

**identifying data deleted to
prevent clearly unwarranted
invasion of personal privacy**

PUBLIC COPY

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**



B6

DATE: **SEP 27 2011** Office: NEBRASKA SERVICE CENTER

FILE:

IN RE: Petitioner:
Beneficiary:

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

ON BEHALF OF PETITIONER:



INSTRUCTIONS:

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

If you believe the law was inappropriately applied by us in reaching our decision, or you have additional information that you wish to have considered, you may file a motion to reconsider or a motion to reopen. The specific requirements for filing such a request can be found at 8 C.F.R. § 103.5. All motions must be submitted to the office that originally decided your case by filing a Form I-290B, Notice of Appeal or Motion, with a fee of \$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 denied by the Director, Nebraska Service Center, and is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner is a self-service gas station. It seeks to employ the beneficiary permanently in the United States as a manager of a retail store. As required by statute, the petition is accompanied by a Form ETA 750, Application for Alien Employment Certification, approved by the United States Department of Labor (DOL). The director determined that the petitioner had not established that it had the continuing ability to pay the beneficiary the proffered wage beginning on the priority date of the visa petition. The director denied the petition accordingly.

The record shows that the appeal is properly filed, timely and makes a specific allegation of error in law or fact. The procedural history in this case is documented by the record and incorporated into the decision. Further elaboration of the procedural history will be made only as necessary.

As set forth in the director's April 27, 2009 denial, the issue in this case is whether the petitioner has the ability to pay the proffered wage as of the priority date and continuing until the beneficiary obtains lawful permanent residence.

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

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

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

The petitioner must demonstrate the continuing ability to pay the proffered wage beginning on the priority date, which is the date the Form ETA 750, was accepted for processing by any office within the employment system of the DOL. See 8 C.F.R. § 204.5(d). The petitioner must also demonstrate that, on the priority date, the beneficiary had the qualifications stated on its Form ETA 750, as certified by the DOL and submitted with the instant petition. *Matter of Wing's Tea House*, 16 I&N Dec. 158 (Act. Reg. Comm. 1977).

Here, the Form ETA 750 was accepted on February 9, 2004. The proffered wage as stated on the Form ETA 750 is \$18.75 per hour (\$39,000.00 per year). The Form ETA 750 states that the position requires three years experience in the job offered.

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

The evidence in the record of proceeding shows that the petitioner is structured as an S corporation. On the petition, the petitioner claimed to have been established on July 1, 1998 and to currently employ three workers. According to the tax returns in the record, the petitioner's fiscal year is based on a calendar year. On the Form ETA 750B, signed by the beneficiary on February 6, 2004, the beneficiary does not claim to have worked for the petitioner.

The petitioner must establish that its job offer to the beneficiary is a realistic one. Because the filing of a Form ETA 750 labor certification application establishes a priority date for any immigrant petition later based on the Form ETA 750, the petitioner must establish that the job offer was realistic as of the priority date and that the offer remained realistic for each year thereafter, until the beneficiary obtains lawful permanent residence. The petitioner's ability to pay the proffered wage is an essential element in evaluating whether a job offer is realistic. *See Matter of Great Wall*, 16 I&N Dec. 142 (Acting Reg. Comm. 1977); *see also* 8 C.F.R. § 204.5(g)(2). In evaluating whether a job offer is realistic, United States Citizenship and Immigration Services (USCIS) requires the petitioner to demonstrate financial resources sufficient to pay the beneficiary's proffered wages, although the totality of the circumstances affecting the petitioning business will be considered if the evidence warrants such consideration. *See Matter of Sonegawa*, 12 I&N Dec. 612 (Reg. Comm. 1967).

In determining the petitioner's ability to pay the proffered wage during a given period, USCIS will first examine whether the petitioner employed and paid the beneficiary during that period. If the petitioner establishes by documentary evidence that it employed the beneficiary at a salary equal to or greater than the proffered wage, the evidence will be considered *prima facie* proof of the petitioner's ability to pay the proffered wage. The proffered wage is \$39,000.00.

The record of proceeding contains copies of IRS Forms W-2 for the tax years as shown in the table below.

- In 2004, the petitioner did not provide any evidence of any wages paid to the beneficiary.
- In 2005, the IRS Form W-2 stated total wages of \$19,723.55 (a deficiency of \$19,276.45).

¹ 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 2006, the IRS Form W-2 stated total wages of \$33,811.80 (a deficiency of \$5,188.20).
- In 2007, the IRS Form W-2 stated total wages of \$33,811.80 (a deficiency of \$5,188.20).
- In 2008, the IRS Form W-2 stated total wages of \$33,811.80 (a deficiency of \$5,188.20).

The petitioner is obligated to show that it can pay the difference between the proffered wage and wages already paid in each year. In subtracting the total wage amounts from the proffered wage, it is determined that the petitioner has failed to demonstrate its ability to pay the proffered wage since filing and currently.

If, as in this case, the petitioner does not establish that it employed and paid the beneficiary an amount at least equal to the proffered wage during that period, USCIS will next examine the net income figure reflected on the petitioner's federal income tax return, without consideration of depreciation or other expenses. *River Street Donuts, LLC v. Napolitano*, 558 F.3d 111 (1st Cir. 2009); *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. *Elatos Restaurant Corp. v. Sava*, 632 F. Supp. 1049, 1054 (S.D.N.Y. 1986) (citing *Tongatapu Woodcraft Hawaii, Ltd. v. Feldman*, 736 F.2d 1305 (9th Cir. 1984)); see also *Chi-Feng Chang v. Thornburgh*, 719 F. Supp. 532 (N.D. Texas 1989); *K.C.P. Food Co., Inc. v. Sava*, 623 F. Supp. 1080 (S.D.N.Y. 1985); *Ubeda v. Palmer*, 539 F. Supp. 647 (N.D. Ill. 1982), *aff'd*, 703 F.2d 571 (7th Cir. 1983). Reliance on the petitioner's gross receipts and wage expense is misplaced. Showing that the petitioner's gross receipts exceeded the proffered wage is insufficient. Similarly, the petitioner showing that it paid wages in excess of the proffered wage is insufficient.

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

The record before the director closed on March 3, 2009, with the receipt by the director of the petitioner’s submissions in response to the director’s request for evidence. The petitioner’s income tax return for 2008 is the most recent return available before the director. The petitioner’s IRS Forms 1120S tax returns² demonstrate its net income for 2004 through 2008, as shown in the table below.

- In 2004, the Form 1120S stated net income of -\$75,821.00.
- In 2005, the Form 1120S stated net income of -\$64,359.00.
- In 2006, the Form 1120S stated net income of -\$49,297.00.
- In 2007, the Form 1120S stated net income of -\$103,037.00.
- In 2008, the Form 1120S stated net income of -\$162,359.00.

Therefore, for the 2004 through 2008, the petitioner did not have sufficient net income to pay the difference between the proffered wage and wages paid to the beneficiary.

As an alternate means of determining the petitioner’s ability to pay the proffered wage, USCIS may review the petitioner’s net current assets. Net current assets are the difference between the

² Where an S corporation’s income is exclusively from a trade or business, USCIS considers net income to be the figure for ordinary income, shown on line 21 of page one of the petitioner’s IRS Form 1120S. However, where an S corporation has income, credits, deductions or other adjustments from sources other than a trade or business, they are reported on Schedule K. If the Schedule K has relevant entries for additional income, credits, deductions or other adjustments, net income is found on line 17e (2004-2005) or line 18 (2006-2008) of Schedule K. See Instructions for Form 1120S, 2006, at <http://www.irs.gov/pub/irs-pdf/i1120s.pdf> (indicating that Schedule K is a summary schedule of all shareholder’s shares of the corporation’s income, deductions, credits, etc.). In this case, the petitioner’s net income is taken from the petitioner’s Schedule K of its tax returns for those years.

petitioner's current assets and current liabilities.³ A corporation's year-end current assets are shown on Schedule L, lines 1 through 6. Its year-end current liabilities are shown on lines 16 through 18. If the total of a corporation's end-of-year net current assets and the wages paid to the beneficiary (if any) are equal to or greater than the proffered wage, the petitioner is expected to be able to pay the proffered wage using those net current assets. The petitioner's tax returns demonstrate its end-of-year net current assets as shown in the table below.

- In 2004, the Form 1120S stated net current assets of \$3,722.00.
- In 2005, the Form 1120S stated net current assets of -\$28,134.00.
- In 2006, the Form 1120S stated net current assets of \$16,899.00.
- In 2007, the Form 1120S stated net current assets of \$7,597.00.
- In 2008, the Form 1120S stated net current assets of -\$30,542.00.

Therefore, for the years 2004, 2005, and 2008, the petitioner did not have sufficient net current assets to pay the difference between the proffered wage and wages paid to the beneficiary.

Therefore, from the date the Form ETA 750 was accepted for processing by the DOL, the petitioner had not established that it had the continuing ability to pay the beneficiary the proffered wage as of the priority date through an examination of wages paid to the beneficiary, or its net income or net current assets.

On appeal, counsel asserts that the director erred in not properly assessing the totality of the circumstances which allegedly demonstrate the petitioner's ability to pay the proffered wage. Counsel further asserts that the petitioner's shareholder owns other business entities and assets sufficient to pay the proffered wage.

Contrary to counsel's assertion, USCIS has long held that it may not "pierce the corporate veil" and look to the assets of the corporation's owner to satisfy the corporation's ability to pay the proffered wage. It is an elementary rule that a corporation is a separate and distinct legal entity from its owners and shareholders. *See Matter of M*, 8 I&N Dec. 24 (BIA 1958), *Matter of Aphrodite Investments, Ltd.*, 17 I&N Dec. 530 (Comm. 1980), and *Matter of Tessel*, 17 I&N Dec. 631 (Act. Assoc. Comm. 1980). Consequently, assets of its shareholders, officers, or of other enterprises or corporations cannot be considered in determining the petitioning corporation's ability to pay the proffered wage.

Counsel further asserts that when taken into consideration, other sources of income such as added back depreciation and interest income demonstrates the petitioner's ability to pay the proffered wage. With respect to counsel's argument that USCIS should add back depreciation to the

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

petitioner's net income, this argument is rejected. As noted above, USCIS and the federal courts have already determined that depreciation expenses will not be added back into net income for purposes of analyzing the petitioner's ability to pay wages.

The petitioner submitted its financial statements for 2004, 2005, and 2008. The regulation at 8 C.F.R. § 204.5(g)(2) makes clear that where a petitioner relies on financial statements to demonstrate its ability to pay the proffered wage, those financial statements must be audited. An audit is conducted in accordance with generally accepted auditing standards to obtain a reasonable assurance that the financial statements of the business are free of material misstatements. The unaudited financial statements that the petitioner submitted are not persuasive evidence. The accountant's report that accompanied those financial statements makes clear that they were produced pursuant to a compilation rather than an audit. As the accountant's report also makes clear, financial statements produced pursuant to a compilation are the representations of management compiled into standard form. The unsupported representations of management are not reliable evidence and are insufficient to demonstrate the ability to pay the proffered wage. The petitioner has not explained why the AAO should not rely on its tax returns, but instead should rely on unaudited, incomplete cash flow statements, in evaluating its ability to pay the proffered wage.

The sole shareholder of a corporation has the authority to allocate expenses of the corporation for various legitimate business purposes, including for the purpose of reducing the corporation's taxable income. Compensation of officers is an expense category explicitly stated on the Form 1120S, U.S. Corporation Income Tax Return. For this reason, the petitioner's figures for compensation of officers may be considered as additional financial resources of the petitioner, in addition to its figures for ordinary income.

The documentation presented here indicates that [REDACTED] hold 100 percent of the company's stock. The record also shows that according to the petitioner's 2008 IRS Form 1120S, first page at line 7 (Compensation of Officers), the petitioner elected to pay \$12,000.00 in officer compensation. The record also shows that in 2004, the petitioner paid the officers \$40,000.00 in interest income. The petitioner claims \$9,000.00 in interest income was also paid in 2005 and, in 2004 and 2005, officers were paid \$12,000.00 in wages in each of those years, even though these wages were purportedly reported on line 8 of the Forms 1040, and not on line 7.

Counsel infers that the shareholders would have been willing to reduce their wages or interest payments to assure that the prevailing wage is paid. USCIS rejects the idea that the shareholder's assets, including its officer compensation, should have been considered in the determination of the ability to pay the proffered wage. Given that the beneficiary's salary in 2008, a difference of \$5,188.20, would reduce the officers' compensation by one half, it is not credible that the officer would have taken this action. Furthermore, since the petitioner had negative net income and net current assets in 2008, it is not likely that any salary sacrificed by the officer could have been shunted to the beneficiary and not to a more pressing obligation. Similarly, in 2005, the \$12,000.00 in officer compensation, assuming it was sacrificed in its entirety, would have been insufficient to

make up the difference between the proffered wage and the wage paid to the beneficiary in that year. In 2004, as the beneficiary was not paid any wages, the claimed officer's compensation would have also been insufficient. As for the petitioner's claim that the "interest" payments claimed in 2004 and 2005 could have been redirected to pay the beneficiary's salary, this argument is not persuasive. It has not been established that these payments were truly discretionary or could have been delayed or forgiven by the officers. Presumably, interest payments would be related to a debt or other obligation of the petitioner. The record is devoid of evidence explaining the terms of this obligation, whether the officers were truly able to adjust these terms, and, if so, the effect this would have had on other pressing financial demands of the business.

Counsel's assertions on appeal cannot be concluded to outweigh the evidence presented in the tax return as submitted by the petitioner that demonstrates that the petitioner could not pay the proffered wage from the day the Form ETA 750 was accepted for processing by the DOL.

Counsel also relies on a decision by the seventh circuit court of appeals in *Construction and Design Co. v. USCIS*, 563 F.3d 593 (7th Cir. 2009). In that case, the seventh circuit addressed the method used by USCIS in determining a petitioner's ability to pay the proffered wage.

The court in *Construction and Design Co.* concurred with existing USCIS procedure in determining an employer's ability to pay the proffered wage. This method involves (1) a determination of whether a petitioner establishes by documentary evidence that it employed the beneficiary at a salary equal to or greater than the proffered wage; (2) where the petitioner does not establish that it employed and paid the beneficiary an amount at least equal to the proffered wage during the relevant period, an examination of the net income figure and net current assets reflected on the petitioner's federal income tax returns; and (3) an examination of the totality of the circumstances affecting the petitioning business pursuant to *Matter of Sonogawa*, 12 I&N Dec. 612.

Further, the court in *Construction and Design Co.* noted that the "proffered wage" could understate the cost to the employer in hiring an employee, as opposed to an independent contractor, as the employer must pay the salary "plus employment taxes (plus employee benefits, if any)." *See id.* at 596. The court stated that if an employer has enough cash flow, either existing or anticipated, to be able to pay the salary of a new employee along with its other expenses, it can "afford" that salary unless there is some reason, which might or might not be revealed by its balance sheet or other accounting records, why it would be an improvident expenditure. *Id.* at 595.

In this matter, the AAO's evaluation of the petitioner's ability to pay the proffered wage considers the totality of the circumstances (see *infra*), and thus fully complies with the decision in *Construction and Design Co.*, even if it were a precedent decision in this matter, which it is not. The AAO is bound by the Act, agency regulations, precedent decisions of the agency, and published decisions from the circuit court of appeals within the circuit where the action arose. *See N.L.R.B. v. Askkenazy Property Management Corp.* 817 F. 2d 74, 75 (9th Cir. 1987)

(administrative agencies are not free to refuse to follow precedent in cases originating within the circuit). The present matter did not arise within the seventh circuit.

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

In this matter, the totality of the circumstances does not establish that the petitioner had the ability to pay the proffered wage. There are no facts paralleling those in *Sonegawa* that are present in the instant matter to a degree sufficient to establish that the petitioner had the ability to pay the proffered wage. The petitioner has not submitted evidence establishing its business reputation or the occurrence of any uncharacteristic business expenditures or losses in 2004, 2005 or 2008. Accordingly, the evidence submitted does not establish that the petitioner had the continuing ability to pay the proffered wage beginning on the priority date.

Beyond the decision of the director, the petitioner has failed to establish that the beneficiary meets the qualifications set forth on the Form ETA 750. The AAO will also deny the petition on this basis and invalidate the labor certification application based on willful misrepresentation. The petitioner was sent a Notice of Derogatory Information (NODI) on April 27, 2011 which informed the petitioner that during the adjudication of the instant appeal, information has come to light that raises questions as to the credibility of its claim with respect to the beneficiary's qualifications to perform the job offered.

The record of proceeding contained inconsistent information with regards to the beneficiary's qualifications as set forth on the Form ETA 750. As noted in the NODI, according to the Form

ETA 750, the position requires the beneficiary to have three years of experience as a manager of a self-service gas station prior to the priority date of February 9, 2004. On the Form ETA 750B, that the beneficiary signed under penalty of perjury, he was asked to list his work experience. The beneficiary indicated that he was employed as the manager of a self-service gas station, [REDACTED] located in Uganda, working 40 hours per week, from August 1998 through July 2002. The petitioner submitted a letter from the managing director of [REDACTED] in Uganda who stated that the beneficiary was employed as store manager at the gas station from August 21, 1998 through July 28, 2002. The managing director also stated that the beneficiary would open the business every morning and close the business every evening.

In contrast, the record of proceeding contains a letter dated April 4, 2002 from [REDACTED] located in Uganda, who stated that the beneficiary was an "Indian Expatriate" working in Uganda and that he had a valid entry/work permit up to December 18, 2002. He also stated that the beneficiary was employed by the company and that his "annual privilege leave" had been sanctioned by the company. The representative stated that the beneficiary's travel expense would be borne by the company. The declarant stated that since the beneficiary had "a good, confirmed job in our company" that he was expected to return to his job after his two to three weeks of vacation in Great Britain and the United States. It appears that this letter was submitted in conjunction with the beneficiary's application for a nonimmigrant visa in 2002 in Kampala, Uganda. The beneficiary signed under penalty of perjury Forms DS-156, Nonimmigrant Visa Application, dated April 4, 2002 and May 16, 2002, copies of which are also in the record, in which he stated at Part 15-16 that he had been employed as a chief accountant for [REDACTED] located in Uganda, since October 2000. He also indicated at Part 12 of the application, where he was asked to list his last two employers, not including his current employer, that he was employed as a chief accountant at [REDACTED] from 1998 to 2000. He also listed an employment experience in India from 1993 to 1997. The petitioner provided a copy of the beneficiary's passport, which was stamped by Republic of Uganda Senior Immigration Officers in 1998 and 1999 at pages 6 & 7, which indicated that the beneficiary was authorized to work for [REDACTED] during that period; and in 2000 and 2001 at pages 10 and 11 respectively, the Republic of Uganda Senior Immigration Officers indicated that the beneficiary entered into Uganda to be employed by [REDACTED] during that period. The beneficiary made no mention whatsoever of his now claimed employment from 1998 to 2002 by [REDACTED]

The AAO requested in the NODI that the petitioner, in order to resolve the discrepancies with independent objective evidence and to establish that the beneficiary had the requisite work experience prior to the filing date of the labor certification application, February 9, 2004, submit all evidence, including but not limited to, copies of pay stubs, payroll records, cancelled checks, corporate tax records of former employers, audited financial statements, employee wage and tax forms and/or other documentation pursuant to 8 C.F.R. §103.2(b)(8)(iv). The petitioner was also given an opportunity to submit additional evidence that it deemed appropriate.

In response to the NODI, counsel admits to the inconsistencies in the record and indicates that the misrepresentations were not material. Counsel further asserts that the noted inconsistencies are

based upon the beneficiary having a "multiple jobholders" form of employment. Contrary to counsel's claim, the evidence in the record shows that the beneficiary had a valid entry/work permit as an "Indian Expartriate" to work for [REDACTED] not multiple employers as noted below.

The petitioner submitted an affidavit from [REDACTED] who states that from June 1998 to April 2001 the author was the manager of stores for [REDACTED] in Kampala, Uganda and that he knows the beneficiary was employed by [REDACTED] in the Kampala area during that period of time. He further states that he knew that the beneficiary worked at different jobs during that time. The petitioner resubmits the letter from [REDACTED] the managing director of [REDACTED] who stated that the company employed the beneficiary from August 1998 through July 2002 as a store manager. He does not indicate any awareness of the beneficiary working multiple jobs during the time period in question. The petitioner also submitted copies of the beneficiary's bank statements dated January 2001 and February 2002. Although counsel indicates that the bank statements reflect deposits made by the beneficiary of payroll received from [REDACTED] there has been no evidence submitted to substantiate this claim. There is no indication from the bank statements that the deposits included pay checks received from any particular payor. Although specifically requested by the AAO, the petitioner has failed to provide copies of pay stubs, payroll records, cancelled checks, and corporate tax records from his former employers to address the many inconsistencies found in the record of proceeding. It is further noted that the beneficiary lists on the Form ETA 750 his full-time employment (40 hours per week) with [REDACTED] but fails to indicate that he was ever employed by [REDACTED]

Without documentary evidence to support the claim, the assertions of counsel will not satisfy the petitioner's burden of proof. The assertions of counsel do not constitute evidence. *Matter of Obaigbena*, 19 I&N Dec. 533, 534 (BIA 1988); *Matter Of Laureano*, 19 I&N Dec. 1 (BIA 1983); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980). Going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. *Matter of Soffici*, 22 I&N Dec. 158, 165 (Comm'r 1998) (citing *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg'l Comm'r 1972)). Regardless, even if the AAO were to accept counsel's claim, the record of proceeding does not establish that the petitioner has the ability to pay the proffered wage as of the priority date and continuing until the beneficiary obtains lawful permanent residence.

Furthermore, the AAO finds that petition and labor certification in this matter involve misrepresentation of a material fact. A misrepresentation is an assertion or manifestation that is not in accord with the true facts. The terms "fraud" and "misrepresentation" are not interchangeable. Unlike a finding of fraud, a finding of material misrepresentation does not require an intent to deceive or that the officer believes and acts upon the false representation. *See Matter of Kai Hing Hui*, 15 I&N Dec. 288 (BIA 1975). 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). A misrepresentation of material fact may lead to serious consequences, including but not limited to the denial of the visa petition, a finding of fact that may render an individual alien inadmissible to the United States, and criminal prosecution.

An immigration officer will deny a visa petition if the petitioner submits evidence which contains false information. In general, a few errors or minor discrepancies are not reason to question the credibility of an alien or an employer seeking immigration benefits. *See Spencer Enterprises Inc. v. United States*, 345 F.3d 683, 694 (9th Cir., 2003). If, however, a petition includes serious errors and discrepancies, and the petitioner fails to resolve those errors and discrepancies after an officer provides an opportunity to rebut or explain, then USCIS will conclude that the facts stated in the petition are not true. *See Matter of Ho*, 19 I&N Dec. 582, 591 (BIA 1988).

Although it was indicated on the Form ETA 750 that the beneficiary is qualified for the proffered position by having worked for [REDACTED] from 1998 to 2002, it is clear from the record that this is untrue. As explained above, the beneficiary claimed in his nonimmigrant visa applications submitted in 2002 in Uganda to have been employed by [REDACTED]. Despite numerous opportunities in the nonimmigrant visa applications to explain his current and past employment, the beneficiary never mentioned the now-claimed employment experience with [REDACTED]. It is not credible that this contemporaneous employment would have been omitted while previous employment in Uganda, and even India, would have been described in the nonimmigrant visa application. The supporting letter from [REDACTED] indicates that his position with that company allowed him to travel at the company's expense and that he had earned "annual privilege leave" permitting the supposed vacation abroad. It is not credible that the beneficiary – a chief accountant for a paint company enjoying perks and benefits – would have simultaneously worked full-time as a store and gas station manager, opening and closing the store everyday, and would have failed to mention this fact to the U.S. Embassy in Kampala when applying for his tourist visa, if it were true. To the contrary, it is clear that the purported position with [REDACTED] was fabricated for purposes of qualifying for the proffered position.

A misrepresentation may lead USCIS to enter a finding that an individual alien sought to procure a visa or other documentation by willful misrepresentation of a material fact. This finding of fact may lead USCIS to determine, in a future proceeding, that the alien is inadmissible to the United States based on the past misrepresentation.

Section 212(a)(6)(C) of the Act, 8 U.S.C. § 1182(a)(6)(C), provides:

Misrepresentation. – (i) In general. – 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.

As outlined by the Board of Immigration Appeals, 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. at 289-90. 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 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, the materiality test has three parts. First, if the record shows that the alien is inadmissible on the true facts, then the misrepresentation is material. *Id.* at 448. If the foreign national would not be inadmissible on the true facts, then the second and third questions must be addressed. The second question is whether the misrepresentation shut off a line of inquiry relevant to the alien's admissibility. *Id.* Third, if 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.

In this matter, it is clear that the evidence accompanying the petition and Form ETA 750B contain false information. The beneficiary's claimed work experience with [REDACTED] did not occur. This information is material to the beneficiary's eligibility. To be considered material, a false statement must be shown to have been predictably capable of affecting the decision of the decision-making body. *Kungys v. U.S.*, 485 U.S. 759 (1988). In the context of a visa petition, a misrepresented fact is material if the misrepresentation shuts off a line of inquiry which is relevant to the eligibility criteria and that inquiry might well have resulted in the denial of the visa petition. *See Matter of Ng*, 17 I&N Dec. at 537.

The misrepresentation shut off a potential line of inquiry regarding the beneficiary's qualifications for the job offered and is therefore material to whether the beneficiary is eligible for the benefit sought. *See Matter of S & B-C-*, 9 I&N Dec. at 447. The AAO accordingly enters

a finding that the petitioner and the beneficiary sought to procure a visa or other documentation by willful misrepresentation of a material fact.

The regulation at 20 C.F.R. § 656.30(d) provides in pertinent part that: “After issuance labor certifications are subject to invalidation by the [USCIS] or by a Consul of the Department of State upon a determination, made in accordance with those agencies, procedures or by a Court, of fraud or willful misrepresentation of a material fact involving the labor certification application.”

As discussed above, it was indicated on the Form ETA 750 that the beneficiary had worked for [REDACTED] in Uganda. The record, however, confirms that this employment experience did not occur because the beneficiary’s nonimmigrant visa applications make clear that he worked elsewhere as a chief accountant and in previous jobs, which did not include [REDACTED]. This constitutes a willful misrepresentation of a material fact. Therefore, the Form ETA 750 will be invalidated.

The petition will be denied for the above stated reasons, with each considered as an independent and alternative basis for denial.

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

ORDER: The appeal is dismissed.

FURTHER ORDER: The AAO finds that the petitioner and the beneficiary willfully misled the DOL and USCIS on elements material to its eligibility for a benefit sought under the immigration laws of the United States. The labor certification application (P-05018-31918) is invalidated pursuant to 20 C.F.R. § 656.30(d) based on the petitioner’s and the beneficiary’s willful misrepresentation.