



U.S. Citizenship
and Immigration
Services

(b)(6)



Date:

Office: TEXAS SERVICE CENTER

FILE:

JAN 28 2013



IN RE:

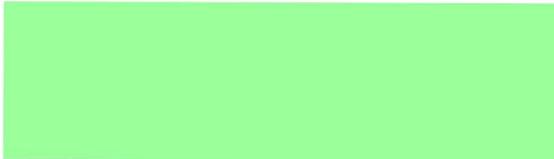
Petitioner:

Beneficiary:



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

ON BEHALF OF PETITIONER:



INSTRUCTIONS:

Enclosed please find the decision of the Administrative Appeals Office 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,

Ron Rosenberg

Acting Chief, Administrative Appeals Office

DISCUSSION: On January 6, 2003, United States Citizenship and Immigration Services (USCIS), Vermont Service Center (VSC), received an Immigrant Petition for Alien Worker, Form I-140, from the petitioner. The employment-based immigrant visa petition was initially approved by the VSC director on April 3, 2004. However, the Director of the Texas Service Center (TSC) revoked the approval of the immigrant petition on July 22, 2010, and the petitioner subsequently appealed the director's decision. The decision of the director is now before the Administrative Appeals Office (AAO). The appeal will be dismissed.

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

The petitioner is a retail establishment. It seeks to permanently employ the beneficiary in the United States as a bookkeeper, a skilled worker pursuant to section 203(b)(3)(A)(i) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(3)(A)(i).¹ As required by statute, the petition is submitted along with an approved Application for Alien Employment Certification (Form ETA 750).² As stated above, the petition was initially approved in April 2004 but its approval was revoked in July 2010. The director determined that the petitioner failed to establish that the beneficiary had the experience required by the terms of the labor certification. Accordingly, the director revoked the approval of the petition under 8 C.F.R. § 205.2.

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

The record shows that the appeal is properly filed, timely and makes a specific allegation of error in law or fact. The AAO conducts appellate review on a *de novo* basis. *See Soltane v. DOJ*, 381

¹ Section 203(b)(3)(A)(i) of 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.

² This petition involves the substitution of the labor certification beneficiary. The substitution of beneficiaries was formerly permitted by the Department of Labor. On May 17, 2007, the DOL issued a final rule prohibiting the substitution of beneficiaries on labor certifications effective July 16, 2007. *See* 72 Fed. Reg. 27904 (codified at 20 C.F.R. § 656). As the filing of the instant petition predates the final rule, and since the other beneficiary has not been issued lawful permanent residence based on the labor certification, the requested substitution will be permitted.

F.3d 143, 145 (3d Cir. 2004). The AAO considers all pertinent evidence in the record, including new evidence properly submitted upon appeal.³

A threshold issue on appeal is whether the director adequately advised the petitioner of the basis for revocation of approval of the petition.

Section 205 of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1155, states:

The Secretary of Homeland Security may, at any time, for what he deems to be good and sufficient cause, revoke the approval of any petition approved by him under section 204. Such revocation shall be effective as of the date of approval of any such petition.

The regulation at 8 C.F.R. § 205.2 states:

(a) *General.* Any Service [USCIS] officer authorized to approve a petition under section 204 of the Act may revoke the approval of that petition upon notice to the petitioner on **any ground** other than those specified in § 205.1 **when the necessity for the revocation comes to the attention of this Service [USCIS]**. (emphasis added).

The regulation at 8 C.F.R. § 103.2(b)(16) states:

(i) Derogatory information unknown to petitioner or applicant. If the decision will be adverse to the applicant or petitioner and is based on derogatory information considered by the Service [USCIS] and of which the applicant or petitioner is unaware, he/she shall be advised of this fact and offered an opportunity to rebut the information and present information in his/her own behalf before the decision is rendered, except as provided in paragraphs (b)(16)(ii), (iii), and (iv) of this section. Any explanation, rebuttal, or information presented by or in behalf of the applicant or petitioner shall be included in the record of proceeding.

Further, *Matter of Arias*, 19 I&N Dec. 568 (BIA 1988); and *Matter of Estime*, 19 I&N Dec. 450 (BIA 1987), provide that:

A notice of intention to revoke the approval of a visa petition is properly issued for "good and sufficient cause" when the evidence of record at the time of issuance, if unexplained and unrebutted, would warrant a denial of the visa petition based upon the petitioner's failure to meet his burden of proof. However,

³ 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).

where a notice of intention to revoke is based upon an unsupported statement, revocation of the visa petition cannot be sustained.

The petition is currently not approvable because the record does not contain sufficient evidence to establish that the beneficiary had the requisite work experience in the job offered before the priority date nor does it demonstrate the petitioner's ability to pay the proffered wage from the priority date.

Here, in the Notice of Intent to Revoke (NOIR) dated November 23, 2009, the director advised the petitioner that the instant case might involve fraud. The director specifically asked the petitioner to submit: additional evidence to demonstrate that it had complied with all of the DOL recruiting requirements; an original letter reaffirming its intent to employ the beneficiary in the proffered job; and evidence that the beneficiary met the minimum experience requirements.

The AAO finds that the director appropriately reopened the approval of the petition by issuing the NOIR, and gave the petitioner notice of the derogatory information specific to the current proceeding. In the NOIR, the director advised the petitioner that "the beneficiary must have met all of the requirements listed on the ETA 750" which in this case is two years of experience as a cook. The director's NOIR sufficiently detailed the evidence of record, pointing out deficiencies in the beneficiary's qualifications that would warrant a denial if unexplained and un rebutted, and thus was properly issued for good and sufficient cause. Specifically, in the NOIR, the director indicated that the beneficiary's employment verification letter, which stated that the beneficiary was previously employed by [REDACTED] from December 1994 until January 1997, was inconsistent with the beneficiary's young age at that time, stating that "in 1994 the beneficiary would have been 13 years of age at the time of employment." Thus, the AAO finds that the NOIR was properly issued pursuant to *Matter of Arias*, 19 I&N Dec. at 568 and *Matter of Estime*, 19 I&N Dec. at 450. Both cases held that a notice of intent to revoke a visa petition is properly issued for "good and sufficient cause" when the evidence of record at the time of issuance, if unexplained and un rebutted, would warrant a denial of the visa petition based upon the petitioner's failure to meet his burden of proof.

In response to the director's NOIR, counsel for the petitioner submitted various documents including:

- Documents demonstrating its recruitment efforts;
- A letter from the beneficiary's current U.S. employer;
- A letter dated November 10, 2002 from [REDACTED], proprietor of [REDACTED] stating that the beneficiary was employed as a bookkeeper from December 1994 to January 1997;
- A letter dated December 14, 2009 from [REDACTED] stating that the beneficiary was a friend of his son, [REDACTED] from school who lived next door to the family and that the beneficiary began working for him when very young due to the death of his father;
- An affidavit of [REDACTED] dated August 6, 2010 who identifies himself as the son of [REDACTED] stating that the beneficiary began working at the factory in December 1994 at the age of 13 because the beneficiary had to support his family since his father died when

he was a baby. [REDACTED] states that the beneficiary attended school from 7 am to 12 pm and then worked from 12 pm to 7 pm six days per week; and

- An affidavit from the beneficiary dated August 6, 2010 stating that his father died in April 1981 and that he made a mistake in filling out the Form G-325A in that he indicated that India was the country of last residence for his father, not that his father was still alive. The death certificate dated 1981 was attached.

Upon review of the additional evidence, the director issued a Notice of Revocation (NOR) finding that the petitioner had failed to establish that the beneficiary possessed the minimum experience required as of the priority date. The director then revoked the approval of the petition. The director determined that the petitioner did establish that it complied with the DOL recruiting and advertising requirements. The AAO concurs with this finding.

The director also found that the petitioner failed to submit sufficient evidence to demonstrate that the beneficiary had the experience required as of the priority date. The AAO agrees. Specifically, the director noted the discrepancy between the beneficiary's claim that he had to work at a young age due to his father being deceased and the entry on the Form G-325 Biographical Information submitted in conjunction with the beneficiary's Form I-485 to Register Permanent Residence or Adjust Status which stated that the beneficiary's father resides in India. In addition, the letters submitted to verify the beneficiary's experience did not address the beneficiary's age nor did they include details of the duties performed.

To determine whether a beneficiary is eligible for a preference immigrant visa, USCIS must ascertain whether the beneficiary is, in fact, qualified for the certified job. 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. 1986). *See also, Madany v. Smith*, 696 F.2d, 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).

Here, the Form ETA 750 was filed and accepted for processing by the DOL on April 4, 2001. The name of the job title or the position for which the petitioner sought to hire is "bookkeeper." Under the job description, section 13 of the Form ETA 750, part A, the petitioner wrote, "Keep financial records; balance checking accounts, accounts payable, receivables, etc. prepare financial reports." Under section 14 of the Form ETA 750A the petitioner specifically required each applicant for this position to have a minimum of two (2) years of work experience in the job offered.

On the Form ETA 750, part B, signed by the beneficiary on November 15, 2002, he represented that he worked 40 hours a week at [REDACTED] as a bookkeeper from December 1994 to January 1997. To show that the beneficiary had the requisite work experience in the job offered as of April 4, 2001, the petitioner submitted the following evidence:

- A letter dated November 10, 2002 from [REDACTED], proprietor of [REDACTED] stating that the beneficiary was employed as a bookkeeper from December 1994 to January 1997;
- A letter dated December 14, 2009 from [REDACTED] stating that the beneficiary was a friend of his son, [REDACTED] from school who lived next door to the family and that the beneficiary began working for him when very young due to the death of his father'
- An affidavit of [REDACTED] dated August 6, 2010 who identifies himself as the son of [REDACTED] stating that the beneficiary began working at the factory in December 1994 at the age of 13 because the beneficiary had to support his family since his father died when he was a baby. [REDACTED] states that the beneficiary attended school from 7 am to 12 pm and then worked from 12 pm to 7 pm six days per week; and
- An affidavit from the beneficiary dated August 6, 2010 stating that his father died in April 1981 and that he made a mistake in filling on the Form G-325A in that he indicated that India was the country of last residence for his father, not that his father was still alive. The death certificate dated 1981 was attached.

The regulation at 8 C.F.R. § 204.5(l)(3)(ii)(A) provides:

Any requirements of training or experience for skilled workers, professionals, or other workers must be supported by letters from trainers or employers giving the name, address, and title of the trainer or employer, and a description of the training received or the experience of the alien.

The AAO notes that both letters submitted from [REDACTED] state that the beneficiary worked as a bookkeeper, but neither included a description of the beneficiary's job duties as required by 8 C.F.R. § 204.5(g)(1) and (l)(3)(ii)(A). In addition, although the second letter from [REDACTED] states that the beneficiary was young, he did not explain how a 13 year old, even one who was "good at math," would be capable of managing payroll and accounts payable and receivable, as well as preparing financial reports. The petitioner submitted no independent, objective evidence to demonstrate that the beneficiary was employed during the dates claimed or that he performed the specific duties required by the terms of the labor certification.

The letter from [REDACTED] is not written by an employer as required by 8 C.F.R. § 204.5(g)(1) and (l)(3)(ii)(A) and therefore, cannot be accepted as evidence of the beneficiary's experience. The affidavit submitted from the beneficiary provides a reasonable explanation to overcome the discrepancy and the death certificate establishes that his father passed away in 1981 and is supported by the death certificate dated 1981, which is corroborative, objective evidence. As a result, the portion of the director's decision concerning this matter is withdrawn. However, despite the establishment of any reason for the beneficiary needing to work at an early age, the evidence does not establish that the beneficiary worked in the claimed position.

Furthermore, the director noted that the petitioner did not establish that a valid job offer existed for the beneficiary. The director noted that the individual who signed the job offer letter is the same individual who verified the beneficiary's previous experience in India for his father and that the letter was not written on company letterhead. In addition, as the author was identified as a childhood friend of the beneficiary, the *bona fide* nature of any offer is in doubt.

On appeal to the AAO, counsel asserts that the director improperly revoked the petitioner's approval stating that the beneficiary worked for the company in India despite his young age due to personal circumstances including his father's death. In addition, counsel states that the petitioner continues to offer full-time employment to the beneficiary, although the beneficiary has ported under the provisions of the American Competitiveness in the Twenty-First Century Act of 2000 (AC21).

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

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).

In determining the petitioner's ability to pay the proffered wage, USCIS first examines whether the petitioner has paid the beneficiary the full proffered wage each year from the priority date. If the petitioner has not paid the beneficiary the full proffered wage each year, USCIS will next examine whether the petitioner had sufficient net income or net current assets to pay the difference between the wage paid, if any, and the proffered wage.⁴ If the petitioner's net income or net current assets is not sufficient to demonstrate the petitioner's ability to pay the proffered wage, USCIS may also consider the overall magnitude of the petitioner's business activities. See *Matter of Sonogawa*, 12 I&N Dec. 612 (Reg'l Comm'r 1967).

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

Here, as noted above, the record shows that the Form ETA 750 was received for processing on April 4, 2001. The rate of pay or the proffered wage as indicated on the Form ETA 750 is \$11.50 per hour (\$20,930.00 per year based on the indicated 35-hour work week).⁵

The record contains two checks from the petitioner written to the beneficiary dated September 23, 2005 and September 30, 2005, each for \$385.12. No evidence was submitted to indicate that either check was negotiated through the bank or otherwise reflects actual wages received by the beneficiary. In any event, the total amount is less than the proffered wage and thus cannot demonstrate the petitioner's ability to pay the proffered wage in that year. The record also contains an Internal Revenue Service (IRS) Form W-2 for 2004 stating that the petitioner paid the beneficiary \$4,500 in that year. As that amount is less than the proffered wage, the petitioner must demonstrate its ability to pay the difference between the actual wage paid and the proffered wage in that year, which is \$16,430.00.

In determining the petitioner's ability to pay the proffered wage, USCIS first examines whether the petitioner has paid the beneficiary the full proffered wage each year from the priority date. If the petitioner has not paid the beneficiary the full proffered wage each year, USCIS will next examine whether the petitioner had sufficient net income or net current assets to pay the difference between the wage paid, if any, and the proffered wage.⁶ The petitioner's 2001 Form 1120S states net income of \$337 and net current assets of -\$7,795. Neither is sufficient to demonstrate the petitioner's ability to pay the proffered wage in 2001. The petitioner submitted no other evidence (i.e. federal tax returns, annual statements, or audited financial statements) to show that it has the ability to pay the proffered wage to the beneficiary.

If the petitioner's net income or net current assets is not sufficient to demonstrate the petitioner's ability to pay the proffered wage, USCIS may also consider the overall magnitude of the petitioner's business activities. *See Matter of Sonogawa*, 12 I&N Dec. 612 (Reg'l Comm'r 1967). The petitioner's 2001 tax return reflects that it paid a total of \$3,750 in salaries and wages in 2001 and had gross receipts of \$66,492. Accordingly, the petitioner has not established its ability to pay the proffered wage from the priority date in 2001 to the present. For this additional reason, the approval of the petition remains revoked.

⁵ The total hours per week indicated on the approved Form ETA 750 is 35 hours. This is permitted so long as the job opportunity is for a permanent and full-time position. *See* 20 C.F.R. §§ 656.3; 656.10(c)(10). The DOL precedent establishes that full-time means at least 35 hours or more per week. *See* Memo, Farmer, Admin. for Reg'l. Mngm't., Div. of Foreign Labor Certification, DOL Field Memo No. 48-94 (May 16, 1994).

⁶ *See River Street Donuts, LLC v. Napolitano*, 558 F.3d 111 (1st Cir. 2009); *Elatos Restaurant Corp. v. Sava*, 632 F. Supp. 1049, 1054 (S.D.N.Y. 1986); *Tongatapu Woodcraft Hawaii, Ltd. v. Feldman*, 736 F.2d 1305 (9th Cir. 1984)); *Chi-Feng Chang v. Thornburgh*, 719 F. Supp. 532 (N.D. Texas 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).

Counsel asserts on appeal that the petition is still "approvable" due to the terms of AC21. Specifically, the petitioner submitted a letter dated August 6, 2010 from [REDACTED], President of [REDACTED] offering the beneficiary a position as a bookkeeper. A letter from [REDACTED] dated December 18, 2009 states that the beneficiary began working for [REDACTED] two years prior to the letter. The AAO does not agree that the terms of AC21 make it so that the instant *immigrant petition* can be approved despite the fact that the petitioner has not demonstrated its eligibility. As noted above, AC21 allows an *application for adjustment of status*⁷ to be approved despite the fact that the initial job offer is no longer valid. The language of AC21 states that the I-140 "shall remain valid" with respect to a new job offer for purposes of the beneficiary's application for adjustment of status despite the fact that he or she no longer intends to work for the petitioning entity provided (1) the application for adjustment of status based upon the initial visa petition must have been pending for more than 180 days and (2) the new job offer the new employer must be for a "same or similar" job. A plain reading of the phrase "will remain valid" suggests that the petition must be valid *prior* to any consideration of whether or not the adjustment application was pending more than 180 days and/or the new position is same or similar. In other words, it is not possible for a petition to remain valid if it is not valid currently. The AAO would not consider a petition wherein the initial petitioner has not demonstrated its eligibility to be a valid petition for purposes of section 106(c) of AC21. This position is supported by the fact that when AC21 was enacted, USCIS regulations required that the underlying I-140 was approved prior to the beneficiary filing for adjustment of status. When AC21 was enacted, the only time that an application for adjustment of status could have been pending for 180 days was when it was filed based on an approved immigrant petition. Therefore, the only possible meaning for the term "remains valid" was that the underlying petition was approved and would not be invalidated by the fact that the job offer was no longer a valid offer. See *Matter of Al Wazzan*, 25 I&N Dec. 359 (AAO 2010).

In addition, as stated by the director in the NOR, it is noted that [REDACTED] is the same name as the son of the beneficiary's employer in India. No evidence was submitted to explain the relationship between the parties. "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." *Matter of Ho*, 19 I&N Dec. at 591. Furthermore, a relationship invalidating a *bona fide* job offer may arise where the beneficiary is related to the petitioner by

⁷ The AAO notes that after the enactment of AC21, USCIS altered its regulations to provide for the concurrent filing of immigrant visa petitions and applications for adjustment of status. This created a possible scenario wherein after an alien's adjustment application had been pending for 180 days, the alien could receive and accept a job offer from a new employer, potentially rendering him or her eligible for AC21 portability, prior to the adjudication of his or her underlying visa petition. A USCIS memorandum signed by [REDACTED] May 12, 2005, provides that if the initial petition is determined "approvable", then the adjustment application may be adjudicated under the terms of AC21. See *Interim Guidance for Processing Form I-140 Employment-Based Immigrant Petitions and Form I-485 and H-1B Petitions Affected by the American Competitiveness in the Twenty-First Century Act of 2000 (AC21) (Public Law 106-313)* at 3. This memorandum was superseded by *Matter of Al Wazzan*, 25 I&N Dec. 359 (AAO 2010), which determined that the petition must have been valid to begin with if it is to remain valid with respect to a new job.

“blood” or it may “be financial, by marriage, or through friendship.” See *Matter of Sunmart 374*, 00-INA-93 (BALCA May 15, 2000).

An additional issue that arose on appeal was confusion as to whether the petitioner will be the beneficiary’s employer. The regulation at 8 C.F.R. § 204.5(c) provides that “[a]ny United States employer desiring and intending to employ an alien may file a petition for classification of the alien under...section 203(b)(3) of the Act.” In addition, the Department of Labor (DOL) regulation at 20 C.F.R. § 656.3⁸ states:

Employer means a person, association, firm, or a corporation which currently has a location within the United States to which U.S. workers may be referred for employment, and which proposes to employ a full-time worker at a place within the United States or the authorized representative of such a person, association, firm, or corporation.

On appeal, counsel states that the petitioner “continues to offer the beneficiary full-time employment as a Bookkeeper.” As stated above, the petitioner paid the beneficiary \$4,500 in 2004 and \$770.24 in 2005 and its 2001 Form 1120S demonstrated insufficient net income or net current assets to pay the proffered wage from the priority date onwards. The petitioner’s Form 1120S states gross income of \$66,492 and total salaries and wages paid of \$3,750. The petitioner does not appear to be generating sufficient income to employ a full time bookkeeper.

We also note that the letter mentioned above from [REDACTED], dated August 6, 2010, states that [REDACTED] continued to offer the beneficiary “full time permanent employment as a Bookkeeper.” In this case, the petitioner submitted two offers of employment for the beneficiary to work as a bookkeeper: one from the petitioner and the other from [REDACTED]. As a result, it has failed to establish which company would actually employ the beneficiary. 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. at 591-592.

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.

⁸ The regulatory scheme governing the alien labor certification process contains certain safeguards to assure that petitioning employers do not treat alien workers more favorably than U.S. workers. The current DOL regulations concerning labor certifications went into effect on March 28, 2005. The new regulations are referred to by the DOL by the acronym PERM. See 69 Fed. Reg. 77325, 77326 (Dec. 27, 2004). The PERM regulation was effective as of March 28, 2005, and applies to labor certification applications for the permanent employment of aliens filed on or after that date.

(b)(6)

ORDER: The director's decision is affirmed. The approval of the petition remains revoked.