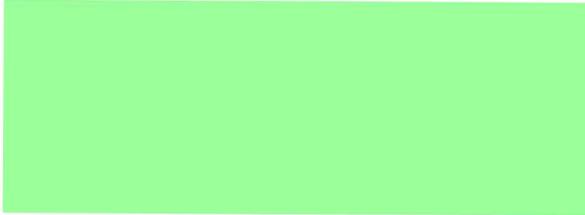




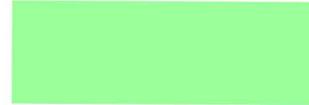
U.S. Citizenship  
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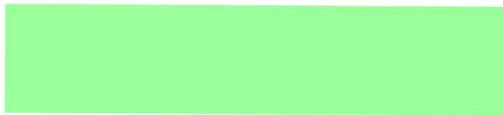


DATE: **MAY 21 2014** OFFICE: TEXAS SERVICE CENTER

FILE:

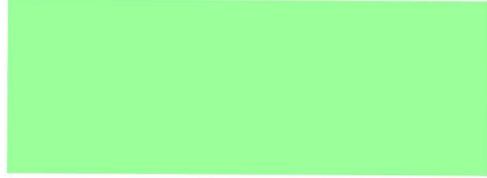


IN RE: Petitioner:  
Beneficiary:



PETITION: Immigrant Petition for Alien Worker as a Member of the Professions Holding an Advanced Degree or an Alien of Exceptional Ability Pursuant to Section 203(b)(2) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)(2)

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, denied the immigrant visa petition and the matter is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner describes itself as an IT services and consulting business. It seeks to permanently employ the beneficiary in the United States as a programmer analyst. The petitioner requests classification of the beneficiary as an advanced degree professional pursuant to section 203(b)(2) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(2).

As required by statute, the petition is accompanied by an ETA Form 9089, Application for Permanent Employment Certification (labor certification), approved by the U.S. Department of Labor (DOL).<sup>1</sup> The priority date of the petition is April 21, 2012.<sup>2</sup>

The director's decision denying the petition concludes that the petitioner did not establish by a preponderance of the evidence that the beneficiary possessed the minimum experience required to perform the offered position by the priority date. The director noted unresolved inconsistencies in the record regarding the beneficiary's employment history.

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.<sup>3</sup>

### **Beneficiary's Qualifications**

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)(1), (12). *See Matter of Wing's Tea House*, 16 I&N Dec. 158, 159 (Acting Reg'l Comm'r 1977); *see also Matter of Katigbak*, 14 I&N Dec. 45, 49 (Reg'l Comm'r 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

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<sup>1</sup> See section 212(a)(5)(D) of the Act, 8 U.S.C. § 1182(a)(5)(D); *see also* 8 C.F.R. § 204.5(a)(2).

<sup>2</sup> The priority date is the date the DOL accepted the labor certification for processing. *See* 8 C.F.R. § 204.5(d).

<sup>3</sup> 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).

may it impose additional requirements. *See Madany v. Smith*, 696 F.2d 1008 (D.C. Cir. 1983); *K.R.K. Irvine, Inc. v. Landon*, 699 F.2d 1006 (9th Cir. 1983); *Stewart Infra-Red Commissary of Massachusetts, Inc. v. Coomey*, 661 F.2d 1 (1st Cir. 1981).

Part H of the labor certification states that the offered position has the following minimum requirements:

- H.4. Education: Master's degree in computer science.
- H.5. Training: None required.
- H.6. Experience in the job offered: 12 months.
- H.7. Alternate field of study: Computer Applications.
- H.8. Alternate combination of education and experience: None accepted.
- H.9. Foreign educational equivalent: Accepted.
- H.10. Experience in an alternate occupation: None accepted.
- H.14. Specific skills or other requirements: Any suitable combination of education, training or experience is acceptable. Will accept a Master's degree in computer science or computer applications as evaluated by a credential evaluation service.

Part J of the labor certification states that the beneficiary possesses a Master's degree from [REDACTED] in India, completed in 2005. The record contains a copy of the beneficiary's Bachelor of Science diploma issued in March 2003, together with transcripts, from [REDACTED] in India. The record also contains a copy of the beneficiary's Master of Computer Applications diploma issued in March 2006, together with transcripts, from [REDACTED] in India.

The record also contains an evaluation of the beneficiary's educational credentials prepared by [REDACTED] for [REDACTED] on October 27, 2011. The evaluation states that the beneficiary's Bachelor of Science degree is equal to three years of undergraduate coursework from an accredited institution of higher education in the United States. The evaluation further states that the beneficiary's Master of Computer Applications degree is the equivalent of a Master of Science degree in Computer Science from an accredited institution of higher education in the United States. The petitioner has established that the beneficiary has the required education for the proffered position.

Part K of the labor certification states that the beneficiary possesses the following employment experience:

- Programmer Analyst with [REDACTED] Inc. in South Plainfield, NJ from October 1, 2008 until February 28, 2010.
- Programmer Analyst with [REDACTED] Corp. d/b/a [REDACTED] Corporation in Edison, NJ from March 1, 2010 until March 31, 2011.
- Programmer Analyst with [REDACTED] Corporation in Edison, NJ from April 1,

2011 until June 20, 2011.

- Programmer Analyst with the petitioner, [REDACTED] Inc., in Cranbury, NJ from June 21, 2011 through the date the beneficiary signed the labor certification application on December 19, 2012.

Evidence relating to qualifying experience must be in the form of a letter from a current or former employer and must include the name, address, and title of the writer, and a specific description of the duties performed by the beneficiary. 8 C.F.R. § 204.5(g)(1). If such evidence is unavailable, USCIS may consider other documentation relating to the beneficiary's experience. *Id.*

With the petition, the petitioner submitted the following experience letters:

- Letter dated August 31, 2007, from [REDACTED] Head of India Local & Transversal Applications, [REDACTED] on [REDACTED] letterhead stating that the company employed the beneficiary from August 2006 until August 2007. The letter indicates that the beneficiary made an "excellent contribution towards development of HR and e-banking applications using various Web technologies... ."
- Letter dated February 28, 2010, from [REDACTED] President, on [REDACTED] letterhead stating that the company employed the beneficiary as a programmer analyst from October 2008 until February 2010.
- Letter dated January 30, 2013, from [REDACTED] a manager at [REDACTED] stating that [REDACTED] employed the beneficiary as a programmer analyst from October 1, 2008 until February 28, 2010. [REDACTED] indicates that he/she reviewed and supervised the beneficiary's activities as an IT subcontractor.
- Letter dated February 1, 2013, from [REDACTED], a former colleague of the beneficiary from October 20, 2008 to February 28, 2010, stating that [REDACTED] employed the beneficiary as a programmer analyst.

The director sent a Notice of Intent to Deny (NOID) to the petitioner dated November 25, 2013. In connection with the beneficiary's work experience, the director indicated that several prior Form I-129 filings on the beneficiary's behalf were inconsistent with the beneficiary's representations regarding his work experience on the labor certification. Specifically, the director noted the following Form I-129 filings on behalf of the beneficiary:

- A Form I-129 filed by [REDACTED] LLC, with validity dates from October 1, 2007 to September 15, 2010.
- A Form I-129 filed by [REDACTED] Inc., with validity dates from May 30, 2008 to March 31, 2011.

- A Form I-129 filed by [REDACTED] Corp, with validity dates from April 12, 2011 to April 11, 2012.
- Two Form I-129s filed by the petitioner, one pending at the time of the NOID and one with validity dates from April 12, 2012 to October 19, 2013.

The director also indicated that because the letters from [REDACTED] and [REDACTED] were not from the beneficiary's former employers, the letters would not be accepted as evidence of the beneficiary's prior work experience with [REDACTED]

The director further stated that the letter from [REDACTED] does not contain employer contact information and is not listed on the labor certification. In addition, the director indicated that the letter from [REDACTED] was signed by [REDACTED] who was charged with immigration fraud in 2010. The director stated that any documents with his name/signature are considered questionable and possibly fraudulent.

In response to the director's NOID, the petitioner submitted, in part, a letter dated March 31, 2011, from [REDACTED] CEO, on [REDACTED] Corporation letterhead stating that the company employed the beneficiary as a programmer analyst from March 1, 2010 until March 31, 2011.

The petitioner also submitted three charts detailing the beneficiary's employment, several Forms I-797 for the beneficiary, an organizational chart for [REDACTED] Corporation, and a Certificate of Amendment to the Certificate of Incorporation of [REDACTED], Inc.

The director's decision denying the petition states that because the letters from [REDACTED] and [REDACTED] were not from the beneficiary's former employers, the letters would not be accepted as evidence of the beneficiary's prior work experience with [REDACTED]

The director further stated in his decision that the letter from [REDACTED] does not contain employer contact information and is not listed on the labor certification. 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 labor certification, lessens the credibility of the evidence and facts asserted. Therefore, the director did not accept the letter from [REDACTED] as evidence of the beneficiary's prior work experience.

Further, the director did not accept the letter from [REDACTED] Corporation as evidence of the beneficiary's prior work experience. The director noted that the owner and President of [REDACTED] Corporation is [REDACTED] who pled guilty to hiring unauthorized aliens in federal court on April 29, 2011. The director also noted that [REDACTED] Inc. dba [REDACTED] Corporation pled guilty to mail fraud and agreed to make restitution to USCIS.

The director further noted that the Form I-129 petition filed by [REDACTED] Inc. was signed by [REDACTED], who was never an employee of the company and did not have authority to file cases for [REDACTED], Inc.<sup>4</sup>

Finally, the director determined that the petitioner did not resolve the inconsistencies in the Form I-129 filings on behalf of the beneficiary and the representations made by the beneficiary on the labor certification application. The director concluded that the petitioner did not establish by a preponderance of the evidence that the beneficiary possessed the minimum experience required to perform the offered position by the priority date.

On appeal, the petitioner submits information regarding the beneficiary's prior employment. We will analyze the beneficiary's claimed employment listed on the labor certification below.

[REDACTED] Inc.

On the labor certification, the beneficiary represented that he worked as a Programmer Analyst with [REDACTED] Inc. in South Plainfield, NJ from October 1, 2008 until February 28, 2010. Two Forms I-129 were filed on the beneficiary's behalf covering that period: one filed by [REDACTED] LLC, with validity dates from October 1, 2007 to September 15, 2010; and one filed by [REDACTED] Inc., with validity dates from May 30, 2008 to March 31, 2011.

On appeal, counsel for the petitioner claims that the beneficiary did work for [REDACTED] LLC until October 1, 2008. However, the petitioner has provided no evidence of the beneficiary's employment with [REDACTED] LLC. 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).

Further, the instructions to the ETA Form 9089 require the beneficiary to list all experiences that qualify him for the job opportunity.<sup>5</sup> The beneficiary failed to list his employment with [REDACTED] LLC on the labor certification. Doubt cast on any aspect of the petitioner's evidence may lead to a reevaluation of the reliability and sufficiency of the remaining evidence offered in support of the visa petition. *Matter of Ho*, 19 I&N Dec. 582, 591 (BIA 1988).

Counsel asserts that after leaving [REDACTED] LLC on October 1, 2008, the beneficiary immediately joined [REDACTED] Inc., which changed its name to [REDACTED] Inc. on May 26, 2009. The Certificate of Amendment to the Certificate of Incorporation of [REDACTED] Inc. supports the name change. Therefore, according to counsel, the

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<sup>4</sup> On appeal, the petitioner's counsel asserts that the beneficiary has no authority to decide who signs petitions on his behalf, and that he was one of the "victims" of [REDACTED]. However, counsel does not dispute that [REDACTED] did not have authority to file cases for [REDACTED] Inc.

<sup>5</sup> <http://www.foreignlaborcert.doleta.gov/pdf/9089inst.pdf>.

beneficiary's employer became [REDACTED] Inc. on the date of the name change.

The record contains three letters in support of the beneficiary's employment with [REDACTED] Inc.: a letter dated February 28, 2010, from [REDACTED] President of [REDACTED] stating that the company employed the beneficiary as a programmer analyst from October 2008 until February 2010; a letter dated January 30, 2013, from [REDACTED] a manager at [REDACTED], stating that [REDACTED] employed the beneficiary as a programmer analyst from October 1, 2008 until February 28, 2010; and a letter dated February 1, 2013, from [REDACTED] a former colleague of the beneficiary from October 20, 2008 to February 28, 2010, stating that [REDACTED] Inc. employed the beneficiary as a programmer analyst.

Evidence relating to qualifying experience must be in the form of a letter from a current or former employer and must include the name, address, and title of the writer, and a specific description of the duties performed by the beneficiary. 8 C.F.R. § 204.5(g)(1). As noted by the director in his NOID, the letter from [REDACTED] President of [REDACTED] Inc., was deemed questionable due to [REDACTED]'s guilty plea. Therefore, the petitioner was required to submit independent, objective evidence of the beneficiary's employment with [REDACTED] Inc. and [REDACTED] Inc.

Because the letters from [REDACTED] and [REDACTED] were not from [REDACTED] Inc., the letters were not accepted by the director as evidence of the beneficiary's prior work experience with [REDACTED] Inc. They also do not provide independent, objective evidence of the beneficiary's employment with [REDACTED] Inc. and [REDACTED] Inc. The letters include two paragraphs describing the beneficiary's duties that are identical to each other. It appears that someone other than [REDACTED] and [REDACTED] wrote the letters, diminishing their authenticity and evidentiary value. Further, the letters fail to reference the name change of [REDACTED] Inc. to [REDACTED] Inc. in 2009. Additionally, the letter from [REDACTED] indicates that the beneficiary performed work for [REDACTED] in Washington, DC, while the labor certification says that he worked in South Plainfield, NJ. Further, [REDACTED] also indicates in the letter that he/she was the beneficiary's supervisor, while the labor certification indicates that [REDACTED] was the beneficiary's supervisor. Doubt cast on any aspect of the petitioner's evidence may lead to a reevaluation of the reliability and sufficiency of the remaining evidence offered in support of the visa petition. *Matter of Ho*, 19 I&N Dec. at 591. The letters from [REDACTED] and [REDACTED] do not establish that the beneficiary worked as a Programmer Analyst with [REDACTED], Inc. in South Plainfield, NJ from October 1, 2008 until February 28, 2010.

On appeal, the petitioner submits earnings statements for the beneficiary. The statements show that the beneficiary was paid by [REDACTED] from the period ending October 15, 2008 through the period ending July 31, 2009; and that the beneficiary was paid by [REDACTED]

Inc. from the period ending August 15, 2009 through the period ending February 28, 2010. If changed its name to Inc. on May 26, 2009, it is unclear why the beneficiary continued to receive paychecks from through the period ending July 31, 2009. 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. at 591-92. Further, the earnings statements from and Inc. do not establish the the beneficiary was employed as a programmer analyst. Therefore, the statements are not independent, objective evidence of the beneficiary's employment as a programmer analyst with Inc. from October 1, 2008 until February 28, 2010. The credibility concerns noted above with respect to the letters from and Inc. have not been resolved.

Next, counsel asserts that on February 22, 2010, Corp., a Maryland corporation, purchased the assets of Inc. (except the assets of Inc.).<sup>6</sup> On appeal, the petitioner submits a Secured Party Bill of Sale dated February 22, 2010, pursuant to which sold to Corp. the personal property of Inc. (except equipment leased by that is the subject of a true lease agreement and any executory contracts not identified on an unattached Exhibit B of a Secured Party Private Sale Agreement). The Bill of Sale does not establish that Corp. purchased the assets of Inc.; instead, the Bill of Sale establishes that Corp. purchased the assets of Inc.<sup>7</sup> Therefore, the petitioner has not established that Corp. purchased the assets of Inc. (formerly Inc.).

In sum, the petitioner has not established that the beneficiary worked as a Programmer Analyst with Inc. in South Plainfield, NJ from October 1, 2008 until February 28, 2010.

Corp.

On the labor certification, the beneficiary represented that he worked as a Programmer Analyst with Corp. d/b/a Corporation in Edison, NJ from March 1, 2010 until March 31, 2011. The Form I-129 filed on the beneficiary's behalf covering that period was filed by Inc., with validity dates from May 30, 2008 to March 31, 2011. As noted above, the petitioner has not established the relationship between Inc. and

<sup>6</sup> The assertions of counsel do not constitute evidence. *Matter of Obaigbena*, 19 I&N Dec. at 534; *Matter of Ramirez-Sanchez*, 17 I&N Dec. at 506 (BIA 1980).

<sup>7</sup> While Inc. was an additional signatory on the Bill of Sale, the relationship between Inc. and Inc. has not been established.

██████████ Corp. Therefore, the inconsistencies in the Form I-129 filing by ██████████ Inc. on behalf of the beneficiary, and the representation made by the beneficiary on the labor certification application regarding his employment with ██████████ Corp., have not been resolved.

Counsel asserts on appeal that ██████████ Corp. operated under the assumed name of ██████████ Corporation until March 31, 2011.<sup>8</sup> The petitioner did not submit an assumed name certificate establishing that ██████████ Corp. operated under the assumed name of ██████████ Corporation. The assertions of counsel do not constitute evidence. *Matter of Obaigbena*, 19 I&N Dec. at 534; *Matter of Ramirez-Sanchez*, 17 I&N Dec. at 506.

The petitioner has not established that the beneficiary worked as a Programmer Analyst with ██████████ Corp. d/b/a ██████████ Corporation in Edison, NJ from March 1, 2010 until March 31, 2011.

██████████ Corporation

Next, on the labor certification, the beneficiary represented that he worked as a Programmer Analyst with ██████████ in Edison, NJ from April 1, 2011 until June 20, 2011. The Form I-129 filed on the beneficiary's behalf covering that period was filed by ██████████ Corp., with validity dates from April 12, 2011 to April 11, 2012. The petitioner did not submit a letter from ██████████ Corp. verifying the beneficiary's employment from April 1, 2011 until June 20, 2011. The petitioner submitted two earnings statements issued to the beneficiary by ██████████ Corp. However, the earnings statements do not establish the the beneficiary was employed as a programmer analyst. Thus, the petitioner has not established that the beneficiary worked as a Programmer Analyst with ██████████ Corporation in Edison, NJ from April 1, 2011 until June 20, 2011.

██████████ Inc. (the petitioner)

Counsel asserts that on June 20, 2011, ██████████ Corp. was merged with the petitioner. The record contains no evidence of the merger. The assertions of counsel do not constitute evidence. *Matter of Obaigbena*, 19 I&N Dec. at 534; *Matter of Ramirez-Sanchez*, 17 I&N Dec. at 506. Without evidence of the merger, the beneficiary's representation on the labor certification that he worked as a Programmer Analyst with the petitioner in Cranbury, NJ from June 21, 2011 through the date he signed the labor certification application on December 19, 2012 is not consistent with the Form I-129 filings for the beneficiary covering that period.<sup>9</sup>

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<sup>8</sup> The petitioner submitted earnings statements issued to the beneficiary by ██████████ Corporation in 2010 and 2011. However, the earnings statements do not establish the the beneficiary was employed as a programmer analyst, or that ██████████ Corp. operated under the assumed name of ██████████ Corporation in 2010 and 2011.

<sup>9</sup> Two Form I-129s were filed by the petitioner on the beneficiary's behalf, one with validity dates from April 12, 2012 to October 19, 2013, and one pending at the time of the NOID.

Further, representations made on the certified ETA Form 9089, which is signed by both the petitioner and the beneficiary under penalty of perjury, clearly indicate that the beneficiary's experience with the petitioner, or experience in an alternate occupation, cannot be used to qualify the beneficiary for the certified position.<sup>10</sup> Specifically, the petitioner indicates that questions J.19 and J.20, which ask about

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<sup>10</sup> 20 C.F.R. § 656.17 states:

(h) *Job duties and requirements.* (1) The job opportunity's requirements, unless adequately documented as arising from business necessity, must be those normally required for the occupation

.....

(4)(i) Alternative experience requirements must be substantially equivalent to the primary requirements of the job opportunity for which certification is sought; and

(i) If the alien beneficiary already is employed by the employer, and the alien does not meet the primary job requirements and only potentially qualifies for the job by virtue of the employer's alternative requirements, certification will be denied unless the application states that any suitable combination of education, training, or experience is acceptable.

(ii) *Actual minimum requirements.* DOL will evaluate the employer's actual minimum requirements in accordance with this paragraph (i).

(1) The job requirements, as described, must represent the employer's actual minimum requirements for the job opportunity.

(2) The employer must not have hired workers with less training or experience for jobs substantially comparable to that involved in the job opportunity.

(3) If the alien beneficiary already is employed by the employer, in considering whether the job requirements represent the employer's actual minimums, DOL will review the training and experience possessed by the alien beneficiary at the time of hiring by the employer, including as a contract employee. The employer can not require domestic worker applicants to possess training and/or experience beyond what the alien possessed at the time of hire unless:

(i) The alien gained the experience while working for the employer, including as a contract employee, in a position not substantially comparable to the position for which certification is being sought, or

(ii) The employer can demonstrate that it is no longer feasible to train a worker to qualify for the position.

experience in an alternate occupation, are not applicable. In response to question J.21, which asks, “Did the alien gain any of the qualifying experience with the employer in a position substantially comparable to the job opportunity requested?,” the petitioner answered “no.” The petitioner specifically indicates in response to question H.6 that 12 months of experience in the job offered is required and in response to question H.10 that experience in an alternate occupation is not acceptable. In general, if the answer to question J.21 is no, then the experience with the employer may be used by the beneficiary to qualify for the proffered position if the position was not substantially comparable<sup>11</sup> and the terms of the ETA Form 9089 at H.10 provide that applicants can qualify through an alternate occupation. Here, the beneficiary indicates in response to question K.1. that his position with the petitioner was as a programmer analyst, and the job duties are the same duties as the position offered. Therefore, the experience gained with the petitioner was in the position offered and is substantially comparable as he was performing the same job duties more than 50 percent of the time. According to DOL regulations, therefore, the petitioner cannot rely on this experience for the beneficiary to qualify for the proffered position. Additionally, as the terms of the labor certification supporting the instant I-140 petition do not permit consideration of experience in an alternate occupation, and the

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(4) In evaluating whether the alien beneficiary satisfies the employer’s actual minimum requirements, DOL will not consider any education or training obtained by the alien beneficiary at the employer’s expense unless the employer offers similar training to domestic worker applicants.

(5) For purposes of this paragraph (i):

(i) The term “employer” means an entity with the same Federal Employer Identification Number (FEIN), provided it meets the definition of an employer at § 656.3.

(ii) A “substantially comparable” job or position means a job or position requiring performance of the same job duties more than 50 percent of the time. This requirement can be documented by furnishing position descriptions, the percentage of time spent on the various duties, organization charts, and payroll records.

<sup>11</sup> A definition of “substantially comparable” is found at 20 C.F.R. § 656.17:

5) For purposes of this paragraph (i):

...  
(ii) A “substantially comparable” job or position means a job or position requiring performance of the same job duties more than 50 percent of the time. This requirement can be documented by furnishing position descriptions, the percentage of time spent on the various duties, organization charts, and payroll records.

beneficiary's experience with the petitioner was in the position offered, the experience may not be used to qualify the beneficiary for the proffered position.

In sum, the petitioner has not established that the beneficiary has 12 months of experience as a programmer analyst. Thus, 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.

### **Ability to Pay the Proffered Wage**

Beyond the decision of the director, the petitioner has also failed to establish its ability to pay the proffered wage of \$74,300 as of the priority date and continuing until the beneficiary obtains lawful permanent residence. *See* 8 C.F.R. § 204.5(g)(2).

The regulation at 8 C.F.R. § 204.5(g)(2) requires that a prospective United States employer demonstrate its continuing ability to pay the proffered wage with evidence in the form of copies of annual reports, federal tax returns, or audited financial statements. In a case where the prospective United States employer employs 100 or more workers, the director may accept a statement from a financial officer of the organization which establishes the prospective employer's ability to pay the proffered wage.<sup>12</sup> In appropriate cases, additional evidence, such as profit/loss statements, bank account records, or personnel records, may be submitted by the petitioner or requested by USCIS.

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. With the petition, the petitioner provided a 2012 IRS Form W-2, Wage and Tax Statement, indicating that the petitioner paid the beneficiary \$96,203.70 in 2012.

Pursuant to the NOID, the director requested the petitioner to submit additional evidence of its

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<sup>12</sup> With the petition, the petitioner provided a statement dated February 12, 2013, from [REDACTED] Chief Executive Officer of [REDACTED] Inc., stating that [REDACTED] Inc. currently employs 135 workers, has gross revenue of \$15 million and net revenues of \$1.5 million. This letter was not written by the petitioner's financial officer on behalf of the petitioner. Therefore, the letter does not establish the petitioner's ability to pay the proffered wage. Further, in response to the director's NOID, the petitioner submitted a letter dated December 9, 2013, from [REDACTED], Chief Financial Officer for the petitioner, stating that the petitioner has more than 100 employees on its payroll and that its annual revenue for 2012 was \$12,917,067. However, because of the inconsistencies in the petitioner's IRS Forms 941 detailed herein and given the petitioner's history of immigration filings, we find that USCIS need not exercise its discretion to accept the letter from [REDACTED] as evidence of the petitioner's ability to pay the proffered wage. USCIS records indicate that the petitioner has filed dozens of Form I-140 and Form I-129 petitions with USCIS. Consequently, USCIS must also take into account the petitioner's ability to pay the beneficiary's wages in the context of its overall recruitment efforts.

ability to pay the proffered wage, including IRS Forms 941 for the first three quarters of 2013, and copies of its annual reports, federal tax returns, or audited financial statements for each year from the priority date.

In response to the NOID, the petitioner submitted the beneficiary's paystubs issued by the petitioner in 2013, indicating that the petitioner paid the beneficiary \$92,874.60 through October 31, 2013. The petitioner also submitted its IRS Forms 941 for the first three quarters of 2013. The Forms 941 indicate that the petitioner employed no employees who received wages, tips or other compensation for the relevant quarters.<sup>13</sup> However, the Forms 941 show wages paid to employees in each quarter. The internal inconsistencies in the 2013 Forms 941 cast doubt upon the authenticity of the beneficiary's pay stubs submitted for 2013. It is incumbent upon the petitioner to resolve any inconsistencies in the record by independent objective evidence. *Matter of Ho*, 19 I&N Dec. at 591-92. Any attempt to explain or reconcile such inconsistencies will not suffice unless the petitioner submits competent objective evidence pointing to where the truth lies. *Id.* Doubt cast on any aspect of the petitioner's proof may, of course, lead to a reevaluation of the reliability and sufficiency of the remaining evidence offered in support of the visa petition. *Id.*

Even if the petitioner had established that it paid the beneficiary the full proffered wage in 2012 and 2013, the petitioner must also submit its annual reports, federal tax returns, or audited financial statements for each relevant period.<sup>14</sup>

The petitioner submitted the 2012 IRS Form 1120, U.S. Corporation Income Tax Return, for [REDACTED] Corporation, and a Form 10Q for [REDACTED] Corporation for the quarterly period ending September 30, 2013.<sup>15</sup> However, the petitioner failed to submit its annual reports,

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<sup>13</sup> Part 1, Question 1 on each Form 941.

<sup>14</sup> If the petitioner has not established that it 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. *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 Haw., Ltd. v. Feldman*, 736 F.2d 1305 (9th Cir. 1984)); *Chi-Feng Chang v. Thornburgh*, 719 F. Supp. 532 (N.D. Texas 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), *aff'd*, No. 10-1517 (6th Cir. filed Nov. 10, 2011).

<sup>15</sup> The federal employer identification number (EIN) for [REDACTED] Corporation is [REDACTED]. The petitioner's EIN is [REDACTED]. The petitioner cannot use the tax returns of its parent entity to establish its ability to pay the proffered wage. Because a corporation is a separate and distinct legal entity from its shareholders, the assets of its shareholders or of other entities cannot be considered in determining the petitioning corporation's ability to pay the proffered wage. *See Matter of Aphrodite Investments, Ltd.*, 17 I&N Dec. 530 (Comm'r 1980). In a similar case, the court in *Sitar v. Ashcroft*, 2003 WL 22203713 (D.Mass. Sept. 18, 2003) stated, "nothing in the governing regulation, 8 C.F.R. § 204.5, permits [USCIS] to consider the financial resources of individuals or

federal tax returns, or audited financial statements as requested in the NOID. 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).

USCIS may also consider the overall magnitude of the petitioner's business activities. *See Matter of Sonegawa*, 12 I&N Dec. 612 (Reg'l Comm'r 1967).<sup>16</sup> The petitioner failed to establish that factors similar to *Sonegawa* existed in the instant case. 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.

In visa petition proceedings, it is the petitioner's burden to establish eligibility for the immigration benefit sought. Section 291 of the Act, 8 U.S.C. § 1361; *Matter of Otiende*, 26 I&N Dec. 127, 128 (BIA 2013). Here, that burden has not been met.

**ORDER:** The appeal is dismissed.

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entities who have no legal obligation to pay the wage." The petitioner would be required to submit audited financial statements or annual reports containing its separate financial information in years that it does not file its own federal tax returns. We note that according to its 2012 tax return, [REDACTED] Corporation had a net loss of -\$6,046,229 and net current liabilities of -\$2,117,940 in 2012.

<sup>16</sup> 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.