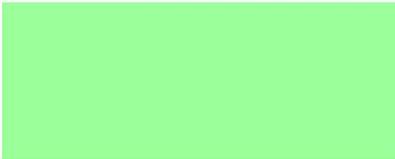




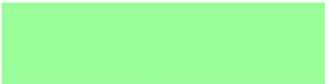
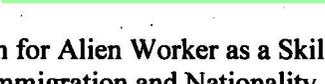
U.S. Citizenship
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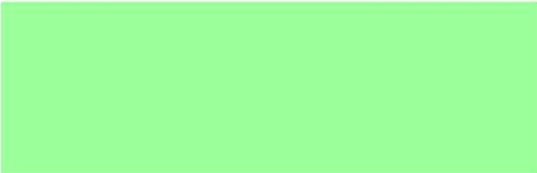
DATE: **APR 05 2013**

Office: VERMONT SERVICE CENTER FILE: 

IN RE: Petitioner: 
Beneficiary: 

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

ON BEHALF OF PETITIONER:



INSTRUCTIONS:

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

If you believe the 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 employment-based visa petition was denied by the Director, Vermont Service Center, and is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner is a restaurant. It seeks to employ the beneficiary permanently in the United States as a pizza maker under section 203(b)(3) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(3). 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 marriage fraud bar under section 204(c) of the Act applies to the case and denied the petition accordingly.

On appeal, counsel asserts that the marriage bar should not apply to the Immigrant Petition to Alien Worker (Form I-140) and that the petition is eligible for approval.

The AAO conducts appellate review on a *de novo* basis. See *Soltane v. DOJ*, 381 F.3d 143, 145 (3d Cir. 2004). 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.

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*, 299 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 at 145 (noting that the AAO reviews appeals on a *de novo* basis).

Based on a review of the record, the AAO determines that there is substantial and probative evidence that the marriage was entered into for the purpose of evading the immigration laws.

Section 204 of the Act governs the procedures for granting immigrant status. Section 204(c) provides for the following:

Notwithstanding the provisions of subsection (b)¹ no petition shall be approved if:

- (1) the alien has previously been accorded, or has sought to be accorded, an immediate relative or preference status as the spouse of a citizen of the United States or the spouse of an alien lawfully admitted for permanent residence, by reason of a marriage determined by the Attorney General to have been entered into for the purpose of evading the immigration laws; or
- (2) the Attorney General has determined that the alien has attempted or conspired to enter into a marriage for the purpose of evading the immigration laws.

¹ Subsection (b) of section 204 of the Act refers to preference visa petitions that are verified as true and forwarded to the State Department for issuance of a visa.

Similarly, the regulation at 8 C.F.R. § 204.2(a) provides in pertinent part:

(1) *Eligibility.* A United States citizen or alien admitted for lawful permanent residence may file a petition on behalf of a spouse.

(ii) *Fraudulent marriage prohibition.* Section 204(c) of the Act prohibits the approval of a visa petition filed on behalf of an alien who has attempted or conspired to enter into a marriage for the purpose of evading the immigration laws. The director will deny a petition for immigrant visa classification filed on behalf of any alien for whom there is substantial and probative evidence of such an attempt or conspiracy, regardless of whether that alien received a benefit through the attempt or conspiracy. Although it is not necessary that the alien have been convicted of, or even prosecuted for, the attempt or conspiracy, the evidence of the attempt or conspiracy must be contained in the alien's file.

The evidence of such attempt or conspiracy must be documented in the alien's file and must be substantial and probative so that the director could reasonably infer the attempt or conspiracy. *See Matter of Tawfik*, 20 I&N Dec. 166 (BIA 1990). *See also Matter of Kahy*, 19 I&N Dec. 803 (BIA 1988); *Matter of Agdinaoay*, 16 I&N Dec. 545 (BIA 1978); *Matter of La Grotta*, 14 I&N Dec. 110 (BIA 1972).

Tawfik at 167 states the following, in pertinent part:

Section 204(c) of the Act . . . prohibits the approval of a visa petition filed on behalf of an alien who has attempted or conspired to enter into a marriage for the purpose of evading the immigration laws. Accordingly, the district director must deny any subsequent visa petition for immigrant classification filed on behalf of such alien, regardless of whether the alien received a benefit through the attempt or conspiracy. As a basis for the denial it is not necessary that the alien have been convicted of, or even prosecuted for, the attempt or conspiracy. However, the evidence of such attempt or conspiracy must be documented in the alien's file and must be substantial and probative.

(citing *Matter of Kahy*, Interim Decision 3086 (BIA 1988); *Matter of Agdinaoay*, 16 I&N Dec. 545 (BIA 1978); *Matter of La Grotta*, 14 I&N Dec. 110 (BIA 1972)).

It is noted that the AAO's appellate jurisdiction may be found at former 8 C.F.R. § 103.1(f)(3)(iii) (2002). 68 FR 10922 (March 6, 2003) and includes appeals from denials of Immigrant Petition for

Alien Workers (Form I-140).² Therefore, the AAO has jurisdiction over the director's denial of the Form I-140 filed in this case based on his determination that its approval was barred by the fraudulent marriage prohibition contained in section 204(c) of the Act.

Although the AAO concurs with counsel that the standard of proof in this proceeding should consist of substantial and probative evidence that the marriage was entered into for the purpose of evading the immigration laws, the AAO finds that it has jurisdiction to examine the record for evidence of a fraudulent marriage if the Form I-140 is denied on this basis. See 8 C.F.R. § 204.2(a). In this case, the record indicates that S.R., U.S. citizen, and the beneficiary married on [REDACTED] in [REDACTED] Massachusetts. On the same day, according to a letter signed by [REDACTED] the beneficiary was seen for a immigration screening exam. One day later, on [REDACTED], S.R. signed the Form I-130 sponsoring the beneficiary as the spouse of a U.S. citizen. It was filed with the Service and the Form I-130 was subsequently approved on March 12, 1998. According to the director's denial of the I-140 and as indicated in the record, an interview was held on August 31, 2000 at the Miami district INS (now USCIS) office which was related to the beneficiary's Application to Register Permanent Residence or Adjust Status (Form I-485) that had been filed on March 12, 1998. At this interview, the beneficiary and S.R. disclosed that she had moved to Florida and the beneficiary had remained living in Boston. They claimed that they still traveled to see each other two or three times per year. The district director requested additional evidence of the *bona fides* of the marriage, but failed to elicit a response. The Form I-485 was denied on March 19, 2001.

On April 30, 2001, the petitioner filed an Application for Alien Employment Certification (Form ETA 750), with the Department of Labor in order to sponsor the beneficiary as a pizza maker as set forth by the terms of the approved labor certification. This labor certification was certified by DOL on December 24, 2002. On May 6, 2005, the petitioner filed a Form I-140 with the Service, seeking an immigrant visa for the beneficiary based on the approved labor certification. On September 16, 2005, the director of the Vermont Service Center issued a request for evidence requesting additional documentation from the petitioner relating to its ability to pay the proffered wage, copies of the petitioner's federal income tax returns for 2001 through 2004; the beneficiary's Wage and Tax Statements (W-2s) for 2001 through 2004; and evidence that the beneficiary possessed the required 'showmanship in preparation of food, such as tossing pizza dough in the air to lighten texture' as set forth by Item 15 of the approved labor certification.

Because the I-140 petitioner's response indicated that the petitioning business had changed ownership, the director issued another request for evidence on January 19, 2006, instructing the petitioner to submit additional documentation that a successorship-in-interest had been created by the change in ownership. It is noted that a valid successor relationship may be established if the job opportunity is the same as originally offered on the labor certification; if the purported successor

² DHS replaced the appellate jurisdiction provision with a general delegation of authority, granting USCIS the authority to adjudicate the appeals that had been previously listed in the regulations as of February 28, 2003. See DHS Delegation No. 0150.1 para. (2)(U) (Mar. 1, 2003).

establishes eligibility in all respects, including the provision of evidence from the predecessor entity, such as evidence of the predecessor's ability to pay the proffered wage as of the priority date; and if the petition fully describes and documents the transfer and assumption of the ownership of the predecessor by the claimed successor. Evidence of transfer of ownership must show that the successor not only purchased the predecessor's assets but also that the successor acquired the essential rights and obligations of the predecessor necessary to carry on the business in the same manner as the predecessor. The successor must continue to operate the same type of business as the predecessor, and the manner in which the business is controlled must remain substantially the same as it was before the ownership transfer. The successor must also establish its continuing ability to pay the proffered wage from the date of business transfer until the beneficiary adjusts status to lawful permanent resident. *See Matter of Dial Auto Repair Shop, Inc.*, 19 I&N Dec. 481 (Comm. 1986).³

³ *Matter of Dial Auto* involved a petition filed by Dial Auto Repair Shop, Inc. (Dial Auto) on behalf of an alien beneficiary for the position of automotive technician. The beneficiary's former employer, Elvira Auto Body, filed the underlying labor certification. On the petition, Dial Auto claimed to be a successor-in-interest to Elvira Auto Body. The part of the Commissioner's decision relating to successor-in-interest issue is set forth below:

Additionally, the *representations made by the petitioner* concerning the relationship between Elvira Auto Body and itself are issues which have not been resolved. On order to determine whether the petitioner was a true successor to Elvira Auto Body, counsel was instructed on appeal to fully explain the manner by which the petitioner took over the business of Elvira Auto Body and to provide the Service with a copy of the contract or agreement between the two entities; however, no response was submitted. If the *petitioner's claim* of having assumed all of Elvira Auto Body's rights, duties, obligations, etc., is found to be untrue, then grounds would exist for *invalidation of the labor certification under 20 C.F.R. § 656.30 (1987)*. Conversely, if the claim is found to be true, *and it is determined that an actual successorship exists*, the petition could be approved if eligibility is otherwise shown, including ability of the predecessor enterprise to have paid the certified wage at the time of filing.

(All emphasis added). The legacy INS and USCIS has, at times, strictly interpreted *Matter of Dial Auto* to limit a successor-in-interest finding to cases where the petitioner could show that it assumed all of the original entity's rights, duties, obligations and assets. However, a close reading of the Commissioner's decision reveals that it does not explicitly require a successor-in-interest to establish that it is assuming all of the original employer's rights, duties, and obligations. Instead, in *Matter of Dial Auto*, the petitioner had *represented* that it had assumed all of the original employer's rights, duties, and obligations, but had failed to submit requested evidence to establish that this was, in fact, true. And, if the petitioner's claim was untrue, the Commissioner stated that the underlying labor certification could be invalidated for fraud or willful misrepresentation pursuant to 20 C.F.R. § 656.30 (1987). This is why the Commissioner said "[i]f the petitioner's claim is found to be true, *and it is determined that an actual successorship exists*, the petition could be approved." (Emphasis

On August 18, 2006, the Service Center director issued a notice of intent to deny approval of the I-140 on section 204(c) of the Act based on the fraudulent marriage prohibition. The director requested evidence supporting the *bona fides* of the marriage including but not limited to joint ownership of property, lease(s) showing joint tenancy at a common residence, commingling of financial resources, birth certificates of any children born to the beneficiary and S.R., and affidavits of third parties having knowledge of the *bona fides* of the marriage relationship. The petitioner was advised that the affidavits must contain the full name, address, date and place of birth of the affiant, as well as a description of his/her relationship and basis of personal knowledge of the marriage. The petitioner was permitted thirty (30) days to respond to the director's notice.

Evidence submitted by the petitioner in support of the marriage at the time of the marriage, which took place on September 29, 1997, and submitted subsequently in connection with the director's notice of intent to deny the Form I-140 and subsequent submissions, includes:

- 1) Copies of the petitioner's and the beneficiary's driver's licenses. S.R.'s Florida driver's license shows that it was issued on June 3, 1998. The beneficiary had a Massachusetts driver's license. It does not show the issuance date.
- 2) A copy of a bank statement of a checking account [REDACTED] dated February 5, 1998, from the [REDACTED] held by the beneficiary or S.R. indicating that it represented activity from January 6, 1998 to February 3, 1998 and began with a balance of \$362.60 and ended with a balance of \$481.67. A copy of a letter, dated September 30, 1997, from this bank indicates that this checking account was held by S.R. or the beneficiary and that the account was opened in the amount of \$1,700. Bank statements submitted on appeal indicate that this account was opened one day after the marriage, on September 30, 1997 and ended with a "-0-" balance as of March 19, 1998. The record does not show whether one or both parties wrote checks or made deposits in this account and no further evidence beyond this five month account had been submitted that suggests any joint ownership of any property and/or any commingling of financial resources.
- 3) A copy of a January 11, 1998, self-storage agreement between [REDACTED] in [REDACTED] Massachusetts and S.R.-[beneficiary's surname] [REDACTED] (U.S. citizen spouse). The beneficiary's name does not appear on this document.
- 4) A copy of a letter, dated September 14, 2006, from S.R.-[beneficiary's surname] and addressed "to whom it may concern," was submitted in response to the director's notice of intent to deny, stating that she and the beneficiary have been married for the past nine years; that they met at the petitioning firm's pizza shop, and that she had known the

added.) The Commissioner was explicitly stating that the petitioner's claim that it assumed all of the original employer's rights, duties, and obligations is a separate inquiry from whether or not the petitioner is a successor-in-interest. The Commissioner was most interested in receiving a full explanation as to the "manner by which the petitioner took over the business of [the alleged predecessor] and seeing a copy of "the contract or agreement between the two entities."

beneficiary for five years before they started dating. [REDACTED] states that she moved out of state (no date given) and then moved back with a two-year old child (not the beneficiary's) and began to date the beneficiary. They dated for a year and talked about moving to Florida because of [REDACTED] arthritis. According to [REDACTED] they decided that she would move first and get things set up and then the beneficiary would follow and attempt to find a job. Following his unsuccessful attempt at finding work that would be a better job than at the pizza shop, it was decided that they would commute back and forth. [REDACTED] claims that she and beneficiary married for love and not for his papers.

- 5) Copies of the beneficiary's individual federal income tax return for 1997, 1999, 2000, 2002, and 2003 submitted on appeal showing that he filed "married, filing separate." It is noted that the beneficiary's tax return for 1998 was not provided and none of his tax returns for 2004 through 2009 were provided as requested in number 16 of the AAO's request for evidence, dated February 26, 2010.⁴
- 6) Statements from seven individuals submitted on appeal, in support of the *bona fides* of the marriage as follows:

- a). An undated letter from [REDACTED] who also worked at the pizza shop and who confirms the story described by [REDACTED] in the circumstances surrounding [REDACTED] initial relationship with the beneficiary and her move to Florida. [REDACTED] states that the beneficiary spent "several months" looking for work in Florida but was unsuccessful and returned to the pizza shop in Massachusetts. [REDACTED] claims that they commuted for a couple of years but this was a strain on the marriage and [REDACTED] health required her to live in Florida. It is unclear whether this knowledge comes from personal observation or from other sources.

- b). A letter, dated November 21, 2006, from [REDACTED] a neighbor of the beneficiary and a city councilor in [REDACTED] Massachusetts. [REDACTED] states that in the past, he was introduced to a lady described as the beneficiary's wife, who also worked at the store during this time. It is unclear if "in the past" indicates one meeting or several and there is no indication how familiar this person was with the *bona fides* of the marriage relationship

- c). A letter, dated November 16, 2006, from [REDACTED] who is one of the beneficiary's co-workers at the pizza shop. [REDACTED] states that "I know him since 1999 when I started to work at the same place. I know from him that at that time he was married. One time on the year 2000 (I don't remember the exact date) I have seen his wife at the workplace."

- d). A letter, dated November 16, 2006, from [REDACTED] who is another of the beneficiary's co-workers, but fails to mention any knowledge or acquaintance of the beneficiary's marriage.

⁴ It is noted that on appeal, the petitioner was able to produce the beneficiary's income tax returns for the years stated above in number 5. The same counsel and law firm represents the petitioner and the beneficiary.

e). An undated letter, from [REDACTED] who identifies herself as the daughter of the man who owned the pizza shop and generally confirms [REDACTED] account of the beneficiary and [REDACTED] relationship. She states that the parties commuted back and forth for "several years," but that they were "very much in love when they got married." It is unclear whether [REDACTED] opinion comes from personal observation or from other sources. It is further noted that this person appears to be related to the past and present owners of the petitioning business.

Despite the director's request, no probative evidence of marital cohabitation has been provided. Although lack of cohabitation is not solely determinative, it is also noted that there is no evidence of children born to the marriage, no evidence of joint ownership of any real or personal property⁵ and scant evidence of commingled liquid cash assets beyond a joint checking account that lasted for five months and was reduced to zero a few days after the I-130 was approved. An independent review of the documentation in the record of proceeding presents substantial and probative evidence to support a reasonable inference that the beneficiary entered a marriage with S.R. for the purpose of evading immigration laws. Thus, the director's determination that the beneficiary sought to be accorded an immediate relative or preference status as the spouse of a citizen of the United States by reason of a marriage determined by U.S. Citizenship and Immigration Services (USCIS) to have been entered into for the purpose of evading the immigration laws is affirmed.

Beyond the decision of the director, there is no persuasive evidence in the record that the beneficiary satisfied the terms of the ETA 750. The regulation at 8 C.F.R. § 204.5(1)(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.

Although counsel correctly states that no employment experience, training, or formal education was required for the position of pizza maker, item 15 of the labor certification, as indicated above, requires that the applicant be able to "[e]xercise showmanship in preparation of food, such as tossing pizza dough in air to lighten texture." This requirement was specified on the certified labor certification and raised by the director in his September 16, 2005, request for evidence to show that the beneficiary possessed such ability. It is noted that various documents in the record prior to the response to the AAO's request for evidence reflect that the beneficiary's employment at the petitioning business do not support any claim of showmanship such as tossing pizza dough in air to lighten texture. A letter dated October 13, 2005, signed by [REDACTED] as owners of the petitioner was offered in support of the beneficiary's employment as a pizza maker.

⁵Public records in Florida indicate that S.R. has conveyed real estate as a single woman in July 2000.

Although the letter speaks of the beneficiary's ability to multi-task, it does not endorse his showmanship and specifically disclaims the beneficiary's ability to toss pizza dough in the air as "unfortunately, [the beneficiary] cannot 'toss pizza dough in the air' to lighten texture," and that they "have machines that flatten the dough to the required size." It is further noted that an unsigned draft of a statement from [REDACTED] submitted in response to the AAO's request for evidence now states that the beneficiary "has been employed by [the petitioner] continuously even prior to filing the LCA [labor certification] in April of 2001, and has the ability to toss pizza dough in the air to lighten texture." In addition to being unsigned, the statement does not clearly document that the beneficiary had any such skills before the priority date. An unsigned statement is not probative of the beneficiary's abilities. Further, as the priority date of April 30, 2001 is the date that the beneficiary must have obtained such skills, and the prior letter of October 13, 2005 from [REDACTED] specifically contradicted the claim contained in the unsigned statement, we do not find the statement credible. 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. 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. *See Matter of Ho*, 19 I&N Dec. 582, 591-592 (BIA 1988).

There are two undated letters from [REDACTED] the former owner of the petitioning business until the change of ownership on May 1, 2004. The first one states that the beneficiary has worked for the petitioner since January 1, 1997 when he was employed as a driver. It describes his prospective duties but fails to mention any showmanship qualities and fails to verify that even a full-time, 35-40 hour per week job was being offered, stating that his employment would be \$6.25 per hour for "30/HRS A WEEK." A second letter, signed by [REDACTED] was submitted in response to the director's September 16, 2005 request for evidence. The letter discusses his reliability and ability to deal with the customers but does not mention showmanship or the ability to toss dough in the air. A third unsigned statement from [REDACTED] submitted in response to the AAO's request for evidence indicates that the beneficiary has the ability to toss pizza dough in the air. As noted above, an unsigned statement is of no probative value and fails to credibly document that the beneficiary had the ability to toss pizza dough in the air or possessed any showmanship qualities as required by item 15 of the ETA 750.

Additionally, the AAO finds that there is insufficient evidence to establish that a *bona fide* job offer existed as represented on the I-140 petition, because the I-140 petition was not properly filed by the current owners, the [REDACTED] which appears to be comprised of [REDACTED] equally,⁶ but filed by the former owner, [REDACTED]. This I-140 petition filing was signed by [REDACTED] in February 2005 and filed in May 2005, even though the change of

⁶This is based on the 2004 U.S. Return of Partnership Income filed by the [REDACTED].

⁷ Moreover, the signature represented to be that of [REDACTED] which appears on the preference petition, bears little resemblance to his signature on other documents in the record. This was not

ownership had already occurred on May 1, 2004, over one year earlier. The federal employer identification number (FEIN)⁸ stated on Part 1 of the I-140 was claimed to be [REDACTED] which belongs to the [REDACTED]. As such, an entity that is clearly not the prospective U.S. employer filed the I-140 petition even though the business had been sold a year before and the FEIN was misrepresented on the I-140 petition to be the number of the original sold entity. The [REDACTED] may be the parents of [REDACTED] one of the present owners, but it remains that where the circumstances reveal that any change in ownership occurred *prior* to the filing of the Form I-140, the actual prospective U.S. employer files the I-140 with the corresponding accurately identified FEIN and other pertinent information to demonstrate successorship. As noted in the AAO's RFE, this Form I-140 petition, as currently constituted, may not be approved because it does not represent a proper filing by the prospective U.S. employer. See 8 C.F.R. § 204.5(c).

Further, it is noted that the record suggests that the beneficiary may be related to the petitioner's prior or current owners.⁹ Pertinent to the determination of whether a petition is based on a *bona fide* job offer is the determination of whether a pre-existing family, business, or personal relationship may have influenced the labor certification.

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 Department of Labor (DOL) advisory opinion in invalidating the labor certification. 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.

addressed in the petitioner's response to the AAO's request for evidence.

⁸20 C.F.R. § 656.3 requires that employers possess a valid FEIN.

⁹See [REDACTED] letter dated October 13, 2005, suggesting that the beneficiary was a member of the family. It is also noted that at the interview at the district office in 2000, the beneficiary indicated that his family could not find a replacement at work for him.

In this case, the AAO requested (number(s) 12 and 13 of the RFE) information related to whether the beneficiary has or had any ownership or financial interest in the petitioning business (number 12) and to what degree through blood or marriage that the beneficiary was related to [REDACTED] or any other owner, officer, manager, supervisor or worker at the petitioning business. Also requested was evidence of first-hand evidence of who authorized the beneficiary's employment and hired him (number 4 of AAO RFE). The only documents submitted in response to these questions represented the unsigned statements of [REDACTED] in which it is denied that the beneficiary has any financial interest or "direct" familial relationship to persons connected to the ownership of the petitioning business. As noted above, these unsigned statements are not probative or responsive to the AAO's request for evidence. 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). As this inquiry is material as to whether the job offer is *bona fide*, the failure to respond shall be an additional ground of denial.

Even if considered a proper filing, it is further noted that the AAO's RFE addressed the petitioner's ability to pay the proffered wage. 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 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, the day the ETA Form 750 was accepted for processing by any office within the employment system of the Department of Labor. See 8 CFR § 204.5(d). Here, that date is April 30, 2001.¹⁰ The proffered wage as stated on the ETA 750 is \$13.02 per hour, which amounts to \$23,696.40 per year.¹¹

¹⁰ If the petition is approved, the priority date is also used in conjunction with the Visa Bulletin issued by the Department of State to determine when a beneficiary can apply for adjustment of status or for an immigrant visa abroad. Thus, the importance of reviewing the *bona fides* of a job opportunity as of the priority date, including a prospective U.S. employer's ability to pay the proffered wage is clear.

¹¹ The proffered wage is based on a 35 hour week as stated on the labor certification. The petitioner must establish that its job offer to the beneficiary is a realistic one. Because the filing of a labor certification application establishes a priority date for any immigrant petition later based on the Form ETA 750, the petitioner must establish that the job offer was realistic as of the priority date and that the offer remained realistic for each year thereafter, until the beneficiary obtains lawful permanent residence. The petitioner's ability to pay the proffered wage is an essential element in evaluating whether a job offer is realistic. See *Matter of Great Wall*, 16 I&N Dec. 142 (Acting Reg. Comm.

As noted in the AAO's RFE, the record indicates that the petitioning business was initially structured as a sole proprietorship. The sole proprietors identified on the 2001 federal tax return submitted to

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 overall circumstances affecting the petitioning business will be considered if the evidence warrants such consideration. *See Matter of Sonegawa*, 12 I&N Dec. 612 (Reg. Comm. 1967).

In determining the petitioner's ability to pay the proffered wage during a given period, USCIS will first examine whether the petitioner may have 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. To the extent that the petitioner may have paid the beneficiary less than the proffered wage, those amounts will be considered. If the difference between the amount of wages paid and the proffered wage can be covered by the petitioner's net income or net current assets for a given year, then the petitioner's ability to pay the full proffered wage for that period will also be demonstrated. In this case, except for 2001, copies of the beneficiary's W-2s or W-2 information state that he was paid \$29,900 in 2002; \$30,875 in 2003; \$20,400 and \$10,800 in 2004 for a total of \$31,200; \$31,800 in 2005; \$31,200 in 2006; \$31,800 in 2007; \$33,800 in 2008; and \$31,200 in 2009.

If the petitioner does not establish that it employed and paid the beneficiary an amount at least equal to the proffered wage during a given 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). 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).

the record were [REDACTED] It is noted that with respect to this year, unlike other years reflected by the W-2s submitted to the record, the beneficiary's 2001 W-2 shows that he was paid less than the proffered wage of \$23,696.40. His annual wage was shown as \$18,950, or \$4,476.40 less than the proffered wage. In order to determine if the sole proprietor(s) could cover this difference, it was requested that the petitioner provide a summary of the sole proprietor(s) recurring monthly household expenses including but not limited to mortgage or rent, automobile payments, utilities, food, installment loans, etc. Evidence of other available cash or readily available cash assets were also invited to be submitted. In this case, this information was not provided.

This information was requested because a sole proprietor's adjusted gross income, assets and personal liabilities are also considered as part of the petitioner's ability to pay. Sole proprietors report income and expenses from their businesses on their individual (Form 1040) federal tax return each year. The business-related income and expenses are reported on Schedule C and are carried forward to the first page of the tax return. Sole proprietors must show that they can cover their existing business expenses as well as pay the proffered wage out of their adjusted gross income or other available funds. In addition, sole proprietors must show that they can sustain themselves and their dependents. *See Ubeda v. Palmer*, 539 F. Supp. 647 (N.D. Ill. 1982), *aff'd*, 703 F.2d 571 (7th Cir. 1983). For that reason, sole proprietors provide evidence of pertinent household expenses that are considered as part of the calculation of their continuing financial ability to pay the proffered wage. Such household expenses include but are not limited to mortgage or rent, automobile payments, utilities, food, installment loans, etc. In *Ubeda*, 539 F. Supp. at 650, the court concluded that it was highly unlikely that a petitioning entity structured as a sole proprietorship could support himself, his spouse and five dependents on a gross income of slightly more than \$20,000 where the beneficiary's proposed salary was \$6,000 or approximately thirty percent (30%) of the petitioner's gross income.

As the information was not provided, the petitioner's ability to pay the proffered wage in 2001 could not be clearly determined and was not established. 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).

Matter of Sonogawa, is sometimes applicable where other factors such as the expectations of increasing business and profits overcome evidence of small profits. That case, however relates to petitions filed during uncharacteristically unprofitable or difficult years within a framework of profitable or successful years. During the year in which the petition was filed, the *Sonogawa* petitioner changed business locations, and paid rent on both the old and new locations for five months. There were large moving costs and a period of time when business could not be conducted. The Regional Commissioner determined that the prospects for a resumption of successful operations were well established. He noted that the petitioner was a well-known fashion designer who had been featured in *Time* and *Look*. Her clients included movie actresses, society matrons and Miss Universe. The petitioner had 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, historical growth and outstanding reputation as a couturiere. It is noted that although it is claimed that the

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petitioner has employed the beneficiary beginning at various dates as noted in the AAO's RFE, the information necessary to determine the petitioner's ability to pay the proffered wage in 2001, the year covering the priority date, was not provided and the instant petitioner has not submitted sufficient evidence demonstrating that uncharacteristic losses, factors of outstanding reputation or other circumstances that prevailed in *Sonegawa* that are persuasive in this matter in that year. The AAO does not conclude that the petitioner has established that it has had the continuing ability to pay the proffered wage.

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.