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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



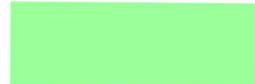
U.S. Citizenship
and Immigration
Services



DATE: **DEC 16 2014**

OFFICE: TEXAS SERVICE CENTER

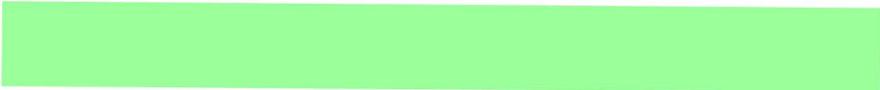
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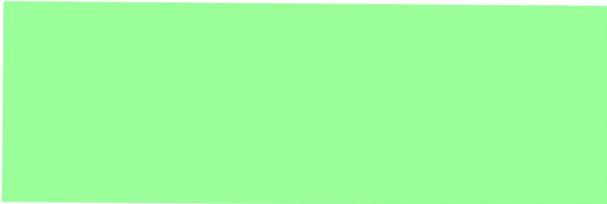
Petitioner:

Beneficiary:



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

ON BEHALF OF PETITIONER:



INSTRUCTIONS:

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

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, Texas Service Center (Director), denied the immigrant visa petition and invalidated the labor certification based on findings of fraud or willful misrepresentation of a material fact by the petitioner and the beneficiary. The petitioner filed an appeal, which was dismissed by the Chief, Administrative Appeals Office (AAO). In addition to affirming the Director's findings, we found additional grounds to deny the petition. The petitioner filed a motion to reopen and a motion to reconsider. We granted the motions, but affirmed our previous decision to leave the petition denied and the labor certification invalidated.

The case is now before the AAO on a motion to reconsider. The motion will be granted, the findings of fraud or willful misrepresentation against the petitioner and the beneficiary will be withdrawn, and the invalidation of the labor certification will be rescinded. We will also withdraw one other ground for denial of the petition. However, two remaining grounds for denial will be affirmed. Accordingly, the petition will remain denied.

The petitioner is a convenience store. It seeks to employ the beneficiary permanently in the United States as a manager pursuant to section 203(b)(3)(A) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(3)(A). Section 203(b)(3)(A)(i) of the Act, 8 U.S.C. § 1153(b)(3)(A)(i), provides for the granting of preference classification to qualified immigrants who are capable of performing skilled labor (requiring at least two years training or experience), not of a temporary nature, for which qualified workers are not available in the United States. Section 203(b)(3)(A)(ii) of the Act, 8 U.S.C. § 1153(b)(3)(A)(ii), provides for the granting of preference classification to qualified immigrants who hold baccalaureate degrees and are members of the professions.

The petitioner filed the instant Form I-140, Immigrant Petition for Alien Worker, on September 17, 2007. As required by statute, the petition was accompanied by a labor certification application (Form ETA 750, Application for Alien Employment Certification), which was filed at the Department of Labor (DOL) on April 30, 2001, and certified by the DOL (labor certification) on June 21, 2007.

Section 14 of the Form ETA 750 specifies that a minimum of two years of experience in the job offered (manager), or in the related occupation of assistant manager, is required to qualify for the proffered position. No education or training is required by the labor certification. Thus, the instant petition seeks classification of the beneficiary as a skilled worker.

By decision dated June 11, 2012, the Director denied the petition on two grounds. As the first ground for denial, the Director determined that the petitioner failed to establish that the beneficiary had two years of qualifying experience by the priority date of April 30, 2001,¹ as required for him to be eligible for classification as a skilled worker under section 203(b)(3)(A)(i) of the Act. The Director also found that both the petitioner and the beneficiary engaged in fraud or willful

¹ The priority date of the petition is the date the underlying labor certification application was received for processing by the DOL. See C.F.R. § 204.5(d). A beneficiary must have all the education, training, and experience specified on the labor certification as of the petition's priority date to be eligible for the classification sought. See *Matter of Wing's Tea House*, 16 I&N Dec.158 (Act. Reg. Comm. 1977).

misrepresentation of a material fact by submitting falsified documents relating to the beneficiary's employment history which did not accord with the information provided in the labor certification. Based on the finding of fraud or willful misrepresentation the Director invalidated the labor certification in accordance with the authority conferred by 20 C.F.R. § 656.30(d). Since the instant petition was no longer accompanied by a valid labor certification, as required by 8 C.F.R. § 204.5(l)(3)(i), the Director denied the petition on this second ground as well.

The petitioner filed an appeal, supplemented by a brief from counsel and supporting documentation. We conduct appellate review on a *de novo* basis. See *Soltane v. Department of Justice*, 381 F.3d 143, 145 (3d Cir. 2004).

On June 7, 2013, we issued a decision affirming the Director's findings that: (1) the petitioner failed to establish that the beneficiary had at least two years of qualifying experience to be eligible for skilled worker classification, and (2) fraud or willful misrepresentation of a material fact was committed with respect to the labor certification which warranted its invalidation. Like the Director, we made a specific finding that the beneficiary engaged in fraud or willful misrepresentation regarding his employment history during the labor certification process. Beyond the decision of the Director, we also found two additional grounds for denying the petition. Specifically, we found that the petitioner failed to establish (a) its continuing ability to pay the proffered wage from the priority date up to the present and (b) that the proffered position is a *bona fide* job opportunity available to U.S. workers. Regarding the ability to pay issue, we stated that U.S. Citizenship and Immigration Services (USCIS) records showed that the petitioner had filed another Form I-140 petition on behalf of another beneficiary. We indicated that the petitioner must establish its continuing ability to pay the proffered wage to that individual as well as to the instant beneficiary, and identified the types of evidence needed in respect to the other individual. As for the *bona fides* of the job offer, we noted that close business and family ties exist between the beneficiary and one or more of the petitioner's owners, and concluded that the evidence of record failed to establish that the proffered position represents a job opportunity that is actually available to U.S. workers.

The petitioner filed a motion to reopen and a motion to reconsider, along with a brief from counsel and supporting documentation.

On November 14, 2013, we issued a decision that granted the motions to reopen and reconsider, but affirmed our previous decision which left the petition denied and the labor certification invalidated. In particular, we found that the petitioner failed to establish that the beneficiary had at least two years of qualifying experience, notwithstanding the fact that the petitioner was able to resolve several evidentiary issues in the documentation of record. We also found that the newly-submitted evidence did not overcome the previous findings of fraud or willful misrepresentation involving the labor certification. On the ability to pay issue, we cited the photocopied federal income tax returns submitted by the petitioner – which covered the years 2001-2012, but without Schedule L for the years 2003, 2011,² and 2012 – and indicated that none of the specifically identified information regarding the other I-140 beneficiary had been submitted. Accordingly, we once again found that

² In fact, the record does include the petitioner's Schedule L for the tax year 2011.

the petitioner failed to establish its continuing ability to pay the proffered wage to the instant beneficiary and to the beneficiary of the other I-140 petition. Finally, we concluded, as before, that the evidence of record failed to establish that the proffered position was a *bona fide* job opportunity open to U.S. workers, noting that the DOL, as far as the record showed, was unaware of the pre-existing business and familial relationships between the beneficiary and the petitioner's owners.

The petitioner filed a motion to reconsider the decision, along with a brief from counsel and copies of documentation already in the record. The requirements for a motion to reconsider are set forth at 8 C.F.R. § 103.5(a)(3):

A motion to reconsider must state the reasons for reconsideration and be supported by any pertinent precedent decisions to establish that the decision was based on an incorrect application of law or [USCIS] policy. A motion to reconsider a decision on an application or petition must, when filed, also establish that the decision was incorrect based on the evidence of record at the time of the initial decision.

The petitioner's motion meets these regulatory requirements, and will therefore be granted. In visa petition proceedings, the burden is on the petitioner to establish eligibility for the benefit sought. *See Matter of Brantigan*, 11 I&N Dec. 493 (BIA 1966). The petitioner must prove by a preponderance of the evidence that the beneficiary is fully qualified for the benefit sought. *See Matter of Martinez*, 21 I&N Dec. 1035, 1036 (BIA 1997); *Matter of Patel*, 19 I&N Dec. 774 (BIA 1988); *Matter of Soo Hoo*, 11 I&N Dec. 151 (BIA 1965).

After reviewing the entire record in this case, we are persuaded by a preponderance of the evidence that the beneficiary had at least two years of qualifying experience as a manager or assistant manager in a convenience store, in conformance with the terms of the labor certification, before the priority date of April 30, 2001. Accordingly, the previous findings by our office and the Director that the petitioner failed to establish that the beneficiary met the minimum experience requirement set forth on the labor certification for classification as a skilled worker under section 203(b)(3)(A)(i) of the Act will be withdrawn. We are also persuaded, by a preponderance of the evidence, that no fraud or willful misrepresentation of a material fact involving the labor certification was committed by the petitioner or the beneficiary. Accordingly, the invalidation of the labor certification by the Director, and our decisions affirming the invalidation, will be rescinded. In addition, the specific findings by our office and the Director that the beneficiary was engaged in fraud or willful misrepresentation of a material fact involving the labor certification will be withdrawn.

While the petitioner has overcome the grounds for denial described above, the petition cannot be approved because two grounds for denial remain intact. For the reasons discussed hereinafter, we affirm our previous findings that (a) the petitioner has failed to establish its continuing ability to pay the proffered wage of the job offered (as well as that of the other I-140 beneficiary) from the priority date up to the present, and (b) the petitioner has failed to establish that the proffered position is a *bona fide* job opportunity available to U.S. workers.

Ability to Pay the Proffered Wage

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

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

The record in this case includes photocopies of the petitioner's federal tax returns (Form 1120S, U.S. Income Tax Return for an S Corporation) for each of the years 2001-2012, some of which are incomplete. Specifically, for the year 2012 only the first two pages of the tax return are in the record (thereby omitting much of Schedule K and all of Schedules L, M-1, and M-2 on pages 3 and 4), for the year 2003 only the first three pages of the tax return are in the record (thereby omitting the Schedules L, M-1 and M-2 on page 4), and for the years 2007-2009 only the first four pages of the tax return are in the record. For all of these years (2003, 2007-2009, and 2012) the Forms K-1 (which were submitted for the years 2001-2002, 2004-2006, and 2010-2011) are missing.

The petitioner must demonstrate its continuing ability to pay the proffered wage beginning on the priority date. As previously noted, the priority date in this case is April 30, 2001. The proffered wage stated on the Form ETA 750 is \$20.70 per hour (as amended on October 18, 2004), which amounts to \$43,056 per year (based on a standard work year of 2,080 hours).³

The petitioner must establish that its job offer to the beneficiary is realistic. Because the filing of a Form ETA 750 establishes a priority date for any immigrant petition later based on that document, the petitioner must establish that the job offer was realistic as of the priority date and that the offer remained realistic for each year thereafter, until the beneficiary obtains lawful permanent residence. The petitioner's ability to pay the proffered wage is an essential element in evaluating whether a job offer is realistic. *See Matter of Great Wall*, 16 I&N Dec. 142 (Acting Reg. Comm. 1977); *see also* 8 C.F.R. § 204.5(g)(2). In evaluating whether a job offer is realistic, USCIS requires the petitioner to demonstrate financial resources sufficient to pay the beneficiary's proffered wages, although the totality of the circumstances affecting the petitioning business will be considered if the evidence warrants such consideration. *See Matter of Sonegawa*, 12 I&N Dec. 612 (Reg. Comm. 1967).

In determining the petitioner's ability to pay the proffered wage between the priority date and the present, USCIS first examines 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

³ On the Form I-140 subsequently filed in 2007, the petitioner stated that the weekly wages for the proffered position were \$828.00. That amounts to \$43,080 per year based on a 52-week work year. The controlling document for the proffered wage, however, is the labor certification, not the petition.

salary equal to or greater than the proffered wage, the evidence will be considered *prima facie* proof of the petitioner's ability to pay the proffered wage. In this case, there is no evidence that the petitioner has employed and paid the beneficiary at any time since the priority date.

Thus, the petitioner has not established its continuing ability to pay the proffered wage from the priority date (April 30, 2001) up to the present based on its actual compensation to the beneficiary.

If the petitioner has not employed the beneficiary since the priority date, USCIS will next examine the net income figure reflected on the petitioner's federal income tax return, without consideration of depreciation or other expenses. See *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). 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. See *Elatos Restaurant Corp. v. Sava*, 632 F. Supp. 1049, 1054 (S.D.N.Y. 1986) (citing *Tongatapu Woodcraft Hawaii, Ltd. v. Feldman*, 736 F.2d 1305 (9th Cir. 1984)); see also *Chi-Feng Chang v. Thornburgh*, 719 F. Supp. 532 (N.D. Texas 1989); *K.C.P. Food Co., Inc. v. Sava*, 623 F. Supp. 1080 (S.D.N.Y. 1985); *Ubeda v. Palmer*, 539 F. Supp. 647 (N.D. Ill. 1982), *aff'd*, 703 F.2d 571 (7th Cir. 1983). Reliance on the petitioner's wage expense is misplaced. Showing that the petitioner's gross receipts exceeded the proffered wage is insufficient. Similarly, showing that the petitioner paid wages to all of its employees in excess of the proffered wage to the beneficiary 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). Consistent with its prior adjudications, and backed by federal court rulings, we will not consider depreciation in examining the petitioner’s net income.

The petitioner’s federal income tax returns (Forms 1120S) for the years 2001-2012 recorded net income in the following amounts:⁴

2001:	\$ 32,478	2007:	\$ 55,672
2002:	\$ 39,911	2008:	\$ 31,931
2003:	\$ 46,607	2009:	\$ 31,362
2004:	\$ 48,424	2010:	\$ 29,675
2005:	\$ 49,559	2011:	\$ 28,492
2006:	\$ 53,638	2012:	\$ 7,206 ⁵

In only five of the above years (2003-2007) did the petitioner’s net income equal or exceed the annualized proffered wage of \$43,056.

Accordingly, the petitioner has not established its continuing ability to pay the proffered wage based on its net income in the years since the priority date.

As another alternate means of determining the petitioner’s ability to pay the proffered wage, USCIS may review the petitioner’s net current assets as reflected on its federal income tax returns. Net current assets are the difference between the petitioner’s current assets and current liabilities.⁶ A

⁴ For an S corporation, if its 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 IRS Form 1120S. However, if 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 18 (for the tax years 2001-2003), line 17e (for the tax years 2004-2005), and line 23 (for the tax years 2006 onward). 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 shareholder’s shares of the corporation’s income, deductions, credits, etc.). In the petitioner’s case, the figures on page 1, line 21, and the respective line in Schedule K are the same for every year from 2001 to 2011.

⁵ The partial tax return for 2012 does not include the complete Schedule K. Therefore, this income figure is taken from page 1, line 21 of the Form 1120S.

⁶ According to *Barron’s Dictionary of Accounting Terms* 117 (3rd ed. 2000), “current assets” consist of items having (in most cases) a life of one year or less, such as cash, marketable securities, inventory and prepaid expenses. “Current liabilities” are obligations payable (in most cases) within one year, such accounts payable, short-term notes payable, and accrued expenses (such as taxes and salaries). *Id.* at 118.

corporation's year-end current assets are shown on Schedule L, lines 1 through 6. Its year-end current liabilities are shown on Schedule L, 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.

In this case the petitioner's federal income tax returns show net current assets for the years 2001-2002, and 2004-2011, in the following amounts:

2001:	\$ 85,549	2007:	\$155,514
2002:	\$113,287	2008:	\$128,608
2003:	-----	2009:	\$ 86,145
2004:	\$115,844	2010:	\$109,688
2005:	\$150,183	2011:	\$172,223
2006:	\$127,813	2012:	-----

While the petitioner's net current assets exceeded the annualized proffered wage of \$43,056 in the years 2001, 2002, and 2004-2011, there is no evidence they did so in the years 2003 and 2012 because the Schedule L was not submitted for either of those years.

Accordingly, the petitioner has not established its continuing ability to pay the proffered wage based on its net current assets in all of the years since 2001.

The foregoing analysis indicates that the petitioner's net income and/or its net current assets exceeded the proffered wage for each of the years 2001-2011, but not for the year 2012. If the instant beneficiary were the only one for whom the petitioner had filed a Form I-140 petition, its ability to pay the proffered wage would be established for all of the above years except for 2012. However, USCIS records show that the petitioner filed another Form I-140 on behalf of another beneficiary in 2007, and that petition was approved in 2008. The petitioner must produce evidence that its job offers to every beneficiary are realistic – *i.e.* that it has the ability to pay the proffered wages to each of the beneficiaries from the priority date of each petition and continuing until the beneficiary of each petition obtains lawful permanent residence. *See Matter of Great Wall*, 16 I&N Dec. at 144-145; *see also* 8 C.F.R. § 204.5(g)(2). In our previous two decisions we advised the petitioner that we needed specific evidence about the other petition – including the priority date, the proffered wage, the status of the application, and whether the beneficiary has acquired lawful permanent resident status – in order to determine the petitioner's ability to pay the proffered wage of that petition. The petitioner has not submitted any evidence or information whatsoever about its other I-140 petition. Thus, we cannot determine whether the petitioner has had the overall ability to pay the proffered wages of both the instant beneficiary and the other beneficiary from the time the other petition was filed in 2007 up to the present. 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 addition to the previously discussed criteria of compensation actually paid to the beneficiary, as well as the petitioner's net income and net current assets over the years, USCIS may consider the totality of circumstances, including the overall magnitude of business activities, in determining the petitioner's ability to pay the proffered wage. *See Matter of Sonogawa*, 12 I&N Dec. 612.⁷ As in *Sonogawa*, USCIS may, at its discretion, consider evidence relevant to the instant petitioner's financial ability that falls outside of its net income and net current assets. USCIS may consider such factors as the number of years the petitioner has been doing business, the established historical growth of the petitioner's business, the petitioner's reputation within its industry, the overall number of employees, whether the beneficiary is replacing a former employee or an outsourced service, the amount of compensation paid to officers, the occurrence of any uncharacteristic business expenditures or losses, and any other evidence that USCIS deems relevant to the petitioner's ability to pay the proffered wage.

In this case, the petitioner indicates that it has been in business since 1993 and had two employees at the time the instant petition was filed in 2007. While its federal income tax returns show gradually increasing gross receipts in the years 2001-2008 (from \$820,729 in 2001 up to \$1,047,660 in 2008), subsequent years show sharp drops in gross receipts down to \$916,033 in 2009, \$830,228 in 2010, \$770,959 in 2011, and \$541,518 in 2012. Thus, gross income dropped by nearly half in the four-year period from 2008 to 2012. Moreover, by 2012 the petitioner's net income was down to \$7,206, nearly \$50,000 below its highest figure in 2007. The petitioner has not shown that it has other financial resources to compensate for its declining income. On its tax returns the petitioner reported that it paid \$48,000 in salaries and wages for each of the years 2001-2006, \$57,690 for the years 2007 and 2008, \$48,000 for the years 2009-2011, and \$49,500 for the year 2012. In hiring one additional worker at approximately the same compensation level as the beneficiary the petitioner would need to nearly double this figure. The petitioner's failure to furnish any evidence or information about the other I-140 petition it filed in 2007, and its additional financial obligation to that beneficiary, calls into question whether it had the ability to pay the proffered wage of the job offered to the instant beneficiary during the entire period from 2007 up to the present. For the reasons discussed above, the record does not establish that the totality of the petitioner's circumstances, as in *Sonogawa*, demonstrates its continuing ability to pay the proffered wage of the job offered from the priority date up to the present.

⁷ 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.

Based on the foregoing analysis, we determine that the petitioner has failed to establish its ability to pay the proffered wage of the subject position from the priority date (April 30, 2001) up to the present. Accordingly, the petition cannot be approved.

Bona Fides of the Job Offer

In addition, the petitioner has not established that a *bona fide* job offer exists that is open to U.S. citizens. See *Matter of Silver Dragon Chinese Restaurant*, 19 I&N Dec. 401 (Comm'r 1986). In accordance with 20 C.F.R. § 626.20(c)(8) and § 656.3, the petitioner must demonstrate that a valid employment relationship exists and that a *bona fide* job opportunity is available to U.S. workers. See also 20 C.F.R. § 656.17(l); *Matter of Amger Corp.*, 87-INA-545 (BALCA 1987). 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." *Matter of Sunmart 374*, 00-INA-93 (BALCA May 15, 2000); see also *Keyjoy Trading Co.*, 1987-INA-592 (BALCA Dec. 15, 1987) (*en banc*).

In determining whether a *bona fide* job opportunity exists for U.S. workers, adjudicators must consider multiple factors, including but not limited to whether the alien (a) is in a position to control or influence hiring decisions regarding the proffered position; (b) is related to corporate directors, officers, or employees; (c) incorporated or founded the company; (d) sits on its board of directors; (e) is one of a small group of employees; and (f) has qualifications matching specialized or unusual job duties or requirements stated in the labor certification. See *Modular Container Systems, Inc.*, 1989-INA-228 (BALCA July 16, 1991) (*en banc*).

In the instant case, while we are persuaded that the petitioner and the beneficiary did not engage in fraud or misrepresentation of a material fact in connection with the labor certification, the record indicates that there is a familial and business relationship between one (or both) of the petitioner's co-owners and the beneficiary which was not disclosed to the DOL. As noted in our previous decisions, the beneficiary has had a business relationship with [REDACTED], a relative of one of the petitioner's owners ([REDACTED], identified in the petitioner's federal income tax returns as a 50% shareholder).⁸ This relationship raises questions as to whether it created undue influence in the recruitment process for the proffered position of store manager and whether the job opportunity was truly open to qualified U.S. workers. No documentary evidence has been submitted showing that it was – including such materials as the online and print announcements of the job opening, the resumes received in response thereto, the petitioner's evaluation sheets of those resumes, and the petitioner's recruitment report to the DOL.

Based on the evidence of record in this case, we determine that the petitioner has failed to establish that the store manager position at issue in this proceeding is or was a *bona fide* job opportunity available to U.S. workers. For this reason as well, the petition cannot be approved.

⁸ It appears that the beneficiary may also have had a prior business relationship with the petitioner's other 50% shareholder, [REDACTED].

Conclusion

In summation, we determine that the instant petition cannot be approved on the following grounds:

- (1) The petitioner has not established its continuing ability to pay the proffered wage of the job offered from the priority date (April 30, 2001) up to the present.
- (2) The petitioner has not established that a *bona fide* job offer is or was available to U.S. workers due to the business relationship between the beneficiary and one or both of its co-owners.

The petition will remain 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. *See* section 291 of the Act, 8 U.S.C. § 1361; *Matter of Otiende*, 26 I&N Dec. 127, 128 (BIA 2013). That burden has not been met in this proceeding with respect to the petitioner's continuing ability to pay the proffered wage and the *bona fides* of the job opportunity.

ORDER: The motion to reconsider is granted. The invalidation of the labor certification, Form ETA 750, ETA case number [REDACTED], is rescinded. The findings by our office and the Director that the beneficiary engaged in fraud or willful misrepresentation of a material fact involving the labor certification are withdrawn. The findings by our office and the Director that the petitioner failed to establish that the beneficiary had two years of qualifying experience under the terms of the labor certification and was eligible for skilled worker classification are also withdrawn.

We affirm our denial of the petition, however, based on the two grounds set forth above.