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

DATE: JUN 18 2014 OFFICE: TEXAS SERVICE CENTER FILE:

IN RE: Petitioner:
Beneficiary:

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

ON BEHALF OF PETITIONER:

INSTRUCTIONS:

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

This is a non-precedent decision. The AAO does not announce new constructions of law nor establish agency policy through non-precedent decisions. If you believe the AAO incorrectly applied current law or policy to your case or if you seek to present new facts for consideration, you may file a motion to reconsider or a motion to reopen, respectively. Any motion must be filed on a Notice of Appeal or Motion (Form I-290B) within 33 days of the date of this decision. **Please review the Form I-290B instructions at http://www.uscis.gov/forms for the latest information on fee, filing location, and other requirements.** *See also* 8 C.F.R. § 103.5. **Do not file a motion directly with the AAO.**

Thank you,

Ron Rosenberg
Chief, Administrative Appeals Office

DISCUSSION: The Director, Texas Service Center (director), initially approved the preference visa petition. Upon review of the record, the director subsequently served the petitioner with Notice of Intent to Revoke the approval of the petition (NOIR). In a Notice of Revocation (NOR), the director revoked the approval of the Immigrant Petition for Alien Worker (Form I-140). The matter is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner processes law enforcement applications. It seeks to permanently employ[1] the beneficiary in the United States as a Computer Programmer II. The petitioner requests classification of the beneficiary as 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).

As required by statute, the petition was accompanied by a Form ETA 750, Application for Alien Labor Certification[2] approved by the Department of Labor. The director approved the petition on April 7, 2010.

For the reasons explained below, the AAO concurs with the director's decision to revoke approval of the petition.

Section 205 of the Act, 8 U.S.C. § 1155, provides that "[t]he Attorney General [now Secretary, Department of Homeland Security], may, at any time, for what [she] deems to be good and sufficient cause, revoke the approval of any petition approved by [her] under section 204." The realization by the director that the petition was approved in error may be good and sufficient cause for revoking the approval. *Matter of Ho,* 19 I&N Dec. 582, 590 (BIA 1988).

The AAO conducts appellate review on a *de novo* basis. The AAO's *de novo* authority is well recognized by the federal courts. *See Soltane v. DOJ*, 381 F.3d 143, 145 (3d Cir. 2004). The procedural history in this case is documented by the record and incorporated. Further elaboration of the procedural history will be made only as necessary.[3]

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[1] The regulation at 20 C.F.R. § 656.3 states:

> *Employer* means a person, association, firm, or a corporation which currently has a location within the United States to which U.S. workers may be referred for employment, and which proposes to employ a full-time worker at a place within the United States or the authorized representative of such a person, association, firm, or corporation.
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> *Employment* means permanent full-time work by an employee for an employer other than oneself. For the purposes of this definition an investor is not an employee.

[2] After March 28, 2005, the correct form to apply for labor certification is the ETA Form 9089. *See* 69 Fed. Reg. 77325, 77326 (Dec. 27, 2004). If the petition is approved, the priority date is also used in conjunction with the Visa Bulletin issued by the Department of State to determine when a beneficiary can apply for adjustment of status or for an immigrant visa abroad.

[3] The submission of additional evidence on appeal is allowed by the instructions to the Form I-290B,

Section 204(a)(1)(F) of the Act, 8 U.S.C. § 1154(a)(1)(F), provides that "[a]ny employer desiring and intending to employ within the United States an alien entitled to classification under section . . . 203(b)(1)(B) . . . of this title may file a petition with the Attorney General [now Secretary of Homeland Security] for such classification." (Emphasis added.)

Section 212(a)(5)(A)(i) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1182(a)(5)(i) provides that 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.

It is left to United States Citizenship and Immigration Services (USCIS) to determine whether the proffered position and alien qualify for a specific immigrant classification or even the job offered. This fact has not gone unnoticed by Federal Circuit Courts:

> There is no doubt that the authority to make preference classification decisions rests with INS. The language of section 204 cannot be read otherwise. *See Castaneda-Gonzalez v. INS*, 564 F.2d 417, 429 (D.C. Cir. 1977). In turn, DOL has the authority to make the two determinations listed in section 212(a)(14).[4] Id. at 423. The necessary result of these two grants of authority is that section 212(a)(14) determinations are not subject to review by INS absent fraud or willful misrepresentation, but all matters relating to preference classification eligibility not expressly delegated to DOL remain within INS' authority.
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> * * *
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> Given the language of the Act, the totality of the legislative history, and the agencies' own interpretations of their duties under the Act, we must conclude that Congress did not intend DOL to have primary authority to make any determinations other than the two stated in section 212(a)(14). If DOL is to analyze alien qualifications, it is for the purpose of "matching" them with those of corresponding United States workers so that it will then be "in a position to meet the requirement of the law," namely the section 212(a)(14) determinations.

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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).

[4] Based on revisions to the Act, the current citation is section 212(a)(5)(A) as set forth above.

Madany v. Smith, 696 F.2d 1008, 1012-1013 (D.C. Cir. 1983).[5]

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. Section 203(b)(3)(A)(ii) of the Act, 8 U.S.C. § 1153(b)(3)(A)(ii), provides for the granting of preference classification to qualified immigrants who hold baccalaureate degrees and are members of the professions.

The petitioner must establish that its job offer to the beneficiary is a realistic one and that the opportunity is a *bona fide* job offer. Because the filing of a Form ETA 750 labor certification application establishes a priority date for any immigrant petition later based on the Form 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 filing date or priority date of the petition is the initial receipt in the DOL's employment service system. *See* 8 C.F.R. § 204.5(d); *Matter of Wing's Tea House*, 16 I&N 158 (Act. Reg. Comm. 1977). Here, the Form ETA 750 indicates that it was accepted for processing on January 19, 2005, which establishes the priority date.[6]

The record indicates that the petitioner filed Form I-140, Immigrant Petition for Alien Worker on or about July 2, 2007. Part 6 of the petition indicates that the petitioner was established on October 17, 1982 and currently employs 36 workers. It claims over four million dollars in gross annual income and $2,720,536.07 in net annual income. The Form ETA 750 indicates that the proffered wage is $46,342.40 per year and that the position of Computer Programmer II requires a Bachelor of Science

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[5] The Ninth Circuit, citing *K.R.K. Irvine, Inc.*, 699 F.2d at 1006, has stated:

> The Department of Labor (DOL) must certify that insufficient domestic workers are available to perform the job and that the alien's performance of the job will not adversely affect the wages and working conditions of similarly employed domestic workers. *Id.* § 212(a)(14), 8 U.S.C. § 1182(a)(14). The INS then makes its own determination of the alien's entitlement to sixth preference status. *Id.* § 204(b), 8 U.S.C. § 1154(b). *See generally K.R.K. Irvine, Inc. v. Landon*, 699 F.2d 1006, 1008 9th Cir.1983).
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> The INS, [now USCIS] therefore, may make a de novo determination of whether the alien is in fact qualified to fill the certified job offer.

Tongatapu Woodcraft Hawaii, Ltd. v. Feldman, 736 F. 2d 1305, 1309 (9th Cir. 1984).

[6] The *bona fides* of the job offer including such elements as the beneficiary's qualifications for the position and the petitioner's ability to pay the proffered wage are essential elements 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).

degree in Computer Science and two years of experience in the job offered or two years of experience in the related occupation defined as Computer Programmer I/Computer Programmer II or any combination.

The director issued a Notice of Intent to Revoke (NOIR) the approval of the Immigrant Petition for Alien Worker (Form I-140) on August 24, 2012. The director concluded that Form I-140 was approved in error and raised issues relevant to the beneficiary's educational credentials, the quantity and terms of the beneficiary's work experience as well as petitioner's continuing ability to pay the proffered wage.

Upon review of the petitioner's response to the NOIR, the director found that the petitioner had not established its continuing ability to pay the proffered wage and had not established that the beneficiary possessed the required two years of qualifying experience.[7]

Ability to Pay the Proffered Wage

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.

As noted above, 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 was accepted for processing by any office within the employment system of the DOL. *See* 8 C.F.R. § 204.5(d). The petitioner must also demonstrate that, on the priority date, the beneficiary had the qualifications stated on its labor 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).

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

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[7] The regulation at 8 C.F.R. § 204.5(l)(3) provides:

> (ii) *Other documentation*—
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> > (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.

or greater than the proffered wage, the evidence will be considered *prima facie* proof of the petitioner's ability to pay the proffered wage. Additionally, if the petitioner's net income or net current assets can cover any difference between the actual wages paid to the beneficiary and the proffered wage during a given period of time, it establishes its ability to pay the proffered wage during that period of time. In the instant case, the petitioner established that it paid at least the annual proffered wage to the beneficiary in 2009, 2010, and 2011, thus establishing its ability to pay the full proffered wage in these years. In 2005, it paid the beneficiary $35,426.28; in 2006, it paid the beneficiary $38,898.66, and in 2007, it paid the beneficiary $43,497.31.

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.
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> 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).

Besides net income and as an alternative method of reviewing a petitioner's ability to pay a proposed wage, USCIS will examine a petitioner's net current assets. Net current assets are the difference between the petitioner's current assets and current liabilities.[1] It represents a measure of liquidity during a given period and a possible resource out of which the proffered wage may be paid for that period. In cases where corporate income tax returns are provided, the corporate petitioner's year-end current assets and current liabilities are shown on Schedule L of its federal tax returns. Current assets are shown on line(s) 1 through 6 of Schedule L and current liabilities are shown on line(s) 16 through 18. If a corporation's end-of-year net current assets are equal to or greater than the proffered wage, the corporate petitioner is expected to be able to pay the proffered wage out of those net current assets.

In this case, the petitioner established that either its net income or net current assets could cover the difference between the actual wages paid to the beneficiary and the full proffered wage in 2005 and 2006. However in 2007, neither the petitioner's -$571,105 in net income nor its -$63,274 could cover the difference of $2,845.09 between the proffered wage of $46,342.40 and the wages paid of $43,497.31 to the beneficiary. Counsel asserts that the figure is inaccurate and does not account for the beneficiary's pre-tax health withholdings. USCIS uses the compensation that appears on Box 1 of the W-2, which here is $43,497.31.[8]

In some cases, 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). In this case, the AAO has reviewed factors such as uncharacteristic business expenses such as asserted by counsel in 2007, but also notes that the petitioner reported negative net income in 2006 and negative net current assets in 2011 as shown by its tax returns. The AAO concludes that the petition does not merit approval based on *Sonegawa.*

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[8] The wage offered is "not based on commissions, bonuses or other incentives, unless the employer guarantees a prevailing wage paid on a weekly, bi-weekly or monthly basis that equals or exceeds the prevailing wage." *See* 20 C.F.R. § 656.20(c)(3).

Beneficiary's Experience Gained with Petitioner

Whether the beneficiary is qualified to perform the duties of the proffered position described in the Form ETA 750 is raised in the director's decision to revoke the petition's approval. [9] Although the AAO finds that the beneficiary's quantity of experience is sufficiently supported by the record, it does not conclude that the experience gained with the petitioner may be used to satisfy the terms of the labor certification requiring two years of experience.

At the outset, we emphasize that federal circuit courts have upheld our authority to inquire as to whether the alien is qualified for the classification sought.

> There is no doubt that the authority to make preference classification decisions rests with INS. The language of section 204 cannot be read otherwise. *See Castaneda-Gonzalez v. INS*, 564 F.2d 417, 429 (D.C. Cir. 1977).

Madany v. Smith, 696 F.2d 1008, 1012-1013 (D.C. Cir. 1983). *See also Tongatapu Woodcraft Hawaii, Ltd. v. Feldman,* 736 F. 2d 1305, 1309 (9th Cir. 1984). A United States baccalaureate degree is generally found to require four years of education. *Matter of Shah*, 17 I&N Dec. 244 (Reg. Comm. 1977).

As noted above, the job offered to the beneficiary is set forth as a Computer Programmer II on the Form ETA 750A. The job requires that the beneficiary have a Bachelor of Science in Computer Science. Item 14 of the Form ETA 750A also requires that he have two years of work experience in the job offered as a Computer Programmer II or two years of work experience in the related occupation defined as Computer Programmer I/Computer Programmer 2 or a combination. Additionally Item 15 requires that the beneficiary must have a background in Embedded Software Development.

The regulation at 20 C.F.R. § 656.21(b)(5) provides that the employer's job requirements must be the actual minimum requirements for the position advertised and that it has not hired workers with less training or experience for jobs similar to the one for which certification is sought, or that it is not feasible to hire workers with less training or experience than that required by the job opportunity. If the alien has gained the requisite experience while working for the employer, the burden is on the employer to show that the alien gained his experience in jobs that are not similar to the job for which the certification is sought. *See MMMats, Inc.,* 1987-INA-540 (Nov. 24, 1987); *Brent-Wood Products, Inc.,*

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[9] The regulatory scheme governing the alien labor certification process contains certain safeguards to assure that petitioning employers do not treat alien workers more favorably than U.S. workers. The current Department of Labor (DOL) regulations concerning labor certifications went into effect on March 28, 2005. The new regulations are referred to by the DOL by the acronym PERM, for Program Electronic Review Management. *See* 69 Fed. Reg. 77325, 77326 (Dec. 27, 2004). The PERM regulation was effective as of March 28, 2005, and applies to labor certification applications for the permanent employment of aliens filed on or after that date. Since the instant labor certification application was filed before March 28, 2005, it is governed by the regulations in effect before PERM as referenced above.

1988-INA-0259 (Feb. 28, 189 (en banc). As noted by the director, in *Delitzer Corp. of Newton,* 1988-INA-842 (May 9, 1999) (en banc), the Board identified various factors to be considered when determining whether the "lesser" job experience gained with the employer is sufficiently dissimilar to the "greater" job so that such experience may be accepted as qualifying. These factors include a comparison of job duties and requirements, supervisory responsibilities, positions of the jobs in the employer's job hierarchy, whether and by whom the position has been filled previously, the Employer's prior employment practices regarding the relative positions, the amount or percentage of time spent performing each job duty in each job, and the job salaries.

The job duties of the offered position of Computer Programmer II are described on the Form ETA 750A as:

> Develop applications that require experience in Embedded programming. Perform routine programming assignments that do not require skilled background experience but do require knowledge of established programming procedures and data processing requirements. The data is defined and the format of the final product is very similar to that of the input or is well designed when significantly different. Maintenance & modification of routine programs. Make approved changes to amending program flow charts, developing detailed processing logic, & coding changes. Write routine programs using prescribed specifications.

As set forth on Part B of the Form ETA 750, signed by the beneficiary on January 14, 2005, the beneficiary's claimed two years of experience for the certified position of Computer Programmer II was gained with the petitioning employer as a Computer Programmer I commencing in August 2002 and running until the present (date of signing). As is indicated in the record, the beneficiary continues to work for the petitioner. The duties performed as a Computer Programmer I are set forth as follows:

> Assist higher level staff by performing elementary programming tasks which concern limited & simple data items and steps which closely follow patterns of previous work done in the organization, e.g. drawing flow charts, writing operator instructions or coding and testing routines to accumulate counts, tallies, or summaries. Perform routine programming assignments under close supervision. In addition, to assist higher level staff, may perform elementary fact-finding concerning a specified work progress, e.g. a file of clerical records which is treated as unit (invoices, purchase orders, etc); report findings to higher level staff. May receive training in elementary fact finding. Detailed, step by step instructions are given for each tasks and any deviation must be authorized by supervisor. Work is usually monitored progress; all work is reviewed upon completion for accuracy and compliance with standards.

It is noted that the record contains four documents signed by [redacted] President and CEO of the petitioner in which the beneficiary's employment history and the nature of the jobs are discussed. In a letter, dated May 30, 2007, Mr [redacted] describes the job offered of Computer Programmer II and states that the beneficiary has been employed by the petitioner as a Computer Programmer I

since September 2002. Although the letter describes the duties to be performed as a Computer Programmer II, like the Form ETA 750 description of the duties, it omits any mention of supervisory duties being required as part of those duties as a Computer Programmer II. In a letter dated, April 16, 2010, Mr. also offers a description of the Computer Programmer II position,[10] affirms the beneficiary's employment in this position, but also fails to mention that the position includes supervisory duties of any other workers.

In an affidavit, dated September 20, 2012, Mr. states that the industry practice and the petitioner's practice in the past has been to treat the two positions as separate jobs and that the significant differences between the two jobs lies with the tasks performed and the level of supervision given to the higher position. Mr. summarizes the differences as including a degree and two years of experience required for a Computer Programmer II position whereas only a degree is required for a Computer Programmer I job. He also states that the Computer Programmer II reports to the Development Manager whereas the Computer Programmer I reports to the Computer Programmer II and that before the positions of the Computer Programmer II and Development Manager were created, the Computer Programmer I reported directly to the Vice President. The affidavit adds that the Computer Programmer II spends 100% of his time doing more complex work as well as supervising other computer programmers, whereas the Computer Programmer I spends 100% of his time accomplishing tasks as assigned and does not have any supervisory duties. Mr. further states that the salary for the Computer Programmer I is between $28,000 and $36,753.60 while the salary for a Computer Programmer II is $46,000 per year and that the beneficiary was promoted to Computer Programmer II in 2006.

An affidavit, dated January 23, 2013 has also been submitted to the record by Mr. Relevant to the beneficiary's position, Mr. states that the beneficiary was promoted to Computer Programmer II on November 1, 2006. This affidavit reiterates the job descriptions of the two positions and describes what petitioner asserts are the significant differences between the two positions as set forth above.

It is noted that the record indicates some discrepant information relevant to the duration and kind of positions held by the beneficiary. For example, on the Form G-325, Biographic Information signed by the beneficiary on May 30, 2007 and submitted in conjunction with his I-485, Application to

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[10] Mr. 's letter states in pertinent part:

> [The beneficiary] in his current position as a Computer Programmer II, continues to develop applications that require experience in embedded programming. He performs routine programming assignments that do not require skilled background experience, but do require knowledge of established programming procedures and data processing, requirements. The data id defined and the format of the final product is very similar to that of the input or is well designed when significantly different. He is responsible for maintenance and modification of routine programs. He makes approved changes to amend program flow charts, develop detailed processing logic, and code changes. Furthermore, he continues to write routing programs using prescribed specifications.

Register Permanent Residence or Adjust Status, the beneficiary states that he was working as a Computer Programmer I from October 2002 until the present time (date of signing). If he had been promoted to Computer Programmer II on November 1, 2006, as is asserted, it is unclear why the beneficiary's information on the Form G-325 failed to match that claimed by Mr. Further, the beneficiary's 2007 W-2 does not reflect that he was paid the $46,000 per year given to Computer Programmer IIs. As noted above, his 2007 wages were $2,845.09 less than this amount. 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. *See Matter of Ho*, 19 I&N Dec. 582, 591-592 (BIA 1988).

Further, as is noted above, there is no indication on the Form ETA 750 or in the record of such independent objective evidence such as correspondence with DOL or copies of job advertisements that would corroborate that these supervisory duties are part of the requirements for Computer Programmer II. It is also noted that no independent documentation is contained the record that supports or identifies industry practice relevant to these two positions or specifically delineates percentage of time accomplishing the duties described as typical of the two positions or identifies workers who have held these positions. While the AAO accepts the petitioner's assertion that the Computer Programmer I and the Computer Programmer II are not the same position, the AAO does not find that they are so substantially dissimilar that would warrant a finding that the experience that the beneficiary gained with the petitioner qualifies as work experience that satisfies the requirements of the Form ETA 750. Since the beneficiary gained all of his relevant experience with the petitioner, the petitioner is requiring more experience of U.S. workers than was required of the Alien as of the priority date.[11] The petitioner has not established that the beneficiary possessed the requisite qualifying experience sufficient to approve the petition.

In view of the foregoing, the AAO concludes that the director properly revoked the approval of the petition. Regarding the revocation on notice of an immigrant petition under section 205 of the Act, the Board of Immigration Appeals has stated:

> In *Matter of Estime*, . . . this Board stated that a notice of intention to revoke a visa petition is properly issued for "good and sufficient cause" where the evidence of record at the time the notice is issued, if unexplained and unrebutted, would warrant a denial of the visa petition based upon the petitioner's failure to meet his burden of proof. The decision to revoke will be sustained where the evidence of record at the time the decision is rendered, including any evidence or explanation submitted by the petitioner in rebuttal to the notice of intention to revoke, would warrant such denial.

Matter of Ho, 19 I&N Dec. 582 at 590 (citing *Matter of Estime*, 19 I&N 450 (BIA 1987)). In this case, the evidence contained in the record, which failed to establish the ability to pay the proffered

[11]The petitioner did not submit any documentation to support any assertion that it is not feasible to hire workers with less training or experience than that offered by the employer's job offer. *See* 20 C.F.R. § 656.21(b)(5).

wage or that the beneficiary's experience fulfilled the requirements of the Form ETA 750, as set forth above, at the time the decision was rendered, warranted such denial.

The burden of proof in these proceedings rests solely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. The petitioner has not met that burden.

ORDER: The appeal is dismissed.