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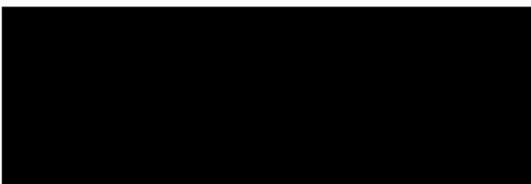
U.S. Department of Homeland Security
U. S. Citizenship and Immigration Services
Office of Administrative Appeals MS 2090
Washington, DC 20529-2090



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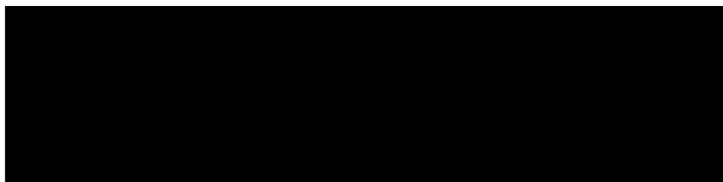
FILE:  Office: NEBRASKA SERVICE CENTER

Date: **SEP 28 2010**

IN RE: Petitioner: 
 Beneficiary:

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

ON BEHALF OF PETITIONER:



INSTRUCTIONS:

Enclosed please find the decision of the Administrative Appeals Office in your case. All of the documents related to this matter have been returned to the office that originally decided your case. Please be advised that any further inquiry that you might have concerning your case must be made to that office.

If you believe the law was inappropriately applied by us in reaching our decision, or you have additional information that you wish to have considered, you may file a motion to reconsider or a motion to reopen. The specific requirements for filing such a request can be found at 8 C.F.R. § 103.5. 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. Please be aware that 8 C.F.R. § 103.5(a)(1)(i) requires that any motion must be filed within 30 days of the decision that the motion seeks to reconsider or reopen.

Thank you,

Perry Rhew
Chief, Administrative Appeals Office

DISCUSSION: The employment-based preference visa petition was initially approved by the Director, Nebraska Service Center. In connection with a subsequent investigation and site visits, the director served the petitioner with notice of intent to revoke the approval of the petition (NOIR). In a Notice of Revocation (NOR), the director ultimately revoked the approval of the Immigrant Petition for Alien Worker (Form I-140). The matter is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner is a travel agency. It seeks to employ the beneficiary permanently in the United States as a manager, travel and tours. As required by statute, an ETA Form 9089, Application for Permanent Employment Certification (ETA Form 9089) approved by the Department of Labor (DOL), accompanied the petition. The director found that the petitioner was involved in fraud or willful misrepresentation of the material facts and invalidated the labor certification. The director revoked the approval of the petition accordingly.

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.

The AAO conducts appellate review on a *de novo* basis. *See Soltane v. DOJ*, 381 F.3d 143, 145 (3d Cir. 2004). The AAO considers all pertinent evidence in the record, including new evidence properly submitted upon appeal.¹

As set forth in the director's November 30, 2009 NOR, the key issue in this matter is whether or not the petitioner willfully misrepresented a material fact to DOL in the labor certification process and to U.S. Citizenship and Immigration Services (USCIS) in the immigrant petition process, such that the labor certification was properly invalidated and approval of the petition was properly revoked.

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 petitioner must establish that its job offer to the beneficiary is a realistic one. Because the filing of an ETA 9089 labor certification application establishes a priority date for any immigrant petition later based on the ETA 9089, the petitioner must establish that the job offer was realistic as of the priority date. To determine whether a beneficiary is eligible for an employment based immigrant

¹ 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).

visa, 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, the ETA 9089 was filed on November 2, 2005 and the job offered was "Manager, Travel & Tours" at [REDACTED]. The position requires 24 months (two years) of experience in the job offered. On the ETA 9089, the petitioner claimed that the beneficiary had been working for [REDACTED] as a manager since March 25, 2000. The ETA Form 9089 was certified on February 21, 2006.

Based on a subsequent investigation and site visits, the director determined that the job offered by the petitioner to the beneficiary is not a realistic and bona fide one because the petitioner had no business operating in the location indicated on the ETA 9089.² In addition, the labor certification application concealed the fact that the beneficiary has a family relationship with the petitioner's president, and therefore, the petitioner misrepresented a material fact during the labor certification proceeding. The director determined the ETA Form 9089 was not approvable at the time of filing and invalidated it.

On appeal counsel argues that both the primary worksite and concealment of the family relationship between the beneficiary and the petitioner's president are typographical mistakes due to the secretary's miscommunication with the lawyer's office and that the petitioner filed two motions with DOL to correct the typographical mistakes in the labor certification, and therefore, there were no willful misrepresentations in the labor certification proceeding.

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

The AAO finds that the director had good and sufficient cause to revoke the approval of this petition. The petitioner's evidentiary submissions and counsel's assertions are also non-responsive to whether or not the petitioner's job offer was realistic and *bona fide*.

The AAO finds that the petitioner made a fraudulent or willful misrepresentation of a material fact involving the labor certification application, and therefore the director correctly invalidated the labor certification. The labor certification indicates that the petitioner offers the beneficiary the job at the location of [REDACTED]. However, the site visit revealed

² The site visit reveals that it is a UPS store.

and the petitioner also admits that the petitioner does not do any business at that location. Therefore, the job offer the petitioner offered to the beneficiary does not exist. The petitioner failed to establish that its job offer was realistic and bona fide from the time the labor certification was filed. Counsel asserts that this is a typographic error and submits a copy of correspondence from the Board of Alien Labor Certification Appeals (BALCA) dated September 23, 2009 as evidence to prove that it filed a motion to correct the typographical error in block H, #1 of ETA Form 9089. The correspondence shows that BALCA forwarded a motion to reopen labor certification [REDACTED] to the certifying officer in Chicago on June 11, 2009, after the filing of the petition and associated labor certification with USCIS. However, the record does not contain a copy of the motion to reopen or any documents indicating its content. 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)). A petitioner may not make material changes to a petition in an effort to make a deficient petition conform to USCIS requirements. *See Matter of Izummi*, 22 I&N Dec. 169, 176 (Assoc. Comm. 1988). If the petitioner had wanted to correct the typographical error, it should have submitted the motion to reopen with BALCA prior to filing the instant immigrant petition based on the underlying labor certification. Furthermore, if there is still a motion to reopen the determination of the underlying labor certification pending with BALCA, the labor certification process has not been finalized and the labor certification is not valid yet. Therefore, the petitioner failed to provide a valid finalized labor certification certified by DOL to support the instant immigrant petition and thus the petition is not approvable. The director initially approved the petition in error.

Under 20 C.F.R. §§ 626.20(c)(8) and 656.3, the petitioner has the burden 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 petitioner answered "No" to question 9 in Part C "Is the employer a closely held corporation, partnership, or sole proprietorship in which the alien has an ownership interest, or is there a familial relationship between the owners, stockholders, partners, corporate officers, incorporators, and the alien?" In the instant matter, Nusrat N. Siddique signed the labor certification, the immigrant petition and supporting letters as the president of the petitioning entity. USCIS records show that Nusrat N. Siddique and the beneficiary have the same parents listed in their records. Nusrat N. Siddique is the sister of the beneficiary. Counsel claims this is also a typographical mistake. In response to the director's NOIR, counsel submitted a copy of a letter from BALCA as evidence that the petitioner filed a motion to correct this typographical error. However, counsel did not submit a copy of the motion to USCIS. Therefore, it is not clear when the motion was filed with BALCA. If the answer to the question 9 was really a typographical error and the petitioner had wanted to correct it, it should have submitted the motion to reopen with BALCA prior to filing the instant immigrant petition based on the underlying labor certification instead making material changes to the labor certification in an effort to make a deficient labor certification conform to USCIS requirements. In addition, BALCA's September 23, 2009 correspondence cannot determine that the petitioner filed a motion to correct this second typographical error on the

underlying labor certification. Furthermore, the correspondence clearly indicates that BALCA did not docket the matter as an appeal.

Where the petitioner is owned by the person applying for the position, it is not a *bona fide* offer. See *Bulk Farms, Inc. v. Martin*, 963 F.2d 1286 (9th Cir. 1992) (denied labor certification application for president, sole shareholder and chief cheese maker even where no person qualified for position applied). Contrary to counsel's assertions, the record of proceeding shows that the beneficiary is involved in the petitioner's business and owns one hundred percent (100%) of its ownership interest. The record contains the petitioner's tax returns for 2005 through 2008. The petitioner's tax returns for 2005 through 2007 do not reflect its ownership and the record does not contain any documentary evidence of the petitioner's ownership. However, Schedule E to the petitioner's 2008 tax return shows that the petitioner paid the beneficiary \$10,500 as officer compensation and the beneficiary owns 100% of common stock of the petitioner.³ The petitioner's Form DE-6 shows that the petitioner hired and paid the beneficiary's wife and son from the first quarter of 2008. Therefore, the evidence in the record establishes that the job offer is not realistic and bona fide and the labor certification and petition were filed just to provide the beneficiary with lawful permanent resident status.

The record also shows that the beneficiary owns and runs [REDACTED].⁴ He filed an I-140 immigrant petition for himself for classification as a multinational executive or manager on March 7, 2001.⁵ The petition was denied on December 13, 2001 and the subsequent appeal was dismissed by the AAO on February 25, 2003.⁶ The beneficiary's last I-129 L-1 petition was administratively closed on June 4, 2004.⁷ The instant petitioner was established on December 23, 2004 at the same location and in the same business with [REDACTED]. In February 2005, the beneficiary set up a mailbox for the petitioner. While the petitioner's gross sales in its first year (2005) were \$237,327, they were dropped to \$20,448 in its second year (2006) and to \$4,500 in its third year (2007).⁸ The record shows that [REDACTED] is still doing business actively.⁹ The

³ See The petitioner's Form 1120 U.S. Corporation Income Tax Return for 2008.

⁴ Schedule K-1 to Form 1065 U.S. Return of Partnership Income filed by [REDACTED] for 2001 shows that the beneficiary owns 100% ownership of capital and is the only LLC member of [REDACTED].

⁶ The appeal receipt number: [REDACTED]

⁸ See The petitioner's Form 1120 U.S. Corporation Income Tax Return for 2005 through 2007.

⁹ See California Secretary of State official business entity database at <http://kepler.sos.ca.gov/>

record also contains a copy of a lease agreement signed by [REDACTED] for the space [REDACTED]. The lease agreement indicates that the size of suite 213 is 455 square feet and the monthly rent is \$465. As mentioned above, [REDACTED] alleged that she is the owner and president of the petitioner. However, she did not pay herself any officer compensation in any relevant years or salaries except for \$2,600 in October 2005. In 2006 and 2007 the petitioner did not have any employees and pay any wages or salaries. In 2008, all the employees of the petitioner are the beneficiary, his family members and [REDACTED]. USCIS records show that [REDACTED] filed an I-140 immigrant petition on behalf of [REDACTED] on July 5, 2002 and an appeal from the revocation of its initial approval was finally dismissed by the AAO in June 2009.¹⁰ [REDACTED] was also listed in the organizational chart of [REDACTED] submitted with the beneficiary's L-1 extension petition. According to the petitioner's DE-6 forms, the petitioner hired and paid [REDACTED] in 2008 and the first quarter of 2009.¹¹ All the evidence in the record supports the director's finding that the petitioning business was formed to obtain immigration benefits for the beneficiary.

The regulation at 20 C.F.R. § 656.30(d) provides in pertinent part that: "After issuance labor certifications are subject to invalidation by the [USCIS] 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 bona fides of the job offer constitute material facts. By willful misrepresentation of a non-existing business location and concealment of the familial relationship between the owner of the petitioning entity and the beneficiary, and the beneficiary's ownership interest in 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 that willful misrepresentation and concealment of the beneficiary's relationship to the owner of the petitioner and ownership interest in the petitioner's business.

In *Matter of Silver Dragon Chinese Restaurant*, 19 I&N Dec. 401 (Comm. 1986), the commissioner noted that while it is not an automatic disqualification for an alien beneficiary to have an interest in a petitioning business, if the alien beneficiary's true relationship to the petitioning business is not apparent in the labor certification proceedings, it causes the certifying officer to fail to examine more carefully whether the position was clearly open to qualified U.S. workers and whether U.S. workers were rejected solely for lawful job-related reasons.

cbs.aspx (accessed on July 6, 2010).

¹¹ The petitioner's DE-6 forms show that the petitioner paid [REDACTED] \$8,550 in the first quarter, \$3,925 in the second quarter, \$2,715 in the third quarter, \$3,000 in the fourth quarter of 2008, and \$750 in the first quarter of 2009.

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

Therefore, we affirm the director's decision to revoke approval of the petition and invalidate the underlying labor certification application.

The second issue is whether the petitioner established its continuing ability to pay the proffered wage from the date of the filing of the labor certification until the beneficiary obtains lawful permanent residence.

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

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

The petitioner must demonstrate the continuing ability to pay the proffered wage beginning on the priority date, which is the date the ETA Form 9089 Application for Permanent Employment Certification (ETA Form 9089), was accepted for processing by any office within the employment system of 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 ETA Form 9089 as certified by DOL and submitted with the instant petition. *Matter of Wing's Tea House*, 16 I&N Dec. 158 (Act. Reg. Comm. 1977).

Here, the ETA Form 9089 was accepted on November 2, 2005. The proffered wage as stated on the ETA Form 9089 is \$22.04 per hour (\$45,843.20 per year). On the ETA Form 9089, Part J, signed by the beneficiary, the beneficiary did not claim to have worked for the petitioner. On the petition, the petitioner claimed to have an establishment date in 2004, a gross annual income of \$237,327, a net income of \$46,727 and four employees.

Where the petitioner has submitted the requisite initial documentation required in the regulation at 8 C.F.R. § 204.5(g)(2), USCIS will first examine whether the petitioner 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, the evidence will be considered *prima facie* proof of the petitioner's ability to pay the proffered wage. In the instant case,

the petitioner submits the beneficiary's W-2 form for 2008.¹² The beneficiary's W-2 form shows that the petitioner paid the beneficiary \$10,500 in 2008. The petitioner failed to establish that it employed and paid the beneficiary the full proffered wage in 2005 and thereafter. The petitioner must demonstrate that it had sufficient net income or net current assets to pay the full proffered wage of \$45,843.20 for 2005 through 2007 and the difference of \$35,343.20 between wages actually paid to the beneficiary and the proffered wage for 2008.

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.

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

¹² As previously discussed, the beneficiary's compensation of officers in 2008 raises the issue of a bona fide job offer. However, here we still consider the beneficiary's compensation as part of wages actually paid to the beneficiary for the purpose of determining the petitioner's ability to pay the proffered wage in this matter.

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).

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.¹³ 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 evidence in the record of proceeding shows that the petitioner is structured as a C corporation. According to the tax returns in the record, the petitioner’s fiscal year is based on a calendar year. The record contains the petitioner’s federal income tax returns for 2005 through 2008. The petitioner’s tax returns demonstrate its net income and net current assets for 2005 through 2008, as shown in the table below.

- In 2005, the Form 1120 stated net income¹⁴ of \$46,727 and net current assets of \$42,999.
- In 2006, the Form 1120 stated net income of (\$4,177).¹⁵
- In 2007, the Form 1120 stated net income of (\$1,224).¹⁶

¹³ 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.

¹⁴ For a C corporation, USCIS considers net income to be the figure shown on Line 28 of the Form 1120, U.S. Corporation Income Tax Return.

¹⁵ The petitioner’s net current assets cannot be determined because the petitioner did not submit Schedule L to the Form 1120 for 2006 and was not required to complete Schedule L, as its total receipts or total assets at the end of tax year 2006 were less than \$250,000.

- In 2008, the Form 1120 stated net income of \$5,724 and net current assets of \$1,000.

Therefore, while the petitioner had sufficient net income to pay the beneficiary the full proffered wage of \$45,843.20 for 2005, the petitioner did not have sufficient net income or net current assets to pay the beneficiary the proffered wage for 2006 and 2007, and the petitioner did not have sufficient net income or net current assets to pay the difference of \$35,343.20 between wages actually paid to the beneficiary and the proffered wage for 2008.

Therefore, from the date the ETA Form 9089 was accepted for processing by the DOL, the petitioner had 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.

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

In the instant case, the record contains the petitioner's tax returns for four years from 2005 to 2008. The petitioner barely satisfied the financial requirement to pay the proffered wage for 2005 but failed to establish its ability to pay the proffered wage for the rest of the relevant time period. In

¹⁶ The petitioner's net current assets cannot be determined because the petitioner did not submit Schedule L to the Form 1120 for 2007 and it was not required to complete Schedule L, as its total receipts or total assets at the end of tax year 2007 were less than \$250,000.

2006 and 2007, the petitioner had net losses, it did not pay any wages to its employees, and its gross receipts were only \$4,500 in 2007. It appears that the petitioner did not do business in 2007. No unusual circumstances have been shown to exist in this case to parallel those in *Sonegawa*, nor has it been established that all these three years were uncharacteristically unprofitable years for the petitioner. 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 cannot overcome the director's decision and the evidence submitted does not establish that the petitioner has the continuing ability to pay the proffered wage beginning on the priority date.

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." Additionally, the regulations state that the willful failure to provide full and truthful information requested by USCIS constitutes a failure to maintain nonimmigrant status. 8 C.F.R. § 214.1(f). For these provisions to be effective, USCIS is required to enter a factual finding of fraud or material misrepresentation into the administrative record.¹⁷ The Attorney General has held that a misrepresentation made in connection with an application for a visa or other document, or with entry into the United States, is material if either:

- (1) the alien is excludable on the true facts, or
- (2) the misrepresentation tends to shut off a line of inquiry which is relevant to the alien's eligibility and which might well have resulted in a proper determination that he be excluded.

Matter of S & B-C-, 9 I&N Dec. 436,447 (A.G. 1961). Accordingly, in this case, by providing false information about its primary worksite location, creating the business to obtain immigration benefits, and concealing the familial relationship between the petitioner's president and the beneficiary as well as the beneficiary's ownership interest in the petitioner's business, the petitioner and beneficiary sought to procure a benefit provided under the Act through fraud and willful misrepresentation of a material fact. The beneficiary also signed ETA Form 9089, which contained similar misrepresentations of material fact, under penalty of perjury. Therefore, 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.

¹⁷ It is important to note that while it may present the opportunity to enter an administrative finding of fraud, the immigrant visa petition is not the appropriate forum for finding an alien inadmissible. See *Matter of O*, 8 I&N Dec. 295 (BIA 1959). Instead, the alien may be found inadmissible at a later date when he or she subsequently applies for admission into the United States or applies for adjustment of status to permanent resident status. See sections 212(a) and 245(a) of the Act, 8 U.S.C. §§ 1182(a) and 1255(a). Nevertheless, the AAO has the authority to enter a fraud finding, if during the course of adjudication, it discovers fraud or a material misrepresentation.

In visa petition proceedings, the burden of proving eligibility for the benefit sought remains entirely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. Here, that burden has not been met.

ORDER: The appeal is dismissed. The approval of the petition remains revoked and the labor certification remains invalid.

FURTHER ORDER: The AAO finds that the petitioner and the beneficiary knowingly misrepresented the petitioner's business operation and concealed their familial relationship and the beneficiary's ownership interest in the petitioner's business to mislead the DOL, USCIS and the AAO on elements material to the beneficiary's eligibility for a benefit sought under the immigration laws of the United States.