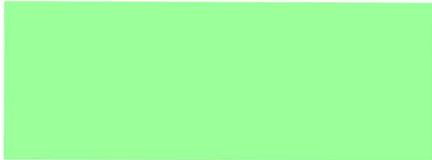




U.S. Citizenship
and Immigration
Services

(b)(6)



Date: **JUN 03 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:

SELF-REPRESENTED

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,

Rachel M. Fazio
for

Ron Rosenberg
Acting Chief, Administrative Appeals Office

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

The petitioner is a distillery. It seeks to employ the beneficiary permanently in the United States as a chief operations officer. 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 failed to resolve inconsistencies contained in the record relating to its ownership. The director further determined that the petitioner was not eligible to file a petition on the beneficiary's behalf pursuant to section 203(b)(3) of the Immigration and Nationality Act (Act), because the beneficiary is a part-owner of the petitioner and considered to be a self-petitioner. Therefore, the director denied the petition accordingly.

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.

On appeal, the petitioner asserted that the beneficiary, [REDACTED] as well as [REDACTED], [REDACTED], and [REDACTED] first opened a limited partnership in Texas. The petitioner contended that these individuals dissolved the Texas limited partnership with the beneficiary, [REDACTED], [REDACTED], and [REDACTED] selling their respective ownership interests to a new limited liability company created in Florida and solely owned by [REDACTED]. The petitioner stated that the petitioner, the limited liability company created in Florida and solely owned by [REDACTED] was eligible to file a petition on the beneficiary's behalf pursuant to section 203(b)(3) of the Act because the beneficiary had sold his ownership interest in the petitioner and he was not a self-petitioner. The petitioner included copies of previously submitted documentation in support of the appeal.

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.¹

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, 145 (3d Cir. 2004) (AAO's *de novo* authority is well recognized by the federal courts).

¹ The submission of additional evidence on appeal is allowed by the instructions to the Form I-290B, which are incorporated into the regulations by 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).

During the adjudication of the appeal, the AAO discovered the existence of derogatory evidence that the director had not considered in denying the petition. The AAO issued a Notice of Intent to Dismiss and Notice of Derogatory Information (NOID/NDI) on April 11, 2013, to the petitioner and former counsel acknowledging that the tax returns in the record reflect that [REDACTED] does in fact own 100% of the petitioner's business, and, thus, the evidence of ownership establishes that the beneficiary more likely than not does not own a percentage of the petitioner's business. Therefore, the AAO withdrew this basis of the director's denial. However, the AAO noted that the record did not contain any credible evidence demonstrating that the DOL was aware that the beneficiary is the father of the owner and operator of the petitioner's business. The AAO informed the petitioner that if the job opportunity was not clearly open to any qualified U.S. worker, then the petitioner misrepresented a material fact regarding the job opportunity to the DOL on the labor certification. Further, if the job offer was not open to any qualified U.S. worker, then the petitioner's claims that the job offer was *bona fide* and signing the labor certification under penalty of perjury constituted an act of willful misrepresentation. The AAO noted that a finding that the petitioner had engaged in willful misrepresentation in the labor certification application process would lead to invalidation of the Form ETA 750 pursuant to 20 C.F.R. § 656.30(d), using the procedures described at 20 C.F.R. § 656.31 regarding labor certification applications involving fraud or willful misrepresentation.

In addition and beyond the decision of the director, the AAO noted that the record did not contain evidence establishing that the petitioner had the continuing ability to pay the proffered wage since the priority date as required by 8 C.F.R. § 204.5(g)(2). The AAO provided a detailed analysis of this issue and the relevant evidence in the NOID/NDI dated April 11, 2013, which shall be discussed later in the decision.

Also beyond the director's decision, the AAO determined that the record does not contain sufficient evidence establishing that the beneficiary possessed the required education and experience set forth on the labor certification by the priority date pursuant to 8 C.F.R. § 103.2(b)(1), (12). *See Matter of Wing's Tea House*, 16 I&N Dec. 158, 159 (Acting Reg'l Comm'r 1977); *see also Matter of Katigbak*, 14 I&N Dec. 45, 49 (Reg'l Comm'r 1971). The AAO provided a detailed analysis of this issue and the relevant evidence in the NOID/NDI dated April 11, 2013, which shall be discussed later in the decision.

Finally and beyond the decision of the director as well, the AAO noted that U.S. Citizenship and Immigration Services (USCIS) conducted a site visit of the petitioner's business on September 22, 2010, and found the premises to be locked. Although the business had signage and appeared to be the type of business claimed, a chain linked fence around the perimeter of the property was padlocked, and all of the lights were off in the building. The USCIS officer conducting the site visit called the numbers listed for the company, but these calls went unanswered. Based on the USCIS site visit and corresponding evaluation, the AAO determined that the petitioner's business may not have been operating as stated in the record of proceeding.

The AAO informed the petitioner of its intent to dismiss the appeal for these additional reasons in the NOID/NDI issued on April 11, 2013. In the NOID/NDI, the AAO specifically alerted the petitioner that failure to respond to the NOID/NDI/ would result in dismissal since the AAO could not substantively adjudicate the appeal without the information requested. The failure to submit requested evidence that precludes a material line of inquiry shall be grounds for denying the petition. *See* 8 C.F.R. § 103.2(b)(14).

In response, prior counsel submits a statement in which she informs the AAO that she is no longer the attorney of record and requests that all further correspondence in the matter be directed to the petitioner.

The record shows as of the date of this decision, the petitioner has failed to respond to the AAO's NOID/NDI. Therefore, the record must be considered complete.

The first issue to be examined in these proceedings is whether the petitioner misrepresented a material fact regarding the job opportunity to the DOL on the labor certification.

The AAO notes that the precedent decision, *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).

It is noted that the petitioner's employee, [REDACTED], a viticulture specialist, signed the Form ETA 750 under a declaration that the contents of the form are true and correct under penalty of perjury. In addition, at section 23 of the Form ETA 750 [REDACTED] certified among other things, that "[t]he job opportunity has been and is clearly open to any qualified U.S. worker."

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

The record of proceeding contains a Limited Liability Company Interest Assignment Agreement and Consent that is dated February 28, 2003. The agreement reflects that [REDACTED], the beneficiary; [REDACTED], the beneficiary's wife; [REDACTED] the beneficiary's son; and [REDACTED] the beneficiary's daughter-in-law, were owners of [REDACTED], a Texas limited partnership. The business subsequently relocated to Florida and changed its name to [REDACTED] and then later to [REDACTED]. The Limited Liability Company Interest Assignment Agreement and Consent also states that the family members transferred their ownership shares of the petitioner to [REDACTED] as of February 28, 2003. Although the record is absent evidence of any payment made to the beneficiary for the transfer of the business to his ownership, the record contains a Form I-526, Immigrant Petition by Alien Entrepreneur, including supporting documents, that was previously filed by the beneficiary on March 2, 2001. The Form I-526 petition and supporting documents tend to corroborate the family relationships and the original formation of the business as discussed above. According to the claims made by the beneficiary in the filing of the Form I-526, the beneficiary began the business entity in the United States with a capital investment of over \$1 million dollars. Now, several years later, the business is purporting to have conducted a search to fill the job of chief operations officer and has decided to hire the beneficiary. The AAO notes that, in addition to the family relationship with the current owner, the fact that the beneficiary has made a claimed investment of over \$1 million dollars in the petitioner's business gives the beneficiary an advantage over other applicants for the position, thus preventing the job offer from being realistically open to all the other applicants.

According to both the Form I-140 petition and the Form ETA 750 contained in the record, the address of the petitioner is [REDACTED] New Port Richey, Florida [REDACTED] Document Number [REDACTED] in Book [REDACTED] Page [REDACTED] in the records of the [REDACTED] Florida, listed the beneficiary, [REDACTED] and his wife, [REDACTED] as the owners of the property located at [REDACTED] New Port Richey, Florida [REDACTED]. The AAO notes that in addition to the family relationship with the current owner, the fact that the beneficiary and his wife, a managing member of the company, own the property on which the petitioner operates its business gives the beneficiary an advantage over other applicants for the position, thus preventing the job offer from being realistically open to all the other applicants.

The record shows that the director issued a Request for Evidence (RFE) on December 17, 2008, in which the petitioner was asked to provide evidence that DOL was aware of the relationship between the beneficiary, [REDACTED] and his son, [REDACTED] the petitioner's owner. In response, prior counsel submitted a letter dated January 26, 2009, in which he stated that, as the labor certification did not ask for proof of a relationship between the petitioner and beneficiary, the relationship was not identified. Prior counsel also stated that proof of the relationship "may have been made evident" in the employment verification letter from August

2007, submitted with the Form I-140 that stated that the business was “family owned” and provided both men’s last names.

The AAO notes that the employment verification letter dated August 15, 2007, submitted with the Form I-140, was addressed to and sent to USCIS at the Nebraska Service Center and not to DOL, which certified the Form ETA 750. Further, this letter is dated August 15, 2007, well after the certification of the Form ETA 750 on October 3, 2006. The AAO also notes that the Form ETA 750 was not signed by [REDACTED] but by another employee of the petitioner’s business, [REDACTED]. Thus, the evidence does not demonstrate that DOL was made aware of this family relationship.

Prior counsel also states in the letter of January 26, 2009, that [REDACTED] recused himself from the recruitment process and delegated that authority to [REDACTED], who is the employee who signed the Form ETA 750. However, the AAO notes that, according to the list of job applicants provided by the petitioner, [REDACTED] was an applicant for the job of chief operations officer. It is not clear how [REDACTED] could have been granted the authority to conduct recruitment for a *bona fide* job offer if he was both an applicant and the selecting official. The beneficiary’s name was not on the list of job applicants.

In addition, the Florida Department of State Division of Corporations maintains a publically accessible website that allows business searches to be conducted and also allows certain filed corporate documents to be viewed. See <http://www.sunbiz.org/search.html> (accessed on October 22, 2012). According to: 1) the Articles of Amendment to Articles of Organization of [REDACTED] filed on July 21, 2009, and 2) the Limited Liability Company Reinstatement filed by the petitioner on November 3, 2009, the beneficiary’s wife, [REDACTED] was added as a managing member. The AAO notes that in addition to the family relationship with the current owner, the fact that the beneficiary’s wife is a managing member of the petitioner’s business gives the beneficiary an advantage over other applicants for the position, thus preventing the job offer from being realistically open to all the other applicants.

In the instant case, the beneficiary created the enterprise and claims in a prior filing to have made a substantial investment of capital. The beneficiary’s wife is a managing member of the petitioner’s business, and the beneficiary along with his wife owns the property on which the petitioner conducts business. In addition, the beneficiary is the father of the owner of the petitioner’s business. These factors indicate that the job opportunity was not clearly open to any qualified U.S. worker, but that the beneficiary had an advantage due to the family relationship, the beneficiary’s prior claimed investment, the beneficiary’s wife’s control over the petitioner as a managing member, and the beneficiary’s influence over the property on which the petitioner operates. The failure of the petitioner to make DOL aware of the family relationship that existed prior to the filing of the labor certification and to then attest under penalty of perjury that the job opportunity has been and is clearly open to any qualified U.S. worker is a willful misrepresentation.

Willful misrepresentation of a material fact in these proceedings may render the beneficiary inadmissible to the United States. See INA Section 212(a)(6)(C), [8 U.S.C. 1182(a)(6)(C)], regarding misrepresentation, “(i) in general – any alien, who by fraud or willfully misrepresenting a material fact, seeks (or has sought to procure, or who has procured) a visa, other documentation, or admission to the United States or other benefit provided under the Act is inadmissible.”

A material issue in this case is whether the job opportunity was clearly open to any qualified U.S. worker. If the job offer was not open to any qualified U.S. worker, then the petitioner’s claims that the job offer was *bona fide* and signing the labor certification under penalty of perjury constitutes an act of willful misrepresentation. See *Kungys v. U.S.*, 485 U.S. 759 (1988), (“materiality is a legal question of whether “misrepresentation or concealment was predictably capable of affecting, *i.e.*, had a natural tendency to affect the official decision.”). Here, the claim that the job offer was *bona fide* is a willful misrepresentation of the job that adversely impacted DOL’s adjudication of the Form ETA 750 and USCIS’s immigrant petition analysis.

The AAO notes that the petitioner and its former counsel submitted the materials that contained the omission and formed the basis of the misrepresentation. It is reasonable to conclude that both the petitioner and its former counsel had knowledge of the contents of the submissions and the misrepresentation which they contain.

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

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

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

The regulation at 20 C.F.R. § 656.30(d) provides:

(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 the labor certification application. 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 notification shall be sent to the regional or national office, as appropriate, of the Department of Labor's Office of Inspector General.

The record does not contain evidence demonstrating that the DOL was made aware that the beneficiary is the father of the owner and operator of the petitioner's business during the labor certification application process. The job opportunity was not clearly open to any qualified U.S. worker, and therefore, the petitioner misrepresented a material fact regarding the job opportunity to the DOL on the labor certification. Further, the AAO concludes the petitioner's representations that the job offer was *bona fide* and the signing of the labor certification under penalty of perjury by the petitioner's employee constituted an act of willful misrepresentation. The AAO concludes that the evidence in the record establishes that the petitioner sought to procure a benefit provided under the Act through fraud and willful misrepresentation of a material fact. The AAO makes a finding of fraud as it relates to the petitioner in the instant case. This finding of fraud shall be considered in any future proceeding where admissibility is an issue. We will invalidate the Form ETA 750 pursuant to 20 C.F.R. § 656.31(d) based on the petitioner's willful misrepresentation.

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).

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.

Section 203(b)(3)(A)(ii) of the Act, 8 U.S.C. § 1153(b)(3)(A)(ii), provides for the granting of preference classification to qualified immigrants who hold baccalaureate degrees and are members of the professions. Section 101(a)(32) of the Act, 8 U.S.C. § 1101(a)(32), provides that "the term 'profession' shall include but not be limited to architects, engineers, lawyers, physicians, surgeons, and teachers in elementary or secondary schools, colleges, academies, or seminaries."

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 December 29, 2003. The proffered wage as stated on the Form ETA 750 is \$82,600.00 per year based upon a forty hour week. The Form ETA 750 states that the position requires four years of college with a bachelor's degree in business administration or management or the equivalent of a bachelor's degree based on experience, and two years of experience in the job offered of chief operations officer or in the related occupation of a manager.

The evidence in the record of proceeding shows that the petitioner is structured as a limited liability company (LLC). An LLC is an entity formed under state law by filing articles of organization. An LLC may be classified for federal income tax purposes as if it were a sole proprietorship, a partnership or a corporation. If the LLC has only one owner, it will automatically be treated as a sole proprietorship by the Internal Revenue Service (IRS) unless an election is made to be treated as a corporation. If the LLC has two or more owners, it will automatically be considered to be a partnership by the IRS unless an election is made to be treated as a corporation. If the LLC does not elect its classification, a default classification of partnership (multi-member LLC) or disregarded entity (taxed as if it were a sole proprietorship) will apply. See 26 C.F.R. § 301.7701-3. The election referred to is made using IRS Form 8832, Entity Classification Election. In the instant case, the petitioner, an LLC formed under Florida law, was considered to be a sole proprietorship for federal tax purposes in 2003 and 2004 and an S corporation in 2005, 2006, and 2007. An LLC, like a corporation, is a legal entity separate and distinct from its owners. The debts and obligations of the company generally are not the debts and obligations of the owners or anyone else.² An investor's liability is limited to his or her initial investment. As the owners and others only are liable to his or her initial investment, the total income and assets of the owners and others and their ability, if they wished, to pay the company's debts and obligations, cannot be utilized to demonstrate the petitioner's ability to pay the proffered wage. The petitioner must show the ability to pay the proffered wage out of its own funds. On the Form I-140 petition, the petitioner claimed to have been established in 1999 and to employ seven

² Although this general rule might be amenable to alteration pursuant to contract or otherwise, no evidence appears in the record to indicate that the general rule is inapplicable in the instant case.

workers. According to the tax returns in the record, the petitioner's fiscal year is based on a calendar year.

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, USCIS requires the petitioner to demonstrate financial resources sufficient to pay the beneficiary's proffered wages, although the totality of the circumstances affecting the petitioning business will be considered if the evidence warrants such consideration. *See Matter of Sonogawa*, 12 I&N Dec. 612 (Reg'l Comm'r 1967).

In determining the petitioner's ability to pay the proffered wage during a given period, USCIS will first examine whether the petitioner employed and paid the beneficiary during that period. If the petitioner establishes by documentary evidence that it employed the beneficiary at a salary equal to or greater than the proffered wage, the evidence will be considered *prima facie* proof of the petitioner's ability to pay the proffered wage. In the instant case, the 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 2003 or subsequently. The record contains a Form W-2, Wage and Tax Statement, that was issued by the petitioner to the beneficiary in 2007. The Form W-2 statement reflects that the petitioner paid the beneficiary wages in the amount of \$23,827.05 in 2007. Therefore, the petitioner did not pay the beneficiary any wages in 2003, 2004, 2005, and 2006, and did not pay the beneficiary the full proffered wage of \$82,600.00 in 2007. However, the petitioner is only obligated to demonstrate its ability to pay the difference between wages it actually paid and the full proffered wage, \$58,772.95, in 2007.

If the petitioner does not establish that it employed and paid the beneficiary an amount at least equal to the proffered wage during that period, USCIS will next examine the net income figure reflected on the petitioner's federal income tax return, without consideration of depreciation or other expenses. *River Street Donuts, LLC v. Napolitano*, 558 F.3d 111 (1st Cir. 2009); *Taco Especial v. Napolitano*, 696 F. Supp. 2d 873 (E.D. Mich. 2010). *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 April 10, 2009, with the petitioner's submissions in response to the director's NOID. As of that date, the petitioner's 2008 federal income tax return was not yet due. Therefore, the petitioner's 2007 tax return is the most recent tax return available. The petitioner submitted completed Schedules C of the Form 1040, U.S. Individual Income Tax Return, for 2003 and 2004, as well as Forms 1120S, U.S. Income Tax Return for an S Corporation, for 2005, 2006, and 2007.

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

- In 2003, the Schedule C stated net income of -\$48,001.00.

- In 2004, the Schedule C stated net income of -\$2,065,086.00.
- In 2005, the Form 1120S stated net income⁴ of -\$535,015.00.
- In 2006, the Form 1120S stated net income of -\$557,010.00.
- In 2007, the Form 1120S stated net income of -\$478,402.00.

Therefore, for the years 2003, 2004, 2005, and 2006, the petitioner did not have sufficient net income to pay the proffered wage. For 2007, the petitioner did not have sufficient net income to pay the difference between the proffered wage and wages paid to the beneficiary.

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.⁵ 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 2003, 2004, 2005, 2006, and 2007, as shown in the table below.

- In 2003, net current assets were not stated.
- In 2004, net current assets were not stated.
- In 2005, the Form 1120S stated net current assets of \$874,750.00.
- In 2006, the Form 1120S stated net current assets of \$843,021.00.
- In 2007, the Form 1120S stated net current assets of \$836,026.00.

⁴ Where an S corporation's income is exclusively from a trade or business, USCIS considers net income to be the figure for ordinary income, shown on line 21 of page one of the petitioner's IRS Form 1120S. However, where an S corporation has income, credits, deductions, or other adjustments from sources other than a trade or business, they are reported on Schedule K. If the Schedule K has relevant entries for additional income, credits, deductions, or other adjustments, net income is found on line 23 (1997-2003), line 17e (2004-2005), or line 18 (2006-2011) of Schedule K. See Instructions for Form 1120S, at <http://www.irs.gov/pub/irs-pdf/i1120s.pdf> (accessed May 23, 2013) (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, credits, deductions, or other adjustments shown on its Schedule K for 2006 and 2007, the petitioner's net income is found on Schedule K of its tax returns for those years.

⁵ According to *Barron's Dictionary of Accounting Terms* 117 (3rd ed. 2000), "current assets" consist of items having (in most cases) a life of one year or less, such as cash, marketable securities, inventory and prepaid expenses. "Current liabilities" are obligations payable (in most cases) within one year, such accounts payable, short-term notes payable, and accrued expenses (such as taxes and salaries). *Id.* at 118.

The petitioner did not have sufficient net current assets to pay the proffered wage to the beneficiary in 2003 and 2004.

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 for 2003 and 2004.

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 \$100,000.00. During the year in which the petition was filed in that case, the petitioner changed business locations and paid rent on both the old and new locations for five months. There were large moving costs and also a period of time when the petitioner was unable to do regular business. The Regional Commissioner determined that the petitioner's prospects for a resumption of successful business operations were well established. The petitioner was a fashion designer whose work had been featured in *Time* and *Look* magazines. Her clients included Miss Universe, movie actresses, and society matrons. The petitioner's clients had been included in the lists of the best-dressed California women. The petitioner lectured on fashion design at design and fashion shows throughout the United States and at colleges and universities in California. The Regional Commissioner's determination in *Sonogawa* was based in part on the petitioner's sound business reputation and outstanding reputation as a couturiere. As in *Sonogawa*, USCIS may, at its discretion, consider evidence relevant to the petitioner's financial ability that falls outside of a petitioner's net income and net current assets. USCIS may consider such factors as the number of years the petitioner has been doing business, the established historical growth of the petitioner's business, the overall number of employees, the occurrence of any uncharacteristic business expenditures or losses, the petitioner's reputation within its industry, whether the beneficiary is replacing a former employee or an outsourced service, or any other evidence that USCIS deems relevant to the petitioner's ability to pay the proffered wage.

In this matter, the petitioner failed to demonstrate that it had sufficient net current assets to pay the proffered wage in 2003 and 2004. The instant petitioner has not submitted any evidence demonstrating that uncharacteristic losses, factors of outstanding reputation, or other circumstances that prevailed in *Sonogawa* are present in this matter. The AAO cannot conclude that the petitioner has established that it had the continuing ability to pay the proffered wage of the beneficiary since the priority date.

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. Further, any evidence submitted to rebut the above analysis would also need to establish the petitioner's ability to pay the proffered wage in 2008, 2009, 2010, 2011, and 2012 through regulatory-prescribed evidence.

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

In the instant case, the labor certification states that the offered position requires four years of college with a bachelor's degree in business administration or management or the equivalent of a bachelor's degree based on experience, and two years of experience in the job offered of chief operations officer or in the related occupation of a manager.

On the labor certification, the beneficiary claims to qualify for the offered position based on a bachelor's degree from the [REDACTED] Poland awarded in 1965 as well as experience as: president of [REDACTED] in Beamsville, Ontario, Canada from 1985 to May 1987; and president of [REDACTED] in Kitchener, Canada from June 1987 to July 2002. The labor certification also lists experience as the chief operating officer of the petitioner from August 2002 to the present.

The record contains an education evaluation from [REDACTED] of [REDACTED] dated July 1, 2002 in which he concludes that the beneficiary, based on approximately twenty years of employment experience, has attained the equivalent of a Bachelor of Business Administration degree with a concentration in management from an accredited institution of higher education in the United States. USCIS may, in its discretion, use as advisory opinions statements submitted as expert testimony. However, where an opinion is not in accord with other information or is in any way questionable, the Service is not required to accept or may give less weight to that evidence. *Matter of Caron International*, 19 I&N Dec. 791 (Comm'r 1988); *Matter of Sea, Inc.*, 19 I&N Dec. 817 (Comm'r 1988). *See also Matter of D-R-*, 25 I&N Dec. 445 (BIA 2011)(expert witness testimony may be given different weight depending on the extent of the expert's qualifications or the relevance, reliability, and probative value of the testimony).

The evaluation in the record used the rule to equate three years of experience for one year of education, but that equivalence applies to non-immigrant H-1B petitions, not to immigrant petitions. *See* 8 CFR § 214.2(h)(4)(iii)(D)(5). The beneficiary was required to have a bachelor's degree or the equivalent based on experience on the Form ETA 750, but the petitioner failed to specify how equivalency would be determined and what measures would be used. In addition, the job advertisements placed online and in the newspaper failed to state that the position was open to applicants with a bachelor's degree or the equivalent in experience. The petitioner's

actual minimum requirements could have been clarified or changed before the Form ETA 750 was certified by the DOL. Since that was not done, the petition may not be approved. In addition, no copy of the beneficiary's diploma or other education credentials was submitted into the record.

Further, the beneficiary's claimed qualifying experience must be supported by letters from employers giving the name, address, and title of the employer, and a description of the beneficiary's experience. See 8 C.F.R. § 204.5(l)(3)(ii)(A). The record contains one undated letter of experience written by the owner of the petitioner's business who signs his name as [REDACTED] manager, for [REDACTED] located at [REDACTED], AYR, Ontario, [REDACTED], Canada, which states that the beneficiary was employed at the business as president from June 1987 to November 1999.

The AAO notes the beneficiary set forth his credentials on the labor certification and signed his name on November 25, 2003, under a declaration that the contents of the form are true and correct under the penalty of perjury. At Part B, question 15 where the beneficiary is required to list "all jobs held during the last three (3) years" and to "list any other jobs related to the occupation for which [he] is seeking certification," the beneficiary stated that his employment with [REDACTED] ended in July 2002, which is approximately two and one-half years later than the date provided in the letter of experience.

See *Matter of Ho*, 19 I&N Dec. at 591-592, which states:

It is incumbent on the petitioner to resolve any inconsistencies in the record by independent objective evidence, and attempts to explain or reconcile such inconsistencies, absent competent objective evidence pointing to where the truth, in fact, lies, will not suffice.

The record does not contain any explanation to resolve the inconsistency between the labor certification and the letter of experience. The evidence in the record does not establish that the beneficiary possessed the required education and experience set forth on the labor certification by the priority date. Therefore, the petitioner has also failed to establish that the beneficiary is qualified for the offered position.

Beyond the decision of the director, USCIS conducted a site visit of the petitioner's business on September 22, 2010 and found the premises to be locked. Although the business had signage and appeared to be the type of business claimed, a chain linked fence around the perimeter of the property was padlocked, and all of the lights were off in the building. The USCIS officer conducting the site visit called the numbers listed for the company, but the call went unanswered. The AAO finds that the petitioner's business may not have been operating as stated in the record of proceeding based on the USCIS site visit and corresponding evaluation. Where there is no active business, no legitimate job offer exists, and the request that a foreign worker be allowed to fill the position listed in the petition has become moot. Additionally, even if the appeal could be

otherwise sustained, the petition's approval would be subject to automatic revocation pursuant to 8 C.F.R. § 205.1(a)(iii)(D) which sets forth that an approval is subject to automatic revocation without notice upon termination of the employer's business in an employment-based preference case.

The petition will be denied for the above stated reasons, with each considered as an independent and alternative basis for denial. The burden of proof in these proceedings rests solely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. The petitioner has not met that burden.

ORDER: The appeal is dismissed with a finding of fraud.

FURTHER ORDER: The AAO finds that the petitioner fraudulently and willfully mislead the DOL and USCIS on elements material to its 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. § 656.31(d) based on the petitioner's fraudulent misrepresentation.

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