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



U.S. Citizenship
and Immigration
Services

PUBLIC COPY



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DATE: **MAY 04 2011** Office: NEBRASKA SERVICE CENTER FILE:

IN RE: Petitioner:
Beneficiary:

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:

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 \$630. 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 preference visa petition was initially approved and then 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 Administrative Appeals Office (AAO) dismissed a subsequent appeal. The matter is now before the AAO on a motion to reconsider. The motion will be approved. The previous decisions of the director and the AAO will be affirmed. The petition will remain denied and the labor certification will remain invalidated.

The petitioner is a kosher bakery. It sought 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 conducts appellate review on a *de novo* basis. The AAO's *de novo* authority is well recognized by the federal courts. *See Soltane v. DOJ*, 381 F.3d 143, 145 (3d Cir. 2004). The procedural history of this case is documented in the record and is incorporated herein. Further references to the procedural history will only be made as necessary.

On March 25, 2010, the petitioner, through counsel filed a motion to reconsider. The regulation at 8 C.F.R. § 103.5(a)(3) provides that a motion to reconsider must offer the reasons for reconsideration and be supported by pertinent legal authority showing that the decision was based on an incorrect application of law or U.S. Citizenship and Immigration Services (USCIS) policy. It must also demonstrate that the decision was incorrect based on the evidence contained in the record at the time of the initial decision.

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.

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."

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 regulation at 8 C.F.R. § 204.5(l)(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(d) (1998) provided in pertinent part:

(d) After issuance labor certifications are subject to invalidation by the INS or by a Consul of the Department of State upon a determination, made in accordance with those agencies, procedures or by a Court, of fraud or willful misrepresentation of a material fact involving the labor certification application. If evidence of such fraud or willful misrepresentation becomes known to a RA or to the Director, the RA or Director, as appropriate, shall notify in writing the INS or State Department, as appropriate. A copy of the notification shall be sent to the regional or national office, as appropriate, of the Department of Labor's Office of Inspector General.²

² The current 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 § 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. If evidence of such fraud or willful misrepresentation becomes known to the CO or to the Chief, Division of Foreign Labor Certification, the CO, or the Chief of the Division of Foreign Labor Certification, as appropriate, shall notify in writing the DHS or Department of State, as appropriate. A copy of the notification must be sent to the regional or national

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, which established the priority date.³ 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 have 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."⁴

On motion, relevant to the beneficiary's qualifying experience, counsel merely states that the experience letter submitted on behalf of the beneficiary was issued prior to the filing of the petition and was not for immigration purposes. Counsel asserts that the AAO erred in reviewing this issue.

It is noted that in the AAO's prior decision, in support of the beneficiary's qualifying experience, a letter was submitted that was typed on the letterhead of the petitioning business, dated July 3, 2003, signed by [REDACTED] Manager." It stated 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 (NOID) issued on July 13, 2007. It is dated June 21, 1992 and is from [REDACTED]. No address is given and it appears to be a translation of a letter in Hebrew. It states that [REDACTED] and [the beneficiary] worked as pastry cooks and bakers between 1982 and 1987 at our [REDACTED] which is a kosher bakery." The author is stated to be an individual named [REDACTED] who shares the same surname as the

office, as appropriate, of the Department of Labor's Office of Inspector General. 20
C.F.R. § 656.30 (2010).

³ If the petition is approved, the priority date is also used in conjunction with the Visa Bulletin issued by the Department of State to determine when a beneficiary can apply for adjustment of status or for an immigrant visa abroad.

⁴ The ETA 750B, signed by the beneficiary on August 5, 1998, lists three jobs that he has held. He states that he worked for [REDACTED] 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 [REDACTED] 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).

beneficiary. His title is stated as [REDACTED]. 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 the letter's author's 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.⁵ Counsel did not submit any certified translation on motion, address the other deficiencies in the letter, or address why the beneficiary failed to list this experience on Form ETA 750B. 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).

As noted in the AAO's prior decision, relevant 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 [the beneficiary's surname] 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, [REDACTED], under the title of 'manager,'" and that she "completed and signed Form G-325A on March 14, 2005." On this form, using her married name, the beneficiary's surname, the beneficiary's wife states she has not worked in the last five years. The director noted that "as this statement was made on March 14, 2005, it suggests that [the beneficiary's wife] did not hold employment from March 14, 2000 through March 14, 2005."

On appeal, counsel stated 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 and whether she was employed with the petitioner while signing documents on the Petitioner's behalf and verifying the beneficiary's experience with the petitioner. 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). As the petitioner has failed

⁵ 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.)

to adequately address the outlined inconsistencies in the experience letters submitted, 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.

Relevant to the ability to pay the proffered wage of \$28,000 per year, in the AAO's prior decision, we found 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, but failed to establish the ability to pay the proffered wage in the other years of 1998, 1999, 2000, 2001, 2005 and 2006, because it failed to submit complete tax returns either in the underlying record or on appeal.

On motion, counsel submits more complete copies of the petitioner's federal income tax returns for 1998, 1999, 2000, 2001, 2005 and 2006. 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 specifically 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 2006.⁶ As noted by the AAO on appeal, although the petitioner provided copies of its tax returns' Schedule L, Balance Sheets per Books, for 1998 through 2006 on appeal, they were not be considered as probative of the petitioner's ability to pay the proffered wage.⁷ The AAO noted

⁶ 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 *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).

⁷ 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

that the purpose of the request for evidence is to elicit further information that clarifies whether eligibility for the benefit sought has been established, as of the time the petition is filed. *See* 8 C.F.R. §§ 103.2(b)(8) and (12). The failure to submit requested evidence that precludes a material line of inquiry shall be grounds for denying the petition. 8 C.F.R. § 103.2(b)(14). Similarly, on motion, as in the present matter, where a petitioner was put on notice of a deficiency in the evidence and was given an opportunity to respond to that deficiency, the AAO will not accept evidence offered for the first time on appeal or on motion. *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 documents in response to the director's request for evidence. *Id.* Under the circumstances, the AAO need not, and does not, consider the sufficiency of the evidence submitted on motion on this issue. The petitioner has not met its burden of proof on this issue. *See 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)).⁸ It may not

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. It is noted that even if reviewing the figures, the petitioner's tax returns failed to show the ability to pay because except for 2005, the petitioner's net income of -\$21,464 (Sched. K, line 23) in 1998; net income of -\$16,984 (Sched. K, line 23) in 2000; \$17,550 (Sched. K, line 23) in 2001; and \$18,968 (Sched. K, line 18) in 2006 were each insufficient to cover the proffered wage or the difference between actual wages paid and the proffered wage. Similarly, the petitioner's -\$15,400 in net current assets in 1998; -\$10,856 in 2000; net current assets of -\$22,684 in 2001; and -\$144 were each insufficient to pay the proffered wage or the difference between actual wages paid and the proffered wage and thus failed to demonstrate the petitioner's ability to pay the proffered wage.

⁸ 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. *River Street Donuts, LLC v. Napolitano*, 558 F.3d 111 (1st Cir. 2009); *Taco Especial v. Napolitano*, 696 F. Supp. 2d. 873 (E.E. Mich. 2010). 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

be concluded that for 1998, 1999, 2000, 2001, 2005, or 2006 that the petitioner established its continuing financial ability to pay the proffered wage pursuant to 8 C.F.R. 204.5(g)(2).⁹

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 CIS, 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. See *Taco Especial v. Napolitano*, 696 F. Supp. 2d. at 881 (gross profits overstate an employer's ability to pay because it ignores other necessary expenses).

It is further noted that the petitioner filed for a second worker which was raised in the AAO's prior decision. 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. Despite notification of this issue, counsel did not address this in his motion to reconsider.

⁹ 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*. This was

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.¹⁰ On motion, and from the information derived from the district office 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. In 2006, the tax return shows that the beneficiary is the sole shareholder of the petitioning business. Based on the facts in this case, we conclude that the preference petition essentially sought to sponsor the beneficiary in self-employment and the job opportunity was not clearly open to U.S. workers.

Where Schedule K-1 was provided first on appeal, the beneficiary is shown as a 50% shareholder on the tax returns for 1999, 2001, 2002, 2003, and 2004. The petitioner did not submit the second Form K-1 with the initial filing or on appeal, but instead only with its motion. 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.¹¹

additionally noted in the AAO's prior decision. Counsel did not address this point in his motion to reconsider.

¹⁰ See <http://www.ilsos.gov/corporatellc/CorporateLlcController>. (Accessed January 14, 2010). The petitioner is shown to have been incorporated on August 10, 1995; the beneficiary is stated to be the 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 in 1996, 1997, and 1998 are listed as the beneficiary's brother [REDACTED] as president and the beneficiary as secretary.

¹¹ 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 to the director's NOID, 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 on appeal or on motion. 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 ██████████ and that the beneficiary spoke different languages as "he talks to his brother ██████████ 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. On motion, counsel merely asserts that the beneficiary is only a baker and that the AAO erred in determining that the person signing the petition could not be the beneficiary's supervisor. Undocumented assertions of counsel do not constitute evidence. *Matter of Obaighbena*, 19 I&N Dec. 533, 534 (BIA 1988); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980). As noted above, the petitioner failed to provide any DOL correspondence as requested and failed to address this omission except to say that the information was readily available. Only on motion does counsel state that¹² "the beneficiary was a part owner with his brother."

¹² In response to the director's NOID, counsel states that the beneficiary and his wife were not married at the time the labor certification was filed. This omits the fact that the beneficiary and his brother were co-owners at the time that the labor certification was filed, which counsel did not state until filing the motion to reconsider. Counsel asserts that the "the information was readily available and presented during the filing, as well as during the interview in Chicago, Illinois." As the petitioner's tax returns identifying one or both shareholders were not submitted until appeal, or on motion to reconsider, this statement lacks veracity. 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. See *Matter of Ho*, 19 I&N Dec. 582, 591 (BIA 1988). Counsel's undocumented assertions of counsel do not constitute evidence. *Matter of Obaighbena*, 19 I&N Dec. 533, 534 (BIA 1988); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980).

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 court in *Bulk Farms, Inc.* noted:

The regulatory scheme challenged by Bulk Farms is reasonable related to the achievement of the purpose outlined in section 212(a). As the district court correctly noted, “the DOL certification process is built around a central administrative mechanism: A private good faith search by the certification applicant for U.S. workers qualified to take the job at issue.” See 20 C.F.R. § 656.21. This “good faith search” process operates successfully because all employers are subject to uniform certification requirements. The two independent safeguards challenged by Bulk Farms—the ban on alien self-employment and the *bona fide* job requirements—make the good faith search process self-enforcing. The prophylactic rules permit the Department of Labor to process more than 50,000 permanent labor certification requests each year. . .

The challenged regulations also represent a reasonable construction of section 212(a) insofar as they ensure the integrity of the information gathered by DOL. As a practical matter, where an employer is indistinguishable from the alien seeking the job in question, there is reason for the employer to abuse the process. . .

Bulk Farms, Inc., v. Martin, 963 F.2d 1286-1289 (1992).

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 402-403.

As outlined by the Board of Immigration Appeals (BIA), a material misrepresentation requires that the alien willfully make a material misstatement to a government official for the purpose of obtaining an immigration benefit to which one is not entitled. *Matter of Kai Hing Hui*, 15 I&N Dec. 288, 289-90 (BIA 1975). "The intent to deceive is no longer required before the willful misrepresentation charge comes into play." *Id.* at p. 290.¹³ The term "willfully" means knowing and intentionally, as distinguished from accidentally inadvertently, or in an honest belief that the facts are otherwise. See *Matter of Healy and Goodchild*, 17 I&N Dec. 22, 28 (BIA 1979). To be considered material, the misrepresentation must be one which "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 Ng*, 17 I&N Dec. 536, 537 (BIA 1980). Accordingly, for an immigration officer to find a willful and material misrepresentation in visa petition proceedings, he or she must determine: 1) that the petitioner or beneficiary made a false representation to an authorized official of the United States government; 2) that the misrepresentation was willfully made; and 3) that the fact misrepresented was material. See *Matter of M-*, 6 I&N Dec. 149 (BIA 1954); *Matter of L-L-*, 9 I&N Dec. 324 (BIA 1961); *Matter of Kai Hing Hui*, 15 I&N Dec. at 288.

The regulation at 20 C.F.R. § 656.3 further states that employment means: "Permanent full-time work by an employee for an employer other than oneself."

An occupational preference petition may be filed on behalf of a prospective employee who is a shareholder in the corporation. The prospective employee's interest in the corporation, however, is a material fact to be considered in determining whether the job being offered was really open to all qualified applicants. A shareholder's concealment, in labor certification proceedings, of his or her interest in the petitioning corporation constitutes willful misrepresentation of a material fact and is a ground for invalidation of an approved labor certification under 20 C.F.R. § 656.30(d) (1986). *Matter of Silver Dragon Chinese Restaurant*, 19 I&N Dec. 401,406 (Comm. 1986). In that case, the Commissioner 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 404.

In the circumstances set forth in this case, failure to disclose the beneficiary's relationship to the petitioning company and the other shareholder amounts to the willful effort to procure a benefit ultimately leading to permanent residence under the Act. See *Kungys v. U.S.*, 485 U.S. 759 (1988), (materiality is a legal question of whether "misrepresentation or concealment was predictably capable of affecting, i.e., had a natural tendency to affect the official decision.") In the context of a visa petition, a misrepresented fact is material if the misrepresentation cuts off a line of inquiry

¹³ In contrast, a finding of fraud requires a determination that the alien made a false representation of fact of a material fact with knowledge of its falsity and with the intent to deceive an immigration officer. Furthermore, the false representation must have been believed an acted upon by the officer. See *Matter of G-G-*, 7 I&N Dec. 161 (BIA 1956).

which is relevant to the eligibility criteria and that inquiry might well have resulted in the denial of a visa petition. *See Matter of Ng*, 17 I&N Dec. at 537.¹⁴

As noted in the AAO's prior decision, 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 had additionally noted in *Matter of Silver Dragon Chinese Restaurant* 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. *Matter of Silver Dragon Chinese Restaurant* at 404.

In this case, as noted above, the ETA 750 indicates that [REDACTED] as manager, 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. The petitioner failed to disclose the beneficiary's ownership interest, and did not submit evidence related to the company's ownership as the director requested. Additionally, the petitioner failed to submit its complete tax returns, which only on motion established the actual ownership of the petitioning entity. As noted above, 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 40. The misrepresentation cut off a potential line of inquiry regarding the *bona fide* nature of the offer of employment. This is directly

¹⁴ A misrepresentation is an assertion or manifestation that is not in accord with the true facts. A misrepresentation of a material fact may include but not be limited to such consequences as a denial of a visa petition, a decision rendering an alien inadmissible to the United States, and possible criminal prosecution. It is noted that section 212(a)(6)(C) of the Act, 8 U.S.C. § 1182 provides that any "alien who, by fraud or willfully misrepresenting a material fact, seeks to procure (or has sought to procure or has procured) a visa, other documentation, or admission into the United States or other benefit provided under this Act is inadmissible. An alien may be found inadmissible 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). 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 determining admissibility, the materiality test has three parts. First, if the record shows the alien is inadmissible on the true facts, then the second and third questions must be addressed. The second question is whether the relevant line of inquiry has been shut off, then it must be determined whether the inquiry might have resulted in a proper determination that the foreign national should have been excluded. *Id.* at 449.

material as to whether the petitioner is an “employer” which “intends to employ” the beneficiary as required by section 204(a)(1)(F) of the Act, and is therefore material as to whether the beneficiary is eligible for the benefit sought. *See Matter of S & B-C*, 9 I&N Dec. at 447.¹⁵

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 and did so at the time of the priority date, 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 the beneficiary’s wife as manager¹⁶ and

¹⁵ Although not binding on the USCIS, the Board of Alien Labor Certification Appeals (BALCA) in *Matter of Modular Container Systems, Inc.*, 89 INA 228 (July 16, 1991), determined that a *bona fide* job opportunity was dependent on whether U.S. workers could legitimately compete for the job opening and whether a genuine need for alien labor existed. If the certified job opportunity is tantamount to self-employment, then there is a per se bar to labor certification. Whether the job is clearly open to U.S. workers if measured by such factors as: 1) whether the alien was in a position to influence or control hiring decisions regarding the job for which certification is sought; 2) whether the alien was related to the corporate directors, officers, or employees; 3) whether the alien was the incorporator or founder of the employer; 4) whether the alien had an ownership interest in the company; 5) whether the alien was involved in the management of the company; 6) whether he was one of a small number of employees; 7) whether the alien has qualifications for the job that are identical to specialized or unusual job duties and requirements as stated in the application; and 8) whether the alien is so inseparable from the petitioning employer because of a pervasive presence and personal attributes that the employer would be unlikely to continue in operation without him.

In this case, as the beneficiary was one of the petitioner’s owner and subsequently the sole owner, he was: 1) in a position to influence or control hiring; 2) he was closely related to the other owner; 3) he was a co-founder; 4) he had ownership interest in the business; 5) we believe he was involved with the management of the company; 6) he was one of a small number of employees; and 8) we believe that he is not separable from the company.

The same standard has been incorporated into the PERM (Program Electronic Review Management) regulations. *See* 69 Fed. Reg. 77325, 77326 (Dec. 27, 2004). The regulation at 20 C.F.R. § 656.17(l) (2010) describes the documentation that a petitioner must provide if it is a closely held corporation or partnership in which the alien has an ownership interest, or where there is a familial relationship between the alien and the shareholders, officers, incorporators or partners, or the alien is one of a small number of employees. The petitioner must demonstrate that a *bona fide* job opportunity existed and that it was available to all U.S. workers. The regulation then lists the supporting documentation that the petitioner must provide in order to demonstrate the *bona fides* of the job opportunity.

¹⁶ As noted above, the record contains inconsistencies regarding her employment with the petitioner, which have not been resolved and cast doubt whether she was, therefore, a proper signatory for the petitioner, or a proper party to submit verification of the beneficiary’s work experience.

constitutes a 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 experience 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 that was “clearly open to any qualified U.S. worker” as attested to by the petitioner on Item 22-h of Part A of the Form ETA 750. The AAO concurs with the director’s finding¹⁷ that pursuant to 20 C.F.R. § 656.30(d), the labor certification should remain invalidated based on willful misrepresentation.

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 motion to reconsider is approved. The AAO decision dated March 2, 2010 is affirmed. The petition remains denied.

FURTHER ORDER: The AAO finds that the petitioner and the beneficiary willfully misrepresented a material fact to fraudulently obtain an immigration benefit. The AAO finds that the petitioner’s job offer was not *bona fide* based on the beneficiary’s undisclosed relationship interest to the petitioning company and the other owner, which constituted willful misrepresentation of a material fact underlying eligibility for a benefit sought under the immigration laws of the United States. The labor certification application is invalidated pursuant to 20 C.F.R. § 656.30(d) based on the willful misrepresentation.

¹⁷ The director’s October 2, 2007 decision clearly stated that “the regulation at 20 C.F.R. § 656.30(d) provides that [USCIS], the Department of State or a court may invalidate a labor certification upon a determination of fraud or willful misrepresentation of a material fact involving the application for labor certification.”