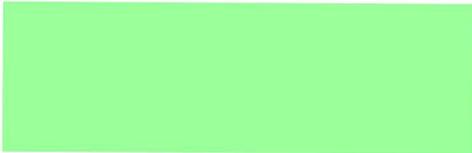




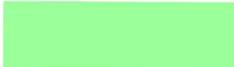
U.S. Citizenship
and Immigration
Services

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Date: **JUN 20 2012**

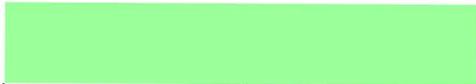
Office: NEBRASKA SERVICE CENTER

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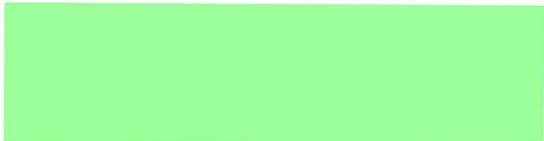
Petitioner:

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 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 with the field office or service center that originally decided your case by filing a Form I-290B, Notice of Appeal or Motion, with a fee of \$630. The specific requirements for filing such a motion can be found at 8 C.F.R. § 103.5. **Do not file any motion directly with the AAO.** Please be aware that 8 C.F.R. § 103.5(a)(1)(i) requires any motion to be filed within 30 days of the decision that the motion seeks to reconsider or reopen.

Thank you,


Perry Rhew

Chief, Administrative Appeals Office

DISCUSSION: The preference visa petition was denied by the Director, Nebraska Service Center, and is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner provides marine services. It seeks to employ the beneficiary permanently in the United States as a staff accountant. As required by statute, the petition is accompanied by ETA Form 9089, Application for Permanent Employment Certification, approved by the United States Department of Labor (DOL). The director determined that the petitioner had not established that it had the continuing ability to pay the beneficiary the proffered wage beginning on the priority date of the visa petition. The director denied the petition accordingly.

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

As set forth in the director's May 28, 2009 denial, an issue in this case is whether or not the petitioner has the ability to pay the proffered wage as of the priority date and continuing until the beneficiary obtains lawful permanent residence.

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

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

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

The petitioner must demonstrate the continuing ability to pay the proffered wage beginning on the priority date, which is the date the ETA Form 9089, Application for Permanent Employment Certification, 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 ETA Form 9089, Application for Permanent Employment Certification, as certified by the DOL and submitted with the instant petition. *Matter of Wing's Tea House*, 16 I&N Dec. 158 (Acting Reg'l Comm'r 1977).

Here, the ETA Form 9089 was accepted on March 3, 2006. The proffered wage as stated on the ETA Form 9089 is \$41,496 per year. The ETA Form 9089 states that the position requires 72 months of experience in the job offered as a staff accountant, or 72 months of experience as an accountant, controller, or financial manager. The petitioner stated that alternatively, a Bachelor's degree combined with one year of experience is acceptable.

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.¹

The evidence in the record of proceeding shows that the petitioner is structured as an S corporation. According to the tax returns in the record, the petitioner was incorporated on May 22, 1997, and its fiscal year is based on a calendar year.² On the ETA Form 9089, signed by the beneficiary on October 1, 2007, the beneficiary claimed to have worked for the petitioner from July 15, 2004 to March 30, 2007.

The petitioner must establish that its job offer to the beneficiary is a realistic one. Because the filing of an ETA Form 9089 labor certification application establishes a priority date for any immigrant petition later based on the ETA Form 9089, the petitioner must establish that the job offer was realistic as of the priority date and that the offer remained realistic for each year thereafter, until the beneficiary obtains lawful permanent residence. The petitioner's ability to pay the proffered wage is an essential element in evaluating whether a job offer is realistic. See *Matter of Great Wall*, 16 I&N Dec. 142 (Acting Reg'l Comm'r 1977); see also 8 C.F.R. § 204.5(g)(2). In evaluating whether a job offer is realistic, United States Citizenship and Immigration Services (USCIS) requires the petitioner to demonstrate financial resources sufficient to pay the beneficiary's proffered wages, although the totality of the circumstances affecting the petitioning business will be considered if the evidence warrants such consideration. See *Matter of Sonogawa*, 12 I&N Dec. 612 (Reg'l Comm'r-1967).

In order to establish its ability to pay the proffered wage, the petitioner initially submitted:

- A copy of the petitioner's 2006 Form W-3.³

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

² The Federal Employer Identification Number (FEIN) listed on the petition [REDACTED] does not match the FEIN listed on ETA Form 9089 or the petitioner's federal tax returns (Forms 1120S) of record [REDACTED]. It is incumbent upon the petitioner to resolve the inconsistencies by independent objective evidence. Attempts to explain or reconcile the conflicting accounts, absent competent objective evidence pointing to where the truth, in fact, lies, will not suffice. *Matter of Ho*, 19 I&N Dec. 582, 591-592 (BIA 1988). This issue must be addressed in any further filing.

³ The Transmittal of Wage and Tax Statements (Form W-3) is not a proper document to establish petitioner's ability to pay. Form W-3 contains a summary of all the Form W-2s submitted to the

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- A copy of the petitioner's 2006 Application for Automatic Extension of Time to File Certain Business Income Tax, Information, and Other Returns (Form 7004).

In response to the director's February 5, 2009 Request for Evidence (RFE), the petitioner submitted copies of its 2006, 2007, and 2008 federal tax returns (Forms 1120S).

In determining the petitioner's ability to pay the proffered wage during a given period, USCIS will first examine whether the petitioner employed and paid the beneficiary during that period. If the petitioner establishes by documentary evidence that it employed the beneficiary at a salary equal to or greater than the proffered wage, the evidence will be considered *prima facie* proof of the petitioner's ability to pay the proffered wage. In the instant case, although the beneficiary claimed on the labor certification to have worked for the petitioner from July 15, 2004 to March 30, 2007, the petitioner did not submit any evidence that it employed and paid the beneficiary an amount equal or greater than the proffered wage. Therefore, the petitioner has not established that it employed and paid the beneficiary the full proffered wage during all relevant timeframe from the priority date in 2003.

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).

Social Security Administration (SSA). In general, wages already paid to others are not available to prove the ability to pay the wage proffered to the beneficiary at the priority date of the petition and continuing to the present.

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

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

We find that the AAO has a rational explanation for its policy of not adding depreciation back to net income. Namely, that the amount spent on a long term tangible asset is a "real" expense.

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

The record before the director closed on March 16, 2009, with the receipt by the director of the petitioner’s submissions in response to the director’s request for evidence. As of that date, the petitioner’s 2009 federal income tax return was not yet due. The petitioner’s federal income tax return for 2008 is the most recent return in the record. The petitioner’s federal tax returns demonstrate its net income for 2006, 2007, and 2008 as shown in the table below.

- In 2006, the Form 1120S stated net income⁴ of \$(48,632).
- In 2007, the Form 1120S stated net income of \$3,300.
- In 2008, the Form 1120S stated net income of \$210,932.

⁴ Where an S corporation’s income is exclusively from a trade or business, USCIS considers net income to be the figure for ordinary income, shown on line 21 of page one of the petitioner’s IRS Form 1120S. However, where an S corporation has income, credits, deductions or other adjustments from sources other than a trade or business, they are reported on Schedule K. If the Schedule K has relevant entries for additional income, credits, deductions or other adjustments, net income is found line 18 (2006-2011) of Schedule K. See Instructions for Form 1120S, at <http://www.irs.gov/pub/irs-pdf/i1120s.pdf> (accessed May 7, 2012) (indicating that Schedule K is a summary schedule of all shareholders’ shares of the corporation’s income, deductions, credits, etc.). Because the petitioner had other adjustments shown on its Schedule K for 2006, 2007, and 2008, the petitioner’s net income is found on Schedule K of its tax returns.

Therefore, for the years 2006 and 2007 the petitioner did not have sufficient net income to pay the proffered wage. Although it appears that the petitioner had sufficient net income to pay the proffered wage in 2008, according to USCIS records, the petitioner has filed other 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.

As an alternate means of determining the petitioner's ability to pay the proffered wage, USCIS may review the petitioner's net current assets. Net current assets are the difference between the petitioner's current assets and current liabilities.⁵ A corporation's year-end current assets are shown on Schedule L, lines 1 through 6. Its year-end current liabilities are shown on lines 16 through 18. If the total of a corporation's end-of-year net current assets and the wages paid to the beneficiary (if any) are equal to or greater than the proffered wage, the petitioner is expected to be able to pay the proffered wage using those net current assets. The petitioner's tax returns demonstrate its end-of-year net current assets for 2006, 2007, and 2008, as shown in the table below.

- In 2006, the Form 1120S stated net current assets of \$27,013.
- In 2007, the Form 1120S stated net current assets of \$1,552.
- In 2008, the Form 1120S stated net current assets of \$182,865.

Therefore, for the years 2006 and 2007, the petitioner did not have sufficient net current assets to pay the proffered wage. Although it appears that, in 2008, the petitioner had sufficient net current assets to pay the proffered wage, as noted above, the petitioner has filed other petitions on behalf of other beneficiaries and 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.

Therefore, from the date the ETA Form 9089 was accepted for processing by the DOL, the petitioner had not established that it had the continuing ability to pay the beneficiary the proffered wage as of the priority date through an examination of wages paid to the beneficiary, or its net income or net current assets.

On appeal, counsel asserts that the director's decision was erroneous as it does not reflect the petitioner's ability to pay the proffered wage. To demonstrate the petitioner's ability to pay the proffered wage, counsel submits on appeal the petitioner's bank statements, [REDACTED] bills of

⁵According to *Barron's Dictionary of Accounting Terms* 117 (3rd ed. 2000), "current assets" consist of items having (in most cases) a life of one year or less, such as cash, marketable securities, inventory and prepaid expenses. "Current liabilities" are obligations payable (in most cases) within one year, such accounts payable, short-term notes payable, and accrued expenses (such as taxes and salaries). *Id.* at 118.

property purchases, [REDACTED]'s warranty deeds, and a stock certificate issued by the petitioner to its sole shareholder, [REDACTED]

Counsel's reliance on the balances in the petitioner's bank account is misplaced. First, bank statements are not among the three types of evidence, enumerated in 8 C.F.R. § 204.5(g)(2), required to illustrate a petitioner's ability to pay a proffered wage. While this regulation allows additional material "in appropriate cases," the petitioner in this case has not demonstrated why the documentation specified at 8 C.F.R. § 204.5(g)(2) is inapplicable or otherwise paints an inaccurate financial picture of the petitioner. Second, bank statements show the amount in an account on a given date, and cannot show the sustainable ability to pay a proffered wage. Third, no evidence was submitted to demonstrate that the funds reported on the petitioner's bank statements somehow reflect additional available funds that were not reflected on its tax return(s), such as the petitioner's taxable income (income minus deductions) or the cash specified on Schedule L that will be considered below in determining the petitioner's net current assets.

Counsel asserts that because [REDACTED] is the only owner of the petitioner, his personal assets should be considered to establish the petitioner's ability to pay the proffered wage. Counsel also cites *Ranchito Coletero*, 2002-INA-104 (2004 BALCA), for the premise that the sole proprietor's individual assets should be considered in determining whether the employer has the ability to pay the proffered wage. Counsel does not state how the DOL's Board of Alien Labor Certification Appeals (BALCA) precedent is binding on the AAO. While 8 C.F.R. § 103.3(c) provides that precedent decisions of USCIS are binding on all its employees in the administration of the Act, BALCA decisions are not similarly binding. Precedent decisions must be designated and published in bound volumes or as interim decisions. 8 C.F.R. § 103.9(a). Moreover, *Ranchito Coletero* deals with a sole proprietorship and is not directly applicable to the instant petition, which deals with a corporation. Because a corporation is a separate and distinct legal entity from its owners and shareholders, the assets of its shareholders or of other enterprises or corporations 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 entities who have no legal obligation to pay the wage."

Counsel's assertions on appeal cannot be concluded to outweigh the evidence presented in the tax returns as submitted by the petitioner that demonstrates that the petitioner could not pay the proffered wage from the day the ETA Form 9089 was accepted for processing by the DOL.

Finally, 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 Sonogawa*, 12 I&N Dec. 612 (Reg'l Comm'r 1967). The petitioning entity in *Sonogawa* had been in business for over 11 years and routinely earned a gross annual income of about \$100,000. During the year in which the petition was filed in that case, the petitioner changed business locations and paid rent on both the old and new locations for five months. There were large moving costs and also a period of time

when the petitioner was unable to do regular business. The Regional Commissioner determined that the petitioner's prospects for a resumption of successful business operations were well established. The petitioner was a fashion designer whose work had been featured in *Time* and *Look* magazines. Her clients included Miss Universe, movie actresses, and society matrons. The petitioner's clients had been included in the lists of the best-dressed California women. The petitioner lectured on fashion design at design and fashion shows throughout the United States and at colleges and universities in California. The Regional Commissioner's determination in *Sonegawa* was based in part on the petitioner's sound business reputation and outstanding reputation as a couturiere. As in *Sonegawa*, USCIS may, at its discretion, consider evidence relevant to the petitioner's financial ability that falls outside of a petitioner's net income and net current assets. USCIS may consider such factors as the number of years the petitioner has been doing business, the established historical growth of the petitioner's business, the overall number of employees, the occurrence of any uncharacteristic business expenditures or losses, the petitioner's reputation within its industry, whether the beneficiary is replacing a former employee or an outsourced service, or any other evidence that USCIS deems relevant to the petitioner's ability to pay the proffered wage.

In the instant case, the petitioning company was incorporated in 1997. The evidence of record does not show that the petitioner has significantly increased its gross sales from 2006 to 2008. The petitioner has not established a historical growth, the occurrence of any uncharacteristic business expenditures or losses that would indicate that its tax returns do not paint an accurate financial picture. The evidence of record does not establish the petitioner's ability to pay the proffered wage for one beneficiary starting at the priority date in 2006. Yet, the petitioner has multiple beneficiaries for which it is responsible for paying the proffered wage. Thus, assessing the totality of the circumstances in this individual case, it is concluded that the petitioner has not established that it had the continuing ability to pay the proffered wage.

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

Beyond the decision of the director,⁶ the petitioner has also not established that the beneficiary is qualified for the offered position. The petitioner must establish that the beneficiary possessed all the education, training, and experience specified on the labor certification as of the priority date. 8 C.F.R. § 103.2(b)(1), (12). See *Matter of Wing's Tea House*, 16 I&N Dec. 158, 159 (Acting Reg'l Comm'r 1977); see also *Matter of Katigbak*, 14 I&N Dec. 45, 49 (Reg'l Comm'r 1971). In evaluating the beneficiary's qualifications, USCIS must look to the job offer portion of the labor certification to determine the required qualifications for the position. 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'r 1986). See also, *Madany v. Smith*, 696 F.2d

⁶ An application or petition that fails to comply with the technical requirements of the law may be denied by the AAO even if the Service Center does not identify all of the grounds for denial in the initial decision. See *Spencer Enterprises, Inc. v. United States*, 229 F. Supp. 2d 1025, 1043 (E.D. Cal. 2001), *aff'd*, 345 F.3d 683 (9th Cir. 2003); see also *Soltane v. DOJ*, 381 F.3d 143, 145 (3d Cir. 2004) (noting that the AAO conducts appellate review on a *de novo* basis).

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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).

In the instant case, the labor certification states that the offered position requires 72 months of experience in the job offered as a staff accountant or as an accountant, controller, or financial manager. The petitioner stated that alternatively, a Bachelor's degree combined with one year of experience is acceptable. On the labor certification, the beneficiary claims to qualify for the offered position based on the following experience:

- From October 2, 2003 to July 14, 2004, as a full-time controller with [REDACTED]
- From September 1, 2001 to October 1, 2003 as a full-time controller with [REDACTED]
- From April 1, 1997 to September 1, 2001 as a full-time partner and controller with [REDACTED] Argentina.
- From May 1, 1985 to March 1, 1997, as a full-time controller with [REDACTED] in [REDACTED] Argentina.

The beneficiary also claims on the Form 9089 to have been employed with the petitioner as a full-time staff accountant from July 15, 2004 to March 30, 2007. The beneficiary's claimed qualifying experience must be supported by letters from employers giving the name, address, and title of the employer, and a description of the beneficiary's experience. *See* 8 C.F.R. § 204.5(l)(3)(ii)(A).

The record contains a letter dated July 4, 2003, on [REDACTED] letterhead, signed by Hugo [REDACTED]. In this letter, Mr. [REDACTED] attested to the beneficiary's employment as comptroller and public relations from 1985 to 1997. The letter does not comply with the requirements of the regulations as it does not state the title of the signatory and it does not mention whether the beneficiary was a full-time or part-time employee.

The record also contains a letter dated June 30, 2003, signed by [REDACTED], Vice-President of [REDACTED], Argentina. Mr. [REDACTED] attested to the beneficiary's employment as a partner and marketing manager from April 1997 to July 2001. The duties described in Mr. [REDACTED]'s letter are those of a marketing and public relations manager. According to Mr. [REDACTED], the beneficiary directed and organized the marketing department and public relations of [REDACTED]. These duties are not those of a staff accountant, or an accountant, controller or financial manager, as is required by the terms of the labor certification. Therefore, the beneficiary's experience with [REDACTED] will not be considered as qualifying experience for the job offered. It is noted that on the labor certification, the beneficiary represented himself as partner, controller, performing the duties of a chief financial officer for [REDACTED], responsible for the overall financial management of the company. The duties listed on Mr. [REDACTED]'s June 30, 2003 letter cannot be reconciled with the duties listed by the beneficiary on the ETA Form 9089.

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On Form G-325A submitted by the beneficiary in connection with his Form I-485 application to adjust status, and signed on August 6, 2007, the beneficiary represented that he has been working for [REDACTED], located at [REDACTED] as a controller since July 2004. However, on the labor certification, the beneficiary represented that he worked as a full-time staff accountant for [REDACTED], the petitioning company, from June 14, 2004 to March 30, 2007. The beneficiary also represented on his G-325A that from September 2003 to June 2004 he worked as a controller for [REDACTED], located at [REDACTED], while on the labor certification he represented that from October 2, 2003 to July 14, 2004, he was employed as a full-time controller with [REDACTED], located at [REDACTED].

On his Form G-325A, the beneficiary also represented that from November 2001 to May 2003 he was the executive manager of [REDACTED], located at [REDACTED], while on the labor certification, he represented that he was a full-time controller with [REDACTED] from September 1, 2001 to October 1, 2003.

Due to the numerous discrepancies mentioned above, the beneficiary's work experience represented on the labor certification cannot be reconciled with the work experience history shown on his Form G-325A of record. 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. It is incumbent upon the petitioner to resolve any inconsistencies in the record by independent objective evidence, and attempts to explain or reconcile such inconsistencies, absent competent objective evidence pointing to where the truth, in fact, lies, will not suffice. *Matter of Ho*, 19 I&N Dec. 582, 591-592 (BIA 1988).

The evidence in the record does not establish that the beneficiary possessed the required experience set forth on the labor certification by the priority date. Therefore, the petitioner has also failed to establish that the beneficiary is qualified for the offered position.

Also beyond the decision of the director, the petitioner has also failed to establish that it will be the actual employer of the beneficiary. See 8 C.F.R. § 204.5(c); 20 C.F.R. § 656.3.

In determining whether the petitioner will be the beneficiary's actual employer, USCIS will assess the petitioner's control over the beneficiary in the offered position. See *Nationwide Mutual Ins. Co. v. Darden*, 503 U.S. 318 (1992); *Clackamas Gastroenterology Associates, P.C. v. Wells*, 538 U.S. 440 (2003) (hereinafter "*Clackamas*"); see also Restatement (Second) of Agency § 220(2) (1958). Such indicia of control include when, where, and how a worker performs the job; the continuity of the worker's relationship with the employer; the tax treatment of the worker; the provision of employee benefits; and whether the work performed by the worker is part of the employer's regular business. See *Clackamas*, 538 U.S. at 448-449; cf. New Compliance Manual, Equal Employment Opportunity Commission, § 2-III(A)(1), (EEOC 2006) (adopting a materially identical test and indicating that said test was based on the *Darden* decision).

The regulation at 20 C.F.R. § 656.3 states, in part:

Employer means:

(1) A person, association, firm, or a corporation that currently has a location within the United States to which U.S. workers may be referred for employment and that proposes to employ a full-time employee at a place within the United States, or the authorized representative of such a person, association, firm, or corporation. An employer must possess a valid Federal Employer Identification Number (FEIN). For purposes of this definition, an "authorized representative" means an employee of the employer whose position or legal status authorizes the employee to act for the employer in labor certification matters. A labor certification cannot be granted for an Application for Permanent Employment Certification filed on behalf of an independent contractor.

The evidence in the record does not establish that the petitioner will be the beneficiary's actual employer. According to the Florida Department of State Division of Corporation's Website, [REDACTED], the petitioning company, was incorporated on May 22, 1997, is located at [REDACTED], and its Federal Employer Identification Number (FEIN) is [REDACTED]. [REDACTED] was incorporated on May 23, 1995, is located at [REDACTED], and its FEIN is [REDACTED].⁸ As noted above, on Part 1 of Form I-140 the petitioner listed its IRS Tax identification number as [REDACTED] and on the ETA Form 9089 as [REDACTED]. The petitioner's tax returns of record show its FEIN number as [REDACTED]. In the instant case, the petitioner failed to establish the relationship between [REDACTED] and [REDACTED], as well as which entity will employ the beneficiary.

Due to the inconsistencies noted above, it is unclear that the petitioner will be the beneficiary's actual employer. Therefore, the petition must also be denied because the petitioner failed to establish that it will actually employ the beneficiary.

⁷See [REDACTED] (accessed May 8, 2012).

⁸See [REDACTED] (accessed May 8, 2012).

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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.