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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

[redacted]

B6

DATE: AUG 07 2012 OFFICE: NEBRASKA SERVICE CENTER FILE: [redacted]

IN RE: Petitioner: [redacted]
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:

[redacted]

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,

Perry Rhew
Chief, Administrative Appeals Office

**DISCUSSION:** The preference visa petition was denied by the Director, Nebraska Service Center, and the petitioner filed a motion to reopen or reconsider. The director granted the motion, accepted new evidence into the record, and affirmed the denial. The petition is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner is an internet business application development company. It seeks to employ the beneficiary permanently in the United States as a computer programmer. As required by statute, the petition is accompanied by a Form ETA 750, Application for Alien Employment Certification, approved by the United States Department of Labor (DOL). The director determined that the petitioner had not established that it had the continuing ability to pay the beneficiary the proffered wage beginning on the priority date of the visa petition, nor had the petitioner established that the beneficiary was qualified for the proffered job.[1] The director denied the petition accordingly.

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.

As set forth in the director's denial, an issue in this case is whether or not the petitioner has the ability to pay the proffered wage as of the priority date and continuing until the beneficiary obtains lawful permanent residence.

Section 203(b)(3)(A)(i) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(3)(A)(i), provides for the granting of preference classification to qualified immigrants who are capable, at the time of petitioning for classification under this paragraph, of performing skilled labor (requiring at least two years training or experience), not of a temporary nature, for which qualified workers are not available in the United States.

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

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

The petitioner must demonstrate the continuing ability to pay the proffered wage beginning on the priority date, which is the date the Form ETA 750, Application for Alien Employment Certification, was accepted for processing by any office within the employment system of the DOL. *See* 8 C.F.R.

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[1] The director also found that the petitioner failed to establish that the job offer was *bona fide*. This finding was based upon the fact that the beneficiary and the petitioner had a personal relationship during the pendency of the petition.

§ 204.5(d). The petitioner must also demonstrate that, on the priority date, the beneficiary had the qualifications stated on its Form ETA 750, Application for Alien Employment Certification, as certified by the DOL and submitted with the instant petition. *Matter of Wing's Tea House*, 16 I&N Dec. 158 (Acting Reg'l Comm'r 1977).

Here, the Form ETA 750 was accepted on April 27, 2001. The proffered wage as stated on the Form ETA 750 is $61,526 per year. The Form ETA 750 states that the position requires three years of college resulting in an Associate's Degree in Computer Science, and two years of experience in the job offered as a computer programmer. The position also requires familiarity with auction software and method, patent process in business method category, and experience in ColdFusion and database management.

The AAO conducts appellate review on a *de novo* basis. *See Soltane v. DOJ*, 381 F.3d 143, 145 (3d Cir. 2004). The AAO considers all pertinent evidence in the record, including new evidence properly submitted upon appeal.[2]

The evidence in the record of proceeding shows that the petitioner is structured as an S corporation. On the petition, the petitioner claimed to have been established in 2000 and to currently employ 1 worker. According to the tax returns in the record, the petitioner's fiscal year is based on a calendar year. On the Form ETA 750B, signed by the beneficiary on April 26, 2001, the beneficiary did not claim to have worked for the petitioner.

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'l Comm'r 1977); *see also* 8 C.F.R. § 204.5(g)(2). In evaluating whether a job offer is realistic, United States Citizenship and Immigration Services (USCIS) requires the petitioner to demonstrate financial resources sufficient to pay the beneficiary's proffered wages, although the totality of the circumstances affecting the petitioning business will be considered if the evidence warrants such consideration. *See Matter of Sonegawa*, 12 I&N Dec. 612 (Reg'l Comm'r 1967).

In determining the petitioner's ability to pay the proffered wage during a given period, USCIS will first examine whether the petitioner employed and paid the beneficiary during that period. If the petitioner establishes by documentary evidence that it employed the beneficiary at a salary equal to or greater than the proffered wage, the evidence will be considered *prima facie* proof of the petitioner's ability to pay the proffered wage.

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[2] 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).

In the instant case, the petitioner provide Forms 1099 for 2007, 2008, 2009 and 2010, demonstrating payments made to the beneficiary from the petitioner as shown in the table below.

| Year | Wages | Difference Between Proffered Wage and Wages Paid |
|---|---|---|
| 2007 | $31,250.00 | $30,276.00 |
| 2008 | $34,760.00 | $26,766.00 |
| 2009 | $39,600.00 | $21,926.00 |
| 2010 | $39,748.75 | $21,777.25 |

For 2007 through 2010, the petitioner must demonstrate its ability to pay the difference between the proffered wage and wages already paid to the beneficiary, as shown above.

For the years 2001 through 2006, the petitioner submitted Transaction Lists demonstrating checks written for various services and fees in each year. Accompanying each list is a printout of the beneficiary's tax return transcript issued by the Internal Revenue Service. Although each Transaction List indicates the beneficiary's name, no other identifying information such as address or social security number is included on the lists. Going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. *Matter of Soffici*, 22 I&N Dec. 158, 165 (Comm'r 1998) (citing *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg'l Comm'r 1972)). Further, the amounts listed in gross receipts or sales in the beneficiary's tax transcripts do not match the payments alleged to the beneficiary in the Transaction List for all years. It is incumbent upon the petitioner to resolve the inconsistencies by independent objective evidence. Attempts to explain or reconcile the conflicting accounts, 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). Therefore, the petitioner has not demonstrated that it employed and paid the beneficiary any amount for 2001 through 2006.

The petitioner has not established that it employed and paid the beneficiary the full proffered wage in any year from filing the application for labor certification in 2001 or subsequently.

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

proffered wage is insufficient. Similarly, showing that the petitioner paid wages in excess of the proffered wage is insufficient.

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

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

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

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

Although the petitioner's counsel submitted its appellate brief in February 2012, the most recent federal income tax return submitted in the record is for 2006.[3] The petitioner's tax returns demonstrate its net income as shown in the table below.

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[3] The petitioner was notified in the director's December 15, 2011 decision granting the motion to reopen and affirming the denial, as well as in the April 8, 2011 Notice of Intent to Deny, that the 2003, 2004, 2007, 2008, 2009 and 2010 tax returns were missing from the record of proceeding. The petitioner's failure to submit these documents cannot be excused. 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 2001, the Form 1120S stated net income[4] of -$75,821.00.
- In 2002, the Form 1120S stated net income of -$33,944.00.
- The petitioner did not provide its 2003 federal tax return.
- The petitioner did not provide its 2004 federal tax return.
- In 2005, the Form 1120S stated net income of $7,395.00.
- In 2006, the Form 1120S stated net income[5] of -$3,817.00.
- The petitioner did not provide its 2007 federal tax return.
- The petitioner did not provide its 2008 federal tax return.
- The petitioner did not provide its 2009 federal tax return.
- The petitioner did not provide its 2010 federal tax return.

Therefore, the petitioner did not establish that it had sufficient net income to pay the proffered wage in any year after the application for labor certification was filed in 2001.

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

- In 2001, the Form 1120S stated net current assets of $7,346.00.

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[4] Where an S corporation's income is exclusively from a trade or business, USCIS considers net income to be the figure for ordinary income, shown on line 21 of page one of the petitioner's IRS Form 1120S. However, where an S corporation has income, credits, deductions or other adjustments from sources other than a trade or business, they are reported on Schedule K. If the Schedule K has relevant entries for additional income, credits, deductions or other adjustments, net income is found on line 23 (1997-2003), line 17e (2004-2005), line 18 (2006-2011) of Schedule K. *See* Instructions for Form 1120S, at http://www.irs.gov/pub/irs-pdf/i1120s.pdf (accessed August 7, 2012) (indicating that Schedule K is a summary schedule of all shareholders' shares of the corporation's income, deductions, credits, etc.). Because the petitioner had other adjustments shown on its Schedule K for 2001, 2002, 2005 and 2006, the petitioner's net income is found on Schedule K of its tax returns.

[5] Where an S corporation's income is exclusively from a trade or business, USCIS considers net income to be the figure for ordinary income, shown on line 21 of page one of the petitioner's IRS Form 1120S.

[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.

- In 2002, the Form 1120S stated net current assets of $0.00.
- The petitioner did not provide its 2003 federal tax return.
- The petitioner did not provide its 2004 federal tax return.
- In 2005, the Form 1120S stated net current assets of $23,808.00.
- In 2006, the Form 1120S stated net current assets of $20,781.00.
- The petitioner did not provide its 2007 federal tax return.
- The petitioner did not provide its 2008 federal tax return.
- The petitioner did not provide its 2009 federal tax return.
- The petitioner did not provide its 2010 federal tax return.

Therefore, the petitioner did not establish that it had sufficient net current assets to pay the proffered wage in any year since the priority date in 2001.

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

On appeal, counsel submitted the petitioner's financial statements for 2001 through 2010. The regulation at 8 C.F.R. § 204.5(g)(2) makes clear that where a petitioner relies on financial statements to demonstrate its ability to pay the proffered wage, those financial statements must be audited. An audit is conducted in accordance with generally accepted auditing standards to obtain a reasonable assurance that the financial statements of the business are free of material misstatements. The unaudited financial statements that counsel submitted with the petition are not persuasive evidence. The accountant's report that accompanied those financial statements makes clear that they were produced pursuant to a compilation rather than an audit. As the accountant's report also makes clear, financial statements produced pursuant to a compilation are the representations of management compiled into standard form. The unsupported representations of management are not reliable evidence and are insufficient to demonstrate the ability to pay the proffered wage.

In his brief submitted in February 2012, counsel asserts that the petitioner was given only 30 days in the Notice of Intent to Deny to provide its financial information, and that by limiting the petitioner to 30 days, it was unable to obtain audited financial statements. The petitioner was notified in both the April 2011 Notice of Intent to Deny (NOID) and the December 2011 decision affirming the denial that its tax returns for certain years were missing. Further, the petitioner was notified in the December 2011 decision that unaudited financial statements were insufficient to establish its ability to pay the proffered wage. Although the NOID did require that the petitioner respond within 30 days, the petitioner had ten months between the issuance of the NOID and the appeal to obtain the missing tax returns. Further, the petitioner had two months between the issuance of the December 2011 decision and the appeal to obtain and provide audited financial statements. The assertions of counsel do not constitute evidence. *Matter of Obaigbena*, 19 I&N Dec. 533, 534 (BIA 1988); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980).

Counsel's assertions on appeal cannot be concluded to outweigh the evidence presented in the tax returns as submitted by the petitioner that demonstrate that the petitioner could not pay the proffered wage from the day the Form ETA 750 was accepted for processing by the DOL.

USCIS may consider the overall magnitude of the petitioner's business activities in its determination of the petitioner's ability to pay the proffered wage. *See Matter of Sonegawa*, 12 I&N Dec. 612 (Reg'l Comm'r 1967). The petitioning entity in *Sonegawa* 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 *Sonegawa* was based in part on the petitioner's sound business reputation and outstanding reputation as a couturiere. As in *Sonegawa*, USCIS may, at its discretion, consider evidence relevant to the petitioner's financial ability that falls outside of a petitioner's net income and net current assets. USCIS may consider such factors as the number of years the petitioner has been doing business, the established historical growth of the petitioner's business, the overall number of employees, the occurrence of any uncharacteristic business expenditures or losses, the petitioner's reputation within its industry, whether the beneficiary is replacing a former employee or an outsourced service, or any other evidence that USCIS deems relevant to the petitioner's ability to pay the proffered wage.

In the instant case, the petitioner was formed in 2000, just one year before it submitted the application for labor certification. The petitioner failed to provide all of its tax returns for all relevant years from the priority date. The tax returns submitted show minimal or negative net income. The petitioner did not submit evidence of a long standing record of success or reputation in the industry, or evidence that it experience unusual circumstances in any of the relevant years, as the petitioner in *Sonegawa* did. Thus, assessing the totality of the circumstances in this individual case, it is concluded that the petitioner has not established that it had the continuing ability to pay the proffered wage.

The evidence submitted does not establish that the petitioner had the continuing ability to pay the proffered wage beginning on the priority date.

The beneficiary must also meet all of the requirements of the offered position set forth on the labor certification by the priority date of the petition. 8 C.F.R. § 103.2(b)(l), (12). *See Matter of Wing's Tea House*, 16 I&N Dec. 158, 159 (Act. Reg. Comm. 1977); *see also Matter of Katigbak*, 14 I&N Dec. 45, 49 (Reg. Comm. 1971).

In evaluating the labor certification to determine the required qualifications for the position, U.S. Citizenship and Immigration Services (USCIS) may not ignore a term of the labor certification, nor may it impose additional requirements. *See Matter of Silver Dragon Chinese Restaurant*, 19 I&N Dec. 401, 406 (Comm. 1986). *See also Madany*, 696 F.2d at 1008; *K.R.K. Irvine, Inc.*, 699 F.2d at 1006; *Stewart Infra-Red Commissary of Massachusetts, Inc. v. Coomey*, 661 F.2d 1 (1st Cir. 1981).

Where the job requirements in a labor certification are not otherwise unambiguously prescribed, e.g., by regulation, USCIS must examine "the language of the labor certification job requirements" in order to determine what the petitioner must demonstrate about the beneficiary's qualifications. *Madany*, 696 F.2d at 1015. The only rational manner by which USCIS can be expected to interpret the meaning of terms used to describe the requirements of a job in a labor certification is to "examine the certified job offer *exactly* as it is completed by the prospective employer." *Rosedale Linden Park Company v. Smith*, 595 F. Supp. 829, 833 (D.D.C. 1984)(emphasis added). USCIS's interpretation of the job's requirements, as stated on the labor certification must involve "reading and applying *the plain language* of the [labor certification]." *Id.* at 834 (emphasis added). USCIS cannot and should not reasonably be expected to look beyond the plain language of the labor certification or otherwise attempt to divine the employer's intentions through some sort of reverse engineering of the labor certification.

In the instant case, the labor certification states that the offered position has the following minimum requirements:

EDUCATION
Grade School: 6 years
High School: 5 years
College: 3 years
College Degree Required: Associate Degree
Major Field of Study: Computer Science
TRAINING: None Required
EXPERIENCE: Two (2) years in the job offered
OTHER SPECIAL REQUIREMENTS: Familiar with auction software and method; familiar with patent process in business method category; experience with ColdFusion and Data Base Management.

To demonstrate the educational requirements, the labor certification states the beneficiary qualifies for the proffered job based upon the following: a high school diploma awarded in 1992 by the [redacted]; studies at [redacted], from November 1994 to March 1995; studies at [redacted], from April 1995 to December 1998, and; two classes taken through San Francisco State University Continuing Education in California, from June to October 2000. The record contains transcripts from SEIF. However, the transcripts are dated in November 2000, and state that the beneficiary studied at SEIF for three years. This differs from the application for labor certification in the time and duration of the program. The record also contains transcripts for the beneficiary's program at IST Telematic.

However, the dates on the transcripts do not match those shown on the application for labor certification. The transcripts indicate the beneficiary studied from 1996 to 1998. The record contains a diploma which was awarded in April 1999. The record contains an unofficial transcript from SFSU, dated May 21, 2001. This transcript does not indicate that the beneficiary completed the two courses.

The petitioner submitted an evaluation of the beneficiary's education credentials claiming that the beneficiary possesses the equivalent of three years of academic study toward a bachelor of science degree in computer science, the inconsistencies in the record noted above do not allow consideration of the beneficiary's claimed education without further clarification. It is incumbent upon the petitioner to resolve any inconsistencies in the record by independent objective evidence. Any attempt to explain or reconcile such inconsistencies will not suffice unless the petitioner submits competent objective evidence pointing to where the truth lies. *Matter of Ho*, 19 I&N Dec. 582, 591-92 (BIA 1988). These inconsistencies must be addressed in any further filings.

The labor certification also states that the beneficiary qualifies for the offered position based on experience as a: computer programmer with [redacted], from August 1999 to October 1999; [redacted], from March 1999 to July 1999, and; Data Entry Clerk with [redacted], in Peru, from November 1996 to February 1999. No other experience is listed. The beneficiary signed the labor certification under a declaration that the contents are true and correct under penalty of perjury.

The regulation at 8 C.F.R. § 204.5(l)(3)(ii)(A) states:

> 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.

In support of the beneficiary's claimed experience the petitioner provided several letters. One letter was from [redacted]. The letter states that the beneficiary worked as a "Programmer Jr." from March 1, 1995, to November 30, 1996. The letter does not state whether the employment was full- or part-time. Additionally, the beneficiary did not claim to have worked for Telematic on the Form ETA 750, Part B. In *Matter of Leung*, 16 I&N Dec. 2530 (BIA 1976), the Board's dicta notes that the beneficiary's experience, without such fact certified by DOL on the beneficiary's Form ETA 750B, lessens the credibility of the evidence and facts asserted. For the above stated reasons, the letter does not meet the regulatory standards.

A letter from [redacted], states the beneficiary was employed as a programmer in the systems department from August 1, 1999, to October 13, 1999. However, the letter does not state if the employment was full-time, nor does the letter give specifics

about the nature of the beneficiary's work. For the above stated reasons, the letter does not meet the regulatory standards.

The record contains an experience letter from [redacted] letterhead stating that the beneficiary was employed working on "systems programming and database management" for [redacted] from November 1996 to February 1999. Although the dates of the letter are consistent with those claimed on the labor certification, the job description differs markedly. The beneficiary claimed to work as a data entry clerk on the application for labor certification, while the letter describes her as a programmer. The letter does not state if the employment was full-time, and it also fails to give details about the beneficiary's duties and training. The letter also fails to comply with the regulation as it does not provide the address of the employer. Furthermore, the dates of the claimed employment are concurrent with the beneficiary's claimed education in programming. For the above stated reasons, the letter does not meet the regulatory standards.

A letter from [redacted], states that the beneficiary assisted in an unpaid position from January 15, 2000, to December 2000. The letter does not state if the position was full-time. The letter states that the beneficiary learned about "the different aspects of the patent process including but not limited to business method process." No other details were given about the training or experience the beneficiary may have attained. Finally, the letter does not contain the address of the employer. For the above stated reasons, the letter does not meet the regulatory standards.

The beneficiary provided an affidavit stating that, in 2000, she studied on her own to improve her skills, including eBay's history and online auction process so that she could apply for a job with eBay. It is impossible to discern from this affidavit exactly what skills, training or experience the beneficiary attained. The beneficiary's affidavit is self-serving and does not provide independent, objective evidence of his prior work experience. See *Matter of Ho*, 19 I&N Dec. 582, 591-592 (BIA 1988)(states that the petitioner must resolve any inconsistencies in the record by independent, objective evidence). Going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. *Matter of Soffici*, 22 I&N Dec. 158, 165 (Comm'r 1998) (citing *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg'l Comm'r 1972)).

None of the supporting letters establish that the beneficiary has any experience or proficiency with ColdFusion, which is a requirement of the labor certification.

Therefore, the petitioner has not demonstrated that the beneficiary met all of the requirements of the offered position set forth on the labor certification by the priority date of the petition.

The director also states that the petitioner failed to demonstrate that a *bona fide* job opportunity is available to U.S. workers. The director noted that, in a June 2007 affidavit to a Customs and Border Patrol Officer, the beneficiary identified the petitioner's owner as her "boyfriend." 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 Matter of Sunmart 374*, 00-INA-93 (BALCA May 15, 2000).

Where the petitioner is owned by the person applying for a position, it is not a *bona fide* offer. *See Bulk Farms, Inc. v. Martin*, 963 F.2d 1286 (9th Cir. 1992) (denied labor certification application for president, sole shareholder and chief cheese maker even where no person qualified for position applied).

The record includes a statement from the petitioner's owner, [redacted], stating that the personal relationship between himself and the beneficiary began in 2003 or 2004 and ended in 2007. The record also includes copies of two newspaper advertisements for the offered position, directing applicants to submit resumes directly to the DOL. The petitioner's name does not appear in either advertisement. No evidence connecting these advertisements to the instant petitioner, labor certification, or petition was submitted. Also submitted was an advertisement for a computer programmer from the petitioner's own website dated December 6, 2006. No evidence was submitted connecting this advertisement to the instant petition or labor certification was submitted.

On appeal, counsel states that the recruitment period for the instant labor certification began December 5, 2006 and ended January 4, 2007. No supporting evidence for this assertion, such as instructions from the DOL regarding the placement of advertisements or a recruitment report submitted to the DOL after the recruitment period, was submitted. The assertions of counsel do not constitute evidence. *Matter of Obaigbena*, 19 I&N Dec. 533, 534 (BIA 1988); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980).

The AAO affirms the director's decision that the petitioner failed to establish that a *bona fide* job offer was open to U.S. workers at the time of the filing of the labor certification, or that a *bona fide* job offer continues to exist.

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.