

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

(b)(6)

DATE: **AUG 02 2012**

OFFICE: NEBRASKA SERVICE CENTER

FILE: [REDACTED]

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 AAO inappropriately applied the law in reaching its decision, or you have additional information that you wish to have considered, you may file a motion to reconsider or a motion to reopen in accordance with the instructions on Form I-290B, Notice of Appeal or Motion, with a fee of \$630. The specific requirements for filing such a motion can be found at 8 C.F.R. § 103.5. **Do not file any motion directly with the AAO.** Please be aware that 8 C.F.R. § 103.5(a)(1)(i) requires any motion to be filed within 30 days of the decision that the motion seeks to reconsider or reopen.

Thank you,

Perry Rhew  
Chief, Administrative Appeals Office

(b)(6)

**DISCUSSION:** The preference visa petition was denied by the Director, Nebraska Service Center (the director), and is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner is an auto service and repair business. It seeks to employ the beneficiary permanently in the United States as a mechanic. 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 March 4, 2009 denial, the single issue in this case is whether or not the petitioner has the ability to pay the proffered wage as of the priority date and continuing until the beneficiary obtains lawful permanent residence.

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, Application for Alien Employment Certification, 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, Application for Alien Employment Certification, 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).

Here, the Form ETA 750 was accepted on April 30, 2001. The proffered wage as stated on the Form ETA 750 is \$424.80 per week (\$22,089.60 per year).<sup>1</sup> The Form ETA 750 states that the position requires two years of 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.<sup>2</sup>

On appeal, counsel submits a brief; a receipt from the New York State Department of State for the petitioner's business incorporation; bank statements for lines of credit granted to the petitioning business; credit card statements for Theocharis Semertsides; and copies of the petitioner's U.S. Income Tax Return for an S Corporation (Form 1120S) for 2001, 2002, 2003, 2004, 2005, 2006, 2007 and 2008.

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 in 1988 and currently to employ four 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 April 24, 2001, the beneficiary did not claim to have worked for the petitioner.

On appeal, counsel asserts that the petitioner's former representative erred in neglecting to provide complete copies of the petitioner's federal income tax returns, as requested by the director. Counsel also asserts that United States Citizenship and Immigration Services (USCIS) should consider the totality of the petitioner's financial circumstances in determining its ability to pay because the petitioner's federal tax returns do not accurately reflect its financial condition. Further, counsel asserts that the petitioner's assets are inaccurately reflected on the federal income tax returns because Schedule L identifies "loans from shareholders" as a liability. Counsel asserts that such loans actually constitute an asset. Correspondingly, counsel asserts that lines of credit have been extended both to the petitioning corporation and to the owners of the petitioning corporation, personally, and that these funds are available to the petitioner for purposes of paying the beneficiary.

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

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<sup>1</sup> The director erroneously identified the proffered wage as \$400.80 per week / \$28,841.60 per year. Form ETA 750 bears a correction to the proffered wage which was certified on June 13, 2007. The proffered wage was changed from \$400 per week to \$424.80 per week which equates to \$22,089.60 per year.

<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 by the regulation at 8 C.F.R. § 103.2(a)(1). The record in the instant case provides no reason to preclude consideration of any of the documents newly submitted on appeal. See *Matter of Soriano*, 19 I&N Dec. 764 (BIA 1988).

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'l Comm'r 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'l Comm'r 1967).

In determining the petitioner's ability to pay the proffered wage during a given period, USCIS will first examine whether the petitioner employed and paid the beneficiary during that period. If the petitioner establishes by documentary evidence that it employed the beneficiary at a salary equal to or greater than the proffered wage, the evidence will be considered *prima facie* proof of the petitioner's ability to pay the proffered wage. In the instant case, the beneficiary does not claim to have worked for the petitioner. Additionally, the petitioner has neither claimed to have employed nor provided evidence of any wages paid to the beneficiary. Therefore, the petitioner has not established that it employed and paid the beneficiary the full proffered wage during any relevant timeframe including the period from the priority date in 2001 or subsequently.

If the petitioner does not establish that it employed and paid the beneficiary an amount at least equal to the proffered wage during that period, USCIS will next examine the net income figure reflected on the petitioner's federal income tax return, without consideration of depreciation or other expenses. *River Street Donuts, LLC v. Napolitano*, 558 F.3d 111 (1<sup>st</sup> Cir. 2009); *Taco Especial v. Napolitano*, 696 F. Supp. 2d 873 (E.D. Mich. 2010), *aff'd*, No. 10-1517 (6th Cir. filed Nov. 10, 2011). 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, showing that the petitioner paid wages in excess of the proffered wage is insufficient.

In *K.C.P. Food Co., Inc. v. Sava*, 623 F. Supp. at 1084, the court held that the Immigration and Naturalization Service, now USCIS, had properly relied on the petitioner's net income figure, as stated on the petitioner's corporate income tax returns, rather than the petitioner's gross income. The court specifically rejected the argument that 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 January 27, 2009 with the receipt by the director of the petitioner’s submissions in response to the director’s request for evidence. As of that date, the petitioner’s 2008 federal income tax return was not yet due. Therefore, the petitioner’s income tax return for 2007 was the most recent return available at that time. However, on appeal, counsel has provided the petitioner’s federal income tax return for 2008.

It must also be noted that with the petitioner’s initial petition submission, as evidence of the ability to pay the petitioner provided only the first page of its U.S. Income Tax Return for an S Corporation (Form 1120S) for each year from 2001 through 2006. On January 14, 2009, the director issued a request for evidence (RFE), asking the petitioner to provide complete federal income tax returns for each year from 2001 through 2007. The petitioner responded on January 27, 2009 by providing the complete federal income tax return for 2007. However, for 2001 through 2006, the petitioner again only provided the first page of the federal income tax return. On appeal, for the first time, counsel provides the complete federal income tax returns for 2001 through 2006, in addition to the complete returns for 2007 and 2008. In his brief, counsel apologized for the petitioner’s previous representative’s failure to provide the requested returns but offered no explanation for the failure.<sup>3</sup>

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<sup>3</sup> Although the petitioner claims that its prior representative was incompetent, in this matter, the petitioner did not properly articulate a claim for ineffective assistance of counsel under *Matter of Lozada*, 19 I&N Dec. 637 (BIA 1988), *affd.*, 857 F.2d 10 (1<sup>st</sup> Cir. 1988). A claim based upon ineffective assistance of counsel requires the affected party to, *inter alia*, file a complaint with the appropriate disciplinary authorities or, if no complaint has been filed, to explain why not. The instant appeal does not address these requirements. The petitioner does not explain the facts surrounding the preparation of the petition or the engagement of the representative. Accordingly, the

Neither did the petitioner offer an explanation for the failure to provide the requested documents when the response to the directors RFE was submitted.

The purpose of the request for evidence is to elicit further information that clarifies whether eligibility for the benefit sought has been established, as of the time the petition is filed. *See* 8 C.F.R. §§ 103.2(b)(8) and (12). The failure to submit requested evidence that precludes a material line of inquiry shall be grounds for denying the petition. 8 C.F.R. § 103.2(b)(14). As in the present matter, where a petitioner has been put on notice of a deficiency in the evidence and has been given an opportunity to respond to that deficiency, the AAO will not accept evidence offered for the first time on appeal. *See Matter of Soriano*, 19 I&N Dec. 764 (BIA 1988); *Matter of Obaigbena*, 19 I&N Dec. 533 (BIA 1988). If the petitioner had wanted the submitted evidence to be considered, it should have submitted the documents in response to the director's request for evidence. *Id.* Under the circumstances, the AAO need not, and does not, consider the sufficiency of the evidence submitted on appeal.

The petitioner's tax returns demonstrate its net income for 2001, 2002, 2003, 2004, 2005, 2006, 2007 and 2008, as shown in the table below.

- In 2001, the Form 1120S stated net income<sup>4</sup> of \$4,829.00.
- In 2002, the Form 1120S stated net income of \$811.00.
- In 2003, the Form 1120S stated net income of \$643.00.
- In 2004, the Form 1120S stated a net loss of \$3,859.00.
- In 2005, the Form 1120S stated a net loss of \$1,265.00.
- In 2006, the Form 1120S stated net income of \$695.00.
- In 2007, the Form 1120S stated net income of \$16,445.00.
- In 2008, the Form 1120S stated net income of \$5,788.00.

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petitioner did not articulate a proper claim based upon ineffective assistance of counsel.

<sup>4</sup> 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 23 (1997-2003), line 17e (2004-2005) and line 18 (2006-2011) of Schedule K. *See* Instructions for Form 1120S, at <http://www.irs.gov/pub/irs-pdf/i1120s.pdf> (accessed June 12, 2012) (indicating that Schedule K is a summary schedule of all shareholders' shares of the corporation's income, deductions, credits, etc.). Because the petitioner had no additional income, credits, deductions or other adjustments shown on its Schedule K for 2007 or 2008, the petitioner's net income is found on line 21 of the first page of IRS Form 1120S. For 2001, 2002, 2003, 2004, 2005 and 2006, the petitioner failed to supply properly copies of its complete tax return, including Schedule K. Therefore, its net income will likewise be derived from line 21 of the first page of IRS Form 1120S for those years.

Therefore, for the years 2001, 2002, 2003, 2004, 2005, 2006, 2007 and 2008, the petitioner did not have sufficient net income to pay the proffered wage.

As an alternate means of determining the petitioner's ability to pay the proffered wage, USCIS may review the petitioner's net current assets. Net current assets are the difference between the petitioner's current assets and current liabilities.<sup>5</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. As explained above, the petitioner only properly submitted its Schedule L for 2007 and 2008. Therefore, the petitioner's tax returns demonstrate its end-of-year net current assets for 2007 and 2008, as shown in the table below.

- In 2001, the petitioner provided no properly submitted regulatory prescribed evidence of its current assets.
- In 2002, the petitioner provided no properly submitted regulatory prescribed evidence of its current assets.
- In 2003, the petitioner provided no properly submitted regulatory prescribed evidence of its current assets.
- In 2004, the petitioner provided no properly submitted regulatory prescribed evidence of its current assets.
- In 2005, the petitioner provided no properly submitted regulatory prescribed evidence of its current assets.
- In 2006, the petitioner provided no properly submitted regulatory prescribed evidence of its current assets.
- In 2007, the Form 1120S, Schedule L stated net current assets of \$13,428.00
- In 2008, the Form 1120S, Schedule L stated net current assets of \$20,095.00.

Therefore, for the years 2001 through 2006, the petitioner did not demonstrate sufficient net current assets to pay the proffered wage because it failed to submit properly the requested regulatory-prescribed forms of evidence which would demonstrate such assets. For 2007 and 2008, the petitioner did not demonstrate sufficient net current assets to pay the full proffered wage.

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.

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<sup>5</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.

On appeal, counsel asserts that the petitioner's former representative erred in neglecting to provide complete copies of the petitioner's federal income tax returns, as requested by the director. Counsel asserts that now that he has provided such documents, they will demonstrate that the petitioner had the ability to pay the proffered wage because they demonstrate "an ongoing business."

As explained above, where a petitioner has been put on notice of a deficiency in the evidence and has been given an opportunity to respond to that deficiency, the AAO will not accept evidence offered for the first time on appeal. *See Matter of Soriano*, 19 I&N Dec. 764 (BIA 1988); *Matter of Obaigbena*, 19 I&N Dec. 533 (BIA 1988). If the petitioner had wanted the submitted evidence to be considered, it should have submitted the documents in response to the director's request for evidence. *Id.* Under the circumstances, the AAO need not, and does not, consider the sufficiency of the evidence submitted on appeal.

Thus, USCIS will only consider those documents which were properly submitted, to wit the first page of the petitioner's federal income tax returns for each year from 2001 through 2006 and the complete federal income tax returns for 2007 and 2008. As discussed above, these have been analyzed and the findings set forth above.

Counsel also asserts that USCIS should consider the totality of the petitioner's financial circumstances in determining its ability to pay because the petitioner's federal tax returns do not accurately reflect its financial condition. For example, counsel asserts that the petitioner's assets are inaccurately reflected on the federal income tax returns because though Schedule L identifies "loans from shareholders" as a liability, counsel asserts that such loans actually constitute an asset. Counsel asserts that lines of credit have been extended both to the petitioning corporation and to the owners of the petitioning corporation, personally. Counsel asserts that these funds are available to the petitioner for purposes of paying the beneficiary.

In calculating the ability to pay the proffered salary, USCIS will not augment the petitioner's net income or net current assets by adding in the petitioner's credit limits, bank lines, or lines of credit. A "bank line" or "line of credit" is a bank's unenforceable commitment to make loans to a particular borrower up to a specified maximum during a specified time period. A line of credit is not a contractual or legal obligation on the part of the bank. *See John Downes and Jordan Elliot Goodman, Barron's Dictionary of Finance and Investment Terms* 45 (5<sup>th</sup> ed. 1998).

Since the line of credit is a "commitment to loan" and not an existent loan, the petitioner has not established that the unused funds from the line of credit are available at the time of filing the petition. As noted above, a petitioner must establish eligibility at the time of filing; a petition cannot be approved at a future date after the petitioner becomes eligible under a new set of facts. *See Matter of Katigbak*, 14 I&N Dec. 45, 49 (Comm'r 1971). Moreover, the petitioner's existent loans will be reflected in the balance sheet provided in the tax return or audited financial statement and will be fully considered in the evaluation of the petitioner's net current assets. Comparable to the limit on a credit card, the line of credit cannot be treated as cash or as a cash asset. However, if the petitioner wishes to rely on a line of credit as evidence of ability to pay, the petitioner must submit documentary evidence, such as a detailed business plan and audited cash flow statements, to

demonstrate that the line of credit will augment and not weaken its overall financial position. Finally, USCIS will give less weight to loans and debt as a means of paying salary since the debts will increase the petitioner's liabilities and will not improve its overall financial position. Although lines of credit and debt are an integral part of any business operation, USCIS must evaluate the overall financial position of a petitioner to determine whether the employer is making a realistic job offer and has the overall financial ability to satisfy the proffered wage. See *Matter of Great Wall*, 16 I&N Dec. 142 (Acting Reg'l Comm'r 1977).

Further, because a corporation is a separate and distinct legal entity from its owners and shareholders, the assets of its shareholders or of other enterprises or corporations cannot be considered in determining the petitioning corporation's ability to pay the proffered wage. See *Matter of Aphrodite Investments, Ltd.*, 17 I&N Dec. 530 (Comm'r 1980). In a similar case, the court in *Sitar v. Ashcroft*, 2003 WL 22203713 (D.Mass. Sept. 18, 2003) stated, "nothing in the governing regulation, 8 C.F.R. § 204.5, permits [USCIS] to consider the financial resources of individuals or entities who have no legal obligation to pay the wage." For that reason, USCIS could not consider those lines of credit which were extended to the owners of the petitioning entity, in their personal capacity or any other personal assets held by the owners of the petitioning entity. For the same reason, loans made by shareholders are actual liabilities because these entities are separate and distinct from the petitioning organization.

Counsel's assertions on appeal cannot be concluded to outweigh the evidence presented in the tax returns 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.

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

beneficiary is replacing a former employee or an outsourced service, or any other evidence that USCIS deems relevant to the petitioner's ability to pay the proffered wage.

In the instant case, the petitioner has provided financial documentation for eight years of business operations. In that time, the petitioner's gross sales have remained modest and relatively consistent. However, its officer compensation and payroll have been marginal to nonexistent. Further, the petitioner has not demonstrated the historical growth of its business, the overall number of employees, the occurrence of any uncharacteristic business expenditures or losses, the petitioner's reputation within its industry or whether the beneficiary is replacing a former employee or an outsourced service. Thus, assessing the totality of the circumstances in this individual case, it is concluded that the petitioner has not established that it had the continuing ability to pay the proffered wage.

The evidence submitted does not establish that the petitioner had the continuing ability to pay the proffered wage beginning on the priority date.

An application or petition that fails to comply with the technical requirements of the law may be denied by the AAO even if the Service Center does not identify all of the grounds for denial in the initial decision. *See Spencer Enterprises, Inc. v. United States*, 229 F. Supp. 2d 1025, 1043 (E.D. Cal. 2001), *aff'd*, 345 F.3d 683 (9<sup>th</sup> Cir. 2003); *see also Soltane v. DOJ*, 381 F.3d 143, 145 (3d Cir. 2004) (noting that the AAO conducts appellate review on a *de novo* basis).

Beyond the decision of the director, the petitioner has also not established that the beneficiary is qualified for the offered position. The petitioner must establish that the beneficiary possessed all the education, training, and experience specified on the labor certification as of the priority date. 8 C.F.R. § 103.2(b)(1), (12). *See Matter of Wing's Tea House*, 16 I&N Dec. 158, 159 (Acting Reg'l Comm'r 1977); *see also Matter of Katigbak*, 14 I&N Dec. 45, 49 (Reg'l Comm'r 1971). In evaluating the beneficiary's qualifications, USCIS must look to the job offer portion of the labor certification to determine the required qualifications for the position. USCIS may not ignore a term of the labor certification, nor may it impose additional requirements. *See Matter of Silver Dragon Chinese Restaurant*, 19 I&N Dec. 401, 406 (Comm'r 1986). *See also Madany v. Smith*, 696 F.2d 1008 (D.C. Cir. 1983); *K.R.K. Irvine, Inc. v. Landon*, 699 F.2d 1006 (9<sup>th</sup> Cir. 1983); *Stewart Infra-Red Commissary of Massachusetts, Inc. v. Coomey*, 661 F.2d 1 (1<sup>st</sup> Cir. 1981).

In the instant case, the labor certification states that the offered position requires two years of experience in the job offered: mechanic. On the labor certification, the beneficiary claims to qualify for the offered position based on experience as a mechanic at [REDACTED] Greece from March 1997 until March 2000. Form ETA 750B identifies no other qualifying experience.

The beneficiary's claimed qualifying experience must be supported by letters from employers giving the name, address, and title of the employer, and a description of the beneficiary's experience. *See* 8 C.F.R. § 204.5(l)(3)(ii)(A). The record contains one letter dated April 18, 2001 from [REDACTED]. The single letter was written by an individual who does not identify his title or position

with the employing company. Further, in the translation of the Greek document, the translator does not include the author's name. The individual states, "I certify that Mr. [REDACTED] of [REDACTED] working in our workshop as a car mechanic during the time frame of May 3, 1995 until February 2, 1999."

In failing to identify his position with [REDACTED] the letter fails to conform to the regulatory requirements as USCIS cannot ascertain if the author was in a position to know about the beneficiary's employment experience. Further, the individual does not identify the duties which the beneficiary was supposed to have performed and does not indicate whether the beneficiary worked on a full-time or part-time basis. Additionally, the author states that the beneficiary worked from May 3, 1995 until February 2, 1999. However, on Form ETA 750B, signed by the beneficiary on April 24, 2001, under penalty of perjury, the beneficiary states that he worked for [REDACTED] from March 1997 until March 2000. The petitioner nowhere addresses this discrepancy.

It is incumbent on the petitioner to resolve any inconsistencies in the record by independent objective evidence, and attempts to explain or reconcile such inconsistencies, absent competent objective evidence pointing to where the truth, in fact, lies, will not suffice. *Matter of Ho*, 19 I&N Dec. 582, 591-592 (BIA 1988)

The beneficiary neither claims to have nor substantiates any additional experience. As explained above, the unexplained inconsistencies between the experience claimed on Form ETA 750B and the employment letter results in a failure to substantiate the beneficiary's claimed experience which would qualify him for the proffered position. Therefore, the evidence in the record does not establish that the beneficiary possessed the required experience set forth on the labor certification by the priority date. Therefore, the petitioner has also failed to establish that the beneficiary is qualified for the offered position.

Beyond the decision of the director, it is also concluded that the petition is not supported by a *bona fide* job offer. *Matter of Silver Dragon Chinese Restaurant*, 19 I&N Dec. 401 (Comm'r 1986), discussed a beneficiary's 50% ownership of the petitioning entity. The decision quoted an advisory opinion from the Chief of 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 regulations 656.20.

*Id.* at 405. Accordingly, where the beneficiary named in an alien labor certification application has an ownership interest in the petitioning entity, the petitioner must establish that the job is *bona fide*, or clearly open to U.S. workers. *See Keyjoy Trading Co.*, 1987-INA-592 (BALCA Dec. 15, 1987) (*en*

*banc*). A relationship invalidating a *bona fide* job offer may also 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*, 2000-INA-93 (BALCA May 15, 2000).

The petitioner has the burden of establishing that a *bona fide* job opportunity exists when asked to show that the job opportunity is clearly open to U.S. workers. See *Matter of Amger Corp.*, 87-INA-545 (BALCA 1987); see also 8 U.S.C. § 1361.

In the instant circumstance, the evidence in the record, as well as evidence obtained from USCIS electronic records and public records, indicate that the beneficiary is the brother of [REDACTED] the owner of the petitioning entity. Failure to disclose such a familial relationship to the DOL when making application for alien labor certification would prevent DOL the opportunity to audit and assess the nature of the familial relationship and the extent of the alien’s influence and control over the job opportunity. Therefore, a material issue in the case is whether the petitioner failed to disclose a close familial relationship between the petitioner’s owner and the beneficiary.

The evidence would further suggest that the petitioner willfully concealed this information from the DOL and attempted to conceal it from USCIS. For example, when making application for alien labor certification on Form ETA 750, the individual who filed and signed Form ETA 750 was [REDACTED] who is identified in Section 23 of Part A as the owner of the petitioning entity. Further, Mr. [REDACTED] name is the only name, associated with the petitioning entity, which is included on Form ETA 750. A search of public records, via WestLaw, reveals no individual by the name of [REDACTED] as having either any ownership interest in the petitioning entity or any executive responsibility with this organization. Thus, the petitioner represented an individual, who is not the owner of the petitioner, as being the owner of the petitioning entity when applying for labor certification with the DOL, thereby preventing the DOL from properly vetting the application for purposes of determining whether, in fact, the job opportunity was truly open to U.S. workers.

When submitting Form I-140 with USCIS, as evidence of its ability to pay, the petitioner provided only the first page of its U.S. Income Tax Return for an S Corporation (Form 1120S) for each of the years from 2001 through 2006. Further, the petitioner provided no other documentary evidence describing the petitioning entity or documenting the ownership of the petitioning entity. On January 14, 2009, the director issued a request for evidence, asking the petitioner to supply complete federal income tax returns for each of the years from 2001 through 2007, documents which would have included Schedule K-1 which would identify the ownership of the petitioning entity. In response, the petitioner provided the complete tax return for 2007 and 2008 only, returns which included Schedule K-1, Shareholder’s Share of Income, Deductions, Credits, etc. On appeal, counsel for the petitioner supplied the complete federal income tax returns, including Schedule K-1, for each year from 2001 through 2008. According to these documents, until 2007, [REDACTED] owned

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<sup>6</sup> This individual’s name appears in several variations on various documents: [REDACTED] in the New York State Department of State, Division of Corporations database and in public records accessed via WestLaw and on the receipt for incorporation which was issued by the New York State Department of State; [REDACTED] on Form G-28 filed with the instant appeal and in

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100 percent of the petitioning corporation. In 2007, ownership changed reducing [REDACTED]' portion to 95 percent and moving 5 percent to [REDACTED]

On appeal, counsel also submitted a receipt which the petitioner received after incorporating in the State of New York. The receipt is dated February 3, 1988 and is issued by the New York State Department of State to [REDACTED]. Therefore, the evidence would seem to indicate that [REDACTED] founded the petitioning entity and was its sole owner until 2007 when he sold 5 percent of the shares to [REDACTED]. Thus, the evidence would further suggest that the petitioner misrepresented the ownership of the petitioning entity when making application for alien labor certification.

The evidence would further suggest that the petitioner concealed this information because [REDACTED] is the brother of the beneficiary.

The two individuals bear the same last name. On Schedule K-1 of Form 1120S, the owner is identified as [REDACTED]. However, on Form G-28 submitted with the instant appeal, the owner of the petitioner signed and printed his name "[REDACTED]." A search of public records, via WestLaw, using the petitioner's social security number revealed that the petitioner also uses the name [REDACTED]. A search of USCIS electronic records reveals one individual with the name [REDACTED]<sup>7</sup> who naturalized on June 14, 2000. This individual has a date of birth of January 2, 1957 and his parents' names are [REDACTED] and [REDACTED]. On Form I-485, Application to Register Permanent Residence or Adjust Status, the beneficiary of the instant petition identified his parents as [REDACTED] and [REDACTED].

The failure to disclose the beneficiary's family relationship to any owner would constitute willful misrepresentation. Willful misrepresentation of a material fact in these proceedings may render the beneficiary inadmissible to the United States. See Section 212(a)(6)(C) of the Act, 8 U.S.C. § 1182(a)(6)(C), regarding misrepresentation, "(i) in general – any alien, who by fraud or willfully misrepresenting a material fact, seeks (or has sought to procure, or who has procured) a visa, other documentation, or admission to the United States or other benefit provided under the Act is inadmissible."

A material issue in this case is whether the petitioning entity disclosed any family relationship or close or financial relationship between the petitioning entity and the beneficiary. Failure to notify DOL amounts to a willful effort to procure a benefit ultimately leading to permanent residence under

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USCIS electronic records; [REDACTED] on Schedule K-1 of the U.S. Income Tax Return for an S Corporation, on the statements for lines of credit granted to the petitioner and in a search of public records using the petitioner's social security number; [REDACTED] via a search of the petitioner's Federal Employer Identification Number; and [REDACTED]

[REDACTED] as aliases identified in public records accessed through WestLaw.

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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.”) Here, the omission of the beneficiary’s status as a relative in a small corporation, if any, would be a willful misrepresentation that adversely impacted DOL’s adjudication of the ETA Form 750.

Furthermore, a finding of misrepresentation may lead to invalidation of the Form ETA 750. *See* 20 C.F.R. § 656.31(d) regarding labor certification applications involving fraud or willful misrepresentation:

Finding of fraud or willful misrepresentation. If as referenced in Sec. 656.30(d), a court, the DHS or the Department of State determines there was fraud or willful misrepresentation involving a labor certification application, the application will be considered to be invalidated, processing is terminated, a notice of the termination and the reason therefore is sent by the Certifying Officer to the employer, attorney/agent as appropriate.

By failing to identify any potential familial relationship, the beneficiary would seek to procure a benefit provided under the Act through fraud and willful misrepresentation of a material fact. Any finding of fraud as a result shall be considered in any future proceeding where admissibility is an issue.

Doubt cast on any aspect of the petitioner’s evidence may lead to a reevaluation of the reliability and sufficiency of the remaining evidence offered in support of the visa petition. It is incumbent upon the petitioner to resolve any inconsistencies in the record by independent objective evidence, and attempts to explain or reconcile such inconsistencies, absent competent objective evidence pointing to where the truth, in fact, lies, will not suffice. *Matter of Ho*, 19 I&N Dec. 582, 591-592 (BIA, 1988).

Based on the relationship described above, and considering the evidence in the record relating to the employer and the job opportunity, the petitioner has failed to establish that the instant petition is based a *bona fide* job opportunity available to U.S. workers. Accordingly, the petition must also be denied for this reason and, should willful misrepresentation be established, the labor certification would be subject to invalidation.

The petition will be denied for the above stated reasons, with each considered as an independent and alternative basis for denial. In visa petition proceedings, the burden of proving eligibility for the benefit sought remains entirely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. Here, that burden has not been met.

**ORDER:** The appeal is dismissed.