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U.S. Citizenship
and Immigration
Services



DATE: MAR 18 2013

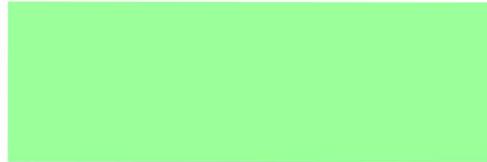
OFFICE: NEBRASKA SERVICE CENTER

FILE: [Redacted]

IN RE: Petitioner: [Redacted]
Beneficiary: [Redacted]

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

ON BEHALF OF PETITIONER:



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 a restaurant. It seeks to employ the beneficiary permanently in the United States as a Pakistani specialty cook. As required by statute, the petition is accompanied by an ETA Form 9089, Application for Permanent Employment Certification, approved by the United States Department of Labor (DOL). The director determined that the petitioner had not established that it was a valid successor-in-interest to the original labor certification, and therefore, the petition was submitted without a valid labor certification application. The director also found that the entity that filed the labor certification did not exist on the priority date, and therefore, could not make a *bona fide* job offer. The director further 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. 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.

As set forth in the director's May 12, 2010 denial, an issue in this case is whether the I-140 petitioner, [REDACTED] (petitioning successor), is a successor-in-interest to the entity that filed the ETA 9089 labor certification, [REDACTED] (predecessor).

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

The record indicates that the petitioner is structured as a limited liability company.² The petitioning successor has not submitted any of its IRS Form 1065 tax returns.³ On the petition, the petitioning

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 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).

² A limited liability company (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 predecessor, [REDACTED] an LLC formed under Arizona state

successor claimed to have been established in 2008 and to currently employ three workers.⁴ On the ETA Form 9089, signed by the beneficiary on April 10, 2009, the beneficiary did not list his employment with the petitioner.⁵

USCIS has not issued regulations governing immigrant visa petitions filed by a successor-in-interest employer. Instead, such matters are adjudicated in accordance with *Matter of Dial Auto Repair Shop, Inc.*, 19 I&N Dec. 481 (Comm'r 1986) ("*Matter of Dial Auto*") a binding, legacy Immigration and Naturalization Service (INS) decision that was designated as a precedent by the Commissioner in 1986. The regulation at 8 C.F.R. § 103.3(c) provides that precedent decisions are binding on all immigration officers in the administration of the Act.

The facts of the precedent decision, *Matter of Dial Auto*, are instructive in this matter. *Matter of Dial Auto* involved a petition filed by Dial Auto Repair Shop, Inc. on behalf of an alien beneficiary for the position of automotive technician. The beneficiary's former employer, Elvira Auto Body, filed the underlying labor certification. On the petition, Dial Auto claimed to be a successor-in-interest to Elvira Auto Body. The part of the Commissioner's decision relating to the successor-in-interest issue follows:

Additionally, the representations made by the petitioner concerning the relationship between Elvira Auto Body and itself are issues which have not been resolved. In order to determine whether the petitioner was a true successor to Elvira Auto Body, counsel

law, is considered to be a sole proprietorship for federal tax purposes. The petitioning successor, [REDACTED] LLC, an LLC formed under Arizona state law, is considered to be a partnership for federal tax purposes. The petitioning successor, 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. (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.) 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.

³ The entity that filed the labor certification, [REDACTED], submitted the 2008 IRS Form 1040 Individual Income Tax Return with Schedule C for [REDACTED]. However, the entity that filed the I-140, [REDACTED] has not submitted its IRS Form 1065 for 2009 or 2010.

⁴ The record indicates that [REDACTED] was organized on March 2, 2009. The organization that filed the labor certification, [REDACTED] was organized in 2008. Furthermore, The I-140, submitted by [REDACTED] contains [REDACTED] Federal Employment Identification Number (FEIN) even though [REDACTED] is a separate entity.

⁵ This cannot be reconciled with the 2008 Form W-2 in the record issued by [REDACTED] to the beneficiary.

was instructed on appeal to fully explain the manner by which the petitioner took over the business of Elvira Auto Body and to provide the Service with a copy of the contract or agreement between the two entities; however, no response was submitted. If the *petitioner's claim of having assumed all of Elvira Auto Body's rights, duties, obligations, etc.*, is found to be untrue, then grounds would exist for invalidation of the labor certification under 20 C.F.R. § 656.30 (1987). Conversely, if the claim is found to be true, and it is determined that an actual successorship exists, the petition could be approved if eligibility is otherwise shown, including ability of the predecessor enterprise to have paid the certified wage at the time of filing.

19 I&N Dec. at 482-3 (emphasis added).

In the present matter, the USCIS Nebraska Service Center Director found that the claimed successor, [REDACTED], did not submit evidence that it was a successor-in-interest to the entity on the labor certification, [REDACTED]. The director gave the claimed successor the opportunity to submit evidence showing that it was a successor-in-interest through issuance of both a request for additional evidence (RFE) dated August 17, 2009, and a notice of intent to deny (NOID) dated October 22, 2009. The petitioning successor did not submit any documentary evidence in response to either the RFE or the NOID that supports a successor-in-interest claim.

In *Matter of Dial Auto*, the petitioner specifically represented that it had assumed all of the original employer's rights, duties, and obligations, but failed to submit requested evidence to establish that this claim was, in fact, true. The Commissioner stated that if the petitioner's claim was untrue, the INS could invalidate the underlying labor certification for fraud or willful misrepresentation. For this reason the Commissioner said: "if the claim is found to be true, *and* it is determined that an actual successorship exists, the petition could be approved" *Id.* (emphasis added).

The Commissioner clearly considered the petitioner's claim that it had assumed all of the original employer's rights, duties, and obligations to be a separate inquiry from whether or not the petitioner is a successor-in-interest. The Commissioner was most interested in receiving a full explanation as to the "manner by which the petitioner took over the business" and seeing a copy of "the contract or agreement between the two entities" in order to verify the petitioner's claims. *Id.*

Accordingly, *Matter of Dial Auto* does not stand for the proposition that a valid successor relationship may only be established through the assumption of "all" or a totality of a predecessor entity's rights, duties, and obligations. Instead, the generally accepted definition of a successor-in-interest is broader: "One who follows another in ownership or control of property. A successor in interest retains the same rights as the original owner, with no change in substance." *Black's Law Dictionary* 1570 (9th ed. 2009) (defining "successor in interest").

With respect to corporations, a successor is generally created when one corporation is vested with the rights and obligations of an earlier corporation through amalgamation, consolidation, or other

assumption of interests.⁶ *Id.* at 1569 (defining “successor”). When considering other business organizations, such as partnerships or sole proprietorships, even a partial change in ownership may require the petitioner to establish that it is a true successor-in-interest to the employer identified in the labor certification application.⁷

The merger or consolidation of a business organization into another will give rise to a successor-in-interest relationship because the assets and obligations are transferred by operation of law. However, a mere transfer of assets, even one that takes up a predecessor’s business activities, does not necessarily create a successor-in-interest. *See Holland v. Williams Mountain Coal Co.*, 496 F.3d 670, 672 (D.C. Cir. 2007). An asset transaction occurs when one business organization sells property – such as real estate, machinery, or intellectual property - to another business organization. The purchase of assets from a predecessor will only result in a successor-in-interest relationship if the parties agree to the transfer and assumption of the essential rights and obligations of the predecessor necessary to carry on the business.⁸ *See generally* 19 Am. Jur. 2d *Corporations* § 2170 (2010).

Considering *Matter of Dial Auto* and the generally accepted definition of successor-in-interest, a petitioner may establish a valid successor relationship for immigration purposes if it satisfies three conditions. First, the petitioning successor must fully describe and document the transaction transferring ownership of all, or a relevant part of, the beneficiary’s predecessor employer. Second,

⁶ Merger and acquisition transactions, in which the interests of two or more corporations become unified, may be arranged into four general groups. The first group includes “consolidations” that occur when two or more corporations are united to create one new corporation. The second group includes “mergers,” consisting of a transaction in which one of the constituent companies remains in being, absorbing the other constituent corporation. The third type of combination includes “reorganizations” that occur when the new corporation is the reincarnation or reorganization of one previously existing. The fourth group includes transactions in which a corporation, although continuing to exist as a “shell” legal entity, is in fact merged into another through the acquisition of its assets and business operations. 19 Am. Jur. 2d *Corporations* § 2165 (2010).

⁷ For example, unlike a corporation with its own distinct legal identity, if a general partnership adds a partner after the filing of a labor certification application, a Form I-140 filed by what is essentially a new partnership must contain evidence that this partnership is a successor-in-interest to the filer of the labor certification application. *See Matter of United Investment Group*, 19 I&N Dec. 248 (Comm’r 1984). Similarly, if the employer identified in a labor certification application is a sole proprietorship, and the petitioner identified in the Form I-140 is a business organization, such as a corporation which happens to be solely owned by the individual who filed the labor certification application, the petitioner must nevertheless establish that it is a bona fide successor-in-interest.

⁸ The mere assumption of immigration obligations, or the transfer of immigration benefits derived from approved or pending immigration petitions or applications, will not give rise to a successor-in-interest relationship unless the transfer results from the bona fide acquisition of the essential rights and obligations of the predecessor necessary to carry on the business. *See* 19 Am. Jur. 2d *Corporations* § 2170; *see also* 20 C.F.R. § 656.12(a).

the petitioning successor must demonstrate that the job opportunity is the same as originally offered on the labor certification. Third, the petitioning successor must prove by a preponderance of the evidence that it is eligible for the immigrant visa in all respects.

Evidence of transfer of ownership must show that the successor not only purchased assets from the predecessor, but also the essential rights and obligations of the predecessor necessary to carry on the business. To ensure that the job opportunity remains the same as originally certified, the successor must continue to operate the same type of business as the predecessor, in the same metropolitan statistical area and the essential business functions must remain substantially the same as before the ownership transfer. *See Matter of Dial Auto*, 19 I&N Dec. at 482.

In order to establish eligibility for the immigrant visa in all respects, the petitioner must support its claim with all necessary evidence, including evidence of ability to pay. The petitioning successor must prove the predecessor's ability to pay the proffered wage as of the priority date and until the date of transfer of ownership to the successor. In addition, the petitioner must establish the successor's ability to pay the proffered wage in accordance from the date of transfer of ownership forward. 8 C.F.R. § 204.5(g)(2); *see also Matter of Dial Auto*, 19 I&N Dec. at 482.

Applying the analysis set forth above to the instant petition, the petitioner has not established a valid successor relationship for immigration purposes. The petitioner has not fully described and documented the transaction transferring ownership of all, or a relevant part of, the beneficiary's predecessor employer. In response to the director's RFE, a letter is submitted from an unknown individual which states that there was an "opportunity to sell" the restaurant, [REDACTED], but provides no further details. In response to the director's NOID, dated October 22, 2009, a letter is submitted and signed by [REDACTED] and the beneficiary, [REDACTED], which states that the "owner of the restaurant has changed," and "by the time we had filed all of the paperwork [to the Department of Labor], the restaurant was already sold to a new owner." No details were provided and no other documentation was submitted.

On appeal, the petitioner submits letters from [REDACTED] and from [REDACTED] stating that the organization of the two entities is the same and that the successor continued to operate a Pakistani restaurant and employ the beneficiary as a cook. The petitioner also submits a copy of an "assignment of commercial lease" between the assignor, [REDACTED] (represented by the beneficiary, [REDACTED] i) and the assignee, [REDACTED] (represented by [REDACTED]).

The letters in the record of proceeding and the letters submitted on appeal do not provide any details regarding the sale of the restaurant and the transfer of ownership, nor is any independent, objective evidence submitted to corroborate the letters. *See Matter of Ho*, 19 I&N Dec. 582, 591-592 (BIA 1988) (states that the petitioner must resolve any inconsistencies in the record by independent, objective evidence). The lease assignment submitted on appeal does not show that the successor purchased assets from the predecessor, as well as the essential rights and obligations of the predecessor necessary to carry out the business.

In the letters submitted on appeal, the assertion that the entities are both organized as LLCs, that they both employ the beneficiary as a cook, and that they both operate as a [REDACTED] with the same vendors does not suffice to show that the successor not only purchased assets from the predecessor, but also the essential rights and obligations of the predecessor necessary to carry on the business. Going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. *Matter of Soffici*, 22 I&N Dec. 158, 165 (Comm'r 1998) (citing *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg'l Comm'r 1972)).

On appeal, counsel asserts that the two letters should be considered in light of a Neufeld memo. See Memorandum from Donald Neufeld, Acting Associate Director, Domestic Operations, *Successor-In-Interest Determinations in Adjudication of Form I-140 Petitions; Adjudicator's Field Manual (AFM) Update to Chapter 22.2(b)(5) (AD09-37)*. HQ70/6.2 ADO9-37, August 6, 2009.⁹

⁹ The Neufeld Memorandum relied upon by counsel provides guidance to adjudicators to review a successor-in-interest claim based on three factors. First, the petitioning successor must fully describe and document the transaction transferring ownership of all, or a relevant part of, the beneficiary's predecessor employer. Second, the petitioning successor must demonstrate that the job opportunity is the same as originally offered on the labor certification. Third, the petitioning successor must prove by a preponderance of the evidence that it is eligible for the immigrant visa in all respects. The AAO is bound by the Act, agency regulations, precedent decisions of the agency and published decisions from the circuit court of appeals from whatever circuit that the action arose. See *N.L.R.B. v. Ashkenazy Property Management Corp.*, 817 F.2d 74, 75 (9th Cir. 1987) (administrative agencies are not free to refuse to follow precedent in cases originating within the circuit); *R.L. Inv. Ltd. Partners v. INS*, 86 F. Supp. 2d 1014, 1022 (D. Haw. 2000), *aff'd*, 273 F.3d 874 (9th Cir. 2001) (unpublished agency decisions and agency legal memoranda are not binding under the APA, even when they are published in private publications or widely circulated). Even USCIS internal memoranda do not establish judicially enforceable rights. See *Loa-Herrera v. Trominski*, 231 F.3d 984, 989 (5th Cir. 2000) (An agency's internal guidelines "neither confer upon [plaintiffs] substantive rights nor provide procedures upon which [they] may rely.") See also Stephen R. Viña, Legislative Attorney, Congressional Research Service (CRS) Memorandum, to the House Subcommittee on Immigration, Border Security, and Claims regarding "Questions on Internal Policy Memoranda issued by the Immigration and Naturalization Service," dated February 3, 2006. The memorandum addresses, "the specific questions you raised regarding the legal effect of internal policy memoranda issued by the former Immigration and Naturalization Service (INS) on current Department of Homeland Security (DHS) practices." The memo states that, "policy memoranda fall under the general category of nonlegislative rules and are, by definition, legally nonbinding because they are designed to 'inform rather than control.'" CRS at p.3 citing to *American Trucking Ass'n v. ICC*, 659 F.2d 452, 462 (5th Cir. 1981). See also *Pacific Gas & Electric Co. v. Federal Power Comm'n*, 506 F.2d 33 (D.C. Cir. 1974), "A general statement of policy . . . does not establish a binding norm. It is not finally determinative of the issues or rights to which it is addressed. The agency cannot apply or rely upon a general statement of policy as law because a general statement of policy announces what the agency seeks to establish as policy." The memo notes that "policy

Counsel also asserts that the copy of the assignment of the commercial lease space should be considered.

The director, however, requested evidence regarding the successor-in-interest in an RFE dated August 17, 2009 and in a NOID dated October 22, 2009. 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 request for evidence. *Id.* Under the circumstances, the AAO need not, and does not, consider the sufficiency of the evidence submitted on appeal.

Based on the evidence in the record, the petitioning successor has not established that it is a successor-in-interest to the predecessor.

Another 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. The petitioning successor must prove the predecessor's ability to pay the proffered wage as of the priority date and until the date of transfer of ownership to the successor. In addition, the petitioner must establish the successor's ability to pay the proffered wage in accordance from the date of transfer of ownership forward. 8 C.F.R. § 204.5(g)(2); *see also Matter of Dial Auto*, 19 I&N Dec. at 482.

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:

memoranda come in a variety of forms, including guidelines, manuals, memoranda, bulletins, opinion letters, and press releases. Legislative rules, on the other hand, have the force of law and are legally binding upon an agency and the public. Legislative rules are the product of an exercise of delegated legislative power.” *Id.* at 3, citing to Robert A. Anthony, *Interpretive Rules, Policy Statements, Guidances, Manuals, and the Like – Should Federal Agencies Use them to Bind the Public?*, 41 Duke L.J. 1311 (1992).

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 ETA Form 9089, Application for Permanent 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 ETA Form 9089, Application for Permanent 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 ETA Form 9089 was accepted on August 17 2008. The proffered wage as stated on the ETA Form 9089 is \$13.00 per hour (\$27,040 per year based on 40 hours per week). The ETA Form 9089 states that the position requires 24 months of experience in the job offered as a Pakistani specialty cook.

The petitioner must establish that its job offer to the beneficiary is a realistic one. Because the filing of an ETA 9089 labor certification application establishes a priority date for any immigrant petition later based on the ETA 9089, 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.

The beneficiary did not list his employment with the petitioner or the previous entity on the ETA Form 9089. However, the evidence submitted with the petition and on appeal shows that the beneficiary was employed by the petitioning successor and the predecessor. On appeal, the petitioning successor submitted a copy of the payroll register for May 10, 2010 showing payment to

the beneficiary; a copy of a check paid to the beneficiary on May 10, 2010 in the gross amount of \$1,040.00; a copy of its Form 941 quarterly tax return for the first quarter of 2010; a copy of its Arizona state quarterly withholding tax return, Form A1-QRT, for the first quarter of 2010; and a copy of its Arizona state unemployment tax and wage report for the first quarter of 2010. The record of proceeding also contains a copy of the payroll information for the beneficiary from the pay period beginning February 28, 2009 and ending July 17, 2009; copies of checks payable to the beneficiary on July 6, 2010 and July 20, 2010 from [REDACTED] the beneficiary's amended individual tax returns for 2009; the beneficiary's Form W-2 from the predecessor for 2008 showing wages of \$8,840; a copy of the predecessor's Form 941 quarterly tax return for the first quarter of 2009 and the third quarter of 2008; and a copy of the predecessor's Arizona state quarterly withholding tax return, Form A1-QRT, for the first quarter of 2009 and the third quarter of 2008.

It is incumbent upon the petitioner to resolve any inconsistencies in the record by independent objective evidence. *See Matter of Ho*, 19 I&N Dec. 582, 591-92 (BIA 1988). Any attempt to explain or reconcile such inconsistencies will not suffice unless the petitioner submits competent objective evidence pointing to where the truth lies. *Id.* Furthermore, doubt cast on any aspect of the petitioner's proof may, of course, lead to a reevaluation of the reliability and sufficiency of the remaining evidence offered in support of the visa petition. *Id.*

In the instant case, the petitioner has not established through independent, objective evidence that it employed and paid the beneficiary the proffered wage from the priority date in 2008 onwards. The 2008 Form W-2 for the beneficiary shows payment of \$8,840 for the year, which is less than the proffered wage of \$27,040. No other Form W-2 is submitted. The quarterly tax information is not submitted for all four quarters of any given year, and the quarterly returns do not contain any identifying information about the employee, and thus, cannot be considered without other independent, objective evidence in the record. Furthermore, the quarterly tax returns submitted do not reflect an amount in wages, tips, and other compensation that reflects the proffered wage.

The record also contains a printout of paycheck information for the beneficiary from February 28, 2009 to July 17, 2009, but the paycheck information does not contain the name of the employer, thus making it impossible to ascertain who issued the checks. Furthermore, there are business checks issued to the beneficiary by the petitioning successor dated July 6, 2010 and July 20, 2010 for \$852.06, which is the same amount as the net pay for the beneficiary on the payroll checks submitted for July 6, 2010 and July 20, 2010. It is unclear why the beneficiary would have been paid the same amount on the same date through payroll and by business check. Nothing was submitted to explain the discrepancy.

Finally, the beneficiary's 2009 amended tax returns are included in the record of proceeding. The AAO views the beneficiary's amended tax return as questionable, specifically because the beneficiary amended the tax returns to include wages that were not originally reported. *See Matter of Ho*, 19 I&N Dec. 582, 591 (BIA 1988) (stating that doubt cast on any aspect of the petitioner's proof may lead to a reevaluation of the reliability and sufficiency of the remaining evidence offered in support of the visa petition). A petitioner may not make material changes to a petition in an effort to make a deficient petition conform to USCIS requirements. *See Matter of Izummi*, 22 I&N Dec.

169, 176 (Assoc. Comm'r 1988). Further, the amended tax return shows no evidence of submission to the Internal Revenue Service (IRS) or its receipt or acceptance by the IRS. USCIS requires IRS-certified copies of the amended return to establish that the amended return was actually received and processed by the IRS. Going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. *Matter of Soffici*, 22 I&N Dec. 158, 165 (Comm'r 1998) (citing *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg'l Comm'r 1972)). Thus, the AAO will not consider the beneficiary's 2009 amended tax returns.

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 wage expense is misplaced. Showing that the petitioner paid wages in excess of the proffered wage is insufficient.

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).

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

The record before the director closed on November 16, 2009 with the receipt by the director of the petitioner's submissions in response to the director's NOID. As of that date, the predecessor's 2008 federal income tax return is the most recent return available. The petitioner successor has not submitted tax returns for 2009, nor has the predecessor submitted tax returns for 2009, nor has any information been submitted to indicate the date the predecessor closed and the petitioning successor opened. The non-existence or other unavailability of required evidence creates a presumption of ineligibility. 8 C.F.R. § 103.2(b)(2)(i). The predecessor's tax returns stated its net income as detailed in the table below.

In 2008, the predecessor's Form 1040 Schedule C stated net income¹⁰ of \$-3,640.

Therefore, for the year 2008 the predecessor did not establish that it had sufficient net income to pay the proffered wage or the difference between the wages actually paid to the beneficiary and the proffered wage.

If the net income the petitioner demonstrates it had available during that period, if any, added to the wages paid to the beneficiary during the period, if any, do not equal the amount of the proffered wage or more, USCIS will review the petitioner's assets. Net current assets are the difference between the petitioner's current assets and current liabilities.¹¹ Since the petitioner did not submit audited financial statements or annual reports according to the regulation at 8 C.F.R. § 204.5(g)(2), and current assets and current liabilities are not stated on the Schedules C (Form 1040) submitted by the petitioner, net current assets cannot be ascertained for any year. Therefore, the petitioner did not establish that it had sufficient net current assets to pay the difference between wages actually paid to the beneficiary and the proffered wage in 2008, or the full proffered wage in 2009. The non-existence or other unavailability of required evidence creates a presumption of ineligibility. 8 C.F.R. § 103.2(b)(2)(i).

¹⁰ The petitioner's net income is reported on its member's IRS Form 1040, Schedule C at line 31 for 2008.

¹¹ 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.

Therefore, for the years 2008 and 2009, neither the petitioner nor the predecessor established that it had sufficient net current assets to pay the proffered wage.

The record also contains unaudited balance sheets and unaudited income statements. The regulation at 8 C.F.R. § 204.5(g)(2) makes clear that where a petitioner relies on financial statements to demonstrate its ability to pay the proffered wage, those financial statements must be audited. As there is no accountant's report accompanying these statements, the AAO cannot conclude that they are audited statements. Unaudited financial statements are the representations of management. The unsupported representations of management are not reliable evidence and are insufficient to demonstrate the ability to pay the proffered wage.

Additionally, the record contains bank account statements for the petitioning successor and the predecessor. 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 or audited balance sheets.

Thus, from the date the ETA Form 9089 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.

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 *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 the instant case, the petitioning successor has not demonstrated sufficient net income or net assets to pay the proffered wage. The petitioning successor also failed to include any evidence of historical growth of its business, its reputation within the industry, or the occurrence of any uncharacteristic business expenditures or losses. 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 stated in the director's denial, another issue in this case is whether the job offer is *bona fide*. The director stated that the entity that filed the labor certification did not exist at the time of filing, and therefore, it could not make a *bona fide* offer of employment. The director also stated that the individual who signed the labor certification, [REDACTED] is not the same person as the sole member of the petitioner as listed on the Articles of Organization, [REDACTED]. Therefore, as [REDACTED] was not the owner of the employer listed on the labor certification, he improperly signed it.

Under 20 C.F.R. §§ 626.20(c)(8) and 656.3, the petitioner has the burden when asked to show that a valid employment relationship exists, that a *bona fide* job opportunity is available to U.S. workers. *See Matter of Amger Corp.*, 87-INA-545 (BALCA 1987).

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 ETA Form 9089 specifically asks in Section C.9: “Is the employer a closely held corporation, partnership, or sole proprietorship in which the alien has an ownership interest, or is there a familial relationship between the owners, stockholders, partners, corporate officers, incorporators, and the alien?” The petitioner identified that it was an entity with two employees, and checked “yes” to the question of whether the beneficiary was related to the owner. In determining whether the job is subject to the alien’s influence and control, the adjudicator will look to the totality of the circumstances. See *Modular Container Systems, Inc.*, 1989-INA-228 (BALCA Jul. 16, 1991) (*en banc*). The same standard has been incorporated into the PERM regulations. See 69 Fed. Reg. 77326, 77356 (ETA) (Dec. 27, 2004).

The PERM regulation specifically addresses this issue at 20 C.F.R. § 656.17(l) and states in pertinent part:

(l) Alien influence and control over job opportunity. If the employer is a closely held corporation or partnership in which the alien has an ownership interest, or if there is a familial relationship between the stockholders, corporate officers, incorporators, or partners, and the alien, or if the alien is one of a small number of employees, the employer in the event of an audit must be able to demonstrate the existence of a bona fide job opportunity, i.e., the job is available to all U.S. workers, and must provide to the Certifying Officer, the following supporting documentation:

- (1) A copy of the articles of incorporation, partnership agreement, business license or similar documents that establish the business entity;
- (2) A list of all corporate/company officers and shareholders/partners of the corporation/firm/business, their titles and positions in the business' structure, and a description of the relationships to each other and to the alien beneficiary;
- (3) The financial history of the corporation/company/partnership, including the total investment in the business entity and the amount of investment of each officer, incorporator/partner and the alien beneficiary; and
- (4) The name of the business' official with primary responsibility for interviewing and hiring applicants for positions within the organization and the name(s) of the business' official(s) having control or influence over hiring decisions involving the position for which labor certification is sought.
- (5) If the alien is one of 10 or fewer employees, the employer must document any family relationship between the employees and the alien.

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.

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).

In the instant case, there is nothing in the record to support a bona fide job offer at the time the labor certification was filed. The record contains an undated letter from an unknown individual on "[REDACTED]" letterhead which admits that the labor certification was filed before the company existed.

The record does not contain any information regarding the date of sale of the business or any documents showing the sale or transfer of the business to the petitioning successor. On appeal, a letter is submitted from [REDACTED] in which he admits the restaurant was not physically in existence at the time of filing the labor certification. The record, however, contains evidence that the beneficiary was paid in the third quarter of 2008, prior to the predecessor obtaining a certificate of occupancy, which was issued on September 30, 2008. As an entity that does not exist cannot extend an offer of employment to an employee, the offer was not a *bona fide* offer of employment.

Furthermore, the beneficiary was listed as manager of [REDACTED] in the Articles of Organization. This is a member-managed business, and thus, the beneficiary had control over the day-to-day operations of the business. The beneficiary also claims that [REDACTED], Inc., of which he was a shareholder, officer, and director, had an ownership interest in [REDACTED], [REDACTED] who is the sole member of [REDACTED], is also a member of [REDACTED]. The business relationship between the beneficiary and [REDACTED] was never disclosed to the DOL.¹² Therefore, no *bona fide* job offer existed.

Thus, the AAO is invalidating the labor certification pursuant to the regulation at 20 C.F.R. § 656.30(d) based on willful misrepresentation of a material fact.

Beyond the decision of the director,¹³ the petitioner has also not established that the beneficiary is qualified for the offered position. The petitioner must establish that the beneficiary possessed all of 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

¹² See <http://starpas.azcc.gov/scripts/cgiip.exe/WService=wsbroker1/history-detail.p?corp-id=L14860743> (accessed December 17, 2012).

¹³ 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*, 229 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) (noting that the AAO conducts appellate review on a *de novo* basis).

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 offered position requires 24 months of experience in the job offered as a Pakistani specialty cook. On the labor certification, the beneficiary claims to qualify for the offered position based on experience as a cook. The labor certification requires the beneficiary to possess special skills as listed in Part H.14. In Part H.14, the labor certification requires the ability to plan menus, order food, operate kitchen equipment, manage food inventory, weigh and measure ingredients, and cook Pakistani-style dishes.

On Part K of the labor certification, the beneficiary lists his experience as a cook at the [REDACTED] in Bombay, India. His duties as described on the labor certification do not describe cooking Pakistani-style food.

The 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 a letter from [REDACTED] in Bombay, India. The letter does not state the beneficiary's duties nor does it describe a position in which the beneficiary cooked Pakistani-style food. The experience letter merely states that the beneficiary was a "cook" and that he engaged in "testing of foods—especially in Indian and Pakistani foods." There is nothing in the letter that indicates the beneficiary had the required experience and special skills as set forth in the labor certification.

On the ETA Form 9089, which the beneficiary signed under penalty of perjury, he states that he worked for [REDACTED] as a purchasing manager from December 21, 1996 to July 19, 2006. He states that he worked forty hours per week. However, USCIS records reveal that the beneficiary, [REDACTED] obtained two L-1A non-immigrant executive/manager visas¹⁴ valid from August 24, 1999 to August 23, 2002 through [REDACTED], a company in which he was a shareholder, officer, and director.¹⁵ The two time periods overlap for the entire duration of his L-1A visa and extension.¹⁶ It is not plausible that the beneficiary was working full-time for two companies.

¹⁴ [REDACTED] petitioned for the beneficiary for an L-1A nonimmigrant visa with receipt number [REDACTED] valid from August 24, 1999 to August 23, 2000. [REDACTED] filed an extension of the L1A visa for the beneficiary with receipt number [REDACTED] from August 24, 2000 to August 23, 2002.

¹⁵ *See* [http://starpas.azcc.gov/scripts/cgiip.exe/WService=wsbroker1/history-detail.p?corp-id=\[REDACTED\]](http://starpas.azcc.gov/scripts/cgiip.exe/WService=wsbroker1/history-detail.p?corp-id=[REDACTED]) (accessed December 17, 2012) at the Arizona Secretary of State website.

In support of a previously filed petition on the beneficiary's behalf, the beneficiary submitted an affidavit, dated October 27, 2002, which stated that he worked as a purchasing agent for [REDACTED] beginning in August 1999. [REDACTED], owner of the [REDACTED] and [REDACTED], said in two affidavits, both dated February 19, 2001, that the beneficiary was employed at [REDACTED] from October 1996 to April 1997 and at [REDACTED] from May to July 1997. The beneficiary's G-325A dated October 27, 2002, states that he worked at the [REDACTED] beginning on May 1997 through the date of the application and at [REDACTED] from October 1996 to April 1997. Finally, on another previously filed application, the beneficiary states that he worked at [REDACTED] as a purchasing agent from August 1999 to the date of the application, at the [REDACTED] from May 1997 to July 1999, and at [REDACTED] from October 1996 to April 1997. The record is inconsistent regarding the beneficiary's work experience. The beneficiary has had multiple opportunities to adequately explain the inconsistencies, but he has not done so. Furthermore, the beneficiary was authorized to work as an executive/manager for [REDACTED] from 1999 to 2002, thus contradicting his claim that he worked as a "purchasing manager" from 1999 to 2006.

In a letter dated October 27, 2002, the beneficiary explains the discrepancies in his employment with [REDACTED] and [REDACTED]. He states that [REDACTED] owned a percentage of the [REDACTED]. However, he did not submit any documentation to support this assertion, the corporate records of the two business do not support this assertion, and the fact that a corporation, [REDACTED], which is its own entity, had an ownership interest in [REDACTED] does not make the two entities interchangeable. The two companies are separate entities with separate Federal Employment Identification Numbers (EIN) numbers.

Willful misrepresentation of a material fact in these proceedings may render the beneficiary inadmissible to the United States. See section 212(a)(6)(c) of the Act, 8 U.S.C. § 1182, 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."

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. Therefore, the petitioner has also failed to establish that the beneficiary is qualified for the offered position.

The AAO further finds that the predecessor and the beneficiary willfully misrepresented a material fact by intentionally misrepresenting the beneficiary's position and control over [REDACTED], intentionally misrepresenting the sale of the predecessor to the petitioning successor; and providing false information regarding the beneficiary's work experience.

The beneficiary is listed on [REDACTED] Articles of Organization as a manager. In the Articles of Organization for the restaurant, [REDACTED], [REDACTED] elected to be a manager-managed limited liability company. Additionally, [REDACTED] the individual who signed the ETA 9089 and submitted an undated letter on appeal regarding the restaurant and its

organization, is not listed as a member in the Articles of Organization. The sole member of [REDACTED] is "[REDACTED]"¹⁷

Additionally, the beneficiary signed an undated letter, together with [REDACTED], in response to the director's NOID, dated October 22, 2009, in which they explained why the beneficiary is listed as a "manager" of [REDACTED], why the information was not disclosed to the DOL, and why the 2009 quarterly tax return for the first quarter of 2009 was marked "business permanently closed" instead of marked "business sold." In the letter, they state that the beneficiary is listed as a manager because once the beneficiary became a lawful permanent resident, he planned to buy a share of the restaurant and manage it himself. They explain that they did not disclose the information to the DOL because by the time they had filed all of the paperwork, the restaurant had already been sold. Additionally, they state that the quarterly taxes were completed in a hurry, and thus, the wrong box was checked.

On appeal, the petitioner submitted two letters, one from [REDACTED] i and one from [REDACTED] which state that the beneficiary was a chef at their respective restaurants, [REDACTED] and [REDACTED]. However, the evidence demonstrates that the beneficiary was not the chef at [REDACTED] he was the manager, and had complete control over the day-to-day operations of the restaurant.

Moreover, to qualify as a third preference employment-based immigrant professional, the beneficiary was required to establish that he met the petitioner's minimum education and experience requirements. *Compare* 8 C.F.R. § 204.5(g) with § 204.5(1)(1)(3)(ii)(C). The beneficiary has intentionally attempted to mislead the Service by misrepresenting his experience, which is consistently inaccurate in the documentation on the record.

In this case, the Department of Labor was unable to make a proper investigation of the facts when determining certification, because the beneficiary shut off a line of relevant inquiry. If the Department of Labor had known the true facts, it would have denied the employer's labor certification. In other words, the concealed facts, if known, would have resulted in the employer's labor certification being denied. *See Matter of Silver Dragon Chinese Restaurant* at 403. Accordingly, the beneficiary's misrepresentation was material under the second and third inquiries of *Matter of S & B-C*.

By misrepresenting the beneficiary's position and control over the restaurant, the sale of the restaurant, and the beneficiary's experience, the beneficiary and the predecessor sought to procure a benefit provided under the Act through fraud and willful misrepresentation of a material fact. Any finding of fraud as a result shall be considered in any future proceeding where admissibility is an issue. *See also Matter of Ho*, 19 I&N Dec. at 591-592.

¹⁷ See [http://starpas.azcc.gov/scripts/cgiip.exe/WService=wsbroker1/history-detail.p?corp-id=\[REDACTED\]](http://starpas.azcc.gov/scripts/cgiip.exe/WService=wsbroker1/history-detail.p?corp-id=[REDACTED]) (accessed December 17, 2012) at the Arizona Secretary of State website.

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

(d) Invalidation of labor certifications. After issuance, a labor certification may be revoked by ETA using the procedures described in Sec. 656.32. Additionally, after issuance, a labor certification is subject to invalidation by the DHS or by a Consul of the Department of State upon a determination, made in accordance with those agencies' procedures or by a court, of fraud or willful misrepresentation of a material fact involving the labor certification application. If evidence of such fraud or willful misrepresentation becomes known to the CO or to the Chief, Division of Foreign Labor Certification, the CO, or the Chief of the Division of Foreign Labor Certification, as appropriate, shall notify in writing the DHS or Department of State, as appropriate. A copy of the notification must be sent to the regional or national office, as appropriate, of the Department of Labor's Office of Inspector General.

As a result of the material misrepresentation in the instant case, the labor certification is invalidated.

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

ORDER: The appeal is dismissed with a finding that the petitioner and beneficiary willfully misrepresented a material fact.

FURTHER ORDER: The labor certification application is invalidated pursuant to 20 C.F.R. § 656.30(d) based on the petitioner's and the beneficiary's willful misrepresentation.