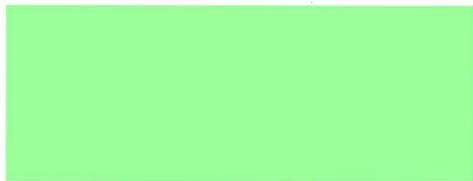


(b)(6)

U.S. Department of Homeland Security
U.S. Citizenship and Immigration Services
Administrative Appeals Office (AAO)
20 Massachusetts Ave., N.W., MS 2090
Washington, DC 20529-2090



U.S. Citizenship
and Immigration
Services



DATE: OFFICE: TEXAS SERVICE CENTER

FILE: [Redacted]

JAN 24 2013

IN RE: Petitioner: [Redacted]
Beneficiary: [Redacted]

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

ON BEHALF OF PETITIONER:
[Redacted]

INSTRUCTIONS:

Enclosed please find the decision of the Administrative Appeals Office in your case. All of the documents related to this matter have been returned to the office that originally decided your case. Please be advised that any further inquiry that you might have concerning your case must be made to that office.

If you believe the AAO inappropriately applied the law in reaching its decision, or you have additional information that you wish to have considered, you may file a motion to reconsider or a motion to reopen in accordance with the instructions on Form I-290B, Notice of Appeal or Motion, with a fee of \$630. The specific requirements for filing such a motion can be found at 8 C.F.R. § 103.5. **Do not file any motion directly with the AAO.** Please be aware that 8 C.F.R. § 103.5(a)(1)(i) requires any motion to be filed within 30 days of the decision that the motion seeks to reconsider or reopen.

Thank you,


Ron Rosenberg
Acting Chief, Administrative Appeals Office

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

The petitioner is a software development and engineering company. It seeks to employ the beneficiary permanently in the United States as a web developer. As required by statute, the petition is accompanied by a Form ETA 750, Application for Alien Employment Certification, approved by the United States Department of Labor (DOL). The director determined that the petitioner had not established that it had the continuing ability to pay the beneficiary the proffered wage beginning on the priority date of the visa petition. 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 December 3, 2008 denial, the 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. Section 203(b)(3)(A)(ii) of the Act, 8 U.S.C. § 1153(b)(3)(A)(ii), grants preference classification to qualified immigrants who hold baccalaureate degrees and are members of the professions.

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

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

The petitioner must demonstrate the continuing ability to pay the proffered wage beginning on the priority date, which is the date the Form ETA 750, Application for Alien Employment Certification, was accepted for processing by any office within the employment system of the DOL. See 8 C.F.R. § 204.5(d). The petitioner must also demonstrate that, on the priority date, the beneficiary had the qualifications stated on its Form ETA 750, Application for Alien Employment Certification, as certified by the DOL and submitted with the instant petition. *Matter of Wing's Tea House*, 16 I&N Dec. 158 (Acting Reg'l Comm'r 1977).

Here, the Form ETA 750 was filed by Prosoft Technologies, Inc., and accepted on October 29, 2004. The proffered wage as stated on the Form ETA 750 is \$48,100 per year. The Form ETA 750 states that the position requires four years of college, with a bachelor's degree (or equivalent) in computer science, engineering, or related field, and one year of experience in the job offered as a web developer or one year of experience as a systems analyst or related occupation. Under "Special Skills," the labor certification states, "Simultaneous or consecutive with one year experience with C, Java, HTML, or SQL."

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 a C corporation. Documentation submitted shows that [REDACTED], was acquired by [REDACTED], effective December 31, 2006.² On the petition, the petitioner claimed to have been established in 1997 and to currently employ 19 workers. According to the tax returns in the record, the petitioner's fiscal year is based on the calendar year. On the Form ETA 750B, signed by the beneficiary on October 22, 2004, the beneficiary claimed to have worked for the petitioner beginning in November 2001 and continuing at least until the date the labor certification was signed, on October 22, 2004.

The petitioner must establish that its job offer to the beneficiary is a realistic one. Because the filing of an ETA 750 labor certification application establishes a priority date for any immigrant petition later based on the ETA 750, the petitioner must establish that the job offer was realistic as of the priority date and that the offer remained realistic for each year thereafter, until the beneficiary obtains lawful permanent residence. The petitioner's ability to pay the proffered wage is an essential element in evaluating whether a job offer is realistic. See *Matter of Great Wall*, 16 I&N Dec. 142 (Acting Reg'l Comm'r 1977); see also 8 C.F.R. § 204.5(g)(2). In evaluating whether a job offer is realistic, United States Citizenship and Immigration Services (USCIS) requires the petitioner to demonstrate financial resources sufficient to pay the beneficiary's proffered wages, although the totality of the circumstances affecting the petitioning business will be considered if the evidence warrants such consideration. See *Matter of Sonogawa*, 12 I&N Dec. 612 (Reg'l Comm'r 1967).

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

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 Documentation in the file, to include the asset purchase agreement signed on December 31, 2006, indicates that the predecessor, [REDACTED] continues to exist as a "holding" company.

beneficiary's Forms W-2 for 2004 through 2009.³ The beneficiary's Forms W-2 demonstrate that the beneficiary was compensated by the petitioner as shown in the table below.

- In 2004, the Form W-2 stated wages of \$39,958.76.
- In 2005, the Form W-2 stated wages of \$49,412.33.
- In 2006, the Form W-2 stated wages of \$57,994.19.
- In 2007, the Form W-2 stated wages of \$63,637.22.
- In 2008, the Form W-2 stated wages of \$63,595.70.
- In 2009, the Form W-2 stated wages of \$52,618.80.
- In 2010, no Form W-2 was submitted.
- In 2011, no Form W-2 was submitted.

Therefore, the petitioner has not established that it employed and paid the beneficiary the full proffered wage as of the priority date. The petitioner must demonstrate its ability to pay the beneficiary the difference between the proffered wage and wages already paid to the beneficiary for 2004, and the full proffered wage for 2010 and 2011.

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 sales and profits and wage expense is misplaced. Showing that the petitioner's gross sales and profits 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 the Service should have considered income before

³ It is noted that the beneficiary was the recipient of two H-1B nonimmigrant petitions sponsored by [REDACTED] the predecessor, and three H-1B nonimmigrant petitions sponsored by [REDACTED] the petitioner, with validity dates covering the period from November 15, 2001 to May 27, 2010. The wages reflected on the 2004 Form W-2 issued to the beneficiary by the petitioner are lower than the certified wages on the labor condition applications submitted with the H-1B petition.

expenses were paid rather than net income. *See Taco Especial v. Napolitano*, 696 F. Supp. 2d at 881 (gross profits overstate an employer's ability to pay because it ignores other necessary expenses).

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

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

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

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

For a C corporation, USCIS considers net income to be the figure shown on Line 28 of the Form 1120, U.S. Corporation Income Tax Return. The record before the AAO closed on August 27, 2012 with the receipt by the AAO of the petitioner's submissions in response to the AAO's request for evidence. As of that date, the petitioner's 2012 federal income tax return was not yet due. Therefore, the petitioner's income tax return for 2011 is the most recent return available. The petitioner's tax returns demonstrate its net income as shown in the table below.

- In 2004, the Form 1120 stated net income of \$543,998.
- In 2005, the Form 1120 stated net income of -\$93,986.
- In 2006, the Form 1120 stated net income of -\$4,681.
- In 2007, the Form 1120 stated net income of \$250,409.
- In 2008, no Form 1120 was submitted.
- In 2009, no Form 1120 was submitted.
- In 2010, the Form 1120 stated net income of -\$103,899.⁴

⁴ For the years 2007, 2010 and 2011, the petitioner submitted the consolidated tax returns for

- In 2011, the Form 1120 stated net income of -\$53,350.

Therefore, for the years 2010 and 2011, the petitioner did not have sufficient net income to pay the proffered wage, or the difference between the proffered wage and wages already paid to the beneficiary.

If the net income the petitioner demonstrates it had available during that period, if any, added to the wages paid to the beneficiary during the period, if any, do not equal the amount of the proffered wage or more, USCIS will 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 and include cash-on-hand. 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 2010 and 2011, as shown in the table below.

- In 2010, the Form 1120 stated net current assets of \$33,536.
- In 2011, the Form 1120 stated net current assets of \$51,176.

Therefore, for the year 2010, the petitioner did not have sufficient net current assets to pay the proffered wage, or the difference between the proffered wage and wages already paid to the beneficiary. Although the petitioner's net income in 2011 was higher than the proffered wage, the petitioner has filed Form I-140 for multiple workers.⁶ Therefore, the petitioner must produce evidence that its job offers to each beneficiary are realistic, and therefore that it has the ability to pay the proffered wages to each of the beneficiaries of its pending petitions, as of the priority date of each petition and continuing until the beneficiary of each petition obtains lawful permanent residence. *See Matter of Great Wall*, 16 I&N Dec. 142, 144-145 (Acting Reg'l Comm'r 1977)

_____, the "holding" company. The tax returns indicate that _____ holds 85% of stock ownership in _____

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.

⁶ In response to the AAO's July 27, 2012 request for evidence (RFE), the petitioner submitted documentation for two other beneficiaries. The documentation shows that _____ was compensated by the petitioner for at least the proffered wage listed on his labor certification for the years 2010 and 2011. The documentation also shows that _____ was not compensated at the proffered wage listed on his labor certification for the years 2010 and 2011. Counsel and the petitioner state that _____ left the petitioner's employ in 2011. However, the I140 remains approved, has not been withdrawn, and service records do not indicate that Mr. _____ has obtained lawful permanent residence.

(petitioner must establish ability to pay as of the date of the Form MA 7-50B job offer, the predecessor to the Form ETA 750 and ETA Form 9089). *See also* 8 C.F.R. § 204.5(g)(2).

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

On appeal, counsel asserts that the petitioner does have the ability to pay the proffered wage. For 2010 and 2011, counsel refers to the petitioner's gross receipts and salaries and wages paid to employees, stating "Clearly, the Company continued to have significant revenues and significant payroll capability." However, as discussed above, showing that the petitioner's gross sales and profits exceeded the proffered wage is insufficient. Similarly, showing that the petitioner paid wages in excess of the proffered wage is insufficient.

Counsel asserts that "...the Company received a legal settlement in 2010 of \$100,000, which was available to pay wages to the beneficiary, if needed." An undated affidavit was submitted from Rahul Jindani, President, stating that "...in 2010, the Company secured a legal settlement of \$100,000. These settlement proceeds were fully available for any Company use, including payment of compensation to [the beneficiary] in the years 2010 and 2011." No other evidence was submitted to corroborate this claim. Going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. *Matter of Soffici*, 22 I&N Dec. 158, 165 (Comm'r 1998) (citing *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg'l Comm'r 1972)).

Counsel asserts that the petitioner has established a continuing ability to pay by compensating the beneficiary more than the proffered wage from 2005 to 2009. In a letter dated December 30, 2008, counsel asserts that "...the beneficiary has received wages above the required wage from [redacted] and its successor [redacted] every year since the filing of this case, with the sole exception of 2007 when the deficiency in the wage was a scant \$4,307.56."⁷ In a letter dated August 24, 2012, counsel states that the beneficiary was paid above the required wage in 2008 and 2009. However, the beneficiary was not employed by the petitioner for the years 2010 and 2011, and the petitioner's federal tax returns for 2010 and 2011 fail to establish the ability to pay the proffered wage. The petitioner must demonstrate the continuing ability to pay the proffered wage beginning on the priority date, which in this case is October 29, 2004, and continuing until the beneficiary obtains lawful permanent residence. Thus, the petitioner must show its ability to pay the proffered wage not only from 2005 to 2009, when the petitioner was paying the proffered wage rate, but it must also show its continuing ability to pay the proffered wage in 2010 and 2011. Demonstrating that the petitioner is paying the proffered wage in a specific year may suffice to show the petitioner's ability to pay for that

⁷ The AAO notes that, while the petitioner has established the ability to pay for the year 2004, the beneficiary was not compensated at the proffered wage for that year. For the year 2007, the petitioner established that the beneficiary was compensated more than the proffered wage after considering wages withheld for the beneficiary's 401(k).

year, but the petitioner must still demonstrate its ability to pay for the rest of the pertinent period of time.

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 Form ETA 750 was accepted for processing by the DOL.

USCIS may consider the overall magnitude of the petitioner's business activities in its determination of the petitioner's ability to pay the proffered wage. *See Matter of 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 *Sonogawa* was based in part on the petitioner's sound business reputation and outstanding reputation as a couturiere. As in *Sonogawa*, 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 petition shows that the petitioner has been in business since 1997 and employs 19 workers. The tax return for 2010 failed to demonstrate the ability to pay the proffered wage through net income or net assets. Although the petitioner's net current assets were higher than the proffered wage for 2011, the petitioner has filed multiple Form I-140 petitions. The petitioner failed to establish that it has the ability to pay the proffered wages to each of the beneficiaries of its petitions, as of the priority date of each petition and continuing until the beneficiary of each petition obtains lawful permanent residence. A review of the petitioner's tax returns shows a significant decrease in gross receipts, salaries paid, officer compensation, and net income from 2004 to 2011.⁸

⁸ The petitioner's tax returns demonstrate the following changes from 2004 to 2011, as shown in the table below.

- The Form 1120 stated gross receipts of \$3,083,820 in 2004 and of \$374,998 in 2011.
- The Form 1120 stated wages and salaries paid of \$1,570,120 in 2004 and \$242,483 in 2011.

In addition, the petitioner's net income was negative in 2005, 2006, 2007, 2010, and 2011. No evidence of the historical growth of the petitioner's business or of the petitioner's reputation within its industry was submitted. The petitioner also failed to provide evidence of any factors that may have impacted the petitioner during the relevant years. 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,⁹ the petitioner also failed to establish that it is a successor-in-interest to the entity that filed the labor certification. The petitioner is a different entity from the employer listed on the labor certification. A labor certification is only valid for the particular job opportunity stated on the application form. 20 C.F.R. § 656.30(c). If the petitioner is a different entity than the labor certification employer, then it must establish that it is a successor-in-interest to that entity. See *Matter of Dial Auto Repair Shop, Inc.*, 19 I&N Dec. 481 (Comm'r 1986).

A petitioner may establish a valid successor relationship for immigration purposes if it satisfies three conditions. First, the successor must fully describe and document the transaction transferring ownership of all, or a relevant part of, the predecessor. Second, the successor must demonstrate that the job opportunity is the same as originally offered on the labor certification. Third, the successor must prove by a preponderance of the evidence that it is eligible for the immigrant visa in all respects.

The evidence in the record does not satisfy all three conditions described above because it does not demonstrate that the claimed successor is eligible for the immigrant visa in all respects, including whether it and the predecessor possessed the ability to pay the proffered wage for the relevant periods. Accordingly, the petition must also be denied because the petitioner has failed to establish that it is a successor-in-interest to the employer that filed the labor certification.

Also beyond the decision of the director, the AAO notes that the petitioner lists two worksites on the petition: [REDACTED] and [REDACTED]. A review of the labor certification shows that the worksite is listed on ETA Form 9089 as [REDACTED].

- The Form 1120 stated officer compensation of \$123,860 in 2004 and \$13,920 in 2010. No officer compensation was listed for 2011.
- The Form 1120 stated a net income of \$543,998 in 2004 and -\$53,350 in 2011.

⁹ 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).

The labor certification is evidence of an individual alien's admissibility under section 212(a)(5)(A)(i) of the Act, which provides:

In general.-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.

20 C.F.R. § 656.3 states:

Area of intended employment means the area within normal commuting distance of the place (address) of intended employment. If the place of intended employment is within a Metropolitan Statistical Area (MSA), any place within the MSA is deemed to be within normal commuting distance of the place of intended employment.

The petitioner filed an application for labor certification, indicating that there were not sufficient United States workers in the South Burlington, Vermont, MSA. The Department of Labor (DOL) certified the application for labor certification, which stated that the South Burlington, Vermont, MSA did not possess sufficient web developers.

The petitioner bears the burden of proving that the job offer remains valid from the time the application for labor certification is filed until the beneficiary adjusts status. Among the things the petitioner must establish is that it continues to have the ability to pay the proffered wage, and that the offered job is still available for the beneficiary. In the instant case, the labor certification indicates that the offered job is for a full-time web developer in South Burlington, Vermont.

The application for labor certification was submitted and tested whether the South Burlington, Vermont, MSA had sufficient web developers. The petition indicates that the petitioner does not intend to hire and employ the beneficiary in that MSA. Instead, the petitioner seeks to hire and employ the beneficiary in the Minneapolis, Minnesota, MSA, approximately 21 hours away, and the Pittsburgh, Pennsylvania, MSA, approximately 10 hours away. See <https://maps.google.com/maps?hl=en> (accessed January 3, 2013). The DOL did not certify whether there were insufficient United States workers in those MSAs to fill the proffered job. Furthermore, the prevailing wage for web developers in the Minneapolis, Minnesota, MSA and the Pittsburgh, Pennsylvania, MSA is currently more than a dollar per hour higher than that in the South Burlington,

Vermont, MSA. See <http://www.flcdatcenter.com> (accessed January 3, 2013). Thus, the job offer in the application for labor certification does not match the offer on the petition.

The AAO also notes that there are inconsistencies in the record. The record includes Form G-325A, Biographic Information, signed by the beneficiary on July 19, 2007. Form G-325A states that the beneficiary's last address outside the United States was in Chennai, India, from September 1973 to March 2003. Form G-325A also states that the beneficiary was residing in the United States in Burlington, Vermont from April 2001 to September 2004. The labor certification states that the beneficiary was working as a web developer with [REDACTED] from February 2001 to November 2001, and as a web developer with [REDACTED] in South Burlington, Vermont beginning in November 2001 and continuing at least until the date the labor certification was signed, on October 22, 2004. The dates listed on the labor certification cannot be reconciled with the dates listed on the Form G-325A. It is incumbent upon the petitioner to resolve any inconsistencies in the record by independent objective evidence. Any attempt to explain or reconcile such inconsistencies will not suffice unless the petitioner submits competent objective evidence pointing to where the truth lies. *Matter of Ho*, 19 I&N Dec. 582, 591-92 (BIA 1988). This inconsistency must be addressed in any further filings.

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.