



U.S. Citizenship
and Immigration
Services

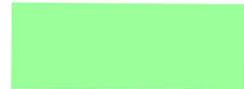
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DATE: JUN 25 2013

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

The petitioner describes itself as an ice skating instruction business. It seeks to permanently employ the beneficiary in the United States as a copy writer. The petitioner requests classification of the beneficiary as a professional or skilled worker pursuant to section 203(b)(3)(A) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(3)(A).¹ 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 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. The AAO conducts appellate review on a *de novo* basis. See *Soltane v. DOJ*, 381 F.3d 143, 145 (3d Cir. 2004). The AAO considers all pertinent evidence in the record, including new evidence properly submitted upon appeal.²

The director denied the petition stating that the petitioner had not established its ability to pay the proffered wage as of the priority date and continuing until the beneficiary obtains lawful permanent residence. On May 8, 2013, the AAO sent the petitioner a Notice of Intent to Dismiss and Notice of Derogatory Information (NOID/NODI) informing the petitioner that the record also does not establish that the beneficiary is qualified for the proffered position or that a *bona fide* job exists.

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

¹ Section 203(b)(3)(A)(i) of the Act, 8 U.S.C. § 1153(b)(3)(A)(i), grants preference classification to qualified immigrants who are capable 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), grants preference classification to qualified immigrants who hold baccalaureate degrees and are members of the professions.

² The submission of additional evidence on appeal is allowed by the instructions to the Form I-290B, which are incorporated into the regulations by the regulation at 8 C.F.R. § 103.2(a)(1). The record in the instant case provides no reason to preclude consideration of any of the documents newly submitted on appeal. See *Matter of Soriano*, 19 I&N Dec. 764 (BIA 1988).

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 November 29, 2001. The proffered wage as stated on the Form ETA 750 is \$24.99 per hour (\$51,979.20 per year). The Form ETA 750 states that the position requires a B.A. degree in English and six months of experience in the job offered. No alternate field of study or alternate occupation is accepted.

The evidence in the record of proceeding shows that the petitioner is structured as a sole proprietorship. On the petition, the petitioner claimed to have been established in 1974 and to currently employ one worker. On the Form ETA 750B, signed by the beneficiary on October 18, 2007, the beneficiary does not claim to have worked for the petitioner.³ The record closed before the director on May 13, 2009 with the petitioner's response to a request for evidence (RFE) from the director. In support of the initial filing and in response to the director's RFE, the petitioner submitted the sole proprietor's Internal Revenue Service (IRS) Forms 1040 and beneficiary's Forms W-2 for 2001 to 2008. On appeal the petitioner submitted the sole proprietor's amended Form 1040 for 2008⁴ and in response to the NOID/NODI from the AAO, the petitioner submitted the sole proprietor's IRS Form 1040 for 2009 to 2011, the beneficiary's Forms W-2 for 2009 to 2010, and an updated list of household expenses.

³ We note that on the beneficiary's Form G-325A submitted in support of his Form I-485 Application to Adjust Status to Permanent Resident, the beneficiary states that he has worked for the petitioner since 1998. 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).

⁴ On appeal the petitioner also submitted a letter from its accountant, [REDACTED] dated June 6, 2013. The letter states that the petitioner's Forms 1040 were amended in 2001, 2002 and 2003 to reflect additional income, but that because the statute of limitations had passed the IRS would not accept these amended filings. We will not consider the amended filings that were not accepted by the IRS.

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 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 submitted IRS Forms W-2 for the beneficiary showing the following wages paid:

<u>Year</u>	<u>Proffered Wage</u>	<u>Wages Paid</u>	<u>Balance</u>
2001	\$51,979.20	\$19,787.55	\$32,191.65
2002	\$51,979.20	\$19,414.20	\$32,565.00
2003	\$51,979.20	\$14,560.65	\$37,418.55
2004	\$51,979.20	\$19,414.20	\$32,565.00
2005	\$51,979.20	\$19,414.20	\$32,565.00
2006	\$51,979.20	\$19,414.20	\$32,565.00
2007	\$51,979.20	\$19,414.20	\$32,565.00
2008	\$51,979.20	\$19,414.20	\$32,565.00
2009	\$51,979.20	\$19,414.20	\$32,565.00
2010	\$51,979.20	\$14,560.65	\$37,418.55

Therefore, the petitioner did not pay the beneficiary the full proffered wage in any of the years in question and the petitioner must establish the ability to pay the balance between the proffered wage and actual wages paid from 2001 to 2010 and the ability to pay the full proffered wage in 2011.

If the petitioner does not establish that he 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).

The petitioner is a sole proprietorship, a business in which one person operates the business in his or her personal capacity. Black's Law Dictionary 1398 (7th Ed. 1999). Unlike a corporation, a sole proprietorship does not exist as an entity apart from the individual owner. *See Matter of United Investment Group*, 19 I&N Dec. 248, 250 (Comm'r 1984). Therefore the sole proprietor's adjusted gross income (AGI), assets and personal liabilities are also considered as part of the petitioner's ability to pay. Sole proprietors report income and expenses from their businesses on their individual (Form 1040) federal tax return each year. The business-related income and expenses are reported on Schedule C and are carried forward to the first page of the tax return. Sole proprietors must show that they can cover their existing business expenses as well as pay the proffered wage out of their adjusted gross income or other available funds. In addition, sole proprietors must show that they can sustain themselves and their dependents. *See Ubeda v. Palmer*, 539 F. Supp. 647 (N.D. Ill. 1982), *aff'd*, 703 F.2d 571 (7th Cir. 1983).

In the instant case, the sole proprietor does not claim any dependents on his tax returns. Originally the sole proprietor claimed \$11,166 in annual expenses, however the AAO noted in its NOID/NODI that the submitted list of recurring monthly household expenses may not be relied upon because it omits mortgage principal paid by the sole proprietor while his Schedule A of Form 1040 reflects that he was paying and deducting home mortgage interest expenses. In response, the sole proprietor submitted an updated list of monthly household expenses for 2012, showing annual household expenses totaling \$41,990. As the petitioner did not submit an updated list of monthly household expenses for the prior years to accurately reflect his mortgage payment or interest, the 2012 expense figure will be applied to the prior years as the annual household expenditures for each year in question in order to calculate the funds available to pay the beneficiary the proffered wage. The sole proprietor's reported AGI and annual household expenses are stated in the table below:

<u>Year</u>	<u>AGI</u>	<u>Household expenses</u>	<u>Balance available to pay wages</u>	<u>Wages owed</u>
2001	\$36,374.00	\$41,990.00	(\$5,616.00)	\$32,191.65
2002	\$40,632.00	\$41,990.00	(\$1,358.00)	\$32,565.00
2003	\$47,336.00	\$41,990.00	\$5,346.00	\$37,418.55
2004	\$47,011.00	\$41,990.00	\$5,021.00	\$32,565.00
2005	\$47,741.00	\$41,990.00	\$5,751.00	\$32,565.00
2006	\$67,097.00	\$41,990.00	\$25,107.00	\$32,565.00
2007	\$63,795.00	\$41,990.00	\$21,805.00	\$32,565.00
2008	\$49,390.00	\$41,990.00	\$7,400.00	\$32,565.00
2009	\$72,052.00	\$41,990.00	\$30,062.00	\$32,565.00
2010	\$68,113.00	\$41,990.00	\$26,123.00	\$37,418.55
2011	\$65,922.00	\$41,990.00	\$23,932.00	\$51,979.20

The sole proprietor's adjusted gross income remaining after the payment of household expenses is not sufficient to pay the difference between wages actually paid and the proffered wage in any year from 2001 to 2011.

On appeal, counsel asserts that the sole proprietor owns three properties which should be considered when determining its ability to pay. However, a home is not a readily liquefiable asset and it is unlikely that a sole proprietor would sell such a significant personal asset to pay the beneficiary's wage. USCIS may reject a fact stated in the petition if it does not believe that fact to be true. Section 204(b) of the Act, 8 U.S.C. § 1154(b); *see also Anetekhahai v. I.N.S.*, 876 F.2d 1218, 1220 (5th Cir. 1989); *Lu-Ann Bakery Shop, Inc. v. Nelson*, 705 F. Supp. 7, 10 (D.D.C. 1988); *Systronics Corp. v. INS*, 153 F. Supp. 2d 7, 15 (D.D.C. 2001). Furthermore, two of the properties are subject to bank liens. It is also noted that the sole proprietor rents out two of the properties, however, the income from these rents is reflected in the sole proprietor's tax returns as income and will not be considered an additional source of funds to pay the beneficiary the proffered wage.

In addition, counsel states that the petitioner has funds available in personal bank accounts, stocks and other investments that could be used to pay the beneficiary the proffered wage. As the petitioner is a sole proprietor we may properly consider these funds in our ability to pay analysis. However, the record does not contain complete information in the form of monthly statements showing average annual balances available from the priority date onward. Rather the record contains a statement dated June 6, 2013 from [REDACTED], a statement dated June 6, 2013 from [REDACTED], a statement dated June 6, 2013 from [REDACTED] and a statement dated June 22, 2011 from [REDACTED]. The figures contained in the submitted statements represent the funds available to the petitioner on that specific date, but in no way indicate the amount of funds that would have been available to pay the beneficiary the proffered wage from 2001 to the present.

USCIS may consider evidence relevant to the petitioner's financial ability that falls outside of his adjusted gross income in its determination of the petitioner's ability to pay the proffered wage. *See Matter of Sonogawa*.⁵ USCIS may consider such factors as any uncharacteristic expenditures or losses incurred by the petitioner, whether the beneficiary is replacing a former household worker or an outsourced service, or any other evidence that USCIS deems relevant to the petitioner's ability to

⁵ 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.

pay the proffered wage. In the instant case, the petitioner is not replacing another worker with the beneficiary and has not provided evidence of any uncharacteristic expenditures or losses incurred or of its reputation within the industry. There is nothing in the record to indicate that the financial documents should be given less weight. Thus, assessing the totality of the circumstances in this individual case, it is concluded that the petitioner has not established that he had the continuing ability to pay the proffered wage.

Beyond the decision of the director, the petitioner has not established that the beneficiary is qualified for the proffered 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. at 159; 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 *Matter of Silver Dragon Chinese Restaurant*, 19 I&N Dec. 401, 406 (Comm'r 1986). See also, *Madany v. Smith*, 696 F.2d 1008 (D.C. Cir. 1983); *K.R.K. Irvine, Inc. v. Landon*, 699 F.2d 1006 (9th Cir. 1983); *Stewart Infra-Red Commissary of Massachusetts, Inc. v. Coomey*, 661 F.2d 1 (1st Cir. 1981).

In the instant case, the labor certification states that the proffered position requires a B.A. degree in English and six months of experience in the job offered of copy writer. On the labor certification, the beneficiary claims to qualify for the proffered position based on a Bachelor of Arts degree in English from the [REDACTED] Australia, completed in 1985 and a graduate diploma of arts in library and information science from [REDACTED] Australia completed in 1992. The record contains a copy of the beneficiary's Bachelor of Arts diploma and transcripts from the [REDACTED] Australia and also a copy of the beneficiary's graduate diploma of arts and transcripts from [REDACTED], Australia.

The record also contains an evaluation of the beneficiary's credentials prepared by [REDACTED], dated January 19, 1999. The evaluation concludes that the beneficiary's education from the [REDACTED] and [REDACTED] are equivalent to a Bachelor of Arts degree in English and library science from an accredited university in the United States. However, the AAO noted in the NOID/NODI that the evaluation fails to specify the methods used in equating the beneficiary's two degrees with a single degree in the United States. The AAO further noted that the beneficiary's diploma does not state the beneficiary's area of concentration or that the degree itself was in English. The beneficiary's transcripts indicate that only five courses in English or literature were taken. Furthermore, the beneficiary's bachelor's degree is a three-year degree rather than a four-year bachelor's degree. The beneficiary's graduate degree in library and information science did not include any additional English or literature courses, thus it is not clear how the beneficiary's educational credentials can be reliably equated to a U.S. Bachelor's in English as is required by the labor certification.

USCIS may, in its discretion, use as advisory opinions statements submitted as expert testimony. See *Matter of Caron International*, 19 I&N Dec. 791, 795 (Commr. 1988). However, USCIS is

ultimately responsible for making the final determination regarding an alien's eligibility for the benefit sought. *Id.* The submission of letters from experts supporting the petition is not presumptive evidence of eligibility. USCIS may evaluate the content of the letters as to whether they support the alien's eligibility. See *id.* at 795. USCIS may give less weight to an opinion that is not corroborated, in accord with other information or is in any way questionable. *Id.* at 795. See also *Matter of Soffici*, 22 I&N Dec. 158, 165 (Commr. 1998) (citing *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Commr. 1972)); *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).

In the NOID/NODI, the AAO noted that it had reviewed the Electronic Database for Global Education (EDGE) created by the American Association of Collegiate Registrars and Admissions Officers (AACRAO). According to its website, AACRAO is "a nonprofit, voluntary, professional association of more than 11,000 higher education admissions and registration professionals who represent more than 2,600 institutions and agencies in the United States and in over 40 countries around the world." See <http://www.aacrao.org/About-AACRAO.aspx>. Its mission "is to serve and advance higher education by providing leadership in academic and enrollment services." *Id.* EDGE is "a web-based resource for the evaluation of foreign educational credentials." <http://edge.aacrao.org/info.php>. Authors for EDGE are not merely expressing their personal opinions. Rather, they must work with a publication consultant and a Council Liaison with AACRAO's National Council on the Evaluation of Foreign Educational Credentials. If placement recommendations are included, the Council Liaison works with the author to give feedback and the publication is subject to final review by the entire Council. *Id.* USCIS considers EDGE to be a reliable, peer-reviewed source of information about foreign credentials equivalencies.

According to EDGE, a bachelor's degree from Australia represents attainment of a level of education comparable to three years of university study in the United States. In addition, a postgraduate certificate from a university in Australia represents attainment of a level of education comparable to either up to one year of university study in the United States, or, if the certificate requires a three year degree and is awarded upon completion of one and one-half years of study, it represents attainment of education comparable to a bachelor's degree in the United States. Therefore, as the beneficiary's transcripts failed to reflect any courses or credits in English beyond those earned in the three-year degree, it appears that the beneficiary's postgraduate diploma of arts in library and information science would at most equate to a U.S. bachelor's degree in library and information science rather than in English.

On appeal, counsel asserts that the evaluation from [REDACTED] does discuss her methodology, quoting from [REDACTED] boilerplate statement included with the credential evaluations about what sources she routinely uses. However, counsel fails to address the fact that [REDACTED] does not discuss how she specifically equates the beneficiary's general bachelor's degree with no concentration shown and a graduate degree in library science to a bachelor's degree in English. In the NOID/NDI, the AAO specifically pointed out these deficiencies and asked for a peer-reviewed evidence to support the claim that the beneficiary's bachelor's degree and graduate degree in library science are equivalent to a U.S. bachelor's degree in English. Such an analysis would include a

comparison between the courses taken by the beneficiary and the course required for a bachelor's degree in English. In the NOID/NODI, the AAO specifically noted that any evaluations submitted in response should address the findings in the EDGE report. However, the petitioner failed to submit any evidence to address the AAO's concerns with regards to the beneficiary's education qualifications. Therefore, the AAO concludes that the evidence in the record does not establish that the beneficiary possessed the required education set forth on the labor certification by the priority date and the petitioner has also failed to establish that the beneficiary is qualified for the offered position.

In regard to the six months of experience in the job offered of copy writer required on the labor certification, the beneficiary claims to qualify for the offered position based on experience as an acting collection review librarian for the [REDACTED] in Sydney, Australia from July 1995 to September 1997 working 40 hours per week and as Research/Reference for the [REDACTED] in Sydney, Australia from November 1992 to July 1995 working 40 hours per week.

The AAO notified the petitioner that the record did not contain evidence of the beneficiary's experience. 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 AAO further noted that the labor certification clearly indicated at Section A.14. that the petitioner will not consider experience in any related occupation. Therefore, the beneficiary's experience in the jobs of acting collection review librarian and "Research/Reference" may not be used to meet the requirement of six months in the job offered of copy writer.

In response the petitioner submitted an experience letter dated March 28, 2008 from [REDACTED] manager, collections service for the [REDACTED] in Australia. [REDACTED] writes that the beneficiary was employed as a collection review librarian from 1995 to 1997. The petitioner also submits a letter dated March 20, 2008 from [REDACTED] team leader professional researchers team, reader services for the [REDACTED] stating that the beneficiary was employed as a research/reference librarian from 1992 to 1995.

Counsel asserts that the beneficiary's prior job duties reflect experience as a copy writer regardless of the job titles. However, as the letters make clear, the duties of the beneficiary's prior positions are not chiefly that of a copy writer and the AAO is unable to determine what portion of the beneficiary's experience, if any, was actually applicable to the proffered position. Had the petitioner intended to accept alternate occupations to satisfy the experience requirements of the position, the labor certification should have been crafted to reflect this. Therefore, the evidence in the record does not establish that the beneficiary possessed the required experience set forth on the labor certification by the priority date.

Beyond the decision of the director and as noted in the AAO NOID/NODI, the record does not establish that a *bona fide* job offer exists that was clearly open to all U.S. workers. *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).

The petitioner and the beneficiary had a pre-existing relationship at the time the labor certification was filed and continuing to the present. In the NOID/NODI, the AAO informed the petitioner that as the beneficiary and petitioner appeared to live together at the business address and owned property together, it appeared that the job offer was not a *bona fide* offer clearly open to all qualified U.S. workers. The petitioner was notified that signing the Form ETA 750 under penalty of perjury, attesting to the fact that the job offer was *bona fide* was material misrepresentation that could lead to the invalidation of the labor certification.

The NOID/NODI informed the petitioner that the Form I-140 and the Form ETA 750, as well as the Forms W-2 issued by the petitioner and the petitioner's Forms 1040 from 2001 through 2007 indicate that the petitioner's residence was [REDACTED] Los Angeles, California [REDACTED] from 2001 through 2007. The record of proceeding also contains a Form G-325A, Biographic Information, which the beneficiary signed under penalty of perjury on September 9, 2008, on which the beneficiary sets forth that he has resided at [REDACTED] Los Angeles, California [REDACTED] from August 1997 to the signing of the form on September 9, 2008. The beneficiary's address on his Forms W-2 and Forms 1040 from 2001 through 2007 also indicate that he resided at this address. The petitioner's 2008 Form 1040 and the 2008 Form W-2 issued to the beneficiary indicate that both men resided at [REDACTED] Los Angeles, California [REDACTED]. Therefore, the evidence in the record indicates that the beneficiary and the petitioner were residing together before and after the priority date.

The AAO further noted that the records of the Tax Assessor of Los Angeles, California contain information that the property located at [REDACTED] Los Angeles, California [REDACTED] is owned by the [REDACTED] a trust containing the initials of both men, which appears to name both the petitioner and the beneficiary as owners of the residence. Similarly, the records of the Tax Assessor of Los Angeles, California contain information that the

property located at [REDACTED] Los Angeles, California [REDACTED], a duplex, is owned by the [REDACTED], thus also indicating ownership of the property by a trust for the benefit of the petitioner and the beneficiary.

The AAO further noted that the beneficiary has posted reviews on the website of [REDACTED] in which he lists his name as [REDACTED] and states that, "...I live with a figure skating coach who is a twenty-five year veteran of the business..." See [REDACTED]. In another review, the beneficiary states, "As my partner is a figure skating coach, and I have actually skated at one of the rinks used in this movie..." See [REDACTED].

On appeal, counsel confirms that the petitioner and beneficiary have been in a committed relationship for over 16 years, well before the labor certification was filed in 2001. Counsel also states that the properties noted in the AAO NOID/NODI are owned by the petitioner but are part of a living trust that would allow the beneficiary to inherit the properties upon the petitioner's death. Counsel asserts that the petitioner did not have a responsibility to disclose his relationship with the beneficiary on the ETA 750 and therefore no misrepresentation has occurred. Counsel goes on to state that the AAO has not shown the job was not a *bona fide* offer or that any U.S. workers were disqualified for unlawful reasons. We note that in the NOID/NODI, the AAO specifically requested copies of the petitioner's recruitment materials including the recruitment report, print advertisements for the position and copies of any resumes or applications received. The petitioner's response to the NOID/NODI failed to address or comply with this request. The petitioner was given ample opportunity to provide evidence of a *bona fide* job offer, but failed to do so.

On appeal, counsel also states that the nature of the job opportunity should be judged on the basis of the totality of circumstance test established in *Modular Container Systems, Inc.*, 1989-INA-228 (BALCA Jul. 16, 1991) (*en banc*). Counsel asserts that only one of the factors laid out in that case to indicate that a labor certification application would warrant further scrutiny, apply in the instant case. The AAO disagrees and finds that three of the factors are present in this case. First, given the beneficiary's relationship with the sole owner and only employee of the petitioner, it is likely that the beneficiary was in a position to influence the hiring decision. Second, the beneficiary has a relationship with the petitioner's owner. Third, the beneficiary would be one of only two employees. When subjected to a totality of circumstances analysis, the job opportunity in the instant case does not appear to be a *bona fide* job opportunity that was clearly open to any qualified U.S. worker.

Therefore, we find that the job opportunity was not clearly open to any qualified U.S. worker. As such, the petitioner willfully misrepresented the job opportunity on the labor certification. 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 ETA 750 and the immigrant petition analysis of U.S. Citizenship and Immigration Services (USCIS).

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.

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 labor certification will be invalidated with a finding of fraud. Therefore, the petition must also be denied because it is not supported by a valid labor certification

Additionally, based on information in the petitioner's tax returns submitted in response to the AAO's NOID/NODI, it appears that the petitioner's ice skating business is no longer operational. From 2001 to 2009, the petitioner filed a Schedule C with his Form 1040 for his sole proprietorship, indicating that he owns an ice skating instructor business. This Schedule was not filed with the sole proprietor's Form 1040 from 2010 to 2011, indicating that he no longer owns and operates the ice skating business. If the organization is no longer in business, then no *bona fide* job offer exists, and the petition and appeal are therefore moot. Even if the appeal could be otherwise sustained, the approval of the petition would be subject to automatic revocation due to the termination of petitioner's business. See 8 C.F.R. § 205.1(a)(iii)(D).

Finally, beyond the decision of the director, it appears that the Form I-140 petition was not supported a certified labor certification for the same job opportunity. The ETA 750 lists the petitioner's business as real estate. The Form I-140 petition states that the petitioner is an ice skating instructor business and the job description is specific to the ice skating industry. A labor certification is only valid for the particular job opportunity stated on the application form. *See* 20 C.F.R. § 656.30(c). In the instant case the ETA 750 was certified for a copy writer for a real estate business and the Form I-140 was filed for a copy writer for an ice skating instructor business. Therefore, the Form I-140 was not filed with a valid labor certification for the same job opportunity and the petition must be denied.

The petition will be denied for the above stated reasons, with each considered as an independent and alternative basis for denial. In visa petition proceedings, the burden of proving eligibility for the benefit sought remains entirely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. Here, that burden has not been met.

ORDER: The appeal is dismissed.

FURTHER ORDER: The Application for Alien Employment Certification, Form ETA 750 is invalidated pursuant to 20 C.F.R. § 656.30(d) with a finding of fraud.