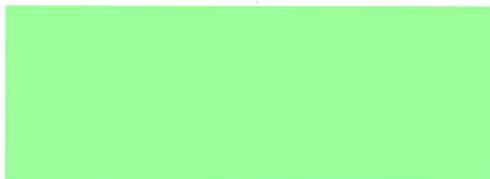
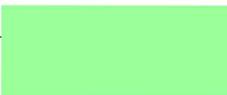


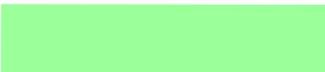
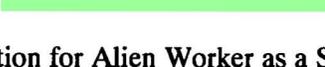


U.S. Citizenship  
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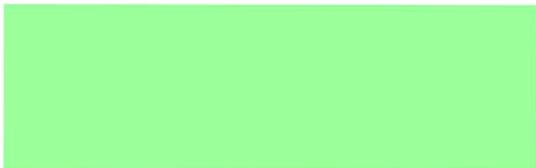


DATE: **JAN 14 2013** OFFICE: NEBRASKA SERVICE CENTER FILE: 

IN RE: Petitioner:   
Beneficiary: 

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

ON BEHALF OF PETITIONER:



INSTRUCTIONS:

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

If you believe the 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, and is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner is an e-commerce website. It seeks to employ the beneficiary permanently in the United States as an e-commerce developer. As required by statute, the petition is accompanied by a Form ETA 750, Application for Alien Employment Certification, approved by the United States Department of Labor (DOL). The director determined that the petitioner had not established that it had the continuing ability to pay the beneficiary the proffered wage beginning on the priority date of the visa petition, that the beneficiary had the requisite experience as stated on the labor certification, and that a bona fide job offer existed. The director denied the petition accordingly.

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

As set forth in the director's July 29, 2010 denial, an issue in this case is whether or not the petitioner has the ability to pay the proffered wage as of the priority date and continuing until the beneficiary obtains lawful permanent residence.

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

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

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

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

Here, the Form ETA 750 was accepted on March 24, 2005. The proffered wage as stated on the Form ETA 750 is \$42,390 per year. The Form ETA 750 states that the position requires a Bachelor of Science in Information Systems and four months of experience in the job offered as an e-commerce developer or four months experience in the alternate occupation of web developer.

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

The evidence in the record of proceeding shows that the petitioner is structured as an S corporation. On the petition, the petitioner claimed to have been established in 2003 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 March 16, 2005, the beneficiary did not claim to have worked for the petitioner.

The petitioner must establish that its job offer to the beneficiary is a realistic one. Because the filing of 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 during any relevant timeframe including the period from the priority date in 2005 or subsequently.

If the petitioner does not establish that it employed and paid the beneficiary an amount at least equal to the proffered wage during that period, USCIS will next examine the net income figure reflected on the petitioner's federal income tax return, without consideration of depreciation or other expenses. *River Street Donuts, LLC v. Napolitano*, 558 F.3d 111 (1<sup>st</sup> Cir. 2009); *Taco Especial v.*

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<sup>1</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).

*Napolitano*, 696 F. Supp. 2d 873 (E.D. Mich. 2010), *aff'd*, No. 10-1517 (6th Cir. filed Nov. 10, 2011). Reliance on federal income tax returns as a basis for determining a petitioner's ability to pay the proffered wage is well established by judicial precedent. *Elatos Restaurant Corp. v. Sava*, 632 F. Supp. 1049, 1054 (S.D.N.Y. 1986) (citing *Tongatapu Woodcraft Hawaii, Ltd. v. Feldman*, 736 F.2d 1305 (9th Cir. 1984)); *see also Chi-Feng Chang v. Thornburgh*, 719 F. Supp. 532 (N.D. Texas 1989); *K.C.P. Food Co., Inc. v. Sava*, 623 F. Supp. 1080 (S.D.N.Y. 1985); *Ubeda v. Palmer*, 539 F. Supp. 647 (N.D. Ill. 1982), *aff'd*, 703 F.2d 571 (7th Cir. 1983). Reliance on the petitioner's gross receipts and wage expense is misplaced. Showing that the petitioner's gross receipts exceeded the proffered wage is insufficient. Similarly, showing that the petitioner paid wages in excess of the proffered wage is insufficient.

In *K.C.P. Food Co., Inc. v. Sava*, 623 F. Supp. at 1084, the court held that the Immigration and Naturalization Service, now USCIS, had properly relied on the petitioner's net income figure, as stated on the petitioner's corporate income tax returns, rather than the petitioner's gross income. The court specifically rejected the argument that USCIS should have considered income before expenses were paid rather than net income. *See Taco Especial v. Napolitano*, 696 F. Supp. 2d at 881 (gross profits overstate an employer's ability to pay because it ignores other necessary expenses).

With respect to depreciation, the court in *River Street Donuts* noted:

The AAO recognized that a depreciation deduction is a systematic allocation of the cost of a tangible long-term asset and does not represent a specific cash expenditure during the year claimed. Furthermore, the AAO indicated that the allocation of the depreciation of a long-term asset could be spread out over the years or concentrated into a few depending on the petitioner's choice of accounting and depreciation methods. Nonetheless, the AAO explained that depreciation represents an actual cost of doing business, which could represent either the diminution in value of buildings and equipment or the accumulation of funds necessary to replace perishable equipment and buildings. Accordingly, the AAO stressed that even though amounts deducted for depreciation do not represent current use of cash, neither does it represent amounts available to pay wages.

We find that the AAO has a rational explanation for its policy of not adding depreciation back to net income. Namely, that the amount spent on a long term tangible asset is a "real" expense.

*River Street Donuts* at 118. "[USCIS] and judicial precedent support the use of tax returns and the net income figures in determining petitioner's ability to pay. Plaintiffs' argument that these figures should be revised by the court by adding back depreciation is without support." *Chi-Feng Chang* at 537 (emphasis added).

The record before the director closed on May 14, 2010 with the receipt by the director of the petitioner's submissions in response to the director's notice of intent to deny (NOID). As of that

date, the petitioner's 2009 federal income tax return was already due, but the petitioner did not include its 2009 tax return in its response to the NOID, nor did it give an explanation as to why it was not included.<sup>2</sup> Therefore, the petitioner's income tax return for 2008 is the most recent return available. The petitioner's tax returns demonstrate its net income for 2005 to 2008, as shown in the table below.

- In 2005, the Form 1120S stated net income<sup>3</sup> of -\$24,798.
- In 2006, the Form 1120S stated net income of -\$3,297.
- In 2007, the Form 1120S stated net income of \$93,696.
- In 2008, the Form 1120S stated net income of \$92,746.

Therefore, for the years 2005 and 2006, the petitioner did not have sufficient net income to pay the proffered wage.

As an alternate means of determining the petitioner's ability to pay the proffered wage, USCIS may review the petitioner's net current assets. Net current assets are the difference between the petitioner's current assets and current liabilities.<sup>4</sup> A corporation's year-end current assets are shown on Schedule L, lines 1 through 6. Its year-end current liabilities are shown on lines 16 through 18. If the total of a corporation's end-of-year net current assets and the wages paid to the beneficiary (if any) are equal to or greater than the proffered wage, the petitioner is expected to be able to pay the proffered wage using those net current assets. The petitioner's tax returns demonstrate its end-of-year net current assets for 2005 and 2006, as shown in the table below.

- In 2005, the Form 1120S stated net current assets of \$32.
- In 2006, the Form 1120S stated net current assets of \$5,975.

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<sup>2</sup> Although the director specifically noted the lack of documentation of the petitioner's ability to pay the proffered wage for 2009, the petitioner also did not submit its 2009 tax return on appeal.

<sup>3</sup> Where an S corporation's income is exclusively from a trade or business, USCIS considers net income to be the figure for ordinary income, shown on line 21 of page one of the petitioner's IRS Form 1120S. However, where an S corporation has income, credits, deductions or other adjustments from sources other than a trade or business, they are reported on Schedule K. If the Schedule K has relevant entries for additional income, credits, deductions or other adjustments, net income is found on line 17e (2004-2005), line 18 (2006-2011) of Schedule K. See Instructions for Form 1120S, at <http://www.irs.gov/pub/irs-pdf/i1120s.pdf> (accessed December 3, 2012) (indicating that Schedule K is a summary schedule of all shareholders' shares of the corporation's income, deductions, credits, etc.). Because the petitioner had additional income and deductions shown on its Schedule K for 2007 and 2008, the petitioner's net income is found on Schedule K of its 2007 and 2008 tax return.

<sup>4</sup> According to *Barron's Dictionary of Accounting Terms* 117 (3<sup>rd</sup> ed. 2000), "current assets" consist of items having (in most cases) a life of one year or less, such as cash, marketable securities, inventory and prepaid expenses. "Current liabilities" are obligations payable (in most cases) within one year, such accounts payable, short-term notes payable, and accrued expenses (such as taxes and salaries). *Id.* at 118.

Therefore, for the years 2005 and 2006, the petitioner did not have sufficient net current assets to pay 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 in evaluating the ability to pay the proffered wage, the totality of the circumstances should be taken into account. Counsel states that the petitioner must demonstrate its ability to pay the proffered wage, and that according to the regulation at 8 C.F.R. § 204.5(g)(2), in appropriate cases, additional evidence such as profit/loss statements, bank account records, or personnel records, may be submitted by the petitioner or requested by the Service. Counsel also cites to a memorandum dated May 4, 2004, from William R. Yates, Associate Director of Operations, United States Citizenship and Immigration Services (USCIS), regarding the determination of ability to pay (Yates Memorandum), and states that according to the memo, adjudicating officers are reminded to examine the record of proceedings in their entirety. See Interoffice Memo. from William R. Yates, Associate Director of Operations, USCIS, to Service Center Directors and other USCIS officials, *Determination of Ability to Pay under 8 CFR 204.5(g)(2)*, at 2, (May 4, 2004). Counsel further relies on the I-140 Standard Operating Procedures (2007) to establish that adjudicating officers may rely on additional evidence to establish the ability to pay the proffered wage, and on *Matter of Sonogawa*, 12 I&N Dec. 612 (Reg'l Comm'r 1967) which evaluate the overall magnitude of the petitioner's business activities in determining the petitioner's ability to pay the proffered wage.

On appeal, the petitioner relies on its previously submitted federal tax returns for 2005, 2006, 2007, and 2008 as evidence that under the totality of the circumstances, the business is growing and is not a "sham" business. The petitioner further submits a copy of the NOID; the Yates Memo from May 4, 2004; the NSOP from 2007; an experience letter for the beneficiary; the recruitment results; and a blank ETA Form 9089 with a copy of the Federal Register. See 69 Fed. Reg. 77355, 77356 (December 24, 2007).

USCIS may consider the overall magnitude of the petitioner's business activities in its determination of the petitioner's ability to pay the proffered wage. See *Matter of Sonogawa*, 12 I&N Dec. 612 (Reg'l Comm'r 1967). The petitioning entity in *Sonogawa* had been in business for over 11 years and routinely earned a gross annual income of about \$100,000. During the year in which the petition was filed in that case, the petitioner changed business locations and paid rent on both the old and new locations for five months. There were large moving costs and also a period of time when the petitioner was unable to do regular business. The Regional Commissioner determined that the petitioner's prospects for a resumption of successful business operations were well established. The petitioner was a fashion designer whose work had been featured in *Time* and *Look* magazines. Her clients included Miss Universe, movie actresses, and society matrons. The petitioner's clients had been included in the lists of the best-dressed California women. The petitioner lectured on fashion

design at design and fashion shows throughout the United States and at colleges and universities in California. The Regional Commissioner's determination in *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 has not demonstrated sufficient net income or net assets to pay the proffered wage. The petitioner also failed to include any evidence of historical growth of the petitioner's business, the petitioner's reputation within the industry, or the occurrence of any uncharacteristic business expenditures or losses. Counsel argues that its tax returns for 2005, 2006, 2007 and 2008 are proof that the petitioner's business is growing and "demonstrating that the petitioning employer is not the type of sham business USCIS seeks to discourage." The issue is not whether the petitioner is a "sham" business, but rather the issue is whether the petitioner has the ability to pay the proffered wage. The petitioner's tax returns demonstrate that it does not have sufficient net income or net current assets to pay the proffered wage. The petitioner does not submit any documents in support of counsel's assertions. The assertions of counsel do not constitute evidence. *Matter of Obaighena*, 19 I&N Dec. 533, 534 (BIA 1988); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980). Furthermore, the petitioner never submitted its 2009 federal tax returns. The director requested the petitioner's 2009 tax returns in a NOID, but the petitioner did not submit the requested tax returns, nor did it offer any explanation as to why they were not submitted. At the time the petitioner responded to the NOID, its 2009 federal corporate tax returns were already due. Furthermore, the petitioner did not submit its 2009 federal tax returns on appeal.

The record of proceeding contains one bank statement for the petitioner for the period December 1, 2009 to December 31, 2009. First, bank statements are not among the three types of evidence, enumerated in 8 C.F.R. § 204.5(g)(2), required to illustrate a petitioner's ability to pay a proffered wage. While this regulation allows additional material "in appropriate cases," the petitioner in this case has not demonstrated why the documentation specified at 8 C.F.R. § 204.5(g)(2) is inapplicable or otherwise paints an inaccurate financial picture of the petitioner. Second, bank statements show the amount in an account on a given date, and cannot show the sustainable ability to pay a proffered wage. Third, no evidence was submitted to demonstrate that the funds reported on the petitioner's bank statements somehow reflect additional available funds that were not reflected on its tax return, such as the petitioner's taxable income (income minus deductions) or the cash specified on Schedule L that will be considered below in determining the petitioner's net current assets. As stated above, the petitioner did not even submit its 2009 federal tax returns.

The petitioner did not offer any other evidence or explanation through which it could be determined that it had the ability to pay the proffered wage. 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.

As set forth in the director's July 29, 2010 denial, another issue in this case is whether or not the beneficiary has the required experience as indicated on the ETA 750B.

The petition is accompanied by a Form ETA 750, Application for Alien Employment Certification (labor certification), certified by the U.S. Department of Labor (DOL). The priority date of the petition, which is the date the DOL accepted the labor certification for processing, is March 24, 2005. See 8 C.F.R. § 204.5(d).

The director's decision denying the petition concludes that the beneficiary did not possess the minimum experience required to perform the offered position by the priority date.

The beneficiary must meet all of the requirements of the offered position set forth on the labor certification by the priority date of the petition. 8 C.F.R. § 103.2(b)(1), (12). See *Matter of Wing's Tea House*, 16 I&N Dec. 158, 159 (Act. Reg. Comm. 1977); see also *Matter of Katigbak*, 14 I&N Dec. 45, 49 (Reg. Comm. 1971).

In evaluating the labor certification to determine the required qualifications for the position, U.S. Citizenship and Immigration Services (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*, 696 F.2d at 1008; *K.R.K. Irvine, Inc.*, 699 F.2d at 1006; *Stewart Infra-Red Commissary of Massachusetts, Inc. v. Coomey*, 661 F.2d 1 (1st Cir. 1981).

Where the job requirements in a labor certification are not otherwise unambiguously prescribed, e.g., by regulation, USCIS must examine "the language of the labor certification job requirements" in order to determine what the petitioner must demonstrate about the beneficiary's qualifications. *Madany*, 696 F.2d at 1015. The only rational manner by which USCIS can be expected to interpret the meaning of terms used to describe the requirements of a job in a labor certification is to "examine the certified job offer *exactly* as it is completed by the prospective employer." *Rosedale Linden Park Company v. Smith*, 595 F. Supp. 829, 833 (D.D.C. 1984)(emphasis added). USCIS's interpretation of the job's requirements, as stated on the labor certification must involve "reading and applying *the plain language* of the [labor certification]." *Id.* at 834 (emphasis added). USCIS cannot and should not reasonably be expected to look beyond the plain language of the labor certification or otherwise attempt to divine the employer's intentions through some sort of reverse engineering of the labor certification.

In the instant case, the labor certification states that the offered position has the following minimum requirements:

**EDUCATION**

Grade School: 8 years

High School: 4 years

College: 4 years

College Degree Required: B.S.

Major Field of Study: Information Systems

**TRAINING:** None required

**EXPERIENCE:** Four (4) months in the job offered or four (4) months in the related occupation of web developer.

**OTHER SPECIAL REQUIREMENTS:** Web and database integration, web design and development utilizing Macromedia Dreamweaver MX, Macromedia Fireworks MX, and Macromedia Flash MX.

The labor certification also states that the beneficiary qualifies for the offered position based on experience as a web developer with [REDACTED] from May 2001 until September 2001, and as a systems analyst with [REDACTED] from September 2001 through the date of filing the ETA 750 on March 24, 2005. The beneficiary signed the labor certification under a declaration that the contents are true and correct under penalty of perjury.

The regulation at 8 C.F.R. § 204.5(l)(3)(ii)(A) states:

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.

The record contains an experience letter from [REDACTED] on company letterhead stating that the company employed the beneficiary as a systems analyst from September 10, 2001 through the date of the letter, June 19, 2007. However, the experience gained at Boeing does not match the experience required on the ETA 750. The ETA 750 requires at least four months experience as a web developer, and the beneficiary's position at [REDACTED] was that of systems analyst. Furthermore, the beneficiary's experience as discussed in the [REDACTED] letter does not match the "other special requirements" in part 15 of the ETA 750 which requires experience in web and database integration, web design, and development using Macromedia Dreamweaver MX, Macromedia Fireworks MX, and Macromedia Flash MX.

On appeal, the petitioner submits an experience letter from [REDACTED] on company letterhead stating that the company employed the beneficiary as a web developer from April 2001 to September 2001. However, the letter does not contain any contact information including the address and telephone number of the company, nor is the letter dated.

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<sup>5</sup> A review of USCIS records reveals that [REDACTED] may be the beneficiary's father.

Moreover, the experience letter uses the exact language as is used in the ETA 750 #15, "other special requirements."

The director specifically requested additional evidence from the beneficiary regarding his experience in a NOID dated April 14, 2010. The purpose of the request for evidence is to elicit further information that clarifies whether eligibility for the benefit sought has been established, as of the time the petition is filed. See 8 C.F.R. §§ 103.2(b)(8) and (12). The failure to submit requested evidence that precludes a material line of inquiry shall be grounds for denying the petition. 8 C.F.R. § 103.2(b)(14). As in the present matter, where a petitioner has been put on notice of a deficiency in the evidence and has been given an opportunity to respond to that deficiency, the AAO will not accept evidence offered for the first time on appeal. See *Matter of Soriano*, 19 I&N Dec. 764 (BIA 1988); *Matter of Obaigbena*, 19 I&N Dec. 533 (BIA 1988). If the petitioner had wanted the submitted evidence to be considered, it should have submitted the documents in response to the director's notice of intent to deny. *Id.* Under the circumstances, the AAO need not, and does not, consider the sufficiency of the evidence submitted on appeal.

The AAO affirms the director's decision that the petitioner failed to establish that the beneficiary met the minimum requirements of the offered position set forth on the labor certification as of the priority date. Therefore, the beneficiary does not qualify for classification as a professional or skilled worker under section 203(b)(3)(A) of the Act.

As set forth in the director's July 29, 2010 denial, another issue in this case is whether or not the job offer was *bona fide*.

The petitioner has not established that it has made a *bona fide* job offer to the beneficiary. Under 20 C.F.R. § 656.20(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 Sunmart 374*, 00-INA-93 (BALCA May 15, 2000). The director issued a notice of intent to deny (NOID) to the petitioner on April 14, 2010. The NOID indicated that the petitioner's current sole shareholder as listed on the corporate tax returns is [REDACTED]. The director stated that it appeared that the sole shareholder, [REDACTED] might be related to the beneficiary, [REDACTED]. The NOID asked the petitioner to provide evidence to establish that the petitioner has made a *bona fide* job offer to the beneficiary.

*Matter of Silver Dragon Chinese Restaurant*, 19 I&N Dec. 401 (Comm'r 1986), discussed a beneficiary's 50% ownership of the petitioning entity. The decision quoted an advisory opinion from the Chief of DOL's Division of Foreign Labor Certification as follows:

The regulations require a 'job opportunity' to be 'clearly open.' Requiring the job opportunity to be *bona fide* adds no substance to the regulations, but simply clarifies that the job must truly exist and not merely exist on paper. The administrative interpretation thus advances the purpose of regulation

656.20(c)(8). Likewise, requiring the job opportunity to be *bona fide* clarifies that a true opening must exist, and not merely the functional equivalent of self-employment. Thus, the administrative construction advances the purpose of regulations 656.20.

*Id.* at 405. Accordingly, where the beneficiary named in an alien labor certification application has an ownership interest in the petitioning entity, the petitioner must establish that the job is *bona fide*, or clearly open to U.S. workers. See *Keyjoy Trading Co.*, 1987-INA-592 (BALCA Dec. 15, 1987) (*en banc*). A relationship invalidating a *bona fide* job offer may also arise where the beneficiary is related to the petitioner by “blood” or it may “be financial, by marriage, or through friendship.” See *Matter of Sunmart 374*, 2000-INA-93 (BALCA May 15, 2000).

In response to the NOID, the petitioner’s owner admitted that the beneficiary is his brother. The petitioner’s owner also stated that he is the sole incorporator, sole investor, and sole employee. He further stated that he is the individual responsible for hiring decisions and that the beneficiary has never been employed by the petitioner nor would the petitioner’s operations cease in the beneficiary’s absence.

On appeal, the petitioner’s counsel submits the recruitment information including the reduction in recruitment request to DOL; a copy of the ETA 750; and copies of the job announcements in the Chicago Tribune, JobAdsUSA.com, and careerbuilder.com through the Chicago Tribune. Additionally, the posting notice is included.

Despite the familial relationship between the beneficiary and the petitioner, on appeal, the petitioner’s counsel maintains that the job offer was *bona fide*. She states that since the beneficiary does not have an ownership interest in the petitioner’s business, the beneficiary is not employed by the petitioner, and the beneficiary is not employed in a position of influence with the petitioner, then the instant case is distinguishable from *Matter of Silver Dragon Chinese Restaurant*.

The petitioner’s counsel further argues that the director’s conclusion, based on *Modular Container Systems, Inc.*, 1989-INA-228 (BALCA Jul. 16, 1991) (*en banc*), that the petitioner did not voluntarily acknowledge its owner’s relationship to the beneficiary is unfair. The petitioner’s counsel asserts that the petitioner had no mechanism through which it could voluntarily acknowledge a familial relationship under the pre-PERM labor certification system. The petitioner’s counsel argues that the petitioner did voluntarily acknowledge the owner’s familial relationship with the beneficiary when “the filing mechanism allowed him to do so,” through its response to the notice of intent to deny. We disagree.

The petitioner should have disclosed the relationship between the beneficiary and the petitioner to the DOL. See *Matter of Silver Dragon Chinese Restaurant*, 19 &N Dec. at 406. The burden rests on the employer to provide clear evidence that a *bona fide* job opportunity is available, and that the employer has, in good faith, sought to fill the position with a US worker. *Matter of Amger Corp.*, 87-INA-545 (BALCA 1987). The petitioner failed to make these disclosures. It was not until a notice of intent to deny was issued by the director that the petitioner admitted the familial relationship between its owner and the beneficiary. Further, it appears that the petitioner attempted

to hide the familial relationship from DOL and USCIS by having [REDACTED] sign the Form ETA 750 and the Form I-140 as [REDACTED] instead of [REDACTED]. Further indications of the petitioner's attempt to hide the familial relationship include using the name, [REDACTED] on the reduction in recruitment request to the DOL and on all of the job advertisements. The petitioner's owner uses the name [REDACTED] on the corporate taxes and the articles of incorporation.

The situation in the instant petition is analogous to the beneficiary in *Matter of Silver Dragon Chinese Restaurant* based on the lack of clarity as to the actual family relationship between the petitioner's owner and the beneficiary. The familial relationship would have caused the DOL and USCIS to examine more carefully whether the job opportunity is clearly open to qualified U.S. workers, and whether U.S. workers applying for the job, if any, were rejected solely for lawful job-related reasons. *See Id.* at 402. The recruitment information submitted on appeal indicates that there were two applicants for the proffered job. The petitioner failed to submit any evidence of the two applicants' qualifications for the position. Thus, it is impossible to ascertain if they were rejected for solely lawful job-related reasons. The petitioner has not established that it has made a *bona fide* job offer to the beneficiary.

Section 212(a)(6)(C) of the Act provides:

**Misrepresentation.** – (i) In general. – Any alien who, by fraud or willfully misrepresenting a material fact, seeks to procure (or has sought to procure or has procured) a visa, other documentation, or admission into the United States or other benefit provided under this Act is inadmissible.

Furthermore, a finding of fraud or willful misrepresentation may lead to invalidation of the Form ETA 750 pursuant to 20 C.F.R. § 656.30(d). *See* 20 C.F.R. § 656.31(d) regarding labor certification applications involving fraud or willful misrepresentation:

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

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 p. 290.<sup>6</sup> The term “willfully” means knowing and intentionally, as

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<sup>6</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

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 petitioner's owner 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 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

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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).

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 petitioner's owner and the beneficiary had a familial relationship was a material misrepresentation that was willful. *See Matter of Silver Dragon Chinese Restaurant*, 19 I&N Dec. 401 at 403. The petitioner's owner signed his name on all of the documents submitted to USCIS and the DOL as [REDACTED] instead of [REDACTED]. The petitioner's owner signed the response to the NOID as [REDACTED] after the director issued a NOID requesting information regarding the familial relationship between him and the beneficiary. [REDACTED] is the name used on all of the petitioner's tax returns, as well as the petitioner's articles of incorporation.

The petitioner's misrepresentation as to his relationship to the beneficiary 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.

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 between the petitioner's owner and the beneficiary, 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.

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.