

(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: JUN 14 2013

OFFICE: NEBRASKA SERVICE CENTER FILE [REDACTED]

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)

SELF-REPRESENTED

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, Nebraska Service Center. The petitioner filed a simultaneous motion to reopen and reconsider and an appeal of the director's denial on October 1, 2009. The director granted the motion to reopen and reconsider and affirmed the previous denial on December 11, 2009. The matter is now before the Administrative Appeals Office (AAO) to adjudicate the October 1, 2009 appeal. The appeal will be dismissed.

The petitioner is a retail and investment company. It seeks to employ the beneficiary permanently in the United States as a business management analyst. As required by statute, the petition is accompanied by an 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 director also noted several inconsistencies in the record casting doubt as to whether the job offer was realistic.

In his decision on the motion to reopen and reconsider, the director also concluded that the beneficiary would be performing skilled labor in a position which was not presented to the DOL in the labor certification application.

The record shows that the appeal is properly filed and 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 September 1, 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 December 15, 2006. The proffered wage as stated on the ETA Form 9089 is \$48,984 per year. The ETA Form 9089 states that the position requires a bachelor's degree in business administration and two years of experience in the offered position.

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 sole proprietorship. On the petition, the petitioner claimed to have been established in 2004 and to currently employ five workers. On the ETA Form 9089, signed by the beneficiary on June 5, 2007, the beneficiary claimed to have worked for the petitioner since September 1, 2006.

The petitioner must establish that its job offer to the beneficiary is a realistic one. Because the filing of a Form 9089 labor certification application establishes a priority date for any immigrant petition later based on the 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 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 has submitted Forms

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).

W-2 for the years 2007, 2008, 2009, 2010, and 2011.² The beneficiary's Forms W-2 demonstrate the wages paid for 2007 through 2011 as shown in the table below:

- In 2007, the Form W-2 showed wages paid to the beneficiary of \$12,246.00
- In 2008, the Form W-2 showed wages paid to the beneficiary of \$49,200.00
- In 2009, the Form W-2 showed wages paid to the beneficiary of \$49,920.00
- In 2010, the Form W-2 showed wages paid to the beneficiary of \$49,920.00
- In 2011, the Form W-2 showed wages paid to the beneficiary of \$49,920.00

The inconsistencies in the record with respect to the beneficiary's wages raise doubts about the reliability of the Forms W-2. The petitioner previously submitted falsified checks made payable to the beneficiary and admits that the checks were falsified and that it pays the beneficiary in cash. Additionally, the beneficiary is also conducting business on behalf of [REDACTED] and/or [REDACTED] which is owned by another corporation of which the proprietor's husband is an officer. The Forms 941 and Form 944 submitted by the petitioner are hand-written, and there is no proof that the beneficiary was paid by the petitioner. Moreover, the record contains a letter from the IRS dated December 31, 2007 which states, "when we wrote you about this return earlier, you stated that you had no employees during this tax period." 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. 582, 591 (BIA 1988). It is incumbent on the petitioner to resolve any inconsistencies in the record by independent objective evidence, and attempts to explain or reconcile such inconsistencies, absent competent objective evidence pointing to where the truth, in fact, lies, will not suffice. *Id.* at 692. Without independent, objective evidence that the wages were paid to the instant beneficiary, the AAO cannot consider the Forms W-2 as evidence of the petitioner's ability to pay the proffered wage.

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).

² The AAO notes that it received the Forms W-2 for 2008 through 2011 on May 10, 2013. Although 2012 taxes were due on April 15, 2013, the petitioner did not submit the beneficiary's Form W-2 for 2012.

The petitioner is a sole proprietorship, a business in which one person operates the business in his or her personal capacity. Black's Law Dictionary 1398 (7th Ed. 1999). Unlike a corporation, a sole proprietorship does not exist as an entity apart from the individual owner. *See Matter of United Investment Group*, 19 I&N Dec. 248, 250 (Comm'r 1984). Therefore the sole proprietor's adjusted gross income, assets and personal liabilities are also considered as part of the petitioner's ability to pay. Sole proprietors report income and expenses from their businesses on their individual (Form 1040) federal tax return each year. The business-related income and expenses are reported on Schedule C and are carried forward to the first page of the tax return. Sole proprietors must show that they can cover their existing business expenses as well as pay the proffered wage out of their adjusted gross income or other available funds. In addition, sole proprietors must show that they can sustain themselves and their dependents. *See Ubeda v. Palmer*, 539 F. Supp. 647 (N.D. Ill. 1982), *aff'd*, 703 F.2d 571 (7th Cir. 1983).

In *Ubeda*, 539 F. Supp. at 650, the court concluded that it was highly unlikely that a petitioner could support himself, his spouse and five dependents on a gross income of slightly more than \$20,000 where the beneficiary's proposed salary was \$6,000 or approximately thirty percent (30%) of the petitioner's gross income.

In the instant case, the sole proprietor supports a family of four based on the sole proprietor's Forms 1040 U.S. Individual Income Tax Return for 2006 and 2007. The proprietor's tax returns reflect the following information for the following years:

	<u>2006</u>	<u>2007</u>
Proprietor's adjusted gross income (AGI) (Form 1040, line 37)	\$40,161	\$75,024

In 2006, the sole proprietor's AGI of \$40,161 fails to cover the proffered wage of \$48,984. In 2007, the sole proprietor's AGI was \$75,024. The proprietor lists her household expenses for 2007 as \$51,080. The difference between the proprietor's AGI and the proffered wage for 2007 is \$26,040. Thus, the proprietor does not have sufficient funds remaining to pay the household expenses for 2007. It is improbable that the sole proprietor could support a family of four on a deficit, which is what remains after reducing the adjusted gross income by the amount required to pay the proffered wage for 2006 and 2007.

On appeal, the petitioner asserts that the director erred in not considering the sole proprietor's investment funds.

The record of proceeding contains monthly statements from the sole proprietor's personal brokerage account with Ameritrade covering the period January 2007 through December 31, 2007, with an average annual balance of \$92,740.08, for 2007. As in the instant case, where the petitioner has not established its ability to pay the proffered wage the difference between the proffered wage and the wages paid to the beneficiary in the priority date year or in any subsequent year based on its adjusted gross income (AGI), the proprietor's statements must show an initial average annual balance, in the year of the priority date, exceeding the full proffered wage the difference between the proffered

wage and the wages paid to the beneficiary. The average annual balance for 2007 is sufficient to cover the difference between the proffered wage and the wages paid to the beneficiary. Thus, the sole proprietor's cash assets as reflected in her brokerage account establish the petitioner's ability to pay the proffered wage for 2007.

The petitioner argues that the brokerage accounts with Ameritrade demonstrate the ability to pay the proffered wage for 2006, as well. The petitioner contends that the account was valued at \$71,026.37 during the last month of 2006. However, the last month's statement for 2006 was not submitted.³ Additionally, the proprietor's statements must show an initial average annual balance, in the year of the priority date, exceeding the full proffered wage, the difference between the proffered wage and the wages paid to the beneficiary. Subsequent statements must show annual average balances which increase each year after the priority date year by an amount exceeding the full proffered wage, the difference between the proffered wage and the wages paid to the beneficiary. The petitioner did not submit all of the statements for the brokerage account for 2006. Thus, the initial average balance cannot be determined. Therefore, the proprietor's brokerage account does not establish the petitioner's ability to pay the proffered wage for 2006.

The petitioner argues that the Metrobank statements for 2007 and 2008 demonstrate the petitioner's ability to pay the proffered wage. The funds in the Metrobank account are located in the sole proprietorship's business checking account. Therefore, these funds are likely shown on Schedule C of the sole proprietor's tax returns as gross receipts and expenses. Although USCIS will not consider gross income without also considering the expenses that were incurred to generate that income, the overall magnitude of the entity's business activities should be considered when the entity's ability to pay is marginal or borderline. *See Matter of Sonogawa*, 12 I&N Dec. 612 (Reg'l Comm'r 1967).

The record also contains a deed for real property located in Harris County, Texas. Real property is not a readily liquefiable asset. Further, it is unlikely that a sole proprietor would sell such a significant personal asset to pay the beneficiary's wage. USCIS may reject a fact stated in the petition if it does not believe that fact to be true. Section 204(b) of the Act, 8 U.S.C. § 1154(b); *see also Anetekhai v. I.N.S.*, 876 F.2d 1218, 1220 (5th Cir. 1989); *Lu-Ann Bakery Shop, Inc. v. Nelson*, 705 F. Supp. 7, 10 (D.D.C. 1988); *Systronics Corp. v. INS*, 153 F. Supp. 2d 7, 15 (D.D.C. 2001).

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

³ The AAO notes that the petitioner submitted a statement from Ameritrade which states that the last statement date was December 29, 2006. However, this is not evidence, as the petitioner contends, of the proprietor's balance in the account as of the last statement date.

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 petitioner has not established that it has the ability to pay the proffered wage for each year since the priority date. The petitioner has not demonstrated sufficient adjusted gross income (AGI) of its sole proprietor to pay the proffered wage. In 2006, the sole proprietor's AGI was insufficient to even cover its household expenses, let alone the proffered wage. Based on the evidence in the record, the funds in the sole proprietorship's business bank account appear to be included on the Schedule C to IRS Form 1040. The net profit (or loss) is carried forward to page one of the sole proprietor's IRS Form 1040 and is included in the calculation of the petitioner's AGI, which is insufficient to establish the petitioner's ability to pay the proffered wage. Furthermore, the petitioner also failed to include any evidence of historical growth of its business, its reputation within the industry, or the occurrence of any uncharacteristic business expenditures or losses. The record lacks any regulatory prescribed evidence of the petitioner's ability to pay the proffered wage from 2008 onward.

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 director, in his decision, noted various inconsistencies in the record that undermine the reliability of the evidence in the record. The director noted that the three checks submitted as evidence of the beneficiary's wage were sequentially numbered even though they were issued over three months and they had not been cashed. The director also noted that the ETA Form 9089 stated that the beneficiary had worked full-time for the beneficiary beginning in September 2006. However, the petitioner had submitted a letter dated June 26, 2007 which stated that the beneficiary began working for the petitioner on January 1, 2007. Additionally, the petition states that the petitioner employs five workers, while the petitioner's Forms 944, Employers Annual Federal Tax Return, for 2007 and 2008 show that the petitioner employs only one employee.

On appeal, the petitioner states that it wrote three checks to the beneficiary for January, February, and March 2007. The petitioner further states that it paid the beneficiary cash, and therefore, the beneficiary returned the checks uncashed. The petitioner states that it has submitted its 2007

quarterly wage reports, Forms 941, as well as the beneficiary's 2007 Form W-2 as proof of the beneficiary's wage. The petitioner also states that the beneficiary was ill and was unable to work for several months in 2007, and therefore, he was not paid his monthly salary. In lieu of his monthly salary, the petitioner states that it paid the beneficiary's rent, \$610, during the period when he was not working at all or was working "an unusual schedule."

The record contains multiple inconsistencies that have not been resolved through independent, objective evidence. The record contains a declaration dated January 12, 2010, from the petitioner's owner, [REDACTED] in which she states that the checks issued to the beneficiary were "at the demand of my attorney," and that the beneficiary was paid in cash. However, the petitioner's statement on appeal does not indicate that the attorney advised it to issue the checks. Additionally, the attorney's declaration dated September 29, 2009, does not discuss the checks. The record also contains a letter from the IRS dated October 27, 2008 regarding the petitioner's Form 944 in which the IRS states, "When we wrote you about this return earlier, you stated that you had no employees during this tax period."

The petitioner contends that the Forms W-2, Forms 944 Employer's Annual Federal Tax Return, and Forms 941 Employer's Quarterly Federal Tax Return are evidence that it paid the beneficiary the proffered wage. However, the AAO notes that the Forms 944 and Forms 941 are all hand-written. Given that the checks were falsified, the Forms W-2 issued to the beneficiary and the Forms 944 and 941 are not reliable evidence of the petitioner's ability to pay the proffered wage. The AAO received an unsigned, undated, unsworn letter from the beneficiary with additional evidence on May 9, 2013. In the letter, the beneficiary states that the attorney requested the falsified checks and that she admitted that she advised the petitioner to submit false checks to the Service. However, the attorney's statement does not discuss the checks. Rather, the attorney's statement asserts that a paralegal for the firm failed to make corrections to the ETA Form 9089 as requested by the petitioner.

Included in the evidence submitted by the beneficiary on May 9, 2013 were four checks made payable to the IRS and the [REDACTED]. Two of the checks dated April 25, 2013 contained a note stating that they were for [REDACTED]. There is no evidence in the record, however, that any of the forms were filed or that any of the checks were cashed. Additionally, the beneficiary states that he is submitting his last five years of tax returns, however, no tax returns were submitted with the supplemental filing. 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).

On appeal, the petitioner also states that its attorney's paralegal made mistakes on the labor certification and on the petition with respect to the beneficiary's start date and the number of employees employed by the petitioner. The petitioner states that it trusted the law firm to make the corrections, however, they did not. The record contains a statement from the attorney stating that the

paralegal made the mistakes and did not correct them. However, the AAO notes that the petitioner only mentioned the mistakes on appeal after the director discussed them in his denial. Although the petitioner claims that its counsel was incompetent, in this matter, the petitioner did not properly articulate a claim for ineffective assistance of counsel under *Matter of Lozada*, 19 I&N Dec. 637 (BIA 1988), *affd*, 857 F.2d 10 (1st Cir. 1988). A claim based upon ineffective assistance of counsel requires the affected party to, *inter alia*, file a complaint with the appropriate disciplinary authorities or, if no complaint has been filed, to explain why not. The instant appeal does not address these requirements. Accordingly, the petitioner did not articulate a proper claim based upon ineffective assistance of counsel.

The record does not contain any corroborating evidence of the beneficiary's start date or the true number of employees employed by the petitioner. The AAO also notes that the IRS letter dated October 27, 2008 regarding the petitioner's Form 944 states that the petitioner stated that it had no employees during this tax period. However, the petitioner contends that the beneficiary began working with the petitioner on January 1, 2007. The petitioner must resolve the inconsistencies in the record with objective, independent evidence. *Id.* It has failed to do so.

The beneficiary also appears to be working in a different job than the one indicated on the labor certification and the petition, and he also appears to be working for another employer other than the petitioner. The labor certification and the petition indicate that the job offered is for "Business Management Analyst." The job duties and requirements listed on the labor certification are as follows:

"Analyze operating procedures to devise the most efficient methods for accomplishing work. Conducts organization studies and evaluates designs [*sic*] systems and procedures. Analyzes current and past budgets. Reviews data and develops solutions and alternate measurement studies. Prepares operational and procedural manuals and forms. Designs, evaluates, recommends, and approves changes of forms and reports. Familiar with information flow, integrated production methods, inventory control and cost analysis. Familiarity with Windows, Word, and Excel, and proficient in the internet."

The record contains copies of a daily log report for January 25, 2007; a copy of a PowerPoint presentation; a copy of a bill of lading from [REDACTED] a copy of a manifest ticket from [REDACTED] a copy of an online account with [REDACTED] emails from the beneficiary's email account regarding business he conducted on behalf of the petitioner and [REDACTED] and a copy of a letter from a customer of the petitioner stating that he has seen the beneficiary almost every day since January 2007 because he purchases his household items from the petitioner; a letter from the beneficiary regarding his duties; and a declaration from the petitioner's sole proprietor stating that the beneficiary does perform all of the duties of a "business analyst manager."

In the beneficiary's undated and unsigned letter, he states that as a "business analyst manager" his duties include the following: review, analyze, and forecast business profitability and productivity;

prepare new business plans and feasibility reports and develop new businesses; and manage and maintain company cash flow and returns on investment. However, there is no evidence in the record to support the beneficiary's or the petitioner's statements regarding the beneficiary's duties as a business management analyst. Based on the evidence in the record, it does not appear that the beneficiary is performing duties as stated in the labor certification. It appears that the beneficiary is performing duties more similar to a gas station manager, and not a business management analyst. The beneficiary's affidavit is self-serving and does not provide independent, objective evidence of his prior work experience. See *Matter of Ho*, 19 I&N Dec. 582, 591-592 (BIA 1988)(states that the petitioner must resolve any inconsistencies in the record by independent, objective evidence). 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)). 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. 582, 591 (BIA 1988). It is incumbent on the petitioner to resolve any inconsistencies in the record by independent objective evidence, and attempts to explain or reconcile such inconsistencies, absent competent objective evidence pointing to where the truth, in fact, lies, will not suffice. *Id.* at 592. Based on the information in the record, the beneficiary does not appear to be performing the duties as listed on the labor certification.

The AAO further finds that the petitioner and the beneficiary willfully misrepresented a material fact by intentionally misrepresenting the beneficiary's position and job duties and submitting falsified checks.

A material issue in this case is whether the beneficiary will be performing the duties as indicated on the labor certification and whether the petitioner has the ability to pay the proffered wage. The job offered is Business Management Analyst. However, based on the information in the record, the beneficiary is not working as a Business Management Analyst, but rather, as a gas station manager. The petitioner also admits to submitting falsified checks to show that the beneficiary was being paid the proffered wage. These acts constitute willful misrepresentation and are a willful effort to procure a benefit ultimately leading to permanent residence under the Act. See *Kungys v. U.S.*, 485 U.S. 759 (1988), ("materiality is a legal question of whether "misrepresentation or concealment was predictably capable of affecting, *i.e.*, had a natural tendency to affect the official decision.") Here, the listing of false job duties and the submission of false checks are a willful misrepresentation that adversely impacted USCIS's immigrant petition analysis.

Willful misrepresentation of a material fact in these proceedings may render the beneficiary inadmissible to the United States. See section 212(a)(6)(c) of the Act, 8 U.S.C. § 1182, regarding misrepresentation, "(i) in general – any alien, who by fraud or willfully misrepresenting a material fact, seeks (or has sought to procure, or who has procured) a visa, other documentation, or admission to the United States or other benefit provided under the Act is inadmissible."

Further, 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).

To qualify as a third preference employment-based immigrant professional, the beneficiary was required to establish that he met the petitioner's minimum education and experience requirements. *Compare* 8 C.F.R. § 204.5(g) with § 204.5(1)(1)(3)(ii)(C). The beneficiary has intentionally attempted to mislead the Service by misrepresenting his experience, which is consistently inaccurate in the documentation on the record.

By misrepresenting the job duties and submitting false checks, the beneficiary and the petitioner sought to procure a benefit provided under the Act through fraud and willful misrepresentation of a material fact. Any finding of fraud as a result shall be considered in any future proceeding where admissibility is an issue. *See also Matter of Ho*, 19 I&N Dec. at 591-592.

The regulation at 20 C.F.R. § 656.30(d) provides:

(d) Invalidation of labor certifications. After issuance, a labor certification may be revoked by ETA using the procedures described in Sec. 656.32. Additionally, after issuance, a labor certification is subject to invalidation by the DHS or by a Consul of the Department of State upon a determination, made in accordance with those agencies' procedures or by a court, of fraud or willful misrepresentation of a material fact involving the labor certification application. If evidence of such fraud or willful misrepresentation becomes known to the CO or to the Chief, Division of Foreign Labor Certification, the CO, or the Chief of the Division of Foreign Labor Certification, as appropriate, shall notify in writing the DHS or Department of State, as appropriate. A copy of the notification must be sent to the regional or national office, as appropriate, of the Department of Labor's Office of Inspector General.

As a result of the material misrepresentation in the instant case, the labor certification is invalidated.

Beyond the decision of the director,⁴ 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.

⁴ 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 evidence in the record does not establish that the petitioner will be the beneficiary's actual employer. The record contains emails from the beneficiary in which he is conducting business for [REDACTED]. In an email dated August 4, 2008, the beneficiary requested that an advertisement be placed in the [REDACTED]. In an email dated March 9, 2008, the beneficiary stated that he will be buying beer for "club too in two week [sic]." The emails also reveal that the beneficiary was ordering business cards and t-shirts with the [REDACTED] logo and working with various promoters and advertising for [REDACTED]. The beneficiary also includes [REDACTED] or [REDACTED] in the signature block of emails dated March 9, 2008 and May 24, 2008. In an email dated May 9, 2008, [REDACTED] states to the beneficiary, "thanks for considering us for your club..." and refers to a meeting with the beneficiary and "his boss" regarding printing a logo on t-shirts for the club. The record also contains an "Authorization of Absence" dated June 10, 2009 to "all employees at [REDACTED] which states that the President of [REDACTED] will be absent from June 10, 2009 through June 14, 2009. In his absence, the beneficiary will be in charge of "making all executive decisions" and all of the club's "operation, promotion, and employment decisions." [REDACTED] is owned by [REDACTED] [REDACTED] is owned by [REDACTED] and Sons Investment Fund, Inc. which are separate entities from [REDACTED] [REDACTED] with different employer identification numbers (EIN) from the petitioner. Moreover, a copy of a check dated April 25, 2013 and made payable to [REDACTED] contains a note which says "[REDACTED] [REDACTED] and lists the EIN [REDACTED] which is different than the petitioner's EIN. Therefore, it appears that the beneficiary is also working for another employer.

Therefore, the petition must also be denied because the petitioner failed to establish that it will actually employ the beneficiary.

Also, beyond the decision of the director, 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 Madany v. Smith*, 696 F.2d 1008 (D.C. Cir. 1983); *K.R.K. Irvine, Inc. v. Landon*, 699 F.2d 1006 (9th Cir. 1983); *Stewart Infra-Red Commissary of Massachusetts, Inc. v. Coomey*, 661 F.2d 1 (1st Cir. 1981).

In the instant case, the labor certification states that the offered position requires a bachelor's degree in business administration and 24 months experience in the job offered. In Part H.11, the labor certification requires familiarity with information flow, integrated production methods, inventory control and cost analysis. Additionally, the labor certification requires familiarity with Windows, Word, and Excel as well as proficiency with the internet. On the labor certification, the beneficiary claims to qualify for the offered position based on experience as a Business Analyst Manager at [REDACTED] [REDACTED] from October 16, 2002 through August 31, 2006.

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(1)(3)(ii)(A). The record contains an experience letter from [REDACTED] Director, [REDACTED]. The letter does not state whether the position was full-time, nor does the letter state the beneficiary's duties. There is also nothing in the record to demonstrate that the beneficiary possesses the skills as required in Part H.11 of the labor certification. 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. 582, 591 (BIA 1988). It is incumbent on the petitioner to resolve any inconsistencies in the record by independent objective evidence, and attempts to explain or reconcile such inconsistencies, absent competent objective evidence pointing to where the truth, in fact, lies, will not suffice. *Id.* at 592.

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.

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 with a finding that the petitioner and beneficiary willfully misrepresented a material fact.

FURTHER ORDER: The labor certification application (C-06349-91821) is invalidated pursuant to 20 C.F.R. § 656.30(d) based on the petitioner's and the beneficiary's willful misrepresentation.