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FILE: 
WAC-02-218-52083

Office: CALIFORNIA SERVICE CENTER

NOV 29 2007

Date:

~~NOV 29 2007~~

IN RE: Petitioner: 
Beneficiary: 

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

ON BEHALF OF PETITIONER:



INSTRUCTIONS:

This is the decision of the Administrative Appeals Office in your case. All documents have been returned to the office that originally decided your case. Any further inquiry must be made to that office.


Robert P. Wiemann, Chief
Administrative Appeals Office

DISCUSSION: The Director, California Service Center (“director”) denied the immigrant visa petition. The petitioner appealed and the matter is now before the Administrative Appeals Office (“AAO”). The appeal will be dismissed.

The petitioner is a dental office, and seeks to employ the beneficiary permanently in the United States as a bookkeeper (“Bookkeeper/Full Charge”). As required by statute, the petition filed was submitted with Form ETA 750, Application for Alien Employment Certification, approved by the Department of Labor (DOL). As set forth in the director’s November 22, 2005 decision, the case was denied as the director concluded that the petitioner would not employ the beneficiary as a permanent full-time employee in accordance with the certified Form ETA 750.

The AAO maintains plenary power to review each appeal on a de novo basis. 5 U.S.C. § 557(b) (“On appeal from or review of the initial decision, the agency has all the powers which it would have in making the initial decision except as it may limit the issues on notice or by rule.”); *see also*, *Janka v. U.S. Dept. of Transp.*, NTSB, 925 F.2d 1147, 1149 (9th Cir. 1991). The AAO’s de novo authority has been long recognized by the federal courts. *See, e.g. Dor v. INS*, 891 F.2d 997, 1002 n. 9 (2d Cir. 1989).¹

The record shows that the appeal is properly filed, timely and makes a specific allegation of error in law or fact. The procedural history in this case is documented by the record and incorporated into the decision. Further elaboration of the procedural history will be made only as necessary.

The petitioner has filed to obtain permanent residence and classify the beneficiary as a skilled worker. The regulation at 8 C.F.R. § 204.5(l)(2), and 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. *See also* 8 C.F.R. § 204.5(l)(3)(ii)(b).

The regulation 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 in the form of copies of annual reports, federal tax returns, or audited financial statements.

The petitioner must demonstrate the continuing ability to pay the proffered wage beginning on the priority date, which is the date the Form ETA 750 Application for Alien Employment Certification, was accepted for processing by any office within the employment system of the U.S. Department of Labor (“DOL”). *See* 8 CFR § 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

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

U.S. Department of Labor and submitted with the instant petition. *Matter of Wing's Tea House*, 16 I&N Dec. 158 (Act. Reg. Comm. 1977).

Here, the Form ETA 750 was accepted for processing by the relevant office within the DOL employment system on March 26, 1999. The proffered wage as stated on the Form ETA 750 is \$12.64 per hour, 40 hours per week, which is equivalent to \$26,291.20 per year. The labor certification was approved on May 22, 2002. The petitioner filed an I-140 Petition for the beneficiary on June 26, 2002. The petitioner listed the following information on the I-140 Petition: established: January 1998; gross annual income: \$500,000; net annual income: \$150,000; and current number of employees: 6.

On October 11, 2002, the director issued a Request for Evidence ("RFE") for the petitioner to provide evidence of the beneficiary's prior experience to establish that she met the qualifications of the certified labor certification. The petitioner responded and provided evidence of her prior experience.

On February 12, 2003, the director issued a second RFE for the petitioner to provide the beneficiary's Form W-2s for the years 1993 to 2002. The petitioner provided the documentation requested.²

On September 20, 2005, the petitioner and the beneficiary were interviewed at the Citizenship & Immigration Services ("CIS") Santa Ana, California District Office. Based on the interview and on information obtained at that interview, the director concluded that the petitioner did not intend to employ the beneficiary full-time in accordance with the terms of the certified ETA 750 in the position of a bookkeeper. Specifically, the decision provided:

The petitioner's dental office employs the petitioner and one associate dentist, no dental hygienists, four dental assistants, an office coordinator, an assistant office coordinator, and the beneficiary as a bookkeeper.

The petitioner confirmed that the beneficiary works a forty-hour workweek. The petitioner was questioned about the duties the beneficiary performs in addition to bookkeeping. The petitioner was initially vague when answering this question. Eventually, the petitioner stated that the beneficiary helps out in the office with filing and other non-bookkeeping tasks most of the time when the office is busy. The petitioner roughly defined times when the office was

² The W-2's showed the following:

<u>Year</u>	<u>Employer</u>	<u>Wages</u>
2001		\$30,513
2000		\$33,800
1999		\$33,550
1998		\$31,767
1998		\$8,750
1997		\$8,750
1997		\$1,872
1996		\$9,100
1996		\$6,400
1995		\$16,100
1994		\$16,765
1993		\$5,753

busy as the times when people were off work such as weekend hours and after 5:00 during the week. The petitioner's office is open the following hours:

Closed Monday
11:00 a.m. – 8:00 p.m. Tuesday and Thursday
9:00 a.m. – 6:00 p.m. Wednesday
10:00 a.m. – 7 p.m. Friday
8:00 a.m. – 5:00 p.m. Saturday
Occasional Sunday hours

From the above schedule, and the petitioner's definition of busy, one can see that the beneficiary is potentially doing non-bookkeeping tasks thirteen hours a week. This figure assumes an hour lunch is taken on Saturdays and does not include Sunday hours. The petitioner stated that the beneficiary regularly works on Sunday when the office has Sunday hours.

The director also found "noteworthy inconsistencies" in some of the answers that the petitioner and the beneficiary provided. The ETA 750 position is for a bookkeeper, and such work "should not need to be done when patients are present." Additionally, the director found it relevant that the beneficiary did not have a designated work area, but would instead work in the dentist's office when she issued checks, or in the front office area with the office coordinator and her assistant.

When questioned regarding the need to work on weekends:

Beneficiary and petitioner agreed that working Saturday was necessary to make up hours lost when the office was closed on Monday. However, beneficiary and petitioner gave inconsistent answers in regards to the need for a bookkeeper to work Sunday hours. The petitioner stated that the office would close one extra day during the week when the office was open on Sunday. Petitioner claimed that the beneficiary needed to work Sunday to have a full forty-hour workweek. The beneficiary stated that working Sunday was done for bookkeeping needs, and not necessary to make up hours lost when the office was closed on a day during the week.

As mentioned above, the petitioner eventually stated that the beneficiary does non-bookkeeping tasks most of the time when the office is busy. During the interview, the beneficiary claimed to have only done non-bookkeeping tasks on one possible occasion. The beneficiary was advised of the petitioner's testimony and given the opportunity to respond. The beneficiary repeated her claim of only having done non-bookkeeping tasks on one possible occasion and had no response to the petitioner's testimony.

While the director noted that it was not necessary for the petitioner to actually employ the beneficiary in the position of bookkeeper prior to adjusting, the record as a whole, including the petitioner and beneficiary's testimony, inconsistencies in their responses indicated that the beneficiary was not working full-time as a bookkeeper and that it was unlikely the petitioner intended to employ her in that position on a full-time basis.³

³ The decision additionally noted that during the interview, as it was revealed that the petitioner was the beneficiary's brother, the petitioner would be required to file Form I-864. On appeal, the petitioner provided Form I-864, along with supporting tax returns to demonstrate means of support.

On November 22, 2005, the director denied the petition. The petitioner appealed and the matter is now before the AAO.

The petitioner must establish that its job offer to the beneficiary is a realistic one. Because the filing of an ETA 750 labor certification application establishes a priority date for any immigrant petition later based on the ETA 750, the petitioner must establish that the job offer was realistic as of the priority date and that the offer remained realistic for each year thereafter, until the beneficiary obtains lawful permanent residence. The petitioner's ability to pay the proffered wage is an essential element in evaluating whether a job offer is realistic. *See Matter of Great Wall*, 16 I&N Dec. 142 (Acting Reg. Comm. 1977). *See also* 8 C.F.R. § 204.5(g)(2).

CIS must look to the job offer portion of the labor certification to determine the required terms of, and qualifications for, the position. CIS may not ignore a term of the labor certification, nor may it impose additional requirements. *See Matter of Silver Dragon Chinese Restaurant*, 19 I&N Dec. 401, 406 (Comm. 1986). *See also, Mandany v. Smith*, 696 F.2d 1008, (D.C. Cir. 1983); *K.R.K. Irvine, Inc. v. Landon*, 699 F.2d 1006 (9th Cir. 1983); *Stewart Infra-Red Commissary of Massachusetts, Inc. v. Coomey*, 661 F.2d 1 (1st Cir. 1981). A labor certification is an integral part of this petition, but the issuance of a Form ETA 750 does not mandate the approval of the relating petition. To be eligible for approval, a beneficiary must have all the education, training, and experience specified on the labor certification as of the petition's priority date. 8 C.F.R. § 103.2(b)(1), (12). *See Matter of Wing's Tea House*, 16 I&N Dec. 158, 159 (Acting Reg. Comm. 1977); *Matter of Katigbak*, 14 I. & N. Dec. 45, 49 (Reg. Comm. 1971). A petitioner must establish the elements for the approval of the petition at the time of filing. A petition may not be approved if the beneficiary was not qualified at the priority date, but expects to become eligible at a subsequent time. *Matter of Katigbak*, 14 I&N Dec. 45, 49 (Comm. 1971).

A labor certification for a specific job offer is valid only for the particular job opportunity, the alien for whom the certification was granted, and for the area of intended employment stated on the Form ETA 750. *See* 20 C.F.R. § 656.30(c)(2).

On the Form ETA 750A, the "job offer" states that the position requires two years of experience⁴ in the job offered, as a bookkeeper/full charge with duties including:

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). 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 also Paris Bakery Corporation*, 1998-INA-337 (Jan. 4, 1990) (en banc), which addressed familial relationships: "We did not hold nor did we mean to imply in *Young Seal* that a close family relationship between the alien and the person having authority, standing alone, establishes, that the job opportunity is not bona fide or available to U.S. workers. Such a relationship does require that this aspect of the application be given greater attention. But, in the final analysis, it is only one factor to be considered. Assuming that there is still a genuine need for the employee with the alien's qualifications, the job has not been specifically tailored for the alien, the Employer has undertaken recruitment in good faith and the same has not produced applicants who are qualified, the relationship, per se, does not require denial of the certification." If the petitioner did not reveal the relationship to DOL, then the bona fides of the position may be in question.

⁴ The petitioner submitted documentation in accordance with 8 C.F.R. § 204.5(l)(3) to show the beneficiary's

Responsible for maintaining records to show statistics and other items pertinent to the operation of the Dental Office. He/She will: Maintain records of books of accounts: verify and perform data entry of accounts payable and receivable; analyze and reconcile accounts to reflect status; maintain records of individual accounts; prepare inventory reports and check disbursements; verify and record details of transactions based on records, invoices, sales slips [sic], inventory records and requisitions; prepare profit and loss statements, records and trial balance, quarterly reports; maintain records showing cash receipts and expenditures, accounts payable and receivable, payroll and bank reconciliation; responsible for performing billing and posting of payment.

The petitioner did not list any educational requirements in Section 14 beyond completion of high school. The offer is based on a 40-hour work week. Section 15 "other special requirements" provides that a "test will be given to verify ability to perform job duties."

Based on the information obtained during the interview from the petitioner and the beneficiary, the director concluded that the petitioner was unable to provide full-time employment in accordance with the certified

prior experience.

8 C.F.R. § 204.5(l)(3) requires:

(ii) *Other documentation*—

(A) *General.* Any requirements of training or experience for skilled workers, professionals, or other workers must be supported by letters from trainers or employers giving the name, address, and title of the trainer or employer, and a description of the training received or the experience of the alien.

(B) *Skilled workers.* If the petition is for a skilled worker, the petition must be accompanied by evidence that the alien meets the educational, training or experience, and any other requirements of the individual labor certification, meets the requirements for Schedule A designation, or meets the requirements for the Labor Market Information Pilot Program occupation designation. The minimum requirements for this classification are at least two years of training or experience.

The petitioner submitted a letter from the beneficiary's prior employer [REDACTED], which provided that she worked from December 1993 to November 1995 as a full-charge bookkeeper. We note that the dates in the letter provided differ slightly than those dates listed on Form ETA 750, which lists that she was employed with Body Web from March 1993 to November 1995. The petitioner also provided a second letter that stated the beneficiary was employed for Eunina, Inc., as a full-charge bookkeeper from October to April 13, 2001, and from September 1, 1996 through September 30, 2000 by ENA Clothing (a division of Eunina, Inc.). Form G-325 filed with the beneficiary's Adjustment of Status application, however, lists her position with Eunina and ENA as an "Accountant," rather than as a bookkeeper. 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. *Matter of Ho*, 19 I&N Dec. 582, 591 (BIA 1988). 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. *Id.* at 592.

ETA 750 job description above, and that the beneficiary would be performing work other than as a bookkeeper.

On appeal, counsel asserts the petition should have been granted, and that the director's determination was speculative. Further, counsel asserts that DOL has jurisdiction to determine whether a bona fide job offer exists; that the decision was based on unfavorable information not contained in the record; and that the denial was based on issues, which were not raised in earlier notices and violated the petitioner's rights under 8 C.F.R. § 103.2(b)(8).

Counsel provides that the petitioner's burden of proof is based on the civil standard of preponderance of the evidence. *Matter of Soo Hoo*, 11 I & N 151 (BIA 1965). Further, he provides that the petitioner must show that it is financially able to pay the proffered wage, and that it intends to employ the beneficiary to perform the job duties as set forth in the job. *Matter of Romano*, 12 I & N Dec. 731 (Comm. 1968). Counsel provides that it is undisputed that the petitioner can pay the proffered wage,⁵ that it is undisputed that the

⁵ Although not raised in the director's decision, the application should have been denied as well on the basis that the petitioner has not demonstrated its ability to pay the beneficiary the proffered wage from the time of the priority date until the beneficiary obtains permanent residence. 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 *Dor v. INS*, 891 F.2d 997, 1002 n. 9 (2d Cir. 1989)(noting that the AAO reviews appeals on a de novo basis).

While the petitioner's tax returns reflect that it could pay the proffered wage for the years 2001 onward, the petitioner's tax returns do not exhibit its ability to pay the proffered wage in the years 1999 or 2000.

The petitioner's tax returns reflect that it is a C corporation. For a C corporation, CIS considers net income to be the figure shown on line 28, taxable income before net operating loss deduction and special deductions, of Form 1120 U.S. Corporation Income Tax Return, or the equivalent figure on line 24 of the Form 1120-A U.S. Corporation Short Form Tax Return. The tax returns submitted state amounts for taxable income on line 28 as shown below:

<u>Tax year</u>	<u>Net income or (loss)</u>
2000	-\$230
1999	\$297

The petitioner's tax returns do not exhibit that it could pay the proffered wage in either of these two years.

Net current assets are the difference between the petitioner's current assets and current liabilities. 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 as accounts payable, short-term notes payable, and accrued expenses (such as taxes and salaries). *Id.* at 118.

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

beneficiary is working full-time, and that the only dispute is whether the beneficiary is performing bookkeeping duties full-time.

Counsel asserts that the affidavits provided explain that the conflicts in testimony are the result of the company's owner not being familiar with the beneficiary's work schedule and priorities. Rather, counsel provides that the beneficiary works under the supervision and direction of the office manager. Further, counsel asserts that since the petitioner, beneficiary, and office manager have provided credible affidavits, that the petitioner has met the burden of proof.

The petitioner's owner, _____ provided the following, which was signed and dated on January 16, 2006:

[The beneficiary] is supervised by my office manager . . . who is familiar with her work schedule and priorities. I am not as familiar with her work schedule because she is not under my direct supervision. For that reason I made statements to the office at the I-140 interview of August 22, 2005 which appear to contradict those made by [the beneficiary].

I told the CIS officer that [the beneficiary] must work Sundays to make up for lost hours to have a full 40 hour week. [The beneficiary] told the officer that working Sunday is for bookkeeping needs and not to make up hours lost when the office is closed during the week.

[The beneficiary's] testimony is correct. I was thinking in terms of the other dental support staff who come on Sundays and work under my supervision.

The owner also sought to address the "misunderstanding" that the beneficiary does non-booking work most of the time when the office is busy:

Normally the work schedule of the dentist is carefully and systematically arranged so that the dentist may conduct an orderly treatment of patients. When patients are attended to on schedule, I would not consider it a busy day.

I may have loosely used the word "busy" in relation to times when the patients are off work I meant to refer to a situation when the clinic is shorthanded because one or two staff members are absent because of unforeseen circumstances or when there are unscheduled walk in emergency patients that have to be seen. Situations like this are not a regular occurrence but when they occur, the bookkeeper would be the very last person we would call for help. In such a situation she would be relocated to the front desk by her direct supervisor . . . She

expected to be able to pay the proffered wage using those net current assets. The petitioner's net current assets are as follows:

<u>Tax Year</u>	<u>Net Current Assets</u>
2000	\$7,569
1999	\$2,106

Similarly, the petitioner's tax returns do not reflect that the petitioner can pay the proffered wage base on its net current assets in the years 1999, and 2000. Accordingly, the petitioner has not demonstrated its ability to pay from the time of priority date until the beneficiary obtains permanent residence.

would continue to do bookkeeping tasks which include reviewing and filing documents relating to patient accounts.

[CIS] contends that [the beneficiary] does not have a designated work area. In the office of the Company President, where financial records are kept, there is another working table that the Full Charge Bookkeeper uses as a work area. However, this is a temporary set up. Because of the growth of our business, we plan to purchase a larger building with additional office space for a bookkeeper.

The beneficiary also provided an affidavit, signed, dated, and notarized on January 13, 2006, which provided:

I am currently employed [by the petitioner] as a Full Charge Bookkeeper performing the duties described in Part A of the approved application for labor certification.

. . . the owner, is not familiar with my work schedule because I do not work under his direct supervision.

I work under the supervision of [redacted] who is familiar with my work schedule. My duties are to maintain bookkeeping records to show statistics and other items pertinent to the operation of the dental office. I perform all the duties described in Part A of the approved application for labor certification.

I perform the bookkeeping duties on a full time basis. On rare occasions, when one or two staff members are absent or there are unscheduled walk in emergency patients, I will be relocated to the front desk. When this occurs I will continue to do bookkeeping tasks that include reviewing and filing documents relating to patient accounts.

[CIS] contends that I do not have a designated work area. In the office of the Company President, where financial records are kept, there is another working table then the one beside the Office Manager that the Full Charge Bookkeeper uses as a work area. However, this is a temporary set up. Because of the growth of our business, we plan to purchase a larger building with additional office space for a bookkeeper.

I work on Sunday when the office has Sunday hours to complete bookkeeping tasks and not to make up hours lost when the office is closed during the week.

Additionally, the petitioner provided an affidavit from [redacted] the petitioner's Office Manager, which was signed and dated on January 13, 2006:

[The beneficiary] is currently employed by this office as a Full Charge Bookkeeper . . . the owner, is not familiar with [the beneficiary's] work schedule because she does not work under his direct supervision.

[The beneficiary] works under my supervision and I am familiar with her work schedule and priorities. She performs the following duties described in Part A of the approved application for labor certification.

Her duties are to maintain bookkeeping records to show statistics and other items pertinent to

the operation of the dental office. She maintains records and books of accounts, verifies and performs data entry of accounts payable and receivable, analyzes and reconciles accounts to reflect the status, maintains records of individual accounts, prepares inventory reports and checks disbursements, verifies and records details of transactions based on records, invoices, sales slips, inventory records and requisitions, prepares profit and loss statements, records and trial balance, quarterly reports, maintains records showing cash receipts and expenditures, accounts payable and receivable, payroll and bank reconciliations, and is responsible for performing billing and posting of payments.

[The beneficiary] performs those bookkeeping duties on a full time basis. On rare occasions, when one or two staff members are absent or there are unscheduled walk in emergency patients, she will be relocated to the front desk. When this occurs she continues to do bookkeeping tasks which include reviewing and filing documents relating to patients accounts.

[CIS] contends that [the beneficiary] does not have a designated work area. In the office of the Company President, where financial records are kept, there is another working table than the one beside the Office Manager that the Full Charge Bookkeeper uses as a work area. However, this is a temporary set up. Because of the growth of our business, we plan to purchase a larger building with additional office space for a bookkeeper.

[The beneficiary works on Sunday when the office has Sunday hours to complete her bookkeeping tasks and does not make up hours lost when the office is closed during the week.

Neither the petitioner or the beneficiary attached independent evidence to demonstrate the beneficiary's full-time employment, such as Quarterly Tax Returns, Forms 941, Forms W-2, recent paystubs, or payroll records to document hours worked, and wages paid. Additionally, while the beneficiary may be supervised by the office manager, given the close personal relationship of brother and sister between the owner and the beneficiary, it appears inconsistent that the owner would have little knowledge of when she worked, and what her exact tasks were.

We additionally note that the beneficiary's 2004 federal tax return filed jointly with her spouse, which was submitted with her Form I-485 Adjustment of Status application, shows that she was paid \$17,040 by the petitioner in 2004. The tax return also provides that the beneficiary earned \$55,460 from the Online University of America.⁶ On the basis that the beneficiary earned substantial pay elsewhere, we would not conclude that "it is undisputed" that the beneficiary works full-time for the petitioner. Further, we note that the beneficiary's Form G-325A filed with her I-485 application, reflects that she has been employed as the "Finance Director" of the Online University of America from January 2003 onward. None of the documents submitted list the beneficiary's start date with the petitioner, when she began working full-time for the petitioner, or whether she still retains her employment elsewhere as the "Finance Director." Additionally, we note that her position as Finance Director would be far more advanced than a position as a bookkeeper. The beneficiary also lists her prior work as the "Assistant Director" for the Continuing Education Center in Orange, California from May 2001 to December 2002, and that she was employed as an "Accountant" from

⁶ While the tax return was filed jointly, and did not provide individual copies of Forms W-2, based on the beneficiary's Form G-325A submitted, the beneficiary listed that employment with the Online University, and the earnings accordingly appear to be wages earned by the beneficiary.

September 1996 to May 2001, and not as a “bookkeeper” as a letter submitted attests. These inconsistencies in addition to the inconsistencies in the record, and developed during the interview leave doubts regarding the petitioner’s intent to employ the beneficiary in accordance with the terms of the certified Form ETA 750.

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. *Matter of Ho*, 19 I&N Dec. 582, 591 (BIA 1988). 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).

Based on the foregoing, the petitioner has failed to overcome doubts raised in the denial of the petition.

Counsel next argues that it is DOL and not DHS who may determine the issue of full-time employment. He asserts that DOL certifies the labor certification based on 20 C.F.R. § 656.24 and whether the employer has met the requirements of 20 C.F.R. § 656 and has shown that there are no qualified U.S. workers who are able, willing, qualified, and available at the place of the job opportunity. Further, counsel asserts that in the absence of fraud or willful misrepresentation that DOL’s determination is not subject to review. Counsel asserts that CIS’ role is to determine whether the beneficiary qualifies for the position described in the ETA 750, and that the petitioner has the ability to pay the proffered wage. Counsel contends that CIS now seeks to deny the I-140 petition on the basis of criteria for which CIS was never authorized to evaluate the petition in the first place.

The labor certification is evidence of an individual alien’s admissibility under section 212(a)(5)(A)(i) of the Act, which provides:

In general.-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 employment of such alien will not adversely affect the wages and working conditions of workers in the United States similarly employed.

See also 20 C.F.R. § 656.3.

Following approval of the labor certification, that labor certification forms the basis for the job offer to the beneficiary. 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. *See Matter of Great Wall*, 16 I&N Dec. 142 (Acting Reg. Comm. 1977). *See also* 8 C.F.R. § 204.5(g)(2). It is within CIS’ role to determine whether the job offer is realistic and that the petitioner intends to employ the beneficiary in accordance with the terms of the labor certification. *See Sunoco Energy Development Company*, 17 I&N Dec. 283 (R.C. 1979); *see also* 20 C.F.R. § 656.30(c)(2). The director determined that the record as a whole did not support that the petitioner would employ the beneficiary in the position offered. The director

noted inconsistencies in the petitioner and beneficiary's testimony, that their responses indicated that the beneficiary was not working full-time as a bookkeeper, and that it was unlikely the petitioner intended to employ her in that position on a full-time basis. On that basis, it is reasonable to question whether the petitioner has a realistic and bona fide job offer for the beneficiary. As addressed above, despite the affidavits, doubts remain and we would not conclude that the petitioner has established a realistic and bona fide offer for the beneficiary.

Counsel further contends that under 8 C.F.R. § 103.2(b)(16) an applicant shall be allowed to inspect the record of proceeding, and that the determination shall be based on information disclosed to the applicant or petitioner unless classified. Counsel contends that the derogatory information was only disclosed in the denial, but that CIS failed to disclose "its Memorandum of the Interview" to the petitioner.

8 C.F.R. § 103.2(b)(16) provides that "an applicant or petitioner shall be permitted to inspect the record of proceeding which constitutes the basis for the decision, except as provided in the following paragraphs."

(i) Derogatory information unknown to petitioner or applicant. If the decision will be adverse to the applicant or petitioner and is based on derogatory information considered by [CIS] and of which the applicant is unaware, he/she shall be advised of this fact and offered an opportunity to rebut the information and present information in his/her own behalf before the decision is rendered, except as provided in paragraphs (b)(16)(ii), (iii), and (iv) of this section. Any explanation, rebuttal or information presented by or in behalf of the applicant or petitioner shall be included in the record of proceeding.

(ii) Determination of statutory eligibility. A determination of statutory eligibility shall be based only on information contained in the record of proceeding which is disclosed to the applicant or petitioner, except as provided in paragraph (b)(16)(iv) of this section.

The petitioner was informed of the need for an interview, and allowed to supplement the record at the time of the interview. During the interview, the petitioner and beneficiary were allowed to address questions relevant to the basis for denial. The director based the denial on information obtained from an interview with the beneficiary and the petitioner's owner, so that the conclusion was drawn from facts ascertained at the interview with the petitioner and beneficiary present rather than arbitrary speculation.

Based on the foregoing, the petitioner has failed to overcome the basis for denial, that the petitioner would not employ the beneficiary as a permanent full-time employee in accordance with the certified ETA 750. Further, the petitioner has failed to demonstrate its ability to pay the proffered wage in each year since the time of the priority date. Accordingly, the petition will be denied for the above stated reasons, with each considered as an independent and alternative basis for denial. In visa petition proceedings, the burden of proving eligibility for the benefit sought remains entirely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. Here, that burden has not been met.

ORDER: The appeal is dismissed.