

(b)(6)



U.S. Citizenship
and Immigration
Services

[Redacted]

DATE: **NOV 22 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:

[Redacted]

INSTRUCTIONS:

Enclosed please find the decision of the Administrative Appeals Office (AAO) in your case.

This is a non-precedent decision. The AAO does not announce new constructions of law nor establish agency policy through non-precedent decisions. If you believe the AAO incorrectly applied current law or policy to your case or if you seek to present new facts for consideration, you may file a motion to reconsider or a motion to reopen, respectively. Any motion must be filed on a Notice of Appeal or Motion (Form I-290B) within 33 days of the date of this decision. **Please review the Form I-290B instructions at <http://www.uscis.gov/forms> for the latest information on fee, filing location, and other requirements. See also 8 C.F.R. § 103.5. Do not file a motion directly with the AAO.**

Thank you,

Ron Rosenberg
Chief, Administrative Appeals Office

DISCUSSION: The Director, Nebraska Service Center, denied the Immigrant Petition for Alien Worker (Form I-140). The petitioner filed a motion to reopen and a motion to reconsider, which the director granted. However, the director found that the grounds for denial had not been overcome. The Administrative Appeals Office (AAO) dismissed the petitioner's appeal. The AAO subsequently reopened the matter on motion pursuant to 8 C.F.R. § 103.5(a)(5)(ii) for the purpose of entering a new decision.¹ The appeal will be dismissed.

The petitioner is a truck and trailer repair business. It seeks to employ the beneficiary permanently in the United States as a mechanic specialist pursuant to section 203(b)(3)(A) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(3)(A), as a skilled worker. As required by statute, a labor certification (Form ETA 750) accompanied the petition.²

The director, Nebraska Service Center, denied the petition on July 22, 2009. He found that the petitioner failed to establish that a valid employment relationship existed and that a *bona fide* job opportunity was available to U.S. workers. The AAO affirmed the director's decision that the petitioner failed to establish that a valid employment relationship existed and that a *bona fide* job opportunity was available to U.S. workers. Beyond the decision of the director, the AAO determined that the petitioner misrepresented a material fact and invalidated the labor certification.³

¹ The regulation at 8 C.F.R. § 103.5(a)(5)(ii) states:

Service motion with decision that may be unfavorable to affected part. When a Services officer, on his or her own motion, reopens a Service proceeding or reconsiders a Service decision, and the new decision may be unfavorable to the affected party, the officer shall give the affected party 30 days after service of the motion to submit a brief. The officer may extend the time period for good cause shown. If the affected party does not wish to submit a brief, the affected party may waive the 30-day period.

² The regulatory scheme governing the alien labor certification process contains certain safeguards to assure that petitioning employers do not treat alien workers more favorably than U.S. workers. New Department of Labor (DOL) regulations concerning labor certifications went into effect on March 28, 2005. The new regulations are referred to by the DOL by the acronym PERM, Program Electronic Review Management. See 69 Fed. Reg. 77325, 77326 (Dec. 27, 2004). The PERM regulation was effective as of March 28, 2005, and applies to employment-based petitions which have a priority date on or after that date. Pursuant to PERM, the correct form to use is the ETA Form 9089. However, the instant petition has a priority date of April 30, 2001 and was filed accompanied by the prior Form ETA 750.

³ The regulation at 20 C.F.R. § 656.30 provides:

(d) Invalidation of labor certifications.

After issuance, a labor certification may be revoked by ETA using the procedures described in §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

The AAO also determined that the petitioner failed to establish its continuing ability to pay the proffered wage from the priority date onward, and that the petitioner failed to establish that the beneficiary possessed the required training and work experience as set forth on the labor certification. On May 29, 2013, the AAO dismissed the appeal and invalidated the labor certification.

On September 20, 2013, the AAO reopened the matter on its own motion and requested additional information from the petitioner regarding the bona fides of the job offer, the beneficiary's required training and work experience, the petitioner's ability to pay the proffered wage, and the relationship of the petitioner and another related entity identified as [REDACTED]

The AAO conducts appellate review on a *de novo* basis. The AAO's *de novo* authority is well recognized by the federal courts. *See Soltane v. DOJ*, 381 F.3d 143, 145 (3d Cir. 2004). The procedural history in this case is documented by the record and incorporated. Further elaboration of the procedural history will be made only as necessary.⁴

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, 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.

Former 20 C.F.R. § 656.31(d) (2001) provided:

If a Court, the INS or the Department of State determines there was fraud or willful misrepresentation involving a labor certification application, the application shall be deemed invalidated, processing shall be terminated, a notice of the termination and the reason therefor shall be sent by the Certifying Officer to the employer, and a copy of the notification shall be sent by the Certifying Officer to the alien and to the Department of Labor's Office of the Inspector General.

Former 20 C.F.R. § 656.30(d) (2001) provided:

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.

⁴The 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

Section 204(a)(1)(F) of the Act, 8 U.S.C. § 1154(a)(1)(F), provides that “[a]ny employer desiring and intending to employ within the United States an alien entitled to classification under section . . . 203(b)(1)(B) . . . of this title may file a petition with the Attorney General [now Secretary of Homeland Security] for such classification.” (Emphasis added.)

Section 212(a)(5)(A)(i) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1182(a)(5)(i) provides that any alien who seeks to enter the United States for the purpose of performing skilled or unskilled labor is inadmissible, unless the Secretary of Labor has determined and certified to the Secretary of State and the Attorney General that-

- (I) there are not sufficient workers who are able, willing qualified (or equally qualified in the case of an alien described in clause (ii) and available at the time of application for a visa and admission to the United States and at the place where the alien is to perform such skilled or unskilled labor, and
- (II) the employment⁵ of such alien will not adversely affect the wages and working conditions of workers in the United States similarly employed.

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 petitioner must establish that its job offer to the beneficiary is a realistic one and that the opportunity is a *bona fide* job offer. Because the filing of a Form ETA 750 labor certification application establishes a priority date for any immigrant petition later based on the Form ETA 750, the petitioner must establish that the job offer was realistic as of the priority date and that the offer remained realistic for each year thereafter, until the beneficiary obtains lawful permanent residence. The filing

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).

⁵ The regulation at 20 C.F.R. § 656.3 states:

Employer means a person, association, firm, or a corporation which currently has a location within the United States to which U.S. workers may be referred for employment, and which proposes to employ a full-time worker at a place within the United States or the authorized representative of such a person, association, firm, or corporation.

Employment means permanent full-time work by an employee for an employer other than oneself. For the purposes of this definition an investor is not an employee.

date or priority date of the petition is the initial receipt in the DOL's employment service system. See 8 C.F.R. § 204.5(d); *Matter of Wing's Tea House*, 16 I&N 158 (Act. Reg. Comm. 1977). Here, the Form ETA 750 indicates that it was accepted for processing on April 30, 2001, which establishes the priority date.⁶

The respective roles of DOL and the United States Citizenship and Immigration Services (USCIS) have been discussed by various federal circuit courts:

There is no doubt that the authority to make preference classification decisions rests with INS. The language of section 204 cannot be read otherwise. See *Castaneda-Gonzalez v. INS*, 564 F.2d 417, 429 (D.C. Cir. 1977). In turn, DOL has the authority to make the two determinations listed in section 212(a)(14).⁷ *Id.* at 423. The necessary result of these two grants of authority is that section 212(a)(14) determinations are not subject to review by INS absent fraud or willful misrepresentation, but all matters relating to preference classification eligibility not expressly delegated to DOL remain within INS' authority.

Given the language of the Act, the totality of the legislative history, and the agencies' own interpretations of their duties under the Act, we must conclude that Congress did not intend DOL to have primary authority to make any determinations other than the two stated in section 212(a)(14). If DOL is to analyze alien qualifications, it is for the purpose of "matching" them with those of corresponding United States workers so that it will then be "in a position to meet the requirement of the law," namely the section 212(a)(14) determinations.

Madany v. Smith, 696 F.2d 1008, 1012-1013 (D.C. Cir. 1983). Relying in part on *Madany*, 696 F.2d at 1008, the Ninth Circuit stated:

[I]t appears that the DOL is responsible only for determining the availability of suitable American workers for a job and the impact of alien employment upon the domestic labor market. It does not appear that the DOL's role extends to determining if the alien is qualified for the job for which he seeks sixth preference status. That determination appears to be delegated to the INS under section 204(b), 8 U.S.C. § 1154(b), as one of the determinations incident to the INS's decision whether the alien is entitled to sixth preference status.

⁶ If the petition is approved, the priority date is also used in conjunction with the Visa Bulletin issued by the Department of State to determine when a beneficiary can apply for adjustment of status or for an immigrant visa abroad. Thus, the importance of reviewing the bona fides of a job opportunity as of the priority date is clear.

⁷ Based on revisions to the Act, the current citation is section 212(a)(5)(A).

K.R.K. Irvine, Inc. v. Landon, 699 F.2d 1006, 1008 (9th Cir. 1983). The court relied on an amicus brief from the DOL that stated the following:

The labor certification made by the Secretary of Labor . . . pursuant to section 212(a)(14) of the [Act] is binding as to the findings of whether there are able, willing, qualified, and available United States workers for the job offered to the alien, and whether employment of the alien under the terms set by the employer would adversely affect the wages and working conditions of similarly employed United States workers. *The labor certification in no way indicates that the alien offered the certified job opportunity is qualified (or not qualified) to perform the duties of that job.*

(Emphasis added.) *Id.* at 1009. The Ninth Circuit, citing *K.R.K. Irvine, Inc.*, 699 F.2d at 1006, revisited this issue, stating:

The Department of Labor (DOL) must certify that insufficient domestic workers are available to perform the job and that the alien's performance of the job will not adversely affect the wages and working conditions of similarly employed domestic workers. *Id.* § 212(a)(14), 8 U.S.C. § 1182(a)(14). The INS then makes its own determination of the alien's entitlement to sixth preference status. *Id.* § 204(b), 8 U.S.C. § 1154(b). See generally *K.R.K. Irvine, Inc. v. Landon*, 699 F.2d 1006, 1008 9th Cir.1983).

The INS, therefore, may make a de novo determination of whether the alien is in fact qualified to fill the certified job offer.

Tongatapu Woodcraft Hawaii, Ltd. v. Feldman, 736 F. 2d 1305, 1309 (9th Cir. 1984).

Therefore, it is the DOL's responsibility to determine whether there are qualified U.S. workers available to perform the offered position, and whether the employment of the beneficiary will adversely affect similarly employed U.S. workers. It is the responsibility of USCIS to determine if the beneficiary qualifies for the offered position, and whether the offered position and beneficiary are eligible for the requested employment-based immigrant visa classification. USCIS authority also extends to investigating the *bona fides* of a job offer to determine whether fraud or misrepresentation is involved.

Bona Fide Job Offer

According to Part 5 of the Form I-140, which was filed July 7, 2008, the petitioner was established on July 1, 1990, and claimed current employees as "5+." The exact number of workers was not disclosed nor was it evident in 2001, the year of the priority date. The proffered wage of \$22.80 per hour amounts to \$47,424 per year (based on a 40 hour week as stated on the Form ETA 750). The beneficiary appears to have been employed by the petitioner since 2001.

Based on the record, including the state and federal tax returns for 2001 and the petitioner's response to the director's request for evidence (RFE) issued on April 6, 2009, [REDACTED] held 51% of the petitioning corporation and his brother, [REDACTED] owned 49% of the petitioning business. [REDACTED] signed the Form ETA 750 as "owner." The beneficiary is the brother of [REDACTED]. In a letter, dated May 15, 2009, submitted in response to the director's RFE, [REDACTED] stated that the recruitment for the certified position followed all DOL procedures in an attempt to solicit U.S. workers, but no viable applicants were available.⁸ He added that the beneficiary was not favored in any manner.

The record indicates that the petitioner submitted no evidence to the DOL that the petitioner's two owners were the beneficiary's brothers. The petitioner did not disclose this relationship until requested by the director in his RFE. On appeal, and in response to the director's RFE, and the AAO's Notice of Intent to Dismiss (NOID), counsel asserts that valid attempts were made to comply with DOL and USCIS requirements and that the pre-PERM alien labor certification process did not require the petitioner to disclose the existence of a familial relationship between the beneficiary and the petitioner to DOL.

With respect to the *bona fides* of the job offer, it is noted that a relationship invalidating a *bona fide* job offer may arise where the beneficiary is related to the petitioner by "blood" or it may be "financial, by marriage, or through friendship." See *Matter of Sunmart* 374, 00-INA-93 (BALCA May 15, 2000). The regulation at 20 C.F.R. § 656.3 states that employment means: "Permanent full-time work by an employee for an employer other than oneself."

In *Matter of Silver Dragon Chinese Restaurant*, 19 I&N Dec. 401 (Comm. 1986), the BIA found that where the beneficiary's association with the petitioning corporation is concealed in labor certification proceedings, it prevents DOL from discharging its function of examining whether the job opportunity was clearly open to U.S. workers. It was concluded that the misrepresentation was both willful and material. The DOL advisory opinion submitted in that case noted that while it is not an absolute ground for denial of an application for certification, the alien's ownership of the corporate employer should cause the certifying officer to examine more closely whether the job opportunity was clearly open to qualified U.S. workers. The alien's ownership of his employer

⁸ The Form ETA 750 filed on behalf of the beneficiary requires one year of training in Auto Mechanics and two years of employment experience in the job offered as a Mechanic Specialist. It is observed that the copies of recruitment postings submitted reflected discrepancies from the labor certification requirements as follows: 1) the petitioner's internal job posting specified two (2) years of auto mechanic training instead of one year; 2) the [REDACTED] ad of February 2005 required two years of experience and omitted the training requirement of one year; and 3) the three [REDACTED] advertisements required two years of experience and also omitted the training requirement of one year. It is noted that the regulation at 20 C.F.R. § 656.21(b)(5) (2004) provides in relevant part that the employer shall document that its requirements for the job as described, represent the actual minimum requirements.

would be one ground for denial since it would not constitute work for an employer other than oneself as required by regulation. *Id.*, at 403. The decision also quoted the DOL advisory opinion:

The regulations require a 'job opportunity' to be 'clearly open.' Requiring the job opportunity to be bona fide adds no substance into 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.

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); see also 8 U.S.C. § 1361. As noted by the court in *Alva Decking, Inc. v. Holder*, 2013 WL 1609983 (D. Colo. 2013)(unpublished)(the court dismissed based on lack of subject matter jurisdiction), U.S. Citizenship and Immigration Services (USCIS) has been authorized to use its discretion to determine when a job offer is *bona fide*. Where the petitioner is owned by the person applying for position, it is not a *bona fide* offer. See *Bulk Farms, Inc. v. Martin*, 963 F.2d 1286 (9th Cir. 1992) (denied labor certification application for president, sole shareholder and chief cheese maker even where no person qualified for position applied). The court noted:

The regulatory scheme challenged by Bulk Farms is reasonably related to the achievement of the purpose outlined in section 212(a). As the district court correctly noted, "the DOL certification process is built around a central administrative mechanism: A private good faith search by the certification applicant for U.S. workers qualified to take the job at issue." See 20 C.F.R. § 656.21. This "good faith search" process operates successfully because all employers are subject to uniform certification requirements. The two independent safeguards challenged by Bulk Farms—the ban on alien self-employment and the bona fide job requirements—make the good faith search process self-enforcing. The prophylactic rules permit the Department of Labor to process more than 50,000 permanent labor certification requests each year. Were the challenged regulations to be judged inapplicable to self-employed aliens, DOL would be forced to make ad hoc inquiries into each certification request—a task far more difficult and more time consuming than the current certification procedure.

Id. at 1288-89.

In the current matter, in order to determine if a job opportunity is clearly open and the employer has made a private good faith search for qualified U.S. workers, DOL must evaluate any relationships between the foreign worker and the employer's owners, stockholders, partners, or officers as there

may be a possibility that a job opportunity is not open to U.S. workers where the foreign worker has the ability to influence the job opportunity. In this case, the sibling relationship between the beneficiary and the petitioner's two owners raised serious concerns of the beneficiary's influence as it would not be unexpected that the two owners would have a vested interest in the employment of a sibling. The petitioner provided no information as to this relationship at the time of filing the Form ETA 750 with the DOL, and at the initial filing of the Form I-140. As the court noted in *Bulk Farms, Inc. v. Martin*, (although involving an ownership issue), DOL should not have to make ad hoc inquiries into each labor certification application in order to determine whether familial relationships affected the job opportunity.

Counsel also asserts that USCIS should apply the factors cited in *Matter of Modular Container Systems, Inc.*, 89 INA 228 (July 16, 1991). That case represents a decision by the Board of Alien Labor Certification Appeals (BALCA),⁹ and was predicated on the fact that the DOL certifying officer was aware of the investor status of the alien beneficiary in the labor certification proceeding.¹⁰ In this matter, the petitioner has not submitted any evidence that the DOL certifying officer was aware of the beneficiary's sibling relationship with the petitioner's two owners so that the petitioner's level of compliance and good faith in the labor certification proceedings could be measured.

⁹The same standard has been incorporated into the PERM (Program Electronic Review Management) regulations. See 69 Fed. Reg. 77325, 77326 (Dec. 27, 2004). The regulation at 20 C.F.R. § 656.17(l) (2010) describes the documentation that a petitioner must provide if it is a closely held corporation or partnership in which the alien has an ownership interest, or where there is a familial relationship between the alien and the shareholders, officers, incorporators or partners, or the alien is one of a small number of employees. The petitioner must demonstrate that a *bona fide* job opportunity existed and that it was available to all U.S. workers. The regulation then lists the supporting documentation that the petitioner must provide in order to demonstrate the *bona fides* of the job opportunity.

¹⁰In that case, it was determined that DOL should examine whether a *bona fide* job opportunity was dependent on whether U.S. workers could legitimately compete for the job opening and whether a genuine need for alien labor existed. If the certified job opportunity is tantamount to self-employment, then there is a per se bar to labor certification. Whether the job is clearly open to U.S. workers is measured by such factors as 1) whether the alien was in a position to influence or control hiring decisions regarding the job for which certification is sought; 2) whether the alien was related to the corporate directors, officers, or employees; 3) whether the alien was the incorporator or founder of the employer; 4) whether the alien had an ownership interest in the company; 5) whether the alien was involved in the management of the company; 6) whether he was one of a small number of employees; 7) whether the alien has qualifications for the job that are identical to specialized or unusual job duties and requirements as stated in the application; and 8) whether the alien is so inseparable from the petitioning employer because of a pervasive presence and personal attributes that the employer would be unlikely to continue in operation without him.

On appeal, counsel referenced *Hoosier Care, Inc. v. Chertoff*, 482 F.3d 987 (7th Cir., 2007) for the premise that DOL determines the requirements of the proffered position. As discussed above, DOL's role is to primarily determine whether there are qualified U.S. workers available to perform the offered position, and whether the employment of the beneficiary will adversely affect similarly employed U.S. workers. It is the responsibility of USCIS to determine if the beneficiary qualifies for the offered position, and whether the offered position and beneficiary are eligible for the requested employment-based immigrant visa classification. USCIS authority also extends to investigating the *bona fides* of a job offer to determine whether fraud or misrepresentation is involved.

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 qualified U.S. workers, then the petitioner's claims that the job offer to the beneficiary was *bona fide* and clearly open to qualified U.S. workers was willful misrepresentation. See *Kungys v. U.S.*, 485 U.S. 759 (1988), ("materiality is a legal question of whether "misrepresentation or concealment was predictable capable of affecting, *i.e.*, had a natural tendency to affect the official decision.") Here, the claim that the job offer was *bona fide* and clearly open is a willful misrepresentation of a material fact.

It is incumbent on the petitioner to resolve any inconsistencies in the record by independent objective evidence, and attempts to explain or reconcile such inconsistencies, absent competent objective evidence pointing to where the truth, in fact, lies, will not suffice. *Matter of Ho*, 19 I&N Dec. 582, 591-592 (BIA 1988).

The petitioner asserts that, "numerous other workers have been hired by the petitioner in the same or similar positions who were not related to him both before and after the subject labor certification." Whether this statement refers to U.S. workers, other sponsored beneficiaries, or both, is unclear. The petitioner asserts that this demonstrates that the job offer was *bona fide* and open to all qualified U.S. workers. The AAO finds this assertion without relevance to the instant case and the question whether the certified position offered to the beneficiary was open to all qualified U.S. workers.

The AAO finds that the petitioner failed to demonstrate that a *bona fide* job offer existed due to the sibling relationship between the beneficiary and the two owners of the petitioning business. Further, the evidence failed to show that this relationship was disclosed to the DOL and that it was aware of this relationship so that it could better examine the effect of the relationship on the labor certification process. This constitutes a willful misrepresentation of a material fact that the job offer was open to all qualified U.S. workers. In view of the foregoing, the AAO concludes that, based on the willful misrepresentation of a material fact, the labor certification will be invalidated.

Ability to Pay the Proffered Wage

As noted in the AAO's decision of May 29, 2013, and beyond the decision of the director,¹¹ the petitioner failed to establish its continuing financial ability to pay the proffered wage of \$47,424 per year from the priority date onward until the beneficiary obtains lawful permanent residence. See 8 C.F.R. § 204.5(g)(2).

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

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

With respect to this issue, and pursuant to 8 C.F.R. § 204.5(g)(2), the petitioner must establish its continuing ability to pay the proffered wage as of the priority date and continuing until the beneficiary gains permanent residence status. Where a petitioner files I-140 petitions for multiple beneficiaries, it is incumbent on the petitioner to establish its continuing financial ability to pay all proposed wage offers as of the respective priority date of each pending petition and continuing until he obtains permanent resident status. Each petition must conform to the requirements of 8 C.F.R. § 204.5(g)(2) and be supported by pertinent financial documentation. The petitioner must establish that its ETA 750 job offer to the beneficiary is a realistic one for each beneficiary that it sponsors. Therefore, USCIS considers the ability to pay a beneficiary within the context of the number of other beneficiaries sponsored during the same period of time. Thus, a petitioner is requested to provide pertinent information related to the employment and payment of wages to other sponsored beneficiaries in order to calculate the petitioner's ability to pay the proffered wage to the specific petition under consideration.

The petitioner is obligated to show that it has sufficient funds to pay the proffered wages to all the sponsored beneficiaries from their respective priority dates or in accordance with the regulation at 8 C.F.R. § 204.5(g)(2). Current USCIS electronic records indicate that besides the Form I-140 filed for the instant beneficiary, the petitioner has filed at least seven other immigrant petitions. The petitioner submitted copies of the approval notices of the following beneficiaries: 1) [REDACTED]

¹¹ An application or petition that fails to comply with the technical requirements of the law may be denied by the AAO even if the Service Center does not identify all of the grounds for denial in the initial decision. See *Spencer Enterprises, Inc. v. United States*, 299 F. Supp. 2d 1025, 1043 (E.D. Cal. 2001), *aff'd*, 345 F.3d 683 (9th Cir. 2003); see also *Soltane v. DOJ*, 381 F.3d 143, 145 (3d Cir. 2004) (noting that the AAO reviews appeals on a *de novo* basis).

_____ ² The record also contains copies of a 2012 W-2 for _____ and a 2011 and 2012 W-2 for _____. USCIS electronic records indicate that, for the purpose of considering the employment and payment of wages, based on the priority date and the achievement of permanent resident status, _____ status was pending from 2001 to 2004 when he received permanent resident status; _____ status was pending from 2001 to 2006 when he received permanent resident status; _____ status was pending from 2001 to 2006 when he received permanent resident status; and _____ status was pending from 2001 to 2007 when he received permanent resident status. Therefore, the petitioner's ability to pay the proffered wage to the instant beneficiary must include consideration of these beneficiaries' employment and payment of wages as well. Additionally, employment and payment information related to the three other aliens listed in footnote 12 would also be required. Provision of 2011 or 2012 W-2s for aliens who are well past their respective permanent resident dates do not support the petitioner's demonstration of its ability to pay the proffered wage in this matter in earlier years. The petitioner did not provide copies of W-2s for 2001 through 2004 for _____ copies of W-2s for 2001 through 2006 for _____ copies of W-2s for 2001 through 2006 for _____ and copies of W-2s for 2001 to 2007 for _____. Additionally, copies of W-2s issued to _____ for 2003 through 2008 would be required, as well as copies of W-2s for _____ from 2001 through 2004, and copies of W-2s for _____ for 2001 through 2010.

In its Notice of Reopening on Service Motion and Intent to Deny issued on September 20, 2013, the AAO requested additional information on the Form I-140 petitions filed by the petitioner, including dates of employment, payment of wages and Wage and Tax Statements issued to them beginning at the April 30, 2001 priority date of the instant petition. The petitioner did not submit the requested information. Therefore, the petitioner's total wage obligation cannot be determined and within the context of the petitioner's obligation to cover all proffered wages for each sponsored beneficiary, the AAO is unable to calculate the petitioner's ability to pay the proffered wage to the instant beneficiary. The failure to submit requested evidence that precludes a material line of inquiry shall be grounds for denying the petition. *See* 8 C.F.R. § 103.2(b)(14).

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).

¹² The other petitions were filed for: 1) _____ Electronic records indicate that _____ status was pending from 2003 to 2008 when he obtained permanent resident status; _____ pending status ran from 2001 to 2004 when he achieved permanent resident status; and _____ status was pending from 2001 to 2010. A copy of a 2011 W-2 for _____ was submitted to the record. However, the petitioner provided no information about employment and payment of wages to these beneficiaries during their respective pending status.

As noted above, the proffered wage amounts to \$47,424 per year and the priority date is April 30, 2001. The petitioner is required to establish its continuing financial ability to pay the proffered wage from the priority date until the beneficiary obtains lawful permanent residence.

The evidence in the record of proceeding shows that the petitioner is structured as an S corporation. According to the tax returns in the record, the petitioner's fiscal year is based on a calendar year. The record indicates that the beneficiary has worked for the petitioner since 2001.

In evaluating whether a job offer is realistic, USCIS requires the petitioner to demonstrate financial resources sufficient to pay the beneficiary's proffered wages, although the overall 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. If the documentation establishes that the petitioner can cover any difference between actual wages paid and the proffered wage in a given period, the petitioner will be deemed to have shown its ability to pay the full proffered wage for that period. In this case, the petitioner's Forms W-2¹³ issued to the beneficiary in the following years indicates that the petitioner paid the beneficiary the following wages:

Year	Wages Paid	Difference from Proffered Wage of \$47,424 per year
2001	\$26,250	\$21,174.00 Less
2002	\$39,000	\$ 8,424.00 Less
2003	\$38,205.45	\$ 9,218.55 Less
2004	\$38,061.95	\$ 9,362.05 Less
2005	\$38,542.80	\$ 8,881.20 Less
2006	\$40,800	\$ 6,624.00 Less
2007	\$41,600	\$ 5,824.00 Less
2008	\$41,600	\$ 5,824.00 Less
2009	\$43,648.40	\$ 3,775.60 Less
2010	\$44,625.40	\$ 2,798.60 Less

¹³ The wages reported for 2005 through 2008 were initially reported under a different but related company called [REDACTED]. According to a letter dated April 24, 2009 from the petitioner's accountant to the beneficiary, the issuance of these W-2s under the name of [REDACTED] was a mistake attributable to the payroll processing company as the federal tax identification number (FEIN) listed on the initial W-2s was the same as the petitioner's FEIN. Corrected W-2s were issued to the beneficiary. Those wages are reflected in the above table for 2005 through 2008.

2011	\$44,586.10	\$ 2,837.90 Less
2012	\$44,586.10	\$ 2,837.90 Less

If the petitioner does not establish that it employed and paid the beneficiary an amount at least equal to the proffered wage during that period, USCIS will next examine the net income figure reflected on the petitioner's federal income tax return, without consideration of depreciation or other expenses. *River Street Donuts, LLC v. Napolitano*, 558 F.3d 111 (1st Cir. 2009); *Taco Especial v. Napolitano*, 696 F. Supp. 2d 873 (E.D. Mich. 2010), *aff'd*, No. 10-1517 (6th Cir. filed Nov. 10, 2011). Reliance on federal income tax returns as a basis for determining a petitioner's ability to pay the proffered wage is well established by judicial precedent. *Elatos Restaurant Corp. v. Sava*, 632 F. Supp. 1049, 1054 (S.D.N.Y. 1986) (citing *Tongatapu Woodcraft Hawaii, Ltd. v. Feldman*, 736 F.2d 1305 (9th Cir. 1984)); *see also Chi-Feng Chang v. Thornburgh*, 719 F. Supp. 532 (N.D. Texas 1989); *K.C.P. Food Co., Inc. v. Sava*, 623 F. Supp. 1080 (S.D.N.Y. 1985); *Ubeda v. Palmer*, 539 F. Supp. 647 (N.D. Ill. 1982), *aff'd*, 703 F.2d 571 (7th Cir. 1983). Reliance on the petitioner's gross receipts and wage expense is misplaced. Showing that the petitioner's gross receipts exceeded the proffered wage is insufficient. Similarly, showing that the petitioner paid wages in excess of the proffered wage is insufficient.

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

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

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

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

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

The petitioner’s tax returns submitted to the record demonstrate its net income for 2001, 2002, 2003, 2004, 2005, 2006, 2007, 2008, 2009, 2010 and 2011 as shown in the table below. A copy of the first page only of the tax return for 2012 was submitted in response to the AAO’s Notice of Reopening, but neither net income nor net current assets are shown.

- In 2001, the Form 1120S stated net income¹⁴ of \$151,332.
- In 2002, the Form 1120S stated net income of \$95,357.
- In 2003, the Form 1120S stated net income of \$24,209.
- In 2004, the Form 1120S stated net income of \$36,543.
- In 2005, the Form 1120S stated net income of \$39,865.
- In 2006, the Form 1120S stated net income of \$62,362.
- In 2007, the Form 1120S stated net income of \$2,352.
- In 2008, the Form 1120S stated net income of -\$5,269.
- In 2009, the Form 1120S stated net income of -\$130,167.
- In 2010, the Form 1120S stated net income of -\$11,588.
- In 2011, the Form 1120S stated net income of -\$85,138.
- In 2012, page 1 only of tax return was submitted; net income cannot be determined without the petitioner’s Schedule K.

Therefore, for the years 2007, 2008, 2009, 2010 and 2011, the petitioner failed to show sufficient net income to cover the difference between the actual wages paid to the beneficiary and the proffered wage of \$47,424. However, as stated above, this does not include consideration of the other beneficiaries’ wages paid during the relevant period because that information was not provided by the petitioner. Therefore, without information related to the petitioner’s other sponsored workers, the AAO cannot properly calculate the petitioner’s ability to pay the proffered wage to the instant beneficiary out of its reported net income during any of the relevant time period set forth above.

¹⁴ Where an S corporation’s income is exclusively from a trade or business, USCIS considers net income to be the figure for ordinary income, shown on line 21 of page one of the petitioner’s IRS Form 1120S. However, where an S corporation has income, credits, deductions or other adjustments from sources other than a trade or business, they are reported on Schedule K. If the Schedule K has relevant entries for additional income, credits, deductions or other adjustments, net income is found on line 23 (2001-2003) line 17e (2004-2005) and line 18 (2006-2012) of Schedule K. See Instructions for Form 1120S, at <http://www.irs.gov/pub/irs-pdf/i1120s.pdf> (indicating that Schedule K is a summary schedule of all shareholders’ shares of the corporation’s income, deductions, credits, etc.). Because the petitioner had additional income, credits, deductions, or other adjustments shown on its Schedule K for 2001, 2002, 2004, 2006, 2007, 2008, 2009, 2010, and 2011, the petitioner’s net income is found on Schedule K of its tax returns. Neither net income nor net current assets for 2012 could be determined as the petitioner submitted only page 1 of its corporate tax return.

As an alternate means of determining the petitioner's ability to pay the proffered wage, USCIS may review the petitioner's net current assets. Net current assets are the difference between the petitioner's current assets and current liabilities.¹⁵ A corporation's year-end current assets are shown on Schedule L, lines 1 through 6. Its year-end current liabilities are shown on lines 16 through 18. If the total of a corporation's end-of-year net current assets and the wages paid to the beneficiary (if any) are equal to or greater than the proffered wage, the petitioner is expected to be able to pay the proffered wage using those net current assets. The petitioner's tax returns demonstrate its end-of-year net current assets for 2001, 2002, 2003, 2004, 2005, 2006, 2007, 2008, 2009, 2010, and 2011 as shown in the table below.

- In 2001, the Form 1120S stated net current assets of -\$47,053.
- In 2002, the Form 1120S stated net current assets of -\$18,191.
- In 2003, the Form 1120S stated net current assets of -\$385.
- In 2004, the Form 1120S stated net current assets of \$57,153.
- In 2005, the Form 1120S stated net current assets of \$63,628.
- In 2006, the Form 1120S stated net current assets of \$66,227.
- In 2007, the Form 1120S stated net current assets of \$754.
- In 2008, the Form 1120S stated net current assets of \$11,067.
- In 2009, the Form 1120S stated net current assets of \$18,789.
- In 2010, the Form 1120S stated net current assets of -\$13,794.
- In 2011, the Form 1120S stated net current assets of -\$18,589.
- In 2012, page 1 only of the tax return was submitted; net current assets cannot be determined.

Therefore, based only on consideration of the instant beneficiary's difference between actual wages paid and the proffered wage, in 2007, 2010, 2011, and 2012, the petitioner failed to show sufficient net current assets to cover the difference between actual wages paid and the proffered wage. However, as stated above, this does not include consideration of the other beneficiaries' wages paid during the relevant period because that information was not provided by the petitioner. Therefore, no calculation can be made relevant to the petitioner's ability to pay the proffered wage out of its reported net current assets to the instant beneficiary during any of the relevant time period set forth above.

Therefore, from the date the Form ETA 750 was accepted for processing by the DOL, the petitioner had not established that it had the continuing ability to pay the beneficiary the proffered wage as of the priority date through an examination of wages paid to the beneficiary, or its net income or net current assets.

¹⁵According 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.

In some cases, 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*, at 12 I&N Dec. 612. 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 overall factors relevant to the petitioner's situation. 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, or the petitioner's reputation within its industry.

Counsel has submitted copies of the petitioner's website, which he asserts establishes the achievements and growth of the petitioning business. In response to the AAO's Notice to Reopen, counsel has also submitted one page of the petitioner's 2012 tax return and a copy of the petitioner's third quarter 2013 Form 941, Employer's Quarterly Federal tax return showing 35 employees. Counsel also advised that the petitioner has paid the wages of other alien workers and therefore will have the ability to pay the proffered wage.

The assertion that other alien workers' wages may have been paid does not have significance unless evidence is produced showing their employment and payment of wages that spans the time frame from 2001 to the date of their respective permanent resident status, as discussed previously. The petitioner has not produced such information, despite the AAO's request. Therefore it is not possible to calculate the petitioner's ability to pay an individual proffered wage for a pending Form I-140 unless information is provided pertinent to other beneficiaries' petitions and payment of wages, which may overlap the time frame of the instant petition. The failure to submit requested evidence that precludes a material line of inquiry shall be grounds for denying the petition. See 8 C.F.R. § 103.2(b)(14).

In the instant case, as noted above, although the petitioner has paid cumulatively large salaries, the fact that the petitioner has met the payroll of other workers' does not establish its continuing ability to pay the proffered wage to the beneficiary from the priority date of April 30, 2001 onward. Moreover, the petitioner has failed to provide evidence of payment of annual wages to other sponsored beneficiaries in any years other than 2011 and 2012. The ability to pay the proffered wage of the instant beneficiary from his priority date onward cannot be calculated unless information relevant to the employment and payment of wages to all sponsored beneficiaries is provided from

April 30, 2001 onward. Within this context, the petitioner has not established the ability to pay the proffered wage in this matter in any of the relevant years. Even considering this beneficiary only and the petitioner's stated net income and net current assets, the petitioner did not have sufficient net income or net current assets to cover the difference between actual wages paid to the beneficiary and the proffered wage in 2007, 2010 and 2011. Additionally, the petitioner's gross receipts have declined by approximately 16% from 2001 to 2012 and by approximately 40% from 2006 to 2012. There is insufficient evidence in the record of the historical growth of the business or of analogous, unique circumstances similar to *Sonegawa*. Thus, assessing the overall 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 from the priority date onward.

Training and Experience

Beyond the director's decision, the current record does not establish that the beneficiary possessed the required two years of employment experience in the job offered of mechanic specialist and one year of training in auto mechanics as set forth in the Form ETA 750.

On the Form ETA 750, the beneficiary claims to qualify for the offered position based on a certificate in mechanical training from [REDACTED] Poland awarded in 1998 as well as experience as: 1) a mechanic and trailer repair specialist working 40 hours per week for [REDACTED] Poland from November 1992 to January 1998 and 2) a mechanic and trailer repair specialist working 40 hours per week for the petitioner from an unnamed month in 2001 until the present.

Additionally on Form ETA 750B, the beneficiary has set forth the schools, colleges, and universities attended, including trade or vocational facilities. He states that his required one year of training in auto mechanics was earned at the same entity that the beneficiary also lists as the business of his prior employer. The record does not explain why the beneficiary listed the same entity as both a training facility and a place of employment where he gained the required experience for the proffered job. It is incumbent on the petitioner to resolve any inconsistencies in the record by independent objective evidence, and attempts to explain or reconcile such inconsistencies, absent competent objective evidence pointing to where the truth, in fact, lies, will not suffice. *See Matter of Ho*, 19 I&N Dec. 582, 591-592 (BIA 1988). In response to the AAO's Notice of Reopening, counsel offers copies of the same documents submitted to the underlying record and asserts that they establish the beneficiary's training and experience.

The record contains a vocational school graduation certificate dated July 15, 1978. It is noted that the educational overview of Poland according to the Electronic Database for Global Education (EDGE) created by the American Association of Collegiate Registrars and Admissions Officers

(AACRAO)¹⁶ indicates that before 1999, the Polish system consisted of 8 years of primary school, ages 7 to 15 followed by a choice of general secondary, technical secondary school of varying duration, or three-year vocational schools. It is noted that based on his birthdate, the beneficiary would have been 19 years of age on July 15, 1978.¹⁷ The record also contains a "Results of Final Classification" from [REDACTED] group of technical schools in [REDACTED] Poland. An education evaluation written by [REDACTED] for the [REDACTED] [REDACTED] dated October 3, 2007, in which he references a copy of a maturity certificate from a technical secondary school issued by the group of trade schools of [REDACTED] in Poland in 1983. Mr. [REDACTED] states that this certificate indicates that the beneficiary passed a final examination on January 16, 1983 and that the beneficiary was granted the title of automobile mechanic. Mr. [REDACTED] concludes that this credential represents the U.S. equivalent of graduation from an accredited vocational high school in the United States.

Although counsel states the listing of the same entity on the labor certification as a prior training facility and place of employment resulted from a clerical error of his own office, it is noted that the training received in Poland at the technical schools was not listed on the Form ETA 750B, question 11 where the beneficiary is asked to list his education and training facilities, which qualified him for the position. In *Matter of Leung*, 16 I&N Dec. 2530 (BIA 1976), the Board's dicta notes that the beneficiary's experience, without such fact certified by DOL on the beneficiary's Form ETA 750B, lessens the credibility of the evidence and facts asserted. Similarly, claimed training necessary to qualify the beneficiary for the certified position which is not certified by the DOL on the beneficiary's Form ETA 750B lessens the credibility of the evidence.

The record also contains a copy of a work certificate dated February 12, 1988, containing the stamp of [REDACTED] Poland, signed by [REDACTED]. It states that the beneficiary worked full-time as a mechanic from November 1, 1992 to January 1, 1998. The certificate does not include Mr. [REDACTED] title, nor does it describe the beneficiary's duties, and, therefore does not comply with the requirements of 8 C.F.R. §204.5(l)(3)(ii)(A). It is noted that the letter from [REDACTED] dated August 20, 2009, which states that the beneficiary has been working for the petitioner since April 2001 does not comply with the requirements of 8 C.F.R. §204.5(l)(3)(ii)(A) as it does not describe the beneficiary's duties.¹⁸ Further, the record of proceeding contains a Form G-325A (biographic information form), signed by the beneficiary under penalty of perjury on October 9, 2007, in which he states that he began working for the petitioner in February 1998, while on the

¹⁶ AACRAO is a nonprofit, voluntary, professional association of more than 11,000 higher education admissions and registration professionals who represent approximately 2,600 institutions and agencies in the United States and in over 40 countries. See <http://edge.aacrao.org/country/overview/poland-overview> (accessed November 19, 2013).

¹⁷ It is also observed that both copies of the two certificates issued in 1978 and 1983 contain the same photograph of the beneficiary appearing to be under seal in both photos.

¹⁸ Furthermore, when determining whether a beneficiary has the required minimum experience for a position, experience gained with an employer in the offered position cannot be considered without a demonstration that the experience was not gained in a job similar to the job offered for certification. See *Delitizer Corp. of Newton*, 88 INA 482, (May 9, 1990).

labor certification, the beneficiary states that he began working for the petitioner in 2001. Commencing work for the petitioner in 2001 would not enable it to be used as experience gained prior to the priority date. Counsel asserts that while there have been discrepancies, the evidence amply demonstrates that the beneficiary is qualified for the certified position, and counsel notes that the DOL certified that the beneficiary was qualified.

Based on the foregoing, the AAO cannot conclude that the current record establishes that the beneficiary possessed the required training and experience required by the Form ETA 750 as of the April 30, 2001, priority date. Doubt cast on any aspect of the petitioner's proof may, of course, lead to a reevaluation of the reliability and sufficiency of the remaining evidence offered in support of the visa petition. It is incumbent on the petitioner to resolve any inconsistencies in the record by independent objective evidence, and attempts to explain or reconcile such inconsistencies, absent competent objective evidence pointing to where the truth, in fact, lies, will not suffice. *See Matter of Ho*, 19 I&N Dec. 582, 591-592 (BIA 1988).

In view of the foregoing, the petitioner failed to establish that the job offer was *bona fide* and clearly open to all qualified U.S. workers. This constitutes a willful misrepresentation of a material fact that the job offer was open to all qualified U.S. workers. The petitioner also failed to demonstrate its continuing ability to pay the proffered wage and failed to establish that the beneficiary met the training and experience requirements of the labor certification.

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, it is the petitioner's burden to establish eligibility for the immigration benefit sought. Section 291 of the Act, 8 U.S.C. § 1361; *Matter of Otiende*, 26 I&N Dec. 127, 128 (BIA 2013). The petitioner has not met that burden.

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

FURTHER ORDER: The AAO finds that the petitioner's job offer was not *bona fide* based on the petitioner's failure to demonstrate that the offered position was open to all qualified U.S. workers, which constituted willful misrepresentation of a material fact underlying the alien's eligibility for a benefit sought under the immigration laws of the United States. The labor certification application is invalidated pursuant to 20 C.F.R. § 656.31(d) based on the misrepresentation.