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

(b)(6)

U.S. Citizenship and Immigration Services

[redacted]

Date: FEB 27 2013 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,

Elizabeth McCormack

Ron Rosenberg
Acting Chief, Administrative Appeals Office

DISCUSSION: The Director, Nebraska Service Center (director), denied the employment-based immigrant visa petition. The petitioner appealed the decision to the Administrative Appeals Office (AAO). The appeal will be dismissed.

The petitioner describes itself as a semiconductor equipment business. It seeks to permanently employ the beneficiary in the United States as a buyer/purchasing agent. The petitioner requests classification of the beneficiary as a professional or skilled worker pursuant to section 203(b)(3)(A) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(3)(A).[1]

The petition is accompanied by an ETA Form 9089, Application for Permanent Employment Certification (labor certification), certified by the U.S. Department of Labor (DOL). The priority date of the petition, which is the date the DOL accepted the labor certification for processing, is July 29, 2005. *See* 8 C.F.R. § 204.5(d).

The director's decision denying the petition concludes that the petitioner failed to demonstrate that the beneficiary satisfied the minimum level of experience stated on the labor certification because two employment letters were found to be fraudulent and there were inconsistencies with statements offered by the qualifying employer upon interview and the labor certification. *See Matter of Ho*, 19 I&N Dec. 582, 591-92 (BIA 1988). The director found that the evidence submitted by the petitioner failed to overcome the inconsistencies in the record, finding that the beneficiary committed material misrepresentation on the Form ETA 9089 because the employment letters were not credible and the petitioner had failed to overcome the inconsistencies with independent, objective evidence. The director denied the petition on January 12, 2009.

The record shows that the appeal is properly filed 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 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] On appeal, counsel submits a brief, copies of caselaw and copies of documentation already in the record.

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[1] Section 203(b)(3)(A)(i) of the Act, 8 U.S.C. § 1153(b)(3)(A)(i), grants 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), grants preference classification to qualified immigrants who hold baccalaureate degrees and are members of the professions.

[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 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).

The beneficiary must 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:

H.4. Education: None.
H.5. Training: None required.
H.6. Experience in the job offered: 24 months.
H.7. Alternate field of study: None accepted.
H.8. Alternate combination of education and experience: None accepted.
H.9. Foreign educational equivalent: Not Accepted.
H.10. Experience in an alternate occupation: None accepted.
H.11. Job duties: Purchases source tape and reel products; visit trade shows to appraise products on pricing and quality; researches market place from Internet and wholesale sources to find resale and quality items; manages budget and costs for products to be purchased; uses effective negotiation techniques, communication skills for effective negotiation; analyzes inventory and determines which items the market finds desirable.
H.14. Specific skills or other requirements: None.

The labor certification also states that the beneficiary qualifies for the offered position based on

experience as a purchasing manager with from March 7, 2003 until January 4, 2006, the date on which the beneficiary signed the labor certification. There is no other experience listed on the labor certification. 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.

The record contains an experience letter dated January 9, 2006 from Director, on the letterhead of stating that the beneficiary was employed with as a purchasing agent from March 1, 2000 until December 31, 2002 on a fulltime basis. The letter describes the beneficiary's duties as a purchasing agent in language identical to the language utilized on the labor certification to describe the proffered job duties.

In response to the director's request for evidence (RFE) the petitioner submitted a second experience letter from Director, also dated January 9, 2006, on letterhead different in style from the letterhead of the initially submitted January 9, 2006 letter, stating that the beneficiary was employed with as a purchasing agent/director from March 1, 2000 until December 31, 2002 on a fulltime basis. The letter goes on to describe the beneficiary's duties in language identical to the the language utilized on the labor certification to describe the proffered job duties. The petitioner also included copies of the beneficiary's Forms IR8A, tax return Forms in Singapore, for 2001, 2002 and 2003, reflecting that the beneficiary was employed as a director with during these years.[3]

A June 30, 2008 site-check of in Singapore by U.S. officials revealed that: the experience letters from etterhead were fraudulent; has never been employed by as a director; managing director , established in 1989 to provide industrial engineering services, mainly in sanitation, water and gas; the beneficiary was employed by from September 1, 1989 until May 31, 2003 as co-director of where his duties involved senior management responsibilities and largely were as a project director for clients. The director informed the petitioner of these inconsistencies in a notice of intent to deny (NOID) dated September 7, 2007.

In response to the director's NOID the petitioner submitted an experience letter from letterhead, stating that he is owner and director of and that the beneficiary was

[3] The Forms IR8A do not indicate the exact dates of the beneficiary's employment with in 2001, 2002 and 2003 and do not list the beneficiary's duties. The Forms IR8A do, however, clearly state that the beneficiary was employed as a director and not as a purchasing agent.

employed by from March 1, 2000 until December 31, 2002, as a director and purchasing agent on a fulltime basis. The letter goes on to describe the beneficiary's duties in language identical to the the language utilized on the labor certification to describe the proffered job duties and adds that the beneficiary is "to initiate, plan, organize and director the work task, duties of subordinates to ensure operational effectiveness of project and to complete in accordance to expected timeline."

The petitioner also submitted an affidavit from acknowledging that he was interviewed in regard to the beneficiary's employment with on June 30, 2008. He states that he has been director and owner of since 1989. He states that he wishes to clarify his answers during the June 30, 2008 interview since some of his answers were incorrect. He states that the beneficiary was employed by from September 1989 until May 2003 as a director and employee and that the beneficiary's scope of work was broad and included serving in many different positions. He reiterates the statements made in the above-referenced experience letter in regard to the beneficiary's employment from March 1, 2000 until December 31, 2002. However, the experience letter and affidavit conflict with information previously provided by in regard to the beneficiary's employment at The labor certification indicates that the beneficiary was employed by during the time frame claims the beneficiary was still employed by 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). The labor certification only lists the beneficiary's experience as a purchasing manager for in China as the experience the beneficiary has which is related to the experience requirement for the proffered position. In *Matter of Leung*, 16 I&N Dec. 2530 (BIA 1976), the Board's dicta notes that the beneficiary's experience, without such fact certified by DOL on the beneficiary's Form ETA 750B, lessens the credibility of the evidence and facts asserted.

A Form G-325, Biographic Information, that the beneficiary submitted in connection with an Application to Register Permanent Residence or Adjust Status (Form I-485) indicates that the beneficiary had been employed by from March 2003 until December 2005, during the period the beneficiary claims to have been employed by Moreover, even though the beneficiary was requested to provide his employment for the five years immediately preceding the completion of the Form G-325 (September 22, 2006, the date on which the Form G-325 was signed), the beneficiary does not list his employment with It is incumbent upon a petitioner to resolve the inconsistencies in the record concerning the beneficiary's experience by independent objective evidence and any attempt to explain or reconcile such inconsistencies will not suffice unless the petitioner submits competent objective evidence pointing to where the truth lies. *See Matter of Ho*, 19 I&N Dec. 582, 591-92 (BIA 1988).

On appeal, counsel contends that the signatory of the etter is immaterial and that the beneficiary did not commit misrepresentation in regard to his experience since the contents of the fraudulent letters were true. Counsel contends that the beneficiary did not mention that he was also the director of because he only needed to state his experience as a purchasing agent. The AAO

finds that while the beneficiary submitted documentation sufficient to establish that he was employed by in 2001, 2002 and 2003, the affidavit and letter from are not sufficiently independent and objective to establish that the beneficiary's duties with included the duties of a purchasing agent. clearly stated during his interview with U.S. officials during the site visit that the beneficiary's job duties during his employment with involved much more senior management responsibilities than that of a purchasing agent. Further, the Form ETA 9089 requires the beneficiary to list any prior employment that qualifies him for the proffered job. By completely excluding his experience with on the labor certification, the beneficiary implicitly indicates that his experience with did not involve job duties relevant to the position of purchasing agent. Neither the petitioner nor counsel attempt to explain why the petitioner submitted two letters of experience writen on fraudulent letterhead and signed twice by a person as "Director" who had never served as a director for Nor did the petitioner explain why only in response to the RFE did the January 9, 2006 experience letter now include that the beneficiary had also served as a director, in addition to his duties as purchasing agent. 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). The AAO notes that the experience letters and the affidavit submitted are nearly identical to one another in their content, paragraph structure, and information relayed and were submitted only in response to an RFE and NOID. The fact that all of these documents are not contemporaneous with the events, coupled with the similarity of the testimony and the lack of contemporaneous documentation lessens the probative weight of this evidence. As such the petitioner has failed to provide independent objective evidence sufficient to overcome the inconsistencies in the record.

The AAO affirms the director's decision that the petitioner failed to establish that the beneficiary met the minimum requirements of the offered position set forth on the labor certification as of the priority date. Therefore, the beneficiary does not qualify for classification as a professional or skilled worker under section 203(b)(3)(A) of the Act.

Beyond the decision of the director, the petitioner has also failed to establish its ability to pay the proffered wage as of the priority date and continuing until the beneficiary obtains lawful permanent residence. *See* 8 C.F.R. § 204.5(g)(2).

In determining the petitioner's ability to pay the proffered wage, USCIS first examines whether the petitioner has paid the beneficiary the full proffered wage each year from the priority date. If the petitioner has not paid the beneficiary the full proffered wage each year, USCIS will next examine whether the petitioner had sufficient net income or net current assets to pay the difference between the wage paid, if any, and the proffered wage.[4] If the petitioner's net income or net current assets is

[4] *See River Street Donuts, LLC v. Napolitano*, 558 F.3d 111 (1st Cir. 2009); *Elatos Restaurant Corp. v. Sava*, 632 F. Supp. 1049, 1054 (S.D.N.Y. 1986); *Tongatapu Woodcraft Hawaii, Ltd. v. Feldman*, 736 F.2d 1305 (9th Cir. 1984)); *Chi-Feng Chang v. Thornburgh*, 719 F. Supp. 532 (N.D. Texas

not sufficient to demonstrate the petitioner's ability to pay the proffered wage, USCIS may also consider the overall magnitude of the petitioner's business activities. *See Matter of Sonegawa,* 12 I&N Dec. 612 (Reg. Comm'r 1967).

The record before the director closed on November 26, 2008 with the receipt by the director of the petitioner's submissions in response to the director's notice of intent to deny. As of that date, the petitioner's 2007 federal income tax return was the most recent return available. However, the record does not any contain annual reports, federal tax returns, or audited financial statements for the petitioner for 2006 and 2007. The petitioner's failure to provide complete annual reports, federal tax returns, or audited financial statements for each year from the priority date is sufficient cause to dismiss this appeal. While additional evidence may be submitted to establish the petitioner's ability to pay the proffered wage, it may not be substituted for evidence required by regulation.

Additionally, in the instant case, the petitioner did not claim that it employed the beneficiary and its net income and net current assets for 2005, were not equal or greater to the proffered wage. Furthermore, according to USCIS records, the petitioner has filed multiple I-140 petitions on behalf of other beneficiaries. Accordingly, the petitioner must establish that it has had the continuing ability to pay the combined proffered wages to each beneficiary from the priority date of the instant petition. *See Matter of Great Wall*, 16 I&N Dec. 142, 144-145 (Acting Reg'l Comm'r 1977). The evidence in the record does not document the priority date, proffered wage or wages paid to each beneficiary, whether any of the other petitions have been withdrawn, revoked, or denied, or whether any of the other beneficiaries have obtained lawful permanent residence. Thus, it is also concluded that the petitioner has not established its continuing ability to pay the proffered wage to the beneficiary and the proffered wages to the beneficiaries of its other petitions.

Further, the petitioner failed to establish that factors similar to *Sonegawa* existed in the instant case, which would permit a conclusion that the petitioner had the ability to pay the proffered wage despite its net income and net current assets.

Accordingly, after considering the totality of the circumstances, the petitioner has also failed to establish its continuing ability to pay the proffered wage to the beneficiary since the priority date.

Finally, it is also concluded that the petition is not supported by a *bona fide* job offer. *See Matter of Silver Dragon Chinese Restaurant*, 19 I&N Dec. 401 (Comm'r 1986). Specifically, it appears from the evidence in the record that the beneficiary is possibly related to the petitioner's owner in that they are siblings. Business Tax Certificates, lease agreements and public records for the petitioner reflect that the beneficiary's sibling, is an owner, representative and president of the petitioner.[5] Under 20 C.F.R. § 626.20(c)(8) and § 656.3, the petitioner must demonstrate that a valid

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1989); *K.C.P. Food Co. 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); and *Taco Especial v. Napolitano*, 696 F. Supp. 2d 873 (E.D. Mich. 2010).

[5] Work affiliation records for reflect that she is the President of (an

employment relationship exists, that a *bona fide* job opportunity is available to U.S. workers. *See also* 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).

Based on the relationship described above, and considering the evidence in the record relating to the employer and the job opportunity, the petitioner has failed to establish that the instant petition is based a *bona fide* job opportunity available to U.S. workers. Accordingly, the petition must also be denied for this reason.

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

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abbreviation for [redacted] at the same address listed for the petitioner.