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

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U.S. Citizenship and Immigration Services

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[redacted]

Date: APR 0 2 2012 Office: NEBRASKA SERVICE CENTER FILE: [redacted]

IN RE: Petitioner: [redacted]

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:

[redacted]

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,

Elizabeth M'Cormack

Perry Rhew
Chief, Administrative Appeals Office

DISCUSSION: The preference visa petition was denied by the Director, Nebraska Service Center. It then came before the Administrative Appeals Office (AAO) on appeal. On February 26, 2010, this office provided the petitioner with a notice of derogatory information (NDI) in the record and afforded the petitioner an opportunity to provide evidence that might overcome this information. The petitioner responded to the NDI on March 23, 2010. Further, on March 24, 2001, this office provided the petitioner with a second notice of derogatory information (NDI2) in the record and afforded the petitioner an opportunity to provide evidence that might overcome this information. The petitioner responded to the NDI2 on April 22, 2011. The appeal will be dismissed. The AAO will also enter a separate administrative finding of willful material misrepresentation against the petitioner and will invalidate the Form ETA 750, Application for Alien Employment Certification.

The petitioner is a construction company. It seeks to employ the beneficiary permanently in the United States as a cement finisher pursuant to section 203(b)(3) of the Immigration and Nationality Act (the Act), 8 U.S.C. §1153(b)(3). As required by statute, a labor certification approved by the Department of Labor accompanied the petition. 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 also noted that the petitioner has not operated a functional business since the priority date was established on April 30, 2001. Therefore, the director denied the petition.

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 $17.00 per hour ($35,360.00 per year).[1]

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.[2]

The evidence in the record of proceeding shows that the petitioner is structured as a C corporation. On the petition, the petitioner claimed to have been established in September 1997, to have a gross annual income of $0, to have a net annual income of $0 and to currently employ one worker. 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 January 27, 2001, the beneficiary claimed to have worked for the petitioner as a cement finisher's helper from March 1997 to the date he signed the Form ETA 750B.

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 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, 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'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 petitioner has not established that it employed and paid the beneficiary the full proffered wage from the priority date, but it has presented evidence that it paid the beneficiary $17,709.00 in 2002. Therefore, the petitioner must establish that it can pay the full proffered wage in each relevant year except 2002. In 2002, the

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[1] The proffered wage was originally listed by the petitioner on the Form ETA 750 as $15.00 per hour but appears to have been corrected by the petitioner to $17.00 per hour on June 29, 2006 and approved by the DOL on July 28, 2006.

[2] 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).

petitioner must establish that it can pay the difference between the wages paid and the proffered wage, which is $17,651.00.

If the petitioner does not establish that it employed and paid the beneficiary an amount at least equal to the proffered wage during that period, USCIS will next examine the net income figure reflected on the petitioner's federal income tax return, without consideration of depreciation or other expenses. *River Street Donuts, LLC v. Napolitano*, 558 F.3d 111 (1st Cir. 2009); *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 sales and profits and wage expense is misplaced. Showing that the petitioner's gross sales and profits exceeded the proffered wage is insufficient. Similarly, showing that the petitioner paid wages in excess of the proffered wage is insufficient.

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

For a C corporation, USCIS considers net income to be the figure shown on Line 28 of the Form 1120, U.S. Corporation Income Tax Return. The petitioner's tax returns demonstrate its net income for 2001, 2002, 2003, 2004, 2005 and 2006, as shown in the table below.

- In 2001, the Form 1120 tax account transcript stated net taxable income of $0.
- In 2002, the Form 1120 stated net income of $0.
- In 2003, the Form 1120 stated net income of $0.
- In 2004, the Form 1120 stated net income of $0.
- In 2005, the Form 1120 stated net income of $0.
- In 2006, the Form 1120 stated net income of $0.

Therefore, for the years 2001 through 2006, the petitioner did not establish that it had sufficient net income to pay the proffered wage or the difference between the wages paid and the proffered wage.

If the net income the petitioner demonstrates it had available during that period, if any, added to the wages paid to the beneficiary during the period, if any, do not equal the amount of the proffered wage or more, USCIS will review the petitioner's net current assets. Net current assets are the difference between the petitioner's current assets and current liabilities.[3] A corporation's year-end current assets are shown on Schedule L, lines 1 through 6 and include cash-on-hand. 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 for, 2002, 2003, 2004, 2005 and 2006, as shown in the table below.[4]

- In 2002, the Form 1120 stated net current assets of $1,431.00.
- In 2003, the Form 1120 stated net current assets of $0.

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

[4] The petitioner did not submit its 2001 federal income tax return, audited financial statement or annual report. Instead, it submitted a tax account transcript that does not list the petitioner's net current assets for 2001. Therefore, the petitioner has not established its ability to pay the proffered wage for 2001 using its net current assets.

- In 2004, the Form 1120 stated net current assets of $0.
- In 2005, the Form 1120 stated net current assets of $0.
- In 2006, the Form 1120 stated net current assets of $0.

Therefore, for the years 2001 through 2006, the petitioner did establish that it had sufficient net current assets to pay the proffered wage or the difference between the wages paid and the 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.

On appeal, counsel asserts that the petitioner does not have its 2001 tax return available "as the filing was from more than five years ago." The non-existence or other unavailability of required evidence creates a presumption of ineligibility. 8 C.F.R. § 103.2(b)(2)(i). Also, on appeal, counsel states that the petitioner's gross sales were $166,373 and its gross profit was $43,323 in 2002. As previously noted, in *K.C.P. Food Co., Inc. v. Sava*, 623 F. Supp. at 1084, the court held that 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.

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 Sonegawa*, 12 I&N Dec. 612 (Reg'l Comm'r 1967). 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 the instant case, the petitioner's gross receipts were $151,934, $166,373, $127,318, $124,229, $0, $0, $0 and $0 in 1999, 2000, 2001, 2002, 2003, 2004, 2005 and 2006, respectively.[5] The petitioner claims to have only one employee and paid no salaries and wages to employees in 1999, 2000, 2002, 2003, 2004, 2005 and 2006.[6] The petitioner was an active corporation for a little more than two years, from August 5, 1997 to October 7, 1999, when its corporate charter was forfeited in the State of Maryland. The petitioner has not established its historical growth, the occurrence of any uncharacteristic business expenditures or losses or its reputation within its industry. 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.

Further, in the AAO's NDI, this office notified the petitioner that according to the records at the Maryland Department of Assessments & Taxation website, the petitioner is currently forfeited. *See* http://sdatcert3.resiusa.org/UCC-Charter/DisplayEntity_b.aspx?EntityID=[redacted]&EntityName=[redacted] ON++++++++++++++++++++++++++++++++++++&TabNum=1 (accessed January 17, 2012). Furthermore, we noted that in a letter dated September 12, 2007 submitted on appeal, the petitioner stated that its business had been "dormant" since 2003.

If the petitioner's charter is currently forfeited, this is material to whether the job offer, as outlined on the immigrant petition filed by this organization, is a *bona fide* job offer. Moreover, any such concealment of the true status of the organization by the petitioner seriously compromises the credibility of the remaining evidence in the record. *See Matter of Ho*, 19 I&N Dec. 582, 586 (BIA 1988)(stating that doubt cast on any aspect of the petitioner's proof 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. *See Id.*

The AAO's NDI requested evidence that the petitioner is currently in active status. In response to the NDI, counsel stated that "at the time of the application, employer file [sic] Federal and State income tax returns and therefore was effectively a functioning corporation." However, the petitioner failed to provide a certificate of good standing or other proof that the petitioner is in active status in

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[5] The petitioner provided an account transcript for 1998 issued by the IRS indicating that the petitioner did not file a federal income tax return that year.

[6] The tax account transcript for 2001 does not indicate whether the petitioner paid any salaries or wages in 2001.

the State of Maryland. The failure to submit requested evidence that precludes a material line of inquiry shall be grounds for denying the petition. *See* 8 C.F.R. § 103.2(b)(14). In addition, the petitioner has had $0 in gross receipts since 2003 and has admittedly been "dormant" since 2003.

In its NDI2, the AAO stated:

> Forfeiture is the process that allows the Maryland State Department of Assessments and Taxation (Department) to remove inactive entities that have not legally terminated their authority to do business or to notify active entities of an existing oversight in meeting legal filing requirements. A Maryland corporation can avoid forfeiture by filing a Form 1 (annual report/personal property return). If the Department declares the corporate charter to be forfeited, as it did in this case, the corporation becomes a non-entity. All powers of the corporation become null and void. Md. Corp. & Assns. Code Ann. §3–503(d). *See, e.g., Dual Inc. v. Lockheed Martin Corp.*, 857 A.2d 1095, 1101 (Md. 2004) ("A corporation, the charter for which is forfeit, is a legal non-entity; all powers granted to Dual, Inc. by law, including the power to sue or be sued, were extinguished generally as of and during the forfeiture period"); *Kroop & Kurland, P.A. v. Lambros*, 703 A.2d 1287 (Md. 1998) ("[w]hen a corporation's charter is forfeited for non-payment of taxes or failure to file an annual report, the corporation is dissolved by operation of law and ceases to exist as a legal entity").
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> The charter of any corporation which is forfeited may be revived by filing articles of revival; filing all annual reports required to be filed by the corporation or which would have been required if the charter had not been forfeited; and paying all unemployment insurance contributions, or reimbursement payments, all State and local taxes, except taxes on real estate, and all interest and penalties due by the corporation or which would have become due if the charter had not been forfeited. The revival of a corporation's charter has the following effects: all contracts or other acts done in the name of the corporation while the charter was void are validated, and the corporation is liable for them; and all the assets and rights of the corporation, except those sold or those of which it was otherwise divested while the charter was void, are restored to the corporation to the same extent that they were held by the corporation before the expiration or forfeiture of the charter. However, corporate action taken during a period when a corporation's charter is forfeited is null and void, and actions taken after its charter has been revived do not relate back to cure the loss of a right divested during the time the charter was forfeited. *Hill Constr. v. Sunrise Beach, LLC*, 952 A.2d 357 (Md. 2008).
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> In this matter, the petitioner's Maryland corporate charter was forfeited at the time the petition was filed on October 13, 2006. Accordingly, the petitioner was a legal non-entity at the time the petition was filed. An entity which is a legal non-entity – an entity which has been dissolved by operation of law – cannot be said to be in business. For this additional reason, even if the appeal could be otherwise sustained,

> the petition's approval would be subject to automatic revocation due to the "termination of the employer's business." 8 C.F.R. § 205.1(a)(3)(iii)(D).

In response to the AAO's NDI2, counsel and the petitioner's owner stated that the petitioner operated under the understanding that it was a viable business and filed tax returns pursuant to that understanding.[7] Counsel and the petitioner's owner asserted that the petitioner did not learn until it received the AAO's NDI that its corporate charter had been forfeited and that it did not knowingly and intentionally misrepresent the validity of the business to USCIS. However, the petitioner has not revived its charter and has failed to provide a certificate of good standing or other proof that the petitioner is in operation as a viable business or was in operation as a viable business from the priority date onwards. The petition will also be denied on this basis.

In addition, the AAO stated in its NDI2:

> Beyond the decision of the director,[8] an issue in this case is whether your organization has demonstrated that the beneficiary is qualified to perform the duties of the proffered position as you have set forth in your Form ETA 750, Application for Alien Employment Certification. To determine whether a beneficiary is eligible for an employment based immigrant visa, USCIS must examine whether the alien's credentials meet the requirements set forth in the labor certification. 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. 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 (9th Cir. 1983); *Stewart Infra-Red Commissary of Massachusetts, Inc. v. Coomey*, 661 F.2d 1 (1st Cir. 1981).
>
> In the instant case, the Application for Alien Employment Certification, Form ETA-750A, items 14 and 15, set forth the minimum education, training, and experience that an applicant must have for the position of cement finisher. In the instant case, the applicant must have two years of experience in the job offered, or two years of experience in the related occupation of cement finisher's helper. Item 15 of Form ETA 750A does not reflect any special requirements.

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[7] The letter dated April 19, 2011 from [redacted] states that the petitioner "was employed by this company in the past." This letter does not establish that the petitioner is currently in operation as a viable business.

[8] 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 (9th 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).

The beneficiary set forth his credentials on Form ETA 750B and signed his name under a declaration that the contents of the form are true and correct under the penalty of perjury. On Part 15, eliciting information of the beneficiary's work experience, he represented that he worked 40 hours per week as a cement finisher's helper for your organization in Silver Spring, Maryland from March 1997 to the date he signed the Form ETA 750B on January 27, 2001.[9] He did not list any other employment on that form. We note that the beneficiary was found inadmissible under section 212(a) of the Act and was ordered removed from the United States on October 1, 1998. He departed the United States on October 2, 1998. We also note that a letter from counsel submitted in connection with the beneficiary's adjustment of status application dated July 2, 2007, indicates that the beneficiary entered the United States "sometime in fall 1999 over the Mexican border without inspection." Therefore, the beneficiary was not present in the United States during a portion of the time when he alleges that he was working for your organization. *Matter of Ho*, 19 I&N Dec. 582, 591-592 (BIA 1988) states:

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.

The record of proceeding also contains a Form G-325, Biographic Information sheet submitted in connection with the beneficiary's application to adjust status to lawful permanent resident status. On that form, under a section eliciting information about the beneficiary's last occupation abroad, he did not list any employment.

The regulation at 8 C.F.R. § 204.5(l)(3) provides:

(ii) *Other documentation*—

(A) *General.* Any requirements of training or experience for skilled workers, professionals, or other workers must be supported by letters from trainers or employers giving the name, address, and title of the trainer or employer, and a description of the training received or the experience of the alien.

With the petition, you failed to submit any evidence of the beneficiary's prior employment. In response to the director's Request for Evidence dated August 17, 2007 (RFE), you submitted a declaration dated August 31, 2007, from [redacted] in Brazil, stating that the beneficiary was employed as a "helper at cement and concrete application" from May 2, 1990 to October 31, 1992. We note that this employment was not listed by the

[9] The Form ETA 750B specifically instructs the beneficiary to "[l]ist all jobs held during the last (3) years. Also, list any other jobs related to the occupation for which the alien is seeking certification as indicated in item 9."

beneficiary on Form G-325 or on Form ETA 750B.[10]

Because the work experience letter provided by your organization is inconsistent with other information in the record, your organization must provide independent, objective evidence of the beneficiary's former employment. *See Matter of Ho*, 19 I&N Dec. 582, 591-592 (BIA 1988). Such evidence may include pay stubs, tax documents, financial statements or other evidence of payments made to the beneficiary by his previous employers during his periods of employment that precede the priority date. We note that evidence that a petitioner creates after USCIS points out the deficiencies and inconsistencies in the petition will not be considered independent and objective evidence. Necessarily, independent and objective evidence would be evidence that is contemporaneous with the event to be proven and existent at the time of the director's decision.

Unless you can resolve the inconsistent information regarding the beneficiary's prior work experience with independent objective evidence, the AAO intends to dismiss the appeal and enter a finding of willful misrepresentation.[11] As noted previously, the AAO may also invalidate the labor certification based on fraud or willful misrepresentation. See 20 C.F.R. § 656.31(d).[12]

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[10] Doubt cast on any aspect of the petitioner's proof may, of course, lead to a reevaluation of the reliability and sufficiency of the remaining evidence offered in support of the visa petition. *Matter of Ho* at 591. *See Matter of Leung*, 16 I&N Dec. 2530 (BIA 1976), where the Board's dicta notes that the beneficiary's experience, without such fact certified by DOL on the beneficiary's Form ETA 750B lessens the credibility of the evidence and facts asserted.

[11] A material issue in this case is whether the beneficiary has the required experience for the position offered, since the substantive law governing the approval of immigrant visa petitions requires an employer and alien beneficiary to demonstrate that the alien meets the minimum qualifications for the job offered. *See* 8 C.F.R. §§ 204.5(g)(1), 204.5(l)(3)(ii)(B)-(C). Moreover, as a necessary precondition for obtaining a labor certification, employers must document that their job requirements are the actual minimum requirements for the position, *see* 20 C.F.R. § 656.21(b)(5) (1998), and that the alien beneficiary meets those actual, minimum requirements at the time of filing the labor certification application, *see Matter of Saritejdiam*, 1989-INA-87 (BALCA Dec. 21, 1989).

[12] On March 28, 2005, pursuant to 20 C.F.R. § 656.17, the Application for Permanent Employment Certification, Form ETA 9089, replaced the Application for Alien Employment Certification, Form ETA 750. The new Form ETA 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. § 656.31(d) is the pre-PERM regulation applicable to the instant case. The regulation stated:

> If a Court, the INS or the Department of State determines that there was fraud or willful misrepresentation involving a labor certification application, the application

In response to the AAO's NDI2, counsel states that there were typographical errors made on the Form ETA 750 and Form G-325 by former counsel and that the errors were not willful misrepresentation by the petitioner or the beneficiary.[13] He asserts that the beneficiary did not speak English at the time he signed the Form ETA 750 and that he relied on his former counsel to review the information for him. He confirms that the beneficiary was not present in the United States until he began working for the petitioner in March 1999. He further states that objective, independent evidence of his employment prior to 1999 is not available. The non-existence or other unavailability of required evidence creates a presumption of ineligibility. 8 C.F.R. § 103.2(b)(2)(i). He provides monthly bank statements for the beneficiary and asserts that the deposits reflected in those accounts represented payments from the petitioner for services rendered. However, the bank statements do not establish that the petitioner paid the beneficiary any amounts for services. The petitioner did not provide corresponding paychecks for any year except 2002 to reflect payments made by the petitioner to the beneficiary, and the petitioner is required to establish that the beneficiary obtained two years of experience in the job offered, or two years of experience in the related occupation of cement finisher's helper, prior to April 30, 2001.[14] 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)).

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 and the petition will be denied for this additional reason.

Further, the AAO stated in its NDI2:

> Further, beyond the decision of the director, the record in this case also lacks conclusive evidence as to whether the petition is based on a bona fide job offer as it

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> shall be deemed invalidated, processing shall be terminated, a notice of the termination and the reason therefor shall be sent by the Certifying Officer to the employer, and a copy of the notification shall be sent by the Certifying Officer to the alien, and to the Department of Labor's Office of Inspector General.

[13] A petitioner may not make material changes to a petition in an effort to make a deficient petition conform to USCIS requirements. *See Matter of Izummi*, 22 I&N Dec. 169, 176 (Assoc. Comm'r 1988).

[14] The earliest bank statement provided by the petitioner was July 12, 1999 and, therefore, even if we accepted the beneficiary's bank statements as evidence of payments made to the beneficiary by the petitioner, the statements would not establish the beneficiary's two years of prior work experience in the job offered, or two years of experience in the related occupation of cement finisher's helper, prior to the priority date as required by the Form ETA 750.

appears that the petitioner's owner, and the beneficiary may be related.

Under 20 C.F.R. §§ 626.20(c)(8) and 656.3, the petitioner has the burden when asked to show that a valid employment relationship exists, that a *bona fide* job opportunity is available to U.S. workers. *See Matter of Amger Corp.*, 87-INA-545 (BALCA 1987). A relationship invalidating a *bona fide* job offer may arise where the beneficiary is related to the petitioner by "blood" or it may "be financial, by marriage, or through friendship." *See Matter of Summart 374*, 00-INA-93 (BALCA May 15, 2000). Where the person applying for a position owns the petitioner, it is not a *bona fide* offer. *See Bulk Farms, Inc. v. Martin*, 963 F.2d 1286 (9th Cir. 1992) (denied labor certification application for president, sole shareholder and chief cheese maker even where no person qualified for position applied). In *Matter of Silver Dragon Chinese Restaurant*, 19 I&N Dec. 401 (Comm. 1986), the commissioner noted that while it is not an automatic disqualification for an alien beneficiary to have an interest in a petitioning business, if the alien beneficiary's true relationship to the petitioning business is not apparent in the labor certification proceedings, it causes the certifying officer to fail to examine more carefully whether the position was clearly open to qualified U.S. workers and whether U.S. workers were rejected solely for lawful job-related reasons. That case relied upon a DOL advisory opinion in invalidating the labor certification. As noted previously, the regulation at 20 C.F.R. § 656.30(d) provides that [USCIS], the Department of State or a court may invalidate a labor certification upon a determination of fraud or willful misrepresentation of a material fact involving the application for labor certification.

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

Given that the beneficiary may be related to the owner of the petitioner, the facts of the instant case suggest that this may too be the functional equivalent of self-employment. The observations noted above suggest that further investigation, including consultation with the DOL may be warranted under our consultation authority at 204(b) of the Act, in order to determine whether any family, business, or personal relationship between the petitioner and the beneficiary represents an impediment to the approval of any employment-based visa petition filed by this petitioner on behalf of this beneficiary. A misrepresentation of the beneficiary's relationship to a company's owner during the labor certification process would close off a line of relevant inquiry which would have revealed that the labor certification should actually have been denied.

> Therefore, this office requests independent, objective evidence of any relationship between the beneficiary and the petitioner's owner, and if a relationship exists, independent, objective evidence that DOL was cognizant of that relationship when it certified the instant labor certification for the instant beneficiary. If you do not submit independent, objective evidence of any relationship between the beneficiary and the petitioner's owner, and independent, objective evidence that DOL was cognizant of that relationship when it certified the instant labor certification, the AAO intends to dismiss the appeal and enter a finding of willful misrepresentation. As noted previously, the AAO may also invalidate the labor certification based on fraud or willful misrepresentation. See 20 C.F.R. § 656.31(d).

In response to the AAO's NDI2, counsel stated the beneficiary and the petitioner's owner, are brothers. He asserts that neither man made a knowing or intentional non-disclosure of their relationship to DOL or USCIS. The petitioner's owner states in an affidavit that his former counsel advised that "it did not matter that we were related because it was the company that was hiring [the beneficiary]" and that he did not intentionally act to deceive anyone. However, 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 and has willfully misrepresented material facts to obtain an immigration benefit. Accordingly, the petition must also be denied for this reason, and the labor certification must 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 with a finding of willful misrepresentation of a material fact against the petitioner.

FURTHER ORDER: The AAO finds that the owner of the petitioning business knowingly misrepresented a material fact by not disclosing his familial relationship with the beneficiary in an effort to procure a benefit under the Act and the implementing regulations.

FURTHER ORDER: The alien employment certification, Form ETA 750, ETA case number filed by the petitioner is invalidated.

ORDER: The appeal is dismissed.