

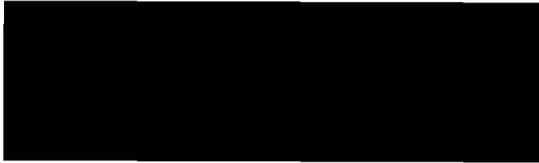
identifying data deleted to  
prevent clearly unwarranted  
invasion of personal privacy

U.S. Department of Homeland Security  
U.S. Citizenship and Immigration Services  
Administrative Appeals Office (AAO)  
20 Massachusetts Ave., N.W., MS 2090  
Washington, DC 20529-2090



U.S. Citizenship  
and Immigration  
Services

**PUBLIC COPY**



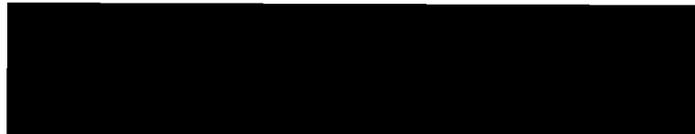
B6

DATE: NOV 14 2011

OFFICE: TEXAS SERVICE CENTER

FILE: 

IN RE: Petitioner:  
Beneficiary:



PETITION: Immigrant petition for Alien Worker as an Other, Unskilled Worker 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 \$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 immigrant visa petition was denied by the Director, Texas Service Center (Director), and certified by the Director to the Administrative Appeals Office (AAO) for review. The AAO affirms the Director's denial of the petition.

The petitioner is a meat processing company. It seeks to employ the beneficiary permanently in the United States as a Hallal food processor in accordance with section 203(b)(3)(A)(iii) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(3)(A)(iii). Under this statutory provision preference classification may be granted to "other" qualified immigrants who are capable, at the time of petitioning for classification under this paragraph, of performing unskilled labor, not of a temporary or seasonal nature, for which qualified workers are not available in the United States.

The Director denied the petition on three grounds: (1) the failure of the petitioner's principal shareholder to disclose his familial relationship with the beneficiary during the labor certification process, which necessitated the invalidation of the labor certification;<sup>1</sup> (2) the petitioner's failure to establish its ability to pay the proffered wage to the beneficiary; and (3) the petitioner's failure to establish that the beneficiary fulfilled the labor certification requirement of two years experience in the "job offered." Finding that "[t]he issues surrounding invalidation of the supporting labor certification are unique," the Director certified his decision to the AAO.

The regulation at 8 C.F.R. § 103.4(a)(1) provides that certifications by field office or service center directors may be made to the AAO "when a case involves an unusually complex or novel issue of law or fact."

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.<sup>2</sup>

---

<sup>1</sup> On March 28, 2005, pursuant to 20 C.F.R. § 656.17, the Application for Permanent Employment Certification, ETA Form 9089, replaced the Application for Alien Employment Certification, Form ETA 750. The new ETA Form 9089 was introduced in connection with the re-engineered permanent foreign labor certification program (PERM), which was published in the Federal Register on December 27, 2004, with an effective date of March 28, 2005. See 69 Fed. Reg. 77326 (Dec. 27, 2004). The regulation cited at 20 C.F.R. § 656.30(d) is the pre-PERM regulation applicable to the instant case. The regulation stated:

If a Court, the INS [Immigration and Naturalization Service] or the Department of State determines that there was fraud or willful misrepresentation involving a labor certification application, the application shall be deemed invalidated, processing shall be terminated, a notice of the termination and the reason therefore shall be sent by the Certifying Officer to the alien, and to the Department of Labor's Office of Inspector General.

<sup>2</sup> The submission of additional evidence on appeal is allowed by the instructions to the Form I-290B, which are incorporated into the regulations at 8 C.F.R. § 103.2(a)(1). In this case, the petitioner

The petitioner filed its Form I-140, Immigrant Petition for Alien Worker, on December 13, 2007. As required by statute, the petition was accompanied by a Form ETA 750, Application for Alien Employment Certification, which was filed at the Department of Labor (DOL) on May 2, 2001, and certified by the DOL on October 30, 2007.

On April 2, 2008, the Director issued a notice of intent to deny (NOID). The Director cited the most recent Public Information Report (PIR) from the Secretary of State in Texas identifying the beneficiary as the petitioner's vice president, and noted that this information conflicted with information on the Form I-140 which listed [REDACTED] as the petitioner's vice president. The Director also noted that the beneficiary's husband, [REDACTED] was the president of the company. The petitioner was advised to submit documentary evidence to clarify the identity of its vice president and to show that the familial relationship of the beneficiary to the petitioner's president was disclosed to the DOL during the labor certification process. Noting that the beneficiary claims to have worked for the petitioner as a Hallal food processor in the years 1998-2001, the Director advised the petitioner to submit W-2 forms (Wage and Tax Statements) for those years, as well as an explanation as to how the beneficiary could have worked in Paducah, Texas, when evidence elsewhere in the file indicated that she lived at that time over 250 miles away in Richardson, Texas. The Director also advised the petitioner to submit additional evidence of its ability to pay the proffered wage to the beneficiary during the years 2001-2007, noting that the petitioner's federal income tax returns already in the record did not demonstrate any such ability to pay.

The petitioner responded on May 2, 2008, with a letter from counsel and additional documentation. Counsel stated that [REDACTED] was the petitioner's vice president when the labor certification application was filed with the DOL in 2001, but that the petitioner had not updated its PIR since then. Counsel acknowledged that there was no evidence that the familial relationship between the beneficiary and the petitioner's president was disclosed to the DOL, but asserted that the labor certification should not be invalidated because the recruitment process for the proffered position was conducted in good faith, monitored by the DOL, and no applications were received. Counsel reiterated that the beneficiary worked for the petitioner from 1998 to 2001, but stated that no W-2 forms were available. Counsel indicated that the beneficiary lived in Childress, Texas – only 30 miles away her job site in Paducah, Texas – when she worked for the petitioner, and submitted a letter from an earlier employer in India attesting to the beneficiary's work as a Hallal food processor in the years 1994-1996. Counsel submitted some profit/loss statements and bank account records as evidence of its ability to pay the proffered wage.

On October 2, 2008, the Director issued a decision denying the petition, which was certified to the AAO. In the Director's view, the petitioner's failure to disclose the familial relationship between its president and the beneficiary to the DOL called into question whether the recruitment for the proffered position was truly open to qualified applicants. Had the DOL known of the familial

---

submitted additional evidence after certification to the AAO in response to a Notice of Derogatory Information.

relationship, it might have scrutinized the labor certification application more closely and may not have approved it. The Director determined that the labor certification must be invalidated, and that without a valid Form ETA 750 the petitioner was ineligible for classification as an unskilled worker. On the issue of the petitioner's ability to pay the proffered wage, the Director noted the lack of evidence that the beneficiary received any wages from the petitioner after 2001. The Director reviewed all the federal income tax returns submitted by the petitioner, in particular the years 2001-2006, and determined that they failed to demonstrate the petitioner's ability to pay the proffered wage, based on its net income or net current assets, during any of those years. Nor did the bank account statements submitted in response to the NOID establish the petitioner's ability to pay the proffered wage. As for the beneficiary's employment experience, the Director rejected the letter attesting to the beneficiary's employment by an Indian company from 1994 to 1996 because that employment was not listed on the petitioner's labor certification application in 2001. As for the beneficiary's employment with the petitioner in Paducah, Texas from January 1998 to at least April 2001, the Director stated that evidence in the record showed the beneficiary resided in Richardson, Texas – over 250 miles away from Paducah – from 2000 onward. The Director noted that utility bills and a house lease agreement had been submitted from Childress, Texas – just 30 miles away from Paducah – but that the beneficiary's husband was the only name that appeared on those documents. The Director concluded that the evidence was insufficient to establish that the beneficiary was employed in Paducah, Texas, from 1998 to 2001.

Following certification of the Director's decision to the AAO, the AAO issued a Notice of Derogatory Information (NDI) on March 31, 2009. In the NDI the AAO cited evidence from an online resource that the petitioner was not in good standing in the state of Texas, and requested that evidence be submitted that the petitioner is currently in active status. The AAO also requested the submission of a complete copy of the petitioner's Form ETA 750 as certified by the DOL – including all correspondence with the DOL and all documents involved in the petitioner's recruitment process – to show the extent to which the familial relationship between the beneficiary and the petitioner's president was disclosed to the DOL during the labor certification process. Noting that Schedule K of the petitioner's federal income tax returns for 2001-2004 indicated that one shareholder owned the company, and that Schedule K of the tax returns for 2005-2006 indicated that no shareholder owned more than 50% of the company, the AAO requested the submission of the statement referenced on the Schedule Ks for 2001-2004 identifying the sole shareholder as well as the names of the petitioner's multiple shareholders in 2005-2006. Finally, the AAO requested the submission of all PIRs submitted by the petitioner with its annual Texas franchise tax reports since the company's incorporation in October 1997, as well as the corporate document recording the election of [REDACTED] as vice president of the company.

The petitioner responded on April 29, 2009, with a letter from counsel and additional documentation. The issues now before the AAO are the following:

- (1) Is the petitioner currently an active business and in good standing with the state of Texas?

- (2) To what extent did the petitioner disclose the familial relationship between its president and the beneficiary to the DOL during the labor certification process, and was its lack of full disclosure valid grounds for the Director to invalidate the labor certification?
- (3) Has the petitioner established its continuing ability to pay the proffered wage from 2001 (when the labor certification application was received by the DOL) up to the present?
- (4) Has the petitioner established that the beneficiary had two years of experience in the “job offered” at the time the labor certification application was filed in 2001?
- (5) Is the proffered position in the Form I-140 the same as the job certified by the DOL on the Form ETA 750?
- (6) May the petitioner request the “other, unskilled worker” classification on the Form I-140 for a position that requires two years of work experience on the labor certification?

#### **Business Status of the Petitioner**

In response to the NDI the petitioner acknowledged that it failed to maintain good standing with the state of Texas because it neglected to pay its franchise taxes over the years, which cost the company some legal rights during that time. The business continued to operate uninterrupted, however, as evidenced by its annual federal income tax returns. The petitioner submitted a copy of its federal income tax return (Form 1120) for the year 2008, which supplemented the returns already in the record for the years 2001-2007. The petitioner also submitted copies of a series of PIRs and documentation from the Texas Comptroller of Public Accounts, including a Tax Payment Receipt, dated April 22, 2009, confirming that the petitioner had paid up its overdue franchise taxes, and a Certificate of Account Status, dated April 29, 2009, certifying that the petitioner had no unpaid franchise taxes and was in good standing until May 17, 2010 – the due date of the next franchise tax report. As of July 28, 2011, according to state records, the petitioner was still in good standing. Based on the evidence of record, therefore, the AAO concludes that the petitioner is in good standing with the state of Texas and has continued in business uninterrupted at all times pertinent to this petition.

#### **Familial Relationship**

Under 20 C.F.R. § 626.20(c)(8) and § 656.3, the petitioner has the burden of proof to show that a valid employment relationship exists and that a *bona fide* job offer is available to United States 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 Sunmart* 374, 00-INA-93 (BALCA May 15, 2000).

The record indicates that the beneficiary is the spouse of the petitioner’s president, [REDACTED]. The beneficiary and her husband were the initial co-directors of the company when it was

incorporated in October 1997, and assumed the titles of president and vice president. In its response to the NDI, the petitioner submitted a letter from the petitioner's certified public accountant (CPA) acknowledging an error on Schedule K of the petitioner's Form 1120 for the years 2001-2004, which incorrectly stated that the petitioner had only one shareholder during those years instead of the three it actually had. The petitioner submitted the minutes of a meeting on October 17, 2000, whereby its sole shareholder, [REDACTED] appointed [REDACTED] vice president and transferred 95 % of the company's stock to him (50 %) and his wife, [REDACTED] (45 %), while retaining a 5 % share in the company. A letter from [REDACTED] dated April 21, 2009, confirms that he and his wife had owned 95 % of the company's shares since 2000. The petitioner also submitted documentation from its recruitment efforts during the labor certification process from the spring of 2001 to the fall of 2007. None of the materials from this six and one-half year period advised the DOL of the familial relationship between the beneficiary and the petitioner's president. It is true, as counsel points out, that there was no item on the Form ETA 750 that specifically asked whether any such relationship existed. Nevertheless, because such a close relationship did exist in this case, it could well have affected how the DOL conducted the labor certification process.

The petitioner should have disclosed the relationship between the beneficiary and the petitioner's president to the DOL when it submitted the beneficiary's Form ETA 750, Part B. *See Matter of Silver Dragon Chinese Restaurant*, 19 I&N Dec. 401 (Comm'r 1986). That case discussed a beneficiary's 50% ownership of the petitioning entity. The decision quoted an advisory opinion from the Chief of the DOL's Division of Foreign Labor Certification as follows:

The regulations require a 'job opportunity' to be 'clearly open.' Requiring the job opportunity to be bona fide adds no substance to the regulations, but simply clarifies that the job must truly exist and not merely exist on paper. The administrative interpretation thus advances the purpose of regulation 656.20(c)(8). Likewise requiring the job opportunity to be bona fide clarifies that a true opening must exist, and not merely the functional equivalent of self-employment. Thus, the administrative construction advances the purpose of regulation 656.20.

*Id.* at 405. In this case the petitioner has provided no evidence that it made any disclosure to the DOL of a familial relationship between its president and the beneficiary. The familial relationship would likely have caused the DOL to examine more carefully whether the job opportunity was clearly open to qualified United States workers, and whether United States workers applying for the job, if any, were rejected solely for lawful job related reasons. *See id.* at 402.

The regulation at 20 C.F.R. § 656.30 (2001) 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 a labor certification. If evidence of such fraud or willful misrepresentation becomes known to a RA [Regional Administrator] 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 notice shall be sent to the regional or national office, as appropriate, of the Department of Labor's Office of Inspector General.

The current regulation 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 [Contracting Officer] 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 office, as appropriate, of the Department of Labor's Office of Inspector General. 20 C.F.R. § 656.30 (2010).

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.<sup>3</sup> 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.

An occupational preference petition may be filed on behalf of a prospective employee who is related to an officer and part-owner of the corporation. The familial relationship, however, is a material fact to be considered in determining whether the job being offered was really open to all qualified applicants. The concealment, in labor certification proceedings, of a familial relationship between

---

<sup>3</sup> In contrast, a finding of fraud requires a determination that the alien made a false representation 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 and acted upon by the officer. See *Matter of G-G-*, 7 I&N Dec. 161 (BIA 1956).

the beneficiary and an officer/part-owner of 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). *See Matter of Silver Dragon Chinese Restaurant*, 19 I&N Dec. 401, 406 (Comm. 1986).

In the circumstances set forth in this case, failure to disclose the beneficiary's familial relationship to the petitioning company's president and part-owner 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 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.

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). The failure to disclose the fact that the beneficiary was married to the petitioner's president and 5% shareholder at the time of the labor certification process was material because it cut off a potential line of inquiry regarding the *bona fide* nature of the offer of employment. This is directly 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 whether the beneficiary is eligible for the benefit sought. *See Matter of S & B-C*, 9 I&N Dec. at 447.

In accordance with the foregoing analysis, and pursuant to 20 C.F.R. § 656.30(d), the AAO finds that the petitioner failed to demonstrate that a *bona fide* job offer existed based on the undisclosed familial relationship between the beneficiary and the petitioner's president/part-owner, which constituted willful misrepresentation of a material fact. The AAO concurs with the director's finding that the labor certification is invalid based on the willful misrepresentation of a material fact. The labor certification remains invalidated on this basis. The AAO concludes, therefore, that the director properly denied the petition.

**Ability to Pay**

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.

With respect to the three types of documentation identified in the foregoing regulation, counsel states that the petitioner does not have any annual reports or audited financial statements. As for federal tax returns, the record includes the petitioner's Form 1120, U.S. Corporation Income Tax Return, for each of the years 2001-2008.

The petitioner must demonstrate the continuing ability to pay the proffered wage beginning on the priority date, which is the date the labor certification application was accepted for processing by any office within the employment system of the DOL. *See* 8 C.F.R. § 204.5(d). In this case, the Form ETA 750 was accepted by the DOL on May 2, 2001. The proffered wage as stated on the Form ETA 750 is \$12.00 per hour for the basic 40-hour work week, plus \$18.00 per hour for 10 hours of overtime each week – which amounts to \$34,320 per year. U.S. Citizenship and Immigration Services (USCIS) may not ignore a term of the labor certification. *See Matter of Silver Dragon Chinese Restaurant, supra.*

The petitioner must establish that its job offer to the beneficiary is a realistic one. Because the filing of an ETA Form 750 establishes a priority date for any immigrant petition later based on that document, 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, USCIS requires the petitioner to demonstrate financial resources sufficient to pay the beneficiary's proffered wages, although the totality of the circumstances affecting the petitioning business will be considered if the evidence warrants such consideration. *See Matter of Sonogawa*, 12 I&N Dec. 612 (Reg. Comm. 1967).

In determining the petitioner's ability to pay the proffered wage between the priority date and the present, USCIS first examines 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 this case, there is no evidence that the petitioner has employed and paid the beneficiary at any time since the priority date.

If the petitioner has not employed the beneficiary since the priority date, USCIS will next examine the net income figure reflected on the petitioner's federal income tax return, without consideration of depreciation or other expenses. *See River Street Donuts, LLC v. Napolitano*, 558 F.3d 111 (1<sup>st</sup> Cir. 2009); *Taco Especial v. Napolitano*, 696 F. Supp. 2d. 873 (E.D. 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. *See 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 wage expense is misplaced. Showing that the petitioner's gross receipts exceeded the proffered wage is insufficient. Similarly, showing that the petitioner paid wages to all of its employees in excess of the proffered wage to the beneficiary is insufficient.

In *K.C.P. Food Co., Inc. v. Sava*, 623 F. Supp. at 1084, the court held that the Immigration and Naturalization Service, now USCIS, had properly relied on the petitioner's net income figure, as stated on the petitioner's corporate income tax returns, rather than the petitioner's gross income. The court specifically rejected the argument that USCIS should have considered income before expenses were paid rather than net income. *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).

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 118. "[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).

Consistent with its prior adjudications, and backed by federal court rulings, the AAO will not consider depreciation in examining the petitioner's net income. The petitioner's federal income tax returns (Form 1120) for the years 2001-2008 show net income in the following amounts:

2001:	-\$80,230	2005:	+\$55,975
2002:	-\$16,373	2006:	+\$24,057
2003:	-\$ 7,919	2007:	+\$35,495
2004:	-\$ 4,483	2008:	+\$41,743

In only three of the above years (2005, 2007, and 2008) did the petitioner's net income equal or exceed the annualized proffered wage of \$34,320. In the other five years the petitioner had either negative net income (2001-2004) or net income less than the annualized proffered wage (2006). Accordingly, the petitioner cannot establish its continuing ability to pay the proffered wage based on its net income over the years.

As another alternate means of determining the petitioner's ability to pay the proffered wage, USCIS may review the petitioner's net current assets as reflected on its federal income tax returns. Net current assets are the difference between the petitioner's current assets and current liabilities.<sup>4</sup> A corporation's year-end current assets are shown on Schedule L, lines 1 through 6. Its year-end current liabilities are shown on lines 16 through 18. If the total of a corporation's end-of-year net current assets and the wages paid to the beneficiary (if any) are equal to or greater than the proffered wage, the petitioner is expected to be able to pay the proffered wage using those net current assets.

In this case the petitioner's federal income tax returns show net current assets for the years 2001-2008 in the following amounts:

2001:	-\$111,487	2005:	+\$ 14,015
2002:	-\$110,136	2006:	+\$ 15,103
2003:	-\$ 4,188	2007:	+\$ 6,894
2004:	+\$ 201	2008:	+\$ 4,542

In none of the above years did the petitioner's net current assets equal or exceed the annualized proffered wage of \$34,320. Accordingly, the petitioner cannot establish its ability to pay the proffered wage based on its net current assets over the years.

---

<sup>4</sup> According to *Barron's Dictionary of Accounting Terms* 117 (3<sup>rd</sup> ed. 2000), "current assets" consist of items having (in most cases) a life of one year or less, such as cash, marketable securities, inventory and prepaid expenses. "Current liabilities" are obligations payable (in most cases) within one year, such accounts payable, short-term notes payable, and accrued expenses (such as taxes and salaries). *Id.* at 118.

Thus, the petitioner has not established its ability to pay the proffered wage in the years 2001-2004 and 2006 by means of wages actually paid to the beneficiary, its net income, or its net current assets during those years.

In addition to the foregoing criteria, USCIS may also consider the totality of circumstances, including the overall magnitude of business activities, in determining the petitioner's ability to pay the proffered wage. *See Matter of Sonogawa*, 12 I&N Dec. 612. 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 instant petitioner's financial ability that falls outside of its 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 petitioner's reputation within its industry, the overall number of employees, whether the beneficiary is replacing a former employee or an outsourced service, the amount of compensation paid to officers, the occurrence of any uncharacteristic business expenditures or losses, and any other evidence that USCIS deems relevant to the petitioner's ability to pay the proffered wage.

In this case, the petitioner has been in business since 1997 and had two employees at the time the instant petition was filed in 2007. While its federal income tax returns show better business results from 2005 onward, the company clearly lost money in the years before that. While exhibiting a general upward trend in net income and net current assets, the petitioner's growth has not been steady as measured by gross receipts, which fluctuated wildly between 2001 and 2008. The gross receipts figures were \$523,830 (2001), \$309,354 (2002), \$303,616 (2003), \$527,826 (2004), \$556,726 (2005), \$478,608 (2006), \$230,493 (2007), and \$336,955 (2008). The petitioner submitted copies of bank account records from 2001 to 2007. As explained by the Director in his denial decision, however, the petitioner has not shown that these funds are separate and distinct from assets reflected on its federal income tax returns, such as cash specified in Schedule L. Most particularly, the petitioner has not demonstrated an ability to pay the proffered wage in the years 2001-2004, when its net income and net current assets were generally in the red, sometimes deeply. Thus, the record does not establish that the totality of the petitioner's circumstances, as in *Sonogawa*, demonstrates its continued ability to pay the proffered wage for the subject position from the priority date up to the present. The job offer was not realistic.

Based on the foregoing analysis, the AAO determines that the petitioner has failed to establish its ability to pay the proffered wage for the subject position from the priority date (May 2, 2001) up to the present. On that ground as well, the petition cannot be approved.

### **Work Experience of the Beneficiary**

The petitioner must demonstrate that, on the priority date, the beneficiary had the qualifications stated on its labor certification application, as certified by the DOL and submitted with the instant petition. *Matter of Wing's Tea House*, 16 I&N Dec. 158 (Acting Reg'l Comm'r 1977). In this case, the beneficiary stated on the Form ETA 750, which she signed and dated on April 26, 2001, that she had worked for the petitioner as a Hallal food processor from January 1998 to the present. That time period exceeds the experience requirement on the Form ETA 750, which is specified as two years minimum. On the Form ETA 750, however, the beneficiary indicated that she was currently (in April 2001) residing in Richardson, Texas, with her husband, whereas the work location was in Paducah, Texas. This information is consistent with the Form G-325A, Biographic Information, submitted with the beneficiary's application for permanent resident status, Form I-485, on December 13, 2007, in which the beneficiary claims to have lived in Richardson, Texas, from April 2000 to the present (*i.e.*, December 2007). As discussed by the Director in his denial decision, these towns are over 250 miles apart, which undermined the beneficiary's claim to have worked for the petitioner in Paducah.

It is incumbent upon an applicant to resolve any inconsistencies in the record by independent objective evidence. Attempts to explain or reconcile such inconsistencies will not suffice without competent evidence pointing to where the truth lies. *See Matter of Ho*, 19 I&N Dec. 582, 591-92 (BIA 1988). Doubt cast on any aspect of the applicant's evidence also reflects on the reliability of the applicant's remaining evidence. *See id.*

The petitioner asserts that the beneficiary actually resided with her husband in Childress, Texas – just 30 miles away from Paducah – during her employment years. The AAO has reviewed the entire record, and found a number of documents which indicate that the beneficiary resided in Childress, Texas, for much of the time in question. The documents include a couple of applications filed by the petitioner in June 1998 and December 1999, signed by its president, [REDACTED] that list his wife, the beneficiary, as a fellow stockholder residing with him in Childress, Texas. The petitioner did not explain why, if the petitioner actually lived in Childress, Texas, from 1998 to 2001, the beneficiary stated on two separate immigration-related documents – the Form ETA 750 (2001) and the Form G-325A (2007) – that she resided in Richardson, Texas, for at least part of that time.

Regardless of whether the beneficiary resided in Childress, Texas, and may have had an ownership interest in the petitioner in the late 1990s, there is no concrete evidence that she was employed by the petitioner at that time. Neither the petitioner nor the beneficiary has produced any W-2 forms documenting the beneficiary's employment by the petitioner during any of the years (1998-2001) she claims to have worked for the company as a Hallal food processor. Nor has the petitioner produced any business or payroll records documenting the beneficiary's employment at any time

between 1998 and 2001. Considering this lack of documentary evidence, and the unresolved inconsistencies regarding the beneficiary's place of residence during the time frame of 1998-2001, the AAO concludes that the record fails to establish that the beneficiary worked for the petitioner as a Hallal food processor at any time between 1998 and 2001.

Moreover, based on the record described above the AAO determines that the petitioner's claim to have employed the beneficiary for a period of more than three years constituted a willful misrepresentation of fact that was material to the beneficiary's eligibility for an immigrant visa petition. Without the work experience claimed in the Form ETA 750, the beneficiary would not meet the minimum requirement of two years of experience in the "job offered," as specified in the labor certification. This willful misrepresentation of a material fact by the petitioner constitutes an additional ground for invalidation of the labor certification, in accordance with the regulation at 20 C.F.R. § 656.30(d).

The only other evidence in the record of the beneficiary's work experience is a letter from [REDACTED] Mumbai, India, that was signed and dated May 3, 2001. In his letter, prepared on the company's letterhead, [REDACTED] "certified" that the beneficiary "worked as a full-time Hallal Food Processor, in accordance with the dietary requirements of Muslim faith, at our establishment from February 1994 to March 1996." This alleged work experience, however, was not listed on the labor certification application filed by the petitioner on May 2, 2001 and certified by the DOL on October 30, 2007. The failure to identify this work experience on the Form ETA 750, and its resulting lack of certification by the DOL, lessens the credibility of the evidence and facts asserted. *See Matter of Leung*, 16 I&N Dec. 2530 (BIA 1976). Moreover, the letter does not fully comply with the regulatory requirements set forth at 8 C.F.R. § 204.5(g)(1) and 8 C.F.R. § 204.5(l)(3)(ii)(A), which state that the name, address, and title of the writer, and a specific description of the duties performed by the beneficiary must be provided. In this case, the letter from [REDACTED] does not provide a specific description of the duties performed by the beneficiary. Rather, it vaguely asserts that the beneficiary "worked as a full-time Hallal Food Processor" without providing any details as to the specific tasks performed. For the reasons discussed above, the AAO determines that the letter from [REDACTED] is not persuasive evidence that the beneficiary was employed by [REDACTED] as a Hallal food processor from February 1994 to March 1996.

Based on the foregoing analysis, the AAO concludes that the petitioner has failed to establish that the beneficiary had the requisite two years of experience in the "job offered" at the time the labor certification application was filed in 2001. Thus, the petitioner has not established that the beneficiary was qualified for the proffered position of Hallal food processor. For this reason as well, the petition cannot be approved.

### **The Proffered Position and the Labor Certification**

Beyond the decision of the Director, there is a material difference between the job on the Form ETA 750, certified by the DOL, and the proffered position on the immigrant visa petition, Form I-140. On the labor certification the Hallal food processor is specified as a 50-hour per week job, with basic

pay of \$12.00/hour for the first 40 hours and overtime pay of \$18.00/hour for 10 additional hours. Weekly pay, therefore, would total \$660 – consisting of \$480 in basic pay (for the standard 40 hours) and \$180 in overtime pay (for 10 additional hours). These job specifications differ from those in the petition, which states that the wages for the proffered position are \$480/week with no mention of any overtime component.

The regulation at 8 C.F.R. § 204.5(l)(3)(i) requires that the instant petition be accompanied by an individual labor certification from the DOL. The regulation at 20 C.F.R. § 656.30(c)(2) further provides that “[a] permanent labor certification involving a specific job offer is valid only for the particular job opportunity . . . stated on the Application for Alien Employment Certification (Form ETA 750) or the Application for Permanent Employment Certification (ETA Form 9089).” In this case the 50-hour/week job certified by the DOL is not the same as the 40-hour/week job described in the Form I-140. The labor certification is for a job involving 25% more work time than the job stated in the immigrant visa petition. Since the working conditions of a 50-hour work week are materially different from those of a 40-hour work week, the labor certification is not valid for the job opportunity set forth in the petition.<sup>5</sup>

In accordance with the regulation at 20 C.F.R. § 656.30(c)(2), therefore, the AAO determines that the Form ETA 750 certified by the DOL on October 30, 2007 is not valid for the Form I-140 petition filed on December 13, 2007. For this additional reason, the petition cannot be approved.

### **Classification of the Proffered Position**

Also beyond the decision of the Director, the proffered position has not been properly classified on the immigrant visa petition, Form I-140. The petitioner categorized the Hallal food processor position in Part 2.g. of the Form I-140 as “[a]ny other worker (requiring less than two years of training or experience).” As identified on the petition, therefore, the proffered position fits the classification of an “other worker” capable of performing “unskilled labor” pursuant to section 203(b)(3)(A)(iii) of the Act. On the Form ETA 750 certified by the DOL, however, the petitioner stated that the minimum experience required for the subject position was two years in the job offered. As described in the labor certification, the proffered position fits the classification of a “skilled worker” capable of performing “skilled labor (requiring at least two years training or experience)” pursuant to section 203(b)(3)(A)(i) of the Act.

The regulation at 8 C.F.R. § 204.5(l) provides in pertinent part:

(4) *Differentiating between skilled and other workers.* The determination of whether a worker is a skilled or other worker will be based on the requirements of training and/or experience placed on the job by the prospective employer, as certified by the Department of Labor.

---

<sup>5</sup> The labor certification also requires that the employee “be of the Muslim faith,” which deviates from the immigrant visa petition which includes no such religious requirement.

In this case, the petitioner stated on the Form ETA 750 that the proffered position requires at least two years of employment experience, which makes it a "skilled worker" position under the Act. However, the petitioner requested an "other worker" classification on the Form I-140. Thus, the position described in the labor certification does not correlate with the position identified on the immigrant visa petition. Accordingly, the instant petition is not accompanied by a labor certification valid for the proffered position, in accordance with 8 C.F.R. § 204.5(l)(3)(i) and 20 C.F.R. § 656.30(c)(2). On this ground as well, the petition cannot be approved.

### **Conclusion**

Based on the foregoing analysis of the issues, the AAO concludes that the instant petition is deniable on the following grounds:

- (1) The petitioner did not establish that a *bona fide* job offer was available to U.S. workers because it failed to disclose the familial relationship of its president and the beneficiary to the DOL during the labor certification process.
- (2) The petitioner failed to establish its continuing ability to pay the proffered wage from the priority date (May 2, 2001) up to the present.
- (3) The petitioner has not established that the beneficiary had the requisite two years of experience in the "job offered" at the time the labor certification application was filed in May 2001.
- (4) The petition is not accompanied by a valid labor certification because (a) the weekly hours stated in the petition do not match those prescribed in the labor certification, and (b) the work experience requirement of the petition does not match that of the labor certification.

For all of these reasons, considered both in sum and as separate grounds for denial, the petition may not be approved. Accordingly, the decision certified to the AAO will be affirmed, and the petition denied.

The burden of proof in these proceedings rests solely with the petitioner. *See* section 291 of the Act, 8 U.S.C. § 1361. The petitioner has not met that burden.

**ORDER:** The decision certified to the AAO is affirmed. The petition is denied.