



U.S. Citizenship
and Immigration
Services

(b)(6)

[Redacted]

DATE: OFFICE: TEXAS SERVICE CENTER
JUN 25 2013

[Redacted]

IN RE: Petitioner:
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 the Administrative Appeals Office (AAO) dismissed the subsequent appeal. The matter is now before the AAO on a motion to reopen and a motion to reconsider. The motions will be granted, the previous decision of the AAO will be affirmed, and the petition will remain denied.

The petitioner is a church. It seeks to employ the beneficiary permanently in the United States as a bible teacher. 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. 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.

On appeal, the AAO affirmed the director's finding that the petitioner did not establish the ability to pay the proffered wage. The AAO also found that the petitioner had failed to establish that the beneficiary is qualified for the proffered position or that there is a *bona fide* job offer.

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

The AAO conducts appellate review on a *de novo* basis. *See Soltane v. DOJ*, 381 F.3d 143, 145 (3d Cir. 2004). The AAO considers all pertinent evidence in the record, including new evidence properly submitted upon motion.¹ On motion, counsel submits a brief, copies of the beneficiary's individual federal tax returns, bank balance information charts and bank statements for the petitioner and copies of documents that are already in the record.

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.

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 8 C.F.R. § 103.2(a)(1). While the petitioner did not comply with regulations governing motions, which require the submission of any documentation with the motion, the AAO will consider the documents newly submitted subsequent to motion.

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 accepted on March 8, 2004. The proffered wage as stated on the Form ETA 750 is \$33,238.00 per year. The Form ETA 750 states that the position requires two (2) years of experience in the proffered position of bible teacher.

The evidence in the record of proceeding shows that the petitioner is a tax exempt corporation. On the petition, the petitioner claimed to have been established in 2000, to have a gross annual income of \$75,522.76, and to currently employ one (1) worker. On the Form ETA 750B, signed by the beneficiary on an unknown date, the beneficiary claimed to have worked for the petitioner since January 2000.

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. As advised in the AAO's decision, the petitioner has not established that it employed and paid the beneficiary the full proffered wage at any time. The petitioner failed to submit Internal Revenue Service (IRS) Forms W-2, Wage and Tax Statements, for the beneficiary. On motion, counsel contends that the submitted copies of checks and the beneficiary's individual tax returns establish that the petitioner paid the beneficiary \$3,750.00 in 2000; \$18,650.00 in 2001; \$18,557.00 in 2002; \$20,100.00 in 2003; \$28,500.00 in 2004; and \$21,500.00 in 2005. As advised in the AAO's decision, the record contained check stubs from [REDACTED] to the beneficiary; however, the check stubs were not issued by the petitioner and are also not sufficient evidence of payment. On motion, counsel submits copies of the

beneficiary's individual federal tax returns; however, the tax returns are not sufficient evidence of payment of wages by the petitioner.² Moreover, the federal tax returns reflect that the beneficiary claims the amounts of \$18,557.00 in 2002; \$20,100.00 in 2003; \$28,500.00 in 2004; and \$21,500.00 in 2005 as income from his sole proprietorship³, a ministry. The beneficiary also claims to be employed as a minister on the federal tax returns, rather than as a bible teacher.⁴ The federal tax returns are inconsistent with the petitioner's claim that the beneficiary was employed by the petitioner during the period in question or that the beneficiary was employed as a bible teacher and chorus conductor. 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).

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 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).

² Additionally, the AAO advised the petitioner that the social security number (SSN) information on the Form I-140 and the beneficiary's personal tax returns matched multiple individuals and we were therefore unable to verify whether any funds were paid to the beneficiary under this SSN. In any future filings the petitioner should provide evidence that the Social Security Administration (SSA) issued the SSN listed on the federal tax returns or IRS Forms W-2 to the beneficiary.

³ This income and information is reflected on the beneficiary's Internal Revenue Service (IRS) Form 1040 Schedule C.

⁴ This information is reflected on the beneficiary's IRS Form 1040 page two on the beneficiary's signature line.

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

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

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

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

The record before the director closed on March 10, 2009 with the receipt by the director of the petitioner’s submission in response to the director’s request for evidence. As of that date, the petitioner’s 2008 federal income tax return was not yet due. Therefore, the petitioner’s income tax return for 2007 would be the most recent return available. The petitioner failed to submit its tax returns, Form 990 to establish net income. 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. 1998) (citing *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm. 1972)). As advised in the AAO’s decision, for the years 2004 through 2007 the petitioner did not establish that it had sufficient net income to pay the proffered wage.

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. It is noted that the Form 990 does not permit a filer to identify its net current assets. In order to establish its net current assets in this case, the petitioner would have needed to have submitted audited balance sheets. However, the record is devoid of such 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. 1998) (citing *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm. 1972)). Additionally, the petitioner failed to submit any of the other two types of

evidence, enumerated in 8 C.F.R. § 204.5(g)(2), which would illustrate a petitioner's net income and ability to pay a proffered wage. As advised in the AAO's decision, for the years 2004 through 2007 the petitioner did not establish that it had sufficient net current assets to pay the proffered wage.⁵

Therefore, as advised in the AAO's decision, 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 asserted that the petitioner's financial statements reflected a net income of \$15,392.00 in 2007, \$15,022.00 in 2006, \$10,767.00 in 2005 and \$9,371.00 in 2003. On motion, counsel contends that the petitioner's budget statements reflected carry overs of \$17,092.00 in 2007; \$15,022.00 in 2006; \$10,766.00 in 2005; and \$9,731.00 in 2004, which show an ability to pay the proffered wage. As advised in the AAO's decision, counsel's reliance on unaudited financial records is misplaced. The regulation at 8 C.F.R. § 204.5(g)(2) makes clear that where a petitioner relies on financial statements to demonstrate its ability to pay the proffered wage, those financial statements must be audited. Therefore, the petitioner's unaudited financial statements do not establish the petitioner's ability to pay the proffered wage in any relevant year.⁶

On appeal, counsel contended that the petitioner's bank statements reflected that the petitioner had cash balances of \$13,731.00 in 2004, \$13,466.00 in 2005, \$16,367.00 in 2006 and \$13,955.00 in 2007 which could have been used to pay the proffered wage. On motion, counsel again relies on the petitioner's bank balances which reflect an average balance of \$9,578.00 to \$22,335.00 over a four-year period, as evidence of the ability to pay the proffered wage. As advised in the AAO's decision, counsel's reliance on the balances in the petitioner's bank account is misplaced. First, bank statements are not among the three types of evidence, enumerated in 8 C.F.R. § 204.5(g)(2), required to illustrate a petitioner's ability to pay a proffered wage. While this regulation allows additional material "in appropriate cases," the petitioner in this case has not demonstrated why the documentation specified at 8 C.F.R. § 204.5(g)(2) is inapplicable or otherwise paints an inaccurate financial picture of the petitioner. Second, bank statements show the amount in an account on a given date, and cannot show the sustainable ability to pay a proffered wage. Third, no evidence was submitted to demonstrate that the funds reported on the petitioner's bank statements somehow reflect additional available funds that would not be reflected on its tax return(s), such as the petitioner's taxable income (income minus deductions) or the cash specified on the petitioner's unaudited financial statements that was considered above.

⁵ The record contains a letter, dated April 20, 2001, from [REDACTED] for the petitioner. 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)).

⁶ Even if the AAO were to accept the petitioner's unaudited financial statements, it would not have left sufficient funds to pay the proffered wage in all relevant years.

On appeal, counsel requested that USCIS prorate the proffered wage for the portion of the year that occurred after the priority date in 2004. As advised in the AAO's decision, we will not, however, consider 12 months of income towards an ability to pay a lesser period of the proffered wage any more than we would consider 24 months of income towards paying the annual proffered wage. While USCIS will prorate the proffered wage if the record contains evidence of net income or payment of the beneficiary's wages specifically covering the portion of the year that occurred after the priority date (and only that period), such as monthly income statements or pay stubs, the petitioner has not submitted such evidence.

Further, on appeal, counsel contended that, pursuant to *Full Gospel Portland Church v. Thornburgh*, 730 F. Supp. 441 (D.D.C. 1988), USCIS should consider the pledges of church members to pay the proffered wage to the beneficiary to the extent that the petitioner's budget would not cover those wages. On motion, counsel reiterates that three members of the church signed pledges stating that they would provide support to the church if the church is unable to pay the proffered wage. As advised in the AAO's decision, the decision in *Full Gospel Portland Church v. Thornburgh*, 730 F. Supp. 441 (D.D.C. 1988), is not binding. Although the AAO may consider the reasoning of the decision, the AAO is not bound to follow the published decision of a United States district court in cases arising within the same district. See *Matter of K-S-*, 20 I&N Dec. 715 (BIA 1993). Further, as stated in the AAO's decision, the petitioner did not submit evidence sufficient to demonstrate that the church members making such a pledge were willing and able to forego their incomes in order to pay the beneficiary the proffered wage from 2004 through the present.

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.

On motion, counsel contends that the overall circumstances of the petitioner reflect an ability to pay the proffered wage. As advised in the AAO's decision, the petitioner failed to submit one of the three types of evidence, enumerated in 8 C.F.R. § 204.5(g)(2), required to illustrate a petitioner's ability to pay a proffered wage for 2004 through 2007, precluding the AAO from making a determination as to whether it had the ability to pay the proffered wage for those years. Further, the petitioner did not submit evidence sufficient to demonstrate that its church members were willing and able to forego their income in order to pay the beneficiary the proffered wage from 2004 through the present. In addition, there is no evidence in the record of the historical growth of the proprietor's business, of the occurrence of any uncharacteristic business expenditures or losses from which it has since recovered, or of the proprietor's reputation within its industry. 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.

Beyond the decision of the director, the AAO found that the petitioner did not establish 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. Comm. 1977); see also *Matter of Katigbak*, 14 I&N Dec. 45, 49 (Reg. Comm. 1971). In evaluating the beneficiary's qualifications, USCIS must look to the job offer portion of the labor certification to determine the required qualifications for the position. USCIS may not ignore a term of the labor certification, nor may it impose additional requirements. See *Matter of Silver Dragon Chinese Restaurant*, 19 I&N Dec. 401, 406 (Comm. 1986). See also, *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 two (2) years of experience in the proffered position. On the labor certification, the beneficiary claims to qualify for the offered position based on experience as a bible teacher for [REDACTED] Baptist Church from January 1989 until December 1999; and as a bible teacher and chorus conductor for the petitioner from January 2000 until an unknown date in 2004 prior to March 8, 2004, the priority date.⁷

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

⁷ The AAO notes that on the Form G-325, Biographical Information, signed by the beneficiary on August 14, 2007, he did not list his employment with [REDACTED] Baptist Church. On motion, counsel states that the beneficiary did not list his employment at [REDACTED] Baptist Church on the Form G-325A because the Form G-325A only requests the past five years of experience; however, the Form G-325A specifically requests that the beneficiary list his last occupation abroad if it does not appear in the list of the past five years. It is incumbent upon the petitioner to resolve any inconsistencies in the record by independent objective evidence. Any attempt to explain or reconcile such inconsistencies will not suffice unless the petitioner submits competent objective evidence pointing to where the truth lies. *Matter of Ho*, 19 I&N Dec. at 591-92.

8 C.F.R. § 204.5(i)(3)(ii)(A). The record contains a verification of employment letter, dated June 25, 2000, which states that the beneficiary was employed from January 1, 1989 through December 19, 1999 with [REDACTED] Baptist Church and was a chorus member and weekly school teacher. As advised in the AAO's decision, however, the verification does not provide a sufficiently detailed description of the beneficiary's experience and fails to list the author's address. Moreover, the letter indicates that the beneficiary only spent 30 hours a week in the capacity of bible teacher, less than full-time.

The record contains a Certificate of Employment, dated August 11, 2002, which states that the beneficiary was employed from January 1, 1989 through December 19, 1999 with [REDACTED] Baptist Church and was an assistant pastor (weekly school teacher/chorus member). As advised in the AAO's decision, however, the certificate does not provide a sufficiently detailed description of the beneficiary's experience and fails to list the author's address. Moreover, the letter indicates that the beneficiary only spent 30 hours a week in the capacity of bible teacher, less than full-time.

On motion, counsel contends that the verification of employment letters reflect that the beneficiary was employed 34 hours per week and not 30 hours per week. The AAO notes that while the letters reflect that the beneficiary was employed for 34 hours per week, the letters clearly indicate that the beneficiary only spent 30 hours a week in the capacity of the proffered position (bible teacher), which is less than full-time.⁸

Additionally, the certificates provided state that they are translations, yet the petitioner failed to submit certified translations for the above listed documents. The AAO cannot determine whether the evidence supports the petitioner's claims because the certified translations of the document do not meet the requirements of 8 C.F.R. § 103.2(b)(3). Accordingly, the evidence is not probative and will not be accorded any weight in this proceeding.

The record contains a Verification of Employment, dated July 11, 2004, which states that the beneficiary was employed from January 1, 2000 until July 11, 2004 with the petitioner as a ministry (bible teacher and chorus conductor). The record contains a Verification of Employment, dated March 1, 2009, which states that the beneficiary was employed from January 1, 2000 until September 10, 2005 with the petitioner as a ministry (bible teacher and chorus conductor).

On motion, counsel contends that he beneficiary was employed as a bible teacher and chorus member with the petitioner from September 11, 2000 until September 10, 2005. However, as advised in the AAO's decision, the Verification of Employment does not provide a sufficiently detailed

⁸ 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). Even if the AAO accepted that the beneficiary had been employed in the duties of the proffered position for 34 hours, this would not equal full-time employment.

description of the beneficiary's experience, what percentage of time the beneficiary spent working as chorus member versus bible teacher, the proffered position, or whether the beneficiary was employed on a full time basis.

Additionally, when determining whether a beneficiary has the required minimum experience for a position, experience gained by the beneficiary with the petitioner in the offered position cannot be considered. See 20 C.F.R. § 656.21(b)(5) [2004]. This position is supported by the Board of Alien Labor Certification Appeals (BALCA). See *Delitizer Corp. of Newton*, 88-INA-482, May 9, 1990 (BALCA). *Delitizer* determined that 20 C.F.R. § 656.21(b)(6) does require that employers establish "the 'dissimilarity' of the position offered for certification from the position in which the alien gained the required experience." *Delitizer Corp. of Newton*, at 4. In its decision, BALCA stated that Certifying Officers should consider various factors to establish that the requirement of dissimilarity under 20 C.F.R. § 656.21(b)(6) has been met, and that, while Certifying Officers must state the factors considered as a basis for their decisions, the employer bears the burden of proof in establishing that the positions are dissimilar. *Delitizer Corp. of Newton*, at 5. In the instant case, representations made on the certified Form ETA 750 clearly indicate that the actual minimum requirement for the offered position is two years of experience in the job offered and that experience in an alternate occupation is not acceptable. In the instant case, the beneficiary did not represent on Form ETA 750, Part B that he had been employed with the petitioner in any position other than the proffered position.

As discussed above, in order to utilize the experience gained with the employer, the employer must demonstrate that the job in which the alien gained experience was not similar to the job offered for certification. *Delitizer Corp. of Newton*, 88-INA-482, May 9, 1990 (BALCA). The petitioner failed to establish the dissimilarity between the position the beneficiary previously held with the employer and the permanent position offered. Therefore, the AAO cannot consider the beneficiary's experience gained with the petitioner as qualifying experience to meet the requirements of the labor certification by the priority date. 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.

Additionally, the AAO also found that the petition is not supported by a *bona fide* job offer. See *Matter of Silver Dragon Chinese Restaurant*, 19 I&N Dec. 401 (Comm'r 1986). Specifically, the AAO advised that it appears from the evidence in the record that the beneficiary is possibly related to the petitioner in that they share a common surname. The corporation documentation also reflects that the beneficiary is an officer of the petitioner.⁹ Under 20 C.F.R. § 626.20(c)(8) and § 656.3, the petitioner must demonstrate that a valid employment relationship exists, that a *bona fide* job opportunity is available to U.S. workers. See also C.F.R. § 656.17(l); *Matter of Amger Corp.*, 87-INA-545 (BALCA 1987). A relationship invalidating a *bona fide* job offer may arise where the beneficiary is related to the petitioner by "blood" or it may "be financial, by marriage, or through

⁹ The Georgia Secretary of State's Business Name History for the petitioner indicates that the beneficiary is the Secretary.

friendship.” *Matter of Sunmart 374*, 00-INA-93 (BALCA May 15, 2000); *see also Keyjoy Trading Co.*, 1987-INA-592 (BALCA Dec. 15, 1987) (en banc).

On motion, counsel contends that the familial relationship between the beneficiary and the petitioning entity was raised previously by the DOL and that the Form ETA 750 was duly certified after rebuttal of the DOL. In support of his contentions, counsel submits a DOL Notice of Findings (NOF), dated May 18, 2007, in which the DOL questions the relationship between the petitioning entity and the beneficiary, and a copy of the petitioner’s rebuttal, dated June 21, 2007. In the rebuttal and on motion, counsel contends that there is a *bona fide* job offer despite the familial relationship and the fact that the beneficiary is an officer of the petitioning entity because, as stated in a letter of the chairman of the church member committee¹⁰, all church matters are determined by a meeting of the church members and the pastor has no authority on the issue. Counsel relies on *Matter of Altobeli’s Fine Italian Cuisine*, 90 INA 130 (1991).

However, the instant case is distinguishable from *Matter of Altobeli’s Fine Italian Cuisine*, in that the instant petitioner has never operated without the alien¹¹, has only ever employed one worker—the beneficiary, and the congregation of the church is too small to negate the familial relationship. Further, the beneficiary’s individual federal tax returns reflect that the beneficiary claimed that he was employed by his own business, a ministry, as a minister, during the period of time he claims to have been employed by the petitioner. This inconsistency raises the question as to whether the beneficiary is the petitioner and is filing a labor certification for self-employment purposes.¹² It is incumbent upon the petitioner to resolve any inconsistencies in the record by independent objective evidence. Any attempt to explain or reconcile such inconsistencies will not suffice unless the petitioner submits competent objective evidence pointing to where the truth lies. *Matter of Ho*, 19 I&N Dec. at 591-92. Based on the relationship and inconsistencies described above, and considering the evidence in the record relating to the employer and the job opportunity, the petitioner has failed to establish that the instant petition is based on a *bona fide* job opportunity available to U.S. workers. Accordingly, as advised in the AAO’s decision, the petition must also be denied for this reason.

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 motion to reopen and reconsider is granted. Upon reopening and reconsideration, the AAO’s decision, dated November 19, 2012, is affirmed. The petition will remain denied.

¹⁰ The record does not contain the referenced letter.

¹¹ The petitioner has employed the beneficiary since the petitioner was established in 2000.

¹² It is noted that the AAO is unable to find any evidence that [REDACTED] exists outside of the incorporation documents for the petitioner.