



U.S. Citizenship  
and Immigration  
Services

[REDACTED]

B/c

DATE: DEC 05 2012 Office: NEBRASKA SERVICE CENTER FILE: [REDACTED]

IN RE: Petitioner: [REDACTED]  
Beneficiary: [REDACTED]

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 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,

Ron Rosenberg  
Acting Chief, Administrative Appeals Office

**DISCUSSION:** The preference visa petition was denied by the Director, Nebraska Service Center.<sup>1</sup> The petitioner filed a motion to reopen and reconsider, which the director granted and subsequently affirmed the previous decision. The petition<sup>2</sup> is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner is a liquor store. It sought to employ the beneficiary permanently in the United States as a store manager.<sup>3</sup> As required by statute, the petition was accompanied by an individual alien labor certification, Form ETA 750, approved by the Department of Labor.

The record shows that the appeal is properly filed and 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 February 22, 2010 and March 2, 2010 decisions, the issue in this case is whether or not the job offer was *bona fide* due to the beneficiary's ownership of the petitioner from 1994 to 2002.

The record shows that the appeal is properly filed, timely and makes a specific allegation of error in law or fact. The Administrative Appeals Office (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>4</sup>

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.

---

<sup>1</sup> The petitioner previously filed a Form I-140 using the same Form ETA 750 sponsoring the beneficiary. That petition was approved, however, the Department of State terminated the application under its authority pursuant to § 203(g) of the Act. That decision is not on appeal before the AAO.

<sup>2</sup> We note that the Form I-140 petition did not include the name of the petitioning business or organization. We will consider the petitioner to be the entity on the Form ETA 750 with the corresponding Federal Employer Identification Number (FEIN) listed on the Form I-140.

<sup>3</sup> Section 203(b)(3)(A)(ii) of the Act, 8 U.S.C. § 1153(b)(3)(A)(ii), also provides for the granting of preference classification to qualified immigrants who hold baccalaureate degrees and are members of the professions.

<sup>4</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).

Concerning the *bona fide* nature of the job offered, the petitioner's Internal Revenue Service (IRS) Form 1065s, U.S. Partnership Income Tax Returns for 1999, 2000, 2001, and 2002 all list the beneficiary as a 50% partner. In addition, as noted by the director in both decisions, the beneficiary's name appears on the California Department of Alcoholic Beverage Control website as a co-licensees on the petitioner's liquor license from December 29, 1994 to May 29, 2002.

In response to the director's January 10, 2010 Notice of Intent to Deny (NOID), counsel stated that "there is no evidence to suggest that the company was developed for the sole purpose to enable the alien's labor certification. . . . the Beneficiary never had a controlling interest in the company, and it is clear from the years of continuous operation of the Petitioner, that the business was not a sham for the purpose of obtaining a labor certification for the Beneficiary."

It is noted that section 212(a)(5)(A)(i) of the Act and the scope of the regulation at 20 C.F.R. § 656.1(a) describe the role of the DOL in the labor certification process as follows:

In general.-Any alien who seeks to enter the United States for the purpose of performing skilled or unskilled labor is inadmissible, unless the Secretary of Labor has determined and certified to the Secretary of State and the Attorney General that-

- (I) there are not sufficient workers who are able, willing, qualified (or equally qualified in the case of an alien described in clause (ii)) and available at the time of application for a visa and admission to the United States and at the place where the alien is to perform such skilled or unskilled labor, and
- (II) the employment of such alien will not adversely affect the wages and working conditions of workers in the United States similarly employed.

It is left to United States Citizenship and Immigration Services (USCIS) to determine whether the proffered position and alien qualify for a specific immigrant classification or even the job offered. This fact has not gone unnoticed by Federal Circuit Courts:

There is no doubt that the authority to make preference classification decisions rests with INS. The language of section 204 cannot be read otherwise. See *Castaneda-Gonzalez v. INS*, 564 F.2d 417, 429 (D.C. Cir. 1977). In turn, DOL has the authority to make the two determinations listed in section 212(a)(14).<sup>5</sup> *Id.* at 423. The necessary result of these two grants of authority is that section 212(a)(14) determinations are not subject to review by INS absent fraud or willful misrepresentation, but all matters relating to preference classification eligibility not expressly delegated to DOL remain within INS' authority.

\* \* \*

---

<sup>5</sup> Based on revisions to the Act, the current citation is section 212(a)(5)(A) as set forth above.

Given the language of the Act, the totality of the legislative history, and the agencies' own interpretations of their duties under the Act, we must conclude that Congress did not intend DOL to have primary authority to make any determinations other than the two stated in section 212(a)(14). If DOL is to analyze alien qualifications, it is for the purpose of "matching" them with those of corresponding United States workers so that it will then be "in a position to meet the requirement of the law," namely the section 212(a)(14) determinations.

*Madany v. Smith*, 696 F.2d 1008, 1012-1013 (D.C. Cir. 1983).<sup>6</sup> In this case, the petitioner has failed to demonstrate that the certified job opportunity was "clearly open to any qualified U.S. worker" as attested on Item 22-h of Part A of the Form ETA 750 because the beneficiary had an ownership interest in the petitioning business. The job offer was essentially a form of self-employment.

To be eligible for approval, a beneficiary must have all the education, training, and experience specified on the labor certification as of the petition's priority date. See 8 C.F.R. § 103.2(b)(1), (12). See also *Matter of Wing's Tea House*, 16 I&N Dec. 158, 159 (Acting Reg. Comm. 1977); *Matter of Katigbak*, 14 I&N Dec. 45, 49 (Reg. Comm. 1971). Fundamentally, the job offer must be "clearly open to any qualified U.S. worker." It is noted that a relationship invalidating a *bona fide* job offer may arise where the beneficiary is related to the petitioner by "blood" or it may be "financial, by marriage, or through friendship." See *Matter of Sunmart* 374, 00-INA-93 (BALCA May 15, 2000). The regulation at 20 C.F.R. § 656.3 states that employment means: "Permanent full-time work by an employee for an employer other than oneself." Therefore, if the petitioning business is owned by the beneficiary or she has a substantial ownership interest in it, then it is the functional equivalent of self-employment and is not a job offer for someone other than oneself.

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). Where the petitioner is

---

<sup>6</sup> The Ninth Circuit, citing *K.R.K. Irvine, Inc.*, 699 F.2d at 1006, has stated:

The Department of Labor (DOL) must certify that insufficient domestic workers are available to perform the job and that the alien's performance of the job will not adversely affect the wages and working conditions of similarly employed domestic workers. *Id.* § 212(a)(14), 8 U.S.C. § 1182(a)(14). The INS then makes its own determination of the alien's entitlement to sixth preference status. *Id.* § 204(b), 8 U.S.C. § 1154(b). See generally *K.R.K. Irvine, Inc. v. Landon*, 699 F.2d 1006, 1008 9th Cir.1983).

The INS, [now USCIS] therefore, may make a *de novo* determination of whether the alien is in fact qualified to fill the certified job offer.

*Tongatapu Woodcraft Hawaii, Ltd. v. Feldman*, 736 F. 2d 1305, 1309 (9<sup>th</sup> Cir. 1984).

owned by the person applying for position, 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). The court noted:

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

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

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

The regulation at 20 C.F.R. § 656.30 (2001) provided in pertinent part:

(d) After issuance labor certifications are subject to invalidation by the INS or by a *Consul of the Department of State upon a determination, made in accordance with those agencies, procedures or by a Court, of fraud or willful misrepresentation of a material fact involving a labor certification. If evidence of such fraud or willful misrepresentation becomes known to a RA or to the Director, the RA or Director, as appropriate, shall notify in writing the INS or State Department, as appropriate. A copy of the notice shall be sent to the regional or national office, as appropriate, of the Department of Labor’s Office of Inspector General.*<sup>7</sup>

---

<sup>7</sup> The current regulation provides: provides in pertinent part:

(d) *Invalidation of labor certifications.* After issuance, a labor certification may be revoked by ETA using the procedures described § 656.32. Additionally, after issuance, a labor certification is subject to invalidation by the DHS or by a *Consul of the Department of State upon a determination, made in accordance with those agencies’ procedures or by a court, of fraud or willful misrepresentation of a*

As outlined by the Board of Immigration Appeals (BIA), a material misrepresentation requires that the alien willfully make a material misstatement to a government official for the purpose of obtaining an immigration benefit to which one is not entitled. *Matter of Kai Hing Hui*, 15 I&N Dec. 288, 289-90 (BIA 1975). “The intent to deceive is no longer required before the willful misrepresentation charge comes into play.” *Id.* at 290.<sup>8</sup> The term “willfully” means knowingly and intentionally, as distinguished from accidentally, inadvertently, or in an honest belief that the facts are otherwise. See *Matter of Healy and Goodchild*, 17 I&N Dec. 22, 28 (BIA 1979). To be considered material, the misrepresentation must be one which “tends to shut off a line of inquiry which is relevant to the alien’s eligibility, and which might well have resulted in a proper determination that he be excluded.” *Matter of Ng*, 17 I&N Dec. 536, 537 (BIA 1980). Accordingly, for an immigration officer to find a willful and material misrepresentation in visa petition proceedings, he or she must determine: 1) that the petitioner or beneficiary made a false representation to an authorized official of the United States government; 2) that the misrepresentation was willfully made; and 3) that the fact misrepresented was material. See *Matter of M-*, 6 I&N Dec. 149 (BIA 1954); *Matter of L-L-*, 9 I&N Dec. 324 (BIA 1961); *Matter of Kai Hing Hui*, 15 I&N Dec. at 288.

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

In the circumstances set forth in this case, failure to disclose the beneficiary’s relationship to the petitioning company amounts to the willful effort to procure a benefit ultimately leading to permanent residence under the Act. See *Kungys v. U.S.*, 485 U.S. 759 (1988), (materiality is a legal question of whether “misrepresentation or concealment was predictably capable of affecting, i.e., had a natural tendency to affect the official decision.”) In the context of a visa

---

material fact involving the labor certification application. If evidence of such fraud or willful misrepresentation becomes known to the CO or to the Chief, Division of Foreign Labor Certification, the CO, or the Chief of the Division of Foreign Labor Certification, as appropriate shall notify in writing the DHS or Department of State, as appropriate. A copy of the notification must be sent to the regional or national office, as appropriate, of the Department of Labor’s Office of Inspector General. 20 C.F.R. § 656.30 (2010).

<sup>8</sup> In contrast, a finding of fraud requires a determination that the alien made a false representation of fact of a material fact with knowledge of its falsity and with the intent to deceive an immigration officer. Furthermore, the false representation must have been believed an acted upon by the officer. See *Matter of G-G-*, 7 I&N Dec. 161 (BIA 1956).

petition, a misrepresented fact is material if the misrepresentation cuts off a line of inquiry which is relevant to the eligibility criteria and that inquiry might well have resulted in the denial of a visa petition. *See Matter of Ng*, 17 I&N Dec. at 537.

A misrepresentation is an assertion or manifestation that is not in accord with the true facts. A misrepresentation of a material fact may include but not be limited to such consequences as a denial of a visa petition, a decision rendering an alien inadmissible to the United States, and possible criminal prosecution. It is noted that section 212(a)(6)(C) of the Act, 8 U.S.C. § 1182 provides that any "alien who, by fraud or willfully misrepresenting a material fact, seeks to procure (or has sought to procure or has procured) a visa, other documentation, or admission into the United States or other benefit provided under this Act is inadmissible. An alien may be found inadmissible when he or she subsequently applies for admission into the United States or applies for adjustment of status to permanent resident status. *See* sections 212(a) and 245((a) of the Act, 8 U.S.C. §§ 1182(a) and 1255(a). The Attorney General has held that a misrepresentation made in connection with an application for a visa or other document, or with entry into the United States, is material if either: (1) the alien is excludable on the true facts, or (2) the misrepresentation tends to shut off a line of inquiry which is relevant to the alien's eligibility and which might well have resulted in a proper determination that he be excluded. *Matter of S & B-C*, 9 I&N Dec. 436, 447 (A.G. 1961). Accordingly, in determining admissibility, the materiality test has three parts. First, if the record shows the alien is inadmissible on the true facts, then the second and third questions must be addressed. The second question is whether the relevant line of inquiry has been shut off, then it must be determined whether the inquiry might have resulted in a proper determination that the foreign national should have been excluded. *Id.* at 449.

The failure to disclose the fact that the beneficiary had an ownership interest in the petitioning company at the time the labor certification was secured was a material misrepresentation that was willful because the officer, principal and owner of the company was presumed to be aware and informed of the organization and staff of the enterprise. *See Matter of Silver Dragon Chinese Restaurant*, 19 I&N Dec. 401 at 403. The petitioner failed to offer any credible explanation as to how its 50% partner would not have had a controlling interest in the petitioner. According to the IRS, "a partnership is the relationship existing between two or more persons who join to carry on a trade or business. Each person contributes money, property, labor or skill, and expects to share in the profits and losses of the business." The petitioner submitted no evidence to demonstrate that the beneficiary did not have joint decision making authority in business decisions such as the employment of workers.

In response to the director's NOID, counsel cited to *Hall v. McLaughlin*, 864 F.2d 868 (D.C. Cir. 1989), where the court stated that two prongs existed for determining whether a genuine employment relationship existed: whether the business was a sham by which the beneficiary would gain residency or whether "come to rely heavily upon the alien's skills and contacts so that, were it not for the alien, the corporation would probably cease to exist."

After *Hall v. McLaughlin* was decided, the Board of Alien Labor Certification Appeals (BALCA) again considered the question in *Modular Container Systems, Inc.*, 1989-INA-228 (BALCA Jul. 16, 1991) (*en banc*). BALCA enumerated a number of factors for consideration related to closely held corporations, or entities where there is a family relationship:

1. Whether the applicant is in a position of control or influence hiring decisions regarding the job for which the labor certification is sought;
2. Whether the alien is related to corporate directors, officers or employees;
3. Whether the alien was an incorporator or founder of the company;
4. Whether the alien is involved in the management of the company;
5. Whether the alien is one of a small number of employees;
6. Whether the alien has qualifications for the job that are identical to specialized or unusual job duties and requirements stated on the application;
7. Whether the alien is so inseparable from the sponsoring employer because of his or her pervasive presence and personal attributes that the employer would be unlikely to continue operation without the alien; or
8. Whether the business was established for the sole purpose of obtaining labor certification for the alien.

As stated by the director in both decisions, the beneficiary was in a position of control to influence hiring decisions as a 50% owner, he was a founder of the company, and he appears as the designated partner on the petitioner's tax returns, so that he is clearly involved in the management of the company. Further, the petitioner claimed to have only two employees on its Form I-140.

On appeal, counsel stated that not every one of the eight enumerated factors from *Modular Container Systems* applied here, such as whether the beneficiary's qualifications were identical to the job duties of the application. However, BALCA did not hold that every factor enumerated in the list must be met in order to support a finding that the position was not *bona fide*. Counsel also notes that the petitioner has continued operations since 2002 under new ownership separate from the beneficiary. However, the new ownership has no effect on the analysis of the state of affairs of the petitioner at the time it filed the labor certification and/or the bona fides of the job offer.

On appeal, counsel further states that the duties of hiring and firing employees were undertaken by the "managing Partner, who was solely responsible for overseeing the operations and management of the business. The Beneficiary, although a partner, was involved in the day to day business operations of the Petitioner as a Store Manager." The assertions of counsel do not constitute evidence. *Matter of Obaigbena*, 19 I&N Dec. 533, 534 (BIA 1988); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980).<sup>9</sup> The petitioner submitted no evidence to

<sup>9</sup> We also note that the job duties enumerated in the beneficiary's prior experience were very similar to the job duties set forth as required for the position on the Form ETA 750A. Moreover,

demonstrate any delineation of partnership duties to include that all employment decisions were undertaken by the beneficiary's partner or that one partner had the ability to decide whether the other partner would be employed by the business. The AAO agrees with the conclusion of the director that the job offer here was not *bona fide* under a totality of the circumstances analysis

The petitioner's misrepresentation as to the beneficiary's relationship to the company cut off a potential line of inquiry regarding the *bona fide* nature of the offer of employment. This is directly material as to whether the petitioner is an "employer" which "intends to employ" the beneficiary as required by section 204(a)(1)(F) of the Act, and 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 petitioner must establish the elements for the approval of the petition at the time of filing. *Matter of Katigbak*, 14 I&N Dec. 45, 49 (Comm. 1971). Section 205 of the Act, 8 U.S.C. § 1155, provides that "[t]he Attorney General [now Secretary, Department of Homeland Security], may, at any time, for what he deems to be good and sufficient cause, revoke the approval of any petition approved by him under section 204." The realization by the director that the petition was approved in error may be good and sufficient cause for revoking the approval. *Matter of Ho*, 19 I&N Dec. 582, 590 (BIA 1988).

As set forth above, and pursuant to 20 C.F.R. § 656.31(d), the AAO finds that the petitioner failed to demonstrate that a *bona fide* job offer existed based on the undisclosed relationship interest of the beneficiary to the petitioner, which constituted willful misrepresentation of a material fact. The AAO concurs with the director who found the labor certification invalid based on the willful misrepresentation of a material fact and the labor certification remains invalidated based on willful misrepresentation of a material fact.

Beyond the decision of the director, the petitioner has also failed to establish its ability to pay the proffered wage as of the priority date and continuing until the beneficiary obtains lawful permanent residence. See 8 C.F.R. § 204.5(g)(2).

In determining the petitioner's ability to pay the proffered wage, USCIS first examines whether the petitioner has paid the beneficiary the full proffered wage each year from the priority date. If the petitioner has not paid the beneficiary the full proffered wage each year, USCIS will next examine whether the petitioner had sufficient net income or net current assets to pay the difference between the wage paid, if any, and the proffered wage.<sup>10</sup> If the petitioner's net

---

we note that the "managing partner" has a surname identical to that of the beneficiary; a reasonable conclusion would be that the beneficiary was related by blood or marriage to his partner.

<sup>10</sup> See *River Street Donuts, LLC v. Napolitano*, 558 F.3d 111 (1st Cir. 2009); *Elatos Restaurant Corp. v. Sava*, 632 F. Supp. 1049, 1054 (S.D.N.Y. 1986); *Tongatapu Woodcraft Hawaii, Ltd. v. Feldman*, 736 F.2d 1305 (9th Cir. 1984)); *Chi-Feng Chang v. Thornburgh*, 719 F. Supp. 532 (N.D. Texas 1989); *K.C.P. Food Co. 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); and *Taco*

income or net current assets is not sufficient to demonstrate the petitioner's ability to pay the proffered wage, USCIS may also consider the overall magnitude of the petitioner's business activities. See *Matter of Sonogawa*, 12 I&N Dec. 612 (Reg'l Comm'r 1967).

In the instant case, the petitioner did not submit any evidence of its ability to pay for 1996, 1997, 1998, 2003, or 2004.<sup>11</sup> Further, the petitioner failed to establish that factors similar to *Sonogawa* existed in the instant case, which would permit a conclusion that the petitioner had the ability to pay the proffered wage despite its failure to submit financial documents for the five years listed above. Accordingly, after considering the totality of the circumstances, the petitioner has also failed to establish its continuing ability to pay the proffered wage to the beneficiary since the priority date.

Beyond the decision of the director, the petitioner has also failed to establish that it will be the actual employer of the beneficiary. See 8 C.F.R. § 204.5(c); 20 C.F.R. § 656.3.

In determining whether the petitioner will be the beneficiary's actual employer, USCIS will assess the petitioner's control over the beneficiary in the offered position. See *Nationwide Mutual Ins. Co. v. Darden*, 503 U.S. 318 (1992); *Clackamas Gastroenterology Associates, P.C. v. Wells*, 538 U.S. 440 (2003) (hereinafter "*Clackamas*"); see also Restatement (Second) of Agency § 220(2) (1958). Such indicia of control include when, where, and how a worker performs the job; the continuity of the worker's relationship with the employer; the tax treatment of the worker; the provision of employee benefits; and whether the work performed by the worker is part of the employer's regular business. See *Clackamas*, 538 U.S. at 448-449; cf. New Compliance Manual, Equal Employment Opportunity Commission, § 2-III(A)(1), (EEOC 2006) (adopting a materially identical test and indicating that said test was based on the *Darden* decision).

The evidence in the record does not establish that the petitioner will be the beneficiary's actual employer. Instead, records kept by the California Department of Alcoholic Beverage Control reveal that the beneficiary is listed as the owner of [REDACTED] since July 2, 2002, as an owner of [REDACTED] from July 26, 2004 to June 30, 2011, and as a co-licensee of the Liquor Mart located on [REDACTED] from August 21, 2003 onward. These records indicate that the beneficiary is self employed elsewhere.

Therefore, the petition must also be denied because the petitioner failed to establish that it will actually employ the beneficiary.

---

*Especial v. Napolitano*, 696 F. Supp. 2d 873 (E.D. Mich. 2010), *aff'd*, No. 10-1517 (6th Cir. filed Nov. 10, 2011).

<sup>11</sup> The director's NOID stated that the ownership of the petitioner changed after the labor certification was accepted by DOL. In response, the petitioner submitted a bill of sale evidencing the transfer of ownership of rights, duties, obligations and assets of the original owner and submitted evidence that the successor continues to operate the same type of business. The evidence of the ability to pay of the petitioning successor from 2005 onward was submitted concerning the new partnership.

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 with a finding that the petitioner and beneficiary willfully misrepresented a material fact.

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