Department of Labor (DOL). The director determined that the petitioner had not established its continuing ability to pay the proffered wage, and denied the petition accordingly. The director also determined that the petitioner failed to establish that the position was available to all qualified applicants of the United States and that the familial relationship was disclosed to the DOL. Accordingly, the director invalidated the Form ETA 750.

The record shows that the appeal is properly and timely filed, 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 January 21, 2010 denial, the primary issues in this case are 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 and whether the petitioner has established that the position was available to all qualified applicants of the United States and that the familial relationship was disclosed to the DOL.

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

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

> *Ability of prospective employer to pay wage.* Any petition filed by or for an employment-based immigrant which requires an offer of employment must be accompanied by evidence that the prospective United States employer has the ability to pay the proffered wage. The petitioner must demonstrate this ability at the time the priority date is established and continuing until the beneficiary obtains lawful

[1] This is the second I-140 immigrant petition the petitioner filed on behalf of the beneficiary for the proffered position based on the underlying labor certification. The record shows that the petitioner filed an I-140 petition (EAC-03-069-54875) on behalf of the beneficiary on January 2, 2003 with the Vermont Service Center. The Vermont Service Center denied the petitioner on September 18, 2003. A subsequent appeal was demised by the Administrative Appeals Office on April 29, 2005.

> 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 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 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).

The Form ETA 750 was accepted on April 27, 2001. The proffered wage as stated on the Form ETA 750 is $11.90 per hour ($24,752 per year). The Form ETA 750 states that the position requires two years of experience in the job offered. The instant I-140 petition was submitted on May 24, 2005. On the petition, the petitioner claimed to have been established on September 17, 1999,[2] to have a gross annual income of $95,185, to have a net annual income of $26,548, and to currently have four employee. On the Form ETA 750 signed by the beneficiary on April 27, 2001, the beneficiary claimed to have worked 10-15 hours per week for the petitioner as a cook since October 10, 1999.

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.[3]

The petitioner must establish that its job offer to the beneficiary is a realistic one. Because the filing of a Form ETA 750 establishes a priority date for any immigrant petition later based on the Form 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

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[2] However, the petitioner's corporate documentation and tax returns show that the petitioner was established on September 20, 1999.

[3] 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).

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 petitioner did not submit any documentary evidence showing that the petitioner employed and paid the beneficiary compensation although it claimed that the beneficiary worked in the proffered position from October 1999 to 2005. Therefore, the petitioner failed to demonstrate that it employed and paid the beneficiary the full proffered wage from the priority date, and thus, failed to establish its ability to pay the proffered wage through the examination of wages actually paid to the beneficiary.

If the petitioner does not establish that it employed and paid the beneficiary an amount at least equal to the proffered wage during 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 (1st 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.

Counsel's argument on appeal that the value of the petitioner's depreciated assets should be considered in determining its ability to pay the proffered wage is misplaced. 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).

The evidence in the record of proceeding shows that the petitioner is structured as a limited liability company (LLC).[4] According to the tax returns in the record, the petitioner's fiscal year is based on calendar year, and the petitioner has two LLC members and files its tax returns on Form 1065, U.S. Return of Partnership Income. The record contains the petitioner's tax returns for 2000 through 2008. The petitioner's 2000 tax return is not necessarily dispositive since the priority date in the instant case is April 27, 2001. The petitioner's tax returns demonstrate its net income for 2001 through 2008, as shown in the table below.

- In 2001, the Form 1065 stated net income[5] of $25,390.

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[4] A limited liability company (LLC) is an entity formed under state law by filing articles of organization. An LLC may be classified for federal income tax purposes as if it were a sole proprietorship, a partnership or a corporation. If the LLC has only one owner, it will automatically be treated as a sole proprietorship by the IRS unless an election is made to be treated as a corporation. If the LLC has two or more owners, it will automatically be considered to be a partnership by the IRS unless an election is made to be treated as a corporation. If the LLC does not elect its classification, a default classification of partnership (multi-member LLC) or disregarded entity (taxed as if it were a sole proprietorship) will apply. *See* 26 C.F.R. § 301.7701-3. The election referred to is made using IRS Form 8832, Entity Classification Election.

[5] Where a LLC's income is exclusively from a trade or business, USCIS considers net income to be the figure for ordinary income, shown on Line 22 of page one of the petitioner's Form 1065. The instructions on the Form 1065, U.S. Partnership Income, state on page one, "Caution, Include only trade or business income and expenses on lines 1a through 22." Where a LLC has income from sources other than from a trade or business, net income is found on Schedule K. The Schedule K (page 3 of Form 1065) is a summary schedule of all the partners' shares of the partnership's income, credits, deductions, etc. The net income is reported on Analysis

- In 2002, the Form 1065 stated net income of ($2,494).
- In 2003, the Form 1065 stated net income of $25,449).
- In 2004, the Form 1065 stated net income of $26,548.
- In 2005, the Form 1065 stated net income of $27,030.
- In 2006, the Form 1065 stated net income of $18,520.
- In 2007, the Form 1065 stated net income of ($10,166).
- In 2008, the Form 1065 stated net income of $7,368.

Therefore, while the petitioner's net income in 2001, 2003, 2004 and 2005 was sufficient to pay the beneficiary the proffered wage, the petitioner did not have sufficient net income to pay the proffered wage of $24,752 in 2002, 2006, 2007 and 2008.

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.[6] An LLC'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 17. If the total of an LLC'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 reflect its end-of-year net current assets for the relevant years as follows:

- The petitioner's net current assets during 2002 were $8,000.
- The petitioner's net current assets during 2006 were $7,285.
- The petitioner's net current assets during 2007 were $3,186.
- The petitioner's net current assets during 2008 were $0.

Thus, for the years 2002, 2006, 2007 and 2008, the petitioner did not have sufficient net current assets to pay the proffered wage.

Therefore, from the date the Form ETA 750 was accepted for processing by the DOL, the petitioner has not established that it had the continuing ability to pay the instant 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.

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of Net Income (Loss) line 1 Net income (loss). See Internal Revenue Service, Instructions for Form 1065, at http://www.irsgov/pub/irs-pdf/i1065.pdf.

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

On appeal, counsel submits a deed document showing that the two LLC members own the building that houses the petitioning business and argues that the ownership of the building should also be considered in determining the petitioner's ability to pay the proffered wage. The AAO notes that the two LLC members of the petitioner as husband and wife personally purchased and own the real property which houses the petitioning business. An LLC, like a corporation, is a legal entity separate and distinct from its owners. The debts and obligations of the company generally are not the debts and obligations of the owners or anyone else. An investor's liability is limited to his or her initial investment. As the owners and others only are liable to his or her initial investment, the total income and assets of the owners and others and their ability, if they wished, to pay the company's debts and obligations, cannot be utilized to demonstrate the petitioner's ability to pay the proffered wage. The petitioner must show the ability to pay the proffered wage out of its own funds. Contrary to counsel's assertion, USCIS may not "pierce the corporate veil" and look to the assets of the LLC's owner to satisfy the LLC's ability to pay the proffered wage. It is an elementary rule that an LLC, like a corporation, is a separate and distinct legal entity from its owners and shareholders. *See Matter of M*, 8 I&N Dec. 24 (BIA 1958), *Matter of Aphrodite Investments, Ltd.*, 17 I&N Dec. 530 (Comm. 1980), and *Matter of Tessel*, 17 I&N Dec. 631 (Act. Assoc. Comm. 1980). Consequently, assets of its members or of other enterprises or corporations cannot be considered in determining the petitioning corporation's ability to pay the proffered wage.

Counsel also relies on the petitioner's reestablishing Middle Eastern cuisine when the beneficiary is hired back to establish its ability to pay the proffered wage. Against the projection of future earnings, *Matter of Great Wall*, 16 I&N Dec. 142, 144-145 (Acting Reg. Comm. 1977) states:

> I do not feel, nor do I believe the Congress intended, that the petitioner, who admittedly could not pay the offered wage at the time the petition was filed, should subsequently become eligible to have the petition approved under a new set of facts hinged upon probability and projections, even beyond the information presented on appeal.

Counsel's argument concerning the petitioner's totality of circumstances, however, cannot be overlooked. 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, although the petitioner has been in the business more than ten years by now, its gross receipts or sales were less than $100,000 in last eight years, its net income was insufficient to pay a single proffered wage of $24,750 in four out of eight years, and it claims to have four employees, but the salaries and wages it paid were in the range from $0 (2008) to $25,410 (2002) with an average of $14,964,13 per year. 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 wages.

The second issue is whether or not the petitioner demonstrates that the beneficiary possessed the requisite two years of experience on the job offered prior to the priority date with regulatory-prescribed evidence.

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

In the instant case, Form ETA 750A, items 14 and 15, set forth the minimum education, training, and experience that an applicant must have for the position of specialty cook (Middle Eastern). In the instant case, item 14 describes the requirements of the proffered position as follows:

14.	Experience	
	Job Offered	2 years
	Related Occupation	Blank

The duties are delineated at Item 13 of the Form ETA 750A as "Prepare Middle Eastern dishes for lunch and dinner. Grill meats, poultry, vegetables adn[sic] falafel. Pre3pare soups and salads." Item 15 of Form ETA 750A does not reflect any special requirements.

The beneficiary set forth his credentials on Form ETA 750B and signed his name on April 27, 2001 under a declaration that the contents of the form are true and correct under the penalty of perjury. On Part 15, eliciting information of the beneficiary's work experience, he represented that he has been working 10-15 hours per week as a cook for the petitioner since October 1999. Prior to that, he represented that in Philadelphia, PA, employed him as a full time cook from November 1998 to September 1999; and that he worked 20 hours per week as a cook for from January 1997 to October 1998. He does not provide any additional information concerning his employment background on that form.

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

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

The record contains letters from the beneficiary's former employers pertinent to the beneficiary's employment. The first experience letter in the record is on letterhead of , dated November 25, 2009 and signed by as the owner of the business. This letter stated concerning the beneficiary's work experience in pertinent part that:

> [The beneficiary] worked 40 hours a week for my Middle Eastern Specialty food restaurant from November, 1998 unt5il September of 1999. In his role as Middle Eastern Chef, [the beneficiary] prepared and cooked traditional Middle Eastern specialties including falafel sandwiches, homemade spinach pies, lamb and chicken shawarma, chicken and beef kabobs, baba ghannouj, hummus, Greek salad and baklava.

The letter is from the owner of the business, and thus it is a letter from a former employer. The letter includes a specific description of the duties the beneficiary performed as required by the regulation, however, it verifies that the beneficiary was employed as a full time cook for 10 months from November 1998 to September 1999. Therefore, the petitioner cannot establish the beneficiary's requisite two years of experience in the job offered with this letter alone. In addition, the AAO notes that this former employer uses a computer-created letterhead instead of its standard stationary despite of its longevity in the business, that this letter is dated same day as the one from Pine Street Grocery, and that the name of the business on the letterhead is incorrectly spelt, and also called differently between this letter and the beneficiary's statements on the Form ETA 750B. All these deficiencies and inconsistencies raise doubt on the authenticity of this experience letter. Doubt cast on any aspect of the petitioner's proof may, of course, lead to a reevaluation of the reliability and sufficiency of the remaining evidence offered in support of the visa petition. *Matter of Ho*, 19 I&N Dec. 582, 591 (BIA 1988).

The second experience letter in the record is also on a computer-created letterhead of , dated November 25, 2009, signed by as the owner of the business and contains a specific description of the duties, while the letter states that " closed in December of 1999." The record does not contain any documentary evidence, such as the business' personnel records, payroll records, the beneficiary's income or compensation from this company to support the contents of this letter and fails to explain how the writer could still use the company's letterhead 10 years after the business closed. The writer did not include his address and contact information but the company's then address. The experience letter from does not meet the requirements set forth by the regulation at 8 C.F.R. § 204.5(g)(1), and thus, the AAO cannot accept it as primary evidence for the beneficiary's qualifications. Furthermore, even if this letter were acceptable, the letter indicates that the beneficiary worked 20 hours per week, and therefore, the beneficiary's 21 months of experience on a part-time basis could only be considered as 10 months of full-time experience. Without the 10 months of experience from the petitioner would only demonstrate a total 20 months of the experience that is still less than the 24 months of experience required by the Form ETA 750.

The third experience letter in the record is from . The English translation indicates the beneficiary's employment as a cook with this company from April 26, 1990 to April 26, 1996. However, this letter provides inconsistent information with the record. In response to the director's notice of intent to deny dated November 17, 2009, the petitioner submitted the beneficiary's educational documents and evaluation report which show that the beneficiary completed his four-year bachelor's program in civil engineering at Damascus University in Syria and was awarded a bachelor of civil engineering degree from the Department of Hydraulic Engineering on November 17, 1994. The record also contains a copy of the beneficiary's member card of Syrian Engineers Damascus without an issuing date. The record does not contain any statements from or the beneficiary verify that the beneficiary worked as a cook for that company on a part-time basis or full-time basis and any explanation how the beneficiary managed his time between the full-time student at Damascus University in Syria and the full-time cook at Midaf Restaurant Management, Souieda. *Matter of Ho*, 19 I&N Dec. 582, 591-592 (BIA 1988) states: "It is incumbent on the petitioner to resolve any inconsistencies in the record by independent objective evidence, and attempts to explain or reconcile such inconsistencies, absent competent objective evidence pointing to where the truth, in fact, lies, will not suffice." The record does not contain any independent objective evidence to resolve the inconsistencies. Thus, the employment verification from cannot be accepted as evidence to demonstrate the beneficiary's requisite experience.

Therefore, the petitioner did not establish with regulatory-prescribed evidence the beneficiary's prior at least two years of experience as a Middle Eastern specialty cook, and further failed to establish that the beneficiary is qualified for the proffered position.

The third issue in the instant case is whether or not the petitioner misrepresented the job to DOL in the labor certification process, and therefore, the labor certification is deemed invalid.

The petitioner must establish that its job offer to the beneficiary was a realistic one as of the priority date and continues to be bona fide until the beneficiary obtains lawful permanent resident status.

In the instant case, the Form ETA 750 was filed on April 27, 2001 and the job offer consists of the name of job title: "Specialty Cook (Middle Eastern)"; the working schedule of the beneficiary: "40 basic hours and five overtime hours per week, 11:00am to 9:00pm on Wednesdays through Saturdays and 1:00pm to 6:00 pm on Sundays", the location of the employment: "20th and ' and the duties to be performed: "Prepare Middle Eastern dishes for lunch and dinner. Grill meats, poultry, vegetables and falafel. Prepare soups and salads."

The director found that the record did not establish that the position was available to all qualified U.S. workers at the time of the job offer and continue to the present because the proffered position may not exist. The petitioner's website shows that the petitioner does not provide Middle Eastern dishes in its menu.[7] Therefore, the director issued a notice of intent to deny (NOID) on November 17, 2009 affording the petitioner 30 days to rebut this ground of ineligibility. In response to the NOID, counsel submitted letters from the petitioner and other supporting materials pertinent to its Middle Eastern cuisine services provided before 2005 and reestablishment of the cuisine upon the approval on the beneficiary's application for adjustment of status.

The AAO finds that the petitioner failed to establish that the proffered position was existing at the time of the job offer, and has been continuously available to the qualified U.S. workers to the present, and thus, failed to establish that the job offer was a *bona fide* and realistic one from the priority date to the present. First of all, the labor certification was filed by the petitioner and accepted by DOL on April 27, 2001. However, the record does not contain any evidence regarding menu at that time, commercials, signs or official registration documents showing that the petitioner was in the business of Middle Eastern cuisine. Both the petitioner and the beneficiary state that the beneficiary worked for the petitioner as a Middle Eastern specialty cook from October 1999 to 2005. This is the only statement to support the claim that the petitioner was engaged in Middle Eastern cuisine business back to 2001. The record does not contain any solid independent evidence verifying that the beneficiary worked for the petitioner in the position of Middle Eastern specialty cook. In addition, the petitioner opens 11:00 am -11:00 pm Monday through Thursday, 11:00 am – 12:00 am Friday and Saturday, and 12:00 pm - 10:00 pm on Sunday, a total of 84 hours per week. The petitioner would have had at least two full-time cooks to run Middle Eastern cuisine. The beneficiary claimed to have worked for the petitioner 10-15 hours per week. The petitioner did not submit any evidence showing that it had other employees working as Middle Eastern cooks. Furthermore, if the beneficiary were the only employee to fulfill the duties as a Middle Eastern specialty cook, the petitioner would not have had a full-time permanent position to be eligible to file a labor certification. Therefore, the petitioner failed to establish that a full-time permanent position was existing and available at the time the labor certification was filed.

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[7] *See* [redacted] (the director accessed on November 9, 2009).

Second, the instant petition was filed on June 1, 2005. According to the petitioner's statement, the beneficiary left the position in 2005 and the petitioner no longer provided the Middle Eastern cuisine options to its customers. Therefore, the proffered position did not exist, the job opportunity was not open to any qualified U.S. workers as required by 20 C.F.R. § 656.20(c) and thus, the job offer was not a realistic one when it filed the instant petition in 2005.

Third, in response to the director's NOID, counsel submitted a letter dated December 16, 2009 from the owner of the petitioner. This letter states that the petitioner needs to reestablish the Middle Eastern Cuisine options. The petitioner submitted materials for sample businesses of successful combination of American and Middle Eastern Cuisine and its proposed menu for the Middle Eastern cuisine that they will serve upon the approval of the beneficiary's application. However, other entities' successful practice and its own proposed menu for future do not establish that the proffered position exists and the job offer for the position is realistic and *bona fide*. The petitioner failed to demonstrate that the job offer for the proffered position in the instant case continues to be realistic before the director denied the petition on January 21, 2010. A petitioner must establish the beneficiary's eligibility for the visa classification at the time of filing; a petition cannot be approved at a future date after eligibility is established under a new set of facts. *Matter of Katigbak,* 14 I&N Dec. 45, 49 (Comm. 1971).

In addition, 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). In the instant case, USCIS records show that the beneficiary and the owner of the petitioner, [redacted], are brothers. The beneficiary lived with the petitioner's owner at [redacted] from September 1999 to August 2001, and [redacted] since August 2001.[8] The owner of the petitioner also filed a Form I-864 Affidavit of Support Under Section 213A of the Act, for the beneficiary's I-485 adjustment of status application. However, the owner of the petitioner did not disclose information on relationship to the intending immigrant on the form. The record does not contain any evidence that the petitioner disclosed the close familial relationship between the petitioner's owner and the beneficiary to DOL in the labor certification processing. If the petitioner did not disclose the familial relationship in the labor certification processing, DOL would not be allowed an opportunity to audit and assess the nature of the familial relationship and the extent of the alien's influence and control over job opportunity. Therefore, whether the petitioner failed to disclose a close familial relationship between the petitioner's principal, a manager, and registered agent, and the beneficiary is a material issue. Here, the omission of the beneficiary's status as a relative in a small business, if any, is a willful misrepresentation that adversely impacted DOL's adjudication of the Form ETA 750.

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[8] See the beneficiary's Form G-325A, Biographic Information, singed by the beneficiary on September 12, 2002.

The regulation at 20 C.F.R. § 656.31(d) provides regarding labor certification applications involving fraud or willful misrepresentation that:

> (d) 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.

A material fact to the immigrant petition's eligibility is the beneficiary's close familial relationship to the petitioner and the bona fides of the job offer. By willful misrepresentation and concealment of the beneficiary's relationship to the petitioner, DOL did not have accurate information concerning the bona fides of the job offer or the alien's background during the labor certification process. The test of the U.S. labor market and other procedural and substantive aspects of the labor certification adjudication could not have been properly completed because of willful misrepresentation and concealment. Accordingly the director's decision to invalidate the labor certification is affirmed.

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.

In addition, section 212(a)(6)(c) of the Act, 8 U.S.C. § 1182, provides that "(i) in general – any alien, who by fraud or willfully misrepresenting a material fact, seeks (or has sought to procure, or who has procured) a visa, other documentation, or admission to the United States or other benefit provided under the Act is inadmissible." By concealing the close familial relationship between the beneficiary and the petitioner, filing the labor certification for a non-existing position and failing to establish the bona fide of the job offer, the beneficiary sought to procure a benefit provided under the Act through fraud and willful misrepresentation of a material fact. The AAO will dismiss the appeal and enter a formal finding of fraud into the record. This finding of fraud will be considered in any future proceeding where admissibility is an issue.

ORDER: The appeal is dismissed.