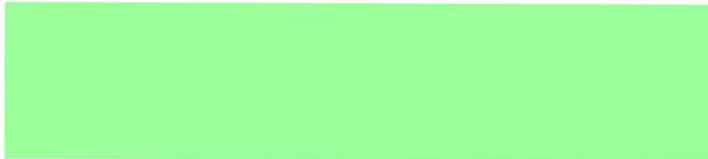


(b)(6)

U.S. Department of Homeland Security
U.S. Citizenship and Immigration Services
Administrative Appeals Office (AAO)
20 Massachusetts Ave., N.W., MS 2090
Washington, DC 20529-2090



U.S. Citizenship
and Immigration
Services



DATE: **AUG 27 2014**

OFFICE: TEXAS SERVICE CENTER

FILE: 

IN RE: Petitioner: 
Beneficiary:

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

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,

A handwritten signature in black ink that appears to read "Ron Rosenberg".

Ron Rosenberg
Chief, Administrative Appeals Office

DISCUSSION: The Director, Texas Service Center (Director), denied the employment-based immigrant visa petition. The Administrative Appeals Office (AAO) dismissed the petitioner's appeal. The matter is now before us on the petitioner's motion to reconsider. The motion will be granted, the appeal's dismissal will be affirmed, and the petition will remain denied.

The petitioner is a real-estate brokerage. It seeks to permanently employ the beneficiary in the United States as a secretary. The petitioner requests classification of the beneficiary as a professional or skilled worker under section 203(b)(3)(A) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(3)(A).¹

A Form ETA 750, Application for Alien Employment Certification (labor certification), certified by the U.S. Department of Labor (DOL), accompanies the petition. The petition's priority date is May 5, 2004, the date the DOL employment service system accepted the labor certification for processing. See 8 C.F.R. § 204.5(d).

The Director concluded that the petitioner did not establish the existence of a *bona fide* job opportunity or its continuing ability to pay the beneficiary's proffered wage from the petition's priority date onward. The director also found that the petitioner did not demonstrate that an authorized company officer signed the petition.

On appeal, we found that the petitioner did not establish its ability to pay the beneficiary's proffered wage or the existence of a *bona fide* job opportunity. However, we withdrew the Director's determination regarding the signature on the petition. We found that the record showed that the signatory was an authorized officer of the petitioner.

The motion to reconsider is timely and properly filed. It will be granted because it asserts that we misapplied law or policy. See 8 C.F.R. § 103.5(a)(3).

The record documents the procedural history in this case, which is incorporated into the decision. We will elaborate on the procedural history only as necessary. This office conducts review on a *de novo* basis. See, e.g., *Soltane v. Dep't of Justice*, 381 F.3d 143, 145 (3d Cir. 2004).

Ability to Pay the Proffered Wage

We previously found that the petitioner established its ability to pay the proffered wage in 2005 and 2006 based on evidence of sufficient net income. However, we found that the petitioner did not demonstrate its ability to pay the proffered wage in 2004, 2007 and 2008, as the record indicated it

¹ Section 203(b)(3)(A)(i) of the Act provides preference classification to qualified immigrants who are capable of performing skilled labor (requiring at least two years training or experience), not of a temporary nature, for which qualified workers are not available in the United States. Section 203(b)(3)(A)(ii) of the Act provides preference classification to qualified immigrants who hold baccalaureate degrees and are members of the professions.

had insufficient net income and net current assets in 2007 and 2008, and did not submit required evidence of its ability to pay in 2004.²

On motion, the petitioner acknowledges that the information reflected in its federal income tax returns does not demonstrate its ability to pay the beneficiary's proffered wage in 2007 and 2008. However, the petitioner asserts that the overall magnitude of its business activities demonstrates its ability to pay. The petitioner asserts that it reported profits in 10 of the 12 years it has conducted business. Counsel asserts that a downturn in the real estate market resulted in "short-term setbacks" for the petitioner's finances.

The petitioner claims that it spent more than the beneficiary's annual proffered wage of \$23,823.80 on "leased employees" to perform secretarial duties from 2007 through 2011. Counsel argues that the petitioner's leased employee expenses during the period demonstrate its continuing ability to pay the beneficiary's proffered wage despite its losses in 2007 and 2008.

As counsel argues, a petitioner's temporary inability to demonstrate sufficient net income or net current assets does not necessarily preclude it from establishing its ability to pay the proffered wage. See *Matter of Sonogawa*, 12 I&N Dec. 612, 614-15 (Reg'l Comm'r 1967). The petitioner in *Matter of Sonogawa*, *supra*, had conducted business for more than 11 years, generating routine gross annual income amounts of about \$100,000. In the year of the petition's filing, the petitioner relocated, paying rent on two business properties for a 5-month period, incurring substantial moving costs, and suffering a brief loss of operations. Despite its financial difficulties, the Regional Commissioner determined that the petitioner was likely to resume successful business operations and had demonstrated its ability to pay the proffered wage.

As in *Matter of Sonogawa*, *supra*, when determining a petitioner's ability to pay the proffered wage, USCIS may consider such factors as: the petitioner's number of years in business; established historical growth of its business; its number of employees; the occurrence of any uncharacteristic business expenditures or losses; its reputation within its industry; whether the beneficiary is replacing a former employee or an outsourced service; and any other evidence relevant to its ability to pay the proffered wage.

In our appellate decision, we analyzed the totality of the circumstances regarding the petitioner's business activities based on the record at that time. The instant record indicates that the petitioner's business operations began in 2001. It reported positive annual net income amounts on its tax returns

² Despite the Director's request in his Notice of Intent to Deny for a copy of the petitioner's 2004 federal tax return, the petitioner did not submit the documentation until the filing of this motion. We exercise our discretion and accept the tax return notwithstanding the Director's earlier request for it. Cf. *Matter of Soriano*, 19 I&N Dec. 764, 766 (BIA 1988) (rejecting evidence on appeal where the petitioner was notified of the required evidence and given a reasonable opportunity to provide it before the petition's adjudication). Line 21 of the petitioner's 2004 return shows an annual net income of \$444,559, well above the proffered wage of \$13.09 per hour for a 35-hour work week, or \$23,823.80 per year. We find that the petitioner has demonstrated its ability to pay the annual proffered wage in 2004. However, as mentioned above, the petitioner has not demonstrated its ability to pay the proffered wage in 2007 or 2008.

from 2004 through 2006. However, its 2007 and 2008 tax returns report net income losses and sharp drops in gross sales. Although the petitioner claimed to employ five people at the time of the petition's filing on July 25, 2007, its tax returns indicate that it did not pay any salaries or wages in 2007 and 2008.

The petitioner's tax returns indicate that the petitioner spent \$59,099 in 2007 and \$49,000 in 2008 on leased employee services. Lines 19 of the petitioner's corresponding Internal Revenue Service (IRS) Forms 1120S state expenses for "leased employees" in the above amounts as "Other deductions." The petitioner also submits a February 5, 2013 letter from the controller at [REDACTED] Inc., stating that that company "is and has been providing a leased employee to [the petitioner] to perform secretarial duties."³ Attached to the letter are copies of IRS Forms W-2 of the purported leased employee, showing that [REDACTED] employed her for most of 2011.

However, the worker's remaining Forms W-2 show that another company with a federal employer identification number different than that of [REDACTED] employed her in 2009, 2010, and the remaining part of 2011. Although all the Forms W-2 from the other company contain the same federal employer identification number, the company identified itself on the 2009 W-2 form as [REDACTED] and on the 2010 and 2011 Forms W-2 as [REDACTED].

The petitioner's submission of the February 5, 2013 letter from [REDACTED] suggests that only that company leased an employee to the petitioner. However, the 2009, 2010 and 2011 Forms W-2 indicate that a different company previously paid the worker. The record does not contain any evidence that the two companies were part of the same entity or that [REDACTED] was a successor-in-interest to the prior company. The record also lacks copies of the petitioner's agreements with the leasing companies, and the record contains no evidence that the petitioner leased a secretarial employee from [REDACTED]. The W-2 forms from those two companies indicate only that those companies paid wages to an employee, not that an employee was leased to the petitioner or the duties performed by that employee. The unexplained evidence of multiple leasing companies casts doubt on the credibility of the documentation submitted and the petitioner's claim that it has leased a secretarial worker since 2009. *See Matter of Ho*, 19 I&N Dec. 582, 591-92 (holding that a petitioner must resolve inconsistencies in the record by independent, objective evidence). Moreover, the record does not contain copies of Forms W-2 for secretarial workers leased by the petitioner in 2007 and 2008,

³ Online records indicate that the beneficiary's eldest son is the president and registered agent [REDACTED] which was incorporated on June 1, 2010. *See generally* Fla. Dep't of State, Div. of Corps., *available at* [http://search.s\[REDACTED\]](http://search.s[REDACTED]) (accessed July 15, 2014).

⁴ Online records indicate that the petitioner's president and the beneficiary's husband incorporated [REDACTED] effective January 1, 2004. *See generally* Fla. Dep't of State, Div. of Corps., *available at* [http://search\[REDACTED\]](http://search[REDACTED]) (accessed July 15, 2014). The records show that the beneficiary's husband resigned as the company's president, effective January 1, 2004. *Id.* Its annual reports through 2009 identify the petitioner's president as its vice president. *Id.* The records show that the company changed its name to [REDACTED] on February 18, 2010 and remains active. *Id.*

which are the years in question for which the petitioner has not demonstrated an ability to pay the proffered wage.

In addition, while the petitioner's annual spending on a temporary employee from 2007 through 2011 appears to exceed the proffered wage for the same period, the record does not establish that the temporary worker performed the same job duties of the offered position. The February 5, 2013 letter from [REDACTED] describes the work of the employee it leased to the petitioner for part of 2011 as "secretarial duties." This two-word description is not specific enough to establish that the temporary worker performed the duties of the offered position. The letter also does not address the duties of the temporary employee when she worked on behalf of the other payroll companies.

A February 5, 2013 letter from the petitioner's president also does not specify the duties of the leased employee.⁵ The letter states that the offered position "is still available" and that "[w]e have been leasing an employee in the interim pending the appeal decision." This letter is insufficient to establish that the petitioner leased an employee for the years in question, or that the leased employee performed the same job duties as the offered position. The petitioner's leased employee expenses therefore do not demonstrate its ability to pay the proffered wage from 2007 onward as counsel argues.

In addition, the record lacks evidence linking the petitioner's business losses in 2007 and 2008 to a downturn in the real estate market as counsel asserts. *See Matter of Obaigbena, supra*, at 534 n.2 (the assertions of counsel do not constitute evidence). The petitioner submitted evidence from a trade group indicating that sales of existing Florida homes and condominiums rose in October 2009, as well as real estate sales and price figures for the [REDACTED] Florida area as of January 2013. However, these materials do not state the causes of the petitioner's business losses in 2007 and 2008, nor do they establish the petitioner's return to profitability. The petitioner submitted audited financial statements for 2009. However, the audited statements do not establish its return to profitability because they do not include financial information for an entire fiscal year. A period of less than 1 year is insufficient to gauge a business's financial condition, which can be distorted by short-term seasonal sales and business cycles.

Moreover, contrary to counsel's assertion, the petitioner's president did not attribute the petitioner's losses in 2007 and 2008 solely to a downturn in the real-estate market. In his letter of October 9, 2009, the petitioner's president stated that "[t]he decline in profits in 2007 and 2008 were caused in part by the market conditions and by the upheaval caused by a lawsuit from a former sales manager which has now been settled." The petitioner has not identified the lawsuit to which the letter refers or explained its purported effect on the petitioner's financial condition. *See Matter of Soffici*, 22 I&N Dec. 158, 165

⁵ We will refer to the petitioner's signatory to the labor certification and the petition as its president, although immigration filings identify him by additional titles. The Immigrant Petition for Alien Worker, Form I-140, did not specify his title with the petitioner. However, he signed the accompanying labor certification and a letter in support of the petition under the title of "President." USCIS records show that he identified his position with the petitioner as "Broker" in his 2007 naturalization application. In a letter in response to the director's Notice of Intent to Deny, he stated that he serves as both a "Broker" and "Owner" of the petitioner. The record shows that, since 2008, he and another shareholder have each owned half of the petitioner's stock.

(Assoc. Comm'r 1998) (citation omitted) (going on record without supporting documentary evidence is insufficient to meet the burden of proof in visa petition proceedings). The petitioner has therefore not established that temporary, uncharacteristic business conditions caused its losses in 2007 and 2008.

After reconsideration of all of the circumstances in this individual case pursuant to *Matter of Sonogawa, supra*, we conclude that the petitioner has not established its continuing ability to pay the beneficiary's proffered wage from the petition's priority date onward.

Bona Fide Job Opportunity

The petitioner argues that we erred in finding that it did not establish the existence of a *bona fide* job opportunity. Counsel asserts that our determination rests on "unfounded and unsubstantiated allegations that the beneficiary's husband is in a business relationship with the petitioner." Counsel notes that we found no evidence that the beneficiary or her husband possess an ownership interest in the petitioner. Counsel acknowledges that the petitioner's president and the beneficiary's husband previously owned a Florida corporation together. However, counsel argues that the pair's prior ownership of a company that dissolved before the instant petition's priority date does not support our determination that the job opportunity was not clearly open to U.S. workers.⁶

An employer must attest on a labor certification that "the job opportunity has been and is clearly open to any qualified United States worker." 20 C.F.R. § 656.20(c)(8) (2004).⁷ "This provision infuses the recruitment process with the requirement of a *bona fide* job opportunity: not merely a test of the job market." *Matter of Modular Container Sys., Inc.*, 89-INA-228, 1991 WL 223955, *7 (BALCA July 16, 1991) (*en banc*).

Where the alien for whom labor certification is sought is in a position to control hiring decisions or where the alien has such a dominant role in, or close personal relationship with, the sponsoring employer's business that it would be unlikely that the alien would be replaced by a qualified U.S. applicant, the question arises whether the employer has a *bona fide* job opportunity.

Id.

⁶ Online records show that the petitioner's president established the now-defunct company on February 24, 1999 under the name [REDACTED]. See Fla. Dep't of State, Div. of Corps., available at <http://sear> [REDACTED]

[REDACTED] (accessed July 15, 2014). The company changed its name to [REDACTED] on October 9, 2000 and amended its articles of incorporation on October 17, 2001 to identify the beneficiary's husband as its president and a director. *Id.* The corporation voluntarily dissolved on September 19, 2003. *Id.*

⁷ Because the petitioner filed the accompanying labor certification before March 28, 2005, the former DOL regulations govern the labor certification in this matter. See PERM Final Rule, 69 Fed. Reg. 77325, 77325 (Dec. 27, 2004). The immigration service may deny a visa petition accompanied by a labor certification that violates DOL regulations. See *Matter of Sunoco Energy Dev. Co.*, 17 I&N Dec. 283, 284 (Reg'l Comm'r 1979) (affirming denial of visa petition because its accompanying labor certification was not certified for the area of intended employment).

Ultimately, the question of whether a *bona fide* job opportunity exists in situations where the alien has an ownership interest or some other special relationship with the employer depends on “whether a genuine determination of need for alien labor can be made by the employer corporation and whether a genuine opportunity exists for American workers to compete for the opening.”

Id. (citing *Hall v. McLaughlin*, 864 F.2d 868, 870 (D.C. Cir. 1989)).

In determining whether a job opportunity is clearly open to U.S. workers, the Board of Alien Labor Certification Appeals (BALCA) applies a “totality of the circumstances” test. *Id.* at *8. The following factors may be considered, including, but not limited to, whether the alien: is in the position to control or influence hiring decisions regarding the offered position; is related to the corporation’s directors, officers, or employees; was an incorporator or founder of the company; has an ownership interest in the company; is involved in the company’s management; is on its board of directors; is one of a small number of employees; has qualifications for the job that are identical to specialized or unusual job duties and requirements stated in the application; and is so inseparable from the sponsoring employer that the employer would be unlikely to continue operations without the alien. *Id.* The totality of the circumstances test also considers the employer’s level of compliance and good faith in the application’s processing. *Id.* In addition, the business cannot have been established for the sole purpose of obtaining certification for the alien. *Id.*

When questioned, an employer bears the burden of showing that a *bona fide* job opportunity is available to domestic workers. *Matter of Amger Corp.*, 87-INA-545, 1987 WL 341738, *2 (BALCA Oct. 15, 1987). The DOL’s current regulations, which adopt the totality of the circumstances test in *Matter of Modular Container Sys.*, *supra*, require an employer to submit the following documentation on request if the alien will be one of a small number of employees or has some other special relationship to the employer: 1) evidence of the business entity; 2) a list of corporate shareholders and officers, and their relationships to each other and the alien; 3) the company’s financial history and the amount each investor invested; 4) names and positions of officials responsible for hiring the person to fill the offered position; and 5) evidence of any family relationships between the alien and company’s employees. 20 C.F.R. § 656.17(1); *see also* PERM Final Rule, 69 Fed. Reg. 77325, 77356 (Dec. 27, 2004) (adopting the test in *Matter of Modular Container Sys.*, *supra*, to determine whether the offered job is subject to the alien’s influence and control).

In the instant case, although the record indicates that the beneficiary will be one of a small number of employees, many of the other factors identified in *Matter of Modular Container Sys.*, *supra*, indicate that the job opportunity is valid. However, BALCA stated in *Matter of Modular Container Sys.*, *supra*, that the circumstances to be considered “are not limited to” the cited factors. *Matter of Modular Containers*, *supra*, at *8. Contrary to counsel’s assertion, the record establishes a close business relationship among the beneficiary, her husband, the petitioner and its president.

USCIS records indicate that the beneficiary and her husband obtained E-2 nonimmigrant visa status through the now-defunct company that the petitioner's president and the beneficiary's husband previously owned together. As counsel argues, the Director's decision focused on the pair's prior ownership of that company. However, additional evidence supports the finding of a continuing close business relationship between the petitioner and the beneficiary's husband.⁸

Our prior decision discusses an October 9, 2009 letter of record from the petitioner's president, which states that the petitioner is a franchisee of [REDACTED]. The letter and online records indicate that [REDACTED] the franchisor, was and continues to be owned by the petitioner's president and the beneficiary's husband. See Fla. Dep't of State, Div. of Corps., available at [http://search.\[REDACTED\]](http://search.[REDACTED]) (search by document [REDACTED]) (accessed August 26, 2014). [REDACTED], which the pair established on August 2, 2002, remains active. *Id.* This record indicates that the petitioner's president and the beneficiary's husband continue to be the only co-owners of the franchisor, [REDACTED]. *Id.*

Online records also indicate that, since 2002, the petitioner's president and the beneficiary's husband have served together as officers in at least eight other companies in Florida, four of which remain active. The records state that the pair has managed the following entities together:

- [REDACTED] – established on February 14, 2005, administratively dissolved on September 26, 2008.
- [REDACTED] – established May 24, 2005, administratively dissolved on September 25, 2009.
- [REDACTED] – established on June 1, 2005, administrative dissolved on September 14, 2007.
- [REDACTED] – established on September 15, 2006, remains active and also does business as [REDACTED] for [REDACTED]
- [REDACTED] – established on May 22, 2007, remains active.
- [REDACTED] – established June 25, 2007, remains active.
- [REDACTED] – established on February 23, 2010, remains active.
- [REDACTED] established on February 16, 2011, inactive since April 9, 2013.

See generally, Fla. Dep't of State, Div. of Corps., available at [http://search.\[REDACTED\]](http://search.[REDACTED]) (accessed July 15, 2014).

⁸ On August 2, 2013, this office held these proceedings in abeyance while it consulted with the DOL regarding possible inquiries the DOL may have made into the relationship between the petitioner and the beneficiary during labor certification proceedings. See section 204(b) of the Act, 8 U.S.C. § 1154(b) (requiring USCIS to adjudicate employment-based immigrant visa petitions “[a]fter an investigation of the facts in each case, and after consultation with the Secretary of Labor”). Subsequently, the DOL stated that it could not provide further information to USCIS because records regarding the accompanying labor certification were unavailable due to the DOL's records retention policies.

The website of the petitioner's franchisor also indicates that the petitioner's president and the beneficiary's husband work closely together in managing the real-estate franchise. The website states that the petitioner's president "co-created" the [REDACTED] franchise with the beneficiary's husband, "his longtime friend and business associate." See [REDACTED], [http://\[REDACTED\].in/about](http://[REDACTED].in/about) (accessed on July 15, 2014). The website also states that the petitioner's president "is involved with every aspect of [REDACTED] *Id.*

News articles also indicate a close business relationship between the petitioner's president and the beneficiary's husband. The pair reportedly founded Sellstate in 2001 and launched it as a national franchise in 2002. See [REDACTED] July 23, 2008, available at [http://\[REDACTED\].com/23/real_estate/084.html](http://[REDACTED].com/23/real_estate/084.html) (accessed July 15, 2014). The pair also reportedly worked together for several years in Canada before establishing the [REDACTED] franchise in the United States. See [REDACTED] July 14, 2008, [http://w\[REDACTED\].com](http://w[REDACTED].com) (accessed July 15, 2014). After the beneficiary's husband bought a real-estate franchisee in Canada in the late 1980s, the petitioner's president reportedly joined that business. *Id.* The beneficiary's husband was quoted as saying that the Canadian real-estate franchise served as a model when he and the petitioner's president later decided to establish their own franchise together in the United States. *Id.*

In addition, the beneficiary's son also serves as chief operating officer of the petitioner's franchisor. See [REDACTED] 801 F. Supp. 2d 834, 837 (D.Minn. 2011) (stating "undisputed" facts of the case, including identification of the franchisor's chief operating officer as the son of its chief executive officer).

Thus, substantial evidence supports our finding of a long-term, close business relationship between the petitioner and the beneficiary's husband. The evidence shows that: the petitioner's president and the beneficiary's husband worked together for several years in Canada before co-founding the [REDACTED] real-estate franchise in the United States; that, together, they operated a company that petitioned for the beneficiary and her husband to obtain E-2 visas and work authorization in the U.S.; that, since 2002, the petitioner's president and the beneficiary's husband have owned and managed the [REDACTED] franchisor together; that, over the same time period, they have served together as officers in at least eight other companies, four of which remain active; and, that the beneficiary's husband's business partner, who is the franchisor's co-owner, is also the petitioner's president.⁹

The business relationships between the petitioner's president and the beneficiary's family members cast substantial doubt on the existence of a *bona fide* job opportunity for a qualified U.S. worker.

⁹ If a petitioner is unaware of derogatory information that will form the basis of an adverse decision, we must advise the petitioner of the information and provide it with an opportunity to rebut the information and to submit evidence on its behalf. See 8 C.F.R. § 103.2(b)(16)(i). Here, however, the record shows that the petitioner knew of the business relationship between its president and the beneficiary's husband, as its franchisor's website and the corporate filings of its president contain the derogatory information. See *Hassan v. Chertoff*, 593 F.3d 785, 789 (9th Cir. 2010) (holding that 8 C.F.R. § 103.2(b)(16)(i) does not require USCIS to advise an applicant of derogatory information of which he was already aware).

The relationships suggest that the offered position exists to provide the beneficiary and the beneficiary's husband, the longtime friend and business partner of its president and the chief executive officer of its franchisor, with a path to legal permanent residence in the United States and that the job is not available to U.S. workers. A job opportunity must be clearly open to any qualified U.S. worker, and cannot exist only for the purposes of the labor certification. 20 C.F.R. § 656.10(c)(8); see *Matter of Silver Dragon Chinese Restaurant*, 19 I&N Dec. 401 (Comm'r 1986). That 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.

For example, where the alien's spouse was a director, chief financial officer, and corporate secretary of the employer corporation, BALCA affirmed the denial of a labor certification application because the employer did not establish the *bona fides* of the job opportunity. *Matter of Young Seal of Am., Inc.*, 88-INA-121, 1989 WL 250362, *2 (BALCA May 17, 1989) (*en banc*). BALCA stated: "In light of the marital relationship and the amount of control exercised by the Alien's spouse, it appears evident that the Alien is unlikely to be displaced by a U.S. worker." *Id.* at *3.

The evidence in the record indicates that the franchisor maintains a degree of control over the franchisee, casting doubt on whether the job opportunity was open to any qualified U.S. worker. Specifically, as detailed above, the petitioner's president is the co-owner of the franchisor, along with the beneficiary's husband. Further, the petitioner's president and the beneficiary's husband are close, long-term business partners who created and control a franchise system, which purports to offer a *bona fide* job opportunity to the beneficiary through a franchisee. In the instant case, the petitioner has not submitted a copy of its franchise agreement with its franchisor, [REDACTED]. The degree of control exercised over the petitioner by the franchisor and the beneficiary's husband, its chief executive officer and co-owner, is unclear. However, evidence of record suggests that the franchisor and the beneficiary's husband exercise some control over the petitioner. As noted above, the beneficiary's husband is the chief executive officer of the franchisor, and the beneficiary's son is the chief operating officer of the franchisor. The petitioner's president is a co-owner and executive officer of the franchisor.

As discussed previously, news articles and the franchisor's website state that the petitioner's president co-founded the franchise with the beneficiary's husband and "is involved in every aspect of [REDACTED]" See [REDACTED] (accessed

on July 15, 2014). The franchisor's website also states that the franchise was designed to provide national, centralized technology systems to eliminate "the majority of administrative duties from the office level." *Id.* Thus, the franchisor's website suggests that the beneficiary's husband, as the franchisor's chief executive officer, exercises some control over the petitioner and that, in light of the centralized systems of the franchisor, the petitioner would have little need for the administrative services of a secretary.

Counsel asserts that we relied on cases distinguishable from the instant matter in our prior decision. Unlike the foreign nationals in *Matter of Silver Dragon Chinese Rest.*, 19 I&N Dec. 401 (Comm'r 1986), *Matter of Amger Corp.*, 87-INA-545 (BALCA Oct. 15, 1987) (*en banc*), and *Matter of Sunmart 374*, 2000-INA-93, 2000 WL 707942 (BALCA May 15, 2000), counsel argues that neither the beneficiary nor her husband have an ownership interest in the petitioner. Counsel also asserts that the finding in *Matter of Sunmart 374*, *supra*, is inapplicable to the instant case. Unlike the petitioner in that case, which did not submit a complete, responsive answer to the DOL's request for evidence of the alien's relationship to it, counsel argues that the instant petitioner has submitted copies of its labor certification recruitment package to demonstrate the "extensive recruitment" it performed, purportedly showing that the offered position "was truly open to U.S. workers."

As previously indicated, we acknowledge that the record does not contain evidence of an ownership interest in the petitioner by the beneficiary or her husband. However, in *Matter of Sunmart 374*, *supra*, which was decided after both *Matter of Silver Dragon*, *supra*, and *Matter of Amger*, *supra*, BALCA found that a variety of relationships between a petitioner and a beneficiary can render a job opportunity invalid. BALCA stated that a potentially invalid relationship "is not only of the blood; it may also be financial, by marriage, or through friendship." *Matter of Sunmart 374*, *supra*, at *3; see also *Matter of Modular Container Systems*, *supra*, at *8 ("Where an alien has an ownership interest in, or some other special relationship with, the sponsoring employer, the employer must demonstrate that a *bona fide* job opportunity exists for qualified U.S. applicants") (emphasis added). The record demonstrates that a relationship exists among the beneficiary, her husband, the petitioner and its president that indicates that the job opportunity is not open to U.S. workers.

The information and evidence in the record indicate a degree of relationship between the franchisor, in which the beneficiary's husband is an executive officer and a co-owner and her son is an executive officer, and the petitioner/franchisee, which purports to offer a *bona fide* job opportunity, that would preclude the position from being clearly open to any U.S. worker. In any further proceedings, the petitioner would need to submit additional evidence that establishes a *bona fide* job opportunity exists that was clearly open to U.S. workers.

Also, the petitioner's recruitment evidence alone does not establish a *bona fide* job opportunity. A job opportunity is not *bona fide* merely because the petitioner advertised it. Rather, when questioned, the employer must show that it sought to fill the position with a U.S. worker "in good faith." *Matter of Amger*, *supra*, at *2. The petitioner's obligation to show that the job opportunity has been and is clearly open to qualified U.S. workers "infuses the recruitment process with the requirement of a *bona fide* job opportunity: not merely a test of the job market." *Matter of Modular*

Container Systems, supra, at *7. Evidence of the petitioner's advertisement of the offered position, by itself, is insufficient to establish the *bona fides* of the job opportunity.

In addition, the petitioner's recruitment for the offered position during the labor certification process appears to be deficient. At the time of the petition's priority date, an employer was required to document its "reasonable good faith efforts to recruit U.S. workers," 20 C.F.R. § 656.21(b)(1) (2004), and to place an advertisement for the job opportunity in a newspaper of general circulation or a professional, trade, or ethnic publication, whichever is appropriate and "most likely to bring responses from able, willing, qualified, and available U.S. workers." 20 C.F.R. § 656.21(g) (2004).

The copies of the newspaper ads submitted by the petitioner specifically identify the job location as [REDACTED] Florida. However, the labor certification states that the beneficiary will work in [REDACTED] Florida. All of the petitioner's ads were placed in the [REDACTED] newspaper, and each of the four ads placed from January 23, 2004 to March 21, 2004 indicate the job location to be in [REDACTED] and [REDACTED] are located in different counties and in different Metropolitan Statistical Areas. See *eg.*, DOL Foreign Labor Data Center, <http://www.flcdcenter.com/OesWizardStep2.aspx?stateName=Florida> (accessed Aug. 26, 2014).

The petitioner's recruitment report also includes a "Notice of Job Availability, signed by the petitioner's president, indicating information for the position offered was posted from February 24, 2004 to March 12, 2004. The posting notice does not list a job location, and does not specify where the notice was posted. The petitioner does not appear to have an office location in [REDACTED] Florida, or to carry on business in [REDACTED] Florida. See [http://www.\[REDACTED\]/contactus](http://www.[REDACTED]/contactus) (accessed Aug. 26, 2014). The petitioner's recruitment report indicates that its advertisement in a [REDACTED] Florida, newspaper for a secretary to work in [REDACTED] Florida, resulted in "no responses."

These advertisements do not appear to describe the job opportunity with particularity. 20 C.F.R. § 656.21(g)(3). It appears that the petitioner's advertisements, which were placed in [REDACTED] Florida and indicated a work location of [REDACTED] Florida, offered less favorable terms and conditions of employment than those offered to the beneficiary. 20 C.F.R. § 656.21(g)(8) (the employer must "[o]ffer wages, terms, and conditions of employment which are no less favorable than those offered to the alien).

Because the advertised job location does not match the worksite indicated on the labor certification application and the place of advertisement, the record does not establish that the petitioner engaged in reasonable good faith efforts to recruit U.S. workers, or that it placed an ad in a publication most likely to bring responses from able, willing, qualified, and available U.S. workers.

The petitioner also submits documentation about job "networking." Counsel argues that we should consider networking with friends and family members to be a valid part of a "job search." Counsel states that "[i]t would not be farfetched to have the beneficiary approach her spouse in regards to job leads available in the areas."

Counsel appears to assert that the beneficiary's husband told her of the offered position in response to an inquiry by her about available jobs and that this is further evidence that the petitioner conducted its recruitment in good faith. However, the record lacks evidence to support such an assertion. See *Matter of Obaigbena*, supra, at 534 n.2 (the assertions of counsel do not constitute evidence) (citation omitted); see also *Matter of Soffici*, supra, at 165 (stating that going on record without supporting documentary evidence is insufficient to meet the burden of proof in visa petition proceedings) (citation omitted).

In addition, although the petition, the accompanying labor certification, and the petitioner's website identify a different mailing and worksite address for the petitioner, see [http://www. \[REDACTED\] ntactus/default.aspx](http://www. [REDACTED] ntactus/default.aspx) (accessed Aug. 6, 2014), the petitioner's appeal and instant motion to this office state its mailing address to be the address of its franchisor. The petitioner's use of the franchisor's address in its recent immigration filings suggests that the franchisor exercises some control over the petitioner, including involvement and control of the petitioner's immigration filings. The use of the franchisor's address, combined with the discrepancy between the worksite on the petition and the advertised worksite of [REDACTED], casts additional doubt on the *bona fides* of the job opportunity.

In summary, substantial evidence supports the finding of a continuing, close business relationship between the petitioner's president and the beneficiary's husband, casting doubt on the *bona fides* of the offered job opportunity. The petitioner's president is also the co-owner, with the beneficiary's husband, of the franchisor company through which the petitioner operates. The evidence provided on motion, of the position's advertisement and the lack of an ownership interest in the petitioner by the beneficiary or her husband, is insufficient to overcome this doubt and to establish the *bona fides* of the job opportunity. Substantial evidence suggests that the job opportunity was not available to any qualified U.S. worker because of the financial or other special relationships that exist in this matter. After careful reconsideration, we affirm our prior determination that the record does not establish the *bona fides* of the job opportunity.

In conclusion, the petitioner's motion to reconsider will be granted. However, we will affirm our determinations that the petitioner did not establish the existence of a *bona fide* job opportunity or its continuing ability to pay the beneficiary's proffered wage from the petitioner's priority date onward.

The petition will be denied for the above stated reasons, with each considered 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; *Matter of Otiende*, 26 I&N Dec. 127, 128 (BIA 2013). Here, that burden has not been met.

ORDER: The motion to reconsider is granted, and the petition remains denied.